THE ROLE OF NATIONAL AND INTERNATIONAL LEGAL INSTRUMENTS IN THE PROTECTION OF AFRICAN CULTURAL GOODS

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Inventory, Protection and Promotion of African Cultural Goods

Introduction to heritage law in Africa

African legal systems, inherited from the colonial powers, can be classified into two major groups. In the case of sub-Saharan Africa, the Roman law group comprises, in particular, those States originating from the former French Colonial Empire and the former Spanish and Portuguese territories. For reasons related to their history, some states, like Mauritius and the Seychelles, are linked with this group despite their ties with the Commonwealth. The common law group concerns those states originating from the former British Empire. This group also includes those states that belonged to the Roman law group before they were annexed by England. In the case of North Africa, the different countries in the region have implemented, in the cultural domain, legal concepts and laws based on the French or Italian system. This is the result of either colonisation or the political and cultural influence of France.

Nevertheless, it would be misleading to introduce an oversimplified view of African legal systems, which would give the impression that the laws of the former colonial states have been merely grafted onto the domestic legislation of African states. It would be more accurate to point out that the total renunciation of colonial law was not conceivable, especially considering the public structures and administrative bodies that the colonial powers had developed on African territories. The governments of the newly independent states were thus led to proclaim the principle of continuity in the legal domain.

This conception led to the abandoning of traditional rules, that is, the customary law that existed before the introduction of European law. Whether they are labelled as transplanting, borrowing or mimicry, the phenomenon of imitating foreign models can be justified as a recourse to legislation that would be accepted by the former colonial powers, which had become the major economic partners of the new states and whose collaboration was necessary to establish the economic development the objectives of which were, moreover, partly dictated by the European states.

Nonetheless, this importation of Western legal models met with traditional resistance. The substitution, by the colonial states, of the African traditional system for a legal system founded on the law did not affect all the branches of the law or the organisation of African
society. Furthermore, the terms of this policy of substitution were expressed differently according to the colonial powers involved. The European states with a Roman legal tradition implemented the system of direct administration while the British, being more pragmatic, used the local traditional institutions and merely reinforced them or weakened them according to their political needs.

Thus, while the English had, on the whole, a policy of indirect administration, designed as indirect rule, where it was established that the local populations could govern themselves under the control of British authorities, the French, the Spanish and the Portuguese pursued a policy of assimilation whose terms were that the home country took direct charge of the country’s administration.

Whereas British law applied the decentralising conception, Roman law preferred a centralising solution. These two concepts have left their mark on the institutional forms and the administrative organisation of African states today. These two major legal classes correspond, therefore, to different systems of administration shown in the diversity of the legal status applied to cultural heritage.

The African legislations concerning cultural heritage have crossed the history of the continent. The colonial period has printed its mark on the edification of legal systems, but even more on the concepts of protection and identification of cultural heritage.

Independence has not always be the opportunity of a breaking off with the cultural heritage protection system installed by the former colonial power. Two situations can be identified:

1) The vote of laws protecting cultural heritage happens immediately or no longer after independence. Its corresponds to a will to institutionalise the protection of cultural heritage, either because the former and passed on colonial system was deficient, or to reject this legacy and build the protection of cultural heritage on a new cultural identity. But there can be a gap between the proclaimed concepts and their juridical translation: a persistence of colonial criteria and protection methods can be seen (Lesotho, Malawi, Seychelles). This situation prevails in many French-speaking and Portuguese-speaking and in some English-speaking African States, because of the conflicts caused by independence.

2) The colonial power had adopted a specific law to protect cultural heritage, and this text has been repealed or replaced by a new law many years after independence (Kenya, Zambia, Togo, Niger), or is still in force (Zimbabwe, Congo, Guinea). But the enforcement of colonial laws (during 20 years in Kenya and 25 years in Zambia) after independence has never been seen in any French-speaking African country. For example, the colonial French law was not really applied in Niger. As well, the persistence of the colonial law – updated – in Zimbabwe, is characteristic of the continuation of some legal rules in English-speaking Africa, despite, in this case, a long and painful war of liberation. But the Zimbabwe seems to be an exception.

