

Restitution of Cultural Heritage under International Law

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Abstract: In recent years, the protection of cultural heritage has attracted worldwide attention and has been gradually deepened in all countries and nationalities. Due to all kinds of historical and realistic factors, the problem of illegal transfer of cultural heritage is very serious. And whether in war or peace times, cultural heritage can not escape plunder, theft and illegal export and other adversities. Therefore, in order to protect the cultural heritage, it is very important to sort out the basis of its restitution, clarify the dilemma faced by its restitution, thus explore the legal mechanism of the restitution of the cultural heritage.

1. Basis for the Restitution of Cultural Heritage**1.1 Theory Basis**

As a special property, cultural heritage has the commercial value of ordinary property. On the other hand, cultural heritage is not only the embodiment of material value, but also the symbol of a nation and nation. And it is historical and contemporary. Therefore, because cultural heritage is integrated into the feelings of a nation, nation and individual, it is historic and inherited, and every country and nation will do its best to protect the integrity and authenticity of the cultural heritage and pass it on to future generations. So, the special value of the property makes the original owner's right to restitution different from the general property.

In addition, as an important link in national property and national civilization, cultural heritage involves a broad group of interests. Violating the will of the State of origin to steal and loot cultural property, this behavior is an infringement of a country's sovereignty.

1.2 International Law Basis

At present, the international community has adopted plenty of global international treaties on the protection of

cultural heritage, such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted by UNESCO in 1954 for use in times of armed conflict. The transfer of cultural heritage is to prevent loss, so the occupying Power and the third State are only depository and not have the ownership of the heritage. Certainly, the State of origin can prescribe a request for restitution in accordance with the convention.

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in 1970, stipulates that the importing country will confiscate the stolen cultural relics when they enter the customs and restitution them to the exporting country. It indicates that the import of stolen cultural relics will be prohibited directly; The illegal export of cultural relics by limiting their presence in the country Move measures while imposing indirect restrictions. It provides a legal basis for the state to exercise the right of restitution of the heritage. Finally, the Convention on Stolen or Illegally Exported Cultural Objects adopted by the International Institute for the Unification of Private Law in 1995 stipulates that the possessor State of cultural relics has the obligation to restitution under certain conditions. But this restitution is a private law act which is resolved by filing a civil action.

2. Difficulties Faced by the Restitution of Cultural Heritage

2.1 Limitations of the Convention Itself

Since several important conventions dealing with the restitution of cultural heritage are provided for only in specific cases of restitution proceedings, the scope of application is not broad enough, mainly in the following areas:

Firstly, the scope of application of the Convention is limited, and it is concluded by States parties on a voluntary basis and therefore applies only to States parties and is not binding on other States. Therefore, when the possession of cultural objects is not a State party, the Convention cannot be the legal basis for the requesting State to exercise the right to restitution.

Secondly, The time limit for the application of the Convention is limited. Unless it is expressly stated that the Convention shall have no retroactivity. So any legacy lost prior to the entry into force of the Convention in question shall not be returned under the Convention.

Thirdly, the substantive laws and regulations applicable to the Convention are limited, and each convention has a clear application. In addition, some conventions seek to balance interests. It has established the principle that the restitution of cultural relics should still be governed by general private law norms, depending on the

different circumstances of stolen or illegally imported cultural relics. Then, as long as the legal counterplea or other restrictive reasons appear, the owner of cultural relics will not have the legal obligation to restitution cultural relics, which increases the difficulty of cultural restitution.

2.2 Limitation of State immunity

Sovereign equality of States is a fundamental principle of international law. So in international proceedings in which the State is the defendant, the State is often exempt from the proceedings on the basis of the sovereign immunity of the State. Despite the increasing number of States adopting the doctrine of limiting immunity, the United States has enacted the Foreign sovereign immunity law, which provides for exceptions to immunity from national jurisdiction, among which commercial exceptions and exceptions imposed by illegal international law are most applicable. However, the application of the law has strict standards, and the applicable conditions are still controversial. Some countries give immunity to national jurisdiction on the basis of the principle of national comity and political factors, which brings some obstacles to the restitution of cultural heritage.

2.3 the Problem of Conflict Law in the Return Proceedings

In the last century, German Nazis plundered countless cultural heritages from Jews, and Japanese and other invading countries violently plundered Chinese cultural relics. Although the cultural heritage has been sold by auction, gifts and other forms of public and private possession, but they still face the return of cultural heritage litigation. After the court determined its jurisdiction, the case went on to the stage of substantive hearing. At this time, the application of the applicable law is particularly important, because the law often reflects the value orientation and national culture of a country, and the application of the applicable law has a great influence on the burden of proof, the way of debate and the result of judgment.

