Culture Assimilation:

Integration of Traditional Practices into Formal Heritage Laws as a Potential Way of Heritage Protection

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Abstract

Attitudes toward the past can be recognised in many different ways. European worldview in physical protection of cultural heritage, reflecting in formal laws, has carved out social elements of such heritage rooted in indigenous societies, for example, the belief of sacredness. This research, therefore, focuses on problems that probably arose during the introduction of Western legal systems to protect cultural heritage in non-Western societies: Indonesia, Zimbabwe, Canada and Australia. From the study on sociology and history of law, it shows that European-based law when first introduced to the regions has excluded customary law which obtained social respect. This created a gap between legal comprehension and people who are the subject to law.

Up to present day these European influences of the legal system regarding to heritage management can still be discerned in international conventions. To bridge this gap, two suggestions are given in this research: one to work cooperatively between *the 1972 UNESCO World Heritage* and the *2003 UNESCO Intangible Cultural Heritage Conventions*; another to reinterpret *in situ* preservation in the *2001 UNESCO Underwater Cultural Heritage Convention* as a way to treat the site with respect. The integration of traditional practices and heritage laws make it possible for indigenous and local people to gain more understanding of the heritage laws and thus to obey to these laws more easily. Hypothetically, the formal heritage laws become more effective.

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Chapter I

Introduction

I.1 Research Questions and Goal

This study carries out case studies in four non-Western[1] societies: Indonesia, Zimbabwe, Canada and Australia. The various locations and continents have been intentionally chosen to represent the wide diversity of traditional practices in protecting cultural heritage and the degree of government recognition of such practices. Thus, the questions to be addressed in this research are: can the traditional practices of heritage protection through beliefs, customs and norms be more effective than the current legislative protection based on the Western legal systems? And how could these traditional practices be integrated into heritage laws[2] that are currently in place?

Since the European invasion, Western legal principles have been widely and abruptly adopted by many countries outside continent of Europe. Some misinterpretation and misunderstanding of laws on heritage protection and usage has been raised since that period. Therefore, this thesis strives for two goals. Firstly, it aims to observe the existence of traditional approaches to heritage protection in case studies – Indonesia, Zimbabwe, Canada and Australia – that have been neglected by Western-based laws. Second, by researching on legal theory, it aims to contribute possible suggestions regarding the integration of heritage protection by traditional practices into formal legal systems, namely, international legislations.

I.2 Scope of the Research and Term usage

Nowadays, the voice of indigenous people throughout the world calling for the responsibility on the interpretation and management of their cultural heritage has increasingly been recognised (Layton 1989) and this trend has been observed with interest especially by archaeologists (Carmichael et al. 1998). Therefore, in this research,

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[1] In this paper, it means to point out legal issues in relation to heritage management and protection of case studies in post-colonial period. It is also possible to look into the past before the European invasion in these countries. In this regard, the term Western and non-Western (with capital 'W') are used to differentiate between European (coloniser) and native population in the colonised country. To be more specific, the term Western indicates only European countries that have major roles in colonial period like Britain, France, and the Netherlands.

[2] Due to the variation of titles of laws concerning to heritage protection like Monumental laws, Archaeology laws, etc., in this thesis, 'heritage laws' will be used constantly and consistently as a collective term to define all the relevant heritage legislation that have been enacted in formal process.

a wide range of case studies from many parts of the world is offered in order to demonstrate the variability and diversity of traditional practices in heritage protection and management. However, the scope of this research will be restricted to only case studies from four different continents, namely, Asia (Indonesia), Africa (Zimbabwe), North America (Canada) and Oceania (Australia). Other areas like South America and Europe that have more examples of such practices fall outside the scope of this study.

It is also essential to note that the focus of this research is on archaeological heritage management within the legal framework. The study of legal theory and some related heritage legislation intends to conceptualise the understanding of the characteristics of laws from various viewpoints. Then, based upon these theoretical ground; it aims to find ways to merge the traditional practices on heritage management into the formal legal system. Moreover, according to the limitation of national laws – language competency and various legal systems – this document will rest mainly on the relevant international conventions, particularly, the *1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage*[3] *(WH Convention), the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*[4] *(ICH Convention), and the 2003 UNESCO Conservation for the Safeguarding of the Intangible Cultural Heritage*[5] *(UCH Convention)* and other relevant materials. However, it is possible to portray the heritage issues that appear in the national laws of each case study.

In cultural heritage circles, there are various terminologies used to define a group of people. In some societies, groups are divided by ethnicity, social status, political standing among other criteria. In this thesis, the problematic words are 'indigenous' and 'local' that are used interchangeably. I do not intend to draw a strict line between them because they sometimes contain overlapping meanings. The rights of indigenous people[6] to claim their cultural heritage are affirmed by the United Nations[7]. Considering the case studies, the assertion of heritage rights in Canadian and Australian cases have been given to native population such as the Sto:lo in Canada and the Aborigines in Australia while local people (e.g. European) do not have this cultural right. On the contrary, the cases in Indonesia and Zimbabwe are different. The rights of cultural heritage have been given to the local people because all groups of people, including the government in these countries, have been inherited before the colonisation. In this regard, the boundary of these two terms can roughly be made through their cultural rights. Furthermore, the term

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[3] See http://whc.unesco.org/en/conventiontext (accessed 30 March 2012).

[4] See http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/ (accessed 30 March 2012).

[5] See http://www.unesco.org/culture/ich/index.php?lg=en&pg=00006 (accessed 30 March 2012).

[6] In brief 'indigenous people 'refers to member of indigenous population who have a historical continuity with pre-invasion and pre-colonial societies in their territories and in present are culturally and politically distinct from dominant population. See www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc (accessed 10 December 2012).

[7] See http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 20 October 2012).

indigenous is used preferably in collective meaning because it contains stronger legal rights.

I.3 Research Methodology

In order to resolve the research problems, the methodology mainly depends on two components. First of all, the majority of information is generated from available literature and documents written in the English language because of my language limitation. I have also relied on desk-based survey of scholarly previous works aimed at the conceptualisation of legal principles and the acknowledgement of heritage protection through traditional practices and beliefs.

In addition, the actual implementation of these approaches – laws and traditions – is crucial. It would have been best to conduct a field survey to gain further insight information. However, because of a tight timeframe and geographical distance, I am not able to do so. Instead, I designed a set of qualitative questionnaire (See Appendix) to collect data from heritage authorities in Indonesia during my internship project (from March 1 – May 31, 2012) with the Dutch cultural agency, *Rijksdienst voor het Cultureel Erfgoed (RCE)* in Amersfoort. The objective of the survey is to seek for the availability of all kinds of traditional practices related to heritage protection and the effectiveness of heritage laws that are in place. On this account, the reflective ideas on traditional practices of heritage protection and attitudes toward present heritage laws in Indonesia are presented. I believe that the Indonesian respondents are able to provide reflective information, as they are not only heritage officers but also local people who live harmoniously with the traditions.

The focus on Indonesia was due to the richness of traditional practices and beliefs in protecting cultural heritage. At the same time, there are strong Dutch influences, including legal aspect, which lies deeply in the Indonesian society since the colonial period. Furthermore, on account of the Indonesian study, I expect knowledge sharing and information support from the Common Cultural Heritage Policy *(Gemeenschappelijk Cultureel Erfgoedbeleid)* of the Dutch Cultural Agency (*RCE*). A purpose of this project is to search for collaboration with foreign partners on the sustainable maintenance and management of Common Heritage in priority countries in Asia, inclusive of Indonesia.

The questionnaires were distributed to the informants in Indonesia by email. Three out of five were returned by a number of government and non-government authorities, namely, Catrini Pratihari Kubontubuh, an Executive Director of Indonesian Heritage Trust (based in Indonesia), Dyah Retno Wijayanti, a Temporary Researcher for Surabaya's City Development Planning Board and Nia Naelul Hasanah Ridwan, a Maritime Archaeology Research Scientist for the Research Institute of Marine and Coastal Resources and Vulnerability, Ministry of Marine Affairs and Fisheries Republic of

Indonesia. Unfortunately, no information has been generated from the university and law-making institution in Indonesia. Furthermore, the set of questions was also used in a semi-structured interview with Hasti Tarekat, a Representative of the Indonesia Heritage Trust in the Netherlands that was conducted on 13 April 2012 in Amsterdam.

Contained herein are the brief results of my survey on the present heritage management in Indonesia within the formal legal framework that is reported to be weak. As mentioned in my questionnaires and the actual interview, heritage law has a lot of technical terms and issues. Moreover, the lack of human resources to enforce the law effectively is a vital factor. In the meantime, all of the respondents agree that in some particular areas, heritage protection by traditional ways is still forcibly active. To be specific, shipwreck protection in eastern Bali waters is used to demonstrate effective traditional practices and community control. In this regard, the exploration results of traditional practices will be analysed thorough the research. The legal theories regarding heritage management and the proposal for incorporation of these practices into formal laws will be discussed in Chapter IV.

However, the methods used have its advantages and disadvantages. For my questionnaire, the terminology use is quite a problematic. For example, it is difficult to find the blanket definition of 'traditional ways', so I need clarify this by providing more relevant meanings including, but not limited to, traditions, beliefs, customs and norms. This tends to be quite 'wordy' but is a possible solution. On the other hand, it allows the informant more time to find the right answers. An informant, Tarekat, however, preferred to be interviewed thus it was possible to arrange a talk. By undertaking the interview, the word ambiguities are lessened as I can give more examples and explanation. Also, the informant is more 'active' in responding to the questions. However, according to my tight schedule, to arrange more interviews is not possible because travel to Indonesia to conduct interviews is time consuming and not practical. Therefore, the outcomes are more or less from the Indonesian heritage officers. For future research, I would want to arrange field interviews and site observations in order to participate and observe the real traditional practices. Moreover, a larger amount of informants would be needed. Hence, at this stage, I emphasize more on theory.

The outcomes of the data collection during the internship period enabled me to present a paper under the title *'Culture Assimilation: the Integration of Traditional Ways and Law as Potential Way of Heritage Protection'* at the European Association of Archaeologists Conference held in Helsinki, Finland (August 29 – September 1, 2012). Above all, I also distributed this paper to all the Indonesian respondents and supervisors at *RCE* so that they can be informed of the research results. At the same time, they can evaluate and review my approach to the Indonesian heritage management.

Although the paper only focuses on the Indonesian case study, this will be used as a baseline study for the entirety of my thesis. I have undertaken a desk-based

research on case studies in Zimbabwe, Canada and Australia to illustrate more about traditional practices toward heritage management and protection.

I.4 Research Structure

Following the similar structure of the Indonesian case study, I expect to extend my research area to the other parts of the world to demonstrate legal issues in heritage laws and reinforce on the aspect that traditional practices of heritage protection still exists and works very well in line with the people's way of life. In so doing, this research is presented within six chapters.

The first Chapter presents the introduction. Chapter II discusses the legal conceptualisation. Based upon theories of law, I seek for problems that may occur during the implantation process of Western-based laws in non-Western societies. This then makes possible to point out alternative ways, other than the systemic process of law making, that laws can be developed. Natural law is the most fundamental idea in understanding the relationship between the law and people. As social beings, members of a society normally create their unique ways in dealing with one another through norms, values, customs, standard, similar phrase. This allows the sociology of law to explain how laws and society are related. Further, it is possible to find the uniqueness of law through legal culture reflected in anthropological perspectives. The flow of legal culture strain is later presented from historical studies to understand the process and development of how law has been changed through different time periods. The reformulation of indigenous laws is also presented to better recognise non-Western cultural identities.

At the end of the Chapter II, I will emphasise the focal point on international laws – the *WH Convention* and the *ICH Convention* – together with a specific law – the *UCH Convention* – for protecting underwater cultural heritage. These UNESCO Conventions are drafted in order to set up a common ground for state parties to protect and safeguard both the tangible and intangible cultural heritage whether on land or underwater. It is important to note the strong European influence in these laws.
The dilemmas, problems and possible solutions are raised that can encourage community participation.

In Chapter III, in addition to the Indonesian case study, more cases from different countries – Zimbabwe, Canada and Australia – are added to illustrate respective traditional practices concerning heritage safeguarding and issues that occur when such practices have been ignored.

In Zimbabwe, a recent research conducted by Siamon and Violah Makuvaza (2012) demonstrates unwritten laws[8] on heritage protection at Matobo Hills prior to the arrival of Europeans and the introduction of written laws[9]. European-based laws only protect the physical aspects of the heritage but cast away traditions and beliefs. The study indicates that Matobo Hills and its people have been alienated since the colonisation period in late nineteenth century. The Hills were developed into a National Park for only recreational and educational purposes. The activities mostly served the need of the new settlers. The protection by traditional practices was said to be deterioration of the site. Therefore they were not allowed by European laws. As such, the practices were replaced by scientific programmes. As a result, the local people who possess tight connections with the natural and cultural heritage in the area had to be evicted. Attempts to claim back their lands and lives have caused wars and killings. Up to the present, their hopes have not been fulfilled yet.

Similar to the Zimbabwe heritage, sacred places of indigenous people in Canada also needs close attention. Besides stunning landscapes and bountiful flora and fauna in the Fraser River Valleys, Sto:lo people are living their lives reciprocally with the nature. To understand how people perceive their lands as an integral part of their lives is difficult to explain, as they do not have specific descriptive words. However, according to a study by Gordon Mohs (1998), there is a wide range of site types: transformer site, spiritual residences, ceremonial areas and burials among others. Sacred areas can be found throughout the woods. Furthermore, conflicting ideas regarding heritage management plan are also pointed out. Instead of beliefs and spirituality, scientific-based protection and conservation have been legally introduced and strictly implemented. Failure to address the spiritual values of the forest by the British Columbia government concerns the Sto:lo people as it is difficult to maintain their rituals and beliefs outside the reserve areas.

Issues of indigenous people who live in their lands before the advent of colonialism are not so much different. In Australia, Aborigines also share this experience. In the middle of the massive central desert is a huge sandstone, Uluru or Ayers Rock, where Pitjandjara, an Aboriginal tribe who lives nearby, possess a strong belief in its sacredness and as a symbol of creation. Every groove, waterhole and cave contains spiritual significance in connection with their ancestral spirits. The mythical stories about the rock is part of the group's oral tradition and have been handed down from generation to generation. They live simply as a part of nature and their lives remain rather unchanged. The work of Charles Mountford revealed the mysterious lives of the Aborigines that were completely different from Europeans'. When the Europeans came with their modern technologies and new ways of living, it caused a significant interference

[8] Unwritten form of laws can be presented as traditions, customs, norms and the like. Permeating in way of life, the law is accepted and believed by members of a society.

[9] Written laws, herein, are referred to code laws which are created in systematic process or codification.

to the Aborigines' way of live. In late twentieth century, the Commonwealth government of Australia issued legislations to protect heritage of Aboriginal people. The most significant is *Aboriginal Land Rights (NT) 1976 Act.* The result, however, is that the physical features of nature are separately protected from culture and social values. The misinterpretation and lack of understanding of sacred sites by archaeologists and scientists has imposed limitation on the people to protect their resources by traditional practices. Until about the last 50 years, the rights of Aboriginal tribes related to their lands and culture have been increasingly acknowledged. It is an offence to disturb and desecrate the sites located within the Aboriginal Land Trust or Aboriginal Freehold Lands. It seems that the rights to lands and sacred sites of Aborigines in Australia are in a better situation than other case studies.

