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ARTICLES

- A. A. Adewumi & O. A. Bamghose: Inhibiting Nigerian Cultural Heritage Crimes Through Penal Laws:- 484-500
- A. O. Alubo: Plea Bargaining Imperative in Nigeria:- 501-522
- O. S. Kuteyi: An Analysis of Judicial Attitudes to the Defence of Insanity Under The Nigerian Penal Codes:- 523-548
- A. O. Ewere: Devolution of Intestate Estates: Are Shares and other Modern Properties Alien to Customary Law?:- 549-563
- K. O. Fayokun: The 'in Loco Parentis' Doctrine and School Discipline:- 564-576
- O. T. Ibraheem: The Phenomenon of Child Abuse and Its Implications on World Security:- 577-587
- O. B. Adegbite: An Appraisal of the Standard of Nigerian Legal Education:- 588-608
- H. Okorie: An Appraisal of the Same- Sex Marriage (Prohibition) Act, 2013:- 609-619
- O. Olayanju: Universalism / Cultural Relativism and the Quest for Women's Human Rights Protection:- 620-635
- H. A. Hammed & K. K. Ibrahim Fletu: An Appraisal of the New Partnership for Africa's Development (NEPAD):- 636-655
- A. Oluwaseyi Leigh: Casualisation of Employment in Nigeria:- 650-678
- A. Otubu: Democratic Land Governance and the Land Use Act in Nigeria 679-702
- O. M. Osinibi: The Imperative of Compulsory Insurance Policy in Nigeria:- 703-716
- S. M. Olokooba, A. A. Kareem & L. K. Zakariyau:- Ambiguities in the Nigerian Tax Laws:- 717- 732
- S. M. Abdulmalik & S. A. Omisore: Law as an Instrument of Environmental Protection and Land Use Regulation in Nigeria:- 733-751
- R. Haule & G. A. Olagunju- States' Responsibility for Safety of Navigation in Internal and Coastal Waters under Nigerian and Tanzanian Maritime Law:- 752-787
- A. A. Daibu & L. A. Abdulrauf: Establishment of Joint Development Zones or Arrangement as A Panacea to Maritime Boundary Disputes in Africa:- 788-805
- E. Okeri, A. C. Essiet & H. A. Okeri: Eco- Labelling As A Tool for Environmental Protection in Nigeria: Efficacy:- 806-827
- A. L. Raimi: An Appraisal of Inheritance Under The SF 828-855

INHIBITING NIGERIAN CULTURAL HERITAGE CRIMES THROUGH PENAL LAWS

A. A. Adewumi* & O. A. Bamgbose**

Abstract

From time immemorial, crimes against cultural heritage have always been frowned at and anyone who decides to sell these 'sacred objects' will be jeered at. Only the so called 'outcasts' in the family or community dared to dabble into the illegal sale of cultural objects. Over the years, trade in cultural objects has become lucrative. Attempts have been made in the Nigerian laws to ensure that items of our cultural heritage do not leave the shores of the country illegally by penalizing certain behaviors in relation to cultural objects. This article takes a cursory look at the impact of heritage crimes nationally and globally and considers if the legislation in Nigeria has been able to adequately put the situation under control thereby achieving the aims of sentencing.

Introduction

When someone thinks of art crime, a Hollywood image is conjured, one of black-clad cat burglars and thieves in top hats and white gloves. But the truth behind art crime, one misunderstood by the general public and professionals alike, is far more sinister and intriguing. Art crime has its share of cinematic thefts and larger-than-life characters, but it also is the realm of international organised crime syndicates, the involvement of which results in art crime funding all manner of other serious offences, including those pertaining to the drug trade and terrorism. Art crime has shifted from a relatively innocuous, ideological crime into a major international plague.¹

The above records the substance and substratum of crime that relate to cultural Heritage. A breach of the sanctity of cultural property may look harmless yet it has far reaching and serious effect on the economic and social equilibrium of a community. It also has national, international, intellectual and global consequences.

*Afolasade A. Adewumi LL.B., LL.M. (Ibadan), Barrister-at-Law, is a Ph.D. student of Cultural Property Law. She is also a Lecturer in the Department of Public and International Law, Faculty of Law, University of Ibadan, Ibadan, Nigeria.

**Professor Oluyemisi A. Bamgbose is the Dean of Law and a Professor of Criminal Law & Criminology, University of Ibadan, Ibadan, Nigeria

¹ Charney N. and Denton P, Protecting Cultural Heritage from Art Theft, International Challenge, Local opportunity, FBI Law Enforcement Bulletin, <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin> accessed on 12th April, 2013

Cultural Heritage like intellectual property is a term that is difficult to define. As Lalive puts it:

“A movable object may only be characterised as ‘artistic’ or ‘cultural’ as a result of a value judgement, i.e. of a personal and subjective opinion. Contrary to ordinary movables or chattels, it can hardly be described with precision by its weight or measure – and its value does not depend on physical characteristics but rather on aesthetic or historic factors. Hence, the difficulty of regulating sales of works of art and, for instance, the responsibility of the seller and the relevance of an expertise. So the definition of cultural property is clearly an obstacle, first to legislation (national and international) on the subject and then to its implementation.”²

As strategic and distinct as Cultural Heritage may be, many a times, Cultural Heritage is a source of great interest to those who know its value and worth. On the other hand, to those who do not appreciate Cultural Heritage, it is a target of attack which occasions unquantifiable damage and loss. In each of the occasions stated above, a type of crime is committed, whether willful damage, theft or criminal trespass.

