

THE NECESSARY EVOLUTION OF THE MEXICAN LAW  
UNDER THE NEW PARADIGM OF THE 1972  
UNESCO CONVENTION IN ORDER TO STRENGTHEN  
THE FIGHT AGAINST THE ILLICIT TRAFFICKING  
OF CULTURAL PROPERTY

Ernesto BECERRIL

THE “BABEL EFFECT”

I would like to start with a common story that I am sure is repeated several times in Latin America and probably in other parts of the world.

In 2011, officials of the National Institute of Anthropology and History (INAH) requested me to review an issue which they were very concerned about. Some people were arrested for having pieces of unquestionable historic value that were the product of theft and looting. Despite the fact that both, the Federal Prosecutor and INAH, were focused on the restitution of this cultural material, we had a huge problem: both institutions were talking “different languages” and did not understand each other. Please, let me explain the situation.

When cultural material coming from illicit trafficking is detected, INAH should issue a technical opinion to determine whether this material is part of the Cultural Heritage. In this case, INAH issued a technical opinion, which was perfect, but inefficient. I would like to mention three of these cultural materials: a book of choir musical works, a book containing prayers and a painting of Jesus Christ on wood.

In all these cases, I found a common situation: the technical opinion contained a perfect terminology for describing not only the historical background of the material, but also proposing a restoration program for these objects. The problem was that the Federal Prosecutor could not understand the document: the language was so technical that it could only be understood by an expert in this field. A Federal Prosecutor is an official who has a medium average education in our country, so it was logical that he could

not understand what a “bifolio”, an “incunabula” or an “anthropomorphic figure” meant.

But the worst problem found by the Federal Prosecutor in INAH’s technical opinion was, that it did not answer the most important question: are these materials really monuments in accordance to the law? Since this question was not answered, the Federal Prosecutor could not determine if these goods had to be restituted to the nation or returned to their owners because they are not protected by the law.

There was a problem that I call “the Babel effect”: Although both institutions wanted to achieve the same objective, both spoke different languages.

The solution was not complicated. My proposal was to review the technical opinion and simplify the language: a) instead of talking about a “bifolio”, we talked about “a music score from the colonial period”; b) the term “incunabula” was changed to “a book of prayers published in the 18<sup>th</sup> century” and c) the terminology “a painting of an anthropomorphic figure” was modified to a “painting of Jesus Christ on wood made in the 19<sup>th</sup> century”. With this language simplification, we surpassed the first obstacle. But the point where we paid more attention was to prove that the cultural value of these objects was in compliance with the legal definition of a historical monument. This work meant a very important challenge for the INAH experts, but finally we could achieve a re-expressed technical opinion. Fortunately, the Federal Prosecutor considered that the document was very useful and served as the basis for a Restitution Order for returning these assets to their original owner: the Mexican nation. This story came to a successful learning, INAH Officials asked me to train the members of INAH’s local offices in the 32 States of the country so that they could follow this same methodology, because there were similar problems throughout the country. But for some reasons, this training was never carried out.

I know that I have talked a lot about this story. Recently, Jorge Sánchez Cordero published an article with a very suggestive title —“Who is the Owner of the Cultural Heritage?”— on one of the national magazines, explaining some relevant cases of illicit trafficking of cultural property. Compared to those “big cases”, the situation which I have explained can be considered as one minor matter. I have to reiterate that this situation happens very often in Mexico, Latin America and other parts of the world. And every day, cultural goods are lost due to this “Babel effect”. But the main reflection, which I want to share with you, is about the difficulty of implementing an UNESCO Convention at a national level.

I would like to focus this article not in a disgusting comparison, but in the way Mexico has evolved with the implementation of two UNESCO

conventions: the World Heritage Convention (which I will refer as the 1972 Convention) and the Convention against illicit traffic of cultural property (which I will refer as the 1970 Convention).