Today, it becomes clearer that approaches in protecting heritage are diverse and complex. Indigenous people throughout the world are shouting for their rights to interpret, present and manage their resources in their own ways (Mountfort; 1965; Mohs 1998; Makuvaza 2012). However, it is not possible to turn back time and take everything back. Worlds – of indigenous people and foreigners – have to move on together. Protection by systematic laws has advantages in terms of creating a common understanding about heritage and its safeguard as well as an enforcing of strong legal punishment to violators. Simultaneously, spirituality and sacredness of the sites must be recognised for a better heritage protection. I also discuss about this global movement in Chapter IV. To conclude this part, I suggest a possibility of integrating traditional knowledge into current laws.

Chapter V discusses the observations of contemporary heritage management trends through some international conventions. Lastly, in Chapter VI, a conclusion is reached to help wrapping up the main idea and answer the research questions.

I.5 Benefaction of the Research

Essentially, the research ambition is that the hypothesis on formal and informal legal integration will be useful for the heritage laws and management systems that are already in place in many countries. Because the restrictive ways of protection alone seems not to be effective enough to protect cultural heritage, other practical considerations should be taken into account to increase public interests and government responsibility on the importance of indigenous heritage and its safeguarding. Hopefully, the incorporation of these elements can be one of the ways to make heritage laws more effective as it will be easier for local and indigenous people to understand and conform to the laws as way of life. To a greater degree, the results of this research can be of benefit to the sustainability of cultural heritage resources.

I.6 Motivated Cases in African Heritage Management

Striking cases in Africa regarding heritage management were presented in the ICCROM report of 2009 (Nadoro et al. 2009). The study focuses on the legal frameworks regarding the immovable cultural heritage in the English-speaking sub-Saharan Africa. The research shows an abundance of inherited traditional ways of heritage protection in local communities that has been passed down from generation to generation as part of the society's culture. Prior to the introduction of European laws, the traditional protection had been performed in conjunction with people's life ways. Unfortunately, these are frequently ignored in Western-based laws on heritage. In addition, the sense of ownership has shifted from the local community to the government institution. A result of colonisation is that the heritage laws have excluded indigenous perceptions of heritage. This has become an issue in Africa, that among other factors, the government fails to enforce the law effectively thereby depriving the local people of their rights. It is stated that this is one of the reasons why the African heritage laws lack effectiveness and places the African cultural heritage in danger (Nadoro et al. 2009).

Chapter II

How (to make) Heritage Laws Work

II.1 Theory of Law from Various Approaches

Due to difficulties in enforcing heritage laws effectively, illegal exploitation of archaeological heritage happens continuously. This seems to be one of the most pressing concerns in heritage discourses. In many countries including the European community, laws or legal system related to heritage protection does not seem work well in reality[1]. The problem is set aside and other strategies thought to be more effective are taken into consideration like awareness raising and capacity building. Nonetheless, in doing so, heritage laws are considered focal parts to include such activities into the formal framework. To speak of this issue is not to blame on legislators for not making heritage laws more efficient. Instead, I aim for attention from lawmakers and heritage managers as well as those who are interested in this topic to look at this dilemma a bit more carefully. Therefore, in this chapter, theoretical approaches together with non-Western perspectives toward laws in general will be presented to learn how the laws should develop and function. This makes it possible to describe the Eurocentric influence in international conventions with regard to heritage protection to indicate missing crucial elements of laws, such as social and intangible aspects.

Spirituality and sacredness embedded in nature, landscape and cultural heritage have created unique cultures and beliefs in non-Western societies prior to the invasion of the Europeans[2]. At that time however, these elements were not recognisable to European eyes. They only appreciated the physical appearances of cultural heritage sites as the results in heritage laws. Yet, is this kind of law the only way to have the heritage protected? It rather seems to be a prolongation of the Age of Enlightenment in seventeenth century that stretched down to the twentieth century and up to the present (Alott 1980). After a few centuries, doubt has yielded to introspective enquiry: How effective are heritage laws? What factors make the laws incapable of being fully and effectively applied? Are there other forms of law, such as norms, customs and morals applicable in a particular society? Or the rather extreme statement is that without codifications there is no law at all. However, now it has been slightly proved that the triumph of legislated laws over traditions and custodianship in colonial period rather

[1] Mentioned in session A17: Managing the Archaeological Heritage: Perceptions and Realities, the recent European Association of Archaeologists 18th annual meeting held in Helsinki, Finland from August 29-September 1, 2012.

[2] See case studies in chapter III of this thesis.

creates limitation to effectiveness of such laws and have the laws stuck into a linguistic battle of technical terms.

In the next chapter, the legal situations of heritage law in sample countries with a colonial past will be illustrated. But before going further, it is necessary to point out some of the debates on definition of law given by scholars from various approaches, such as sociology, anthropology, history and legal positivism. This allows some of the fundamental thoughts from diverse aspects of law in general to be laid down. Then, for the purpose of this paper, I will narrow this discussion to the legal issues on heritage management in the international level.

'What can be made into law?' It is not easy to formulate one single answer to this question. Many theories have been continually developed that aimed to indicate elements of law from various approaches. However, it does not seem possible to give a definite solution. Common usage of the term 'law' is a set of rules whether in written or unwritten form. It is used to define what is right or wrong (Friedman 1975, 1-5). Still, the term 'rule' is as vague as the law itself. A further look into the origins of law says that it is crucial to first consider natural law. The development of advanced science and the rise of complex states soon influenced modern legal theory in the seventeenth century onwards.

II.1.1 Law of Nature

The Greek philosopher Plato introduced the law of nature that is the belief in the being of things as something eternal and unchangeable (Hart 1961, 181-189). It is the truth of life and cannot be changed like every man needs to eat and sleep. This principle has an effect on legal theory such as the moral needs of humans. During that period, the law had to be in line with morals. Later on, Locke's formulated the empirical concept, in which he looked into the natural world with a different perspective and argued with Plato's doctrine of innate ideas. Locke agreed with this concept but he pointed out interestingly that knowledge was a matter of fact derived from experiences. It is what he called 'perception' (Friedmann 1967). According to this, the human being was distinguished from and greater than any other living things by their rational minds (Hart 1961, 181-189). The empiricism concept weakened the former conception of this metaphysics. Legal positivists such as Austin and Kelsen later adopted Locke's idea (Friedmann 1967, 253-255). The basic notion of legal positivism is that the law is the coercive order that superior men make and use to rule over others. But the idea also extracted law from morals. To bring up these paradoxical ideas is nothing more than to study law and morality. Law, whether it is the discovery of humanity or man-made compulsion, has no clear-cut distinction between them. It is therefore worthwhile to look at some points in its relations.

II.1.2 Positive Law

Positivism in legal context refers to secular laws made by men and alienated from morality that are often seen as opposition to natural law (Hart 1961, 181-189). As a result of positivist turn in the nineteenth century, codification and institutional process were used to systemise, formalise and clarify the laws.

Indeed, the debate between positive and natural theory of law has been continuing for nearly two and a half thousand years and is still going on. The two great Greek philosophers, Plato and Aristotle, who made great contributions to Western thought in general and legal theory, insist that law is embodied in morals. Although this idea was downgraded during the Age of Enlightenment, it re-entered into the field of law during the late nineteenth century, in order to bridge the gap between law and morality made by positive law. Due to a range of social crises that took place in this period, Friedmann (1967, 152) explains that it became clear that there were many inequalities and unsolvable problems. The need for natural law revived the search for a moral guide that is higher than positive law. In other words, positive law has to conform to the modern principles of natural law. This relates to what Aristotle argued, that man is part of nature, as well as distinct from nature by virtue of a being having reason. By doing so, he demonstrated his belief in the rational ability of man that shows the relationship between human law and morals that can be discovered by reason.

II.1.3 Sociology of Law

From a sociological viewpoint, man is also a social being who live in groups, i.e., in a family, village, community. Hart (1961, 189-195) presents the idea of 'Truism' in the *Concept of Law*. According to human nature, the fact is that human is: viulnerable; of approximate equality; limited altruism; limited resources; and with limited understanding and strength of will. These flaws indicate that humans are imperfect. Therefore, to live together peacefully and securely, human beings set up rules or agreements to maintain society in order. Such rules or agreements however, should not be set arbitrarily. It is the society that forces a change in law. The notion of legal sociology is that the law is a product of society. The development of law in each society results in unique legal solutions. This is why different societies have specific reactions to behaviours or conduct of individuals. Inversely, it does not mean that every individual act could have a bearing on law. Rather, such act has to be so overt and constant that it can be conceived by and imposed on members of the society. Additionally, Friedman explains that social theory can reveal the imprint of social forces in living law but not directly. Social forces should be expressed in form of demand by a dominant group (Friedman 1975, 144-150). In this case, a change in law will occur.

The study of sociology departs from the assumption that every society creates its own systems to settle disputes by establishing norm-changing mechanisms and procedures of enforcement. In some societies, people prefer to live under informal law - such as traditions and norms – as against formal law that appears as organized institutions showing the strict hierarchy of power and command. Other than legislation, Ross (1969) uses term 'social control' in a broad sense. It is including, but not limited to, public opinion, religion, education, custom or even art.

Additionally, Horwitz (1996) adopts a normative conception of law that defines social control as a specific attempt to influence deviance and conformity. To make social order enforceable is, more or less, the same as formal legal system. That is, to have sanction procedures. He argues that social control is an informal process of social order responding to normative violations. Typically, people may use common sense to react to deviance prior to formal law.

Moreover, people will often respect rules of morality (Reid 1980). Styles of social control – on the basis of penalties, compensatory, conciliatory and therapeutic – can vary according to the type of harm. However, social norms are not objectively from nature but are a social creation (Horwitz 1990, 8-9). They are often ambiguous. To be more precise, no form of law can survive without consensus and 'shared norms'. These can create understanding of law among people. Friedman illustrates that 'shared norms' is some kind of morals containing substantive quality to legitimacy of law. As said in *The Morality of Law*, Fuller (1964, 33-38) indicates eight ways of lawmaking failure. One of them is that lawmakers fail to make rules understandable.

In addition, the nature of informal rules of conduct or what Hart (1961, 89-96) called 'primary rules of obligation' has some frailties as well. He argues that rules in small communities are static, uncertain and inefficient. As for a remedy for these defects, formal law is called to generate concrete criteria on a conflicting situation. Although the process of lawmaking is elaborately developed on a rational basis, from a sociological point of view, it cannot be divorced from social concurrence. The development of law in each society can be understood by members of that particular society. Thus, the separation of law from social aspect can cause a lack of clarity and conceivability of formal law. This, among other factors, can lead to legal ineffectiveness.

Although some positivists and naturalists deny the sociological concept of law, it does expose a social function of law as a normative quality of conduct. This gives room for sociology in the legal domain. However, in order to find the concrete norms of conduct, a study on history and development of a certain society must be carried out. The extent to which actions are evaluated through normative criteria varies across societies, historical eras, groups and individuals (Horwitz 1990, 10).

II.1.4 History of Law and Anthropological Perspectives

Other aspects that should not be overlooked are historical and anthropological approaches to law. Law is changed according to time and space. Pound (1923, 1) has noted that 'law must be stable and yet it cannot stand still'. It can be said that this is a somewhat paradoxical expression but can be unified by historical apprehension. Hence, the study of legal history and development is considered. Influenced by the legal history school of Savigny, one of his statements is that laws are found and developed uniquely within society. In other words, people in each society have shaped their own legal habits, creating uniqueness of law (Friedmann 1967, 211).

The term 'legal culture' appears from an anthropological viewpoint. Benedict (1946) refers to more or less consistent patterns of thought and action that are connected with law. Chiba (1988, 85-91) advanced the concept of the cultural characteristics of law, which is used by recent scholars such as Friedman and Ehrman. According to them, legal culture is strongly interrelated with societies. For example, the French Civil Code is a product of the French Revolution. It is the consequence of political factors that stimulated uniquely legal developments in French society. This explains why the introduction of the new French Code to German states was vigorously opposed by scholars like Savigny and Montesquieu, who believed in the harmony and firm interrelationship between law and society.

II.1.5 Laws in non-Western Societies

In 'Asian Indigenous Law', Chiba (1986, 1-9) offers 'the three-level structure of law' theory that divides laws in non-Western countries into three types: official law, unofficial law and legal postulate. In non-Western thought, Chiba (1988, 85-91) developed the term 'identity postulate of indigenous law,' which can be applied to Japanese as well as in other societies, particularly non-Western. It works to orient people to make choices as it gives them tools to reformulate indigenous law and impose foreign law in order to maintain their cultural identity and independence. The changes of identity postulate caused by the transplantation of modern law are probably the most serious for non-Western peoples. During the time of European invasion, the Western-style laws became widely spread to non-Western societies. It created an immediate change in the receiving countries regardless of whether they voluntarily adapted or were obliged to accept. This onrush of legal resettlement led to both theoretical and practical problems (Chiba 1988, 85-91). To minimize the legal issues, non-Western peoples had to integrate their own legal culture within Western-based legal systems for better understanding of law.

To illustrate this viewpoint, African cultural heritage context will work. It is where traditions and cultures are obviously encountered by the adoption of foreign laws. Misunderstandings of heritage definition provided in the European-based legislation can

be found for example, with regard to African immovable heritage. In general, African heritage always has at least two dimensions, spirit and matter (Eboreime 2009, 1-5). But the foreign rules that were imported in the time of colonisation ignored this spiritual value of the heritage. After the country's liberation, Africa's independent government proclaimed the principle of continuity in the legal domain and the negligence of heritage spiritual value is still going on (Negri 2009, 7-10). Furthermore, a sense of heritage ownership shifted from the communities to the official authorities. As a result, the traditional and customary mechanisms recognised by the African society prior to the European occupation were destroyed and local communities became alienated from the use and protection of heritage. In this case, the alienation between the local people and their heritage was the result of the heritage law ineffectiveness in Africa as formal law has been less effective in heritage management than it was hoped for. People hardly obey the laws since the rules does not correspond with their way of life.

II.2 Eurocentric Views in International Laws and Relevant Documents

The local struggle that emerged from the establishment of non-Western concepts in heritage laws that were based on the Western legal system are seen throughout the world even at the time of post-colonialism. The Eurocentric view of heritage laws – valuing heritage on the physical features and on scientific grounds – still has a deep root not only in former colonised countries but also on the international stage. For example, the laws are visible in three of the main heritage conventions of UNESCO: the *1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (WH Convention),* the *2003 Convention for Safeguarding of the Intangible Cultural Heritage (ICH Convention*) and the *2001 Convention on the Protection of Underwater Cultural Heritage (UCH Convention).* To study on this point, definition part of heritage laws is crucial. As for any of formal laws, definition aims to define boundary to a subject whether it is in the scope of the legal application. Therefore, in this case, I mostly consider the definitions of cultural heritage given by these Conventions and, if necessary, other relevant components like Operational guidelines, Annex and Documents.

WH Convention:

Since 1972, when this convention was adopted, it was received with great success as 190[3] out of 193[4] states ratified the convention up to the present year (2012). It shows the concern and importance of the value and significance of cultural heritage sites all over the world. Other than the sites themselves, 'cultural landscapes'[5] inclusively mean non-physical elements such as the human society and their settlement over time. Further, in the selection criteria of the World Heritage List however, it became clear that monumentality and aesthetic values play a central role, as illustrated by the use of the concept 'masterpiece'[6] and the condition of 'authenticity'.[7] Therefore, the issues of nomination procedure and criteria are still heatedly debated.

