The Protection of Cultural Heritage : a Mexican Perspective

Jorge Sánchez Cordero

I. – INTRODUCTION

The author of "The Plundered Past", K.E. MEYER,[1] cites the American Curator in ancient art, John D. Cooney from the Cleveland Museum, who in 1972 estimated that 95% of all the antiques in the United States were illegally imported. Regardless of the accuracy of this statement, we may assume that this trend has persisted in the U.S. market.[2] We can discuss the methodology and the data, if any, as to the volume of this illegal traffic, but it is a cruel reality that we have to face.

At other latitudes and in recent times, we have learned of the embarrassing details of the "greedy" auctions in the Swiss art market during World War II of German cultural objects belonging to German museums or German Jews.[3]

This prompts us to refresh our memory and recall a reality dating back to the XIXth century when the foundations of the art market as we know it today were first laid. Putting it in modern terms (a fact rudely brought home to us by the process of globalization), we can say, to state the obvious, that as long as there exists a demand, the pillage of cultural objects will continue. Today, all arguments seem to be judged first by the market, and it must be admitted that looting is profitable since there are always buyers. However strong the regulatory controls, complete prevention would entail unaffordable costs [4] with meager results.

In parallel with this phenomenon, we have also witnessed a raising of international consciousness and will to protect cultural objects. The international agenda has shown intense activity in cultural matters. Practically every nation now

Public notary, Mexico D.F. (Mexico); Member of the UNIDROIT Governing Council; Director, Centro de derecho uniforme (Mexico).

Paper delivered at the 75th Anniversary Congress of the International Institute for the Unification of Private Law (UNIDROIT): "Worldwide Harmonisation of Private Law and Regional Economic Integration", held at *Pontificia Università Urbaniana*, Rome (Italy), 27-28 September 2002.

1 Karl E. MEYER, *The Plundered Past*, Arts Books Society, First Edition (New York), Readers Union Group, 1973, 123.

2 Sabine VON SCHORLERMER, *Internationaler Kulturgtersschutz,* First Edition, Duncker & Humboldt (Berlin), 1992, 386.

3 Hans Henning KUNZE, *Restitution Entarteter Kunst,* First Edition, De Gruyter (Berlin), 2000, 334; Thomas BUOMBERGER, *Raubkkunst Kunstraub,* First Edition (Zurich), 1998; Gunther HAASE, *Herman Goering. Die Kunstsammlung des Reichsmarschalls*, First Edition, Edition q. 2000, 104.

4 Paul M. BATOR, "An essay on the international trade in art", Vol. 34 (Stanford), *Stanford Law Review*, Lelan Stanford Union University, 1981-1982, 325.

has regulations, with varying degrees of restrictiveness, with the exception of the United States of America, Denmark, Uganda, Singapore and Togo.[5]

It was in the second half of the XXth century that this rise of international consciousness became perceptible. The UNESCO Conventions of 1954, 1970 and 1972 are the first recognizable points of reference of this new international cultural legal order.

The 1970 UNESCO Convention on the *Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* can be considered as one of the pillars in this context. It confers on Governments the power to designate the cultural objects that shall be legally protected within their respective boundaries. This has led to the creation of cultural nationalism where Governments have the privilege of laying down what should be considered as culturally worthy. Despite its intrinsic value, a pernicious side effect of this development is the cultural hegemony of the State.

From 1991 to 1995 no fewer than eight international instruments of all descriptions were prepared, including multilateral and bilateral treaties or agreements and so on, which were discussed in a heterogeneous range of fora such as the United Nations, UNIDROIT, the European Union, the Council of Europe, the International Law Association and the Institute of International Law.[6]

During this same period, the Federal Republic of Germany and the United States of America drew up treaties or bilateral agreements concerning the protection of cultural objects.

A very intense debate is currently raging over two notions of principle, namely: cultural nationalism versus cultural internationalism. In essence, this is the same debate that fuelled the old arguments defended by two prominent British personalities: George Gordon (Lord Byron) and Lord Elgin. Byronism or Elginism, terms very precisely defined in the French language, clearly summarize the two concepts.

