

Chapter 2

Heritage Values, Jurisprudence, and Globalization

Hilary A. Soderland

Introduction

No society, nation, or culture is immune from the exigencies of development, neglect, politics, greed, conflict, illicit trade—and more—that threaten irreplaceable elements of heritage. How, when, and by whom the past is valued by definition, measurement, and application encompass many disciplines, peoples, and perspectives. Identity and authenticity are vested in culture, nationalism, and the human experience. Governance of the past raises not just legal but ethical and sustainability issues. Yet, legal rules, like ethical guidelines, cannot account for all potential circumstances. Nevertheless, the manifestations through which the remnants of the past are articulated in culture, history, and memory have expanded as legal classificatory schemes now engage contemporary negotiations of heritage values.

Law defines what warrants protection and who has legal standing to participate in that determination. Law has become firmly embedded in heritage management; however, inquiry into precisely how “law” intersects with “practice” often overshadows the fundamental issue of whether law is (in)compatible with sustainable heritage development. International norms have endorsed law as implicit, and arguably indispensable, to practitioners responsible for the protection of cultural sites, natural areas/parks, and intangible attributes of cultural expression. Law contours contemporary paradigms of policy formation, the viability of cooperative endeavors, and the socio-politics of the past.

H.A. Soderland (✉)

Attorney and Registered Professional Archaeologist, Seattle, WA, USA

e-mail: hsoderland@cantab.net

Jurisprudential Universality in Heritage Management

Heritage practitioners are situated squarely within the discourse in which law has become a universal instrument for management, regulation, and protection. This inevitably raises the question of how “law” intersects with “practice.” How universal is law as a governing apparatus and to what extent do specific concerns and priorities—at the nation-state, regional, or local level—affect its efficacy, adherence, implementation, and enforcement? Does law embrace or eschew the formation of viable partnerships? This chapter scrutinizes, as an integral dynamic in sustainable heritage management, the relationship between law (as a formal, institutionalized construct) and practice (as a more informal, often grassroots, initiative). This dynamic posits the tenets of “heritage” within a regulatory rubric informed by practical realities in order to critique law’s limitations for stewardship as well as to advance law’s possibilities for future application.

It is under such a regulatory rubric that heritage managers must confront national priorities and acute realities that concern the creation and viability of partnerships among multiple actors. Worldwide, law is an established platform upon which the power and politics of participation/representation are negotiated—and determined. Whether law is—or should be—such a dominant platform is not perhaps as significant to the present inquiry as is a recognition of its strong enduring presence.

Jurisprudence can be characterized as an international norm of heritage management that can provide an equitable and sustainable framework for stewardship of the past. Legally binding obligations with sanctions for contravention or noncompliance serve both to pervade and entwine domestic law and interstate conventions, treaties, and accords. International legal instruments without binding authority cannot guarantee a change in conduct or an (automatic or even gradual) amelioration of a particular problem; however, they can lay the foundation for transforming behavior and, in turn, international standards. A leading example is the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage. Despite its lack of genuine means of enforcement (such as trade sanctions or penalties) for noncompliance or violations, the World Heritage Convention has become synonymous with the sustainable governance of heritage. It is now almost universally accepted (ratified by 189 states as of March 2012; UNESCO World Heritage Convention, 1972: States Parties: Ratification Status) and has been implemented in domestic legal systems across the globe. The Convention’s World Heritage List has established a standard of “outstanding universal value” for heritage. Inscription as a World Heritage Site has proved a catalyst to raising awareness of national heritage that meets this standard. The associated “prestige” attracts tourist revenue as well as other financial and philanthropic contributions from entities such as nongovernmental organizations, private individuals, conservation societies, and professional organizations. The international recognition derives from the Convention’s objective of “preserv[ing] the world heritage of mankind” by effectuating a “system of collective protection of the cultural and natural heritage of outstanding universal

value, organized on a permanent basis and in accordance with modern scientific methods [since the] deterioration or disappearance of any item of the [universally valued] cultural or natural heritage constitutes a harmful impoverishment” for all nations (UNESCO World Heritage Convention, 1972). The ethos of governance imbued in the World Heritage Convention signifies that principles and standards that embody heritage values articulated in a global directive can both modulate how nation-states conceive of law as a heritage management tool as well as modify nation-state conduct by effectuating congruent domestic law.

Law’s Limits in Heritage Management

Law as an instrument of management is commonly criticized as a rigid and static doctrine that defers to procedure, precedent, and definitional precision. Law students are indoctrinated in the “language of law” and schools of law pride themselves on the process of inculcation that teaches the student to “think like a lawyer.” This, in turn, produces legal practitioners who conform to narrow specialized standards and techniques while adhering to a very specific skill set that uses distinctive terms of art. Legal authority and knowledge are thus distanced from other approaches or types of knowledge. So, while the law may provide a useful means of approaching conflict, it more often than not does so in a fashion that can fail to cohere with, or account for, the multiplicity of meanings that heritage encompasses.