Furthermore, the status 'World Heritage' will only be granted to heritage with 'outstanding universal values' (Articles 1 and 2) while informal indigenous knowledge and practices are considered as primarily a backstage to tangible heritage. In other words, heritage significance under these provisions exclude community values and primarily focuses on universal values. The new values added to heritage are mainly based on aesthetic and scientific points of view. These selection criteria facilitate more concrete and global idea to heritage but disregard people's commitment to heritage.

ICH Convention:

Due to variety of heritage definitions around the world, the scope of the concept of heritage has later on broadened and started to cover many aspects of heritage significance, ranging from material to environment and social values. As a consequence, the *ICH* Convention was adopted in 2003 instead of extending the scope of 1972 *WH* Convention. This Convention of 2003 considers the importance of intangible cultural heritage as possessing a flexible and dynamic nature. As a result, the selection criteria tend to avoid risk of unchanged form.

An example is the *Representative Lists of the Intangible Cultural Heritage of Humanity* (Article 16) that was established as a counterweight to the idea of universal and

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[3] The latest updated (on September 19, 2012) of the States to the Convention. See http://whc.unesco.org/en/statesparties/ (accessed on November 30, 2012).

[4] Total of independent sovereign states that are the member of United Nations. See https://www.un.org/en/members/index.shtml (accessed 30 November, 2012).

[5] Definition of World Heritage, paragraph 47 of Operational Guidelines for the Implementation of the World Heritage Convention adopted in 2008. See http://whc.unesco.org/en/guidelines (accessed 30 March 2012).

[6] Selection criteria for outstanding universal value (criteria i), paragraph 77 (i) of Operational Guidelines for the Implementation of the World Heritage Convention adopted in 2008. See http://whc.unesco.org/en/guidelines (accessed 30 March 2012).

[7] Report on the Conference on Authenticity in relation to the World Heritage Convention held in Nara, Japan, November 1-6, 1994. See http://whc.unesco.org/archive/nara94.htm (accessed 20 October 2012).

outstanding values that led to hierarchy and fossilisation among diverse forms of intangible cultural heritage (Smeets 2004; Noriko 2006). More than that, the use of the term 'safeguarding' in Article 2 paragraph 3 of this Convention shows an aim to ensure the continuity of traditional knowledge and transmission of intangible cultural heritage protected under this provision. Essentially, a democratic approach to have the community playing a role in heritage safeguarding can be seen throughout the Convention, in particular, Article 15. This allows and ensures participation of communities, groups and individuals to take part in safeguarding activities of the heritage at the national level.

However, considering the definition in the second paragraph of Article 2, intangible cultural heritage falls into particular domains and limited to oral traditions and expressions; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship. Nothing in this provision expressly states the assurance of the protection of intangible cultural heritage in relation to tangible cultural heritage, or to be more specific, traditional practices to protection of archaeological heritage. Therefore, a suggestion to work in collaboration with other legal instruments, namely the ICH Convention, Operational Guideline (2008) and the Nara Document will be discussed in chapter IV.

UCH Convention:

The advancement of modern technology today enlarges human ability to search for cultural remains in unusual surroundings like under great sea depths and remote islands. This makes a bigger chance for researchers to reveal more secrets of the past and share the knowledge with others. But this situation is not always simple and easy. Specific laws geared to protect heritage found under water is needed to oppose improper and illegal activities like looting, salvaging and hunting for ancient treasure. it is therefore essential to have laws that protect underwater cultural heritage (UCH). It is in this spirit that the UCH Convention was enacted.

Unlike the two Conventions above, this law is free from the 'list' and 'masterpiece' system. The model of this Convention is obviously different. Still, according to the definition of underwater cultural heritage stated in Article 1 of the Convention, it is limited only to the physical elements of the this kind of heritage such as structures, buildings, artefacts, vessels and objects. The heritage's significance lies in its cultural, historical and archaeological values. Again, this Convention shows the negligence of the abstract elements attached to the heritage like beliefs and sacredness of the sites. Moreover, traces of humans have been singled out from not only physical materials but also their connection with the maritime landscape and living people. That is to say, people who lived nearby the coastline normally have their beliefs of sacredness in the sea that are rooted deeply in their way of life. But this value is not addressed in the Convention.

Furthermore, this Convention strongly promotes the protection of heritage exclusively on science-based methods. A new legal invention of the Convention is that it has an Annex attached to it as an integral part of the law. This will be used by state parties as restrictive guidelines for activities directed at underwater cultural heritage due to concerns of increasing commercial exploitation of the heritage. Thus, non-scientific researches are slightly incompatible with the Convention. Although public awareness is clearly borne in Article 20, the performance of traditional practices by the local community to protect their intangible heritage is not included. In Chapter IV, suggestions to reinterpret this Convention will be taken into account.

Chapter III

Traditional Practices on Heritage Protection in Non-Western Countries: Case Studies in Indonesia, Zimbabwe, Canada and Australia

In this Chapter the focal attention centres on the traditional practices related to heritage management and protection in non-Western societies in – Indonesia, Zimbabwe, Canada and Australia. To do so, it is worthy to look at their history of politics: how were the Western interpretations of heritage laws introduced in the regions? And what are its effects on the management of cultural heritage up to the present? Moreover, some aspects of the imported legal systems that are conflict with the local systems of heritage protection in the receiving countries are pointed out.

III.1 Indonesia: USAT Liberty Shipwreck

General Information

Fig. 1 Geographical map of Indonesia

Source: retrieved from http://www.geographicguide.com/asia/maps/indonesia.htm (assessed 28 October 2012).

Due to the richness and wide diversity of its cultural heritage, the Republic of Indonesia has been selected as a case study in the Southeast Asia region. Geographically, it consists of nearly 20,000 islands[17], with five main islands (Sumatra, Java, Kalimantan, Sulawesi, and Irian Jaya) and numerous islets. The capital city is Jakata. A vast land area of Indonesia that lies from the west to the east is located between two oceans (Indian and Pacific Oceans) (see Fig. 1) and surrounded by four continents: Asia, Africa, Australia and South America. This geographical information shows that people lived in isolation and is separated by natural barriers that can account for the cultural diversity in Indonesia. Ethnic minorities are also innumerable, e.g. the *Toraja* in central Sulawesi, *Dayak* in southern Kalimantan, Tanimbarese in the Southeastern part of the Maluku Province, among others (Frederick and Worden 2012). Each group has their own unique traditional practices regarding their heritage. At the same time, the strategic position of the country as sea-lane location has fostered inter-island and international trading. Therefore, since the seventeenth century, Indonesia became an important destination of European voyages in the Far East.

History and Reception of European Law

Indonesia is a good case study because it has a lot of European (Portuguese, Dutch and British) influences mixed with local traditions. This study, however, concentrates more on the Dutch legacy as it left a vast and profound impact on the Indonesian society and its heritage. Moreover, it is possible to enumerate the theoretical problems of the already in-placed law. Through the colonial law, the separation of people from their heritage has created a gap between the people and the law. This likely happened during Dutch occupation, the legal introduction period. Even after the Indonesian liberation in 1945, there still remains a misunderstanding between the local people and the heritage laws. For these reasons, research on legal pluralism particularly in the heritage field is facilitated.

Indonesia and the Netherlands have been in a firm relationship since the seventeenth century. The Dutch VOC (*Vereenigde Oostindische Compagnie*) enjoyed its great commercial success until its bankruptcy coupled with political frustrations in Europe during the late eighteenth century. In the nineteenth century, it was the great impact of French Revolution. The rise of Nationalism and the constitution of codification have spread out all over Europe as well as other regions through colonisation. The Dutch government, so, had re-established its presence in Indonesia but by this time, the trading

[17] ASEM Development conference II: Towards an Asia-Europe partnership for sustainable development. 26–27 May 2010, Yogyakarta, Indonesia. See http://ec.europa.eu/europeaid/where/asia/regional-cooperation/support-regional-integration/asem/documents/10.03.10_info_on_indonesia_finale_en.pdf (accessed 10 October 2012).

policy had turned into a process of exploitive political, military, and economic integration (Frederick and Worden 2012).

Further, in the late nineteenth century, the most influential idea in Europe was the Social Darwinian viewpoint that supported the concept of imperialism. It emphasizes in the concept of survival of the fittest in order to dominate over others. This led to the struggles between the national and racial groups as well as the colonisers and the indigenous people. Within the colonial context, the imperial concept had an effect on the early forms of heritage management and was used to justify sovereign titles for the superior society (Willems, 2009: 649-658). Therefore, power relations between the colonisers and the local people were asymmetric.

Moreover, the reception of European law in which regulations depended on state (colonial government) was more likely to regulate stewardship of heritage management by means of a formal system. This legal knowledge has made a great expansion to many parts of the world during the time of colonisation. Heritage resources which local people previously recognised as sacred places were eradicated and replaced by new knowledge of science, conservation and physical preservation. The separation of people and heritage site was to avoid destruction to the ancient structure. Consequently, the role of the local people in heritage protection and usage diminished. This type of heritage management in Indonesia can also be recognised in their heritage laws.

Unlike in Western societies, the role of religion – Buddhism, Hinduism, Islam – in Indonesia was vital and had made a considerable contribution throughout the archipelago in the period before and after the European expansion. For instance, the Indonesian people lived under *adatrecht* that could reasonably be rendered as 'customary law' (Burns 2004). According to the natural theory of law, this type of unwritten law was tied to moral and religious matters and enforced by social control as sociological views. Nevertheless, the Dutch administration saw *adatrecht* as a myth rather than a law in the perspective of a Western-based law. This could be explained by the conception of extreme legal positivism and the separation of legal reasoning from normative rules. Hence, the superior government disposed formal regulations over the colony.

As seen in the first Agrarian Act (Land Law) of 1870, private ownership system of land was constituted. According to *adatrecht*, the disposal of land was a communal right. The village itself had the right to control over the land on behalf of the community (*Andasasmita*). But the colonial government now claimed the constitutive right to land administration instead of the local Indonesian communities. This is an example of different rights granted by different sources. The former is the right from *adatrecht*. It was understandable for local people because it had been developed within the society and people consented to its rules. Whereas the latter is the legal right achieved by governmental power during the colonial period. As for the historical theory of law, the legal development was interrupted. Eventually, the Act was amended several times within the period of Dutch occupation and even after the independence, where it had to be

adjusted as a consequence of the local people's right to reclaim their land. This shows that the fundamental needs of locals and value systems could not be neglected if the Dutch sought to profit from trade and industry in Indonesia. It became clear that the colonial government had to adjust itself to reach the reciprocity and mutual benefits of colonial lands.

Similarly, regarding the management of heritage resources in Indonesia, the Dutch *Hoofd van den Oudheidkundigen Dienst* (the Head of Heritage Service) (*Oudheidkundige Dienst in Nederlandsch-Indië 1938*) used scientific archaeological methodologies to replace traditional belief systems and to protect the indigenous heritage. This was written down in the Monument Act that was enacted in 1931[18] (*Monumenten-ordonnantie stbl 1931 no. 238* amended in 1934) by the Dutch government. Under this regulation, heritage referred to man-made, natural remains and site (Tanudirjo, 2007) and would be protected on the basis of formal and scientific criteria.

Although *Indisch-archaeologen* (Indonesian-archaeologists) were part of the scientific team (*Oudheidkundige Dienst in Nederlandsch-Indië 1938*)[19], local people in general were excluded from their heritage as they were not considered professional scientists. Moreover, a number of artefacts of highly social and spiritual values – *Kris* (dagger) and religious statues – were taken away from the place of origin and transferred to the mother country, in this case the Netherlands. This implied that local people were no longer able to pay respect to those objects. This indicates that the sense of ownership shifted from the local people to the superior authority. Tarekat[20] states that "nowadays, Indonesia laws separate tangible and intangible heritage but local people are trying to introduce new idea that these heritage cannot be separated". As a result, the Act of 1931 had major amendments in 1992 and 2010 respectively. However, she adds: "it is very difficult to convince the government. It lasts for years. But we are getting closer."

Heritage Management in Indonesia

Nowadays, people in the big cities such as Jakata and Surabaya conform to modernisation and urbanisation. As a result, they are not bound with strong traditional ways of living. For example, in the context of Surabaya, Wijayanti[21] explained that most of the existing legacies are from the Dutch colonial government that are not related to the norms and customs of the communities. At this point, it can be said that globalisation has a negative effect on the traditional practices toward cultural heritage in the cities.

[18] This Act was issued even before the first heritage law in the Netherlands itself that is in 1961.

[19] Unofficial translated by Drs. Jean-Paul Corten, a heritage officer at *RCE*.

[20] Interviewed with Hasti Tarekat, a Representative of Indonesia Heritage Trust in the Netherlands on April 13, 2012 in Amsterdam.

[21] Information from Dyah Retno Wijayanti, a Temporary Researcher for Surabaya's City Development Planning Board.

However, the fact is that there was no unity of action among the Indonesian states. After the liberation, it became clear that in many parts of Indonesia, old traditions still operate strongly in the daily lives of people in the archipelagos, as agreed by all the Indonesian informants and heritage field is no exception.

According to the questionnaire results, government laws are full of technical terms informed by Kubontubuh[22] and there is a severe lack of human resource to implement and enforce the laws according to Ridwan[23]. Moreover, another interesting point mentioned by Wijayanti is the government's lack of responsibility regarding history and cultural heritage. This is an important concern since the government is the most powerful stakeholder for heritage protection and management as well as the prominent parameter in law enforcement and policy making. Cultural heritage in Indonesia can be placed into danger if the government fails to act on this.

More than that, all Indonesian heritage officers report that local people are eager to participate in heritage management planning. It is, however, unclear what role the community is portraying. Although the local authorities confirm the recognition of the traditional practices of cultural heritage in most parts of Indonesia, no precise integration of the formal system is done thus far.

Historically, the local people have been excluded in the formulation of formal law in the field of heritage. They have not been able to conceive the law in the way it *ought to be*. That is to say, the law aims to promote scientific methods to protect heritage but this is not understood by the local people. Meanwhile, local people find it difficult to obey the law as it contradicts with their way of life and differences in the perception of heritage.

Presently, there is a major revision of Republic Act on Heritage 1992[24] to resolve some legal problems. However, it is too soon to say whether the new law can improve the heritage protection in Indonesia. Therefore, in this thesis legal issues mentioned are based on the result of the previous provision. The Act of 1992 is said to be ineffective. Its legal weakness is recognised by the Indonesian heritage authorities (Sudarayadi 2011; Ridwan 2011; questionnaires & interview) because illegal activities are still ongoing throughout the Indonesian archipelago. This is illustrated in the case of the Belitung wreck in the west Belitung Island. The site is important as it reveals archaeological evidence showing a direct trade route between the Indian Ocean in the west and China in the east. Unfortunately, the site has been severely damaged by looting and salvaging. Among other causes is the lack of awareness of local people about the value of the site, and the ineffectiveness of the law (Sudarayadi, 2011). There are, however, examples of good practice in eastern Bali where the Liberty shipwreck is well protected by the local community.

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[22] Information form Catrini Pratihari Kubontubuh, an Executive Director of Indonesian Heritage Trust (based in Indonesia).

[23] Information from Nia Naelul Hasanah Ridwan, a Maritime Archaeology Research Scientist for Research Institute of Marine and Coastal Resources and Vulnerability, Ministry of Marine Affairs and Fisheries Republic of Indonesia.

[24] Undang-Undang Republik Indonesia Nomor 5 Tahun 1992 tentang Benda Cagar Budaya.

