Indeterminacy in the cultural property restitution debate

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ABSTRACT
The debate over the restitution of cultural property is usually framed as the dispute between what John Henry Merryman defined as ‘cultural nationalism’ and ‘cultural internationalism’: the opposite viewpoints that argue whether cultural heritage objects should be returned to their countries of origin or spread around the world as determined by other principles. I argue, however, that the concepts are problematic both in their definition and their perception as two dialectically opposed sides of a dispute. This article analyses the restitution debate by examining some of the most important arguments and counterarguments used in the debate and by comparing them to the international law ‘New Stream’ theory. It is revealed that a similar indeterminacy which defines international law in the theory also defines the restitution debate, and that cultural nationalism and internationalism do not in fact provide answers to the debate but only function as two entry points that echo each other without a way to end the debate. Therefore, it is necessary to see beyond the two concepts in order to find solutions to the disputes.

Introduction

Recently, news such as the United Kingdom’s withdrawal from the European Union and the French President Emmanuel Macron’s declaration to return cultural objects taken from African countries during colonialism have rekindled the debate over the restitution of cultural heritage. After John Henry Merryman (1985, 1986) coined the terms in the 1980s, the debate has commonly been framed between the opposing concepts of ‘cultural nationalism’ and ‘cultural internationalism’, where the former argues for the return of objects to their countries of origin based on their inherent belonging with the culture and the latter argues mostly for their retention in so-called universal/encyclopaedic museums through principles of universality of cultural heritage. After decades of little advancement, recently many museums have begun to be more accepting of the idea of restitution in cases where the objects have been acquired through the abuse of colonial or other inequal power relations. These are especially cases involving indigenous items and human remains. However, when it comes to public and legal debate in high-profile cases between nations, and objects used for national identity purposes, very little seems to change in the argumentation, still based on ownership arguments (Tythacott and Arvanitis 2014, 5). This keeps causing tensions between states and the status quo may even be upholding colonial relations and imperialist attitudes (see, e.g. Abungu 2019; Shyllon 2009; Barkan 2002).

What, then, has held this area of the debate back, keeping it stuck repeating the same arguments? In this article I analyse the role that cultural nationalism and internationalism have in the restitution debate and compare this to the international law ‘New Stream’ theory. I argue that Merryman’s
conception of the restitution debate as the struggle between cultural nationalism and internationalism is misleading – if not outright false – for two reasons: first, because Merryman’s definitions do not adequately represent the different sides of the debate; and second, because much like the ascending and descending justifications of international law according to the New Stream theory, cultural nationalism and internationalism do not provide the debate with solutions but merely non-hierarchical tools of argument and entry points into the debate, echoing each other’s arguments and perpetuating the debate ad infinitum.

I do not mean to downplay the role that Merryman’s categories have had on the field of cultural heritage – especially in law (see Lixinski 2019, 574) – or to deny that Merryman’s ideas are based on some true insight into the heritage debate. His concepts have shaped and defined the restitution debate and their impact is undeniable, having become the most common way through which the debate is conceptualised. However, my point is to question the idea that that is all there is, that the debate is structured between these two opposites. There has already been a significant shift away from such thinking in much of museum practice and cultural heritage studies in general, but in legal debates over the ownership of cultural heritage it still permeates much of the discourse and analysis (see, e.g. Peters 2020).

Realigning the debate matters. By representing the debate in a dualistic, polar manner, its scope is severely narrowed, limiting possible solutions and marginalising alternative voices. By acknowledging the plurality of approaches and motivations, there is a chance to introduce novel solutions and to give voice to those who do not fit within the nationalism/internationalism paradigm. As Lixinski (2019) notes, especially indigenous voices are left out of a framework where the two options are either national or international (see also Esterling 2020). And these are real struggles. Cultural heritage plays a key role in collective identity and the rights of peoples. The contentions are also long-lasting and especially for indigenous peoples reflect long struggles against oppression, colonialism and disenfranchisement (Abungu 2019). Restitution can be one way to alleviate these old wounds and to help in decolonizing museums. This process is growing in the museum world, with more museums re-examining the origins of their collections. In fact, as stated by Tythacott and Arvanitis (2014, 9), ‘in countries such as US, Canada, New Zealand and Australia, restitution has become an integral part of museum work,’ commenting also how restitution has been re-conceptualized as positive, potentially benefting both sides of the discourse. However, the growing movement for restitution has also caused some to double down on the defence of keeping museum collections untouched.

