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Legislation in Archaeology: Overview and Introduction

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State of Knowledge and Current Debates

Introduction

Every country in the world has some form of law relating to its cultural heritage. These range from the draconian (and sometimes relatively ineffective: Cleere 1984: 130) to the more loosely formulated and generally respected. In between lies the majority, more or less complex and more or less complied with. Some are "homegrown" and reflect particular local circumstances; others elsewhere are copied from neighboring or more distant places; others again have been adopted from past rulers but remain in place nonetheless. Law has been very important to the development of the idea of preserving material from the past (Carman 2012): laws have always proved a key means by which that preservation was effected. Laws also serve to legitimize the idea of that preservation.

This entry will look at the different kinds of laws that apply to the material heritage in different parts of the world and how they operate. In doing so, it is an exploration and celebration of difference rather than similarity. The common thread, however, lies in the adoption of law – of whatever kind and however written – as the key method of dealing with the cultural heritage. It has been the promulgation of laws to preserve old things – whatever the motivation driving it – that turns a mere private or sectional interest into something like heritage management as we know it. In the current state of heritage management, laws are even more crucial to the preservation of our heritage: without them, it can be cogently argued, there is no heritage (Cleere 1989: 10). At the same time, these laws need to be overseen and put into effect by appropriately empowered agents, whether of the state or independent. These agents too have their powers and duties defined by the laws that govern them and the material on which they act. Accordingly, even in so-called "non-statutory" systems of heritage management, law is the underlying mechanism and the ultimate repository of authority.

The sections of this entry will offer introductory outlines to some of the forms which laws in this area can take, how they are organized and to be interpreted, and the relations between laws at the national and international level. The opening section will examine some of the justifications for laws in this area, a truly global discourse. A section on interpretation of laws will expose the clear differences that exist between legal systems and which necessarily affect our understanding of them and any attempt at international comparison: these include the legal structures of federal versus unitary states, laws derived from traditions of Roman (and other)

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law, and those grounded in English "Common Law." An overview of international regulation – global in nature but subject to interpretation at the national level – follows. The laws of national territories will then come under scrutiny, representing different systems of laws: those assuming the state to be the proper owner of material versus those where private ownership is held to be the ideal, those favoring direct intervention and control versus more indirect and administrative mechanisms, and so on. Overall, the paradox of the ubiquity of laws to achieve the same ends that take a remarkably diverse set of forms will become clear. A final section will review the effect the promulgation of legislative control has had on the field in terms of the development of professional agendas and associations, both national and international, and the ways these too regulate the practice of heritage management.

This aspect of heritage management is very well documented. This is partly inevitable: laws are usually written documents and to ensure compliance must be made widely available to their intended audience. The literature of heritage management, therefore, abounds with summaries and commentaries at the national level (for the UK, see Carman 1996; Pugh-Smith & Samuels 1996; Hunter & Ralston 2007; for the USA, US Dept. of the Interior 1989-90; for France, Rigambert 1996; for Austria, Hocke 1975; for German states, Dörge 1971; Eberl et al. 1975; for Switzerland, Hangartner 1981; for Mexico, King et al. 1980; etc.) and at the international and comparative level (Burnham 1974; Prott & O'Keefe 1984; Cleere 1984; Carman 2002: 68-76; and on underwater archaeology Dromgoole 1999).

The Role of Law

Despite the ubiquity of legislation as a foundational tool of heritage management practice, very little of the literature of the field concerns the purpose of such laws or, to put it another way, explains why we pass laws on this matter rather than tackling it in another way. McGimsey (1972), for instance, argues powerfully for legislation as a key component of a state preservation program but also argues against legislation alone since it would be an entirely "negative approach" (McGimsey 1972: 33 & 46) lacking the necessary support from the wider public. Prott and O'Keefe (1984) go further: they argue that the dangers facing the archaeological resource are ever greater and that accordingly "some of them can only be controlled by governments" and therefore require legislation (Prott & O'Keefe 1984: 13). At the same time, they recognize the valuable role laws play in resolving key conflicts over material – especially issues of ownership and control – and the setting of policy aims, as well as the increasing requirements of national governments to comply with international treaties concerning the heritage (Prott & O'Keefe 1984: 14). None of these is, however, a reason for law *as such*: both McGimsey and Prott and O'Keefe offer programs of public education and the mustering of political support as alternatives (McGimsey 1972: 29-31; Prott & O'Keefe 1984: 145-15).

In so far as McGimsey does provide a reason for legislation, it must be as part of the requisite "administrative structure" (McGimsey 1972: 27) for such a program, which includes its establishment as a legally recognized authority with its own budget. Pickard (2001: 4-10), reviewing a sample of European states with a view to their response to new international agreements on cultural heritage, expands on this theme by presenting a number of areas where legislation has a valuable defining role:

- Of definition of the heritage, concerning the attributes and characteristics a heritage object should have or be deemed to possess
- Of identification of the heritage, especially the means available of inventory and recording, and the making of lists and schedules
- Of preservation and protection of the heritage, whether through systems of designation or by regulating development
- Of the philosophy of conservation in place, including attitudes to restoration and reconstruction
- Of appropriate sanctions against breaches of the law and the means – coercive or otherwise – to encourage compliance

- Of the integration of cultural preservation with other government policies and imperatives
- Of financial aspects
- Of the specific powers and duties of government and nongovernmental agencies in respect of the heritage
- Of educational and other aspects

From this functionalist perspective, the law in this area can be seen not so much as a mechanism of heritage management but as a facilitator for systems of heritage management to come into being: on its own, it seems, law does nothing but requires other agencies in order to put heritage management into effect. This is perhaps one reason law should so often emerge first in systems of heritage management: it provides the framework on which the other aspects of heritage management can hang. On the other hand, it would seem that other components of a heritage management system could exist independently of legislation to put them into place. The question "why law?" remains.

