CHAPTER 1

INTRODUCTION: DO CULTURE AND PROPERTY COMBINE TO MAKE "CULTURAL PROPERTY"?

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In this introductory chapter, the editors provide a brief overview of the contributions to this book. Their conclusion is that the legal protection of culture serves to acknowledge and strengthen cultural interests and nurture cultural heritage, and thus create new dimensions of cultural property.

Dans ce chapitre préliminaire, les directeurs de cet ouvrage résument les sujets discutés par les auteurs. Ils en concluent que la protection juridique de la culture permet de prendre en compte et de consolider les intérêts culturels et de renforcer la notion de patrimoine, et créent ainsi de nouvelles dimensions à la propriété culturelle.

In this book, authors from the University of French Polynesia and Victoria University of Wellington come together to examine how the law protects and sometimes gives property rights to aspects of culture. As the title of the book asks, does this combination of culture and property make something that can be described as "cultural property"? Each chapter in this collection discusses a different slice of culture and the different rights that may or may not be property associated with that aspect of culture.

There are many ways in which law protects culture and many ways in which it does not. Some types of legal protection, for instance, copyright law, protect the outputs of culture such as songs and literature and the particular way that they are expressed. Such laws do not, however, give rights to the building blocks of cultural products, such as language, words and music. The rationale is that these building blocks must be available for all to use. Artefacts of culture may also be protected under various laws. None of these sorts of legal frameworks are directly designed to

protect culture as such, but they do protect the products of culture in varying degrees and according to their own rationales.

In chapter 2, Māmari Stephens discusses how aspects of language are protected under New Zealand law. She articulates that "language matters to culture".[1] This is because of the ways in which language is used, archived and sometimes protected. The chapter discusses Māori language (te reo) and the significance of that language to Māori culture. Stephens looks at the patchwork of laws that protect and impact te reo. She assesses how the concept of legal personality, if it was applied to te reo, might contribute to its protection and development. Drawing on the use that has been made of legal personality in Treaty of Waitangi settlements, she analyses how that legal status could apply to language and the taonga (treasure) that is te reo. Stephens concludes that giving legal personality to te reo could be beneficial to its role as a language and identifier of Māori culture.

One might ask how any legal system should protect culture or even why it should do so when culture continues to evolve. At least one reason is because the evolution of culture is not always possible or peaceful. Where culture suffers during conflict, there is international law to address "cultural property" in such circumstances.[2] Other international instruments apply to cultural heritage. The terms are often interchanged. This collection is not centred on those international instruments. Rather, it examines, from various perspectives, notions of cultural property in the South Pacific and New Zealand. We do not present this collection as an exhaustive analysis of the phrase "cultural property". However, each chapter gives insight to some of its contours.

Cultures and their signifiers, such as language, that are minority cultures or that are under threat of survival may need protection, but at the same time over-protection can have unintended consequences, such as limited use of the culture, that may simply reinforce its fragility. In such circumstances, identity is threatened as identity and culture are intimately related.

In chapter 3, Arnaud de Raulin discusses the "protection of cultural property in the South Pacific and the search for identity recognition". He reminds the reader how archaeology and architecture embody and reflect the culture of those who created them. As de Raulin says, such manifestations "are also the homes of the life, ambition

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1 Māmari Stephens "To Protect and Serve: Finding New Ways to Protect Te Reo Māori as Cultural Property".

2 Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 215 (opened for signature 14 May 1954, entered into force 7 August 1956). See Alberto Costi “Preserving Humanity in Modern Conflicts” in *Wars, Laws + Humanity* (New Zealand Red Cross IHL Magazine, Centenary Issue, October 2015) 26 at 28.

and hope of a people".[3] He points out that the international protection is frequently coextensive with the domestic legal regimes. With a focus on cultural goods, he discusses how legal developments in the South Pacific are used as a way of recognising and thus developing communities.

In chapter 4, Hervé Raimana Lallemant-Moe examines how rights to cultural heritage have been codified in French Polynesia.[4] Because of its connection to the French Republic, French Polynesia has for a long time drawn on the Republic to frame the law that protects historical, cultural and environmental heritage. As of 2015, a heritage code for French Polynesia has emerged which specifies historical monuments, sites and protected areas. Examples include the Marae of Taputapuatea (Raiatea), which is also on the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage list. Lallemant-Moe examines the challenges and opportunities of codifying heritage in such contexts.

Designating monuments and sites as heritage is only part the process of recognising culture and its association with real property. The protection of real property is intimately bound to culture, even if not always explicitly said to be so. In chapter 5, Richard Boast details the history of New Zealand's iconic Tongariro National Park, which is also a UNESCO World Heritage site.[5] He explains that the park is listed as both a "natural" and a "cultural" heritage under the UNESCO designation system and elucidates the background to the formation of the park, which is often described as a "gift". With the art of the legal historian, Boast unpacks the details behind that gift. He shows how only a very small part of the current park was a "gift" and that much of the park was Māori land the Crown acquired over a long time. In detailing this history, Boast espouses the view that the cultural and heritage status of the park hides the cultural and heritage appropriation that created it.