National Laws

National legislations for the protection and preservation of cultural goods in Africa are of two types: the general and the particular (the grundnorm). The conclusion one can draw from a
survey of Africa's general cultural heritage legislations is that many countries do not have precise laws and regulations that protect cultural heritage. Some countries, like Madagascar and Mauritania, however, have tried to put in place precise and worthwhile laws. Madagascar in her legislation provides that the state has the right to ownership of all property discovered during excavations. Mauritania’s legislation talks about inalienability of cultural property, movable and immovable. The Mauritanian law was passed in 1972, and that of Madagascar in 1982. In some significant respects the provisions were ahead of their time and anticipated Egyptian Law 117 of 1983. It is important in the present predicament of looting and illicit trafficking of cultural goods to declare and create state ownership of all antiquities. Such a pivotal provision has been of immense help to Egypt whose 1983 Law on the Protection of Antiquities has helped her to secure return of stolen antiquities. Egyptian Law 117 prohibits private ownership, possession or trade in antiquities, and imposes sanctions for violations including prison terms. It has long been argued by the art trade and many collectors, that “nationalisation laws” are somehow not legal, and that the courts in the West, particularly those in the two main market countries, the U.S. and the U.K. should disregard them. The Schultz case (in the U.S.) and the conviction of Tokeley Parry (in the U.K.) appear to reject that thinking.

Cultural heritage and national identity

Post independence constitution making in Africa saw some countries [Benin, Burkina Faso, Cape Verde, Congo (Brazzaville), Equatorial-Guinea, Egypt, Ethiopia, Ghana, Guinea, Guinea-Bissau, Madagascar, Sao Tome and Principe, Seychelles, Somalia and Uganda] enshrining the protection of the cultural heritage in the fundamental law of the land.

Indeed, some African states affirm the pre-eminence of the cultural dimension to establish national identity. The incorporation of cultural priorities in the fundamental law may correspond to different objectives. It may be from the need to use these foundations to build a national identity common to the different ethnic groups or the need to promote a dominant national culture that will compel recognition among the various communities of the state.

Burkina Faso constitution of 1991 takes the protection of cultural heritage further in Africa by conferring a positive right of action in the form of an actio popularis on every Burkinabian who detects anyone or any agency harming the country's cultural heritage. Article 30 provides in full: “Every citizen shall have the right to initiate an action or to join a collective action under the form of a petition against these acts: harming the public heritage; harming the interests of social communities; harming the environment or the cultural or artistic heritage.”

The 1st February 1987 constitution of the Democratic People's Republic of Ethiopia declared in Article 55.1 that "Ethiopians shall have a duty to safeguard and take care of the socialist wealth. Ethiopians shall have a duty to participate in the State and the society's efforts to safeguard, collect and use those objects that have a historical interest as well as safeguarding the national heritage and to take care of these objects". In a more neutral and relatively traditional version as regards the objective of protecting and preserving cultural heritage, the 29 May 1999 constitution of the Federal Republic of Nigeria states in Article 21 that “the State shall: (a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter" [Chapter 2 : Fundamental Objectives and Directive Principles of State Policy]. This
recognition of cultural values by the rule of law on which the state is founded is the reason for the special attention that the public authorities develop to the administration and departments that are charged with implementing and spreading these cultural priorities to society and its communities.

The cultural provisions of the constitutions of the Republics of Cape Verde and Guinea Bissau are an example of the will of new states to establish their legitimacy on a national identity that is fortified by a common cultural identity to be put at the service of the society's development. The fundamental laws of these two republics are relatively similar, as a result of historical factors. Article 16.1 of the Cape Verde law, enacted in 1981, states: "The State shall have the fundamental obligation to create and promote favourable conditions for safeguarding its cultural identity, both as a base for national consciousness and dignity and as an incentive to a harmonious development of the society. The State shall preserve, defend and develop the cultural heritage of the Cape Verdian people". In the same vein, the Guinea Bissau constitution states in Article 17.1: "It is the imperative duty of the State to create and promote favourable conditions for the safeguarding of cultural identity in its role as the fulcrum of national conscience and dignity as well as a stimulating factor for the harmonious development of society. The State shall protect and safeguard human dignity".

