



GRIPS Cultural Policy Case Series 21

The Impact of 1970 UNESCO Convention Accession on the Protection of Cultural Property¹

Abstract

This study explores the impact of 1970 UNESCO Convention accession on the protection of Cultural Property, by reviewing UNESCO Report, Preparatory Works, and literatures on illicit trafficking in Cultural Property and protection of Cultural Property. The study sought to discover whether Thai government should ratify this Convention. The study shows that the Convention has inspired a number of legal and practical tools to assist State Parties in the fight against illicit trafficking. Meanwhile, the definition of Cultural Property coupled with insufficient inventory system, has often lead to illicit trade in antiquity. These findings suggest the need to establish an integrative mechanism and incorporate it in cultural property protection.

Cultural property is one of the basic elements that constitutes very precious cultural heritage of the state and of humankind. It is the historic evidence illustrating the past in manifold aspects and also reflects the prestige and pride of all humanity. The parties of the 1970 UNESCO convention “agree that trade in cultural objects exported contrary to the law of the nation of origin is illicit and agree to prevent the importation of such objects and facilitate their return to source nations” (Merryman, 1986, p.843). Therefore, it is the responsibility of every country to protect its own cultural property from illegal excavation or export (Argyropoulos, Polikreti, Simon, Charalambous, 2011). To prevent the destruction of cultural property, each country is obliged not only to protect its own cultural property but also to cooperate to protect the cultural property of all humanity (Shyllon, 2012). According to “the main objective of the convention is to protect cultural property and to regulate measures and policies on its import and export at the international and national levels.” (Marton, 2009). In addition, Bouchenaki found that the illicit traffic of cultural property has increased due to the risks of uncontrolled commercial trade (2009). In order to strengthen the protection of cultural property, the Thai Government must closely cooperate with other

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states to deal with this matter and is supposed to become party to the 1970 UNESCO Convention (Sakulpanich, 2012).

Past researchers analyzed how effective is the Convention. Merryman (1986), for instance, stated that the import restriction of cultural property from the source nation will be regulated by a market nation. On the other hand, Marton (2009) found difficulty arises in defining what cultural property the market nation would restrict. There is a need to ascertain if the convention is still effective. Therefore, the present study attempts to fill this gap in the existing body of research.

Despite some studies (O'Keefe, 2007; Prott, 2011; Merryman, 2005) on the protection of cultural property, there seem to be no agreement on the common definition of cultural property. This is probably because each state has the right to specify the scope and content of the definition of its own cultural property (O'Keefe, 2007) However, there are serious issues of illicit trafficking across all levels of member countries, which affects the effectiveness of the convention. Therefore, it is vital to evaluate after the adoption of the 1970 UNESCO Convention to understand the strengths and weaknesses of the Convention (Prott, 2011). In this section, there is a brief discussion of theory behind the convention. After that, some of the previous studies are presented the related topic.

There are two theories about cultural property. One is components of a common human culture, called "cultural internationalism," wherever their places of origin or present location, independent of property rights or national jurisdiction (Merryman, 2005, p.11). Merryman stated, "everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated and from whatever cultural or geographic sources it derives" (2005, p.11). Another theory is as part of a natural cultural heritage, called "cultural nationalism." This gives a nation a special interest, and implies the attribution of national character to objects (Merryman, 1986). Warring viewed cultural property as a part of the cultural heritage of the nation in which it is found or the nation, which contains the cultural descendants of its creator (2005). Each state has the jurisdiction and the right to exercise control over matters within its territorial boundaries.

The national legal control of illicit traffic in cultural property complements the 1970 UNESCO Convention (O'Keefe, 2007). Some states that are party to that convention could well use their implementing procedures of the Convention to fulfill their obligations under the Resolution (Marton, 2009). Marton maintains that others might need to take new legislative measures (2009). In the context of the implementation, one measure often use to control the illicit trafficking in cultural property is import control (Bouchenaki, 2009). Customs authority impose an obligation to search actively for unlawfully exported cultural property. The meaning of this was an interpretation requiring a search of all passenger luggage, all goods in transit, and all modes of transportation (O'Keefe, 2007). However, this would have been unworkable because in the real situation Customs Officers have been found difficult to inspect every single transport at point of entry.