Although in general sympathetic to heritage management as a practice (and whatever they may choose to call it), others have taken a more critical view of the role of law in this field. A study of English law in this area (Carman 1996) concluded that its main purpose was to give value to archaeological remains. Though a continually reductive process of selection of certain kinds of object from all the things in the world, subsequent categorization of those things into legal terms and allocation to particular agencies for a limited range of treatments, archaeological sites, and monuments would emerge with a new meaning and a new set of values placed upon them. In doing so, they became officially recognized as important and worthy of protection and preservation. This is a reversal of the usual understanding of the sequence, whereby things that are important are chosen to be preserved by law: here, it is the law that makes certain things important. A similar view was reached in respect of legislation to govern the heritage of indigenous populations in Australia and the USA (Smith 2004: 125-155). As Smith puts it, legislation "plays a key role in the management of Indigenous material culture, as. . . it establishes the need for management procedures and processes" (Smith 2004: 125). Such law therefore goes on to define who will manage indigenous culture and how those involved – archaeologists, indigenous people, and government agencies – will interact. This means law sets "the parameters of acceptable management practice. . ..[and] the scope of policy debate, and influences the way in which debate is conducted between the three actors" (Smith 2004: 125). Overall, "legislation provides governments and bureaucracies with terms, concepts and guidelines against which competing claims to material culture may be assessed" (Smith 2004: 126) and ultimately "provides the conceptual frameworks that must govern debates within" heritage management which "institutionalize and regulate the discipline [of archaeology] as a technology of government" (Smith 2004: 154). Similarly, Fourmile (1996) has reviewed the role of Australian legislation in denying the indigenous population any access to or control over their cultural heritage. These readings of the place of legislation in heritage management locate it at the service of requirements external to the discipline itself and closer to those of government. In other words, rather than law serving the needs of archaeology, archaeology is made to serve the needs of government.

Interestingly, however, it is not just those who are critical (or indeed suspicious) of law who see it in this light. Breeze (1996) – writing on the definition given in Scotland to the British legislative category of "national monument" – is clear that the purpose is "to ensure that all people have access to [Scotland's built] heritage [of all periods] and are able to enjoy it, regardless of their own origins and background" (Breeze 1996: 102). He also acknowledges that "preserving monuments. . . is not entirely an end in itself" and cites government reasoning behind it (Breeze 1996: 102). Accordingly, the idea of a "national" archaeological resource based in law is seen here not as a limiting and exclusive concept but nevertheless one that remains at the service of government agendas. This same idea is reflected in Knudson's (1986) review of cultural resource management practice in the USA. As a result of success in "persuading the major

policymakers... of the public significance of archaeological resources.... the implementation of such policies will not leave anyone... out of the process of public accountability for the treatment of those resources," and "this will be conducted within the context of multiple public objectives" (Knudson 1986: 399). The public referred to here is taken to be the Euro-American population of the USA, excluding its indigenous population whose cultural works are under discussion. Accordingly, even though it is acknowledged that conservation of cultural remains is a globally endorsed project, the target of conservation practice in the USA and what flows from it is directed at a particular audience, at least partly the result of "a lack of genetic continuity between the dominant political community in the United States and prehistoric Americans" (Knudson 1986: 396). Here, as elsewhere, law drives the heritage management process rather than providing support for it.

In most writing on heritage management, a legislative basis for preservation practice is taken for granted. The literature is therefore for the most part descriptive rather than critically discursive and does not ask why laws are in place in such profusion. One reason is simply historical: it is "the way it is done." Other reasons emerge from a closer reading, however, whether from an overtly critical or a more sympathetic perspective: laws serve, as it turns out, not the needs of heritage management but rather the agencies – and in particular national governments – who promote them. This is not an issue of effectiveness, but may have an impact on the way heritage management is done in different contexts.

How to Approach, Read, and Interpret Laws

Laws are technical documents rather than discursive texts, which means they are not only written in a particular way but also designed to be read in a certain way (see, e.g., for the USA, Dickerson 1975; for the UK, Cross 1995; for Italy, Tarello 1980; for international comparisons, MacCormick & Summers 1991). Indeed, "reading" in its conventional everyday sense may not be quite the right word: they are usually designed to be used more like a technical manual than read as a linear narrative. Moreover, the particular manner in which such texts should be read varies from jurisdiction to jurisdiction so that an ability to operate in one legal system does not automatically imply an ability to so operate in a different one. The aim of this section is to outline some of the ways in which laws relevant to archaeology can vary from country to country across the globe.

As I have argued elsewhere (Carman 1996: 17; 2002: 102-103), to have a truly meaningful comparison between the practices of archaeological heritage management, it is necessary to take three factors into account:

- Differences between legal and regulatory systems
- Differences in the nature of the material record of the past between one territory and another
- Differences in the traditions and historical development of archaeology between one territory and the other

The first of these covers such things as the basic assumptions relating to the interests to be served by law, the degree of appropriate state control held to be applicable in an area, the weight to be given to private property laws, or the expected powers and duties of state and other agencies. All of these will differ between one territory and another, or one legal system (e.g., Common or Roman) and another. In the UK or USA, for instance, the usual style is to provide for legal protection without taking material directly into state ownership, but in other territories all archaeological remains and other heritage objects are held to be the property of the state. In the UK, the USA, and Australia, this reflects the ideological authority of private property upheld by a system of Common Law, as against the authority of the state more typical of systems deriving from the European continent. Here, the difference lies in expectations of what is right and proper and more fundamental social values. Where it is expected that heritage objects should belong to the state, the kind of system operated in the UK or USA makes no sense; in the UK or USA, the adoption of a system of generalized state ownership would be seen as an attack on private

property. An attempt to assess the merits of one system against another therefore runs up against these fundamental differences in understanding of what laws can and should do and to whom legal authority should be given.