**Strengthening and Upgrading National Legislation**

The formulation and elaboration of cultural heritage laws are often designed on European concepts of the protection of cultural property.

The cultural field has often been monopolised by the public authorities of African countries to reinforce their national identity and, more rarely, to pursue an objective of educating the people. These laws do not state the modalities according to which the knowledge of this heritage can be returned to the populations or in which form it will participate in the social life and the development of the society. This European influence in the transcription into law of the heritage concerns can be found in many African laws. The legal texts which deal with the protection and development of cultural heritage only partially deal with the educational role of heritage.

There is the need to review the existing legislation in individual countries which, in many cases, is very much inspired from European laws and is not always adapted to the present African realities. It is important to bear in mind that certain basic provisions are indispensable for the successful protection of Africa’s cultural property, having regard to present administrative inadequacies, the related problems of looting of archaeological sites, and stealing and smuggling of cultural objects. The following provisions are necessary:

(a) all antiquities belong to the state and are public property,
(b) all archaeological objects belong to the state;
(c) antiquities cannot be owned by private individuals;
(d) cultural objects being res extra commercium (non-tradeable property) trade in them must be prohibited;
(e) all possessors of antiquities must register them with the state;
(f) export of cultural objects without the state's licence must be prohibited;
(g) clear guidelines on lending of antiquities for exhibition abroad;
(h) sanctions and penalties must be deterrent in scope and depth;
(i) rescue archaeology programmes must be guaranteed;
(j) close supervision of archaeological excavations;
(k) coordination of the work of the national police, customs and immigration;
(l) compilation of inventories of heritage in and out of museums and the need of visual documentation;
(m) prompt communication of precise details of losses to INTERPOL, ICOM and other organisations;
(n) educating the public and school children of the harmful effects of illicit traffic;
(o) local government authorities to be involved in cultural heritage management in their areas;
(p) acquisition and de-accessioning must conform to ICOM standards;
(q) strong recommendation to enter into beneficial bilateral and multilateral co-operation agreements with other countries;
(r) establishing cogent administrative machinery to supervise the implementation of the legislation.

To have a good national law is of the utmost importance, but not sufficient in case of repatriation actions for illegally exported cultural objects. In fact, other States (and private persons) must know the African States’ legislation in order to avoid acquiring objects whose export is prohibited. A good way to do this is to put the legislation on the UNESCO Cultural Heritage Laws Database.

It may be worth mentioning the UNESCO-UNIDROIT project to work on the preparation of a law or articles for a model law on the protection of cultural property against illicit trafficking which would complement UNESCO’s Cultural Heritage Laws database, and would clearly state the principle of State ownership of cultural property, in particular of archaeological objects. The objective would be to provide all States with sufficiently explicit legal principles guaranteeing such ownership and which could be relied upon in court in respect of cultural property.

African Participation in International Legal Instruments

There are four UNESCO conventions and the UNIDROIT Convention on the protection, preservation and checking illicit trafficking in cultural goods:

- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (Illicit Import Convention);
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 (UNIDROIT Convention);
African countries appear to be the most vulnerable of any group of countries to illicit trafficking in cultural goods. Yet their participation in the Conventions is poor. There are fifty-three African Member States of the African Union and the United Nations. With regard to the 1954 Hague Convention only twenty-six African countries have subscribed to the Convention; and with regard its first Protocol we have fifteen members, and just six countries have joined the second Protocol of 1999. With regard to the 1970 Convention on illicit trade in cultural property twenty-seven countries have subscribed. The UNIDROIT Convention has a mere two African membership out of a total of thirty [but other five African States have signed it but not ratified]. The Underwater Heritage Convention has a total of twenty-five members out which three are Africans. Interestingly the latest of the Conventions, Intangible Heritage Convention, has the largest African participation having thirty-one African members out of a total of one hundred and fourteen.

It is obvious that the majority of African countries that could benefit by becoming States Parties to these Conventions have not done so. The governments of the States that have not yet done so must urgently ratify or accede to the Conventions. This can be done prior to or at least simultaneously with the revision and upgrading of the national legislation. The crucial point is that unless a country has adequate national legislation, joining the Conventions will have only limited impact in overcoming the scourge of illicit trafficking. Accession to the Conventions must therefore be accompanied with implementation laws. Many countries have joined the conventions without domesticating them.