The criminal acts stated above, when not discouraged, will lead to the extinction of Cultural Heritage and the re-writing of people’s history. The singular communities and the entire world will obviously be the worse for it. A concerted effort must therefore be taken to curb these dastardly ignoble actions. One major way known in human societies, to curb criminal actions is the utilization of penal provisions in the law. Penal provisions of law have a way of engineering social changes in people. The major focus of this paper therefore is the consideration of the protection afforded the Nigerian Cultural Heritage by penal laws.

The paper therefore considers cultural heritage, cultural heritage situation in Nigeria, crimes relating to cultural heritage focusing on illicit trafficking, cultural heritage crimes, cultural heritage legislation and institutions in Nigeria and the purpose of sentencing in crime management. The paper carries out a critique of the penal provisions in the National Commission for Museums and Monuments (NCMM) Act (which is the major law enacted for the protection of cultural property). The paper finally gives appropriate

² Lalive P, A Disturbing International Convention: UNIDROIT, Art, Antiquity and the Law, 1999, London: Kluwer London, Vol. 4, Issue 3, p. 4

recommendations towards ensuring that the benefit (if any) of the penal laws are harnessed to protect Nigeria's Cultural Heritage.

Cultural Heritage in Nigeria

The history of the Nigerian people extends backward in time for some three millennia. Archaeological evidence, oral traditions, and written documentation establish the existence of dynamic societies and well-developed political systems whose history had an important influence on colonial rule and has continued to shape independent Nigeria.³

The earliest culture in Nigeria to be identified by its distinctive artefacts is that of the Nok people. These skilled artisans and ironworkers were associated with Tuaregs and flourished between the fourth century B.C. and the second century A.D. in a large area above the confluence of the Niger and Benue rivers on the Jos Plateau. The Nok achieved a level of material development not repeated in the region for nearly 1,000 years. Their terracotta sculpture, abstractly stylized and geometric in conception, is admired both for its artistic expression and for the high technical standards of its production.⁴

Nigeria as a nation is richly endowed with artefacts which abound from state to state. It suffices now to mention that Edo state is regarded as being the bastion and citadel of culture in Nigeria as it is the custodian of important historical artefacts- bronze, brass, woodwork and terracotta. Most of the bronze and ivory pieces were looted during the British expedition of 1897. The History of 1897 British conquest of Benin Empire is well known. It is also well known that more than 3000 cultural and religious artefacts were looted from the burnt palace of Oba Ovonramwen Nogbaisi in Benin.⁵ It is not known, however, the exact number of cultural artefacts looted from the palace. Ile-Ife in Osun State is also not left out in the looting of her bronze artefacts.

Apart from artefacts, archaeological sites also form part of our invaluable cultural heritage. When extrapolated to the history of humankind looting of archaeological objects⁶ and destruction of archaeological sites cause irreparable damage to a country's history. Artefacts and archaeological objects cannot be fully appreciated and once they have been removed from their natural environment or archaeological context and divorced from the

³ CITATION: Federal Research Division of the Library of Congress. The Country Studies Series. Published 1988-1999. http://www.mongabay.com/reference/country_studies/nigeria/all.html, accessed 5th April, 2013.

⁴ *ibid*

⁵ Benin: City of tradition and culture, Vanguard, <http://www.vanguardngr.com/2011/10/benin-city-of-tradition-and-culture>, accessed 6th July, 2013.

⁶ such as Nok terracotta from the Bauchi Plateau and the Katsina and Sokoto regions; terracotta and bronzes from Ile-Ife; Esie stone statues, all found in Nigeria.

whole to which they belong. Only professional archaeological excavations can help recover their identity, their date and their location.⁷

Nature and Scope of Cultural Heritage Crimes

In the last decades, the western world has become interested in the cultures of other people. This interest is reflected in fashion and design which make use of an eclectic combination of foreign and exotic style elements.⁸ This recognition by the Western World of the cultures and art forms of other world societies has grown to an extent that it has become threatening to drain whole societies of their cultural heritage⁹ and a lot of this trade is illicit.