The development of international instruments in the field of cultural property protection can be analyzed from various viewpoints. For instance, the definition of cultural property, the scope of

each topic, and the mechanism to achieve the objective, reflects the underlying philosophy of the 1970 UNESCO Convention. The background of the 1970 UNESCO Convention depicts that cultural property is understood as something to be transmitted to the future generations (Kono, T., 2010). Therefore, the loss of a national treasure cannot simply be understood as the loss of economic value. It could be considered as the loss of national identity.

1. Motivations

From 19th century onwards, Thai and foreign scholars and archaeologists identified, documented, and researched Thai sites and materials, leading to a deeper understanding of the history of Thai culture. The establishment of the Fine Arts Department (FAD) in 1911 evidenced the importance that Thailand gave to this effort (Stent, J., 2012) to coordinate the government's role in matter relating to art and culture.

In addition, the FAD focused on the research, excavation, reconstruction of the ancient monuments, and also on the conservation of palaces and Buddhist temples of a certain antiquity. In the 1960s, the FAD launched the restoration of Phnom Rung. It found that one of the ancient lintel called the Phra Narai Lintel has gone missing before it was presented in the art institute of Chicago in the 1970s (Denes, A., 2012). It provoked a strong sense of nationalism among Thais. The restoration was completed in 1988. Denes (2012) claims that it was one of the highest profile cases that represented the long way to reclaim cultural property:

The repatriation of the Phra Narai (Vishnu) lintel, the carved lintel that depicts a creation myth featuring the Hindu god Vishnu asleep on the serpent Ananta, was stolen from the Phnom Rung sanctuary in the early 1960s and made it way to the Art Institute of Chicago. It was reported that Thai government agreed to pay compensation to get the priceless lintel back to the Kingdom. (p.189)

Figure 1 Phra Narai Lintel



Source: http://www.oknation.net/blog/voranai_

The other case study is the repatriation of Luang Phor Sila, a sacred statue of Buddha, which is enshrined in Wat Tung Saliem in Sukothai Province. This Buddha statue in meditation posture is made of stone. It is decorated with a seven-headed great serpent encircled over the statue. This Lopburi-style statue is approximately 800 years old and had been stolen (Yasovant, J., 2011). Fortunately, it was found in the United States. Sotheby's London sold the statue in auction in 1988, as part of a nine-item sale of 'Khmer, Thai, Indian, and Himalayan Art'.

It was understood that the owner of the statue felt that he had purchased the property in good faith and he had acquired legitimate title. The Thai government investigated the matter in 1996 and agreed to pay \$200,000 to return Luang Phor Sila back to Thailand. (Yasovant, J., 2011).

Figure 2 Luang Phor Sila



Source: <http://www.archives.scene4.com/jan-2011/0111/janineyasovant0111.html>

2. Background

Today researcher considered illicit trade is one of the largest businesses in the world. It is believed that 80% of all antiquities that come to the market have been illegally excavated and smuggled (Argyropoulos et al., 2011). This trade has been some connection with money laundering and has led to other crime (Hilare, R.S., 2007 as cited in Argyropoulos et al., 2011).

As a consequence of trade in antiquity, the world divides itself into source nations and market nations. Source nations are rich in cultural artifact such as Egypt, Greece, Mexico, and India. This causes the supply of desirable cultural property exceed to the internal demand (Prot, 2011). While in market nations, such as the United States, France, and Canada, the demand exceeds the

supply. Scott (2013) argues that demand in the market nations, not ratification of the Convention, encourages export from source nations, which makes market states reluctant to import control of heritage item of other countries. On the other hand, O'Keefe (2007) maintains that source nation demand for restitution of Cultural Property.

3. Results

After a half century, it is time for scholars to research the 1970 UNESCO Convention on its effectiveness concerning the protection of Cultural Heritage in peacetime. Some studies tried to evaluate the advantages and shortcomings of this instrument. Prott (2011) found a compromise of each position has set a standard for Inter-state cooperation, which has 128 countries, are bound by this Convention. This leads to change of attitude, both with governments, which are parties to the Convention, and with those who are not.

