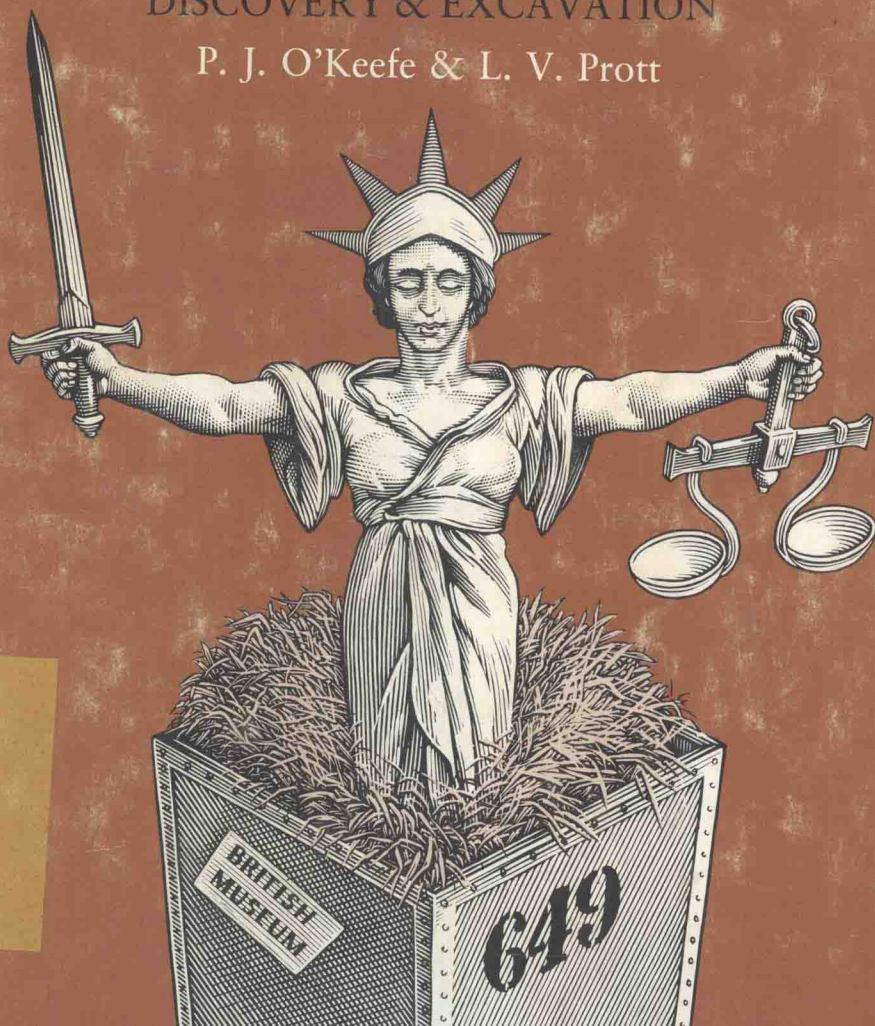


LAW and the CULTURAL HERITAGE

VOLUME 1
DISCOVERY & EXCAVATION

P. J. O'Keefe & L. V. Prott



LAW AND THE CULTURAL HERITAGE

VOLUME I DISCOVERY AND EXCAVATION

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1983

FOREWORD

Although the earliest legislation for the protection of the cultural heritage is itself of respectable antiquity — monuments from the past were protected by a Papal Bull of Pius II as early as 1462, and a Royal Proclamation of 1666 forbade the destruction of ancient monuments and relics in Sweden — a general, world-wide concern for the remains of the past as a tangible manifestation of human achievement and national cultural identity as expressed in terms of legislation is a recent phenomenon. Most European countries took their first tentative steps in this direction in the later 19th century, largely as a result of the development of the modern scientific approach to archaeology, thereby initiating a process of progressive revision and updating that continues to the present day.

Outside Europe there was no comparable evolutionary process. The great museums of Europe and the United States of America are crammed with the loot of the past three centuries brought back by soldiers, colonial administrators, archaeologists, explorers, or mere treasure-hunting entrepreneurs. The serious student of the Sumerians or the Maya, the Egyptians or the Khmer, finds his finest raw material in Paris or London, Philadelphia or Berlin. With the dismantling of the colonial empires in the years following World War II and the creation of new nation states, especially in Africa and Asia, a new generation of antiquities protection legislation was born. The role of the cultural heritage in the establishment of cultural identity in emergent nations is a fundamental one, since it constitutes tangible and monumental proof of distinct nationhood. The constitutions of many of the 'new' states of the postwar world contain comprehensive statutes asserting state ownership and control over all the vestiges of the past within their frontiers, whether 'portable' or monumental, in private or in public hands. Most embody strict controls over the export of cultural material, and many forbid any form of trafficking in national antiquities.

Concern for the cultural heritage is not confined to the national level. A number of UNESCO Conventions and Recommendations have been directed towards this end, on such subjects as archaeological excavation and the illicit trade in antiquities. The Venice Charter of ICOMOS seeks to establish moral and technological standards for the monumental heritage, and there are regional agreements in Europe and the Americas relating to the archaeological heritage and the trade in antiquities.

The legislative approach to the remains of the past varies widely, from the absolute assertion of State control in the Socialist countries of eastern Europe to the partial and relatively ineffectual intervention in the public interest embodied in the legislation of some states in western Europe and the Americas, for example. It is somewhat curious that, for the most part, national legislation has been drafted without any account being taken of comparable legislation elsewhere in the world. Whilst there is a considerable degree of compatibility between individual juridical systems and legislative provisions, whether based on Common Law or Civil Law, in most fields of the law, antiquities protection is anomalous. It is a veritable jungle for any student of comparative international law. Several attempts have been made to compile surveys of national legislation (e.g. Burnham 1974; Hingst & Lipowschek 1975; Council of Europe 1979); however, these have largely balked at the daunting task of comparing these legislations one with another, and as a result their usefulness has been limited. The one serious comparative survey (Council of Europe 1979) extends only to the twenty-one member-states of the Council of Europe.