The second and third factors are linked. They concern the nature of the archaeological record and how it inevitably differs in different territories and the understanding given to the purpose and focus of archaeological research which will differ in one country from another, so that very different research traditions may exist, leading to a differential emphasis on types of material. In the UK, for instance, the treatment of different types of material is very often the same regardless of physical form or age. Prehistoric structures in the countryside can be treated in exactly the same way as medieval ruins in a city, and ancient monuments (a legal category that in England now includes some material from the twentieth century) can be placed upon a schedule, while standing buildings can be placed upon a list, both of which offer some form of legal protection. There are other territories, however, where differences in age make a substantial difference. Material from a preliterate past may be treated very differently from material emanating from historical times, or one period of history – or material representing a particular way of life – may be more highly valued than another, making one subject to legal control and protection, while the other is abandoned to its fate. In the USA, for instance, buried remains of the indigenous population are subject to forms of federal legal control, while the remains of (sometimes contemporary) colonizing Europeans are excluded from this coverage. Such differences will make any direct comparison of UK and US laws rather meaningless, since they are grounded in very different historical circumstances, are driven by very different political and cultural imperatives, and concern significantly different categories of person. At root, therefore, UK and US legislation in this area do not concern the same types of material.

Any set of national laws will also need to be read in accordance with specific standards. These "rules of construction" are quite precise and are often themselves enshrined in law, ensuring that any law of the particular state will be interpreted in the same way as any other and thus guarantee consistency in application. These rules do not, however, cross territorial and jurisdictional boundaries. A brief introduction to some of the key differences that can exist is set out by Prott & O'Keefe (1984: 150-151) and another by Summers and Taruffo (1991: 501), but for specific advice on how to read laws in particular jurisdictions, more precise legal guidance needs to be sought. In particular, there are gross differences between the manner of interpreting laws between systems of legal Codes and the principles of Common Law. All start from the premise that laws are written and composed of words: the question arises as to how to understand the meaning and intent behind certain words and phrases.

Codification of Law: France

As conveniently summarized by Troper et al. (1991: 171), a distinguishing feature of French legal culture is that it is "one of written law. . .. to a large extent codified." The effect of codification is to offer a body of law that is complete and contains no contradictions or elisions: it therefore does not allow opportunities for avoidance or evasion, or for circumstances that are not covered by it. Accordingly, where the law is silent on an issue, it becomes the task of interpreters to fill that silence: either by simply not recognizing the omission or – more likely – by recognizing that the "gap" in legal coverage is a result of the legislator's inability to think of everything in advance and thus prevailing upon the interpreter to do so (Troper et al. 1991: 175-176). It is generally assumed that the legislators intend all laws to comply with the Constitution, and so laws will be interpreted to ensure this (Troper et al. 1991: 195), and that the administration works for the good of the common interest (Troper et al. 1991: 196) although laws restricting liberties are interpreted more strictly (Troper et al. 1991: 202).

Although as elsewhere in the world (see below) interpreters seek the "true" meaning of a law and the intention of the lawmaker, the materials they are allowed to draw upon are very wide rather than being constrained

(as elsewhere) by tight legal rules (Troper et al. 1991: 184-189). These may include:

- The historical background to the law
- Documents used in drafting the law, including drafts and consultations
- Interpretations by users of the law, especially public officials
- The language of other, related, laws
- The language of laws amended by the one in question
- The history of legal terminology
- The effect particular interpretations would have in terms of the national Constitution or international treaty obligations
- Customary procedures and practices that would otherwise be affected

Interestingly, especially for comparison with the USA and UK (see below), interpretations by other courts are rarely drawn upon, although those of superior courts within the same hierarchy may be.

Overall, French law is seen as a unity that governs all those it rules. Interpreters of law – that is, the courts – are seen not at all to make law but simply to seek the lawmaker's intention. Accordingly, in filling "gaps" not covered by a specific legal phraseology, they are seen only to be expressing the will and intent of the legislator rather than making new law or extending its coverage. All laws are interpreted in the light of the overarching Code of which they are a part: it follows that no French law "stands alone" but must be read as part of a coherent and cohesive system that effectively recognizes no differences of status or standing or of exception. As Summers and Taruffo (1991: 501) see it, in French law there are no genuine issues of interpretation, and only one meaning is ever possible, and it is this that interpreters must seek.

A Federal Common Law State: The USA

The French case is very different from that of the USA. While France is a single state, the USA is a federal one, divided into 50 jurisdictions governed by a federal Constitution. All laws of every state and federal law (a jurisdiction in itself) must ultimately comply with the Constitution: as in France, compliance will generally be assumed unless demonstrated otherwise (Summers 1991: 443-444). In the case where a state law is in conflict with a federal law, the federal law prevails, but a statute will prevail over administrative regulation and usually the Common Law which underpins all law (Summers 1991: 444-445). Whereas in French law gaps in legal coverage are acknowledged, in the USA such gaps are generally treated as if they are simple matters of textual interpretation (Summers 1991: 411-412): the issue is one of particular words and their meanings rather than attempts to meet the standards of an overarching Code.

The materials that a US court may draw upon in making interpretations are at once wider than that in other territories and more tightly regulated. Materials that must be taken into account include:

- The language of the text and any titles, subheadings, and other terms relating directly to it (compare with the UK, below)
- Dictionaries and grammars which set out the "ordinary" meanings of words under examination
- Any legal definitions of terms
- The text of other related statutes
- Any prior, repealed, or modified laws
- Any official history of the passage of the law
- Particular historical circumstances the law was intended to address, which may now have altered
- General legal principles
- Interpretations by similar or higher courts
- Interpretations by officials charged with administering the law (Summers 1991: 422-427)

In addition, interpreters are expected (but not required) to take into account interpretations by other (nonofficial) users of the law, by courts in other jurisdictions, and those of senior legal academics. There are also materials expressly forbidden from consideration, such as the testimony of legislators as to what they believed the law to be and nonofficial documentation relating to the history of the legislation.

