

Nationalism versus Internationalism in International Law in the Field of Cultural Relics Recovery

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Abstract. Cultural relics are indispensable in preserving the unity and identity of nations due to their significant historical, literary, and artistic value. The challenge of recovering lost cultural relics has been a persistent issue not only for China but also for other civilizations with rich heritages. Despite the widespread attention this issue has garnered within the international community, the field of international economic law still lacks a definitive legal instrument that outlines clear measures for the repatriation of cultural objects. This absence of a legal framework has prevented international organizations from reaching a consensus on the conditions under which cultural artifacts should be returned. This paper focuses on the 1995 Rome Convention as the study object to apply comparative and normative research methods in examining the influences of nationalism and internationalism on the restitution of cultural relics. It analyzes the impacts of these two advocates on international law legislation and judiciary process. Based on this, the paper aims to offer recommendations on the stance that international law should adopt concerning the recovery of cultural heritage, thereby contributing to the development of a more coherent and effective legal framework in this domain.

Keywords: Cultural Property Recovery, Internationalism, Nationalism, Rome Convention.

1. Introduction

Cultural heritage holds immense archaeological, prehistoric, historical, literary, and artistic value, playing a crucial role in preserving the unity and dignity of a nation by embodying its identity. The issue of cultural relic loss and restitution has emerged as a significant concern, not only for China but for all civilizations rich in heritage. The challenge of recovering lost cultural relics has long stood as a contentious issue within the international community, drawing considerable attention due to the complexities it introduces in the realm of international economic law.

International economic law was conceived and developed in response to the increase in international economic activities, and is devoted to several goals, including the preservation of state sovereignty and the advancement of peaceful international cohabitation. The ownership of cultural property is an important part of the field of international economic law. The issue of the restitution of cultural relics can essentially be regarded as a dispute over the ownership of cultural property, which involves transnational trade in cultural property between countries and the fight for sovereignty.

Currently, there is a notable absence of robust public law treaties that effectively address the ownership and restitution of cultural property. This gap in legal instruments leads to unresolved debates within major international organizations about the conditions under which cultural artifacts should be repatriated. Therefore, this paper explores the effectiveness of international law in the recovery of cultural relics, focusing on the competing interests of nationalism and internationalism, which influence the legislative and judicial effectiveness of these laws.

The paper is structured as follows: after the introduction, Part 2 introduces the theoretical framework, focuses on the theoretical positions of cultural nationalism and cultural internationalism, and reviews the main academic research in the field of return of cultural relics. Part 3 takes the 1995 Rome Convention as an example to discuss the practical dilemmas of the issue of return of cultural objects at both the legislative and the judicial levels. Based on a critique of current international law, Part 4 emphasizes the significance of nationalism in advancing legal justice and safeguarding cultural heritage. Part 4 also takes China as an example to suggest solutions to the dilemma of cultural relics return. Part 5 sums up the findings of this study, emphasizes the need for international law to strike a

better balance between nationalism and internationalism, and puts forward suggestions for the future direction of the study.

2. Theoretical Foundations and Academic Discourse

2.1. Theoretical Foundations

Returns of cultural property have long been a contentious topic in the sphere of international law. The issue of cultural restitution is a dispute over the ownership of cultural property, and cultural property law is an important theoretical basis for such issues. Cultural property law involves international law, national law and relevant moral and ethical principles, aiming to address losses resulting from war, colonial activities, illicit trade, theft and other similar circumstances. This legal field is dedicated to addressing and resolving disputes over transnational cultural property ownership and ensuring that cultural heritage can be appropriately protected and reasonably returned.

The debate over the perspectives of cultural heritage recovery can trace its roots back to a seminal piece by Stanford University Professor John Henry Merryman, "Two Ways of Thinking about Cultural Property" (1986) [1]. Professor Merryman introduced two pivotal theoretical frameworks within cultural property law: cultural nationalism and cultural internationalism.

Cultural nationalism emphasizes the sovereign nature of cultural property, arguing that cultural property should be held in the possession of its country of origin. Proponents argue that cultural objects are key components of national identity and cultural identity, and that their physical attribution should be consistent with their cultural attribution. For instance, many nationalists insist that the historical and cultural symbols of a country, such as temple sculptures or ancient manuscripts, cannot be divorced from their native cultural environment. They argue that any form of exodus is detrimental to the cultural integrity of that country. This position usually involves full sovereignty of the State over its cultural heritage and a strong right of recourse against illicitly acquired cultural objects.

