

PROTECTION OF CULTURAL PROPERTY

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In recent years the concern of governments to protect their national heritage has produced legislation designed to restrict or forbid the export of objects of national cultural significance. A 1980 survey by Lyndel V. Prott and Patrick J. O'Keefe of 124 jurisdictions showed that 106 had some legislative control over export. The penalties for illegal export, they found, ranged from fines to forfeiture of the objects concerned. Some jurisdictions also provided for other penalties such as imprisonment.

2. This legislation has been prompted not only by considerations of national pride but also by the belief that the cultural property of a nation is a part of the heritage of mankind and therefore to be protected at all times. In particular, cultural property is seen to have an important contribution to make in achieving a better understanding between peoples in the cause of peace.

3. In accordance with these developments various initiatives have been taken in the international community, particularly through UNESCO, in establishing measures for the preservation of cultural property and the prevention of illicit dealing in cultural property. In 1964, in recognition of the fact that many emerging nations had been subjected to a systematic denudation of their cultural heritage by agents operating on the increasingly lucrative world art market, UNESCO passed a recommendation on the illicit import and export of cultural property. This recommendation received widespread support from the international community and was later strengthened by the adoption in 1970 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention requires all participating countries to collaborate with one another in securing the return of illicitly exported cultural property. Unfortunately, however, while most countries agree with the principles and objectives of that Convention it has not been widely accepted because of administrative and legal problems foreseen by some States in its implementation in their domestic law.

4. In the absence of international co-operation backed up by agreed legal measures, purely domestic legislation may be of limited efficacy in curbing the illicit transfer of cultural property or securing its return. The problems are well illustrated in recent litigation involving the Government of New Zealand (Attorney-General for New Zealand v. Ortiz [1982] 3 All.E.R. 432, 451).

5. The Ortiz case is a particularly significant one and it has undoubtedly aroused interest in the international community. It is certain to be a major precedent in the English speaking world concerning the enforcement of foreign restrictions on the export of cultural property. The case concerns the attempted recovery by the New Zealand Government of certain Maori carvings removed illegally from New Zealand. The brief facts of the case are:

In 1973 a dealer in primitive works of art purchased from the person who had found them a set of five Maori carvings. These were then illegally exported from New Zealand and were subsequently sold to Mr. Ortiz, a collector of African and Oceanic works of art. In 1978 Mr. Ortiz sent the carvings to Sothebys for auction. This came to the notice of the New Zealand Government. Three days before the sale a writ was issued claiming a declaration that the carvings belonged to the New Zealand Government and seeking an injunction to prevent the sale or disposal of them. In the face of the writ, it was agreed that Sothebys would not include the carvings in the sale but would hold them pending trial or further order. Two points have been tried in the English Courts as preliminary issues:

- (a) whether, on the facts as alleged, the New Zealand Crown has become the owner and is entitled to possession of the carvings pursuant to the relevant New Zealand legislation, and

- (b) whether in any event the provisions of such legislation are unenforceable in England as being foreign penal, revenue, and/or public laws.

6. The High Court in England found in favour of the New Zealand Government on these two issues but the English Court of Appeal subsequently reversed that decision. An appeal is now pending to the House of Lords on these two points and therefore, as the matter is sub judice, it is not possible to discuss the case in any detail.¹ However, the general principles upon which New Zealand is trying to protect its cultural property and some of the matters canvassed in the decisions will be of interest.

7. Both courts spent considerable time upon the construction of the New Zealand legislation (the Historic Articles Act 1962 and the Customs Acts of 1913 and 1966). In respect of the first issue the essential question for the Courts was whether the forfeiture provisions in s.12 of the 1962 Act provided for automatic vesting of title in the Crown or whether seizure or perhaps condemnation of the goods was a condition precedent to the passing of title. Section 12 reads as follows:

"Application of Customs Act 1913 -

"(1) Subject to the provisions of this Act, the provisions of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act in all respects as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Customs Act 1913.

"(2) An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913.

"(3) Where any historic article is forfeited to Her Majesty pursuant to this section, it shall be delivered to the Minister and retained in safe custody in accordance with his directions:

"Provided that the Minister may, in his discretion, direct that the article be returned to the person who was the owner thereof immediately before forfeiture subject to such conditions (if any) as the Minister may think fit to impose".

8. The interpretation of the forfeiture provision was important because the carvings were never seized or condemned pursuant to the New Zealand legislation. The New Zealand Government argued that the legislation provided for automatic forfeiture. If this construction had been accepted then, by the domestic law of New Zealand, the carvings became the property of the Crown when they were exported. As they were within New Zealand at the time of their export, they were within the territorial jurisdiction of the New Zealand legislature at the moment when the forfeiture took effect. Therefore the New Zealand Crown became the owner of the carvings while they were still in New Zealand.

9. The defendants argued that forfeiture under the legislation only took effect either on seizure or later on condemnation and that the New Zealand Government had no claim because neither of these acts had taken place.

10. The High Court Judge concluded that the words "shall be forfeited" are equally capable of meaning shall be forfeited automatically or shall be liable to forfeiture. In the light of this ambiguity, the Judge considered the purpose of the New Zealand legislation which, he concluded, pointed firmly in favour of automatic forfeiture as the intention was to provide for the protection of certain cultural property and to control its removal from New Zealand.

1. The House of Lords subsequently dismissed the Government's appeal and affirmed the decision of the Court of Appeal: See Attorney-General of New Zealand v. Ortiz [1983] 2 W.L.R. 809(H.L.).