Management of USAT Liberty Shipwreck by Local Community

About two hundred metres from the eastern Bali shoreline, is the location of the *USAT Liberty* shipwreck lying on a slop at approximately 9-30 metres under water (Ridwan 2012). A Japanese submarine torpedoed it down during World War II. Later, an attempt of site recovery was made but unfortunately it was the earthquake in the area that made the wreck slide off the beach and lies where it is now (See Fig. 2).

Fig. 2 Location map of USAT Liberty shipwreck
Source: Research Institute of Marine and Coastal Resources and Vulnerability, Ministry of Marine Affairs and Fisheries Republic of Indonesia.

The present location of the vessel is in the area of Pekraman Village, Tulamben, Karang Asem Regency in Bali (Ridwan 2011). The local community successfully guarded the ship on the basis of a social-based law. Remarkably, this shipwreck was a commissioned sea vessel during World War II. It therefore seems to have no direct connection with the community. Nevertheless, according to people's basic thoughts of spirituality, the ship still contains spiritual value. It is believably that the site represents a graveyard where a lot of people had lost their lives. As such, the site deserves respect. Moreover, the local community recognises the economic value of the wreck as it is a touristic asset: a wreck for recreational diving. It welcomes an average of 100-200 divers per day (Ridwan 2011). To safeguard the site is also to enrich the economical benefits for the community: local and foreign exchange generation and an increase of employment. These are some of the motivations that propelled the local community to protect this site.

This case presents a different approach to heritage management in a plural society like Indonesia where it is home to more than 300 ethnic groups. And each group tends to have their own ways of heritage appreciation and protection. This reflects the reason why heritage laws become rather useless when law-making institutions have

failed to notice this fact. In terms of law and social control mechanisms, there are always at least two systems in one place: formal and informal forms of rules. Formal is the heritage laws that are based upon Western concepts of legislation. The informal are the ways in which a village or community perceive their heritage and its use. According to the researches done by the Indonesian Research Institute of Marine and Coastal Resource and Vulnerability, a set of rules called '*Awig-awig*'[25] is used to manage the heritage resources within the village boundary. The rules are relevant to the formal law; *Law No. 22/1999 regarding Regional Autonomy* that is already in place (Ridwan 2011). They are the prohibition of harmful activities to the wreck. And the most significant is its enforcement. Social sanctions – from boycott to permanent exile – are inflicted on anyone who commits social violation. In Tulamben, the life of a villager is very much connected to society and religion. One of the social rules states that if one is expelled from the village, the wrongdoer will not be admitted into another community, at least in the immediate neighbourhood, and he or she will be banned from participating in religious rituals. The research shows that these kinds of moral sanctions carry greater weight than physical punishments. This fact was validated by a *Kelian Adat* (community leader) in Pekraman Village Tulamben (Ridwan, 2011).

From this example, it shows that there is no single way to protect cultural heritage in complex society like in Indonesia. Instead, the choice can be a combination of approaches.

III.2 Zimbabwe: Matobo Hills

General Information

[25] 1. No fishing allowed within 100 metres of the shipwreck (1 km. in the present)

2. Not allowed taking the remains of the shipwreck

3. Not allowed damaging the coral reefs attached to the shipwreck

4. Not allowed taking the stones around the shipwreck

5. Not allowed cutting plants around the beach

6. People in violation of the above prohibitions will receive moral sanction, be ostracized from society and not allowed to follow religious rituals.

Fig. 3 Location of Matobo Hills
Source: retrieved from http://www.africanworldheritagesites.org/cultural-places/traditional-cultural-landscapes/matobo-hills.html (accessed 28 October 2012).

The Republic of Zimbabwe is located in southern part of the African continent (See Fig. 3). The land-locked country is surrounded by South Africa, Botswana, Zambia and Mozambique. Although most of the lands are savanna, the country is rich in flowers and shrubs like hibiscus, spider lily, and teak as well as different types of mammals and other reptiles. The grand Victoria Falls can also be found in Zimbabwe. Evidence of human occupation in the country dates back to 500,000 years[26] ago while the emergence of present African people goes back to the 11th century[27] until the present.

The arrival of British South Africa Company led by Cecil Rhodes in 1880s, dramatically altered the African traditional way of life[28]. Modern technology and new ways of living was introduced. Many legislations were promulgated that aimed to dominant over people's conducts. The cultural heritage aspect was not spare, as new heritage laws and management methods were done using European technique and for European needs. The local people were relegated to the lower class and their heritage traditional practices were prohibited. Being forced to move out of their homeland raised the anger of the locals and created ill relationships between the government and the people. The conflict is still ongoing because the promise to have the local people resettled has never been fulfilled.

[26] See http://whc.unesco.org/en/list/306 (accessed 28 October 2012).

[27] See http://africanhistory.about.com/od/zimbabwe/l/bl-Zimbabwe-Timeline-1.htm (accessed 2 December 2012).

[28] Information received from government official website. See http://www.gta.gov.zw/index.php/zimbabwe-in-brief/history-of-zimbabwe (accessed 28 October 2012).

Matobo Hills and Its Historical Background

Fig. 4 Matobo Hills and landscape
Source: retrieved from http://www.campamalinda.com/wp-content/gallery/gallery/Photo5.jpg (accessed 5 December 2012).

Matobo is locally known as 'Matopos' or 'Matonjeni' (Makuvaza 2012). It is located in the second largest city of Bulawayo, Matabeleland South Province, Zimbabwe. The Matobo Hills site is a highlight of the Matobo National Park and has been inscribed on World Heritage List since 2003[29]. It is also famous for its outstanding physical landform where whaleback-shaped mountains abruptly emerged from a flat plain and surrounded by separate hills called 'kopje'[30] (See Fig. 4). The UNESCO World Heritage website[31] revealed that the Matobo Hills are said to be one of the highest concentration of rock art, some of which can be dated back to at least 13,000 years (criteria iii)[32]. It is also home to various flora and fauna. The Matobo Hills and the surrounding areas became and important natural and settlement sites with highly important archaeological resources. Moreover, people who are now living in the area has long-standing association with landscapes like religious traditions as manifested in the rock art (criteria v)[33]. The Hills

[29] See http://whc.unesco.org/en/list/306 (accessed 28 October 2012).

[30] See http://www.africanworldheritagesites.org/cultural-places/traditional-cultural-landscapes/matobo-hills.html (accessed 28 October 2012)

[31] See http://whc.unesco.org/en/list/306 (accessed 28 October 2012).

[32] Selection criteria iii of World Heritage List: to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared.
See http://whc.unesco.org/en/criteria/ (accessed 2 December 2012).

[33] Selection criteria v of World Heritage List: to be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change.
See http://whc.unesco.org/en/criteria/ (accessed 2 December 2012).

has an outstanding universal significance according to natural creation. Humans have inhabited some of the rock shelters in the area since the Iron Age (criteria vi)[34].

Its historical significance lies in the site being a very important place for graves and traditional shrines. The shrines especially serve not only as a ritual ground, but also a representation of ancestral spirits. Presently, the Hills are recognized as a living culture landscape, where their meaningfulness is still felt for local people.

The Roles of Indigenous People on Heritage Management

In nineteenth century, the Matobo Hills was completely seized by foreigners during the British occupation (Makuvaza 2012, 16). The Conflict between the settlers and the local people turned the picturesque hills into a battlefield. Civil wars between local people and government were waged repeatedly until a unity accord was signed in 1987. However, the problems of alienation by the local people are still ever present. The promises of resettlement have never been fulfilled.

Prior to the acceptance of the European laws, Matobo Hills was strongly protected by traditional laws and practices that had a tight connection with beliefs system. Based upon the work of Makuvaza (2012, 9-34), all the trees in the woods were believed to be a dwelling place of ancestral spirits of Mwali or Mwari. Therefore a strict taboo was put in place to prohibit cutting down of trees or logging. Before any exploitation projects on land and in the trees, permission must be sought from the Mwali or Mwari priest or priestess. Wildlife hunting is permitted outside the sacred groves. Wild animals that entered into the sacred areas are also protected from hunters who had then to leave the site.

Moreover, Makuvaza (2012, 16-17) inform that farm management within the society is exceptional knowledge. Farming can be done with some prohibitions. For instance, the swampy area called the 'inyutha' was considered a sacred zone as it was a place used for forecasting rain. No exploitative activities like cultivation of crops are allowed. A bedding and ridging system is applied during the farming period to preserve moisture and prevent its flow and erosion to soils. Domestic animals like cattles were allowed to graze on the 'vleis' or wetland only during the dry months. After the harvest in August, the cattle had to be relocated from the 'vleis' to the field to graze on cereal stalk. After the summer season, the cattle would be moved back to the grazing area again. The rotating use of land may prevent over-exploitation and also allow the natural resources to recover. This is presently recognized as a basic pattern for the implementation of

[34] Selection criteria vi of World Heritage List: to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.
See http://whc.unesco.org/en/criteria/ (accessed 2 December 2012).

sustainable agriculture. Here, the shrines play a role to control the crop cultivation and to indicate rest days and commercial time.

The shrines are accessible throughout the week except on rest days. The sacred place and its environment would be open for visitors only with permission from the official priest and priestess. Some customs like taking off shoes and wristwatches and the removal of money before entering the shrines were done as a sign of respect to the place. Modern and European objects are not allowed.

Failure to follow the rules would result to bad effects to the person or his/her entire family or the whole community. It is believed that the aggrieved spirits will punish the concerned person/s (Makuvaza 2012, 17-21).

Conflicts with the Europeans

During the early period of European invasion, the Hills were viewed in a different way (Makuvaza 2012, 17-21). In the foreigners' eyes, the sacredness of the Hills does not exist. They appreciated only the scenery landscape and relatively ignored the legitimacy of the local people who relies on traditional practices and rituals. Unlike the European laws, the flexible and informal characteristics of the belief and traditional rules were vague and unrecognizable. So the new settlers thought that there were no law to protect the sites and that the African people had never protected their lands.

Based upon the European scientific knowledge, the traditional agricultural practices of the Matobo people was said to be unscientific that caused the erosion of the Hills. A proper management plan of Matobo Hills required the safeguarding of the flora and fauna from local usage. The plan entailed that the Hills were divided into sections: one part for the African settlement and another for the land procurement by the Westerners. The implementation of the plan resulted to the African people being immediately evacuated from the Hills, the land of their ancestors and their home for generations. The people from the Matobo Hills were relocated from the park to the communal areas of Gulati and Khumalo (Makuvaza 2012). Fixed and visible boundaries were built. People were officially isolated from their souls.

Moreover, Europeans considered the local way of life as primitive and uncivilised and needed to be modernised and institutionalised in Western ways (Makuvaza 2012, 17-21). In order to change the people's mindset and displace the old ideas, religion was a key tool. Missionaries began to convert the local people to be Christians. The London Missionary Society and the Jesuits of Sacred Heart set up several missionary stations and churches in Matobo and the surrounding areas such as Hope Fountain, Cyrene, Embakwe among other places. Christianity then became the dominant religion in Matobo Hills and outside of the National Park.

The new way of power accession and formal law-making process were established to administrate the Hills, as well as the whole country instead of the old institution being managed by the village leaders and priest. Many regulations regarding wildlife and forest reserve were enacted, such as the *Natural Resources Act (1942)*, the *Native Forest Produce Act (1975)*, and the *Parks and Wildlife Management Act (1975)*. Other authority bodies such as the *Wildlife and the Forestry Commissions* were institutionalized in order to put the laws in effect. The consequences of controlling the Hills by legislative protection and institutions resulted to the prohibition of traditional practices like wildlife hunting and cultivation. These practices were thought as damaging to the Hills and its resources. In contrast, the Hills were conserved as a park for tourism and enjoyment.

In 1936, a parliament act called the *Natural and Historical Monument and Relics Act* in line with the body of the Commission were promulgated to preserve natural and cultural heritage in the Hills. The scope of this Act was the preservation of ancient historical and natural monuments, relics and other objects of aesthetic, historic, archaeological or scientific values. Although rock art sites, for example, were recognised for their importance and proclaimed as national monuments, the evaluation on the grounds of pure science led to negative effects in relation to the sacredness of the sites. The places where the local people respected are now turned into visitors' playground and barbecue meeting (Makuvaza 2012, 21-22). For this reason, the people have been strongly opposed against it.

As a result of this different viewpoint, when the Europeans completely took over the whole area of the Hills and the entire country, they turned the sacred places into national parks and recreational fields. A major transfer of power and sense of ownership of the natural and cultural resources of Matobo Hills had downgraded the African traditional laws and conservation methods. Modern laws and administrative corps based on Western system was used as a tool for the colonial government to control over people and all aspects of their lives. Moreover, by so doing, the souls of local people had been stolen from their bodies in a metaphysical sense. Now the locals are calling for the return of their spirits.

Since the introduction of the Western-style laws and the occupation of the Europeans, the once peaceful land had been put on fire. Ignorance and disregard to the cultural norms of the Hills management and usage performed by the local people before European settlement in Africa led to a great conflict between the locals and the new settlers. Wars repeatedly happen, causing the loss of countless lives of both sides.

Hope against Hope

A hope to resettle in their home and a chance to take care of their heritage the way it used to be became a fluctuating situation as many peace agreements and promises were given but have never been actually implemented. The spectacular event was during and after lifetime of Cecil Rhodes, a British Representative in Cape Colony. He and his small group of people set up the first indaba with Matabele leaders in 1896. But it was only a verbal commitment and was never fulfilled. Although Rhodes bought a vast track of land and allowed some chiefs and their people to settle in the land, everything untangled when he passed away in 1902. The local people were removed from the land again. It caused serious resentment that became a crucial motivation to declare the war of liberation. Aiming to raise the people's support, freedom fighters promised the Matobo people to bring back their legitimacy to the lands on Matobo Hills. The people, as expected, wholeheartedly agreed with hope and trust. However, their hope was again lost after the independence when a new government came into power paid no attention to the previous agreement. Despite the return of land rights of the Matobo to the people, the government of the post colonization wanted to maintain their status and power, reminiscent of the previous colonial policies.

Up to the present, the Matobo people have to contend not only against the government dominance, but also the modernization that comes along with Christianity, modern economy and the European-educational system. These factors are in conflict with the local people's traditional ways of living.

More importantly, the modern doctrines of the international heritage convention, *WH* Convention, the natural and cultural heritage interests are defined under one roof as heritage of mankind and outstanding universal value. For the Convention to protect such heritage for humanity as a whole means having the international community to care more about the heritage of others as their own. On the contrary, the Matobo people feel that the heritage belongs to them and they want to manage it using their own ways. In addition to this, a chain reaction of the World Heritage status is that tourism becomes a potential source of national income. The promotion of tourism means welcoming more visitors.

A recent attempt to include the local people into their lands again was during the nomination process of the Matobo Hills to the World Heritage List in 1998 (Makuvaza 2012, 24-27). The people were given a new hope of reattachment with their shrines and other benefits from tourism ventures in the park. It is envisioned to follow the concept of 'living heritage'. But the issue flared up again when the government failed to conform to the management plan on the restoration of the local people into the park. The fact is that the Matobo people remains detached and alienated from their cultural and natural heritage (Makuvaza 2012, 24-27). After over a century of fighting since European occupation and even after post-colonial government, the Matobo people have been and are still fighting for their lost souls.