By contrast especially with France, the US system is one that openly acknowledges the possibility of alternative readings of legal texts (Summers & Taruffo 1991: 501). It follows that

US courts have more of a lawmaking role than their French counterparts. The prior interpretation by other courts has also a much more important role here than is evident in the French system, and the authority of officials over legal interpretation is much less evident. Similarly, no requirement exists to make the law fit part of a broader code despite the overarching commitment to constitutionality.

A Unitary Common Law State: The UK

The role of the courts in the UK is not to make law but, similar to their role in France, only to interpret it. Accordingly, it is not the place of the courts to fill gaps in coverage but to leave this to legislators (Bankowski & MacCormick 1991: 362). The law is not codified, and therefore, in large measure, each piece of legislation stands alone and separate from others except where connections are expressly drawn (Bankowski & MacCormick 1991: 363): the focus of interpretation is therefore very much upon the strict interpretation of particular words and phrases rather than seeking to contextualize the whole (Bankowski & MacCormick 1991: 382). Interpretation is therefore an essentially pragmatic process of seeking the "ordinary signification" of words (Bankowski & MacCormick 1991: 382-386) rather than being driven by broader principle, as in France, or constitutionality, as in the USA. Nevertheless, there are certain underlying presumptions that guide the interpretive process: that absurdity is not an intent of legislators; that laws are designed to operate fairly; that laws do not (unless specifically indicating otherwise) operate retrospectively; and that existing laws remain unaffected unless the law specifically indicates otherwise (Bankowski & MacCormick 1991: 391-2). In the UK system, statutes will prevail over all other kinds of law but increasingly need to comply with laws made elsewhere, in particular EU legislation and certain international treaties (Bankowski & MacCormick 1991: 375).

As in the USA, interpreters may draw on certain materials, may use others or are barred from using others: however, the range of materials differs from that elsewhere. The primary source is the specific substantive language of the law itself, excluding any subheadings, titles, or marginal commentary which is only present to guide users to relevant texts and not to determine its meaning (Cross 1995) but including any "Interpretation" section which sets out the precise meanings certain words and phrases may carry. Any previous interpretation by a similar or higher court must also be drawn upon, together with any relevant subsidiary legislation which may bring the law into force (Bankowski & MacCormick 1991: 375). They may (but are not required) to refer to other laws on the same topic, government guides on good practice, any previous legal history of the terms, current usages of officials, and scholarly writings (Bankowski & MacCormick 1991: 376-380). Material expressly barred from consideration includes any information on the history of the law and economic or sociological data on the effects of particular readings (Bankowski & MacCormick 1991: 380-382).

In general, UK law is seen as a body of separate regulations, some of which stand entirely alone, and others which are grouped together, and are interpreted accordingly. Although general principles and assumptions guide the process, the focus is very much upon the specifics of individual provisions rather than the creation of a unified whole. Only those materials directly relevant to the point at issue are taken into account: extrinsic factors are barred because the courts would then be involved in making policy, which is not their role. The assumption – as in France – is that there is a single meaning lying behind a particular provision and the function of interpretation is to find it.

Differences in Reading Laws

These three examples offer a taste – albeit a small one – of how different sets of laws represent different legal ideologies and are therefore to be read differently from one another. In particular, the clear differences between laws that operate as part of a codified system and those that stand alone need to be taken into account, as do the specific materials that can be drawn upon for interpretation and those that cannot and the extent to which underlying principles regarding the presence of "gaps," absurdity, and contradiction

may be applied. Although Summers and Taruffo (1991) take France and the USA as exemplary of opposed legal systems, here I have used them merely as examples, placed alongside a third, to illustrate diversity. An area not mentioned here has been international law, which is the topic of the next section.

International Laws and Their Coverage

Technically those materials referred to by (especially but not exclusively) heritage practitioners as "international law" in the field of heritage are not in fact law: rather, for the most part, they are sets of agreements between nation states whereby those states agree to a common standard of treatment for certain classes of object, either generally or in defined sets of circumstances. They may be agreements that are designed to operate globally – such as those promulgated by the United Nations or UNESCO – or regionally, such as those relating to Europe or the Americas. These laws are important in the field because they are taken to represent the global principles to which all those concerned with the heritage subscribe. Increasingly they are also taken as the basis for the passage of law at the national level. The main international laws in force at present are set out in Table 1.

Since they are promulgated by organizations composed of individual nation states, these international agreements are binding only upon the states acceding to them: they cannot be enforced against individuals or agencies unless they have also been incorporated into national laws, although this does not lift the responsibility from national governments to put in place appropriate arrangements to ensure compliance below the level of government. They are to be read and interpreted in a distinctive manner which reflects in many ways their purpose as setters of norms and guidance. Each such document begins with a preamble which sets out the conditions under which it was brought into existence and the purpose it serves: its specific provisions must be read in the light of these opening statements as to function rather than as stand-alone imperatives. This contrasts with the way in which laws are read at the level of some nation states which are binding on individual citizens and state and non-state agencies.