The illicit nature of the art trade coupled with secrecy has enhanced cultural objects attractiveness for investment. Cultural objects serve as a protective measure against inflation and are used in connection with illegal activities. Art investors, museums, private collectors and diplomats, hiding under this cover of secrecy, engage on a great scale in illicit trade in cultural objects which provide substantial rewards for illegal activity.¹⁰ The great prices paid for cultural objects make illegal trade in these objects extremely attractive. The trade in cultural items is now a major international business with a ravenous demand. This illicit trade is of epidemic proportion and many countries do not have laws and regulations in place to protect their heritage from disruptions. Some of the countries that have their cultural heritage items appreciated in the western countries can hardly boast of having examples of those items within their boundaries. For example, a UNESCO¹¹/ICOM¹² study carried out in Bangladesh, Mali and Western Samoa showed that while the handicrafts from these countries were greatly appreciated in western countries, examples of these crafts could hardly be found in the countries themselves.¹³

The study found that

“no good or even mediocre examples of lost or dying crafts such as muslin weaving and quilt embroidery were to be

⁷ ICOM RED LIST

⁸ Preventing the Illicit Traffic in Cultural Property, a resource handbook for the implementation of the 1970 UNESCO Convention by Askerud P. and Clement E. (1997) Paris Cedex; UNESCO p. 9; For a detailed definition of Cultural Heritage, see the UNESCO Conventions of 1972, 2001, 2003, 2005.

⁹ *ibid*

¹⁰ Prott L. V, “Problems of Private International Law for the Protection of Cultural Heritage”, *Recueil des Cours*, 1989, p. 217 at 226 - 227

¹¹ United Nations Education Scientific Cultural Organisation (UNESCO)

¹² International Council of Museums (ICOM)

¹³ *Ibid* p. 11

found in Bangladesh, and that while ethnological items from Mali are displayed in art galleries all over the United States and Europe, collections in Mali were minimal. In Samoa, it was found that important manifestations of the Samoan Culture such as royal bowls, double canoes and boats that would carry up to 300 people for sailing on the high seas, just as ceremonial armour of wood, shell or stone – all had completely vanished from Samoa which would not even have examples of these ritual objects to display in a national museum.”

Some countries like Nauru have been totally exploited while others such as the small Pacific Island States or Bhutan are struggling to preserve small unique cultures for which they need to set up an adequate national collection.¹⁴

The West, through furtiveness, force or monetary gain has museums or private collections enriched with archaeological and other cultural riches which have left their countries of origin. The Mediterranean countries with rich archaeological heritage such as Egypt, Italy, Greece and Turkey, as well as many countries in the Arab world and in Central and South America all suffer from extensive tomb robbing. Archaeological sites are looted and sometimes purposefully destroyed to suppress forever any possibility for archaeologists to study remains of ancient civilisations. For example, clandestine excavations in Mali led to loss of information about a flourishing urban civilization which existed over 1000 years ago in the inland Niger Delta.¹⁵

In Asia, Thailand, Cambodia and Myanmar, parts of monumental sculpture are being cut off and stolen from temples and then smuggled abroad¹⁶. Europe, France, Italy among other countries, have organised gangs plunder their castles and churches for sale in the international art market. Civil strife or war also pave way for looting of invaluable collections of the museums such as took place in Afghanistan, Iraq and Kuwait.¹⁷

Annually, developing countries suffer loss of their Cultural Heritage. The loss due to theft and clandestine excavations are encouraged by the high prices these objects command in the international market. These items move in great magnitude from developing countries to the international art market in the rich countries or the West which

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ *ibid*; Farouky J, “Spirited Away: Art Thieves Target Europe’s Churches,” Time, January 10, 2008, <http://www.time.com/time/nation/article/0,8599,1702155,00.html> accessed on 11th Jan, 2013

acts as an attraction to the flow of both licit and illicit trade.¹⁸ For example in Nigeria, the search for antiquities was stimulated by the breakdown of social structure caused by the oil boom of the 1960s and 1970s and also facilitated by the record prices of the objects at auction houses. A picture of Benin bronze plaque taken to England some seventy years before the sale was reported in the newspapers and captioned “Gone for £11,000”.¹⁹ The report said the sale created ‘a world record for any piece of art’.²⁰ In 1960, Colin Legum referred to an ivory pendant mask sold to Nelson A. Rockefeller for £20,000.²¹ The director of the Metropolitan Museum described the ivory pendant mask as one of the museum’s prized possessions.²²

London Times²³ reported a landmark sale of a ‘splendid Benin bronze head of an Oba’ for 9,500 guineas. The Times on 8th December, 1971 reported an auction record of a magnificent Benin bronze head of an Oba which dates from the early sixteenth century with a long gourd-shaped vessel projecting from the top of the Oba’s head. It was sold for £29,000 to an anonymous private collector. The search for antiquities continued over the years at alarming rate and led to endemic museum break-ins. The scale of the disaster gauged from the fact that the one hundred missing objects in Africa which appeared in the International Council of Museums (ICOM) series, twenty-eight were looted from Nigeria.²⁴

The above shows that there are serious problems especially in developing countries which suffer from a dearth of appropriate legislation and policies, sufficient resources, and skilled personnel to counter and control this act and bring the offenders to book.

