

THE SOCIAL HISTORY OF ARTEFACTS AND THE LAW IN SOUTHEAST ASIA

Professor Craig Forrest (University of Queensland, Director, Marine and Shipping Law Unit)

ABSTRACT

The loading of objects on a vessel, their loss, then physical discovery, recovery and subsequent movement, all take place in a legal context. That context is not static and cannot be viewed entirely in hindsight from the now. In unravelling the legal rights and interest to recovered objects the inter-temporal nature of the law requires consideration and possible application. Moreover, irrespective of what law applies at any given time, this intertemporal legal context reflects evolving values and is part of the object's social history. This paper examines this intertemporal nature of salvage law and other related laws as they might apply to objects recovered in Southeast Asia over the past 40 years.

THE COLLECTION

The Abbott Collection comprises approximately 2300 ceramics purchased by a private collector from antique markets in Indonesia and Singapore between 1966 and 2016. The collection has never been catalogued but is believed to include ceramics from a wide range of South-East Asian States, including Thailand, China, Indonesia and Viet Nam, with some dating from at least the 9th century (Polkinghorne 2022, 11-12).

As collectables, these ceramics have little or no provenience or provenance other than, in some cases, the identity of the seller in Indonesia or Singapore. Marine encrustations and glaze condition, together with information provided by the antique sellers in some cases, suggests that most were recovered from shipwrecks in Indonesian waters. Otherwise, little is known about these ceramics. They could, however, reveal much about the Maritime Silk Route and the entities involved. In investigating these ceramics, the project seeks to establish the ceramics "original cultural and historical contexts and to re-establish links to their communities of origin" (Polkinghorne 2022, 12). This entails undertaking provenience and provenance research and linking the collection with communities with verifiable links to each ceramic. That link could be the place of manufacture, the place of loading on board the ship, the nationality of the ship and or its owners, or the place of its sinking. That link could also include those who recovered the ceramics from the shipwrecks, facilitated its movement to market, and ultimately the seller and purchaser.

THE LEGAL CONTEXT

The collector purchased the ceramics and shipped them from Indonesia or Singapore to Australia in good faith and in the belief that all actions were in accordance with the laws as understood at the time. Nevertheless, the lack of any provenience or provenance at the time of purchase means that the legal context would have been largely unknown. As this project reveals the provenience of each ceramic so the provenance and wider legal context will require investigation and application. With 2300 ceramics acquired over a 50-year period, such an undertaking is onerous. This is made more complex as the manufacture of a particular ceramic, its loading on board a vessel, loss, then physical discovery, recovery and subsequent movement, all take place in a legal context that changes over time and place. That context is not static and cannot be viewed entirely in hindsight from the now. This paper considers this inter-temporal nature of the applicable law, as well as its determination across place – jurisdictions.

This consideration of the legal context is not, however, purely for the purpose of determining its current status. The applicable law – in time and place – also reflects the social history of the ceramic.

Each ceramic in this collection was a trade good; manufactured as a commodity. Who owned it, how it was traded, and how it was shipped would have been governed by the law at that point in time. Moreover, that law might differ depending on where the ceramic was at that point in time. As such, if for example, it was manufactured in what is now China, the law of that place might apply to ownership when manufactured, but the law of some other place, such as what is now Singapore, might have applied to the sale of the ceramic while the law of the nationality of the ship or its owner might apply to its transportation. Moreover, what these laws were in the 15th century will be quite different to that applied in the 18th century.

Having been lost at sea, the ceramics in this collection were likely salvaged sometime in the last 100 years, and more likely only in the last 50 years, given the state of diving and salvage technology. Most, but perhaps not all, of the ceramics in this collection are thought to have been recovered in waters over which Indonesia today exercises some form of jurisdiction, and if in the territorial waters – which is most likely - absolute sovereignty. But it may not have been salvaged by an Indonesian national or from an Indonesian vessel, and at the time of salvage, the location of the shipwreck might not have been in Indonesian waters given the changes in jurisdiction over the last 100 years.

Even within Indonesian territorial waters, the law of Indonesia has also changed considerably, especially in the last 30 years.

INDONESIAN LAW

The earliest applicable Indonesian law that will have applied is ‘Barang Muatan Kapal Tenggelam (BMKT)’ which translates to ‘valuable items recovered from shipwreck’, contained in Chapter VII of the Indonesian Commercial Code since 1938 and based on traditional Dutch salvage law. That is not to say that it was actually applied and there are likely to have been many cases where local communities simply recovered ceramics and sold them to dealers without recourse to any legal mechanisms; and without any original owner to pursue the ceramics, no legal issues would have arisen.