In addition to Conventions, the membership of international bodies such as UNESCO and the Council of Europe may also adopt Resolutions, which have much less legal force than a Convention but nevertheless provide guidance as to norms and expectations. These too are not binding upon individual and state and non-state agencies unless their provisions are adopted into national law, but they may also provide the basis on which future Conventions are constructed. Other international organizations also contribute to international law in this area, in a more substantive manner. The European Union is concerned primarily with economic and political issues, leaving matters of culture to the broader membership of the Council of Europe, but recent changes in the EU have allowed it to consider cultural matters, and these may become more significant as time moves on. However, as part of its economic remit, it brought forward in 1992 two legal instruments relating to the movement of cultural items into and out of the EU and between member states. The terms of the Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State will need to be incorporated into national laws before it takes full effect, but this must be done to a set timetable; the Regulation on the export of cultural goods – which places limitations on the export of such items outside the EU – had immediate and direct effect on member states and their citizens.

Like all legislative arrangements, some international instruments purport to relate to all aspects of heritage, such as the UNESCO World Heritage Convention, the European Cultural Convention, and the OAS Convention. Others concern all matters relating to particular types of heritage object, such as the RAMSAR Convention on Wetlands, the European Conventions which separately treat the archaeological and architectural heritage, and the UNESCO Conventions on underwater and intangible heritages. Others attempt to address particular issues that affect cultural objects, such as the UNESCO Hague and Paris Conventions, the UNIDROIT Convention, and the European Union measures

in relation to the movement of cultural objects. The Paris and UNIDROIT Conventions and the EU measures all relate in particular to the issue of the illicit acquisition, movement, and transfer of cultural objects from one state to another: whereas most international law seeks to provide guidance and to set standards, these measures endeavor to go further by regulating behavior. In this way they are acting much more like national laws.

Not all states choose to accede to all international laws in this field. In some cases it will be because they consider they lack the resources to meet the standards required by that law; in others – particularly developed states in the West – that they already have laws and mechanisms in place that meet or surpass those of the particular instrument. In some cases it may be felt that the particular instrument – although perhaps introduced by the state in question – is aimed at the practices of other states who do not meet the standard set. In others it will be because it challenges or threatens a particular national interest, such as an economic interest. Failures to accede inevitably weaken the effect of such laws since they cannot be enforced against states that have not done so. In turn this may affect the capacity of the instrument to act as a measure of minimum performance and an international standard. At the same time, such laws have been criticized for adopting a specifically Western approach to ideas of cultural heritage, constructed around notions of the built and monumental heritage, rather than heritages of practice and belief. Such criticisms have led to a refocusing especially by UNESCO on such ideas as the "intangible heritage" and "cultural diversity," reflected in instruments promulgated in the early part of this century. These represent new approaches to the cultural heritage which can be expected to have influence at the level of the nation state, although not all Western states have yet acceded to these new principles.

National Laws and Their Differences

Although references in the literature of the field to international measures are extensive and such laws are invariably treated in the literature of the field as significantly influential (e.g., Cleere 1989; Skeates 2000; Carman 2002; Smith 2004: 106), nevertheless attempts to assess their effect on law and practice at the key level of the nation state are limited. A project by the Council of Europe nevertheless attempted to do this for the European Conventions relating to the archaeological and architectural heritage, by a process of comparison of how different states put the requirements of the Conventions into effect (Pickard 2001). As would possibly be expected, the range of 13 countries from all parts of Europe – some well established, others newly emergent – provided evidence of a wide diversity of treatment, organization, and focus together with different levels of compliance with the Conventions. The project focused in particular on the following aspects of heritage management in each territory:

- Definition of the heritage, including systems of categorization and selection criteria
- Processes of identification and styles of inventories and recording
- Measures to protect, preserve, and prevent damage
- Conservation philosophy, including attitudes to reconstruction and refurbishment
- Sanctions for breach of regulations and coercive measures in place
- Integration of conservation with other planning and land-use regulation
- Financial provisions, including sources of funding, tax regimes, and economic development programs
- The role and structure of relevant agencies and organizations
- Provision for the education and training of staff

The discussion usefully highlights differences between individual countries but also indicates areas few or none have yet addressed, pointing to the future influence likely to be wielded by regional rather than purely national approaches (Pickard 2001: 4-10). Here, I wish to outline the areas where legislative provisions can take a different approach in different parts of the world. These areas are in particular:

- Ways of defining and specifying the object of such laws
- How different bodies of material are addressed in laws
- Issues of rights of ownership and control
- The kinds of sanctions which may be applied

Depending on the system of law in place, the approach taken in these areas will correlate quite closely.

Defining and Specifying Material

There are several ways in which the material covered by a law or a body of law may be described, set out by Prott and O'Keefe (1984: 184-187) as enumeration, categorization, and classification. *Enumeration* is a system of lists of the kinds of material to be covered: this is typical of US federal laws in this area (US Dept. of the Interior 1989-90) and has been to some extent adopted in the UK for the purpose of describing the kinds of objects that can be considered for the purposes of legal protection (Carman 1996: 120-124 & 187-192). The problem with this approach is that it leaves open the question of whether items not on the list but of a similar kind can be included: for example, if the list specifies "graves and burial sites," does this also cover aboveground disposal of the dead? *Categorization* is a looser approach whereby a broad description of types of material is provided, into which a range of particular objects may fall. The problem of this approach is that too narrow a definition may exclude objects of concern, while too broad a definition may include too much material. By contrast with both, *classification* is not concerned with the form of the object, but with actions taken towards it: in such a system, only those objects officially recognized and designated as such by a responsible authority can be granted protection. While convenient and transparent, the system has the flaw of only recognizing those objects that have been specifically designated, leaving others of similar nature to their fate. At the same time, it is worth noting that these different systems are by no means exclusive. It is possible to use them in combination, so that the list under an enumerative scheme may include categories, while a scheme of categorization may also enumerate particular types of object, and a classificatory scheme may operate in respect of items enumerated or categorized.