¹⁸ *ibid*

¹⁹ Morning Post 11th July, 1968

²⁰ *ibid*

²¹ Legum C, Great Britain: ‘The Elusive City’, Nigeria Magazine (Oct. 1960) p. 159; See also, Shyllon F, One Hundred years of Looting of Nigerian Art Treasures 1897 – 1996, Art, Antiquity and Law, 1998, Vol. 3, Issue 3, p. 260.

²² de Montebello P, ‘Forward to Ezra K, Royal Art of Benin: The Perls Collection, exhibition catalogue (1952), p. 16.

²³ London Times of 8th July, 1968

²⁴ International Council of Museums, One Hundred Missing Objects: Looting in Africa (1994) pp. 60 – 73; Jegede D, ‘Nigerian Art as an Endangered Species’ in Schmidt P. R. Ad Mc Intosh R. J, Plundering Africa’s Past (1996), pp. 135 – 136. Jegede mentioned the theft in 1971 of the entrance doors to the palace of Owa of Idanre, doors which were so heavy that it would take four able-bodied men to carry; Eyo E, ‘Threat to National Art Treasures: The Illicit Traffic in Stolen Art’ in Isar Y. R, The Challenge of our Cultural Heritage: Why Preserve the Past? (1986) p. 209.

Trafficking in cultural objects not only depletes and damages the world's heritage and its understanding; it also fuels the arms trade, drug trafficking and terrorist activities²⁵. Cultural Heritage criminals have no criminal profile. They tend to be mercenary criminals with no experience or knowledge of the art world. The general public cannot specifically enumerate the reasons for and the procedure used for committing the crimes. The crimes present a very diffuse phenomenon, nationally and internationally and little is known about their nature and extent.²⁶

Trade in stolen antiquities which is a multimillion dollar market are at times done shadily behind closed doors and lips.²⁷ The trade is carried out in avoidance of tax and relies so heavily on the unscientific assurance of connoisseurs to determine authenticity and value, with fortunes in the balance.²⁸ According to Brodie, a systematic approach to the gathering of criminal statistics which would permit an accurate analysis of these crimes most of which are likely to be unreported is lacking.²⁹

The reluctance to report thefts of objects from museums could be as a result of fears that donors may stop donating money to them or fears that the insurance premiums on the museum collections will increase more than the museums can afford to pay. In the case of excavations, it might be impossible to know what was stolen from the tomb except there is a record of the contents of the tomb. Many countries do not consider this crime of sufficient severity as governments do not dedicate resources to gathering and analysing data on heritage crimes because the existing data has not proven the extent and severity of the problem³⁰. Some information may however be collated from the limited official data provided by national authorities which though useful to a certain degree, offer only an extremely restricted numbers of criminal typologies and styles.³¹

²⁵ U.S Department of Justice, US National Central Bureau of Interpol, Cultural Property Crimes Program; Charney N, "Art Crime in Context," in *Art & Crime: Exploring the Dark Side of the Art World* (Santa Barbara, CA: Praeger, 2009)

²⁶ Polk K, *Illegal Property Markets*, Paper given at the 3rd National Outlook Symposium on Crime, sponsored by the Australian Institute of Criminology, Canberra, 23 March, 1999.

²⁷ *ibid*

²⁸ *ibid*

²⁹ Brodie N, Doole J, Watson P, *Stealing History: The Illicit Trade in Cultural Objects*, 2000, Cambridge, UK: McDonald Institute for Archaeological Research; Calvani S, Frequency and Figures of organised crime in Art and Antiquities, Selected papers and contributions from the International Conference on "Organised crime in art and antiquities", *Coumayeur Mont Blanc*, Italy, (12-14 December, 2008) (29 *et seq.*) Milano: ISPAC

³⁰ Charney N, *Art Crime Context*, *op.cit.*

³¹ Manacorda S, *Criminal Law Protection of Cultural Heritage: An International Perspective*, Manacorda S. and D. Chappell D. (eds.), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural*

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INTERPOL, the international police organisation, estimated in June 2001 that illicit trade in cultural property is worth U.S. \$4.5 billion a year worldwide; well up from the U.S. \$1 billion annual figure a decade before.³² Over the last fifty years, the U.S Department of Justice has ranked art crime after narcotics and illegal arms in terms of highest grossing criminal trades.³³ Despite the fact that a lot of these thefts go unreported worldwide, it still ranks third in the list of criminal trades. It has been frequently contended that there is a close connection between traffic in cultural objects and organised international crime. The valuable Renoir painting stolen from Sweden's National Museum on 22 December, 2000 was found in a bag by police during an unrelated "drug bust" when they detained three drug suspects.³⁴ British police have had more than one case where a "drug bust" has left them with a good many cultural objects on their hands – some of which have been traced through databases and some of which they cannot find owners for.³⁵ In an Australian case, packages of cocaine seized by police were found used as packing around antiquities which had earlier disappeared from Greece.³⁶ These objects were subsequently returned to Greece. The above buttresses the fact that art works are used as a kind of non-traceable currency which can circulate for years among criminal groups without losing their value.³⁷ Looted antiquities are relied on by fundamentalist terrorist groups as a major source of funding. In 1999, while raising funds for the November 11 attacks, Mohammed Atta tried to sell looted antiquities.³⁸ In regions such as Afghanistan, local farmers dig up treasure troves beneath the soil and sell them to local criminal or government organisations for a tiny fraction of their cultural value. The antiquities are then smuggled abroad, given a false provenance, and sold often on an open market to unsuspecting museums and collectors who never would imagine that their purchase might indirectly fund the Taliban.³⁹ Selling a stolen artefact is not easy in the international art market. Increasingly, wealthy buyers demand to know the provenance of

