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ОХОРОНА АРХЕОЛОГІЧНОЇ ТА КУЛЬТУРНОЇ СПАДЩИНИ: КРИМІНАЛЬНО-ПРАВОВІ АСПЕКТИ

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PROTECTION OF ARCHAEOLOGICAL AND CULTURAL HERITAGE: THE CRIMINAL-LEGAL ASPECTS

Cultural property refers to property that has some special relationship with a particular culture or nation state. Cultural property includes objects found at archeological sites, which provide insight into earlier civilizations, and artworks produced by members of a culture and that are thought to embody or represent that culture in a distinctive way. The contours of the definition are vague and shifting, but the controversies over the use of cultural property are real and raise important problems for domestic and international law [1].

The 1969 European Convention on the Protection of the Archaeological Heritage is mainly concerned with archaeological excavations and the extraction of information from these excavations. It entered into force in 1970. The main thrust is that the parties undertake to prevent illicit excavations, to take the necessary measures to ensure that excavations are authorized and entrusted only to qualified persons, as well as to control and protect the results obtained. The parties accept to take those steps necessary for scientific publication concerning excavation and discoveries, to facilitate the circulation of archaeological objects for scientific, cultural, and educational purposes. The Convention was ratified by twenty-four European countries. Pressure for revision of the Convention came in the late 1970s from the Parliamentary Assembly which was concerned with underwater archaeology and the illegal trade in antiquities [2].

In 1970, UNESCO's General Assembly adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention considers cultural property as a basic element of civilization and national culture (1970 UNESCO Convention).

It is the duty of each nation to protect its cultural property from theft, illegal excavation and illegal export. The Convention also emphasizes that museums,

libraries and Archives should ensure that their collections are built up in accordance with universally recognized ethic principles. The Convention lists three main undertakings 1) registration and control, 2) prohibition on export and import and 3) steps for recovery. All Nordic countries have signed this UNESCO Convention. Finland was first to ratify the convention in 1999, followed by Denmark and Sweden in 2003, and Norway in 2005 [3].

The Council of Europe has generated the June 1985 European Convention on Offences relating to Cultural Property, signed at Delphi on 23 June 1985, although this has remained a dead letter since it was signed only by six States, none of which went on to ratify it.

From the point of view of criminal law, this has to be considered as a “lost opportunity”: the Conventional provision in fact gives particular attention to this dimension, focusing on three distinct assets. These are: direct protection of the assets, their restitution and the repression of crime in this sector. It is very significant that the chapter on restitution includes a series of measures regarding judicial cooperation (Article 8): the execution of Letters Rogatory “for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents”, “for the purpose of seizure and restitution of cultural property which has been removed to the territory of the requested Party subsequent to an offence relating to cultural property” or simply “relating to the enforcement of judgments delivered by the competent authorities of the requesting Party in respect of an offence relating to cultural property for the purpose of seizure and restitution of cultural property”. Similarly, provision is made for restitution in the case of extradition, provided that this has been agreed but cannot be executed “owing to the death or escape of the person claimed or to other reasons of fact”.

Finally, “The requested Party may not refuse to return the cultural property on the grounds that it has seized, confiscated or otherwise acquired rights to the property in question as the result of a fiscal or customs offence committed in respect of that property” [4].

A number of UNESCO instruments are already based upon this new approach: One of the earliest instruments proposing a community-oriented integrated approach to cultural heritage protection is the 1994 ‘Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage’. The Declaration highlights the importance of safeguarding both tangible and intangible heritage in their own right, taking into account their interdependence but also their distinctive characters.

Also, the Convention for the Safeguarding of the Intangible Cultural Heritage recognizes the interdependence between intangible and tangible cultural heritage. Except for the Yamato Declaration and the Convention on the Protection of Intangible Cultural Heritage, the international legal instruments dealing with the protection of cultural heritage are based upon the classical compartmentalized approach of protecting the cultural heritage. Before the ongoing shift in the perception of what constitutes cultural heritage can work through in the legal instruments, the current state of protection first has to be studied from the integrated and community-oriented approach [5].

In 2005, the Council of Europe adopted the Framework Convention on the Value of Cultural Heritage for Society, affirming that cultural heritage is to be considered as a valuable contribution to society. As such, the right to cultural heritage is considered as inherent to the right to take part in cultural life. The Convention articulates the right of the individual to be part of a 'chosen cultural community', independent of nationality, race, or gender. In fact, an individual may be part of multiple communities at the same time [6].

Patty Gerstenblith from The United States notes that criminal statutes contain four elements: the *actus reus* (the action), the *mens rea* (the mental state), the social harm, and any attendant circumstances. Under the common law there were two recognized types of *mens rea* or criminal intent – general intent and specific intent. However, the Supreme Court has recognized that the mental element in criminal law encompasses four culpable mental states – purposeful, knowing, reckless, and negligent. General intent crimes require only that the offender had knowledge with respect to the *actus reus* of the crime – that is, the offender was aware that he/she was acting in the proscribed way.