These differences represent contrasting approaches to the cultural heritage as a phenomenon as well as the structure of law. Where only designated material is covered by law, the emphasis is placed upon the relevant authority and its decisions; where material is enumerated, anything included is automatically covered, removing authority from agencies and placing it more generally; under schemes of categorization, a measure of interpretation is required, placing some but not all focus upon agencies. An enumerative scheme assumes a solid understanding of the kinds of materials and places constituting the heritage: by its nature, anything not listed is excluded. A scheme of categorization has a greater capacity for the inclusion of new types of material, especially if the categories are drawn not on the basis of physical form or attributes (e.g., state of ruination or age) but on value ascriptions (e.g., "of architectural, archaeological, etc., interest or importance"). Paradoxically, the greatest flexibility may exist under a scheme of designation, so long as the capacity to designate is drawn widely: if it is limited by enumeration or categorization, then it is significantly less able to include new types of material.

Addressing Different Bodies of Material

The range of objects that can be classed as cultural resources is wide, ranging from individual moveable objects singly or in groups; to upstanding buildings in use, ruined buildings and structures, earthwork sites, buried features, scatters of material, and natural features used by humans; to entire landscapes, built and natural (Carman 2002: 30-57). Under systems of law, the ways of treating them may be as varied as the material itself. In some regimes, all cultural material of whatever kind is treated under the same body of law: while different objects may be treated in particular ways, the overall scheme is common to all classes of material. By contrast, others make a clear distinction between particular

kinds of object, so they are not only treated differently but are also subject to different bodies of law. In those cases where a single, overarching national antiquities law covers all cultural objects, no distinction is drawn between individual bodies of material. Regardless of whether the object is a moveable object, a scatter of material, a ruin or a buried feature, an upstanding building, or a landscape, it will be subject to the same regime, effectively rendering them all a single class of object for legal purposes.

By contrast, other regimes make a clear distinction between particular kinds of object, so they are not only treated differently but are also subject to different bodies of law. Distinctions may be drawn on the basis of the physical properties or attributes of the material, so that moveable objects are differentiated from fixed monuments and sites, and the latter perhaps from upstanding buildings in use. While moveable objects are subject to laws concerning ownership and their placement in museums or other archives, fixed sites and monuments may be subject to official protection in the care of the state, while buildings in use are subject to controls on use and alteration. Alternatively, distinctions may be drawn on the basis of whose heritage the object represents: in states where an indigenous population may claim rights over its cultural material, such as the Americas or Australia, such material will be treated differently from the historic heritage of the incoming European population. Here, a distinction between prehistoric (i.e., pre-European contact) material and historic (colonial period) material is effectively drawn: but it is in fact not a distinction based upon age but upon putative cultural origin. European states – except those where an indigenous population dwells, such as in northern Scandinavia and Russia – and numbers of states in Africa and Asia (although not all), generally have no need of such a distinction, and material of all periods is capable of treatment under the same regime, although distinctions between different types of object may also be maintained.

Ownership Versus Control

As Prott & O'Keefe (1984: 189) point out, "it is not usually necessary to have ownership of [material] in order to regulate what may be done in relation to it." Nevertheless, as they go on to add (Prott & O'Keefe 1984: 191), a number of states across the globe do claim a right of ownership of certain classes of cultural material from the moment of discovery. While in most cases this right of ownership applies only to removable material – which will most likely find its way into a museum or archive – in some cases it applies also to the land on which they were found (Prott & O'Keefe 1984: 195). Alternatively, material and land may become subject to compulsory acquisition by the state unless certain conditions (such as the deposition of material in a suitable archive) are met. This "nationalization" of the cultural heritage has a number of advantages:

- It is a coherent and transparent process applied equally to all.
- It ensures full control by appropriate agencies over the fate of material.
- It associates such material with the entire community as represented by the nation state.
- It is simple.

However, it rides roughshod over private rights and may encourage finders to fail to report or record finds.

An alternative to state ownership is to provide for the regulation of the treatment of cultural material while allowing private ownership of that material. This may involve drawing distinctions between material on the basis of its type and circumstances of discovery so that some material is the property of the state, while other material of similar kind is not: this is the case, for instance, with the laws of Treasure Trove and Treasure in England (Carman 1996: 55-61; Bland 2004). Alternatively, the "cultural" component of the material may become controlled by state agencies, while the object itself remains the property of another: this is sometimes the case with upstanding monuments, where the land on which it stands and in which it is rooted remains the property of the landowner, but the monument passes into state control; in such cases, the

landowner continues to have use of the land but is subject to limitations on treatment of the monument. A third way is to place controls on the use of land either to prevent damage to existing archaeology or such that the presence of archaeology is so far as possible taken into account before the discovery of cultural material: decisions regarding the fate of any such material will therefore have been taken before any work commences, and where significant material is to be encountered, work likely to damage it may be completely prevented. In cases such as these, laws and administrative arrangements to put them into force will be more complex and potentially more costly but if effective can develop a measure of public support for the project of cultural heritage protection, limiting the problems of avoidance.

Public and Private Agencies

The role of state agencies will differ whether the laws provide for state ownership or state controls on private ownership of cultural material. In the first case, all authority over cultural remains will lie with the state. In the second, state agencies will need to interact and compromise with others who retain an interest in the material.

By far the most common approach is that of central regulation by state control, in which heritage objects are deemed to be the property and thus the responsibility of the nation state and its agencies. Under such a system, only those accredited by the state – frequently its employees but also those granted specific licences – are entitled to conduct archaeological or conservation work. Accordingly, excavation by anyone else is commonly a criminal activity. In theory at least, all building and other work will cease when archaeological remains are encountered and state-employed archaeologists will move onto the site. In practice, however, limitations apply on this potentially draconian system. Small developments will be allowed to proceed unhindered, government-sponsored projects may also proceed without the interference of an archaeologist, and, in many countries where such systems apply, lack of resources will result in incomplete coverage. Nevertheless, the ideal of such a system is a very powerful idea and dominates much thinking in the heritage field. It is the ideal assumed to exist by most international agencies such as UNESCO, and very often those territories or areas not applying this approach can be thought to be deficient. Here, archaeology is a cost carried out of taxation levied on the entire community in whose service it is deemed to exist.