Property. www.springer.com/cda/content/document/cda_downloadaddocument/9781441979452-c1.pdf?SGWID=0-0-45-1106851-P174116366

³² Robinson S./Labi A., 'Endangered Art', TIME, 18 June 2001, 56,57.

³³ Charney N. and Denton P, op cit; Shyllon F., 'Private Law Beyond Markets for Goods and Services :The Example of Cultural Objects', *Uniform Law Review*, 2003-1/2, p.521; Fighting Illicit Traffic, ICOM. <http://icom.museum/programmes/fighting-illicit-traffic/> (accessed July 11, 2011),

³⁴ "Chronicles", *10 International Journal of Cultural Property* (1998) p. 355.

³⁵ Shyllon F, Private Law Beyond Markets for Goods and Services: The Example of Cultural Objects', *op. cit*, p. 355.

³⁶ "Chronicles", *loc.cit*

³⁷ Prott L. V, "Cultural Heritage Law: The Perspective of the Source Nations", *5 Art, Antiquity and the Law*, 2000, p. 333 at 338

³⁸ "Kunst als Terrorfinanzierung," Der Spiegel, July 18, 2005, http://www.spiegel.de/spiegel/print/d_41106138.html (accessed July 11, 2011), Charney N. and Denton P, op cit.

³⁹ Blood Antiques, Journeyman Pictures, 2009 quoted by Charney N and Denton P. *ibid*

antiquities. To circumvent this, smugglers would first ship illicit antiquities to friendly art houses and galleries in cities such as Zurich and Hong Kong, or use their own network of offices. The stolen objects would then reach auction houses in London or New York with newly acquired addresses.⁴⁰

In Nigeria, crimes against cultural heritage had existed as far back as the 1953 Antiquities Ordinance.⁴¹ These crimes include destroying cultural objects; defacing cultural objects; altering the nature of cultural objects; removing or excavating cultural objects without permit; transferring possession of antiquities; exporting antiquities without authority; willfully obstructing, hindering or delaying any person in the exercise or performance of any powers or duties conferred or imposed by the legislation and discovering objects of archaeological interests and failing to notify the National Commission for Museums and Monuments and illicit trafficking and lootings of cultural objects.⁴² The relevant laws that made provision for these crimes issued in 1953 and 1974 have been consolidated in the National Commission for Museums and Monuments (NCMM) Act⁴³ which is the existing law in this regard. These crimes will be discussed and critiqued fully in the course of the paper.

Cultural Heritage Legislation and Institutions in Nigeria

The establishment of museums in Nigeria was led by Mr. K. C. Murray, a British National, employed in 1927 by the Colonial administration to teach Fine Arts. He was disturbed by the rape of Nigeria antiquities by traffickers and overzealous Christian converts who were encouraged by the Missionaries to destroy artefacts condemned by them as “fetish” objects.⁴⁴ In conjunction with some other colonial officials, Murray and his friend, E. H. Duckworth, canvassed for the enacting of the appropriate legislation to protect and safeguard Nigeria’s antiquities.⁴⁵

⁴⁰ A. Srivathsan The murky trail of stolen antiquities CHENNAI, July 15, 2012

<http://www.thehindu.com/news/national/the-murky-trail-of-stolen-antiquities/article3640347.ece>

accessed on July 6, 2013

⁴¹ Opoku K., Nok sculpture damaged in private western collection, *available at*

<http://www.ligali.org/article.php?id=2292>, accessed on 6th January, 2014

⁴² See Antiquities Ordinance 17 of 1953; Antiquities (Prohibited Transfer) Act 1974: Laws of the Federal Republic of Nigeria 1979 No. 9

⁴³ National Commission for Museums and Monuments (NCMM) Act, 1979, Cap. N19, Laws of the Federation of Nigeria, 2004

⁴⁴ *ibid*

⁴⁵ Izuakor L, Nigerian Historiography: The Museum as a Resource, (1998) *Nigerian Heritage* Vol. 7, P. 22.