III.3 Canada: Sacred Land of Sto:lo People

General Information

Fig. 5 Map of Canada

Source: retrieved from http://geology.com/world/canada-satellite-image.shtml (accessed 29 October 2012).

Canada is ranked as the second-largest country in the world (see Fig. 5). There are a mix of indigenous inhabitants – First Nation, Inuit and Metis[35] – and Europeans living across the country. According to the archaeological finds, indigenous people have settled down in the area more than thousand years ago[36]. Prior to the arrival of the Europeans, the traditional ways of living of the indigenous people mostly followed legends and oral history. Like other tribes, Sto:lo, one of the First Nation group, has spread on the west coast area, along the Fraser River (see Fig. 6). Their sacred lands are/have been governed under the British Columbia government since the colonial times that has alienated the local people's beliefs from the physical values of the grounds. During the last few decades, the significance and uniqueness of the indigenous people have been increasingly recognized. Living harmoniously with nature and their ancestral landscapes is essential for the Sto:lo people. The tribal council was established on July 21, 2004[37] to

[35] See http://www.civilization.ca/cmc/exhibitions/tresors/ethno/etb0170e.shtml (accessed 5 December 2012).

[36] See http://www.canadahistory.com/timeline.asp (accessed 5 December 2012).

[37] The Stó:lŌ Tribal Council was founded by the 8 First Nations. The Council's mandate, like that of the Stó:lŌ Nation Society, is to provide representation and governance for its member First Nations in such areas as education, social development, community development, child and family services, employment, economic development, health, advisory services, fisheries, Aboriginal rights and title, treaty negotiations and Halq'emeylem. Efforts are now underway to ensure

defend and protect the interests of their tribes in all aspects: culture, education, and economic.

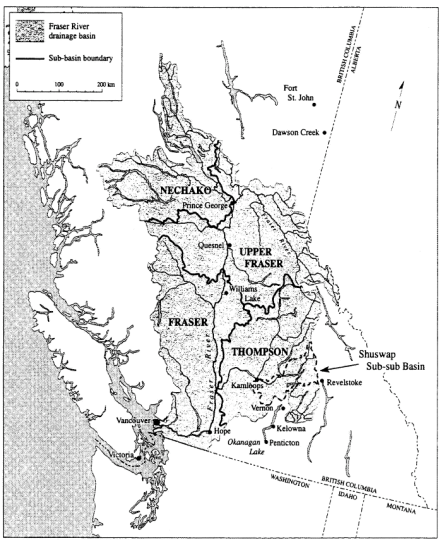

Fig. 6 Map showing Fraser River area
Source: retrieved from
http://www.sciencedirect.com/science/article/pii/S0921800998000329
(accessed 29 October 2012).

Sto:lo People and Their Beliefs

Sto:lo, which means 'people of the river', is a genetic name for the tribal people who communicate with Halq'emylem-speaking language and inhabits Fraser River Valley area in southwestern of British Columbia, Canada (Duff 1952). Since the prehistoric times, material traces of indigenous peoples have been found living throughout the region. According to Schaepe's study (2009), Sto:lo communities settled down around Salish coast at the border of America and Canada from 2,550 – 100 years BP (before the present). They occupied the area long before the Westerners came in during the late 18th century that ushered in the Colonial Era. The people's way of life from the past up until the present is characterized by a very close relationship with nature and its surroundings, especially the river, as seen from the meaning of tribe's name as well as their ceremonies and rituals like first salmon ceremonies and sun ceremonies.

In the past, the traditional land of the Sto:lo had an area of approximately 100 square kilometres, covering the Fraser River and the mountainous areas. Within this territory, sacred places are recognised by the Sto:lo people that has spirits dwelling inside the physical features and located in the entire landscape such as mountains, lakes, trees,

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that all eligible funding is transferred from the Stó:lŌ Nation Society to the Council to enable the Council to deliver services directly to its member First Nations.

See http://www.stolotribalcouncil.ca/ (accessed 23 October 2012).

rocks, pools, hillside and upland (Mohs 1998, 184-188). It is therefore difficult to define the exact boundary in present terms. The young generations would always be taught by the Elders[38] to protect their lands, as it was a place where the ancestral spirits existed that would take care of them.

> "We have a powerful spiritual life and we worship the Great Spirit…This graveyard is still our spirit ground… My Elders are buried here. According to our tradition, they are not just covered with dirt, put in the ground, and forgotten. Their feelings, their spirits feelings, their spirits are with us for life. So, it's important we remember, our Elders are not long dead and gone. Their spirits are still here protecting us…You weren't allowed to make noise, any noise. If you did, you'd wake their spirits up. So it's important to respect our ways, our traditions…It's like cedar trees get hurt, when you break their branches. So, you have to apologise for that when you take from it. Then, the cedar tree understands what it is you're going to do…Indian spirituality is based on respect. Without it we get into trouble. So it's important to identify Indian spirituality for ourselves, to live our life by our spirit, by our spiritual feeling" (Mohs 1998, 190-191).

The quotation is an evidence of the oral tradition from the Sto:lo Elders. It represents the importance of spiritual beliefs in the Sto:lo society and the ways of life relies on the system of respect. In other words, the Sto:lo people treat the spirits of their ancestors with respect.

To understand the Sto:lo spirituality better, it is necessary to acknowledge the concept of Xa:ls, who is believed to be the great creator and the transformer. This is also linked to the beliefs of the tribal ancestors of the Great Spirit or the sun who creates earth and mankind.

In the past, before creation of humans, there was Xa:ls who was regarded as the son of the sun (Mohs 1998, 189-191). Xa:ls as an identity is complex. On one hand, Xa:ls is generally considered as a single male gender. On the other hand, Xa:ls sometimes has a female component. According to the beliefs, Xa:ls travels around the world. His first appearance was believed to be at the Harrison Lake. Sometimes he appears in an animal form as a young bear or with human-like guise. During the journey, Xa:ls would always leave marks that can be seen as geographical formations (see Fig. 7).

[38] Sto:lo Elders are senior and eligible person who are valued for their wisdom. They will pass on story of ancestral belief of the tribe to younger generation. In Gordon Mohs' research (1998) they also contributed these information and knowledge. Following Mohs, therefore, I spell the term 'Elders' with capital 'E' as to maintain the original meaning.

Fig. 7 Sacred 'scratch marks' mythically made by Xa:ls where the first salmon teaching and the fight with Kwiyaxtel took place.
Source: Gordon Mohs, Sto:lo Sacred Ground, In: D.L. Carmichael, J. Hubert, B. Reeves and A. Schanche (eds), *Sacred Sites, Sarced Places* (New York: Routledge 1998), 194.

The legend also believes that the salmon was first given by Xa:ls. Further, Xa:ls also created things like cedar and knowledge such as fish catching methods and weaving. Additionally, Xa:ls was the one who put the world in order and taught the Sto:lo people to pray and pay respect. Consequently, the Sto:lo cultures are very much based upon the principles of respect. They even treat salmons with respect in the form of salmon ceremonies to celebrate the return of yearly return of salmons.

Sacred Sites Identification

Documentation research undertaken by Mohs (1998, 184-207) shows over two hundred identified sites. The methods used were: recording of description and location, field identification and creation of tribal sites. Some information of accorded spiritual values was gathered from the indigenous Elders.

The Sto:lo describes the spiritual significance of the sites as 'spirited spots' or 'spirited places' which are believed to be dwelling places of supernatural forces. The sites also have legends attached to them. In this regard, the spiritual sites can be divided into several types based upon traditional beliefs and ceremonial usages. In this case, I select only some categories in order to build up a comprehensive understanding about the relationship between people and their landscapes. There are many more types of sacred sites that can be categorised: traditional landmarks, power sites, legendary and mythological places, among others

Transformer Sites

The sites are classified according to the legend of Xa:ls whose deed and action had created a number of transformation in the lands. This has resulted in geographical features such as bedrock, large and small boulders, caves, river pools, and even mountains. In total, 70 transformer sites are identified (Mohs 1998, 192-193). Interestingly, they are found in the neighbourhood of ancestral villages and settlement. Most sites have no obvious physical characteristics but are recorded as archaeological sites. Indeed, these sites contain values for the individual like spiritualities and traditional beliefs.

The most revered transformer site is Th'exelis. According to Simon Fraser in 1808 (Mohs 1987, 90), the first white explorer to Sto:lo lands, he was taken by his indigenous hosts to a site where shallow grooves were covered with lichen. The cut marks represented the power of Xa:ls during the battle with his opponent (see Fig. 7) Kwiyaxtel, a powerful medicine man from Spuzzum. Xa:ls sat at the Th'exelis and made scratchings on the rocks with his thumbnail to weaken his enemy. Finally, Kwiyaxtel was defeated and transformed into stone. Also there are many sites that consists of a number of boulders that according to the Elders, are a group of individuals transformed into stone by Xa:ls (Mohs 1998, 192-193).

Spiritual Residences

Spirits such as ghosts, water-babies, thunderbirds, sasquatch, serpent among others are believed to be residing in this type of sites. The sites cover a larger area compared with transformer sites and can be found everywhere in the landscapes like small upland lakes, small river pools, stagnant ponds, caves, and rock formations. It is said in the Sto:lo myths that the spirits possess residual power which can be harmful to unwary visitors. Therefore, visitors should speak to the places to let the spirits know when they come. Otherwise something bad will happen as from story told by the Elders:

> "…Xo:li:s is something that can happen to you at these places if you are not careful…You usually have to speak to these places to let them know you are not the stranger. Otherwise, the power in the place may make strange [Xo:li:s] upon you" (Mohs 1998, 195).

Ceremonial Areas

The sites are associated with ceremonial and ritual functions, mostly for winter spirit dancing. For instance, the sweathouses are used for ceremonial burnings, the bathing-pools and training grounds are important for new dancers to perform initiation rights.

They include areas of many large cedar longhouse, ritual bathing-pool, sweathouse and training grounds.

Burials

There are various forms of burials in the Sto:lo myths including tree burials, box burials, funeral houses, cave burials and interment sites. Today, interment sites are most common while the other kinds are more traditional.

As the beliefs in the spirit of the dead dwells within the living and non-living things, Sto:lo people respectfully takes very good care of the human remains, whether those belonging to the recent or prehistoric past. Although the spirits can offer protection, moving or disturbing the burial sites by any means will make the spirits unpleasant so that they will give harmful effects like illness or spirit loss. For this reason, rituals such as ceremonial burnings, have to be performed as a sign of respect to please the spirits.

Protection in Conflicts

As described above, the spirituality and sacredness of the surrounding environment are rooted deeply in the Sto:lo people's lives and mind. They protect the nature in respectful ways and they believe that they will get protection in return as well. Their lives are reciprocal and compatible with nature and their ancestors. This can also be beneficial for heritage protection in the present terms. In this sense, the idea of the sustainable development of heritage is not new for the people in Sto:lo community, rather, it is already in their lives.

Failure to notice spiritual beliefs embodied to the sacred sites in the Fraser River Valley concerned the Sto:lo Tribal Elders and other band members with regard to sacred site protection and preservation. At the time of European invasion, the Sto:lo had encountered a multitude of modern issues causing social and political problems. Legal prohibition of religious rituals and ceremonial performances during the years 1884 to 1951 (Mohs 1998, 200) is an example of the attempt to discourage past traditional activities. It appeared that the colonial government unsuccessfully pursued the people to follow the laws. On the contrary, the people were suppressed by such action and were forced to go underground.

The river is an important economic resource for both natives and settlers. So the Federal Fisheries office was established to control over native fishing rights. However, careless constructions were done without the awareness of the indigenous peoples' traditional living ways and sacred lands. Industrialisation and urbanisation were the most

pressing concern because the spirits of the land were disturbed by these infrastructures (e.g. railways, highways, pipelines, mining, forestry and dyking). These activities disrespectfully awakens the spirits and will bring harmful results, as the Sto:lo people believe.

Moreover, due to the current land use and development, notably logging industries and recreational activities, the fear of Sto:lo Elders has been reinforced. Cedar poles that served as life poles of the community, were exploited and some of them were taken to museum in Chilliwack. The area was also settled down by non-indigenous individuals who do not recognise the importance of spirituality. Additionally, the sacred grounds formerly used by ritual dancers and activities are now strictly restricted to access according to the new rules of the foreign government. These European influences have caused an unhealthy situation to the Sto:lo spirituality and spiritual sites extensively.

Nowadays, the traditional territories of about 100 square kilometres have been increasingly reduced and the population decreased from 3,500 in 1998 to 2,084, who are formally registered with government up to the present[39]. The two hundred sites previously identified as sacred grounds are in great critical danger (Mohs 1998, 200-202): about 50 of them have already been destroyed and another 50 have suffered damaged. Ongoing disturbance and development are causing another 25 sites in danger. More than 50 percent of the sites (Mohs 1998, 200-202) are not on reserve lands. What can be learnt from this is that the significant evaluation of the sacred sites is in a very disadvantaged position. The degree of site protection relies only on scientific value, primarily archaeology.

In the *British Columbia Heritage Conservation Act (1979)*, ethnic values were absent from the list of criteria of site significance. The problem of evaluating the sacred sites by archaeological values has led to ambiguities in legal implementation. As a result, only a few sacred sites can be protected by this law. Only seven out of 19,000 heritage sites registered with Archaeology Branch of British Columbia in 1990 can be considered as sacred sites (Mohs 1998, 202). Therefore, issues of site sacredness need to be placed into consideration in the current plans regarding archaeological and heritage resource management. The purely scientific point of view approach by the archaeologists and heritage managers has limited their ability to recognise another part of the indigenous landscape protection, as the site contains spiritual importance. Legislations and policies in British Columbia have also failed to do so.

Gordon Mohs suggested in his research that to learn the existence of sacred lands and their values, experts from various fields of archaeology, anthropology, heritage

[39] Ministry of Aboriginal Relations and Reconciliation, British Columbia, Canada.
See http://www.gov.bc.ca/arr/firstnation/stolo/default.html (accessed 23 October 2012).

management and the public needs to work along side the indigenous communities to investigate knowledge and understanding (1998, 204-206).

Although the rights of indigenous people in Canada, and throughout the region, seemed to be increasingly recognised in the policy-making level, there are little results to show. There are no specific provisions that guarantee the traditional uses of sacred sites and the accessibility of these sites for ritual purposes. As a result, the rights of the indigenous people to protect and preserve their heritage are still limited. An attempt to claim back their lands and spiritual areas is still ongoing with the hope of reuniting the ancestral lands with the existing community.

III.4 Australia: Uluru

General Information

Fig. 8 Location of Uluru
Source: Charles P. Mountford, *Ayers Rock: its people, their beliefs and their art* (Sydney: Halstead Press, 1965) xiii.

Australia is a vast country with very diverse landscapes. There are huge mountain ranges extending from the northeast to the southeast while to the east and central are rather dry areas. Almost at the heart of the country located at the southwest corner of the Northern Territory, lies the Uluru (see Fig. 8). This is an important place for the Aboriginal people whose tribes have been living in Australia long before – around 50,000 years ago[40] – the European settlement in 18th century. Because of its huge size and isolated mainland as

[40] Recently, University of Copenhagen reports the new dating result of Aboriginal Australia by using DNA technique. See: http://www.sciencedaily.com/releases/2011/09/110922141858.htm (accessed 20 October 2012).

well as the Uluru's beliefs – lack of interest in the changing of time –their traditional ways of life remain unchanged or has changed very slowly (Mountford 1965, 23-26).