3.1 Theory on Cultural Property

There are two theories about cultural property, one as components of a common human culture, called "cultural internationalism," wherever their places of origin or present location, independent of property rights or national jurisdiction (Merryman, 2005). Merryman also stated, "Everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated and from whatever cultural or geographic sources it derives" (2005, p.11). Another theory is as part of a natural cultural heritage, called "cultural nationalism." This gives nation a special interest, implies the attribution of national character to object (Merryman, 1986, p.842). Warring viewed cultural property as a part of the cultural heritage of the nation in which it is found or the nation, which contains the cultural descendants of its creator (2005). Each state has the jurisdiction and the right to exercise control over matters within its territorial boundaries.

The basic objective of the 1970 UNESCO Convention is to inhibit the illicit international trade in cultural objects. Article 2 provides that the parties agree to oppose the impoverishment of the cultural heritage of a nation through illicit import, export, and transfer of ownership of cultural property. According to Merryman (1986), among the member countries can be classified in two groups: market nations, such as the United States, France, Canada and Japan, and source nations, such as Mexico, Egypt, Greece, and India.

In source nations, they are rich in cultural artifact, which encourages the demand in the market nations. As Merryman state "When, as it often the case, the source nations is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property"(1986, p.832). In reality, two ways of thinking about cultural property have their legitimate ground. This may have caused the 1970 UNESCO Convention to be a compromise between market and source nations (O'Keefe, 2007).

3.2 Definition of Cultural Property

The definition of cultural property is a difficult task. For the purpose of the 1970 UNESCO Convention defined the term 'cultural property' to mean property which, on religious or secular grounds, is specifically designated by each state as being of importance to archaeology, prehistory, history, literature, art, or science and which belong to the categories listed in Article 1 of the Convention.

Carducci's study (as cited in O'Keefe, 2007) describes that there are two elements in the above definition: one element allowing a state to define its own cultural heritage concurrently with a second element. It must be of importance and within the defined categories. Therefore, O'Keefe concluded that in international relationships each nation is equal and contributes its own identity. He also claimed that each state has the right to regulate the scope and content of the definition of its own cultural property.

The diversity of definitions of cultural property reflects the diversity of state parties. Every member country represents their own historical, political, and legal environment. According to Vrdoljak (2014), the diversity is not problematic as long as the definition is concurrent with the parameter of the Convention. However, it impedes the uniformity of law across state parties in particular areas such as in a lawsuit to repatriate cultural objects.

3.3 Practical measures and tools

The effectiveness of the 1970 UNESCO Convention relies on both the national legal environment of each State Party and on the harmonization of legislation at the regional and global levels in order to facilitate international cooperation (Vrdoljak, 2014). In order to fight against the illicit trafficking of cultural property, the Convention divided measures and tools into 3 sections.

(1) Preventive measures

State Parties are required to establish national service for the protection of the cultural heritage and have a function to list important public and private cultural property which should have export certificate. As Vrdoljak stated, the organized inventories are important, as they can constitute a proof of ownership in the case of theft (2014).

(2) Restitution provision

Article 7 (b) (i) of the Convention requires State Parties "to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party after entry into force of this Convention" (See Appendix). This provision is only applied for inventoried objects stolen from a museum, a religious or secular public monument or a similar institution. Vrdoljak concluded that the article does not

apply for cultural property clandestinely excavated from archaeological sites and exported abroad (2014). She also stated that protection is not included cultural property stolen from private institution (2014).

(3) International cooperation framework

Several articles in the Convention are related to international cooperation between State Parties. For example, article 9 call upon State Parties to participate in a “concerted international effort to protect cultural patrimony in jeopardy from pillage”(See Appendix), in order to undertake concrete measures such as the control of exports and imports and international commerce. The purpose of this article is “the deterrence of a situation of pillage threatening the cultural heritage, not just of a single state, but of all mankind” (Kaplan, 1996 as cited in O’Keefe, 2007, p.69)

3.4 State implementation

When a state becomes party to an international instrument it engages in fulfilling the obligations of the convention. However, the state implementation depends on its political, legal, and administrative structure. In some states, once the convention is binding, it is part of the national law. In other states, legislation must be passed before its implementation. According to O’Keefe (2007), implementation could be achieved through several pieces of legislation regulating different aspects of the treaty.

As Vrdoljak mentioned the articles of the 1970 UNESCO Convention are not self-executing (2014). Therefore, the effectiveness of the Convention depends on the national legal environment of each State Party. Vrdoljak also found that the 1970 UNESCO Convention has numerous domestic legal traditions for the protection of movable heritage of member countries (2014). Domestic laws regulating trade in cultural objects have been the driving force in its realization from the 1970 UNESCO Convention to the present day.