Indonesian law also provided some protection over cultural heritage that was also based on early Dutch colonial law. In 1931, the colonial government enacted the Monumenten Ordonnantie Number 19 of 1931 (Stbld. 1931 no. 238) which imposed an obligation to register cultural property and banned their export. This Law was subsequently amended by Monumenten Ordonnantie Number 21 in 1934 (Stbld. 1934 no. 515). It is not likely these laws applied to underwater cultural heritage.

Following the salvage and sale of ceramics from the *Geldermalsen*, Indonesia introduced legislation, Presidential Decree Number 43 of 1989, that regulated the salvage of historic wrecks and asserted ownership of all wrecks within Indonesian territorial waters (Pearson 2019, 709). This legislation also established the National Committee for the Recovery and Utilisation of Valuable Items from Shipwrecks. This Presidential Decree was subsequently replaced with Presidential Decree Number 25 of 1992 together with Law No. 5 year 1992 concerning Cultural Heritage, which was enacted following the *Belitung* looting in the early 1990s. At the same time, the salvage law regime was also changed when Chapter VII was taken out of the Commercial Code and replaced with Law Number 21 of 1992 concerning Navigation (which was later replaced by Law No. 17 of 2008 concerning Navigation) (Nayati 1998, 144).

Further legislative changes occurred in the 2000s. In 2009, a Minister of Finance Regulation No. 184 of 2009 addressed Procedures for Determining the Status of Use and Sale of Valuable Objects from the Ship's Shipwreck, followed, in 2010, by amendments to the law protecting cultural property in Law No. 11 of 2010 that imposed a temporary moratorium on commercial salvage. This was made permanent in 2016 in Presidential Decree No. 44 of 2016 which included historic wrecks in one of the Negative List of Investment, effectively imposed a moratorium on salvage operations (Pearson 2019, 709). Other relevant regulations include an export ban under Ministry of Trade Regulation No. 44/M-DAG/PER/7/2012 and optimisation of Indonesian cultural heritage under Law No. 5 of 2017

concerning Cultural Advancement. Most recently, Presidential Decree No. 1 of 2022 concerning Registration of Cultural Property was introduced. These amendments were largely intended to ensure that Indonesia kept significant and scarce artefacts stored in museums. But legislative definitions of ‘cultural heritage value’ and ‘national identity’ are so ambiguous as to have little or no legislative significance.

Most importantly, Presidential Decree Number 8 of 2023 reinstituted the government-controlled salvage regime, which reverted to the shared model of public/private sharing of the salvage of underwater cultural heritage (UCH).

AUSTRALIAN LAW

While the Indonesian law is pertinent to the provenance of the ceramics, the collection is in Australia and subject to Australian – South Australian and Federal – law. It is thus principally Australian law that governs the ceramics. In light of the socio-legal history of a ceramic, how then is Australian law to address them? While this short paper cannot address this complex issue in detail, three important underlying principles are considered: the nature of inter-temporal law, non-retrospectivity and the choice of law in conflict of laws.

Inter-temporal law

The doctrine of intertemporal law, in the words of Judge Huber of the International Permanent Court of Arbitration, means that “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled” (Island of Palmas 1932, 845; Elias 1980, 286).

As such, whether the recovery of a particular ceramic in, say, 1967, was legal, recourse must be had to the law that existed in 1967 at the place where the salvage occurred, or, if then in international waters, at the place where the ceramic was landed. It is the law as then in existence that will determine rights and duties of the relevant actors, including the salvor, the original owner and the relevant State. The collection is therefore going to be divided into categories dependant on the governing law at the time and place of their recovery; each category giving rise to possibly different rights and obligations. The greater the incremental change in the law in a particular place and the more places involved, the more categories are likely to emerge.

Judge Huber went on to clarify the doctrine by declaring that “as regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights” (Island of Palmas, 1932 845; Elias 1980, 286).

What this means is that while the right might be acquired in accordance with the law at that time, its continued validity is also dependant on the law at any point in time thereafter when the right is relevant to a dispute. This clarification on the doctrine is, at least in an international law context, is subject to some debate but as a general proposition it is appropriate for the case in question (Elias 1980, 292). It means that, for example, the salvor might acquire salvage rights over the wreck, but over time, should the law as to the rights of the salvor over the wreck site change, then the changed law might apply. That new law would not address the acquisition of the right to the wreck, but only the continuation of that right. The debate concerning this clarification of the doctrine lies in the risk that the application of a new law might, in effect, amount to a retrospective law that negates the original acquisition of the right. This is a particular risk where the new law arises from a statutory instrument or an international agreement domestically implemented, such as the 2001 UNESCO Convention on the Protection of UCH (2001 Convention).

The emergence of Australia's Historic Shipwreck Act 1976 might illustrate this point. The Act was adopted in part to address the discovery of a number of old Dutch shipwrecks and the recovery of objects from these sites. For current purposes, the recovery was legal in accordance with the law at the time, and as such, the new Act could not apply retrospectively such that it negated the acquisition of the salvage rights of the salvors. The Act did, however, impose a new obligation on the salvors: a requirement that they register all objects that had been recovered from those sites. Since his new law did not impact the right acquired at the time of recovery, but imposed a new statutory obligation, it applied only from 1976 onwards.