In 1943, the Antiquities Service was established and it can be referred to as the forerunner of the National Commission⁴⁶. Its aim was “to make a list of all the works of art and to gather them whenever possible into the safety of a museum” but then, no museum had been established. It became clear therefore that the setting up of a museum was imminent.⁴⁷

The fortuitous discovery of world-famous artefacts at Nok, Ife, Esie, Benin and Igbo-Ukwu gave impetus to protecting and safeguarding antiquities. The first museum was built at Esie in 1945. Thereafter, the floodgate of museum construction burst open.⁴⁸

The Antiquities Ordinance of 1953⁴⁹ established the Antiquities Commission with full responsibility for the preservation and management of antiquities and monuments.⁵⁰ Section 9 (e) charged it with the responsibilities of establishing and managing museums. Before the creation of the Antiquities Commission, a Department of Antiquities was established by ministerial order to organise museums. The 1953 Act prevented the dealing in antiquities without a permit issued by the Antiquities Commission. This 1953 Act was described by Eluyemi⁵¹ as a smugglers’ charter because the law did not prohibit the export and smuggling of Nigerian antiquities but only asked the smugglers (the same colonial government that enacted the law) to obtain permit.

After independence, the Antiquities (Prohibited Transfers) Act 1974 was promulgated and it placed a ban on the buying and selling of Nigerian antiquities which the 1953 Act failed to prohibit. The above mentioned Act also did not seem to be properly focused on penalising the actions of exploiters of cultural property. Five years thereafter, a new law whose primary objective was to capture the challenges of the past and bring solace to the world of Cultural Heritage in Nigeria was enacted. This is the National Commission for Museums and Monuments (NCMM) Act which repealed the previous Acts; abolished the Antiquities Commission and the Federal Department of Antiquities which had the responsibility of preserving and conserving Nigeria’s cultural heritage and created a National Commission for Museums and Monuments with the responsibility of preserving, conserving and restoring the nation’s historical, cultural, artistic and scientific relics. The

⁴⁶ Arhuidese J., The National Commission for Museums and Monuments as a Legal Instrument for Safeguarding Nigerian Cultural Heritage, (1996) *Nigerian Heritage* Vol.5, p.115

⁴⁷ *ibid*

⁴⁸ Izuakor L, *op.cit.*

⁴⁹ Antiquities Ordinance, *op.cit.*

⁵⁰ Shyllon F, *op. cit.*

⁵¹ Eluyemi O, The Federal Act and Nigeria Archaeology; In Effah-Gyamfi, K (ed.) *Archaeology and Cultural Education in Nigeria*, 1982, P 40 cited in Shyllon F, *Cultural Heritage Legislation and Management in Nigeria op. cit.* P. 236

adequacy or otherwise of the penal sections in this law will be examined after highlighting the purpose of punishment.

Purpose of Sentencing in Crime Management

Crime prevention at its best should be worthy objectives of a criminal justice system. Sentencing which is a stage or an aspect in the criminal justice system has considerable social significance in its own right.⁵²

The Supreme Court of Victoria states that:

*“The purposes of punishment are manifold and each element will assume a different significance, not only in different crimes but in the individual commission of each crime... Ultimately, every sentence imposed represents a sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.”*⁵³

The above quotation points to the fact that all the aims of sentencing should be considered and accommodated in each case by the judge for optimum results. A judge has great latitude of observation while at work, however the Judge is delimited in the scope of the work by the provision of the law which orally gives the nature of sentences that may be imposed in the case of infraction of the law. No matter what sentence a judge may wish to give, it should reasonably satisfy one or more of four (4) aims of sentencing as follows:

1. Deterrence⁵⁴: This aim seeks to prevent consequences of sentences. It relies on threat and fear in producing crime prevention through sentencing. The sentences imposed should be calculated to be sufficient to deter others from committing the same offence.

This aim has been criticized empirically in that there is no factual data on which a deterrent system must be based.⁵⁵

⁵² See Ashworth A, Sentencing and Criminal Justice (3rd ed) Butterworths, London, 2000 p. 59

⁵³ Wilisicroft (1975) VR 292, pp. 299-300, see also Young (1990) VR 951

⁵⁴ Jeremy Bentham is the Chief proponent of this aim of sentencing and his starting point is that all punishment is pain and should therefore be avoided. Economic theorists such as Richard Posner views punishment as a kind of pricing system: Posner (1985) excerpted in Von Hirsch and Ashworth (1998) adapted by Andrew Ashworth *op. cit.* p. 64

⁵⁵ Ashworth A, *op. cit.*, p. 68

2. Incapacitation⁵⁶: This method is aimed at dealing with offenders such that for a substantial period of time thereafter, they would not be able to commit an offence. This measure is usually confined to particular groups such as dangerous offenders, career criminals or other persistent offenders. This method also has its criticisms.
3. Rehabilitation: This method has to do with modification of attitudes and of behavioural problems by making use of sentences and facilities designed to provide various programmes of treatment to offenders.
4. Desert: This theory which is a modern form of retributive philosophy has Andrew Von Hirsch as its leading proponent. This theory has an element which lies on the intuition that punishment is an appropriate or natural response to offending. This element is also not without criticisms.⁵⁷
5. Deprivation of Profits: There is no doubt about the fact that offenders should not be allowed to keep any profit from their offending. Under English Law, the Drug Trafficking Act 1994 is a principal example of Acts with vigorous provisions on deprivation of profits.⁵⁸ Another example is the Criminal Justice Act 1988, as amended which contains a general power to confiscate offenders' assets, and also gives the courts powers to deprive offenders of property used to commit or facilitate the commission of the offence.⁵⁹ In the application of confiscation order, the principle of equality before the law and of preventing a wealthy offender from buying his way out of jail⁶⁰ should be considered to determine the consequence of the order on the offender.