Furthermore, the Convention has inspired a number of legal and practical tools to assist state parties in the fight against illicit trafficking such as UNESCO’s International Code of Ethics for Dealers in Cultural Property (Vrdoljak, 2014). The International Council of Museums (ICOM) developed ICOM Code of Ethics for Museums. Prott (2011) agreed that it also influenced national associations of museums, anthropologists, archaeologist, and assistance programs for member and non-member countries.

4. Discussion

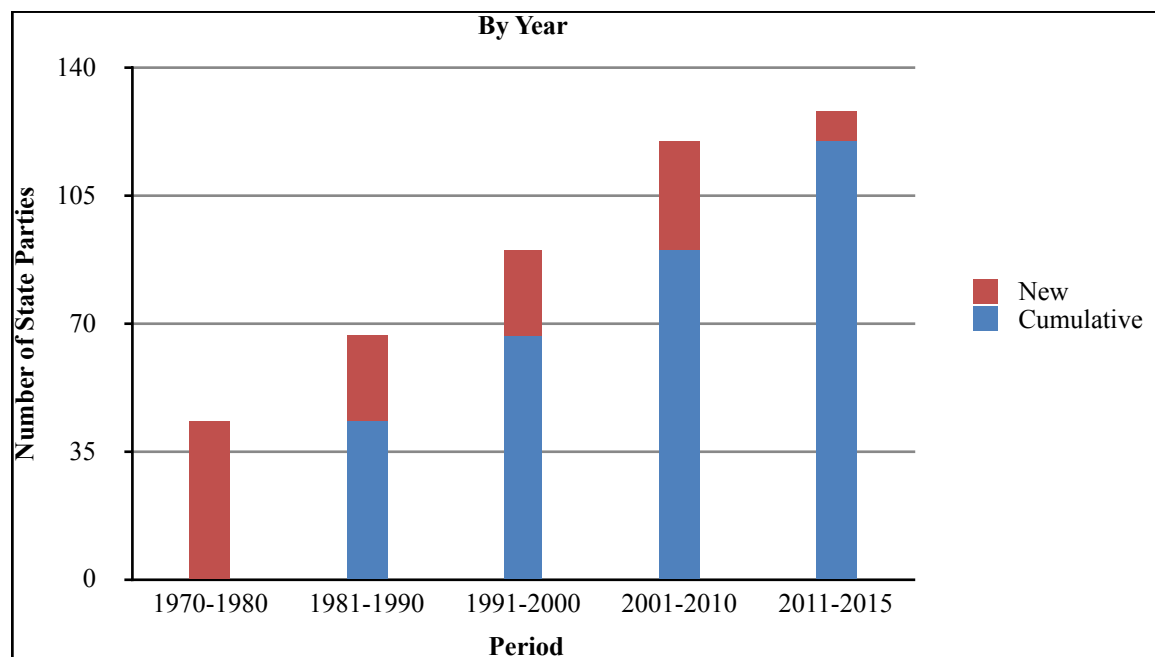
4.1 Impacts of the Convention

The Convention is creating significance change of attitude in international arena. Before

the Convention came into force, the auction catalogues showed that there was a great amount of unprovenanced pieces going in the antiquity trade. Vrdoljak stated that fighting with the art market is a major challenge for State Parties (2014). However, the impact of the Convention plays a significant role on the practices of museums and to place moral pressure on the practices of dealers in the art market (Prott, 2011). It can be seen that some large international auction houses made response to the pressure while in the case of small auction houses or galleries, their way of thinking was less likely to change (Vrdoljak, 2014).

As of 2015, there are 128 State members of the Convention. There are several market nations, including the United States (1972), Canada (1978), France (1997), The United Kingdom (2002), and Japan (2002). This achievement should not be underestimated. The Convention is clearly built on compromises between market and source nations in order to set a standard for inter-state co-operation. This may lead to the passage of national legislation to bring their practice into conformity with the Convention (Prott, 2011).