While we can trace the concept of the protection of cultural objects to Europe, today the issue has taken on a universal dimension. To defuse the charge of eurocentrism, we need to move the focus to other latitudes such as the American continent and analyze the legal mechanisms for the protection of cultural objects that exist there.

It is on American soil that Western expansionism led to an unprecedented event: the meeting of two totally different cultures – the European and the Pre-Columbian. The traces of these Pre-Columbian cultures are today the center of controversy that could never have been imagined by their creators. Illegal and unscrupulous excavations of Pre-Columbian archeological sites have meant the loss of precious

5 BATOR, *supra* note 4, at 314.

6 Kurt SIEHR, "The protection of cultural property. The 1995 UNIDROIT Convention and the EEC instruments of 1992/93 Compared", *Unif. L. Rev. / Rev. dr. unif.*, 1998, 671.

information not only for the countries concerned, but for mankind in general. In effect, it is universal knowledge that resents the loss.

II. – THE *JUS COMMUNE* AND THE MESO-AMERICA AND INCA REGIONS

The legacy of Pre-Columbian culture first and foremost enriches universal knowledge. The loss of information about such cultures alters the development of mankind by erasing its past. It is in contexts such as this that the notion of the cultural heritage of mankind imposes itself.

The discovery of archeological sites is a gradual process and the assimilation and systematization of the information and knowledge pertaining thereto are correspondingly slow. Technology [7] has advanced to such a degree that in Spain, an entire Roman city was discovered without using a single spade! [8] The discovery of archeological sites is governed by the slow and painstaking process of prospecting. Therefore it is inadmissible to assume that only archeological objects belonging to public institutions and duly inventoried can be protected, as is stated by the *American Cultural Property Implementation Act* of 1983. This assumption is beyond all reason, and defies common sense.

The unscrupulous removal of cultural objects has meant the irreversible loss of universal knowledge of ancient cultures; the decontextualization of archeological objects devalues both the archeological object itself and the amputated archeological site and so eliminates all possibility of gathering knowledge.

The protection of archeological sites such as the Pre-Columbian sites transcends the debate between cultural nationalism and cultural internationalism, which has an essentially ideological background. We must place the protection of archeological sites in another context: that of the preservation of human knowledge.

We must bear in mind the importance of cultural objects for the community itself. It has been aptly said that

> "... a perception of a common culture and common past is one way of learning that we are part of a community, that we belong to one another in a special way ... art speaks directly to the inner consciousness within which we resolve whether we do really feel a sense of belonging to a group or community ..." [9]

Therefore, archeological objects also fulfill a cohesive function in society and this is particularly true in Meso-America and the Inca region.

It seems clear to me that for the aforementioned reasons, we can recognize a specificity of archeological objects which has had important repercussions in the law.

To the aforementioned arguments we should add one further point: that is that the *best cultural interest* should prevail. It is obvious that the market cannot become a

7 ARCOS (Archaeological Computer System) developed by the Volkswagen Foundation.

8 VON SCHORLERMER, *supra* note 2, at 190.

9 BATOR, *supra* note 4, at 305.

catalyst of the destruction or mutilation of archeological objects. We often hear that in many cases, archeological sites are being destroyed due to negligence or to the effect of natural elements. This may well be true, but it does not follow that pillage or mutilation will preserve archeological objects any better.[10]

Meso-America – I deliberately employ a cultural term – and the Inca region are clear examples of the juxtaposition of geopolitical realities in cultural units subject to different legal systems. In terms of legal analysis, we must retain two different approaches: the regional and the inter-American mechanisms.

In the regional Latin-American legal environment, we can identify the emergence of a *jus commune* in the protection of Pre-Columbian objects. One of the identifiable elements in this new *jus commune* is the drafting of national laws in the regions of Meso-America (Mexico, Guatemala, Honduras, Costa Rica, Nicaragua, El Salvador and Panama) and in the Inca region (Peru, Bolivia and Ecuador). These laws are highly restrictive as far as Pre-Columbian objects are concerned, but not so with regard to colonial objects or objects of a later period. The legal texts are very similar and converge in their content.