The alternative system, which applies mostly in Anglophone countries such as the UK, USA, and Australia, is that of a partially privatized archaeology. This is essentially a private enterprise system under a measure of regulation by state and state-empowered authorities. In general there will be no limitation on who may carry out archaeological work, although professional bodies will seek to encourage the employment of those accredited by them. Excavation itself will most often be carried out as a result of the need to mitigate the damage of archaeological remains by development projects. In the USA material of "scientific significance" may need to be retrieved or preserved; in the UK, the emphasis is theoretically upon preservation in situ but frequently results in rescue excavation and so-called preservation by record. Where development work reveals archaeological remains, the developer will be responsible for employing archaeologists to carry out appropriate work, monitored by the local authority to ensure proper standards of recording. Here, archaeology is a cost levied on the developer, treating damage to the heritage as a form of pollution and applying the principle of "the polluter pays" for restitution. This is archaeology as enterprise, although never completely unregulated, and much of the discussion of such systems turns upon issues of regulation and control rather than freedom of action.

Sanctions and Penalties

There are two aspects to the issue of sanctions and penalties applied for breach of laws relating to the archaeological resource: to what kinds of offences they relate and the types of sanction applied. Depending on the kind of regime in place – a state-ownership regime or a "privatized" regime – particular attitudes as to the severity of breach and what types of breach

are more serious will prevail, reflected in the sanctions applied both theoretically and in practice. The range of sanctions available runs the full scale of penalties for breach of any kind of law: from prison terms through fines where breach is considered a criminal matter to civil remedies such as damages and carrying the cost of restoration and repair and the confiscation of material. Such penalties may be combined so that a person in breach may have to carry out reparation and pay a fine or serve a prison term. As Pickard (2001: 329) points out, however, such powerful sanctions tend not to be applied: prosecutions may be rare and the penalties awarded relatively light.

Where archaeological material is held to be the property of the state, criminal sanctions are more likely to apply to those who claim it for themselves. It is frequently a breach of criminal law to export such material without the proper authority, and sometimes any private appropriation of such material will be considered a form of theft. In some territories, although private ownership is allowed, penalties apply for the non-reporting of finds (Prott & O'Keefe 1984: 209-10 & 215-216). An alternative is to reward finders for reporting: they may be allowed to retain the find without penalty, or receive payment for its delivery to a suitable repository. Where private ownership of material is the accepted norm, specific provisions may apply to particular classes of material – either on the basis of its attributes, such as its form or material, or on the basis of its context of discovery, such as its location when found, or the process by which it came to light. Accordingly, for the bulk of archaeological material, normal rules for the allocation of ownership will apply, but certain material may become the property of the state. In such cases a need to report may apply to all material or only that owned by the state: in the latter case, provision may nevertheless be made for the voluntary reporting of finds.

Penalties also accrue to those who may damage or destroy archaeological sites and monuments and historic buildings. In some cases, where these are owned by or in the care of the state, the penalties will be criminal, involving fine or prison. In other cases they will be civil, such as reparation or damages. Where arrangements are in place for the control of construction and development work, archaeological remains may be included among those factors to be considered. In such a case, where the likelihood of damage to archaeological remains is envisaged, the proposed work may be prevented altogether but is more likely to have controls placed upon it: for redesign to avoid affecting significant archaeological material, or for advance investigation of such material at the cost of the developer. Failure to comply may result in a fine or the imposition of further controls on development work. In similar vein, some Latin American states may apply sanctions to unsatisfactory excavators for poor quality archaeological work (Prott & O'Keefe 1984: 305): such penalties will involve the cancellation of licences to conduct work in the territory concerned.

Conclusion

It is likely that the kinds of differences between national laws outlined briefly here in some way correlate. Accordingly, where a single body of law applies to all cultural objects, they may also be subject to direct state ownership and control, allow for no non-state agency involvement, and apply at least theoretically strict criminal sanctions. Where distinctions are made between types of object, different ownership regimes may exist side by side, there may be a measure of non-state involvement in archaeology, and sanctions may be relatively light and civil rather than criminal. To date, however, and despite the work of Prott & O'Keefe (1984) and others (e.g., heritagelaw.org), no substantial work of this nature has yet been completed, so these suggested likely correlations remain only as plausible assertions. Nevertheless, whether or not these types of correlations exist in reality, the crucial point is that differences between legal regimes are not mere matters of administrative convenience: in the same way as the differences of legal interpretation covered above, they represent fundamental differences of ideology in terms of what law is for, where authority resides, and the nature of the cultural heritage. In thus approaching national laws, it is necessary to be sensitive to the kinds

of ideology represented and the attitudes towards and expectations of both law and heritage they carry.

The Professionalization of Archaeology

The application of legislation in the field of archaeology and its regulation under law is one of the factors that has encouraged the increasing professionalization of the field. The regulatory influence of official organizations allows them to produce standard-setting documentation which influence practice and require to be met if work is to be granted to those at whom they are aimed: a number of state agencies accordingly have adopted such a nonlegislative approach to controls on archaeological work. Parks Canada, for instance, publish as part of their website (http://parkscanada.pch.gc.ca/library/PC_Guiding_Principles/) their *Cultural Resource Management Policy* setting out the principles guiding their treatment of the historic places in their care. In the UK, English Heritage seek to guide the conduct of publicly funded archaeological work by encouraging a particular managerial approach (English Heritage 1991). English Heritage were also responsible for producing the nationally applicable guidelines for local authorities on the treatment of archaeological sites under threat from development projects (DoE 1990), and their application and effectiveness is monitored by them. The message of such products – whether international or national – is that of the particular expertise of the people responsible for them, which in turn further encourages the professionalization of the discipline as a whole.