With regard to the treatment of disputes of ownership, the current practice of national courts is to apply *lex situs*. Because it meets the needs of international comity principles, it is also predictable and convenient. Although the application of *lex situs* has its unique advantages, it ignores one thing, that is, cultural heritage is different from ordinary property and has the attribute of "culture". In addition, some countries focus on the protection of the rights of bona fide buyers. If the principle of *lex situs* is adopted, the larceners and predators of cultural heritage will purposefully choose the place of exchange in advance so that the bona fide buyer can acquire ownership of the cultural heritage within a short period of time. In fact, it do harm to the legitimate interests of the original owners.

3. the Legal Mechanism of the Restitution of Cultural Heritage

3.1 UNESCO Consultative and Cooperative Mechanism of the Intergovernmental Committee

UNESCO has established the Intergovernmental Committee for the Promotion of the restitution of Cultural property to its countries of Origin or the restitution of illicit possession of Cultural property. In accordance with its statute, its main function is to provide advice and a framework for consultations and negotiations. But it does not have the authority to directly determine disputes over the restitution of States. And it also encourages the necessary exploration and research in order to develop coherent plans to promote bilateral or multilateral cooperation on the restitution.

Despite the limited scope of its functions, with the facilitation and assistance of the Commission, many disputes have been successfully and satisfactorily resolved since its establishment, such as the restitution of hundreds of items by the United States to Greece; The restitution of ancient silk fabrics of religious importance to Bolivian tribes by Canada have demonstrated the positive role of the Commission.

Although these disputes have been resolved after lengthy consultations and the process has not been smooth from the outset, consensus has been reached through friendly dialogue between the two sides. And on the one hand, voluntary restitution have made up for the deficiencies in the existence of existing conventions, on the other hand, it prevents the relations between countries from worsening because of the dispute of the restitution. What's more, it sets a good example of communication for the restitution of cultural heritage.

3.2 Bilateral and Regional Multilateral Treaties

Compared with international conventions, bilateral treaties and regional multilateral treaties are more targeted and operational, and can complement international conventions. Where there is no consensus between the parties or States on all issues, cooperation can be reached on a particular issue or on the restitution of a particular type of cultural property, thereby achieving a more efficient resolution of disputes over the restitution of cultural heritage.

The representative regional treaty is the San Salvador Convention for the Protection of Antiquities, History and artistic Heritage of American countries, drawn up by the Organization of American States. The Treaty takes into account the continuing plunder of the national cultural heritage of the countries of Latin America. In terms of the application of law, article 7 of the Convention stipulates that the issue of ownership of cultural relics shall be subject to the domestic laws of various countries, thereby indirectly recognizing the title of

cultural relics claimed by the resource country. According to the Convention, works of art declared as State property can be recovered through the courts of the State of discovery once stolen.

3.3 Perfecting Domestic Recourse Mechanism

The protection of cultural heritage and the smooth development of its restitution require the guarantee of domestic recourse mechanism in each country. In this regard, we can draw lessons from Egypt's experience of setting up a cultural relics restitution authority to pursue cultural heritage. Egypt is one of the four ancient civilizations, rich in cultural heritage resources, and a country with profound cultural heritage. But historically, Egypt has been torn by war and cultural heritage has been damaged, looted and lost abroad. To this end, Egypt has set up the Antiquities restitution Authority to track about 40 major cultural heritage sites around the world. In addition, Egyptian embassies in foreign countries pay close attention to auctions and transfers of Egyptian cultural relics in host countries. Let's wait. In the event that a cultural heritage involving Egypt is found to be involved in the auction, transfer and exhibition activities, the Property Return Authority may contact the relevant institution or individual at the first time requesting it to produce the corresponding documentary evidence to prove its legal possession of the property. Once the other party is proved to be illegal, Egypt will exert pressure on its host country through such means as diplomacy and return it. If the host country does not cooperate, Egypt will consider terminating all exchange activities with the country in respect of the excavation and display of cultural relics.

Although the establishment of the Egyptian Authority for the restitution of Cultural relics is a domestic institution, its establishment and working mechanism have demonstrated Egypt's great determination to pursue cultural heritage throughout the world. At the same time, the establishment of a special agency to track the development of cultural heritage can really save resources to the maximum extent, improve the efficiency of the pursuit of cultural heritage, which can be used for reference and guidance to the cultural heritage recovery work in the world.

4. Conclusion

On the restitution of cultural heritage, transnational litigation is certainly one of the methods. But it is time-consuming, expensive, difficult to execute and hard to guarantee the expected interests in the litigation for the restitution cultural heritage. Therefore, when the lost cultural heritage can not be pursued by means of litigation, it is necessary to seek other ways to recover the lost cultural heritage which is out-of-litigation way.

In cooperation with international conventions, regional and bilateral agreements have set up legal mechanisms to control the illegal transfer of cultural heritage at different levels and limits, thus effectively promoting the restitution of lost cultural heritage. At the same time, the force of non-governmental organizations and domestic recourse mechanism can not be underestimated.

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