Why is it possible to make this comparison? Because both documents were issued almost simultaneously and had faced common circumstances. The first circumstance is that the Mexican law (which is the mechanism for the implementation of these conventions at a national level) has forty years without any amendment. Secondly, Mexico has changed in the last 40 years: Mexico used to be a country with a deep nationalist policy, with a highly dominating Government and a protectionist and closed position before international trade; currently, we have different political circumstances and we are very opened to free trade. The third point is that Mexican law has to regulate the cultural property to face new relevant phenomena such as globalization, the increase of international trade, the development of telecommunications, sustainable development, new human rights protection, the importance of the NGO's, the cultural diversity, the nationalism struggles, the growth of international crime, etc. All these situations mean a challenge that Mexican legislation has not regulated in an adequate form yet. The implementation, at a national level, of a UNESCO Conventions requires an additional effort for the legislation of any country. Some years ago, I attended a regional workshop on illicit trafficking of cultural property sponsored by the Swedish International Cooperation Agency in El Salvador. In that event, the representative of Nicaragua's police told us that, with the intention of demonstrating the effectiveness of the customs in his country, he introduced in his luggage an archaeological piece. This person could travel without any problem and could introduce material without any hassle: when customs authorities asked for an explanation about the material, he replied that it was a handcraft. There was no further problem and he could cross the border with this material.

Comparing the way in which Mexico has implemented the two conventions, we can report further progress in the World Heritage Convention because the participation of local governments in this matter has increased; in the case of the 1970 Convention, we cannot talk about the same level of progress, since the implementation entirely depends on federal authorities.

The intention of this article is not to do an analysis of Mexican law, but to try to explain specific points that will allow us to discover some aspects where we could work at the national level to make the provisions of the 1970 Convention possible. I would like to talk about common aspects in the implementation of the 1970 Convention in the "every day work", specially, in the case of those cultural goods that certainly will not be recovered because

they don't seem to be relevant; even though they account for the 95% of the total of illicit trafficked cultural material, according to FBI's statistics..

### 1. *We have to talk about the same heritage*

The conventions of 1970 and 1972 establish a very clear explanation about what Cultural Heritage means, although in a different way. The 1970 Convention is very detailed and the 1972 Convention is more conceptual.

In the case of the definition of Cultural Heritage in the 1972 Convention, the scope of the World Heritage definition has been expanded into new categories, such as cultural landscapes and cultural itineraries. In the past, the inscriptions of monuments and sites in the World Heritage List were simpler than they are nowadays. The degree of severity in the qualification of a monument or site to be included in the World Heritage List has changed and the authorities require an additional effort.

The World Heritage Convention establishes three categories of protected goods: monuments, places and sites. The Mexican law, issued in 1972, was not very different from the Convention, as its objective is to protect archaeological, historical and artistic (movable and immovable) monuments and sites. We can say that there was compatibility and this was shown in the way the first inscriptions in the World Heritage List of some historical cities and archaeological sites were reached.

The process was simple: the President declared an archaeological, historical or artistic monument or site, establishing a federal regulation for its protection and subsequently, requesting its inscription in the World Heritage List. In this process, local authorities did not have a relevant participation.

But when the Intergovernmental Committee of the World Heritage defined new categories and criteria for the protection of the cultural landscapes and cultural itineraries, the situation became a bit more difficult: definitions of archaeological and historical sites established in Mexican law do not include the setting. The logical consequence is the need of an amendment: for the protection of cultural landscape is required the cooperation of the federal authorities (who have to protect an archaeological or historical site) and the local authorities (which should contribute to the protection of the setting, for example, the natural environment, use of land, buildings' regulations, buffer zones, etc.). Then, the federal authorities have to lead an engagement process with local authorities in order to achieve their collaboration to protect the Cultural Heritage. In the past, federal authorities

limited the participation of local authorities. Nowadays, there is a better cooperation between federal and local authorities: in other words, federal and local authorities have tried to speak the same language. But there is still a long way to go.