This disconnect is particularly acute for heritage management when considering the law’s emphasis on classification and definitional specificity. An intrinsic component of and first step in creating law is categorization. Classification and the necessity of defining terms in order to explicate and clarify the object(s) of the law are prerequisites to any provision concerning management, administration, and implementation. Thus, terms for concepts associated with heritage—even those that arguably defy definition, such as those in the realm of intangible attributes—have been classified and defined in law. As the intangible has emerged within the heritage discourse as a concept distinct from the tangible, so too has an appreciation of the tensions and complexities inherent in a categorical division of the two concepts. Yet, both tangible and intangible heritage have been defined increasingly in, and demarcated by, law in order for nations to implement protective and regulatory policies, to prioritize rights to certain stakeholders, and to adjudicate conflicting claims. This increase in definitional specificity within legal frameworks is well documented and is not likely to be a passing phenomenon. The law will continue to provide a definition of what constitutes “heritage.” Therefore, regardless of the extent to which law may be a static or inflexible framework, clear difficulty exists in inserting the holistic scope of heritage into its framework. This raises not only the question of how legal classification directs an engagement of our contemporary understanding of heritage but also whether more circumscribed legal definitions hinder law’s

capacity to provide a structure with sufficient elasticity to embrace both national and international heritage management schemes.

The law indisputably defines what warrants protection and who has legal standing to participate in that determination. International conventions and national statutes signify broad chronological indicators as “snapshots” in time when law has captured (however appropriately) contemporaneous conceptions of heritage. Inscription in legal text accords the past a place in legal history. Yet, it is the contemporary mores of the majority within which law always is written. Law and its implementation therefore are partial to a presentist perspective. This can be at odds with heritage, which retains roots deeply embedded in vestiges of the past. It also can be incompatible with heritage and constructs of identity that embody customs, traditions, “...practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage” (UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003). In this vein, the law-making process—by enshrining heritage in statutory language—can be perceived as temporally “freezing” heritage or imposing tangible traits on the intangible or compelling the oral to become written. Thus, jurisprudence while providing a tool to protect, to value, and to manage heritage cannot at times avoid transmuting the very essence of that heritage.

Law’s Possibilities in Heritage Management

Perhaps the greatest possibility of law as management tool is its ability to change in response to modalities of heritage. Law reflects contemporaneous social, political, and economic conditions and values. It is influenced by macro as well as micro societal movements. It is informed by international norms of human rights and racial equality. It is structured by legality’s tenets of civil liberties, constitutional rights, citizenship guarantees, religious freedom, sovereignty, and self-determination. As such, law has proved to be an effective avenue through which to right past “wrongs” and to acknowledge both past and current injustices. In recent decades, the legal arena has demonstrated its ability to extend its reach. Statutes have conferred legal standing—including special or sovereign stakeholder status—to minority groups and indigenous communities. Burdens of proof and evidentiary standards have reflected wider world views. These changes have been described as unlocking a long absent legal avenue through which rights to cultures can be accessed by present-day descendants, serving as the basis for claims of ownership and the disposition of resources. Determination of title or ownership confers the right to possession. At the same time, both the claim and the claimant/stakeholder are authenticated and legitimized—a result with significant social, ethical, and legal consequences. Legal proceedings or courtroom decisions more often than not decide how the concept of heritage is to be

interpreted under the umbrella of the law and, accordingly, which ownership claim or status is validated.

In so doing, juridical declarations of proprietary rights to historically marginalized groups, including indigenous peoples, have been hailed by many as human rights legislation. However, the extension of legal standing has not been without shortcomings as the law still accords rights disparately. In the United States, law differentially situates indigenous peoples vis-à-vis cultural heritage based on a government-imposed classification system. Legal standing and remedy can mean little to claimants not recognized under national or international law or who live in war zones, occupied territories, or regions of disputed sovereignty. Such disparities complicate the role of heritage managers to act in accordance with legal directives that may challenge or prove inconsistent with “on-the-ground” realities. It is clear that profound inequalities and power disparities are perpetuated in law. However, law is virtually never “set in stone” but is marked by resilience in its capacity for amendment or modification to accommodate changing circumstances. Within global heritage discourse and current cultural debates, the umbrella of law is entrusted with the stewardship of culture. The cultural compass that orients law denotes powerful possibilities through which justice, dignity, equality, and protection can be sought—and realized.

Conclusion

The legal process and law itself are marked by compromise and subject to political expediency. Law is an instrument—not an end in itself—but a means to negotiate conflicting ideologies and complex issues. Limitations exist in any legal apparatus that protects and manages tangible material and intangible values. Judicial mores of justice, equity, and impartiality establish standards that cannot always offer potent or cogent remedy when heritage has suffered irreparable harm. Monetary compensation and even restitution or repatriation may never truly indemnify or heal an injury or injustice, or make the heritage “whole” again. As those responsible for implementation, the reality of such limitations is perhaps best known to managers. For it is managers who must navigate the implementation of law—even when law is inadequate, lacks sufficient foresight or enforcement capabilities, counters the establishment of viable local or indigenous partnerships, and/or is ill suited for, or overwhelmed by, the practical realities of management. As a top-down approach, law does not always dovetail with management realities, local needs, or grassroots initiatives. Court ruling can uphold the letter but not always the spirit or even the intent of the law.