The potential value of a comprehensive and detailed comparative survey of world antiquities legislations is enormous. In academic terms, modern national frontiers have for the most part only limited relevance in respect of historical and archaeological remains. Any movement towards the harmonization and overall upgrading of national legislations can only be to the advantage of those remains and, ultimately, of all mankind, whose collective heritage they represent. All those concerned at official or individual level to preserve and interpret that heritage — and their numbers are growing every year — owe a deep debt of gratitude to the husband-and-wife team of Patrick O'Keefe and Lyndel Prott. They have accepted the massive challenge posed by the laws of nearly 400 separate jurisdictions, which they have analysed and compared in a constructive and critical manner and presented in a form that is readily comprehensible to the layman yet at the same time of inestimable utility for the lawyer. *Law and the Cultural Heritage* constitutes a major landmark in the evolution of an integrated world policy towards our past.

Henry Cleere
London, August, 1983

PREFACE

Our thanks must go, first and foremost, to the national cultural authorities in many countries who took time and trouble, sometimes in difficult circumstances, to send us material and answer our persistent enquiries. We hope that, in return for their trouble, this book will be of use to them.

We owe a particular debt to the University of Sydney which has supported us in this project and especially to the Departments of Jurisprudence and of Law and their respective Heads, Professor Alice E.-S. Tay and Professor David Johnson, in the Faculty of Law. We have been greatly aided by the Australian Research Grants Committee (now the Australian Research Grants Scheme) which has given material support to the project for five years, and without whose help the legislation of many countries could not have been translated.

At various stages in the development of the project we have been able to use the facilities of the Institute of Advanced Legal Studies in London and this has been of great benefit to us.

We have also been most fortunate in receiving help from Mme. Olcina of ICOM, Mme. Anne Raidl and Mme. Margaret van Vliet, both of the Cultural Heritage Division of UNESCO, all of whom, despite heavy work schedules, have given us help in our task. The assistance of other members of both organisations is also gratefully acknowledged.

Over the last five years we have had several Research Assistants whose patient and enthusiastic work has enabled us to keep abreast of a field developing faster than we could write. Among these we must mention Marion Pascoe, B.A., LL.M.; Sushil Sidhu, LL.M.; Josephine di Fava, LL.B.; Romana Sadurska, Ph.D., and Gabriel Moens, Dr.IUR, LL.M., Ph.D. We also mention Arthur Garcia, Lic. Derecho, LL.M., who translated many materials from Spanish.

We much appreciate the comments made by archaeologists who have taken the time to comment on early drafts of the work; in particular Dr. Henry Cleere, Dr. David Blackman and Dr. James Specht, who have been largely responsible for educating two amateurs in archaeology and have saved our text from several inaccuracies in archaeological matters. For those that remain we, of course, take responsibility.

In the final months of preparation we are especially grateful to Syracuse University, United States, for its invitation to us to complete our work at its

College of Law as Visiting Scholars; to Professor L.F.E. Goldie, the Director of its Institute of International Legal Studies, for many kinds of help and encouragement; to the Fulbright Foundation, for nominating each of us as a Senior Scholar for 1982-83 and to Butterworths Pty. Ltd., which granted Patrick O'Keefe the Butterworths Fellowship 1983.

A significant proportion of the material on salvage in Chapter 4 was originally printed in O'Keefe, 1978, 3 and is reproduced in this Volume with permission from the *International Journal of Nautical Archaeology and Underwater Exploration*, Copyright: Academic Press Inc. (London) Ltd.

Finally we thank Patrine O'Sullivan for many kinds of support which only she and we fully know the versatility and importance of.

L.V.P.
P.J.O'K.

Sydney 12 July 1983.

ABBREVIATIONS

A.C.	Appeal Cases (United Kingdom)
A.L.J.R.	Australian Law Journal Reports
All E.R.	All England Law Reports (United Kingdom)
A.L.R.	Australian Law Reports
Aust. T.S.	Australian Treaty Series
Cal. Rptr.	California Reporter (United States of America)
Ch.	Law Reports: Chancery Division (United Kingdom)
CINOA	International Confederation of Dealers in Ancient and Oriental Art
C.L.R.	Commonwealth Law Reports (Australia)
Eng. Rep.	English Reports (United Kingdom)
E.T.S.	European Treaty Series
F.2d	Federal Reporter Second Series (United States of America)
F.L.R.	Federal Law Reports (Australia)
F.Supp.	Federal Supplement (United States of America)
I.C.J.	International Court of Justice
ICOM	International Council of Museums
ICOMOS	International Council for Monuments and Sites
ILANUD	Instituto Latinoamericano para la Prevencion del Delito y Tratamiento del Delincuente
Lloyd's L.R.	Lloyd's Law Reports (United Kingdom)
P.	Law Reports: Probate Division (United Kingdom)
P.C.I.J.	Permanent Court of International Justice
S.Ct.	Supreme Court Reporter (United States of America)
S.E. 2d	South Eastern Reporter Second Series (United States of America)
S.W. 2d	South Western Reporter Second Series (United States of America)
UNCLOS III	Third United Nations Conference on Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSDRI	United Nations Social Defence Research Institute (Rome)
U.N.T.S.	United Nations Treaty Series
U.S.	United States Reports (United States of America)
W.L.R.	Weekly Law Reports (United Kingdom)

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