These national laws have as their principal characteristic the protection of Pre-Columbian cultures through the legal formula of public domain. This heritage belongs *ex lege* to the Nation and is therefore subject to the regime of *res extra commercium* with the legal effects of inalienablity and imprescriptibility. It should be very clear to us that when a nation declares itself owner, this should be regarded as an attribute of sovereignty as recognized by an American Judge in the *Mc Clain* case.[11]

Another recognizable element in this new *jus commune* is the drafting of agreements of cooperation and restitution of archeological, artistic and historical objects as defined by national laws and that contain a substantive alteration to the *droit commun* of the countries of the area since the requesting State is not required to pay any form of compensation. This proves that in this area, traffic in Pre-Columbian archeological objects is considered illegal without regard to the objects' national origin, and it also explains why the requesting State need pay no compensation. The characteristic feature of this new *jus commune* is the creation of a new common public cultural order in the region that responds to the desire to maintain cultural unity and integrity. The interest of preservation of a culture should prevail over nationalistic and market interests.

There are still substantial problems that do not find a solution in this new *jus commune* of Pre-Columbian objects. Due to the migration of different Pre-Columbian cultures such as the Maya, it becomes difficult, even for specialists, to identify their national origin. For example, the judge of the forum in international cases could choose as the applicable law that of the country of origin of the cultural object, but would face serious difficulties if an object from one and the same culture belonged to

10 BATOR, *supra* note 4, at 297.

11 *United States v. Mc Clain*, 545 F. 2D 988.

one or more different legal systems. A similar problem arises when ordering such an object's restitution.

There are not yet any legal mechanisms that contemplate solutions to conflicts among nations in the Meso-American and Inca regions. It is precisely the design of such mechanisms that should primarily respond to the best cultural interests as opposed to nationalistic ones.

Last but not least, it must be admitted that the degree of enforcement of these national laws is very uneven and in some cases frankly questionable. It should also be pointed out that the Supreme Court of Costa Rica in its resolution of 23 April 1983 declared anti-constitutional some of the main provisions of law No. 6703 of 1981, known as the law for the protection of the national archeological heritage.

Another element that characterizes this new Latin American *jus commune* is the Convention for the defense of archeological, historical and artistic heritage, known as the 1976 Convention of San Salvador, discussed and approved in the face of reticence,[12] not to say opposition, by the United States. This Convention – *lex specialis* – is intended to strengthen the foundations of the 1970 UNESCO Convention – *lex generalis* – in the Latin American region. With these two Conventions, the Organization of American States has attempted to stop illegal traffic in cultural objects. All the countries of the Inca and Meso-American regions except Mexico have already ratified the San Salvador Convention.

Nevertheless, there is a substantial difference between the 1976 Convention of San Salvador and the Agreements on the protection and restitution of archeological, artistic and historical monuments subscribed under the auspices of the Government of Mexico deserve to be mentioned: the agreements privilege the diplomatic channel.[13] In this context, it is the requested State that is required to pursue by all means, including recourse to the courts, the restitution of cultural objects.

The 1976 Convention of San Salvador establishes that both the requested State and the requesting State can ask the courts directly to order the replevin of the plundered objects and to enforce sanctions against the culprits. The mere thought of a foreign State in the Mexican courts was unacceptable to Mexico. This refusal was motivated by a conception of sovereignty dating back to the XIXth century and is in large measure determined by the complex relations between Mexico and the United States of America – the bilateral treaty between the two nations is governed by the same principle – even though the free trade agreements signed by Mexico render these arguments obsolete.

12 VON SCHORLERMER, *supra* note 2, at 460.

13 Further information may be found in the Mexican Official Journal of 10 February 1993, 23 October 1975 and 27 March 1996.

III. – LATIN AMERICA AND THE NEW INTERNATIONAL CULTURAL ORDER

Protests, mostly from American scholars, denouncing the scandalous pillage to which the Pre-Columbian culture has been subjected as well as the growing international consciousness in favor of the protection of cultural objects, combined to generate, in the 1970s, a series of Conventions, bilateral Treaties and agreements that without question constitute a new international legal system from which Latin America was not excluded.

The US market represents almost 50% of the global art market and is the natural receiver of Pre-Columbian objects. That is why the changes in US laws, important worldwide, are outright determining for Latin America.

The treaty between Mexico and the United States of America is an important reference in the creation of this new international cultural order. In this same context, the American Executive Branch issued an "Executive Agreement" in respect of Peru and Guatemala stating that according to American law, this Agreement was an instrument that committed the American administration in the same way as treaties, without the need for approval by the Senate.

In 1972, the United States of America ratified the 1970 UNESCO Convention and then took until 1983 to issue the implementing Act. The complexity of the phenomenon of traffic in cultural objects is evident simply from a analysis of this Act. In it, the American Government sought to reconcile and balance interests as diverse and contradictory as those of archeologists, ethnologists, dealers, collectors, museums and academic communities, not to mention the different perspectives of the Department of State, the Department of Justice and the Customs Service.

The 1995 *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, being a multilateral agreement, represents a great opportunity for the Latin American region to enrich its legal framework. In fact, Article 3 of the UNIDROIT Convention considers as stolen any cultural objects unlawfully excavated or lawfully excavated but unlawfully retained. This would strengthen the new Meso-American *jus commune* since the possessor of a stolen cultural object would be obliged to return it. In the case of conflict as to national origin, the restitution of the – State-owned – stolen cultural object should be governed by the *best cultural interest* and the preservation of knowledge of the culture. The same criteria should be observed when dealing with illegally exported cultural objects.

IV. – CONCLUSIONS

Different conclusions can be drawn from the analysis of the US Cultural Property Implementation Act, as well as from the bilateral treaties, executive agreements and Inter-American Conventions.

There is a legal recognition explicit in the specificity of archeological and ethnological objects; for instance, they are subject in the American Cultural Implementation Act to a special regime for their restitution, which is a major

improvement despite the likely complexity of achieving signature of the "special agreement" that this Act foresees as well as the real possibilities of restitution. In this same context, we refer to the 1972 *American Statute for the importation of Pre-Columbian monumental or architectural sculpture or murals*. This statute applies only to stone carving and wall art which is the product of a "Pre-Columbian Indian cultures" of the Americas and which constitutes an "immobile monument or architectural structure" or was attached to one. Even though very modest in scope, this Statute is a significant step forward and evidences a response to the new cultural consciousness.

The modification of certain practices in the American Customs System, sharply criticized by some sectors of American society, has in some ways cut down illegal import, especially of archeological objects. This new trend has been questioned within the United States of America itself, with arguments ranging from a refusal to issue a "blank check" to exporting countries to highly pragmatic objections consisting in the elimination of all import restrictions so as not to favor other important art markets such as Japan and Europe.

The American judiciary also offers examples of this new cultural consciousness as in the case of "*Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts. Inc.*" [14] Even though this is a single case, the reasoning of the American judge reflects a clear valorization of the *best cultural interest*. Respecting American international commitments, Judge Cudahy stated that:

> "...The UNESCO Convention and the Cultural Property Implementation Act constitute an effort to instill respect for the cultural property and heritage of all peoples. The mosaics before us are of great intrinsic beauty. They are the virtually unique remnants of an earlier artistic period and should be returned to their homeland and their rightful owner. This is the case not only because the mosaics belong there, but as a reminder that greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court..." [15]

The citing in the *McClain* case of the US National Stolen Property Act as well as the *amicus curiae* defense raised during the proceedings by the American Association of Dealers in Ancient, Oriental and Primitive Art are evidence that the debate is far from concluded and highlight the complexity of favoring *the best cultural interest*.

It should be recalled that under the US *National Stolen Property Act* it is considered a federal crime in the United States to transport in the framework of foreign commerce goods known to be stolen or to receive, conceal, store, sell, or dispose of such goods.

Some American scholars [16] argue that, by the letter of the law, a simple legislative declaration of ownership in itself is an abstraction that should not have any

14 *Autocephalous Church v. Goldberg & Feldmann Fine Arts*. 917 F. 2d 278 (7th cir. 1990).

15 *Idem*.

16 BATOR, *supra* note 4, at 348.

effect in an importing country. Therefore a cultural object exported illegally according to this foreign legislative act should not be considered as "stolen" in American territory. The exporting State could invoke the criminal law in the United States with the sole aim of reinforcing the export legislation by the simple "metaphysical" declaration of property and, by doing so, the exporting country "manipulates" in an inadmissible way the notion of the "stolen" cultural objects in the United States.

It is needless to stress the complexity of this problem and how the preservation of knowledge of a culture can prevail. What cannot be denied is the concern displayed by the international community in the preservation of knowledge of ancient cultures that has already found acceptance in an international Convention such as that of UNIDROIT, which declares as stolen archeological objects illegally excavated or legally excavated but illegally retained. The Preamble of this Convention is also conclusive.

Finally, we should mention the proliferation of non-compulsory declarations, statements, letters, among others, which constitute a body of Codes of Conduct that can be termed "soft law". The notion of "soft law" applies to a body of non-compulsory narrative norms that have enormous influence with museums and art dealers and have an impact on their practices of commercial acquisition with regard to cultural objects.

Those international Conventions still awaiting ratification may be considered as "soft law", such as the 1995 UNIDROIT Cultural Convention approved in essence by the German museums.[17] The American Museums can also be mentioned in this context.[18] The *rationale* behind these new Codes of Conduct is quite simple: one of the principles underlying the "*raison d'être*" of museums is the preservation of the cultural heritage of mankind. Resorting to illegal acquisition of cultural objects simply fosters the destruction of vestiges of ancient cultures. The preservation of cultures presupposes access to information that should remain unalterable.

Ratification of the 1995 UNIDROIT Convention by an important cross-section of Latin American countries would be a significant step forward in the creation of this new international cultural order.

It should be recalled that under the UNIDROIT Convention, the protection of cultural objects is independent of any kind of governmental decision as pernicious as those witnessed in the recent past. The criteria employed by the UNIDROIT Convention were developed from a different perspective than that of the 1970 UNESCO Convention. If the decision is taken out of the Governments' hands, the cultural

17 Erik JAYME, *Eröffnungsvortrag-Rechtsbegriffe Kunstgeschichte. In Neues Recht zum Schutz von Kulturguterschutz. EG-Richtlinie, UNIDROIT-Convention und Folgerecht*, Gerte Reichelt (Hrsg.) (Wien), 1997, Manzsche Verlags-Universitätsbuchhandlung, 11. The Board of Directors of the Berlin museums in November 1996 requested the German Federal Government to inform them of the state of ratification of the UNIDROIT Convention and whether discussions on accession to the instrument had already commenced.

18 The first American museum to announce an acquisition policy of this nature was the University of Pennsylvania University Museum, on 1 April 1970. A new policy, adopted in 1979, particularised and strengthened the Museum's policy against further trade in illegally exported or excavated objects. In: BATOR, *supra* note 4, at 357.

hegemony created as a predictable effect of the privilege conferred by the exclusive right to designate protected cultural objects is overridden, and a new space of cultural freedom created which should be tended and protected against all odds.

The purpose of this paper is to stress elements for discussion in the drafting of these new cultural legal categories and propose to judges criteria for the resolution of conflicts.

The last quarter of the XXth century witnessed a new approach to cultural objects heralding a raising of cultural consciousness consisting in increased concern for the preservation of the cultural heritage of mankind and vigorous condemnation of free market cultural vandalism in its most conspicuous forms such as pillage and mutilation in order to satisfy market demand, and commonly buttressed by philistine arguments.

The unprecedented debate on which we are now embarking should strengthen us in the belief that there are signs of evolution. So let us remain open-minded, and focus on eliminating any legal categories that do not satisfactorily explain the new phenomena.

In an imperfect world prefect solutions do not exist. Tolerance and creativity should guide our conduct – and only time will tell how well we have performed.