Physical Information

Fig. 9 Physical appearance of Uluru, viewed from the north.
Source: retrieved from http://www.henkbouwmanreizen.nl/images/ayers_rock_uluru.jpg accessed 1 November 2012

Ayers Rock, or locally known as 'Uluru', is a flatted-top and rather doom-shape monolith protruding from a flat ground (see Fig. 9). Due to its massive size of approximately 9.4 km. perimeter, its shape depends on the direction that it is viewed (Mountford 1965, 27-30). It is located almost in the centre of Australia or the southwest of Northern Territory border about 320 km. southeast of Alice Spring. At its highest point, the huge sandstone lies about 863 metres above sea level and 348 metres above the plains. According to a geomorphological study, the area comprises two other inselburgs: Mt. Corner and Katatjuta (Mt. Olga as the peak).

Around the base of the Uluru is a fertile land. At its rounded-top surface, without covering of earth and trees, rain falls on the plain below, making the soil fertile for fruits, tubers and grass-seeds (Mountford 1965, 27-30). This makes the boulder a sufficient food resource, not only for the Aborigines, but also for other living creatures like kangaroos, emus and dingoes. Besides the fertile base, Uluru is a great important place for 'Pitijandjara', a group of aborigines who uses the Rock as their shelter.

Beliefs in 'Tjukurapa'

From its stunning and mighty physical appearance, the invention of mythical stories is to be told within the tribe and handed down from generation to generation. The life of the

Aboriginal people is bound closely to their environment. The basic beliefs of the people rested on an integral part of things and timelessness.

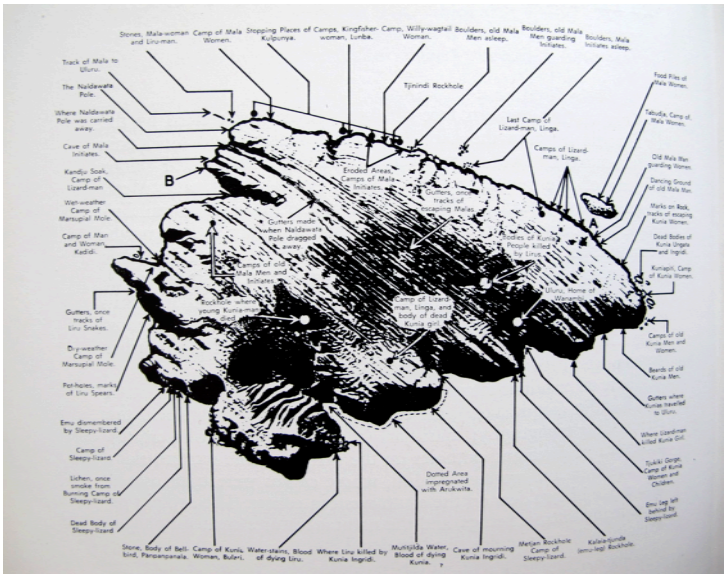

Fig. 10 Totemic map of Uluru
Source: Charles P. Mountford, *Ayers Rock: its people, their beliefs and their art* (Sydney: Halstead Press, 1965) 32.

In Mountford's book (1965, 23-26) he described that *tjukurapa* is a central meaning of belief in a sacred period in remote times. The great totemic heroes of *tjukurapa* time were the creators of things: *Pitjandjara* lands, food, the first spear and spearthrower and the wooden dish and the digging stick for food searching. They also made the traditional laws to dominate all aspects of *Pitjandjara's* lives whether mundane or sacred. The stories of *tjukurapa* have been told through rituals, ceremonies, songs and mime over time since the creation of the world. Aboriginal people have to obey the ancient rules otherwise they will be punished by nature and will suffer. Therefore, the beliefs remain in the mind of every *Pitjandjara* members and are reflected in their behaviour.

Despite the division of time into periods – past, present and future – *Pitjandjara* are less interested in the episode of the past. Instead, they act in opposition to change. They believe that they are living in an unknown period. This viewpoint resulted in their isolation from external influences and unchanged lives, as shown by the primitive tools and weapons (Mountford 1965, 23-26).

The concept of cycles of life is more important: physically changing from infant to older age; the growth of knowledge; the change of seasons in a year, and breeding time. These are meaningful moment of life that remains constant and absolutely true.

Before the creation of living things, there were great creators in the form of carpet-snake, hare-wallaby, sleepy-lizard, marsupial mole, and other examples. In the Aborigines' beliefs, these are, at the same time, their ancestors. In other words, all of the

tribes normally claim themselves as descendants of one of these *tjukurapa* heroes. The notion of mythical beings shows the link between the Aborigines' lives and their tribal country.

Hero stories are narrated through astonishing shapes of boulder formation around the Uluru (see Fig. 10). To illustrate this myth, an instance is given. A story about a battle of Liru and Kunia took place at southern side of the rock where it was believed to be a camp of Kunia men and women.

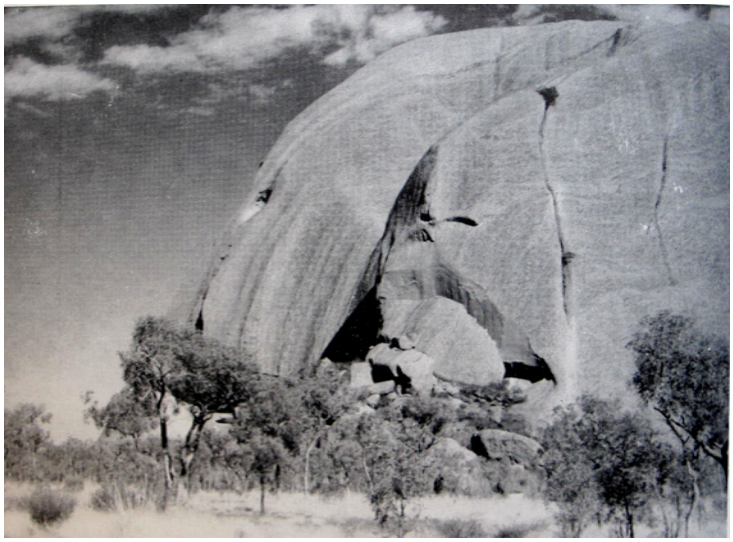

Fig. 11 Mutitjilda gorge: the scene of the fight between poison and non-poison snakes.
Source: Charles P. Mountford, *Ayers Rock: its people, their beliefs and their art* (Sydney: Halstead Press, 1965) 48.

In the legend, the Liru are descendants of poisonous snakes while the Kunia comes from harmless carpet snakes. After traveling and searching for a new place, the Kunia finally settled in a camp at Uluru where later became a battlefield for the fight with the Liru who invaded the Kunia from the south. One remarkable scene depicts a young Kunia fighting against Kulikudjeri, the leader of the Liru. Represented by the two long vertical fissures on the west part of *Mutikudjeri*, it is believed to be the transformed body of the Liru leader whose leg was cut by stone knife of the young Kunia man. There were two cuts: long and short ones. The long cut was made when the knife was still sharp while another one was shorter because the knife was already broken (see Fig. 9 and 11) (Mountford 1965, 50).

Fig.12 Valley in Mutitjida gorge where young Kunia died.
Source: Charles P. Mountford, *Ayers Rock: its people, their beliefs and their art* (Sydney: Halstead Press, 1965) 49.

Fig. 13 Waterhole at Mutitjida
Source: Charles P. Mountford, *Ayers Rock: its people, their beliefs and their art* (Sydney: Halstead Press, 1965) 49.

Although Kulikudjeri got wounds, he continuously kept on fighting until he victoriously cut his opponent in the leg as well. This time, the young Kunia man was not so lucky. His death was caused by *Mutitjilda* water (see Fig. 9 and 12-14). Becoming violently angry, Kunia Ingridi, the mother of the young man, brought her digging stick with an '*arukwita'* (the spirit of disease and death) spitted on it. She aimed for Kulikudjeri's life and successfully did it by cutting his nose apart from his body. This part of the story is seen through a huge slab breaking from the main rock (see Fig. 15).

Fig. 14 Rockholes above *Mutitijilda* water where young Kunia man bled to death.
Source: Charles P. Mountford, *Ayers Rock: its people, their beliefs and their art* (Sydney: Halstead Press, 1965) 53.

This is one instance of the many mythical stories that explains the nature of the Uluru. Other examples include the story of initiation ceremonies of Mala people, the wet-weather camp of the marsupial mole and more. The myths make the relationship between totemic ideas of the Aboriginal people and the natural world around them more understandable and seemingly endless. Every single part of the Uluru has benefited the Aborigines as not only as resources for their living, but also in making their lives more meaningful in the form of totemic spirits of the tribes. Meanwhile, the existence of the Aborigines has reciprocally brought vitality to the Uluru as well. The people takes care of the rock and treat it with respect. In the present sense, this can be helpful for cultural and natural heritage sustainability.

Fig. 15 Detached boulders representing the nose of Liru leader cut by the angry mother of the young Kunia.
Source: Charles P. Mountford, *Ayers Rock: its people, their beliefs and their art* (Sydney: Halstead Press, 1965) 52.

European Laws to Protect Aboriginal Heritage

In Australia, cultural heritage sites of the Aboriginal people normally comprise two categories: natural features like rocks and trees and traces of human occupation such as rock arts, tree carvings and burials. However, both of these categories also contain sacred significance that cannot be assessed by scientific enquiry. Explanations rely on the custodianship and traditions that the Aborigines attach to such sites (Ritchie 1998, 227-229). This became an issue when non-Aboriginal communities wanted to give values onto this heritage on the basis of scientific knowledge or aesthetic consideration.

Western viewpoints appeared in heritage laws in twentieth century (Ritchie 1998, 229). The laws were first designed to protect 'relics' which usually meant rock art, stone artefacts and skeleton materials (Ritchie 1998, 229-230). Contemporary Aborigines have criticized the basis of scientific views in placing importance to the cultural heritage.

To properly illustrate the problems between heritage protection by laws and by traditions, it is convenient to categorise the relevant legislations into three domains: relics legislation, culture significance legislation and general heritage legislation. First, the relics legislation is the category that includes some specific materials that can be defined in terms of objectively observable relics of past occupation from prehistoric sites. Next, cultural significance legislation focuses on rather contemporary Aboriginal cultural heritage than relics of the past. Lastly, the general heritage laws are a blanket legislation that applies to all kinds of heritage places whether its definition as an Aboriginal heritage site or not.

Most of the legislations regarding the heritage protection were extensively enacted in most states between 1960s and 1970s (Ritchie 1998, 229). Up to present, many of them are still in force. But according to the administrative system (of federal

state) in Australia and other factors like density of Aborigines' population, these might cause the uniqueness in laws of different jurisdictions. In Queensland for example, the possibility of protecting the Aboriginal sites falls only into the general heritage legislation because of a political strategy not to make any distinction among different groups of people in Queensland jurisdiction. The situation is relatively different in Northern Territory (the location of Uluru) where 25 percent of the population are indigenous and 45 percent of the area belongs to the Aborigines (Ritchie 1998, 233). Many laws were created and continuously amended to promote better rights to the Aboriginal people, from *Police and Police Offences Ordinance (NT) 1954* to *Northern Territory Sacred Sites Act 2012.*

Among the laws to protect heritage of Aboriginal people, *Commonwealth's Aboriginal Land Rights (NT) Act 1976* is an important milestone as the definition to sacred site is still actively enforced.

> "Sacred site means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of Northern Territory, is declared to be sacred to Aboriginals or of significant according to Aboriginal tradition" (Land Right Act 1976)[41].

By this definition, it shows the concern of the importance of the Aboriginal heritage. More legislation regarding this subject have been produced so far as to apply within jurisdiction of the Northern Territory, such as *Aboriginal Sacred Sites Act, 1989*[42] and *Northern Territory Heritage Conservation Act, 1991*[43]. Although many attempts at mitigation between the interest of Aboriginal people and the benefits for the sake of science have been pushed, it is still confusing to determine between archaeological relics and sacred sites. Despite the efforts of heritage law amendment, the legislative protection on Aboriginal heritage identified by Europeans, overall, neither recognises nor grants any actual rights to the Aborigines with respect to the protection of their own heritage using their own traditional practices.

[41] See http://www.aapant.org.au/ (accessed 28 October 2012).

[42] See http://www.atns.net.au/subcategory.asp?subcategoryid=123 (accessed 28 October 2012).

[43] Ibid.

Chapter IV

Discussion

IV.1 Stress Mitigation in Cultural Heritage Management

As seen in the previous chapter, observations have been made on the traditional practices in relation to heritage management and protection in Indonesia, Zimbabwe, Canada and Australia. Useful information about these traditional practices are revealed in response to the first question proposed at the beginning, whether there are other sufficient ways to protect heritage despite the restrictions of formal legislation. The case studies show the strong implementation of indigenous beliefs and cultures on heritage protection today despite the previous suppression by the colonial government. The problem of the implantation of Western-based laws, as one of unity-making instruments, in non-Western countries without noticing or truly understanding the traditional ways of life (norms, customs, beliefs, and values) rather creates difficulties in legal implementation and enforcement in receiving countries. This is why traditional practices to heritage protection should be called into operation. This leads to another question on the ways to incorporate these ingredients of non-Western traditions and Western-based laws. The alternative choices of cultural heritage protection to provide options for the integration of traditional (informal) practices into the heritage laws (formal system) is discussed after indicating the adverse situations of heritage legislative protection.

However, it is important to note that this study does not aim to give exhaustive solutions for all the problems surrounding the effectiveness of heritage laws. Rather, the following suggestions will be given on the basis of theoretical stance with the intention of creating a mitigatory environment in conflicting situations regarding heritage management among heritage stakeholders, especially the local people and their governments. These conflicts likely happened because of misperception of heritage laws.

IV.2 The Adverse Effect of the Formal Laws to Cultural Heritage Protection

Science, with the support of rationalism, has thrived and became deeply rooted in the Western societies since the Age of Enlightenment in seventeenth century. This was a cultural movement that emerged after the increased questioning of religious dogmas. The conviction persuaded that men should be able to think and act freely. As a result, science and the scientific methods steadily grew and were used, for instance, to prove the natural right of man, to challenge the divine right of the king and to give scientific explanations to natural phenomena. Enlightenment went hand in hand with religious reformation and

many other social developments. A relevant example is the establishment of a system of laws. Jurisprudence or legal science was used as a tool towards a deeper understanding of laws and its nature together with legal reasoning. This is the way to achieve the aim of legal positivism, which is to consciously and unconsciously control over people's behaviours.

Since the end of the eighteenth century, code laws and codification have been considered a potential instrument for social control and engineering apart from other social mechanisms like religion. Many codes were codified starting in Western European countries France, German and Switzerland.

In the nineteenth century, this influence has spread to other non-Western countries through colonisation and globalisation. From the study of history in the sample countries, the reception of European laws can be done in various ways: voluntarily or involuntarily, rapidly or gradually, among others. It is crucial to observe the cultural conflicts that probably arose during the period of reception of the Western legal system in non-Western societies. From this point of view, the interaction of received law and the indigenous laws can be seen. In particular, the legal postulate in indigenous law can reveal whether the official or unofficial laws are justice. The idea of a legal postulate can be from natural law, sacred truth (in some religious laws) or other social values embodied in like seniority, unity clan, or individual freedom. This was regularly neglected during the introduction of Western legal system in the colonial era. According to Chiba (1986, 378-396), a minimum degree of legal postulate into official laws has an effect to legal operation in the present.