Cultural internationalism, on the other hand, considers that cultural property is the common cultural wealth of humankind and that it should be held by States with the capacity to protect it rather than necessarily returning it to its original State. This view holds that cultural objects should transcend national borders and that their value should be shared by all humankind. Internationalists emphasise that the preservation of much cultural heritage is more dependent on the conditions of protection than on the geographical or cultural origin. For example, certain countries may be unable to properly protect their cultural heritage due to political instability or economic difficulties, and therefore it may be in the interest of all humanity to preserve these objects in countries with better facilities and more advanced technology.

These two positions reflect a fundamental understanding of the meaning of cultural heritage and the scope of international cooperation. Nationalism favors the preservation of cultural heritage in its original cultural context and respect for its original cultural values. In contrast, the internationalism advocates for the worldwide exchange of culture, emphasizes the universal benefits of education and research, and argues that the preservation and use of cultural heritage should serve the best interests of all humankind. This divergence is not only reflected in academic discussions, but also has a direct impact on the development of international regulations, bilateral agreements and national legislation.

2.2. Academic Discussion

Law and Cultural Heritage, co-authored by Professors Prott and O'Keefe in 1984, can be regarded as the seminal work on cultural property law [2]. Since then, there has been much academic discussion on the topic of heritage recovery. The current academic discussion on the position towards the restitution of cultural relics is mostly under the framework of Professor Merryman [1]. Chinese scholars mostly adopt the nationalist perspective, such as Mu and Zhu, who believe that the existing Union Law tends to internationalism, increasing the obstacles to the recovery of cultural relics [3]. Huo (2023) also believes that cultural relics, as a unity of cultural and economic values, are very easy to be lost through various ways, and that nationalism is the correct theoretical attitude that the

international community should have [4]. Conversely, most Western scholars embrace cultural internationalism. Merryman clearly pointed out that when it comes to dealing with the problem of Greek cultural treasures, Britain should take the internationalism stance and refuse to return the artifacts [1]. Mezey also believes that cultural relics should be regarded as the common property of the international community, and advocates that the original country of the cultural relics should not insist on requesting for the recovery of the cultural relics [5].

However, through tracing the literature, it is found that Chinese scholars' defense of nationalism mostly stays in proclaiming the importance of cultural background and cultural value of heritage under their own position, failing to critically analyze the absurdities of internationalism. Furthermore, few of them pay attention to the Union Law or examine the reasons behind its poor efficacy from the perspective of the contradiction between nationalism and internationalism. Therefore, this paper will try to fill this research gap by adopting the perspective of nationalism, focusing on the impact of the dispute between nationalism and internationalism on the legislative process and judicial effect of international law, exploring the irrationality of internationalism, and trying to provide solutions.

2.3. Research Methodology

This paper will adopt a normative research approach to aid in comparing the impact of nationalist and internationalist perspectives on the judicial and legislative processes of Union law. These methodologies are chosen to provide a structured and evidence-based analysis of international law's effectiveness in addressing cultural relic recovery.

The normative approach focuses on the contingency of law it provides an opinion on the normative role of law. The normative approach focuses on the normative effect of positive law and the criteria for its adjudication, focusing on the textual law and arguing that the 'law in text' cannot be automatically transformed into 'law in action', but must be supported by the appropriate social institutions [6]. This approach helps this paper to examine the influence mechanisms of the nationalism and internationalism on Union law.

Comparative analysis is used to explain and better understand the causal processes involved in the production of events, features or relationships [7]. The fact that the world community views cultural heritage differently is the reason why the repatriation of these items remains a legacy concern. Different approaches to handling cultural objects have resulted from these distinctions.

Using comparative analysis and a normative research approach, this paper compares nationalist and internationalist views on heritage protection in the framework of the Rome Convention. This paper attempts to point out which perspective should be adopted by the existing legal system for the protection of heritage.

3. Legal Dilemmas - Taking the 1995 Rome Convention as an Example

When tracing back the international legal provisions involved in the recovery of cultural relics, it can be concluded that the 1954 Hague Convention, the 1970 Paris Convention and the 1995 Rome Convention are the three major public international laws most often referred to [8]. The Rome Convention, as the newest among them, offers clearer and more comprehensive provisions than its predecessors, thus broadening its applicability in the restitution of cultural artifacts.