This article focuses specifically on the legal cultural property restitution debate between nations. The implications of Merryman’s dualism in other areas of cultural heritage policy have been to an extent discussed elsewhere (e.g. for a critical view of its effects in international law and on accommodating indigenous perspectives, see Lixinski 2019; Esterling 2020). Of course, Merryman’s approach is far from the only way of understanding the cultural heritage paradigm. Merryman himself was a lawyer and his ideas reflect a legal and property-oriented way of thinking. For many, especially in heritage studies, the subject appears completely different. Alternative approaches range from compromises such as ‘cultural pragmatism’ (Hoffman 2010) to a common idea of cultural objects as a non-renewable resource (e.g. Warren 1999). However, in the current system cultural objects are still property. Therefore, Merryman’s legal, property-oriented approach fits this framework more conveniently than ones that attempt to divert the paradigm into innovative ground, even if an alternative approach were preferable.

In other words, the article focuses on cases where the nationalism/internationalism paradigm continues to be most utilised. There are some fields, such as the return of indigenous remains, which contain their specific issues where the paradigm may not fully apply in the debate. While I do not extend my analysis to these cases, I do emphasise that one of the biggest shortfalls of Merryman’s paradigm is its inability to represent those increasingly more common cases where the claimants are not making their case for a nation but a non-national group. And while museum policies especially in indigenous heritage are increasingly more accommodating towards return and indigenous
collaboration, there are still occasions where the debate has not shifted, and the structuring of the discourse between cultural nationalism and internationalism upholds problematic structures in international law (Esterling 2020).

After the introduction, the second part explains the terms cultural nationalism and cultural internationalism as defined by Merryman and argues that the field of arguments and agendas in the debate is much more diverse. The third part introduces the New Stream theory of international law through the work of Martti Koskenniemi and examines the structure of international legal argumentation and its inherent indeterminacy that cannot be resolved from within its own principles. The fourth and fifth parts focus on the restitution debate: first by analysing central arguments, then re-examining them through the New Stream theory, revealing an argumentation pattern that mirrors that of international law. Finally, in the conclusions, I suggest that framing the debate as between cultural nationalism and internationalism is misleading and to potentially move forward there needs to be a recognition of its indeterminacy and the complexity of the different actors and arguments involved to find common external factors to resolve the issues.

Finally, a note on the choice of words. I use the terms ‘retention’ and ‘return’ to represent the different sides of the restitution debate, as the main goal of the article is to criticise the common conception of cultural nationalism and internationalism as its defining concepts. If used, these terms are specifically chosen to represent the debate as perceived through Merryman’s definitions. Additionally, aware of the debate over the use of cultural heritage/property/objects (e.g. Carman 2005; Prott and O’Keefe 1992), I prefer the neutrality of the term ‘cultural objects.’ However, as many of the texts I refer use ‘cultural property’, I occasionally use it to retain consistency with any original text examined. Finally, for the sake of simplicity, most arguments examined in this article are from the Parthenon Sculptures case as it is the most well-known and most comprehensively argued of restitution cases.

**Cultural nationalism and cultural internationalism**

The terms ‘cultural nationalism’ and ‘cultural internationalism’ were coined by Merryman in his 1985 article ‘Thinking About the Elgin Marbles.’ In it, he introduced the history of the Parthenon Sculptures controversy and framed the debate in terms of these two competing concepts and presented his own ideas on how the debate should be resolved, supporting cultural internationalism. In the following year he went on to develop the concepts further in the article ‘Two Ways of Thinking about Cultural Property’ (Merryman 1986). As stated by Hoffman (2006, 14), Merryman’s ‘paradigm… has often dominated a highly polarised cultural property debate with respect to movable cultural property.’

In Merryman’s view, on one side of the debate is the concept of cultural nationalism, with the fundamental idea that cultural property belongs with the nation that created it. In defining this idea Merryman says that:

> At its best cultural nationalism is based on the relation between cultural property and cultural definition. For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. … A people deprived of its artifacts is culturally impoverished (Merryman 1985, 1912–1913).

However, Merryman, supporting internationalism, always questioned whether such a connection really existed for almost any objects in Western museums. For Merryman the argument is also notedly nationalist – placing national interest over the control of cultural property above all other interests – and it implied to him a parochial attitude of hoarding (see, e.g. Merryman 1986).