Like its human adjudicators, law is far from perfect. It has no crystal ball pre-saging judicial decisions that can envision all future circumstances or consequences. Perhaps no instrument of management does—or can. Nevertheless, law has been, is, and undoubtedly will continue to be, a chosen framework to resolve conflict and manage heritage. Law tenders a valuable framework—not just one with limits, but one with vitality that should indeed remain one of the primary tools

utilized to effect results. Law offers a universal platform in that it structures and transcends national sovereignty. Its scope gives it legitimacy, efficacy, and influence that benefit from the common purpose and shared interests of a community of nations. Jurisprudence has become a customary, if not compelling, tool of sustainable heritage management.

Law should not necessarily supersede other managerial tools. Particularly in the international realm, policy and/or diplomacy may present more creative solutions. Strong enduring fact-specific solutions in contemporary global settings likely draw upon not only policy and law (in its fullest sense: treaties, customary law, general principles, domestic law) but also diplomacy and technical/scientific expertise. Heritage vests “cultural” capital from ideologies, life ways, tradition, and belief systems. The ascription of value is acutely subjective. “Authentic,” one-of-a-kind, and “genuine” are relational within the heritage discourse. Heritage, as a non-fungible commodity, is perhaps as close as any item or commodity can come to being “priceless.” Commercial realities and economic valuation falter as accurate litmus tests. Yet, convergence between economic incentives and policy interests can facilitate a legal solution that also provides the possibility for sustainability to the community whose “heritage” is at issue. Judicially mediated or arbitrated, finely tuned cooperative “joint” management plans or memoranda of understanding can provide innovative, equitable, and enforceable resolutions.

Despite this, the law still retains differences incompatible with heritage. Law is written by lawyers, using legal terminology. The “legalese” of the law starkly contrasts with many expressions of heritage. Heritage epitomizes the “unique,” intangible, and culturally sensitive. The incompatibility is more than semantic but not irreconcilable. In order better to manage heritage, law-makers and heritage practitioners must learn how to “converse” despite—and across—these conceptual/linguistic divisions. I believe the “language of law” needs to align more closely with that of heritage—or at least a higher level of commonalities or understandings needs to be reached. The field of nonrenewable resources and materials steeped with disparate ideologies has the propensity to invite disagreement and conflict. Within heritage, law provides an order under which social issues and contests are directed. The role and place of law is expanding, and resolution of potential discord more and more resides within law’s jurisdiction. Such contemporary circumstances warrant a symbiotic partnership between law and heritage as global collaborators and stewards of the past.

Acknowledgement This chapter expands upon the formal presentations given at the 2011 annual meetings of both the Society for American Archaeology (SAA) and the European Association of Archaeologists (EAA) as part of an ongoing SAA–EAA collaborative initiative vis-à-vis cultural heritage. The 2011 SAA forum, *Cultural Heritage Management and Archaeological Research in the Americas and Europe: A Forum on SAA and EAA Collaboration*, organized by Peter F. Biehl and Douglas C. Comer, was co-sponsored by the SAA Heritage Values Interest Group and the International Scientific Committee on Archaeological Heritage Management (ICAHM) of the International Council on Monuments and Sites (ICOMOS). The 2011 EAA session, *The EAA–SAA Roundtable: Teaching and Researching Heritage–Outreach and Identity*, was organized by Eszter Bánffy, Peter F. Biehl, Douglas C. Comer, and Christopher Prescott.

Furthermore, the foundation of this chapter derives from a paper presented in 2010 at the 2nd International Conference on Heritage and Sustainable Development in Évora, Portugal. The paper, *Law as (In)compatible Interlocutor in Sustainable Heritage Governance: Appraising Jurisprudential Universality as Heritage Management Tool*, was published in the conference proceedings by the Green Lines Institute for Sustainable Development (as cited in the reference list). The Green Lines Institute has permitted its republication subject to this attribution and acknowledgement. This chapter, *Heritage Values, Jurisprudence, and Globalization*, represents an expansion of that publication and, in particular, is influenced by the dialogue fostered by the SAA–EAA collaborative initiative.

References

- Soderland, H. A. (2010). Law as (In)compatible Interlocutor in Sustainable Heritage Governance: appraising jurisprudential universality as heritage management tool. In R. Amoêda, S. Lira, & C. Pinheiro (Eds.), *Heritage 2010: Heritage and Sustainable Development* (volume 1) conference proceedings; the 2nd International Conference on Heritage and Sustainable Development (pp. 265–269). Barcelos, Portugal: Green Lines Institute for Sustainable Development.
- The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (1972). <http://whc.unesco.org/en/conventiontext>. Accessed 28 Apr 2012.
- The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage: States Parties: Ratification Status (1972). <http://whc.unesco.org/en/statesparties>. Accessed 28 Apr 2012.
- The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (2003). <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>. Accessed 28 Apr 2012.



<http://www.springer.com/978-1-4614-6076-3>

Heritage in the Context of Globalization

Europe and the Americas

Biehl, P.F.; Prescott, C.

2013, X, 125 p. 5 illus., Softcover

ISBN: 978-1-4614-6076-3