

## STATE OWNERSHIP OF UNDISCOVERED CULTURAL OBJECTS

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States that have lost a cultural object due to theft or unlawful export may well want to recover it if it is found in another country. The current possessor may be prepared to return it without compensation. If he or she is not willing to do this then some form of third party procedure is needed e.g. mediation, arbitration or litigation. But, whatever process is used, the State needs to have in place, before the theft or unlawful export, a legal system that will give it the best possible arguments for return. It is no use trying to pass legislation and take other action after the taking has occurred. There must be legislation that will enable arguments to be built for return and this must be known to all persons likely to be involved.

Nowhere is this more important than when an unknown object is removed from the ground and taken out of the country. If the State wishes to recover it there must be some basis on which it does so other than the mere fact that it was found in its territory. UNESCO looked at this issue as long ago as 1956 in its *Recommendation on International Principles Applicable to Archaeological Excavations*. After setting out the general principle that each State should ensure the protection of its archaeological heritage, it goes on to say, in Paragraph 5(e), that States should in particular:

Define the legal status of the archaeological subsoil and, where State ownership of the said subsoil is recognized, specifically mention the fact in its legislation.

The issue was raised more recently in the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* 1995. Article 3(2) provides:

For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

Many States have laws on excavation which require that any person excavating cultural objects needs a permit to do so, no matter who owns the object. The application of this may depend on whether the work is being done on public or private land. However, the usual outcome of an unlawful excavation is a prosecution for a criminal offence. This provides no basis for an action to recover the object if it is found in

another country. To do this the State needs an ownership right which will be recognized by the courts in that country.

Under Article 3(2) the classification of the object as “stolen” must be “consistent with the law of the State where the excavation took place”. If the State has laws which make undiscovered cultural objects State property, taking that property would then be theft under the normal rules. The UNIDROIT Convention Article 3(2) means that the possessor of the object in another State cannot argue that it is not theft.

However, this leaves open the issue of whether the legislation claiming State ownership really has the effect claimed. Its claim may be met by arguments that it does not have title because

- the legislation is too vague
- people dealing with the object weren't aware of the legislation
- the State doesn't enforce the legislation against its own citizens

For example, in the case *Iran v. Barakat*, Iran sued the Barakat Gallery Ltd. in the English courts to recover antiquities it claimed had come from South East Iran. In the High Court the judge found that, although Iran had a body of law regulating the discovery and handling of antiquities, there was no law specifically indicating Iran was the owner of these antiquities. The Court of Appeal, on the other hand, found that Iran's rights were so extensive and exclusive that they should be regarded as giving ownership.<sup>1</sup> But to reach this conclusion took years of effort and the expenditure of a great deal of money. A clear piece of legislation would have made all this unnecessary or at least reduced the expenditure.

In an American case – *United States v. Schultz*<sup>2</sup> - the court was concerned with Article 117 of the Egyptian Law of 1983 putting into force the Law on the Protection of Antiquities. This read in part:

All antiquities are considered to be public property – except for charitable and religious endowments.

The court was prepared to accept that “public property” meant the antiquities were owned by the State. It found that:

Law 117 makes it clear that the Egyptian Government claims ownership of all antiquities found in Egypt after 1983, and the government's active enforcement of its ownership rights confirms the intent of the Law.

Here the Secretary-General of the Egyptian Supreme Council of Antiquities had testified that there were no circumstances in which a person finding an antiquity in Egypt could keep it legally. When it learnt that an antiquity had been found, the Government immediately took

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<sup>1</sup> [2007] EWCA 1374

<sup>2</sup> 178 F.Supp 2d 45 (2002); 333 F.3d 393 (2003)

possession of it, registered it and gave it a number. Moreover, legal action had been brought against persons violating the Law inside Egypt. The Director of Criminal Prosecutions for the Egyptian Antiquities Police gave evidence that his officers regularly investigated and prosecuted people trafficking in antiquities within Egypt.

These are only two examples where the legislation claiming State ownership has been upheld even though it has been unclear in the case of Iran and slightly obscure in the case of Egypt. Much time and effort could be avoided if the State that wished to claim ownership of undiscovered cultural objects did so clearly. A possible clause could read:

All undiscovered cultural objects are the property of, and owned by, the State. Unauthorized removal of such objects from the place they are found is theft.

This is an example only. Such a clause would have to be examined by a representative group of experts to see if it is sufficiently precise for use by a wide range of States and would be likely to be recognized by the courts in a wide range of States.

Any Draft Article on this topic would need to be accompanied by a document explaining the need for active enforcement and information programmes informing both experts and the public of the purpose of the legislation. These are matters that a foreign court may look when considering State ownership would be enforced.

Work on this could further the project for a uniform law.