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ *ibid*

⁶⁰ See *Markwich* (1953) 37 Cr App R 125 cited in Ashworth A, *op. cit.* p. 77

A Critique of the Penal Provisions of the NCMM Act

The penal provisions of the NCMM Act are as follows:

Causing injury to cultural property

Section 13(7)⁶¹ prescribes punishment of two hundred naira or imprisonment for six months or both for destroying, defacing, altering, removing, excavating or transferring the possession of the antiquity to which the notice of declaration as National Monument relates. Section 18(1)⁶² prescribes punishment of one thousand naira fine or twice the value of such monument (whichever is higher) or to imprisonment for twelve months or both for willful destruction, defacing, altering, removing or excavating any monument. Section 18(2)⁶³ prescribes punishment of five hundred naira or six months imprisonment for destruction, defacing, altering and removing of any notice, mark or sign, denoting any monument or fence, covering or other thing erected or provided for the maintenance of a monument without lawful authority. Section 26(4)⁶⁴ prescribes as punishment the fine of two hundred naira or imprisonment for six months for anyone who intentionally destroys or damages an antiquity following a refusal of an application to grant a permit to export such antiquity.

These provisions contain ridiculous sanctions especially when compared with the provision of the Criminal Code on injury to property of special value⁶⁵ which attracts a penalty of imprisonment of seven years and the provision in the Criminal Code for intentional destruction of property with explosives⁶⁶ which attracts punishment of fourteen years. Cultural objects being irreplaceable shouldn't attract lesser punishment than that allotted for intentional destruction of property with explosives.

Absence of provision on principal offenders in the Act

Unlike the *Criminal Code Act*⁶⁷ and the *National Drug Law Enforcement Agency Act*⁶⁸ the *NCMM Act* has no provision defining principal offenders in heritage crimes. These two laws⁶⁹ have provisions that state that anyone who actually does the act; enables or aids another to commit the act and counsels or procures any other person to commit the act will be entitled to the same sanction as the person who actually commits the offence. Section

⁶¹ *NCMM Act, op.cit.*

⁶² *ibid*

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ *Criminal Code Act* 1916 Cap. C.38 LFN 2004, Section 451 (6)(g)

⁶⁶ Section 452 *Criminal Code Act*

⁶⁷ Section 7

⁶⁸ *National Drug Law Enforcement Agency (NDLEA) Act*, 1989 Cap. N. 30 LFN 2004. Section 21(2)(a)-(e)&(3)

⁶⁹ *Criminal Code, op.cit. and NDLEA Act, ibid*

19(5) *NCMM Act* which prescribes punishment of a fine of five hundred naira or imprisonment for six months or both for anyone who carries out excavation or other operation without permit or contrary to the conditions prescribed in the permit can be likened to a person who enables or aids another in committing an offence against cultural property. Therefore, whoever contravenes section 19(5) above should be seen as someone who enables the illicit trafficking of such archaeological finds and as such, should be viewed as a principal offender as suggested above.

Likewise, a provision defining principal offenders would prevent situations where heritage offenders will have varying punishments meted out on them such as occurred in the following cases:

*In 1971, A Malian Dealer, Samba Djoun offered for sale the bronze statue of a woman, which had been kept in the village of the Nupe in the Jebba province of Northern Nigeria. Report had it that the statue was recognised but the police failed to implicate the Malian in its illegal export from Nigeria.*⁷⁰

*In 1963, an Israeli, Aharon Boas, was convicted for illegally exporting nine antiquities (terracotta heads and carvings) which were recovered from Canada, America, Paris and Amsterdam. He was ordered to pay £50 fine or go to jail for 3 months in default.*⁷¹

*Dr. Winfried Rathke, a German eye specialist formerly of the University Teaching Hospital, Ibadan was tried before the then acting Chief Magistrate, Mr. Somefun with attempting to smuggle thirty works of art out of the country. He was found guilty and fined £25 or two months imprisonment in default.*⁷²

*The trial of two Nigerians, Michael Adebayo and Abejide Olajisade who were charged with the theft of two large Epa masks known as Ojija from the palace of Olojudo of Iddo Ekiti, Western Nigeria*⁷³ cannot be overlooked in this context. Here, Adebayo was found guilty and sentenced to twelve months imprisonment with hard labour and six strokes of the cane while Olajisade was acquitted.

⁷⁰ The Morning Post, 7th April, 1971.