11. The Court of Appeal disagreed and found that the words provided for conditional forfeiture. The Court also found that it was not entitled to adopt the purposive approach to construction as there was no ambiguity in the meaning of the words.

12. Lord Denning M.R., went further than his brother Judges and challenged the jurisdictional basis of automatic forfeiture laws. In his view, automatic forfeiture in this case would have extra-territorial effect and that would be contrary to international law. Therefore, Lord Denning reasoned, the New Zealand Parliament could not have intended forfeiture to be automatic.

13. The resolution of the first issue of the English Courts therefore turned on a question of statutory interpretation. While the point will not necessarily be relevant in respect of the legislation of other States, it would indicate the need for a State to ensure that its law is capable of establishing title to the object in question beyond all doubt. An export prohibition simpliciter is unlikely to be effective where the object has in fact been illegally exported. At the very least it would seem that such laws must provide for automatic forfeiture. In New Zealand's case the Historic Articles Act 1962 has now been replaced by the Antiquities Act 1975 which provides that any artefact found in New Zealand after the commencement of the Act is to be prima facie the property of the Crown.

14. The Court of Appeal in considering the second issue (the enforceability of the New Zealand statute) held that the Crown's title to the carvings should not be enforced because (per Ackner and O'Connor LJJ) the New Zealand legislation is a penal law or because (per Lord Denning M.R.) it is a public law. Ackner LJ was influenced by the fact that the effect of the forfeiture provisions in the New Zealand legislation would be to deprive Mr. Ortiz of a valuable article without any compensation. The New Zealand Government had argued on the other hand that the purpose of the legislation was not punishment or the vindication of public justice but rather to ensure that New Zealand retained its cultural heritage within its territory. This argument was accepted in the High Court, where it was said:

"Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion."

15. It is this second issue which will be of most interest when the case comes before the House of Lords.

16. Clearly, there are arguments why a court should recognise and enforce foreign legislation designed to protect cultural property, viz:

- (a) the "revenue, penal, and other like laws": exception ought not to be applied to legislation of the kind under consideration;
- (b) the need for reciprocity: General reciprocity would greatly improve the protection of the cultural heritage of all states;
- (c) international comity: Lord Denning M.R. said in the Ortiz case [1982] 3 All.E.R. 432,460: "The retrieval of such works of art must be achieved by diplomatic means. Best of all there should be an international convention on the matter where individual countries can agree and pass the necessary legislation".

17. More generally, while considerable work has been done in this area at the diplomatic level, particularly through UNESCO, and while there is general agreement in the international community about the principles at stake, it has been more difficult to formulate effective legal measures to combat the illicit traffic in cultural property. Though the 1970 Convention represents an important step in this direction, States have found problems in implementing it. The Courts of individual States therefore have an important role to play in developing the law to meet the needs that have arisen.

18. The Ortiz case is very much a test case. Its outcome will no doubt have a significant bearing on future attempts by States to recover historic and cultural property

smuggled out of their territory. The case has already highlighted the problems involved and the need for some form of international legal co-operation in this area.

19. If the Commonwealth is to take an initiative a number of further questions are raised:

- (a) Is there a need for a generally accepted definition of what constitutes "Cultural heritage and cultural property"? How is this to be defined?
- (b) What is the position of the bona fide purchaser? Should there be provision for fair compensation irrespective of questions of strict legal title? Should the fact that the purchaser of a cultural object acted in good faith affect negotiations for its restitution or return?
- (c) Is the adoption of a set of principles sufficient? If legal machinery is necessary to back up such principles then what form should this take? Is a formal Convention required or would a less formal arrangement suffice, under which member States agree to give effect to one another's domestic legislation on the protection of cultural property?
- (d) Should any arrangement have retroactive effect and if so how far back in time should it extend? It is arguable that some objects taken illegally from a State many years ago may be of such national importance that they should be returned notwithstanding the passage of time.
- (e) Under such an arrangement should States to which smuggled objects are removed be under an obligation to seize and return such objects or simply to provide a forum for the country of origin to have its case heard?
- (f) If States are to recognise and enforce foreign legislation dealing with the export of cultural property, what safeguards are required to prevent unreasonable claims by States based on such legislation? Is there a need for all such legislation to be cast in certain standard terms before another State court is required to give judicial recognition to it or should there be a residual discretion in such courts to refuse recognition and enforcement in any extreme situations?
- (g) Should there be any residual obligations placed on States once cultural property has been returned to them? Should they be required to make such objects available for public inspection in recognition of the principle that such objects are part of the heritage of all peoples and as such are an important aid to international understanding?
- (h) Finally, and perhaps most importantly, is the Commonwealth in a better position to deal with the problem of illicit traffic in cultural property than other international forums such as UNESCO, where the results achieved perhaps do not match the considerable amount of work that has been done? While the problems are inherently difficult, there are grounds for hope that a smaller, more closely knit group of States may have somewhat better success.

20. All countries must express deep concern at the continuing illicit traffic in cultural property. The difficulties that New Zealand has encountered in its attempt to recover the Maori carvings should be a matter of concern to all, as should the similar difficulties found by other member States in trying to recover many of their historic and cultural articles. In the Ortiz case, quite apart from the inherent importance of the panels themselves, the legal issues involved are of fundamental importance. Only through international co-operation backed up by effective legal machinery can these issues be satisfactorily resolved in the long term. It is to be hoped that the Commonwealth can make an important contribution.