3.1. Legislation - Resistance of Importing Countries of Cultural Objects

Due to the restrictions placed by the main importing nations, international law around cultural property recovery has proven challenging at the legislative level. The three main international conventions on heritage recovery have progressively shifted in favor of cultural nationalism. Under this trend, the 1995 Rome Convention is an enhancement and modification of the 1970 Paris Convention. Compared with the original Hague Convention, because of its nationalist stance, some importing nations view the Paris Convention as granting extraterritorial impact to the domestic laws of the original countries. Some of the major importing countries criticized the Paris Convention for

violating the basic principle of sovereign equality [9, 10], and were reluctant to accede to the Convention, thus causing the 1970 Convention to fail to be adopted. The 1995 Rome Convention, with its more distinctive stance than the Paris Convention, is the most obvious nationalistic convention so far [8]. Paris convention therefore has been resisted by some of the major exporting countries. With only 37 signatories, the application of the Convention has been greatly reduced.

Being the product of a game and compromise between the interests of the State of origin and the State of the market for the cultural property, most of the conventions suffer from the ambiguity of the wording of their core provisions. The Hague Convention provides for “military necessity” as an exception to heritage protection, but as the Convention does not clearly define the “military necessity”, the wording is obviously too subjective and insufficiently operational. Article 7 of the core provisions of the Paris Convention is in fact only applicable to the return of stolen cultural heritage in the collections, but not to archaeological artefacts lost because of grave robbing, and the 1995 Rome Convention, although more clearly defined than the two previous conventions, also suffers from ambiguities due to the constraints of the major importing countries [4].

China practices the Rome Convention in the field of cultural relics recovery. The statue of the Ancestor Zhang Gong, which was stolen 20 years ago from Yangchun Village, Wushan Township, Datian County, Fujian Province, was found to exhibit at the Hungarian Museum of Natural Sciences. Oscar van Overeem, a Netherland collector, now owns the statue. The Fujian villagers have launched a transnational lawsuit, but in vain. One of the main reasons is that there are only 37 signatories to the Rome Convention, and although the Netherlands has signed the Convention, it has not yet been ratified, so that the Convention is not legally obligatory for the Netherlands [11]. Through the statue of Zhang Gongzu, it can be found that the resistance formed by the nationalism and internationalism dispute in the legislation of international regulations mainly originates from the use of the passage rate by the relevant interest-impaired groups to prevent the law from taking effect.

3.2. Judicial Challenges- Poor Retroactivity

The retroactivity of the Convention is a major obstacle to the return of cultural property. One of the major values of cultural heritage is its historical attributes, and the retroactivity is the most important requirement for the recovery of cultural heritage. The three conventions lack explicit language about their retroactivity because of the market countries' strong opposition.

According to the Vienna Convention, unless the treaty expressly states differently or makes other determinations, it does not bind a party with respect to any act or circumstance that occurred before the date of its entrance into force [12]. None of the three Conventions has a retroactive effect. Neither the Hague nor the Paris Convention is clear about retroactivity, and Article 10 of the Rome Convention explicitly states that it applies only to theft and illicit export of cultural objects occurring after the entry into force of the treaty. The Rome Convention has entered into force in the modern era and its retroactive effect on historical objects is very weak. Given its limited retroactivity, it appears that the Rome Convention is seeking to de-emphasize the historical significance to gain the adherence of more cultural object possessor states. Although such a compromise can led to the adoption of legislation, it will result in a significant reduction in the judicial effectiveness.

For example, the challenges surrounding the restitution of the Parthenon Marbles in Greece and the Flesh Buddha in the Netherlands illustrate the practical limitations of these conventions [8]. These artifacts, which were removed under conditions that would now be considered illicit, fall outside the temporal scope of the conventions. This situation underscores a broader issue: the conventions are designed to foster compliance and consensus among possessing states by not challenging the legality of past actions, thus reducing their judicial effectiveness in cases involving historical objects.

