Irini A. Stamatoudi

Cultural Property Law and Restitution

A Commentary to International Conventions and European Union Law

IHC Series in Heritage Management

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To my little beloved Anastassis, born together with this book.

Preface

Dealing with issues of cultural property law is not an easy task. This area of law combines aspects from many separate areas of law, which only recently took on a more rigid form under the label of cultural property law. On top of this, the interests at stake as well as the stakeholders (states, museums, galleries, collectors, art dealers and so on) are numerous. On the one hand, some of the issues raised are, strictly speaking, legal; on the other hand, this area of law depends heavily on ethics, morality and personal convictions, which, by definition, do not involve pure objectivity, unaffected by emotion.

My involvement with cultural property law, from different perspectives and on different occasions, has allowed me to develop a considerable degree of understanding of the different views and approaches. I studied this area of law in England, with an emphasis on the common law liberal approach and practised it in Greece, with an emphasis on the protective approach. I have participated in negotiations on the Parthenon Marbles issue; acted as a legal advisor for the return of artefacts to Greece from abroad including returns from the J.P. Getty Museum in Los Angeles and the Leon Levy and Shelby White collection in New York; negotiated bilateral agreements on the protection of cultural treasures between Greece and other states; represented Greece in UNESCO; and participated in the drafting Committee of the most recent Act on Measures for the Protection of Cultural Goods and Other Provisions enacted in Greece (Law 3658/2008).

This book was written while I was pregnant with my son Anastassis: in many ways, its writing may be compared to a pregnancy. For this book to be published, many people have played their part. The first ones to thank are the Initiative for Heritage Conservancy (IHC), Lloyd Cotsen, Evangelos Kyriakides and Edward Elgar Publishing for making the publication of this book possible. I also wish to thank Wendy Addison for editing the manuscript, Maria Tzima for editing other smaller parts and the bibliography of this book and Polyxeni Veleni (Director of the Archaeological Museum of Thessaloniki, Greece) for providing the photo which became the cover of this book. Many thanks also to my two other children, Fotini and Manthos: though they did not always manage to keep quiet and behave themselves during its writing, they did, however, try

hard to do so. Last but not least, I am especially grateful to my husband, Angelos, for his unfailing patience and support during the writing of this book.

Contents

Introduction

Cultural property law is a rather recent and fast evolving area of law. Its origins date back to the mid nineteenth century when the first legal instruments were drafted.[1] It has essentially developed around two main areas of interest: the protection of cultural treasures both in times of war and in times of peace. In the latter case, emphasis was placed on incidents of theft, illegal excavation and export of cultural treasures from their countries of origin. Cultural property law, however, encompasses other interests in culture, such as the protection and preservation of cultural goods in general. Although cultural property has developed as a niche area in international law, it involves national and regional laws too. It is a hybrid area of law, in the sense that it involves principles from various hard core

[1] See some examples during this period: The Lieber Code (Francis Lieber, Instructions for the Government of Armies of the United States in the Field,1863); International Convention with Respect to the Law and Customs of War by Land (Hague II), 29 July 1899; Convention Respecting the Laws and Customs of War on Land (Hague IV), 18 October 1907; Article 238 of the Treaty of Peace between the Allied & Associated Powers and Germany, Versailles, 28 June 1919 and Protocols; Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, London, 5 January 1943; Judgment of the International Military Tribunal, 30 September 1946; Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention on Cultural Property), 14 May 1954; Statutes of the International Centre for the Study of the Preservation and Restoration of Cultural Property, 5 December 1956 (as revised, 24 April 1963, and 14–17 April 1969); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970; Convention Concerning the Protection of the World Cultural and Natural Heritage, 23 November 1972; Recommendation Concerning the International Exchange of Cultural Property, adopted by the General Conference at its Nineteenth Session, Paris, 30 November 1976; Recommendation for the Protection of Movable Cultural Property, adopted by the General Conference at its Twentieth Session, Paris, 28 November 1978; European Cultural Convention, 19 July 1954; European Convention on Offences Relating to Cultural Property, 23 June 1985; Convention for the Protection of the Architectural Heritage of Europe, 3 October 1985; European Convention on the Protection of the Archaeological Heritage (Revised), 16 January 1992; Resolution 1205, Looted Cultural Property, Parliamentary Assembly of the Council of Europe, 4 November 1999.

areas of law, such as public international law, private law, private international law and so on.