*What can we say about the 1970 Convention?*

The 1970 Convention establishes a very detailed list of the protected cultural property. However, we cannot find a total compatibility with Mexican legislation in all cases: for example, “ethnological heritage”, “elements from the break-up of artistic or historical monuments” or “phonograms, photographic and cinematographic files” are not legally protected in our country.

The Convention of 1970 (contrary to the 1972 Convention) requires the involvement of non cultural authorities for its implementation, for example, customs and the Federal Prosecutor. The Convention as well, requires a common language between these authorities. Experience has shown that this situation has not always been satisfactory. Again, we can see “the Babel effect” here.

In the Federal Monuments Law, there are three types of protected cultural property: (a) archaeological monuments: made by cultures located in the national territory prior to the establishment of the Spanish culture; (b) historical monuments: linked to the national history after the establishment of the Spanish culture in the country and (c) artistic monuments that have an outstanding aesthetic value.

In the case of the international trade regulation, the Ministry of Economy (which is the authority that regulates trade) issued and amended Rules establishing the requirements for the exportation of cultural material, 15 years ago. The current text indicates that the protected property is as follows: (a) paintings and drawings from the 16th to the 19th century; (b) other goods from the 16th to the 19th century (but the meaning of “others” is unclear); (c) engravings, prints and lithographs from the 16th to the 19th century; (d) statues or paintings from the 16th to the 19th century (e) Numismatic collections of the 19th century; (f) paintings and drawings made by Diego Rivera, Frida Kahlo, Saturnino Herrán, Clemente Orozco, Siqueiros; (g) other goods of the same authors; (h) engravings, prints and lithographs by the same authors and (d) statues or paintings of the same authors.

As we can see, there is a phenomenon of reduction in the protection scope of the Cultural Heritage: in accordance to the list of protected mate-

rial mentioned by the 1970 Convention, the Federal Monuments Law reduces the scope of this international treaty; but even worse, the regulation of foreign trade further reduces the scope of the measures for the protection of Cultural heritage.

In the website of the Ministry of Economy, we can find a presentation that is used as a training process to explain the non-tariff restrictions to the personnel of the customs and to many other officials of government agencies. Let me explain this slide. As you can see in the presentation, historical monuments, specifically, the graphic works, sculptures, statues and coins, are the only ones defined and the works of the previously mentioned artists are not included. Probably, if a customs official considers this information as definitive at the time of reviewing a cultural material, the decision taken by this official will not be correct. The “Babel effect” becomes a bottleneck as more objects are unprotected.

Sharing the same language regarding what we need to protect against the illicit trafficking of cultural material, is a guarantee for this purpose.

## 2. *Reciprocity*

In 1827, only six years after Mexico became an independent nation, the Mexican Government issued a customs law, prohibiting the export of archaeological monuments. Since our early years as a nation, Mexico has suffered from the consequences of the illicit trafficking of cultural property.

For this reason, when the 1970 Convention was signed, our country considered that this international document would solve this problem. Our country has cooperated in the restitution of cultural material that has been illegally imported.

Since the illicit trafficking of cultural property is an issue shared by many Nations, my question is: why does not Mexican legislation provide measures in order to fight the illicit import of cultural property?

It seems to me that there is a lack of reciprocity from our country to the obligations established in the 1970 Convention and that we have to redefine the way in which we have to face this problem. This is also a consequence of the lack of understanding of Mexico’s role as a nation that should contribute to the total fulfillment of the provision of the 1970 Convention.

## 3. *Efficiency makes the difference*

The expectations concerning a law are based on the results of its application. In other words, the law is useful if it solves problems. There are laws that have strong ideological basis. The Federal Monuments Law is one of them. But laws do not live from their ideological basis, but from their implementation and, in the case of regulating illicit trafficking of cultural property, we have found serious signs where our law enforcement is not effective.