Presently, the resulting ineffectiveness of law enforcement and application, particularly in heritage field that are alienated from social roots does not work well. From a sociological point of view, good laws should be made and developed to conform to the consensus of society. But lawmaking institutions during the colonial time likely failed to notice this matter as they tried to put the whole system of law, which were developed and suitable for one society, into their colonies' society just to satisfy political functions.

Indeed, before the formal legal system was introduced, non-Western societies already had other forms of laws, relying on informal processes, which framed the people's conduct. Both formal and informal laws can thus function as a basis of social control. However, in many cases, social sanctions, resting on *de facto*, seemed to be more effective than the legal punishment established by a legislative process that is based upon *de jure*. This can be illustrated by the shipwreck protection in the case study in Indonesia. The indigenous people in the society are more afraid of violating the community's rules as the punishment affects not only their physicality, but also their mentality. For example, the expulsion from the village will make the violator homeless and embarrassed. Moreover, in the case of a family that live close together, the wrong acts of one member can bring shame to the whole family.

Moreover, in the Matobo case, threats to their heritage cause no end of grief to the indigenous people and the protection of the ancestral Hills. Cultivation and wildlife hunting by traditional practices were not allowed after the introduction of the first colonial law, the *Natural Resources Act (1942),* which was enacted to manage the forest using new ways as a National Park. In addition to this, the Sto:lo people also faces similar problems in that their sacred heritage are not protected in fully respective manners and some of these beliefs have been treated as inconceivable by a scientific criteria. The Australian Aborigines situation is not much different when their traditional lifestyles have been interfered by the European coloniser.

Additionally, in the exclusion process of the fact of reciprocity between the people and their heritage, the law producers did not recognise the traditional practices on heritage protection. This happened commonly in the case studies. The distance between the local people and their heritage laws widened when they were excluded from the formulation of the laws. Furthermore, the representative process of law making is an indirect method of exercising rights. This means that their understanding of the direct social relationship and control have already been changed dramatically. Unfortunately, no proper explanation has been made during the early period of the legal introduction. To this extent, less success of the heritage laws applied in some non-Western communities, particularly in the case studies, can be a consequence of these factors. Presumably, the direct rule-making process and application together with the conformation to the primary thoughts of people, like spirituality and sacredness, are more understandable to the local and indigenous people. The people have themselves expressed consent to be bound by the rules and the needs of heritage protection for the sake of their cultures. This can be implied from the notion of legal sociology that laws cannot survive without shared norms and consensus and the definition of cultural identity in formal laws.

The issues of exclusion of the local and indigenous people from the heritage protection plans and policies bring misfortunes to heritage due mainly to the lack of public awareness and human resources. The people often feel alienated as the sense of ownership and belongingness to the heritage have been shifted from the people to the (colonial) governments during the Western occupation and settlement. This transfer of power led to the centralisation of heritage management. The people have limited access to the heritage. In worst cases, they do not feel responsible and therefore ignore the heritage because the treatment of cultural heritage becomes the responsibility of the government. Concurrently, the governments frequently face human resource problems. There are cases in which the heritage suffers poor conditions because of the lack of professionals. In parallel to this, the heritage laws can hardly be enforced effectively because of this deficiency. The hope to treat the heritage in a better way now focuses on the local and indigenous people but unfortunately they can offer little help as a result of public disempowerment.

Thus, there is a need to encourage and ensure public involvement in the heritage management plan and system. This can be achieved through incorporative work of the heritage laws and traditional practices.

IV.3 Alternative Choices for Protecting Cultural Heritage

It seems surely that the relationship between the tangible and intangible cultural heritage are almost impossible to separate. It explains why the positive laws in heritage circle provided for the sole scientifically physical protection are usually said to be weak. The adverse situations of the heritage laws that are the consequences today should be opened to speculation. This makes the target of international organisation concerning this matter, namely UNESCO and other relevant organizations, to reconsider the heritage conventions. At this point, alternative choices for heritage protection are suggested.

Suggestion 1: Intangible culture associated with tangible heritage

According to the definition given by the cultural heritage in *WH Convention*, it is somewhat problematic because the provision only concentrates on the monumentality and aesthetic values of such heritage and excludes the intangible element attached to it. Respectful rituals or beliefs performed by the local and indigenous people were constantly neglected. The discussion therefore is the possible solution in merging these two components of the cultural heritage.

The theme 'authenticity' has emerged in heritage forums as a fundamental criterion to achieve the 'genuineness' of human creativity[44]. During its early emergence, this notion was solely associated with the physical and tangible characters of the cultural heritage that was again influenced by the European perspective. In practice, it has been a challenge as the authenticity of non-Western cultures is viewed in different ways. The result is in *Nara Document of Authenticity* (UNESCO 2007)[45] in which the scope of the term 'authenticity' was suggested to be broadened to better evaluate the values of cultural heritage. In this respect, the intangible cultural heritage in relation to tangible heritage is of the utmost concern. There are also attempts to make an integrated approach and to pay more attention on the totality and unity of the cultural heritage. Through these efforts, the intangibility of heritage sites, like ritual ceremonies and

[44] Criteria i of World Heritage selection is to represent a masterpiece of human creative genius. See http://whc.unesco.org/en/criteria/ (accessed 9 December 2012).

[45] See whc.unesco.org/uploads/events/documents/event-833-3.pdf (accessed 20 October 2012).

religious activities, becomes recognisable. Consequently, there are other examples such as traditions and techniques, spirit and feeling, and other internal and external factors[46].

Although the conservation of the cultural heritage site under these criteria shows care for the intangible feature of the tangible heritage, it does not explain well how such feature in association with the cultural site and its landscape can be protected. According to the aim of this concept, it aspires to identify the genuineness of the nominated resources, that they should be truly what they are claimed to be[47]. Due to the dynamics of the intangible quality of the heritage however, authenticity does not seem proper when assessing intangible element. Therefore, another option is suggested.

In this regard, a specific legislation on the protection of intangible cultural heritage is taken into account, that is the *ICH Convention.* UNESCO adopted this Convention in 2003 in order to widen a type of cultural heritage, from the physical to the non-physical aspect. However, with regards to the protection of intangible quality associated with tangible heritage, the invention of the new convention has little to do with this matter. Due to the definition of intangible cultural heritage in this Convention, it falls into particular domains (*Article 2 Paragraph 2*). The traditional practices at heritage sites are not expressly included. Nonetheless, the idea of interdependence in the Convention can bridge the gap among intangible, tangible and natural heritage. There are some provisions that show the linkage between *WH* and *ICH Conventions*.

An offer to link a channel in *Article 3(a)* on the safeguarding of tangible heritage under the *WH Convention* which is a directly associated item with intangible heritage, the *ICH Convention* proclaims interdependence of both Conventions. Furthermore, the term 'cultural space' in *Article 2* of the same Convention is a flexible term. Therefore, it can possibly be interpreted as a physical space of cultural heritage site. This communicates that, according to the Conventions, it is possible to safeguard the tangible and intangible heritage found in one place and/or one community where existence of one is a condition for the continued existence of the other (Smeets 2004).

In spite of that, the local and indigenous people are still left out by the Conventions. The *UNESCO Operational Guidelines 2008* is introduced to promote and secure the involvement of the people in the heritage management projects stated in *Paragraph 123*[48]. Additionally, the World Heritage selection criteria vi[49] also

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[46] See http://whc.unesco.org/en/events/443/ (accessed 9 December 2012).

[47] Ibid.

[48] Participation of local people in the nomination process is essential to enable them to have a shared responsibility with the State Party in the maintenance of the property. States Parties are encouraged to prepare nominations with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties.

acknowledged the importance of intangible features. It opens more opportunity for locals to manage the heritage on the basis of their own wisdom. Among the Convention stipulations, it *is Article 15* of *ICH* Convention that defines the framework for state party to ensure the participation of communities in safeguarding activities[50]. Moreover, the heritage management trends slightly follow this direction (which will be pointed out in the following chapter). Yet, no full rights to cultural heritage, at least from the case studies, have been granted to local communities until now.

Nonetheless, these channels could not be automatically linked. Therefore, the suggestion to be made here is that the cooperation aspect of these two Conventions in dealing with the tangible and intangible safeguarding of the cultural heritage should be organised. To be exact, the interplay between the Committees of *WH* and *ICH Conventions* should be considered. As a result, the protection measures may be adapted to mutually benefit both components.

Suggestion 2: Safeguarding of Underwater Cultural Heritage

Besides the two Conventions mentioned, there is another kind of heritage that are still not included. The cultural heritage found underwater is under the protection of a separate instrument that is *UCH Convention*. This Convention aims to build up a common ground for maritime archaeology in practice and professionally standardise the protection of underwater cultural heritage against threats, especially looting and destruction (Favis 2012, unit 1).

The goals reflect the good intention to protect heritage and the human past. However, there are some issues with unclear definition (*Article 1*). For instance, heritage considered to be less than 100 years will not be defined as underwater cultural heritage. This means that World War II shipwrecks such as the USAT Liberty in Indonesia are not included in this law. In other words, it cannot be protected by this Convention. So the protection will be on hold until the age of the wreck reaches the criteria.

As a shipwreck reaches 100 years old, its protection begins. But how can it be protected? What criteria should apply to these cases? According to the Annex to the

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[49] To be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria). See http://whc.unesco.org/en/criteria/ (accessed 8 December 2012).

[50] Article 15 – Participation of communities, groups and individuals

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

Convention, an integral and crucial part, provides principles for heritage protection archaeologically and scientifically. The local people can only have reactive roles when the scientific activities are done. The resultant knowledge will be shared to the people who will then be encouraged to participate in the planning according to the scientific plan. This is, of course, based on scientific knowledge. So where do the people's traditional wisdom in protecting the heritage fit in? For instance, where do the Eastern Bali residents fit in with regards to the protection of the wreck?

Perhaps, the local people in Bali valuate the site in different ways. Their beliefs that were formed by traditions and religions consider the site where the ship sunk is sacred. It serves as a graveyard. Although the people who lost their lives in the tragic loss were not direct ancestors to people who live nearby, the sacredness of the site applies because of the locals' beliefs in spirits that dwells in things. They should not be disturbed (more than necessary). Further, modern economical values also embodies with the site. This is how people earn and facilitate their lives. To maintain good practices in the society, traditional social control and sanction are restrictively brought into play. Activities done at the site should be treated in a respectful way.

Does science always disturb a site? In this aspect, the provisions in the *UCH Convention* that show concerns about this issue will be pointed out. *Annex Rule 5* states, "activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites" (UNESCO 2001).

To an extent, the promotion of *in situ* preservation in Annex Rule 1 of the *UCH Convention* is a first option for underwater cultural heritage preservation and site management. The Convention's Rule 4 of the same law mentions that non-destructive methods are preferable. There are scientific reasons why *in situ* preservation should be applied to sites: appreciation and enjoyment for future generations; invention of better legal protection; prioritisation of newly discovered sites; availability of funding; and the improvement of knowledge and protection for future research (Manders 2012, unit 9). These reason lies mainly on scientific interests. But how can *in situ* preservation and non-destructive techniques benefits the traditional beliefs?

At this point, a recommendation is to reinterpret and reconsider *in situ* preservation where possible. The application of scientific methods to the sites is not always harmful and incompatible with traditional beliefs. *In situ* preservation can be done using a variety of techniques such as sandbagging, debris netting, artificial sea grass matting, and geotextiles covering (Manders 2012, unit 9). Basically these methods are used in order to create a more firm and steady physical protection by deploying and trapping sediments. As a result, the sites are buried and biological deterioration rates will be reduced. Moreover, the chances for human activities like fishing or trawling to directly impact the sites will substantially lessened. Other than the scientific interest, it also promotes respect to the site as the underwater cultural heritage site is protected and undisturbed.

However, the *UCH Convention* also allows excavation for the sake of science, if necessary, with less intrusive methods (*Annex rule 4*). Moreover, concerns of the site's sacredness and traditional lifestyles enable the scientists and archaeologists to better understand the scientific disturbance and discuss it with the local community. From this point of view, the protection of underwater cultural heritage sites by legislation can possibly hold hands and perform well with belief system.

VI.4 Remaining Questions

The heritage laws nowadays are considered as an important instrument to create a common understanding on cultural heritage protection whether on land or under water. Lawmakers and similar institutions have put a lot of effort to formulate the law in relation to heritage to cover all aspects of protection. Yet, there is a problem that should not be overlooked. It concerns the inclusion of the intangible feature attached to maritime landscapes or underwater cultural heritage.

It is quite obvious that humans, whether in the past or present, will create connections with the lands or environment around them that are reflected in traditions and ways of life like in the case studies. Every single piece of rock or every tree branch is meaningful to people. It is possible that the people who lived and have lived nearby the coastline will also have this connection to the lands and coasts with maritime or even underwater context such as in the case of sunken ancient city. Probably, myths or legends were invented orally and handed down from generation to generation. The story can, one day, become beliefs and values that people in the society are bound to conform. Thus, if such a case happens, can this myth or legend be considered as intangible component of underwater cultural heritage? Or it will be limited only to land heritage? Can it also be mixed? These questions allow some space for future discussion and debate. Future research is needed.

Chapter V

Looking Backward, Going Forward

Although my study reveals sad cases of ritual and belief negligence in archaeological theory and government policy, I hope this raises more concerns in the analysis and interpretation of archaeology and the equality of rights in heritage protection in the very near future. By looking backward, we have seen the flaws and faults that have defined our action in the present, and we may be able to pave ways for a better future of heritage wellbeing.

V.1 Looking Backward

Since colonial period over a century ago, the European archaeological principles and practices have been dominating the heritage of the indigenous people all over the world. The heritage was used in favour of nationalistic construction and scientific interests. The emergence (in the colonial era) of some theories – colonialism, imperialism and ethnocentrism – have interfered with the interpretation of archaeological remains that affected the sovereignty and contemporary human rights of the indigenous people in the present (Bruchac 2010). The political aspect of archaeological researches has put an imbalance between the non-indigenous archaeologists and indigenous communities.

In the commitment to one specific theory, archaeologists have refused to work along with living peoples as this task has fell into the different science, namely, ethnography and sociology. In taking this view for granted (Insoll 2007), they were able to reconstruct the past in their own ways and left out the social context. As a result, archaeologists, then, have interpreted the objects of the indigenous past with modern concepts. They tried to answer how the objects mean to people but the imperfection of documentation occurs when the indigenous people who have links to the past are ignored. How can (foreign) archaeologists learn about the past of others societies when they only confine themselves to material studies? Can the archaeological knowledge tell enough stories? More importantly, as seen in the case studies, the lack of concern about the indigenous people and their beliefs has led to the destruction of some of local intellectuals and disadvantages to the heritage like lack of public procurement and awareness.

Consequently, archaeologists in the past century and in the recent decades were responding slowly in working with the local community and kept themselves locked-up in their perpetual ivory tower. Outside the sphere of form and modernity, there are people

who can talk about what they and their ancestors have believed in. To fulfil missing information that cannot be witnessed first hand, archaeologists need to work cooperatively, and without bias, with other fields like sociology and anthology.

V.2 Confronting the Present

Reflecting the *UNESCO WH Convention*, the themes of monumentality and masterpiece are dominant concepts. These ideas were strictly implemented previously but now is slightly adapted to support more on the rights of the indigenous people as can be seen in the *UNESCO Operational Guidelines 2008, Paragraph 123*, that encourages the inclusion of local communities into the heritage management plans. The *UNESCO ICH Convention* also aims to protect intangible values of cultural heritage to cover the spiritual values of sacred sites.