This book does not intend to cover all issues pertaining to cultural property law; that would be an extremely optimistic exercise. It will limit itself to issues of restitution and return of cultural treasures, alienated from their countries of origin in times of peace. It sets out the basics, that is the notions of 'cultural property', 'return' and 'restitution'. The two theories in the area, namely that of cultural nationalism and that of cultural internationalism, are also explored (Chapter 1).

Chapter 2 of the book deals with the most important international legal instruments in this field,[2] that is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects.[3] Primary and secondary European Union legislation is examined. This comprises the relevant provisions in the Treaty on the Functioning of the European Union (TFEU) and Regulations 116/09 on the Export of Cultural Goods and 752/93 laying down provisions for the implementation of Council Regulation 3911/92 on the Export of Cultural Goods, as well as Directive 7/93 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (Chapter 3).

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[2] For example, the 1985 European Convention on Offences Relating to Cultural Property (Delphi, 23 July 1985) is not discussed since it never entered into force.

[3] The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage is not discussed because it does not fall squarely within this particular field. For the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage see Camarda, G. & T. Scovazzi (eds) (2002), *The Protection of the Underwater Cultural Heritage – Legal Aspects*, Milan; O'Keefe, P. (2002), *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester; Carducci, G. (2002) 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of the Underwater Cultural Heritage, *American Journal of International Law* 419; Garabello, R. & T. Scovazzi (eds) (2003), *The Protection of the Underwater Cultural Heritage – Before and After the 2001 UNESCO Convention*, Leiden; Dromgoole, S. (ed.) (2006), *The Protection of the Underwater Cultural Heritage – National Perspectives in Light of the UNESCO Convention 2001*, Leiden. See also the Italian cases on the Melquart of Sciacca (9 January, 1963, Tribunal of Sciacca) and the victorious Athlete (two cases 12 June, 2009 and 10 February, 2010, Tribunal of Pesaro) as discussed in Scovazzi, T. (2010) 'A Second Italian Case on Cultural Properties Enmeshed in Fishing Nets' http://www.mepielan-ebulletin.gr/default.aspx?pid=18&CategoryId=4&ArticleId=17&Article=A-Second-Italian-Case-on-Cultural-Properties-Enmeshed-in-Fishing-Nets.

Cultural property law is, to a large extent, affected and shaped by soft law, since it is often expressed as a compromise between the various interests involved, and many acts take place on an ethical and voluntary basis. This is especially so because cultural property law touches on state sovereignty, meaning that, on most occasions, particularly on those falling outside the scope of international conventions and those concerning states with differing national legislation or attitudes, claims involving two or more states are processed on the basis of ethics, mutual agreement and co-operation. To this end, the most important codes of ethics are examined on a par with the role of international organisations, such as UNESCO, ICOM, ICCROM and so on. Reference is also made to registers of stolen and illegally exported cultural objects, which play an increasingly significant role in the tracking down of those objects (Chapter 4).

Dispute resolution in cultural property claims is another significant area which is developed at length. More than in any other field of law, disputes in this field do not necessarily find their way to courts but, because of the particularities and sensitivities they engender, are solved through alternative dispute resolution, such as arbitration, mediation and especially through negotiations. Cultural diplomacy and its role are also examined (Chapter 5).

Chapter 6 of this book explores the basic principles and trends in cultural property law and draws some conclusions as to where we stand today and where we are heading. This is done on the basis of discussions in preceding chapters of the book, but takes a step back from the bulk of law and ethics, in an attempt to assess them as a whole. At the end of the book conclusions are drawn. An Appendix enables the reader to refer to particular provisions of instruments discussed.