The exploitation of culture is not confined to that which is tangible, including land, monuments and other physical manifestations, or even about expressions of culture, such as that found in songs, dance and writings. The strength of protecting intangible rights has been demonstrated through intellectual property systems for a long time. While intellectual property has its own well-established framework, the global trade of intellectual property products has directed attention to the almost absence of protection of intellectual creations of indigenous peoples and their cultures as compared to the cultural and scientific outputs that find protection

3 Arnaud de Raulin "La Protection des Biens Culturels dans le Pacifique Sud et la Recherche d'une Reconnaissance Identitaire".

4 Hervé Raimana Lallemant-Moe "La Codification du Patrimoine en Polynésie Française".

5 Richard Boast "Gift of the Peaks: The Origins of Tongariro National Park".

through regimes such as copyright, patents and trade marks.[6] There are extensive negotiations about the protection of traditional knowledge, particularly at the World Intellectual Property Organization (WIPO), which include protracted treaty negotiations.[7] Protecting the intellectual property of indigenous peoples, known at WIPO as traditional knowledge, is complex. Alain Moyrand discusses this complexity in the setting of French Polynesia in chapter 6, "The legal protection of traditional knowledge in French Polynesia: challenges and realities". Moyrand explains that French colonisation has resulted in the disappearance of local customary institutions and there is a general lack of legislative protection in French Polynesia for traditional knowledge. Moyrand notes that the Declaration of the Rights of Indigenous Peoples[8] would permit the recognition of specific rights for the people originating from French Polynesia. He suggests that this could be a way to address the specificities of this community that are distinct from the French Republic. Moyrand notes that the disappearance of customary law makes it difficult to define the scope of traditional knowledge or, indeed, customary law itself. He adds the caution that defining customary law also potentially brings difficulties as it may appear to resurrect the old institutions of "monarchy", and create a "new" class of politicians to resurrect the old order, and to challenge the existing elite.[9]

The problem of defining traditional knowledge is a global problem. Just as the scope of protection for cultural property can be said to be dependent on what cultural property encompasses at domestic law, the scope of traditional knowledge is dependent on national legislation. The rights of indigenous peoples to the protection of their knowledge and its manifestations vary among jurisdictions. Defining traditional knowledge in domestic law has its own issues,[10] but at least is potentially resolvable. In the Cook Islands, for example, traditional knowledge is defined as meaning:[11]

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6 Susy Frankel "Traditional Knowledge, Indigenous Peoples, and Local Communities" in Rochelle Dreyfuss and Justine Pila (eds) *The Oxford Handbook of Intellectual Property Law* (Oxford University Press, 2017) 758.

7 See WIPO "Traditional Knowledge" <www.wipo.int/tk/en>.

8 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/RES/61/295 (2007), annex.

9 Alain Moyrand "La Protection Juridique des Savoirs Traditionnels en Polynésie Française: Enjeux et Réalités".

10 See generally Peter Drahos and Susy Frankel "Indigenous Peoples' Innovation and Intellectual Property: The Issues" in Peter Drahos and Susy Frankel (eds) *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (ANU epress, Canberra, 2012) 1.

11 Traditional Knowledge Act 2013 (Cook Islands), section 4.

> … knowledge whether manifested in tangible or intangible form that is, or is or was intended by is creator to be, transmitted from generation to generation and (i) originates from a traditional community and (ii) is or was created, developed, acquired or inspired for traditional purposes

International definitions by their nature are particularly fluid and arguably should be in order that there is some degree of specificity appropriate to the domestic situation. That is not to suggest that international regime should not have some teeth. Defining traditional knowledge or indeed culture is challenging and possibly self-defeating simply because these matters are dynamic. The problem may be when other dynamics obscure or worse obliterate a culture.

As Mark Hickford discusses in chapter 7, the process of considering the scope and meaning of culture is not only one of substantive detail, but also involves consideration of "who" has the authority to ascertain and determine the implications of framing culture. Hickford points out how that process of debating culture and its substance is dynamic. He approaches this issue using negotiated indigenous-state agreements in New Zealand concerning natural resources or landscapes, which are "recast or re-narrated as sites of 'cultural property'".[12] Hickford argues that focusing on the outcome of these settlements obscures the context underlying the relationships that create them. The impact of that, he notes, when contestation is ongoing, is that the incremental changes found in agreements become footholds for continuing political challenges to the state's account of its own authority over places of value, such as waterways.

In the final chapter, Jean-Paul Pastorel explains how the protection of maritime cultural heritage is far from coherent, but rather is patchy. He notes the important position that maritime heritage is not only a testimony to the past, but has a present and as such is "a living component of our natural, cultural and social environment". This also provides a pathway to cultural identity. Because of both this vector of identity and the value of maritime heritage, Pastorel concludes that maritime heritage be protected not only for its past value, but also to ensure its transmission to future generations.[13]

This approach of developing and transmitting culture and knowledge for future generations is a theme that transcends the reasons for protection of traditional

12 Mark Hickford "A Commentary on the Problematics of "Cultural" Property – *Modus Vivendi* in New Zealand".

13 Jean-Paul Pastorel "La Protection du Patrimoine Culturel Maritime".

knowledge, heritage sites, ongoing land and water interests and the language of culture itself.

The authors in this collection have approached the issues of combining culture and property from various angles. They all conclude that the direct gains of protection of culture serve to acknowledge and strengthen cultural interests, cultural heritage, and create new dimensions of cultural property.