In learning from the past, present archaeologists have increasingly focused on the special values and features of the cultural heritage sites due to the extension of their knowledge in archaeological interpretation and the rising voices of the indigenous people all over the world with regards to the protection of their heritage.

Most of the case studies – Matobo, Sto:lo, and Aborigines – that I used show that the indigenous people's way of life in the present are inseparably connected with the(ir) past. Their feelings of connection with their past ancestors are still strong. This reciprocal relationship is essential to cultural practices to ensure stability of the eco-system and wellness of the tribes (Bruchac 2010). The traditional administrative system like social control is working well within the community who can reap benefits in cultural heritage like shipwreck managing in Indonesia. The use of local wisdom has also revealed that strong beliefs in spirituality of things in the society are still conceivable. This also apply extendedly to World War II shipwrecks that can be considered as modern vessels and that. The idea of local participation is expanding around archaeology and heritage management discourses. An attention is also drawn together with human rights issues and it also overlaps with bio-cultural protection.

The existence and wellbeing of indigenous people and their ways of life relating to their cultural and natural heritage have also been increasingly recognised as can be seen in many conventions. For example, the *1992 United Nations Convention on Biological Diversity (CBD) Article 8(j)*[51] *and 10(c)*[52] grants an opportunity to restore

[51] (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. See http://www.cbd.int/doc/legal/cbd-en.pdf (accessed 20 October 2012).

traditional practices to protect and conserve biological diversity at sacred sites; the *United Nations Declaration on the Rights of Indigenous People, adopted in 2007, Article 12*[53] asserts the rights of indigenous to practice their religious rituals and access to the sites; the *International Labour Organization Convention on Indigenous and Tribal People in Independence Countries (ILO 169) Article 7.1*[54] states that the indigenous people shall have rights to decide what will be developed in their land concerning social, economical and cultural development and *Article 14.1*[55] pertains to the recognition of ownership to lands of the indigenous people and allow their accessibility to the sacred sites.

In the recent few decades, the whole European society has been grounded with a strong knowledge of science and archaeology by the *European Convention 1992 on the Protection of the Archaeological Heritage known as Malta Convention*[56] (Council of Europe 1992). Until, the *Faro Convention*[57] *(The Framework Convention on the Value of Cultural Heritage for Society)* (Council of Europe 2005) was invented in 2005 to ease conflicting situations regarding the cultural identity among the Eastern, Central and Western European countries. There still exist a number of minorities like the Sámi, Serbs, and Slovaks among others inside Europe. Claims on their identity for both political and cultural independence happens occasionally.

One of the leading countries in dealing with the rights of the indigenous is the United States of America. Although I have not brought up an example here, it will be awkward if I do not mention *NAGPRA (North America Grave Protection and Repatriation Act, 1990)*[58] while talking about indigenous' rights. This law is an important milestone for the indigenous people in North America to reclaim on their cultural property – the remains of their ancestors – to be reburied and treated properly. It has also a wide influence in other parts of the world.

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[52] (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. See ibid. (accessed 20 October 2012).

[53] See http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 20 October 2012).

[54] The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. See http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314 (accessed 15 November 2012).

[55] The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. See http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314 (accessed 15 November 2012).

[56] See http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm (accessed 15 November 2012).

[57] See http://conventions.coe.int/Treaty/EN/Treaties/Html/199.htm (accessed 15 November 2012).

[58] See http://www.cbd.int/doc/legal/cbd-en.pdf (accessed 20 October 2012).

In addition, other regions like South America are also active in this topic. In Guatemala, the Oxlajuj Ajpop, an indigenous organisation comprising representatives from the Maya, Xinca and Garifuna groups, was founded to participate in the drafting process of new laws concerning Mother Earth aspects in indigenous worldviews. The activities have been extended to sacred sites and environmental concerns.

V.3 Future of Indigenous Heritage

In extrapolating from the international conventions, the rights of the indigenous including heritage protection by traditional practices tend to receive more recognition. Heritage and archeological practices today have reshaped their disciplines in the past decades as evidenced by the increased involvement of the indigenous people in the management plans and in some places also possess a strong voice in the making decision process.

More indigenous archaeologists who know about the complex relationships of the present people, their ancestors, the surrounding nature and landscapes have participated in archaeological practices (Bruchac *et al.* 2010).

However, the concern regarding rights and the traditional ways of life in the international community will be only on paper if there is no actual implementation done by member states. Laws, including heritage laws, are tools that guarantees for actual action to be performed within the legal framework. But are there missing element in the laws? Should the world concerns more about the heritage rights of the indigenous or even the minority?

Chapter VI

Conclusion

In conclusion, this research has investigated the existence of traditional practices in relation to heritage management and protection in the case studies (Indonesia, Zimbabwe, Canada and Australia). These practices are considered to be alternative approaches. The theory of law appears as principles of explanation for better understanding the other types of law in written or formal form. Hypothetically, the traditional practices may be recognised as an important element for the development and effectiveness of the laws. Therefore, it can be theoretically merged into the legal system and policy in order to sustainably protect and manage cultural heritage.

Considering the limitation on the operation of heritage laws, it relatively happened at the beginning of application of codification. The authorities and their institutions are over-ambitious in creating tools to dominant indigenous people's way of life and to re-engineer their societies. Additionally, legislatures have failed to arrange the necessary requirements of the communities to make the laws more effective. They turned a blind eye to the people and their traditions. The heritage laws during colonial times were somewhat the reflection of personal or a small group's opinions (colonisers) in favour of faith in science and politics. Personal attitudes towards culture were different among the people especially those from foreign societies. In this regard, the Matobo Hills in Zimbabwe revealed the unpleasantness of the situation in that the land of the indigenous ancestors was converted into a National Park for the sake of recreation and education. This has served only the needs of the new settlers, while the indigenous people were forcibly evicted. When the heritage laws offended the society's consensus or its morality that relies on beliefs and religions, the indigenous people would rather abuse than obey the laws that went against their wills. The conflicts with the European and (post) colonial government have occurred repeatedly and severely in Matobo Hills. As a result, this may be a core factor making heritage laws inconceivable for the indigenous people who have the feeling of alienation from their cultural heritage. The true needs of the societies where the heritage laws are being applied have been overlooked.

On the contrary, from a sociologists' view, good laws are made by consensus of the society and social sanctions will make them work within the society itself. The case study in Indonesia with the Liberty shipwreck in eastern Bali, illustrates a successful case of heritage protection by the local community. The conformity to *Awig-awig*, a set of customary rules, is controlled by the society with social sanctions like exile and religious banishment. This is considered to be an effective way to protect the wreck site. Regarding the components of cultural heritage, there have always been at least two dimensions, namely tangible and intangible, or visible and invisible, or formed and formless. It is difficult, if not impossible, to make an absolute distinction among them

because there is no clear-cut boundary. To be able to perceive the invisible intangibility of formless cultural heritage, social significance is an essential ingredient and cannot be taken away from the heritage laws. Similarly, the case of the Sto:lo sacred land in Canada, sacredness is an invisible element attached to the whole forest., This aspect are not recognised by archaeological methods. Therefore, most of the sacred sites have been excluded from the heritage laws and management plan. This ignorance and lack of concern worries the indigenous people since this might imply an improper treatment to their ancestral ground. They, therefore, made a claim for the respectful protection of their heritage using their own traditional practices. This challenges the law creators to constitute an abstract element of things into a written form of laws.

Moreover, despite these arguments in favour of the alternative systems of social control, in the view of legal positivists, the informal process is vague and only possible to apply in a particular place while the heritage laws are more concrete and can be equally applied to everyone and everywhere in the country. That is to say, the heritage laws contain a generality of law.

It is unarguably true in this sense. But by taking the uniqueness of the traditional practices into consideration, generality maybe less applicable. Through the means of legal culture or legal postulate, the indigenous people in the case study areas strongly maintain their cultural identities. This can be seen in the case of Australian Aborigines who live around Uluru. The Aborigine's patterns of life, considered as primitive to some, are shaped by their traditional beliefs in connection with Uluru that have been interfered by the non-Aborigines. Science is brought in to replace traditions and custodianship. But it is clear in the case study that the identity of the Aboriginal practices can still be seen in reality and needs to be recognised in order to better protect the cultural heritage. In this case, it is noteworthy to mention that the degree of concern for the Aborigines' traditional practices has a direct relationship with the density of the indigenous population. That is to say, the laws regarding heritage protection and management apply in specific location.

It is apparent that translocation of laws from the home countries to another without awareness on indigenous customary laws has occurred. Usually, in non-Western societies, social facts are a foundation of power to enforce the laws and organised based upon informal systems like religions and beliefs. Therefore, European-based laws that are systematically and carefully codified, are not always reasonable outside the European sphere. In other words, the implanted laws can be unjust. As a result, the laws will not work well if they are out of fit with their social context. Also, it is in the heritage laws that the true social needs were not and have never been responded as can be seen from the international heritage laws as well.

The Eurocentric view can still be recognised not only in the national heritage laws, but also in the laws at the international level such as the *UNESCO WH, ICH* and *UCH Conventions*. Science and the mere recognition of physical features of the sites plays vital roles in these legislations. This legal-based management of heritage reflects

the effects of instruments used during the colonisation period in which indigenous people and their cultural heritage were divorced. For this reason, when the problem is known, a step forward needs to be taken.

Presently, many scholars have accepted that legal and non-legal cultural identities are diverse. Besides the legislative protection, reciprocal relations between the indigenous people and the cultural heritage sites have granted corresponding advantages. Unfortunately, during the colonial period, the new government, in many cases, failed to notice this reciprocity. Instead of conforming, both the indigenous and local people in the case-study countries have been suppressed and were forced to go underground. This continuity shows the need of traditional practices. As can be seen in the observations of case studies, the active traditional practices in these countries to some extent are more effective than the formal regulations like heritage laws. It is considerably true because these practices are in tight association with the people's ways of life. It is how to make use of the sites and to establish connection with the past and ancestors. This creates a respectful exploitation of the cultural heritage. And it has become clear that the blanket legislation cannot be successfully applied to every case. So, according to this research on legal theories and non-Western traditional practices, ways have to be sought to integrate the traditional practices into the heritage management and policy. Reinterpretations and reconsiderations of the existing heritage laws are needed in plural societies like Indonesia, Zimbabwe, Canada and Australia. The integration of informal and formal laws will potentially be a way to counterbalance the means for both the local people and the government officials.

Although it is beyond this thesis to say how this integration of national and local laws can be made possible, the international Conventions –*WH, ICH* and *UCH* – can play a role here as state guidelines and normative instruments. It is to safeguard the plural elements of heritage that are found in place. For the sites found on land, the suggestion is made on the incorporation of the Committees of *WH* and *ICH Conventions*. By promoting sites where both tangible and intangible features are celebrated, indigenous people and their cultural heritage will be able to remarry. Moreover, the *UCH Convention*, by means of *in situ* preservation, also acts compatibly with local traditions. The physical protection of the underwater cultural heritage by using *in situ* techniques and the avoidance of intrusive excavation where possible can be reinterpreted as the way to leave the sites undisturbed and not be over-exploited whether by science, commercial or other reasons. However, if archaeological research and excavation needs to be undertaken for the sake of science, less intrusive methods are required.

Above all, if alternative approaches would work to persuade the indigenous and local people to follow the regulatory mechanism like heritage laws, it would be a great benefit to heritage safeguarding. In a way, this makes it possible to raise public awareness. Consequently, when the indigenous and local people, who live around the heritage site, are concerned with the importance of heritage and are willing to safeguard

the resources for generations to come, the heritage, whether on land or under water, can be taken cares of in a sustainable way. Essentially, this can help reduce the government's problem on the lack of human resource to protect the heritage sites. The community can serve as heritage guardians. In addition, this promotes a more democratic mode of heritage management where non-scientists have a voice in the preservation or use of resources. It is interesting to look into the past to make a better future. The study on future trends is presented through global to regional laws. To a greater degree, the rights of indigenous people to claim on their culture are increasingly affirmed. Last but not least, it can be a great contribution to heritage as a whole to promote the veneration of cultural heritage of others.

Nevertheless, it is still too soon to say that the incorporation of informal traditional practices into formal laws will resolve all issues surrounding the legal system with respect to the heritage protection and management. There are many discourses on this matter. The concept of pluralism in heritage laws may possibly minimise one gap between the laws and the indigenous people's perception that will lead to other advantages in heritage field. To a certain extent, this idea can partially lead to the sustainability of cultural heritage. More intensive research in the future is still needed to reinforce this hypothesis.

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Appendix

This questionnaire is designed for data collection of case study in Indonesia during the internship project with the Dutch cultural agency, *Rijkdienst voor het Cultureel Erfgoed (RCE)*, Amersfoort from March 1 – May 31, 2012.

Questionnaire

My name is Abhirada Komoot (Pook). I am a student at the Faculty of Archaeology, Leiden University in the Netherlands. I am doing my internship project with the Rijksdienst voor het Cultureel Erfgoed (RCE the Netherlands Cultural Heritage Agency). My research aims at providing more understanding in the integration of indigenous approaches to heritage into systems of heritage legislation. Due to the weakness of legal application of monumental laws in many countries, including in Asia, I am trying to gain more knowledge about traditional ways of heritage protection in Indonesia in order to find possible solutions for this situation. I believe that the integration of traditional heritage protection into present legal system will make monumental law be more effective. Your answer will be useful not only for my project, but also to our heritage in general.

If you have any queries on the basis of this questionnaire, do not hesitate to contact me. You can reach me on the following email address: a.komoot@umail.leidenuniv.nl

1. Background information

Name:

Gender:

Country:

Place of birth:

Contacts/ Tel:

2. Employment

Organization:

Your function within the organization:

In which respect is your organization related to the field of heritage and heritage management?

3. Existence of Western legal system in your country and the perception of local people to the system.

3.1 Did your country adopt legal principles and structures of Western system?

3.2 When and how did these Western principles and structures become applicable in your country (before or after occupation/ colonization)?

3.3 Does your organization make heritage management plan for local level?

3.4 According to the law who is responsible for the management of heritage?

3.5 How do local people react to the heritage management plan made by your organization?

3.6 Does the community have right to participate in heritage management planning? If yes, please explain when and in what respect.

3.7 Are there any other legal systems applied in your legislation (e.g. Islamic law)? And do they have any effects on heritage management? Please explain.

3.8 Do you think the heritage protection law in your country is effective enough? If yes, provide an explanation why. If no, provide an explanation why.

Opinions

(Please explain according to your knowledge and experiences.)

In what way you think the law could be improved?

4. Recognition of traditional ways of heritage protection in your country/ community.

4.1 Do you think the traditions, beliefs, customs and norms are still strong in your country/ community?

4.2 What is characteristic for these traditional approaches to heritage management?

4.3 Is the community able to practice their traditional approaches to heritage protection? If yes, please describe in what respect.

4.4 Can you mention examples in your country of heritage projects being developed on the basis of traditions, beliefs, customs and norms?

4.5 Do the traditional ways of protecting heritage conflict with legal protection or government policies? If yes, please explain.

Opinions

(Please explain according to your knowledge and experiences.)

Do you think the failure of law enforcement, due to misunderstanding and misinterpretation by the community, can be reduced by integrating traditions, beliefs, customs and norms into the present legal system?

Other comments regarding to information usage:

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……

……

……

I am looking foreword forward to your reply and hoping that we will be able to work together in our aim to improve the protection of for our better heritage protection.