While on the issue of implementation laws it must the observed that only Mali of all the African countries has entered into bilateral agreement with the United States under that country’s Convention on Cultural Property Implementation Act 1983, whereby import restrictions can be imposed on archaeological or ethnological materials from a country into the United States to assist in the protection of its cultural goods.

The next stage should be the harmonisation of laws through the African Union, (or initially through sub- regional groupings like ECOWAS, the Economic Community of West African States; SABC, Southern African Development Community) as is being done in the European Union, for example, through the Council Regulation and Directive. There would be a need for joint border patrols. The ICOM “Red List”, for example, names Burkina Faso, Chad, Cameroon, Cote d’Ivoire, Ghana, Mali, Niger and Nigeria. These countries are neighbours. The feasibility and productivity of joint patrols is surely obvious. There is no reason why the respective police, customs and immigration departments cannot cooperate.

Non-Use of the Inter-Governmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

The Inter-Governmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation was established by UNESCO in 1978. It has held fifteen sessions. It is primarily a negotiating forum aimed at facilitating bilateral negotiations and agreements for the return or restitution of cultural
property, particularly that resulting from colonisation and military occupation to its countries of origin. Surprisingly, African countries whose agitation at the United Nations General Assembly led to the establishment of the Inter-Governmental Committee have made little use of the Committee’s good offices in the recovery of their expropriated cultural property. In fact after thirty one years only Tanzania has filed a claim for the return of the Mankode Mask from Switzerland.

Recommendations

A) At national level

1. Those African countries that do not have constitutional provisions for the protection of their cultural heritage and goods should do so.

2. National legislation must regulate both local sale and export of cultural goods. It must control their management, their movements across state boundaries and rights of state pre-emption in respect of them. There must be provisions for their inalienability.

3. Each country must conduct a national audit of its cultural goods both in public and private collections. This should be done in collaboration with ICOM and AFRICOM (International Council of Museums – ICOM’s programme for Africa) and possible financial and technical assistance of developed countries.

4. Each country should take an inventory of her cultural objects outside the country on the basis of information published in museum, auction and exhibition catalogues and art books. [At the seventh session of the Intergovernmental Committee held in Athens, Greece in April 1991, Madagascar announced that it had recently drawn up the inventory of objects of her cultural heritage held overseas in cooperation with Norway. Madagascar was seeking copies of these objects or their repatriation.]

5. National budgets should provide for preventive activities and state of the art museum infrastructure.

6. Other branches of municipal laws particularly environmental and planning laws should also be deployed to protect cultural property.

B) At bilateral or regional level

7. Each country should commence bilateral negotiations with those countries holding their “irreplaceable masterpieces” to use Amadou Mahtar M’Bow’s phrase in his 1978 “A Plea for the Return of an Irreplaceable Cultural Heritage to those Countries who created it.” If negotiations fail the countries must seek the good offices of the Intergovernmental Government by submitting requests for the return of the objects to the Committee.

8. Other African countries should emulate the example of Mali and enter into bilateral import control agreements with the United States given the pivotal role of the US in the art market. [Apart from Mali, Bolivia, Cambodia, Canada, China, Colombia,
Cyprus, El Salvador, Guatemala, Honduras, Iraq, Italy, Nicaragua and Peru have also done so.]

9. The respective police, customs and immigration departments should be linked together under bilateral and multilateral, mutually beneficial agreements to combat looting and illegal excavations.

C) At international level

10. African Governments that have not joined the UNESCO and UNIDROIT Conventions should do so without delay. The moral impact of fifty-three African nations acceding to these Conventions should not be under-estimated.

11. African governments should offer to host meetings of the Intergovernmental Committee as evidence of their belief in the work of the Committee, and also their earnestness on the issue of return of cultural objects to their countries.

Conclusion

The global effort to protect cultural objects relies on national laws. Since national legislation must operate in the context of international trade and law, convergence in the statutes is inevitable. It is therefore imperative for African countries to strengthen their national laws and wholeheartedly participate in international legal instruments on the subject.

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