In combination with laws and regulatory procedures, systems of self-supervision and oversight create a climate where archaeology operates inevitably as part of systems of governance. Although not widely discussed in these terms (but see Smith 2004: 58-80), the point is recognized by others with an interest in the material remains of the past. Especially in those jurisdictions governed by a tradition of Common Law and private property rather than state control and ownership, those who object to giving control over the past to a "closed" profession, and despite their own inclination towards individualism, organize themselves into groups who may then propagate their own codes of practice and standards of behavior, effectively "professionalizing" an anti-archaeologist stance. This is to some extent the situation in the UK in respect of amateur metal detectors and treasure hunters, many of whom work in association with archaeologists and others. The voluntary Portable Antiquities Scheme – whereby finds are reported and the information made publicly available (www.finds.org.uk; Bland 2004) – is given support by the code of practice of the National Council for Metal Detecting (www.ncmd.co.uk) among others.

Conclusion

The key points to note from this overview of law and regulation in archaeology are the variations in approaches to law in the field: these in turn represent not mere habit and local practice but real differences in ideology and approach. Where a system is based upon close control by central government, it represents a very different understanding of the purpose and role of archaeology in society from one where private ownership is upheld and regulations are looser and more flexible. These are differences that matter, especially in relation to study or work in an area new to one: ideas that are the norm in one territory do not transfer simply to another. Such differences are reflected in how archaeologists are trained and qualified, the relations between archaeologists and the state, relations between archaeologists, between archaeologists and others interested in the past, and between archaeologists and the wider public.

Cross-References

- ▶ African Continent, Archaeological Heritage Management Law on the
- ▶ Athens Charter (1931)
- ▶ Australia, Domestic Archaeological and Heritage Management Law in
- ▶ Australia, Indigenous Cultural Property Return in

- ▶ Burra Charter (1999)
- ▶ Charter for the Conservation of Historic Towns and Urban Areas (1987)
- ▶ Charter for the Protection and Management of the Archaeological Heritage (1990)
- ▶ Charter for the Protection and Management of the Underwater Cultural Heritage (1996)
- ▶ China, Domestic Archaeological Heritage Management Law in
- ▶ Conservation and Management of Archaeological Sites (Legislation)
- ▶ Continental Europe, Domestic Archaeological and Heritage Management Law in
- ▶ Convention for the Safeguarding of Intangible Cultural Heritage (2003)
- ▶ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)
- ▶ Convention on the Protection of the Underwater Cultural Heritage (2001)
- ▶ Council of Europe Framework Convention on the Value of Cultural Heritage and Society (2005)
- ▶ Cultural Property Protection during Wartime: The Second Gulf War (US/Iraq)
- ▶ Cultural Property Repatriation and Restitution: Relevant Rules of International Law
- ▶ Cultural Property Repatriation in the United States: A Case Study in NAGPRA (US)
- ▶ Cultural Property, Trade and Trafficking: Introduction
- ▶ European Convention on the Protection of Archaeological Heritage (1996)
- ▶ European Union Directive 9311/92: Export of Cultural Goods
- ▶ Florence Charter: Historic Gardens (1982)
- ▶ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
- ▶ ICOMOS Charter on Cultural Routes
- ▶ International Charter for the Conservation and Restoration of Monuments and Sites (Venice 1964)
- ▶ International Council of Museums (ICOM): Code of Ethics
- ▶ International Cultural Tourism Charter Managing Tourism at Places of Heritage Significance (1999)
- ▶ International Journal of Cultural Property
- ▶ Latin America, Indigenous Peoples' Rights in
- ▶ Legislation in Archaeology: Overview and Introduction
- ▶ Machu Picchu Artifacts, Repatriation of the
- ▶ Museum Security Network
- ▶ Norms of Quito (1967)
- ▶ Parthenon (Elgin) Marbles, Case Study of
- ▶ United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Convention
- ▶ International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects (1995)
- ▶ United States Domestic Archaeological Heritage Management Law
- ▶ USA and Mexico (1970): Bilateral Treaties and Patrimonial Property Restitution
- ▶ Vermillion Accord on Human Remains (Legislation)

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t1.1 **Legislation in Archaeology: Overview and Introduction, Table 1** Main international instruments relating to the cultural heritage

t1.2	Date	Promoted by (international organization)	Title
t1.3	1954	UNESCO (portal.unesco.org)	Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)
t1.4	1970		Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (Paris Convention)
t1.5	1972		Convention concerning the Protection of the World Cultural and Natural Heritage
t1.6	2001		Convention on the Protection of the Underwater Cultural Heritage
t1.7	2003		Convention for the Safeguarding of the Intangible Cultural Heritage
t1.8	2005		Convention on the Protection and Promotion of the Diversity of Cultural Expressions
t1.9	1971	RAMSAR (www.ramsar.org)	RAMSAR Convention on Wetlands
t1.10	1995	UNIDROIT (www.unidroit.org)	Convention on Stolen or Illegally Exported Cultural Objects
t1.11	1954	Council of Europe (www.coe.int)	European Cultural Convention
t1.12	1969 (revised 1992)		European Convention on the Protection of the Archaeological Heritage
t1.13	1985		European Convention on Offences Relating to Cultural Property
t1.14			Convention for the Protection of the Architectural Heritage of Europe
t1.15	1976	Organization of American States (www.oas.org)	Convention on Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations