

THE ADOPTION OF A STANDARD DEFINITION OF CULTURAL HERITAGE TO THE DEVELOPMENT OF A COHERENT INTERNATIONAL LEGAL FRAMEWORK FOR ITS PROTECTION

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Abstract

This article is dealt with the key issue of how the adoption of a standard definition of cultural heritage would facilitate a uniform understanding of the nature of its subject matter and the development of a coherent international legal framework for its protection. Due to the diverse range of current definitions of cultural heritage mentioned in many international legal instruments, it is very difficult to precisely identify and indicate which monuments, groups of buildings, sites, antiques or other items that might be cultural important should be protected as cultural heritage. If there is no any standard definition of cultural heritage, each state might specify the definition of cultural heritage in a different way that results in a lack of unity. Thus, it would be interesting to determine and discuss how a uniform understanding of the cultural heritage definition can be effectively developed.

Keywords : Cultural Heritage, A Standard Definition, International Legal Framework

1 Introduction

There are currently multi-definitions of cultural heritage that have resulted in several problems relating to the legal interpretation and application for the protection of cultural heritage. Because of the diverse range of current definitions of cultural heritage mentioned in many international legal instruments, it is very difficult to precisely identify and indicate which monuments, groups of buildings, sites, antiques or other items that may be cultural

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important should be protected as cultural heritage. Accordingly, the problem of multi-definitions of cultural heritage leads to the contemporary debate focusing on whether there should be a standard definition of cultural heritage. Furthermore, it would be interesting to discuss and examine whether and how the standard definition of cultural heritage would facilitate a uniform understanding of the nature of its subject matter and the development of a coherent international legal framework for its protection. In order to decrease or eliminate the problem of diverse and ambiguous definitions of cultural heritage, the adoption of a standard definition of cultural heritage would assist both lawyers and non-lawyers to understand what is the certain character of cultural heritage. Consequently, this article would strongly aim to discuss and evaluate how the adoption of a standard definition of cultural heritage would facilitate a uniform understanding of the nature of its subject matter and the development of a coherent international legal framework for its protection.

2 The Identification of the Term "Cultural Heritage"

The term "culture" is described as the totality of socially transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought; furthermore, the meaning of heritage also refers to something which can be inherited or passed down from preceding generations.[1] The well-known concept of cultural heritage is brought to relate to the built environment and ancient structures.[2] The scope of cultural heritage has been broadened from the concern of individual buildings and physical heritage to groups of buildings and intangible heritage.[3]

In regard to the general definition of cultural heritage, it is very likely that cultural heritage can include anything which is culturally significant and may be in diverse forms such as music, literature, art, archaeological sites, historical artifacts, natural formations, ancient remedies or sacred artifacts.[4] On the other hand, there are some contemporary commentators who

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1 Alexandre Kiss and Dinah Shelton, Judicial Handbook on Environmental Law (United Nations Environment Programme, 2005) 109.

2 Ben Boer and Graeme Wiffen, Heritage Law in Australia (Oxford University Press, 2006) 18.

3 Yahaya Ahmad, "The Scope and Definitions of Heritage: From Tangible to Intangible" (2006) 12(3) International Journal of Heritage Studies 292, 299.

4 Sarah Harding, "Value, Obligation and Cultural Heritage" (1999) 31 Arizona State Law Journal 291, 297.

argue that the meaning of cultural heritage should be limited to anything that is virtually associated to a specific culture, both in origin and purpose.[5] However, in terms of the legal definition of cultural heritage, it is found that the phrase "cultural heritage" can be perceived through several legal documents such as international treaties, conventions as well as acts of parliament. International conventions and treaties concerning the protection of cultural heritage also provide a definition of cultural heritage.

Due to the appearance of an international movement for protecting heritage after World War II, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage known as the World Heritage Convention (WHC) was developed from the concept of integration between the preservation of cultural sites and the conservation of nature.[6] Under the WHC, Article 1 provides the definition of cultural heritage and divides the cultural heritage into three categories: (1) Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; (2) Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; (3) Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.[7]

According to Article 1, it seems obvious that cultural heritage is categorized into three main things: (1) monuments, (2) groups of buildings, and (3) sites. However, the important criteria which is to be considered as the world cultural heritage is that those things should consist of outstanding universal value from the point of view of history, art, science, aesthetic, ethnology or anthropology. Unfortunately, the definition of cultural heritage under the WHC is mostly focused on a physical and immovable heritage and tangible heritage but intangible and movable cultural heritage

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5 Ibid.

6 United Nations Educational, Scientific and Cultural Organization, The World Heritage Convention UNESCO World Heritage Centre <http://whc.unesco.org/en/convention>.

7 Convention concerning the Protection of the World Cultural and Natural Heritage, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975) art 1.

is excluded under the WHC.

Nonetheless, although intangible heritage is not included under the WHC, the intangible heritage is specifically protected by the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICH). Under Article 2 of the ICH, intangible heritage refers to the practices, representations, expressions, knowledge, skills, the instruments, objects, artifacts and cultural spaces associated therewith that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. These intangible cultural heritage transmitted from generation to generation is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

Article 2 of the ICH manifests examples of intangible heritage covering oral traditions and expressions, language as a vehicle of the intangible cultural heritage, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe and traditional craftsmanship.[8] It seems that the ICH attempts to narrow the definition of cultural heritage to cover intangible heritage. Nevertheless, there are some key problems of the term "intangible heritage". This term may not be adopted and approved at a domestic level; for example, in some countries, they do not obviously use the term "intangible heritage" in their own national laws.[9]

Beside the term "cultural heritage" and "intangible heritage", there is the emergence of term "cultural property". In regarding the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, it provides the definition of cultural property which means a property, on religious or secular grounds, designated by each state as being of importance for archaeology, prehistory, history, literature, art or science.[10] However, it has remained controversial to distinguish between what is cultural property and

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8 Ibid.

9 Human Sciences Research Council, The Subtitle Power of Intangible Heritage: Legal and Financial Instrument for Safeguarding Intangible Heritage (HSRC, 2004) 27.

10 Convention on the Means of prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, opened for signature 14 November 1970, 823 UNTS 231, 9 ILM 289 (entered into force 1 July 1998) art 1.

cultural heritage. A lot of experts also commented that the cultural heritage can be viewed as public interest while cultural property may be interpreted in a more restricted sense which can be described as an object or group of objects based on the significance of the object as one of archaeological, scientific or historic importance.[11] Therefore, this divergence may probably lead to the confusion of interpretation between the terms "cultural property" and "cultural heritage".

The term "cultural property" also appears in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict that was adopted after the cultural destruction of World War II.[12] This convention particularly aims to protect cultural properties during armed conflict.[13] For the definition of cultural property under this convention, it is described as a movable or immovable property of great importance to the cultural heritage of every people.[14] Its definition is also extended to cover monuments of architecture, art or history, archaeological sites and many works of art.[15] The protection under the convention also includes repositories of cultural objects such as museums, libraries and refuges built as shelter during hostilities.[16]

In terms of national law, the definition of cultural heritage appears in some statutes. For example, in Thailand, Act on Ancient Monuments, Antiques, Objects of Art And National Museums B.E. 2504 (1961) is the main law for protecting the cultural heritage in Thailand. With respect to this Act, it does not directly provide the certain definition of cultural heritage; nevertheless, it attempts to identify the definition of some properties that are categorized as cultural heritage such as monument, antique, object of art. Under Section 4 of this Act, cultural properties can be divided into three types: (1) Ancient Monument means an immovable property which, by its age or architectural characteristics or historical evidence, is

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11 Lucille A. Roussin, "Cultural Heritage and Identity" (2004) 11 Cardozo Journal of International and Comparative Law 707, 707.

12 Patty Gerstenblith et al, "International Art and Cultural Heritage" (2009) 43 International Lawyer 811, 811.

13 Ibid.

14 Convention for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956) art 1(a).

15 Ibid.

16 Patty Gerstenblith, "Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward" (2009) 7 Cardozo Public Law, Policy & Ethics Journal 677, 686.

useful in the field of art, history or archaeology; (2) Antique means an archaic movable property, whether produced by man or by nature, or being any part of ancient monument or of human skeleton or animal carcass which, by its age or characteristics of production or historical evidence, is useful in the field of art, history or archaeology; (3) Object of Art means a thing produced by craftsmanship, which is appreciated as being valuable in the field of art.[17] Nonetheless, it seems obvious that this Act does not include intangible heritage for its protection.

3 The Problems Associated with the Diverse Range of Current Definitions

Diverse definitions of cultural heritage can probably result in several problems in legal interpretation and application. Due to the lack of a standard definition, the interpretation of cultural heritage and cultural property has remained controversial. For example, in considering the WHC and the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, it is unclear to point whether cultural property under the Hague Convention would be included under the WHC.

Additionally, the WHC only mentions the protection of cultural heritage and does not mention about cultural property. However, if we carefully consider the definition of cultural property under the Hague Convention, it is found that cultural property such as monuments of architecture, art or history in addition to groups of buildings is a subcategory within cultural heritage.[18] The debatable issue of whether the definition of cultural property under the Hague Convention may coincide with the WHC can be clarified. Although the definition of cultural property may be included under the WHC, it is unfortunate that there has been the conflict of definition between the WHC and the Hague Convention. Under Article 1 of the WHC, the protection of cultural heritage under WHC only includes movable cultural heritage while the definition of cultural property under the Hague Convention can include both movable and immovable cultural heritage.

Problems associated with diverse definitions may result from the national law of each state. If there is no any standard definition of cultural heritage, each state may specify the definition of cultural heritage in a different way showing a lack of unity. This

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17 Act on Ancient Monuments, Antiques, Objects of Art And National Museums B.E. 2504 (1961) s 4.

18 Janet Blake, "On Defining The Cultural Heritage" (2000) 49 International and Comparative Law Quarterly 61, 66.

significant problem may undermine the effectiveness of the protection of cultural heritage, if some cultural heritage is transferred from one state to another. For instance, in Thailand, Act on Ancient Monuments, Antiques, Objects of Art And National Museums B.E. 2504 (1961) mentions the protection of object of art which refers to a thing produced by craftsmanship appreciated as being valuable in the field of art.[19] When some objects of art that are cultural heritage of another state are transferred into Thailand, probably, those objects of art are not protected under Thai law because they are excluded in the definition under the Act on Ancient Monuments, Antiques, Objects of Art And National Museums B.E. 2504 (1961). From the discussion above, it is important that a standard definition of cultural heritage is very necessary to protect cultural heritage. A standard definition can also play a key role in eliminating the confusion of legal interpretation and developing and providing the uniform understanding of the nature of cultural heritage.

4 Advantages and Disadvantages of A Standard Definition

The advantages of a standard definition can be summarized into three reasons. First of all, a standard definition could promote the effectiveness and unity of national legal measures for protecting cultural heritage because it would be easier for all states to adopt the same standard definition to legislate identical national laws for protecting cultural heritage. Moreover, the adoption of a standard definition would facilitate a uniform understanding of the nature of its subject matter and the development of a coherent international legal framework for its protection. Finally, a standard definition could create a uniform understanding of the significance and value of cultural heritage. If the standard definition is adopted, any confusion and ambiguity could be eliminated.

The disadvantages of a standard definition can be summarized into two reasons. Firstly, the adoption of a standard definition may be too rigid to accommodate the changing character of cultural heritage in the future. The standard definition may be out of date, if the character of cultural heritage is developed and converted to another form that is no longer relevant to the standard definition. Moreover, practically, if the standard definition is adopted in an international legal framework such as treaty,

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[19] Act on Ancient Monuments, Antiques, Objects of Art And National Museums s 4.

convention or protocol, it is difficult to compel any state to recognize such standard definition because each state has the absolute right to adopt its own definition of cultural heritage. Although this problem may be resolved by providing the standard definition as soft law or guidance form, it is realized that the soft law or guidelines are non-legally binding which cannot enforce states to approve and agree with it.

5 Proposals for the Future

The adoption of a standard definition of cultural heritage can provide important benefits for legal interpretation and application. Therefore, the standard definition of cultural heritage should be adopted as soon as possible. The further interesting issue is how such standard definition should be defined and what are the appropriate criteria that should be considered as the standard definition.

Fundamentally, the standard definition of cultural heritage should be defined as anything that can be inherited; moreover, it should express a specific way of life and the heritage of a culture that are explicit outcome of the manner and existence of that culture.[20] In order to set the key criteria of the standard definition, it should include all tangible and intangible heritages, whether on land or underwater and include all movable and immovable heritages, whether on land or underwater. In the future, the standard definition of cultural heritage should be contained in international legal frameworks such as treaties and conventions concerning the protection of cultural heritage so that the confusion of what is cultural heritage can be resolved. Each state can also adopt such standard definition to use in its own jurisdiction in order to protect its own cultural heritage on the same way.

6 Conclusion

In conclusion, the adoption of a standard definition of cultural heritage is very important to protect cultural heritage because the existing definition of cultural heritage has been still complex and difficult to explain, the adoption of a standard definition would assist both lawyer and non-lawyer to understand the exact definition of cultural heritage and identically interpret which areas, objects or anything should be considered as cultural heritage. As a result of the adoption, the standard definition may be extensively used as the main definition in

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[20] Vinay Reddy, "Common Law Conflict of Laws Rules and The Protection of Cultural Heritage: A Conflict Between The Two?" (2001) 5 Flinders Journal of Law Reform 199, 200.

order to provide the unity of the development of a coherent international legal framework for its protection.

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