1. Cultural property and restitution: the theories of cultural nationalism and cultural internationalism

1.1 THE NOTION OF CULTURAL PROPERTY

There is no internationally accepted definition of cultural property. Cultural property is a notion which differs according to the point of view taken, to the legal instrument applied and to the intended result. It is also a notion which is subject to evolution,[1] whilst in bilateral or multilateral relations it forms the subject of mutual agreement or compromise respectively. Therefore the definition of a state's cultural property varies according to whether it is the state itself which defines that property, or whether it is defined by another state involved in a claim for return or restitution. Does that mean that 'cultural property' is a term which is vague and flexible and cannot be subject to an objective definition?[2] Not entirely. Although cultural property is a general notion familiar to the layperson,

[1] Especially after the growth of interest in anthropology and ethnography. Askerud P. & E. Clément (1997), *Preventing the Illicit traffic in Cultural Property. A Resource Handbook for the implementation of the 1970 UNESCO Convention*, Paris: UNESCO, 5. Indicative also is the fact that cultural objects are no longer approached on the basis of their aesthetic value but as evidence of particular cultures and times in history. This is also the reason why their preservation in their context carries so much weight. Preserving cultural objects in context allows one to use them as testimonies of particular habits of their time in order to advance research and contribute to the knowledge of our history. See also Francioni, Fr., 'A Dynamic evolution of concept and scope: from cultural property to cultural heritage', in Yusuf, A. (ed.), *Standard-setting in UNESCO, volume I: normative action in education, science and culture, essays in commemoration of the Sixtieth Anniversary of UNESCO*, Paris, p.221.

[2] Some countries chose a general definition (especially countries in continental Europe) whilst some others (especially common law countries) an enumerative one according to their legal tradition and the items they want to cover. See Lalive, P. (1993), 'Le projet de Convention de l'Unidroit sur les biens culturels volés ou illicitement exportés', in M. Briat and J. Freedberg (eds), *Legal Aspects of International Art Trade*, The Hague: Kluwer Law International, 26–27.

it can still be specified by means of the standpoint taken, the aims pursued and the politics followed.[3] Cultural property is occasionally classified into categories according to time spans (cut-off dates in history), monetary values, types of use, types of material and so on. These categories have much to do with cultural conceptions as to what is worth protecting and what is not, depending primarily on each state's interests and culture. That means that a cultural object may be considered in one state as *res extra commercium*, as non-exportable in another and of no significance to a third. In general, however, one could define cultural property as anything which bears witness to the artistry, history and identity of a particular culture.[4] That includes objects that are considered cultural by nature (for

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[3] As Scovazzi points out, 'cultural heritage is too important to be understood only in the light of legal technicalities'. He also refers to article 4, paragraphs 1 and 2 of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Its Restitution in Case of Illicit Appropriation where it is indicated that the Committee seeks 'ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin' and promotes 'multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin'. In fact he wants to indicate that this Committee takes into consideration not solely the law but ethical and moral issues, too. See Scovazzi, T. (2009), 'Diviser c'est détruire: ethical principles and legal rules in the field of return of cultural properties', Paper presented in the 16th Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation (21–23.9.2010), Paris: UNESCO, at 2.

[4] Specialised categories such as archaeology, prehistory, history, religion, literature, science, anthropology and ethnology are included in the aforementioned general categories. Also included is anything which qualifies as intellectual property according to national and European Union laws and international conventions. Interesting in this respect is also the definition of 'movable cultural property' according to the 1978 Recommendation for the Protection of Movable Cultural Property.

> I.1.For the purposes of this Recommendation: (a) 'movable cultural property' shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest, including items in the following categories: (i) products of archaeological exploration and excavations conducted on land and under water; (ii) antiquities such as tools, pottery, inscriptions, coins, seals, jewellery, weapons and funerary remains, including mummies; (iii) items resulting from the dismemberment of historical monuments; (iv) material of anthropological and ethnological interest; (v) items relating to history, including the history of science and technology and military and social history, to the life of peoples and national leaders, thinkers, scientists and artists and to events of national importance; (vi) items of artistic interest, such as: paintings and drawings, produced entirely by hand on any support and

example a painting) as well as objects, which by reason of time and evolution of beliefs have been rendered cultural (such as, for example, utensils).[5]

'Cultural property' is not a term identical to 'cultural heritage'. In practice though, these two terms are used interchangeably. Cultural property is a western concept with commercial connotations and direct reference to property law and thus ownership.