In opposition Merryman speaks of cultural internationalism, for which cultural property belongs to all humankind and so its allocation should not be determined by matters of politics, origin or ownership but rather by higher principles, of which he names preservation, integrity and distribution/access as the main ones (Merryman 1985, 1916–1921; on his similar ideas on the values of
cultural property policy (preservation, truth, access), see Merryman (1989), and for a critique, see Thompson 2017). By preservation, Merryman means the continued and unharmed existence of the objects; by integrity that the objects should be physically as complete as possible; and by distribution/access that all objects should be allocated ‘so that all of mankind has a reasonable opportunity for access to its own and other people’s cultural achievements’ (Merryman 1985, 1919). Much of Merryman’s ideas about cultural internationalism have been embodied in the 2002 Declaration on the Importance and Value of Universal Museums. This declaration, signed by the directors of 18 major museums such as the British Museum and the Louvre emphasises the role that such museums play in cultural development and the need to resist the urge to return objects to their countries of origin, to protect the collections of museums. The declaration created – and still creates – heated debate which also embodies much of the criticism cast towards Merryman’s idea of cultural internationalism. Most commonly it has been criticised for its stubborn approach against restitution, diminishing the experiences of those whose objects are being held and for upholding colonial attitudes in its lack of acknowledging the often dark histories of the museum acquisitions, its Western-centrism, and the objectification of the museum collection (seeing them as mere ‘art’ instead of the living cultural objects they are to the original cultures) (see, e.g. Curtis 2012; Abungu 2008; Knox 2006). Merryman’s framework and language, therefore, cannot simply be seen as objective ways of resolving a debate but are strongly ingrained in histories of colonial power relations and reveal some of the layers that heritage holds in political, economic and social relations.

Merryman’s definitions can hardly be called unbiased. They were from the beginning formulated as arguing against the conception of cultural nationalism and for cultural internationalism. This, of course, does not mean that the definitions are without merit, but they are problematic by having become the standard (legal) framework to represent the restitution debate – many writers having taken Merryman’s definitions more-or-less as given (see, e.g. Knox 2006; Reppas 1999). Therefore, any flaws that impair Merryman’s definitions are spread throughout the debate. Prott (2005) also emphasises that much of Merryman’s diction carries a strong value charge (e.g. using ‘protection’ for internationalism and ‘retention’ for nationalism). The same can be said about how the concepts are named: ‘nationalism’ tends to have negative connotations while ‘internationalism’ is generally a positive term (on internationalism, see, e.g. Scovazzi 2009, 29).

Merryman’s dichotomous view of the restitution debate especially fails to ignore the many nuances and different approaches throughout the debate. For example, those arguing for the return of objects are all hardly doing it for the same reasons or with the same principles in mind: while some certainly have nationalistic motivations, for some the nation does not factor in at all, being instead interested in, e.g. indigenous rights, while others are arguing from an archaeological standpoint etc. The same is true for those arguing for keeping the objects: their motivations vary from the freeing of trade in art and antiques to those looking to preserve museum collections or protect antiques, opposing their trade (Papa-Sokal 2009). And this problem has persisted beyond Merryman’s texts or those arguing against return. It subsides in many criticisms of cultural internationalism (and Merryman’s views), in general statements such as: ‘the cultural internationalists “articulate [their] concerns in terms of property law principles”’ (Reppas 1999, 925 note 83, quoting Borodkin 1995) – failing to recognise the plurality of approaches on both sides, even within individual texts. Merryman (1998) did later expand on this idea with different categories of approaches that exist under the different sides, but still identified each side as specifically nationalist or internationalist. However, many have also criticised or rejected Merryman’s dualistic account and have instead recognised the multiplicity of approaches on all sides of the debate (see, e.g. Francioni 2011; Lixinski 2019 and for a sliding scale between utilitarian and social value; Bienkowski 2014).