⁷¹ Daily Times of 23rd August, 1963, p. 2

⁷² Shyllon F, One Hundred years of Looting of Nigerian Art Treasures 1897 – 1996, *loc.cit*

⁷³ The Morning Post of 2nd July, 1964

Adebayo was given stiff penalty while the two expatriates (Aharon Boas and Dr. Winfried Rathke) were given lenient punishments. This ought not to be so as it does not show fairness, equity or fair play before the law. When the public are aware of the fact that the same punishment will be meted out on anyone who aids or procures or counsels the one who actually commits the offence, there will be a reduction on how these cultural objects are released by the custodians to the outside world. For example, if the custodians of the museums who have been indicted at one time or the other for being involved in the thefts that have taken place in museums are prosecuted, it would serve as a deterrence on other museum officials and they would guide and guard the cultural objects in their custody as if their life depends on it. Exhibition loophole would also be blocked as whoever signs out the cultural objects for exhibition would ensure they are returned as at when due or else face the wrath of the law for aiding and abetting exportation of the cultural objects.

Carrying out excavation without permit and Non-disclosure of the discovery of objects of archaeological interest

Section 19(5)⁷⁴ provides that anyone who carries out excavation or other operation without permit or contrary to the conditions prescribed in the permit shall be guilty of an offence and liable on conviction to a fine of five hundred naira or to imprisonment for six months or both. Section 20 (3) provides for the punishment due to anyone who knowingly fails to give notice within seven days of discovering objects of archaeological interest during operations. These offences should be made to attract stiffer penalty as it shows the intention of the offender to conceal a criminal act or make way for the illicit trafficking of such archaeological finds.

Trade in Antiquities

Section 21(2) provides that anyone who buys or sells antiquities not being an accredited agent shall be guilty of an offence and liable on conviction to a fine of two thousand naira or five times the value of the antiquity whichever is the greater or to imprisonment for three years and the court imposing the fine or imprisonment shall make an order for the forfeiture of the antiquity connected with the offence to the State. The punishment for buying or selling drugs should be applicable here as the profits made from sale of drugs are laundered in antiquities. Trading in drugs without lawful authority according to the National Drug Law Enforcement Agency (NDLEA) Act,⁷⁵ on conviction, attracts a sentence of life imprisonment.

⁷⁴ NCMM Act.

⁷⁵ NDLEA Act, *op. cit.*, Section 11(c)

Obstructing an officer of the law on duty

Section 22(6) provides that any person who obstructs a police officer or an officer of the Nigerian Customs Service in the performance of his duties is guilty of an offence and liable on conviction to the sum of one thousand naira or to imprisonment for three years.

The above provision should not have the option of fine as the sum payable as fine is so insignificant. The Criminal Code does not make provision for option of fine for similar offence under section 195 which deals with restricting a customs officer engaged in preventing smuggling.

Recommendations

Considering the nature of heritage crimes as an international plague which has been likened to the offence of drug trafficking that must be reduced to the barest minimum in each country's territory, the following recommendations are apt in relation to the penal provisions of the NCMM Act:

Penalty for causing injury to cultural property

The provision of the NCMM Act relating to willful destruction, defacing, altering, removing or causing damage to cultural property in any manner should be reviewed upwards to carry a penalty of not less than fourteen years instead of the six months imprisonment with option of fine as provided in the law.

Introduction of a provision on principal offenders

The *NCMM Act* should contain a provision that looks similar to that found in the Criminal Code and in the National Drug Law Enforcement Agency Act on who principal offenders are.

Carrying out excavation without permit and Non-disclosure of the discovery of objects of archaeological interest

Violators in this regard should qualify as principal offenders of crime.

Trade in Antiquities

The punishment for buying or selling drugs should be applicable to buying and selling antiquities.

Obstructing an officer of the law on duty

Section 22(6) provides for the punishment to be meted out on any person who obstructs a police officer or an officer of the Nigerian Customs Service in the performance of his duties should not have the option of fine as the sum payable as fine is so insignificant.

Allowing for concurrent legislation for cultural property

Cultural objects should belong to the realm of matters within the federal and states legislative competence as opposed to it being on the exclusive legislative list. The federal government should legislate on objects that have been declared as National monuments while the states should legislate on those within their territories bearing in mind that any conflict in the provisions will render the state legislation void to the extent of its inconsistency with the federal law. This is to allow for grass root participation in the protection of cultural patrimony.

Introduction of a provision penalizing dereliction of duty by custodians of cultural objects

A term of seven years should be imposed on authorities or officials who are involved in or facilitate the trafficking of cultural goods with a ban from public service for twice the length of the sentence. This will ensure that those who are employed to guard our antiquities and other heritage objects guard them jealously because their livelihood depends on it.

Conclusion

There is no gainsaying that damage to our nations cultural heritage resources should be appropriately punished to achieve the objectives of punishment in that regard. Considering the fact that antiquity theft can be likened to drug peddling, the punishment for heritage crimes must be stiff. Stiff sanctions will also serve the function of renewing the belief of the general public in the need to protect their heritage. There is therefore need for the law makers to urgently revisit the penalties in our NCMM Act.