The inherent conflict between nationalism and internationalism in these conventions complicates their application. Nationalism demands the return of cultural artifacts to their countries of origin to preserve cultural integrity and historical continuity. In contrast, internationalism often emphasizes the global sharing of cultural heritage, sometimes at the expense of original contexts. This philosophical

divide can dilute the effectiveness of international laws, as compromises made to accommodate both perspectives often result in weakened legal provisions.

Given the public nature of international conventions, reconciling the diverse interests of international stakeholders is crucial for the effective functioning of these laws. However, the divergent nature of nationalism and internationalism presents a significant challenge in achieving a comprehensive and equitable resolution. It is essential for international conventions not only to reconcile these interests but also to address and rectify the shortcomings of current internationalist approaches. This involves acknowledging and resolving issues related to the non-retroactive nature of current laws, rather than merely accommodating contemporary political and economic considerations that may compromise the conventions' effectiveness and integrity.

4. Contingent Recommendations on the Recovery of Cultural Heritage

4.1. The Irrationality of Internationalism

In discussing whether Britain should return the Parthenon Marbles to Greece, Professor Merryman proposes three principles: protection of cultural objects, integrity of cultural objects and proper distribution of cultural objects [1]. Using this as a theoretical basis for analysing internationalism in the recovery of cultural objects, it can be found that it is not reasonable. Nationalist stance should be chosen to solve the problem of the exodus of cultural objects.

4.1.1. The principle of heritage protection

Professor Merryman considered the preservation of cultural property to be the priority, not where they originate [1]. He believed that in measuring whether cultural property should be returned, the protection conditions between the State of origin and the State to which the cultural property had been transferred should be compared. In the case of the Parthenon Marbles in Greece, the climatic conditions in Greece proved to be unsuitable for the preservation of the marbles, thus Professor Merryman advocated that the marbles should be preserved in the United Kingdom. However, in practice, Western museums have not been able to fulfil the conservation principles they advocate. The annual reports of the British Museum in recent years have shown that much of the stock is not well cared for. Thirty percent of the collections have not been placed in the appropriate preservation environments. The problem of heritage conservation has remained unchanged since 2000 [13].

The principle of heritage protection may be rational in nature, but the importing countries of cultural heritage are interpreting the principle based on their own interest needs. It is not ideal to have this kind of misinterpreted principle. To realize the principle of protection, what resource-powerful countries should really do is to tilt their resources in favour of the countries of origin of cultural heritage.

4.1.2. Principle of integrity of cultural heritage

According to Professor Merryman, the principle of integrity should serve the principle of heritage protection [8]. When neither return nor non-return can ensure the integrity, Professor Merryman recommends adhering to the protection principle and depositing them in nations that meet the protection requirements. However, the “lack of integrity of cultural objects” criticized by internationalism is due to the looting and improper trade of the major importing countries themselves. The fact that large quantities of cultural property are broken up and fragmented into small pieces for the sake of transport. This is the real cause of the incompleteness of cultural objects.

Thus, to realise the principle of integrity, resourceful States should return cultural objects and, because of their integrity, help the State of origin of the cultural property to protect them. Resourceful States should not forcibly appropriating cultural property at the expense of severing the link between the property and its cultural context just because the integrity cannot be satisfied.

4.1.3. Principle of appropriate distribution of cultural heritage

Professor Merryman believes that cultural heritage is the common property of all the human beings and should be appropriately distributed all over the world, so that people of all countries can have opportunities to approach and understand the cultural achievements of other nations [14]. However, the inappropriate distribution of cultural heritage is in fact due to the longstanding plundering behaviours of certain possessor countries. The so-called “making other cultural achievements widely known by people of all countries” in fact can only satisfy the needs of the people in developed countries. Taking the British Museum as an example, its cultural exchange activities are mainly concentrated in the first world countries such as Europe, America and Japan instead of spreading the opportunities to developing countries [13].

Therefore, the principle of appropriate distribution of cultural objects should, first, require the return of cultural property to recover the original balance of possession of cultural property. Secondly, it should be made known to the world through legitimate international exchanges and other lawful means, instead of the possession and monopoly of cultural property by a small number of developed countries.

4.2. Optimal Solutions for the Recovery of Cultural Heritage

To effectively address the recovery of displaced cultural relics, China should adopt a nationalistic stance, asserting the sovereign status over the original ownership of cultural relics and promoting their recovery both domestically and internationally.