So far, the attention has been directed at the way that Merryman’s concepts were defined to reveal a conceptual bias and some flaws in definition. But there the problem is simply that of (re-) definition; were these the only flaws in the nationalism/internationalism thinking, it would be relatively simple to refine the categories and redefine biased approaches. However, there is one more fundamental flaw in this thinking that undermines the approach as an effective way to frame
the debate. In actual discourse, the argumentation hardly follows such rigid division where one side only uses arguments identifiable with cultural nationalism and the other only arguments of internationalism. The rest of the article is devoted to this subtler flaw in the nationalism/internationalism framework: I argue that cultural nationalism and internationalism do not, in fact, function as two opposite sides of the debate but rather as entry points into the debate, soon mirrored in the argumentation of both sides. Therefore, there does not exist one side that argues with the principles of cultural nationalism and one that argues through internationalism, but rather they provide some of the tools and language necessary for both sides in the debate to provide a convincing case.

Apology and utopia: indeterminacy in international law

The international law New Stream theory (also known as NAIL, or ‘New Approaches to International Law’) is an offshoot of the Critical Legal Studies (CLS) movement where international law is no longer seen as a system which provides answers to legal problems but rather a language that only provides the tools for argumentation between equally valid legal principles. This also means the system is inherently defined by indeterminacy that is irresolvable from within (therefore also referred to as the ‘indeterminacy theory’). Central to the New Stream and CLS movements is the idea of the political nature of law, that it cannot separate itself into something purely external to states’ wills (Bianchi 2016).

Two writers stand out in New Stream literature: David Kennedy and Martti Koskenniemi. Here, I explain the theory mostly through the work of Koskenniemi (2005) (see also Kennedy 1988). Although New Stream began as a countermovement to mainstream international law thinking, it has since been so influential that it can even be considered the new mainstream (Bianchi 2016, 150). Koskenniemi has also inspired an approach to international law loosely dubbed the Helsinki School (Bianchi 2016, 163–182). Therefore, even though the establishing texts of New Stream were released at the end of 1980s (though Koskenniemi’s From Apology to Utopia was updated and rereleased in 2005), the work is still at least as relevant today.

According to Koskenniemi (2005), once traditional ways of justifying international legal order – based on ideas derived from higher sources such as God or natural law (‘descending’ arguments) – began to ebb, there was a need for new justifications that did not rely on what were considered abstract, malleable and unverifiable ideas. The liberal doctrine came to fill this void, focusing on (‘ascending’) arguments based on the will of equal sovereign actors and individual liberty – that it was by their own will that they bound themselves to the legal system. But in this new justification arose the problem that if international law were simply the matter of states’ will, nothing would keep them bound to it should they change their mind. Therefore, descending arguments were again added in, but this led to an oscillation in needing to balance between these two apparently incompatible ends of the spectrum, neither satisfactory on its own.

The oscillation of ascending and descending argumentation coalesced into modern theories of international law as the entry points through which any theory or argument would approach international law and the reason why it is considered binding. As Koskenniemi notes, it is entirely possible to give an account of international law from the basis of sovereign statehood, or from the basis of the legal sources that determine the operation of international law. However, any account basing itself entirely on state sovereignty will gather criticism of apology towards state power: the objection that it reduces international law into a tool for the states’ will (i.e. reducing it to mere politics). Likewise, any account based entirely on the sources will be accused of utopia: that it has no basis in reality and is subject to wholly subjective interpretation. As Bianchi (2016, 148) states, in both cases ‘politics is … inescapable and inherent in the argumentative structure of international law’ and ‘each and every argument or theory can be offset by a conflicting argument or theory’.

This structure also extends to the argumentation of legal cases, where competing facts and principles without any inherent hierarchy are weighed against each other, and any argument must
be able to defend against accusations of both apology and utopia, therefore using arguments both ascending and descending:

A professionally competent argument is rooted in a social concept of law – it claims to emerge from the way international society is, and not some wishful construction of it. On the other hand, any such doctrine or position must also show that it is not just a reflection of power – that it does not only tell what states do or will but what they should do or will. (Koskenniemi 2005, 573–574; emphasis original)

Therefore, again, we reach an oscillation where parties must use both ascending and descending arguments to make a convincing case. Where one side will enter the debate through a descending argument, the opposition will accuse it as utopian and enter through an ascending argument (opening itself up to criticism of apology). To counter these criticisms, both parties will then find principles of the other type to solidify their claims. In fact, they may even rely on the same principles: for example, in environmental issues such as pollution, the principle of sovereignty is an effective tool in arguing both that states should not intervene in affairs that happen inside another state’s area, but also that states should not have free reign in doing things inside their borders that may influence other states (such as spreading pollution). Regardless, this means that any case on its own will reach an impasse when both sides of the dispute rest their argumentation on hierarchically equal legal principles. The only way to resolve this impasse, then, is to include factors external to the contested legal principles into the decision-making (Koskenniemi 2005, 503–512). This could involve a kind of common sense or equity deliberation and mediation of the facts and principles surrounding the case. Although courts therefore introduce these deliberations at their own discretion, the decisions are not arbitrary, though they are necessarily political (Koskenniemi 2005, 588–589, 606–607).