Here are some examples:

a) Article 16th of the Federal Monuments Law establishes that temporary or permanent export of a privately owned historical monument is possible provided that it is approved by the INAH following the provisions of the Rules of the Federal Law of Monuments. In accordance with our Constitution, only laws may impose restrictions to the activities of the citizens, the objective of the Rules of a law is exclusively to establish provisions to ensure the application of this law and cannot impose restrictions. Notwithstanding the foregoing, the Rules of the Federal Monuments Law establish restrictions to the export of historical material: for example, it prohibits the export of historical material privately owned that cannot be substituted (without explaining the meaning of this concept) or when the transportation could mean a risk for the cultural material. Both are aspects that sound reasonable, but they are not established by law. When an application for an export authorization is rejected by the INAH based on the provisions of the Rules of the Law, the exporter has the possibility to file a constitutional rights protection action (which in Mexico is called “Amparo”). Under this situation, the exporter will surely win the case.

b) In INAH’s website, it is established that if the export of a historical monument is risky, INAH can appoint an expert to verify the measures for the protection of the monument and the exporter has to pay all the fees and costs of this expert. Again, this point seems reasonable. But the problem is repeated and it is worse: this obligation is not provided in a Law or in its Rules, but it is in a web page. If the exporter files an Amparo lawsuit, he is going to win again.

(c) One of the most extreme, but necessary, measures in order to fight the illicit trafficking of cultural material, is the establishment of a criminal legal system. The Federal Monuments Law establishes various offences involving this activity. In general terms, all these crimes deserve a sentence of 1 to 10 years in prison and a fine of 100 to 50,000 Mexican pesos. The prison term could be a concern for a person engaged in this kind of crime, but the fine is not, considering the profits of this activity. Under our criminal legislation, none of these offences are considered “serious crimes” and as a result, it is possible to be released on bail. In the case of the fines, there was

an amendment to the monetary system in the decade of the 90's updating the amount of fines in federal laws reducing three zeros to the established amount. As a consequence of this amendment, the fines established in the Federal Monuments Law were updated and now the amount goes from less than a penny to less than \$5 USD.

In other words, the illicit trafficking of cultural property is a safe business in Mexico: laws are not very clear regarding the objects that must be protected, criminal regulation allows the release on bail and the amount of the fines is ridiculous.

Nowadays, reviewing the implementation of the 1972 Convention in our country, we can find contradictory situations, mainly because our law has not been amended in order to adequate the new social and economical realities involving monuments and sites. There are excellent examples of an adequate protection of many historic cities because there is a close collaboration between INAH and the city authorities. But there are also other cases where it is necessary to strengthen this relationship.

#### 4. *Consistency is everything*

I think that the most important value of any international treaty is the sense of commitment. In a discussion of the Supreme Court of Justice of Mexico where it had to define whether international treaties or federal laws had higher hierarchy in the Mexican legal system, the Court decided that international treaties had more relevance because they meant a commitment of Mexico with the international community.

By signing the 1970 Convention, our country acquired a commitment to prevent the illicit import, export and transfer of ownership of cultural material. The reality is that the speech of the Mexican Government has been very consistent with this commitment: the authorities had seized illegally imported cultural material. For this reason, we can confirm this commitment even the unfavorable circumstances involving the objectives of the 1970 Convention implementation, as the increase of free trade or the international crime. Updating the law will be the logical answer to the complication of circumstances originally regulated.

The possibilities of improving our regulation on this matter are very large; however, it seems that we do not want to solve this point. An example of the above is shown in the 2007-2012 Culture Program of the Mexican Government. In accordance with our Planning Law, at the beginning of each new period the Government issues a National Development Plan that



establishes objectives and strategies for the next six years. Then, each Office and agency establishes its own working program for the same period. If we review the current Culture Program, we can see that one of the objectives of the cultural policy is to fight theft, illicit trafficking and counterfeiting of cultural property. This objective is correct, but this program only defines two strategies: (a) to align the actions of the authorities in order to fight counterfeiting of art works and (b) the coordination with local sacred art commissions. As you can see there was no consistency between the speech of the government and the documents defining the strategies for the protection of the cultural heritage in the last six years. Now, we are starting a new Government and a new culture program will be issued for the coming years. I would like to think that this program will be reviewed and that new strategies and ways of working will be suggested.

On the other hand, we can find lack of consistency in the way in which the authorities see their own functions regarding the illicit trafficking of cultural material. As you can remember, INAH has a very clear idea regarding the protected goods. But in the program of the Ministry of Economy, only certain cultural and historic materials are mentioned. But if we review now the website of Federal Prosecutor Office, we will find a new surprise: they only talk about fighting the illicit trafficking of archaeological material. And if we ask local authorities (States and cities) about their role in this activity, I am almost sure they would not know what to do, despite the fact that they could be the first to establish preventive measures against this matter.

Just talking about local authorities and the 1972 Convention, and without thinking that we are in a perfect situation, there was a fundamental change that has resulted in a better implementation of this Convention: in many cities, there is a regulation establishing coordination measures between local authorities and the INAH giving a very consistent result.

Therefore, I believe we can do much more for the implementation of the 1970 Convention.

## CONCLUSIONS

I wanted to suggest a joint analysis of the implementation of the 1970 Convention and the Convention of 1972 in our country, because when I have spoken about both conventions with my colleagues that are working in some institutions related to the conservation of Cultural Heritage, I have found some significant responses.

In the case of the 1972 Convention, I have found that my colleagues have certainty about the obligations that they have to meet for the fulfillment of this international treaty. I remember that some months ago, I took part in a meeting about the Camino Real de Tierra Adentro (recently filed in the World Heritage List). Many mayors of cities that are part of this itinerary also attended to this meeting and their main request was to have the expert's advice and support for the elaboration of the management plan to protect the Cultural Heritage in their territory. The management plans are still brand new documents in Mexico, so we can say that this is a very positive sign showing that the local authorities are informed about their importance. However, there are still many problems at this respect: for example, in Puebla, local authorities are building a cable car in the historic centre of this city which has meant the destruction of buildings and the alteration of the historical landscape.

I think that the main change of paradigms was to include local authorities in the protection of Mexican World Heritage under a management system, leaving behind the old idea that this was an exclusive activity of federal authorities which could manage Cultural Heritage at its sole discretion.

In the case of the 1970 Convention, I can share with you that most of the times, my colleagues have expressed doubts about the way in which they should implement the Convention. I do not want you to think that this article is a negative critic to Mexican law. But if we want to make proposals, we must be very clear on the issues which mean an opportunity for improvement.

I think that my proposal could be summarize in the following sentence: "think globally, but act locally". I think that there are three points in which we could have an impact on the future of our Convention:

1. Work on a document that will allow us to operate day to day the 1970 Convention. In the case of the 1972 Convention, the issuance and dissemination of the Operational Guidelines in our country gave us more visibility as to the way of working of each government level and the standards that they have to consider. In the case of the 1970 Convention, we have many training materials, but I think that the existence of these operational guidelines would help us to establish a management system defining the functions of the involved authorities and the coordination measures between legal norms, principles and criteria that we should share at a national and local level.

2. I think that the provisions of the Convention have to be transmitted to a larger number of government sectors, mainly because it involves not only justice and foreign trade authorities but other education , religious

and agrarian authorities and even telecommunication sectors because an important part of the illegal trade of cultural material is made by electronic means.

3. Finally, I think that the 1970 Convention is believed to be far away from the people who are really close to the cultural property. For this reason I consider that the most important challenge and opportunity for the implementation of this convention is to achieve the commitment of local authorities, communities, religious institutions, priests, teachers, and local police among others. I would like to underline again, that the future of the Convention regarding the preventive aspect, depends on them.

I would like to finish my participation talking about San Sebastián del Oeste. It is a little village included in the Indicative List of Mexico. This small town is just 40 kilometers from Puerto Vallarta, in a very inaccessible route and where time seems to have stopped. It is a population that is fully committed to the preservation of its heritage against any alteration of its image and the theft of historical goods from their churches. The children of the community are the ones in charge of this job; they are the true guardians of their heritage. This is the true meaning of heritage, the deep social and community roots preserved generation by generation.