> The fundamental policy behind property law has been seen as the protection of the rights of the possessor. If this policy is carried to its logical conclusion then the owner can be buried with a painting that he purchased for millions of dollars but which represents a peak achievement of human culture. The fundamental policy behind cultural heritage law is protection of the heritage for the enjoyment of present and later generations.[6]

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in any material (excluding industrial designs and manufactured articles decorated by hand); original prints, and posters and photographs, as the media for original creativity; original artistic assemblages and montages in any material; works of statuary art and sculpture in any material; works of applied art in such materials as glass, ceramics, metal, wood, etc.; (vii) manuscripts and incunabula, codices, books, documents or publications of special interest; (viii) items of numismatic (medals and coins) and philatelic interest; (ix) archives, including textual records, maps and other cartographic materials, photographs, cinematographic films, sound recordings and machine-readable records; (x) items of furniture, tapestries, carpets, dress and musical instruments; (xi) zoological, botanical and geological specimens; (b) 'protection' shall be taken to mean the prevention and coverage of risks as defined below: (i) 'prevention of risks' means all the measures required, within a comprehensive protection system, to safeguard movable cultural property from every risk to which such property may be exposed, including those resulting from armed conflict, riots or other public disorders; (ii) 'risk coverage' means the guarantee of indemnification in the case of damage to, deterioration, alteration or loss of movable cultural property resulting from any risk whatsoever, including risks incurred as a result of armed conflict, riots or other public disorders whether such coverage is effected through a system of governmental guarantees and indemnities, through the partial assumption of the risks by the State under a deductible or excess loss arrangement, through commercial or national insurance or through mutual insurance arrangements. 2. Each Member State should adopt whatever criteria it deems most suitable for defining the items of movable cultural property within its territory which should be given the protection envisaged in this Recommendation by reason of their archaeological, historical, artistic, scientific or technical value.

[5] Derout, A. (1993), *La protection des biens culturels en droit communautaire*, Rennes: Editions Apogée.

[6] Prott, L.V. and P.J. O'Keefe (1992), '"Cultural Heritage" or "Cultural Property"?', *International Journal of Cultural Property* 1, 307. The authors refer to two characteristic cases: *Milirrpum v. Nabalco Pty. Ltd* (1971) 17 F.L.R. 141 and *Mullick v. Mullick* (1925) LR LII Indian Appeals 245. In the first case it was noted

Cultural property law, if seen restrictively, can be put alongside real property,[7] personal property[8] and intellectual property.[9] [10] However, cultural property law only contains parts of these fields of law (for example only parts of 'real property law' are relevant to cultural property law since not all cultural property is immovable property) and at the same time presents particularities that cannot be accommodated by these fields of law (for example certain aspects of intangible cultural property, which are not protected by intellectual property, i.e. ideas, languages and so on).

Cultural property law has seen an evolution towards cultural heritage law.[11] The term 'cultural property', though known in civil law tradition,[12] was used for the first time in English in a legal context in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. After that it was again used in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The term 'cultural heritage' is found in the 1969 European Convention on the Protection of the Archaeological Heritage (revised in 1992), the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage and the 1985 Convention for the Protection of the Architectural Heritage of Europe, as well as in many regional and national legal instruments. The

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that the Australian aboriginals, rather than believing that the land belonged to them, believed that they belonged to the land. In the second case the Privy Council held that a Hindu family idol was not a mere chattel which was owned and could be dealt with by its owner as he pleased, but a legal entity in its own right to which duties were owed and which was entitled to have its own interests represented in court.

7 Which stands for interests in land.

8 Which stands for everything else but interests in land.

9 Which stands for interests in the fruits of the intellect.

10 Crewdson, R. (1984), 'Cultural Property – a Fourth Estate?', *Law Society Gazette*, 126.

11 Prott, L.V. and P. O'Keefe, n. 6 above. See also Frigo, M. (2004), 'Cultural property v. cultural heritage: a "battle of concepts" in international law?' *International Review of the Red Cross*, 86 (854), 367; Przyborowska-Klimczak, A. (1989–1990), 'Les notions de "biens culturels" et de "patrimoine culturel mondial" dans le droit international', *Polish Yearbook of International Law*, XVIII, 51; Blake, J. (2000), 'On defining the cultural heritage', *International & Comparative Law Quarterly* 61; O'Keefe, R. (1999), 'The meaning of "cultural property" under the 1954 Hague Convention', *Netherlands International Law Review*, 26.

12 E.g. 'biens culturels' in French, 'beni culturali' in Italian and 'politistika agatha' in Greek. The Greek term is a term which though translated in English as 'cultural goods', is however wider than that, since it refers to goods in the wider sense of the word and not as mere commodities. Yet, all these terms cannot incorporate the full notion of cultural heritage.