**Cultural property argumentation**

In cultural heritage debate, a similar interplay of principles is in play. For every principle and argument there is always a way to counter it, and it is not uncommon that in countering the claims the opposite side will, in fact, mirror and flip the original argument. This part introduces some of these arguments and brings up some of these interplays resembling international law according to the New Stream theory. However, most of the analysis of the argumentation and comparison to New Stream will be left to the next part.

Some categorisations of the different arguments have been made before (see especially Prott and O’Keefe 1989, 838–855; Bator 1982, 294–310). Although these lists are now several decades old and could use updating and refinement, they nevertheless serve as a good basis for such systematisation. There is, unfortunately, no room to develop these categories further here. I partially use the terminology of these lists and partially my own. There are four main argument categories I focus on in this article: 1) arguments relating to the relationship between the cultural objects and the identity of the origin and current holding culture (‘home culture’ arguments); 2) arguments relating to the proper context of the objects; 3) arguments regarding the preservation of the objects, and 4) arguments regarding claims of imperialism and politicisation.

**Home culture arguments**

The most basic assessment in the restitution debate is what I would call the ‘home culture argument’: the claim that cultural objects belong with the culture that created them – and therefore should be returned there. This is essentially the basis of Merryman’s cultural nationalism, though unlike in his description the claim is not always made regarding national culture (e.g. in claims by indigenous peoples). As each case tends to be opened via a restitution claim, the home culture arguments are generally first to be heard.
Arguably this is not so much an argument but a principle upon which many different arguments are based: the claim that cultural objects have a ‘home’, a place or culture that they belong with. The most significant of these arguments is what Prott and O’Keefe (1989) named the ‘need for cultural identity argument,’ claiming that cultural heritage forms a basic building block of cultural identity and to deprive such objects from a culture causes it direct harm. Kynourgjopoulou states, that:

The Greek thesis of repatriation rests on the indefinable relationship between object and subject, as the Parthenon Marbles are considered inalienable treasures belonging to the Greek people. They are regarded as elements that constitute Greek nationhood, and thus their function and interpretation can only be properly understood in their original context. (Kynourgjopoulou 2011, 159)

The argument has drawn several counterarguments. The first can be described through Merryman’s proposed principle called ‘essential propinquity’: the idea that for some (and only some) objects there is such an inextricable link to its origin culture that there is a binding imperative to return them. For Merryman, two prerequisites need to be fulfilled for essential propinquity to take effect: the culture in question must be alive and the object must be returned to active use in ‘the religious or ceremonial or communal purposes for which it was made’ (Merryman 1988, 497). However, the argument is that in all other cases where the prerequisites are not met, the obligation to return is not there and any claim for return would not hold (see, e.g. King 2008, 308–309 on the Parthenon Sculptures; and Urice 2006, 152–154 on the Nefertiti Bust).

Finally, one common counterargument against home culture arguments is the claim that the relocated objects have become ingrained in the host culture as well. For example, for the Parthenon Sculptures it is often emphasised how their presence in Britain inspired countless artists, influencing myriad artistic endeavours:

The Parthenon sculptures which Elgin brought back have been in the British Museum far longer than Greece has existed as a country. In those two centuries they have in turn become a part of British heritage. . . . The city state of Athens which created the Parthenon no longer exists, but in the last two centuries, [sic] while in London, the Elgin Marbles have had great impact on English art. (King 2008, 299; for a similar argument see also Merryman 1985, 1915; Jenkins 2016, 214–216)

The original argument, then, is turned on its head and used for the opposite effect. Of course, not everyone agrees with this reversal: Reppas (1999), for example, refutes the idea, saying that the Sculptures’ two centuries in London cannot possibly compare to the two-and-a-half millennia they were in Athens. Merryman (1985, 1916), however, argues that ‘it is not unreasonable to perceive the two positions as roughly equivalent.’ Nevertheless, this argument is quickly flipped and visibly used by both sides of the debate.