4.2.1. Strengthening the domestic system

China should systematically formulate legal provisions on the recovery of displaced cultural relics. It should also make clear which cultural artifacts—State-owned and non-State-owned—are eligible for recovery in each case. The dispute in the field of cultural relics recovery involves different laws and regulations by various countries, and the essence of the conflict is the competition for the sovereignty of cultural relics. Only by clarifying the subjects can the responsibilities and powers of both parties be further clarified.

Scholar Huo points out that the bona fide acquisition system and the acquisitive prescription system, widely found in the domestic laws of various countries, create obstacles to the recovery of cultural relics [4]. When the assignor transfers ownership of movable property to the assignee, it is referred to as a “bona fide acquisition” in law. When the assignee accepts the transfer in good faith, they will nonetheless become the owner of the movable property even though the assignor does not have the legal authority to transfer the ownership. In the practice of cultural relics transaction, the inflowing countries of cultural relics often regard themselves as “bona fide” purchasers and assert the ownership of cultural relics accordingly [4]. Most of the transactions of cultural property in countries of origin are non-public and often pass through several ways. This makes it difficult for States of origin to claim the ownership of cultural objects. “Acquisitive prescription” means the system whereby the non-possessor exercising the ownership after a certain period in possession of the object. This system is designed to prevent a long-term split between possession and ownership [4]. However, it legitimizes the right of possession, and further hinders the recovery of cultural property by the State of origin.

Therefore, China should amend its civil and commercial laws as soon as possible. For the stolen cultural relics, China should establish the rule of reversing the burden of proof, requiring the possessor of the relics, rather than the original owner, to bear the burden of proof. Regarding historically displaced cultural relics, China should explicitly state that the acquisitive prescription system does not apply to the requests by the State concerned.

4.1.2. Leading the international system

China should work to establish new procedures for resolving international disputes in cultural artifacts and pursue the authority to establish international norms. China ought to actively engage in international organizations like UNESCO, fully utilize forums for international collaboration, and

collaborate with nations that share the same goals. China should make great efforts to enhance the right to formulate international rules in the field of cultural relics, and break the dominance of the western countries in international rule-making.

Scholar Huo Zhengxin clearly pointed out that the International Organization for Mediation (IOMed), an intergovernmental international legal organization that China founded as a new forum for the resolution of conflicts over international cultural heritage, should be fully utilized. Huo points out that the existing international and domestic laws cannot provide satisfactory legal solutions in terms of both litigation and arbitration [4]. China, as a major exporting country of cultural relics, should actively seek new measures to deal with international disputes. The International Organization for Mediation is in line with the characteristics of international disputes over cultural relics, and can provide new options for the international disputes over the recovery of cultural relics.

By implementing these strategies, China can take a leadership role in the international community, advocating for changes that enhance the protection and restitution of cultural heritage on a global scale. These efforts will not only benefit China but also set a precedent for how countries can reclaim their cultural legacies and ensure their preservation for future generations.

5. Conclusion

This paper adopts a comparative research method and a normative research method to analyse the dispute between nationalism and internationalism in the field of cultural relics recovery, and further analyze its impact on the legislative process and judicial effectiveness of the relevant public international law. Professor Merryman's principles on the protection, integrity, and distribution of cultural objects served as a critical lens through which the flaws of the internationalist perspective were examined. The study revealed that while internationalism purports to foster a shared responsibility for cultural heritage, in practice, it often facilitates a one-sided benefit to economically and politically powerful nations at the expense of the countries of origin. Based on this, this paper suggests that the best approach to ensure that cultural heritage "go to the world" and "return to the motherland" may be to first return them to their country of origin, after which the powerful resource nations should support the exhibition and preservation of the cultural relics.

Going forward, research should continue to explore the impacts of cultural nationalism and internationalism in other contexts and with other international conventions. Additionally, case studies from countries that have successfully implemented restitution laws can provide valuable insights and serve as models for developing effective strategies in cultural heritage recovery. In conclusion, while the challenges are significant, embracing a nationalist approach in the recovery of cultural relics offers a path towards restoring not only artifacts but also dignity and integrity to the cultures from which these treasures originate. The international community must recognize the importance of cultural heritage as not merely relics of the past but as living embodiments of national identities and histories that deserve to be preserved and celebrated within their rightful homes.

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