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Chaire UNESCO en droit international de la protection des biens culturels, Université de Genève

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How does the tension between nationalism and internationalism affect dispute resolution in art and cultural heritage matters?

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Outline

I. “Two ways of thinking about cultural property” (John Henry Merryman, AJIL, 1986)
II. Developments in cultural heritage law and policy
III. “Cross-fertilization” as a tool to reconcile local and global interests
IV. Towards a *lex culturalis*?

I. “Two ways of thinking about cultural property”

- “Cultural nationalism” **versus** “cultural internationalism”
- *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* **versus** *1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict*
- “Source” nations (or “exporting” nations) **versus** “market” nations (or “importing” nations)

I. “Two ways of thinking about cultural property”

Criticisms against Merryman’s binary classification :

- oversimplifies the multifaceted interests of cultural heritage stakeholders
- fails to consider the objectives of existing legal instruments
- inhibits constructive discourse
- constitutes a pretext to criticise retention by source States while blessing retention by market States

II. Developments in cultural heritage law and policy

Does Merryman's dual perspective accurately reflect present cultural heritage law and policy?

- Proliferation of international instruments on the fight against illicit trafficking
- Market countries' engagement → ratification and implementation of international treaties
- The 'cultural exception' in international treaties promoting free trade of goods (TFEU, GATT/WTO)

II. Developments in cultural heritage law and policy

- Proliferation of bilateral treaties
- The 1970 UNESCO Convention has begun to reconfigure the attitude of market players
- “Culture sensitive” judgments handed over by domestic judges

→ The rising role of **cooperation** as a critical procedural tool to combat the illicit trafficking in art objects and to prevent and resolve disputes

III. “Cross-fertilization” as a tool to reconcile local and global interests

What is cross-fertilization?

- Definition
- Justifications
- Forms and methods
- Advantages and disadvantages
- Practical significance

III. “Cross-fertilization” as a tool to reconcile local and global interests

Decisions testifying to the **dialogue** between courts and to the **relation** between local legal traditions and international legal standards:

- *Van Gogh decision in Switzerland* ATF 82 II 411 (1956)

- *Menzel v. List* 267 N.Y.S.2d 804, 809 (Sup. Ct. NY 1966), rev’d, 246 NE 2d 742 (NY 1969)

III. “Cross-fertilization” as a tool to reconcile local and global interests

- *Iran v. Barakat Galleries Ltd.* [2007] EWHC 705 (QB), [2007] EWCA Civ. 1374, [2009] QB 22 (CA)

- *Italia Nostra v. Ministero per i beni e le attività culturali et al.*, *Consiglio di Stato*, No. 3154, 23 June 2008

III. “Cross-fertilization” as a tool to reconcile local and global interests

Some difficulties on the way:

- *Union de l’Inde v. Crédit Agricole Indosuez (Suisse) SA*, ATF 131 III 418, 8 April 2005

- *Rubin v. The Islamic Republic of Iran*, Civil Action No. 06-11053-GAO, D. Mass., 15 September 2011

IV. Towards a *lex culturalis* ?

- Definition of the *lex culturalis*
- The precedent of the *lex mercatoria*
- An illustration: *L. v. Chambre d'accusation du Canton de Genève*, ATF 123 II 134, 1 April 1997
- The progressive elevation of cultural heritage to the rank of an **international common good** on a similar footing as human and peoples' rights and the environment