The similarity to the interplay of argumentation in international law according to the New Stream theory is clear in the home culture arguments. Whatever one side argues, the other quickly flips the argument on its head and uses it for themselves. Therefore, the idea of a strict division between cultural nationalism and internationalism is hardly sustainable. The use of the home culture argument by those opposing return reveals national sentiment in both sides’ argumentation. Therefore, identifying only one side as nationalist does not lead to a fair understanding of the debate.

**Proper context**

Another central point of contention are arguments regarding the proper context for cultural property, employed by both sides. One key point for contextual argumentation is the role of cultural heritage in science and education in general. Perhaps the most central question is whether the largest scientific and educational gains can be gained in a comparative or the original context.

The objects that are under debate are often in so-called universal/encyclopaedic museums, which gather and display objects from different cultures throughout the world. For those arguing for the retention of these objects, cultural objects are best represented in a comparative context. For
example, Boardman (2000, 258) argues that the Parthenon Sculptures ‘deserve to be placed where they can readily be judged beside the best that other major ancient cultures have yielded,’ and that they form a vital part of a narrative of Western art and its place in relation to the art of the entire world. Additionally, he emphasises that only in the British Museum can there be such a wealth of global comparison available in such proximity, for free no less (see also King 2008, 308–313).

Conversely, those arguing for return often make the claim that only in their original context can the objects be fully understood and appreciated as intended. Stamatoudi, for example, states, that:

exhibiting other people’s cultures separated from their traditions, religions, language and so on can only be done in a sterile way. It is half of the information, if not the wrong information, which is conveyed to the visitor.

(Stamatoudi 2011, 26)

Therefore, when cultural objects are removed from their original location, the object itself is impoverished of the information and experience of observing the object as intended, and the original meaning of the object is colonised by new narratives (Prott and O’Keefe 1989, 11–15; St Clair 2006; Lundén 2016, 139–215). Of course, this does not necessarily apply to all kinds of cultural objects – e.g. most paintings – but for immovable cultural heritage and objects with a clear cultural or geographical connection the argument applies.

Neither side can dismiss the other’s arguments as baseless. There is something to be gained and learned from both a comparative context and a context with a physical connection to the object’s origins, and both sides can be argued to use nationalist and internationalist argumentation – again, recalling international law in New Stream.

Preservation

Many common arguments defending the retention of cultural objects are based on their preservation. For Merryman (1985), preservation is top priority for internationalism – and for heritage discourse in general – because if the objects are not preserved, they cannot fulfil any of their functions for which they have gained their value. However, many have criticised this view, emphasising among other things the narrow Eurocentricity of the principles and the fact that for many cultures and objects, preservation – or preservation in an unaltered, original state – is, in fact, antithetical to their purpose (Thompson 2017). One such famous example is the Ise Shrine in Japan, rebuilt every 20 years (Akagawa 2015).

An important preservation argument is that by moving the objects (into museums) they were saved from damage or destruction. For example, had the Parthenon Sculptures not been moved to Britain (and eventually the British Museum), it is argued they would have been damaged by the Ottomans and eventually by the Athenian smog, or simply taken by the French or Germans (see, e.g. Merryman 1985, 1905 though somewhat sceptical of the argument himself). In use, an object will erode over time, it may become lost, and will eventually perish; meanwhile, in a museum the objects are carefully kept and conserved.

Although there are many different counterarguments raised against the preservation argument, the most important are accusations of imperialism, further examined below. In short, the crux of these accusations is that through prioritising optimal preservation the only option is to retain them in the Western museums where the most funds are available for their preservation. Additionally, Merryman’s ideas of the universal values of cultural heritage – including the purportedly obvious value of preservation – have been refuted by many, for example Thompson (2017). Stamatoudi also notes that preservation needs to be understood in a wider sense than the purely physical one: ‘not only the preservation of the object itself, but also the preservation of its surviving context’ (Stamatoudi 2011, 29).
Imperialism and politicisation

The final arguments I examine are accusations of imperialism and politicisation. There are many sides to these arguments. First, much of the universal museums’ collections were gathered through means of colonial power. Therefore, by refusing to return the objects and even profiting from them (through tourism etc.) these nations are refusing to acknowledge the wrongs of colonialism and even cling on to the remnants of this imperial past (Barkan 2002).