Figure 3 Ratification of the 1970 Convention: 1970-2015



Source: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/>

The adoption of the Convention led to the evolution of support mechanisms for the protection of movable cultural heritage (Prott, 2011). For example, UNESCO, national administration, and non-governmental organizations such as ICOM and Interpol held workshops on the relevant topic. In 1995, Interpol created a stolen works of art database to collect information on stolen items and provide information internationally. According to Interpol Fact

Sheet (2015), at the end of 2014, the database submitted by 129 countries and contained about 45,000 records. Since its creation, more than 2,800 stolen items in the database have been recovered.

These impacts are substantial components of positive side. However, the participation rate is still slow since the Convention came into force. The decision to ratify any convention results from various aspects both national and international (Vrdoljak, 2014). Vrdoljak also maintained that countries, which are rich in antiquities and cultural property, have incentives to ratify the Convention (2014). On the other hand, some market states have a reason for delayed ratification that is the political pressure from players in the art market.

4.2 Challenges of the Convention

4.2.1 Pathway to reclaim cultural property

Although the 1970 UNESCO Convention did not directly respond to issues related to repatriation, it can be seen that the preamble highlighted issues concerning the repatriation of cultural heritage (Gosling, J.K., 2012) The Convention includes some articles related to international cooperation. Article 7 (b) (ii) regulates the procedures for the recovery and return of object stolen from a museum or similar institution. Article 9 call upon State Parties to participate in a “concerted international effort to protect cultural patrimony in jeopardy from pillage” (See Appendix).

The return and restitution of a illegally traffic cultural object is one of the arguments between source nations and market nations because of the complicated legal, political, and moral aspects involved (Vrdoljak, 2014). The accurate inventory system of cultural object leads to the establishment of where an object came from and to whom it belongs (Shyllon, 2014). Shyllon maintained that the documented objects and clear ownership of cultural objects are the factors determining the return of heritage successfully (2014).

4.2.2 National Legislation Conforms to Convention

It has been the passage of national legislation in many countries to bring their practice into conformity with the Convention. The United State ratified the Convention in 1983 when Congress passed the Convention on Cultural Property Implementation Act (CPIA). The State was the first major antiquities market to ratify the Convention (Feldman, M.B., 2010). Its legislation has influenced in other countries with antiquity trade interests such as Japan, the Netherlands, Switzerland, and the United Kingdom (Prott, 2011).

In assessing both the impacts and challenges of the Convention. It offered a framework for the repatriation of Cultural Property. However, the repatriation of cultural objects which have been illicit trafficking still difficult to recover. Prott has argued that UNESCO should co-operate

with UNIDROIT on issues of private law such as good faith acquisition (2011).

5. Conclusion & Policy recommendations

5.1 Conclusion

In addition to general conditions that can cause illicit trafficking in cultural property to occur, there are some factors that contribute to the increasing risks in the trade in antiquity. Considering national treasure as the most valuable for nation pride, such factors includes: import control in dealing with export certificates to fulfill the most practical ways to administer the Convention in the circumstances of the country.

Recognizing such factors and ample state implementation which is exhibited in the Convention should address the threat of illicit trafficking in cultural property. In general, components required to address trade in antiquity: the instruments such as existing laws, as well as related actors and their respective roles. Nevertheless, due to some limitations mentioned and compared to practice implementing the Convention in other countries can be beneficial.

5.2 Policy recommendations

The need to implement an integrative mechanism: Thailand cultural property protection, which composed of the Fine Arts Department, the Customs Department and Department of Foreign Trade, is already available. They still stand individually as institutions to play the key role according to their own responsibility. This kind of working mechanism may result in overlapping in some areas of protection, while risking other area remains untouched. Therefore, there is need for an integrative mechanism in particular to address illicit trafficking in cultural property issues spotlighted. One good model exhibited is the 1970 UNESCO Convention. Not only it touched upon preventive measures such as inventories, export certificate and monitoring trade, it also took care of restitution provisions including museum's acquisition issues.

In addition to the existing related institutions, it should fully integrate participation of the people. People's participation will not only aim to reduce the government's burden but also to build a concrete community who are proud of their national heritage. The need to incorporate with the International Framework as elaborated in the previous section regarding the 1970 UNESCO Convention, the fight against the illicit trafficking of cultural property has attracted global concern on the phenomena of trade in antiquity related to unlawfully removed cultural objects. The effort will also confirm the international community's commitment to combat antiquity trafficking. By incorporating the integrative mechanisms in the current 1970 UNESCO Convention, efforts in combating illicit trafficking in cultural property will be more comprehensive.

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