Under general intent, one can infer that the offender had the required intent merely from commission of the act. Specific intent crimes contain elements that include a separate intent from the *actus reus* of the crime, a special motive or purpose, and awareness of the attendant circumstances. While general intent crimes show a willingness on the part of the legislature to dispense with the *scienter* of a crime, the Supreme Court has stated a strong preference for courts to read in a *mens rea* requirement even when a statute does not expressly contain one. This preference for construing such statutes as creating specific intent crimes is especially strong where a statute seeks to criminalize otherwise innocent conduct [7].

The cultural heritage of Ukraine is an integral part of world cultural heritage. Its preservation is governed by the Constitution of Ukraine, the Law of Ukraine «On Protection of Cultural Heritage» and other legal acts. Active certification, repair and restoration of monuments in places of burial of soldiers who died during the Great Patriotic War of 1941-1945, which are in the public account as monuments of cultural heritage created memorial complexes dedicated to the Great Patriotic War of 1941 -1945.

The efforts of the executive authorities, local governments, businesses, organizations and the public in the task of finding, keeping, construction, repair, restoration, preservation, arrangement and maintenance of war graves of victims of war and political repression. Nowadays, in Ukraine, there are over 130 thousand state-registered monuments, including 57206 – archeological sites (including 418 – National Importance), 51364 – historical monuments (including the 142 – National Importance), 5926 – a monument monumental art (including 44 – national Importance), 16293 – monuments of architecture, urban planning, landscape art and landscape (including 3541 – national Importance), operates 61 historical and Cultural reserve, 13 of them given the status of national reserves [8].

In Greece, the first attempts to update the law on antiquities started in the beginning of the 1990s. At least five law drafting committees delivered their opinions. Politically turbulent times, the involvement of several disciplines with

competing interests, and the ambitious scope of the legislation were the main reasons for the long gestation period.

The 2002 law attempted to deal with all issues related to cultural heritage, modern as well as ancient, including clearer definitions, protection, ownership, collections, import export, research, museum law, penal and tax provisions. Some of its fundamental provisions and directions include: a) Defining antiquities and the degree of protection for each category. b) Under the 2002 law, ancient and recent cultural monuments receive equal protection. c) The law tries to change the old attitude of two opposing sides: the state, which wants to protect monuments by imposing restrictions, and a public presumed hostile to cultural preservation. Several provisions of the 2002 law are aimed at overcoming this attitude (so far unsuccessfully, however) by involving the public more and also by introducing safeguards against abusive behavior by the state. d) Filling a previous legal void, the 2002 law regulates extensively the import and export of antiquities in light of international agreements and EU regulations. e) The law emphasizes the correlation of monuments to their environment, stipulating clearly that protecting monuments includes also protecting the environment nearby. f) Issues of scientific/archaeological research are regulated in detail. Publication rights and obligations are clearly specified, as well as the right of access to information [9].

Thus, for the settlement of issues of restitution of cultural property lost due to illegal exports and illegal appropriation are important regional international legal instruments.

From this perspective, the cultural heritage and in particular its security is already considered not only as value, which keeps a history of the past and the heritage of humanity as a whole. It creates a new sphere of cooperation, which combines cultural, social and economic aspects.

So, an important sector, which regulates the protection of cultural heritage and archaeological sites, is criminal law, it is necessary to take into account the experience of foreign countries concerning the protection of cultural heritage by means of criminal law.

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Gereliuk T. Protection of adchaeological and cultural heritage the criminal legal aspects

In the article investigated foreign and Ukrainian normative legal acts relating to the issue of protection of the archaeological and cultural heritage. It is noted that an important sector, which regulates the protection of cultural heritage and archaeological sites, is criminal law, it is necessary to take into account the experience of foreign countries concerning the protection of cultural heritage by means of criminal law.

Keywords: *archaeological heritage, cultural heritage, crime, foreign legislation, criminal law.*

Герелюк Т.Б. Охорона археологічної та культурної спадщини: кримінально-правові аспекти

У статті досліджуються іноземні та українські нормативно-правові акти, які стосуються питань охорони археологічної та культурної спадщини. Слід зазначити, що важливим сектором, який регулює захист культурної спадщини та археологічних об'єктів, є кримінальне право, необхідно враховувати досвід зарубіжних країн щодо охорони культурної спадщини засобами кримінального права.

Ключові слова: *археологічна спадщина, культурна спадщина, злочин, зарубіжне законодавство, кримінальне право.*

Герелюк Т.Б. Охрана археологического и культурного наследия: уголовно-правовые аспекты

В статье исследуются иностранные и украинские нормативно-правовые акты, касающиеся вопроса о защите археологического и культурного наследия. Следует отметить, что важным сектором, который регулирует защиту культурного наследия и археологических объектов, является уголовное право, необходимо учитывать опыт зарубежных стран, касающийся охраны культурного наследия посредством уголовного права.

Ключевые слова: *археологическое наследие, культурное наследие, преступление, зарубежное законодательство, уголовное право.*

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