Inter-temporal law then is not only a consideration of the rights acquired at the relevant point in time, but also the impact that changing laws then have on those rights over time (and place), provided that the new law did not apply retrospectively.

Non-retrospectivity

The prohibition of the application of any law retrospectively is often, but not universally, regarded as a fundamental principle of law, especially with respect to criminal law (Kryvoi and Matos 2021, 46). It is generally applied to international conventions such as the 2001 Convention. As codified in article 28 of the Vienna Convention on the Law of Treaties which declares that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”.

As article 28 evinces, this is not an absolute prohibition. Indeed, States may give a treaty, or some of its provisions, retroactive effect (von der Decken 2018, 510). Many States, for example, argued the 1970 UNESCO Convention that addresses the illicit trafficking of cultural heritage, should have applied retrospectively in order to address the loss of their heritage during the colonial era. Whilst not accepted, this nevertheless illustrates the circumstance in which States may regard retroactivity as legitimate. It may thus be open to a State such as Indonesia to address the issue of salvage and export of UCH through retrospective legislation, though this may come at a cost in terms of claims for lost rights from individuals. Such legislation would have to be unequivocal in its scope of application. It remains to be seen whether this research project will reveal any instances of retrospective legislative application and its effect on the applicable law.

Choice of law in conflict of laws

Since the Abbott Collection ceramics are found in Australia, only Australia has the judicial capacity to determine and enforce rights to them. It is thus Australian law that applies. That does not, however necessarily mean that Australian domestic rules will apply given Australian choice of law rules that are applied when there is a conflict between the laws of different jurisdictions relevant to the dispute in question; and in this case between the laws of Australia and Indonesia (though other jurisdiction may also be pertinent, such as China, Viet Nam etc, depending on the ceramic in question). As a general proposition, the Australian common law choice of law rule for rights to property is the law of the place where a property was situated at the time the property right is said to be acquired - the *lex rei sitae* (Davies et.al 2019, 795). A salvor's property right to ceramics salvaged in Indonesian territorial sea will therefore be determined in accordance with Indonesian law at that time, even if that dispute were to be adjudicated in Australia. Where the location is not in Indonesian waters, the determination of the applicable law may be rather more complex and require detailed consideration of the conflict of law rules in an intertemporal context: not always an easy undertaking.

A SOCIO-LEGAL HISTORY OF THINGS

The ceramics in this collection, ranging from as early as the 9th century and recovered in different locations over a period of 50 years, means the applicable law at any given point in time is not a straightforward task. If identifying a particular right, or the legality of a particular act needs to be determined, then this is a necessary task. But for each ceramic the continually changing legal context is also part of its social history. The applicable law would have played a role in shaping the initial commodification of the ceramic, its transformation across space and time as its exchange value and use by different social groups have altered to a point where it is elevated beyond commodification and transformed into a public good. This project therefore not only seeks to identify and apply the relevant law to each ceramic, but to place its socio-legal history as a fundamental component of the ceramic as we understand and utilise it today.

BIBLIOGRAPHY

Davies, Martin; Bell, Andrew, Brereton, Pau and Douglas, Michael. *Nygh's Conflict of Laws in Australia*, 10th ed LexisNexis, 2019.

Elias, T.O. "The Doctrine of Intertemporal Law" *The American Journal of International Law* n. 74 (1980) 285.

Hatcher, Michael and Thorncraft, Anthony *The Nanking Cargo* Hamish Hamilton 1987
Island of Palmas case (Netherlands, United States) 2 R. Int'l Arb. Awards 831

Polkinghorne, Martin. *Reuniting cargoes: Underwater Cultural Heritage of the Maritime Silk Route*, Australian Research Council Linkage Grant, 2022 (on file with author)

Kryvoi, Yarik and Matos, Shaun. "Non-Retroactivity as a General Principle of Law" *Utrecht Law Review* no. 17(1) (2021) 46–58.

Nayati, Pudak. "Ownership Rights Over Archaeological/ Historical Objects Found in Indonesian Waters: Republic of Indonesia Act No 5 Of 1992 on Cultural Heritage Objects and its Related Regulation" *Singapore Journal of International and Comparative Law*, no. 2 (1998): 142 – 174.

Pearson, Natali. "Protecting and Preserving UCH in SE Asia." in *The Palgrave Handbook on Art Crime*. Edited by Hufnagel, Saskia and Chappell, Duncan, 685-730. Palgrave MacMillan, 2019

von der Decken, Kersten. 'Article 28' in Oliver Dörr and Kirsten Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* Springer Palgrave, 2018 510.