Second, it is claimed that despite its claims of globality, internationalism eventually boils down to Western-centrism. If, for example, Merryman’s three principles are supposed to be universal, why are essentially all the universal museums in the West? (Criticising the universal museum concept, see, e.g. Abungu 2008.) And if optimal preservation is the most fundamental principle for determining the allocation of heritage, only the richest countries end up with heritage objects by having the most resources to allocate to preservation – and most of such nations happen to be in the West (Banteka 2016). This danger is also raised by Papa-Sokal (2009, 272), who warns ‘that internationalism can sometimes serve as an ideological fig-leaf for the appropriation by rich nations of less powerful nations’ material heritage.’ She quotes Prott, who states directly, that:

> The one-sidedness of this kind of cultural internationalism is evident – it looks far more like cultural imperialism, based as it seems to be on the activities of those from wealthy countries with each other and with poorer states whose cultural resources are flowing in one direction, without an equal exchange. (Prott 2005, 228)

Finally, it is argued that the claim of the universality of internationalism’s principles does not hold up, and that they only promote Western values, further emphasising the Western-centrism of this approach (Thompson 2017; Greenfield 2007; St Clair 2006). This is emphasised by the fact that the 2002 Universal Museums Declaration is exclusively signed by Western museums (for its criticism, see, e.g. Abungu 2008; Stamatoudi 2011, 23–27).

Similar accusations are those claiming that Merryman’s internationalism, despite referring to lofty, non-political values, reduces cultural objects into a commodity for free trade (Banteka 2016). Merryman often emphasised a desire to open up art markets and his belief that only by opening up the heavily regulated, nationally controlled market for cultural objects could their black market be quelled. But some question the sincerity of this argument, arguing instead that freeing up the market is a way for the wealthy to buy up cultural objects into private collections, hidden from the public (Gerstenblith 2001). Papa-Sokal (2009), similarly, wishes to separate Merryman’s ideas of free trade from the internationalist ideology and replace it with what she calls ‘moderate internationalism’, arguing that his policies would in fact be counterproductive to internationalism’s ideals.

However, the accusations of commercialism/commodification have also been voiced against cultural nationalism, arguing that the large-scale retention of objects originating from that country ignores the benefits that the rest of the world would gain by having access to cultural objects of other cultures, in favour of the political opportunities, possesses rights and economic benefits that their control upholds:

> Many national legislations are good examples of chauvinistic thought. They look into cultural property solely as material that proves a politically convenient ethnogenetical theory, or as assets, whose monetary value can be added to a total in the national budget. They do not take into consideration that cultural property is a highly perishable, non-renewable resource for international research and scholarship. (Litvak King 1999, 199; on using heritage in nationalistic narratives, see, e.g. Jenkins 2016, 219–223; Cuno 2008)

However, as Jenkins (2016, 232) points out, similar claims of politicisation can be made against universal/encyclopaedic museums as well, and that many of these museums have equally nationalistic origins and continued national roles. There is certainly much as stake in cultural heritage and a key reason why high-profile cases are not resolved is the immense symbolic, economic and political gains that such objects grant – perhaps contrasted by many returned indigenous objects, which tend to be less well-known and monumental, which together with their nature of contesting national narratives also makes nations less likely to engage with them.
Like in international law, much of this argumentation ultimately boils down to claims of the politicisation of cultural heritage and of apology to state (or imperial) power, the crux of the apology vs. utopia framework. However, this is ultimately futile as politics is inevitable in both cultural heritage and international law.

**Indeterminacy in the restitution debate**

The third part introduced the New Stream theory where international law functions not as a roadmap to solving legal problems but as a language: the tools for arguing any case, requiring factors external to the internal principles of the system to resolve the impasse of hierarchically equal principles competing. In this part, these ideas are applied to the cultural heritage restitution debate. I argue that the view of international law proposed in the New Stream theory is also an effective tool to understand the restitution debate. Some comparisons between the restitution debate and New Stream have been made before (Sljivic 1998; Barker 2001). However, even in these texts the cultural nationalism and internationalism remained unquestioned as fixed descriptions of the two opposite sides. This section aims to show how – in addition to their misleading definitions that narrow their scope – neither cultural nationalism nor internationalism can be directly identified with either side of the debate but rather, at most, as two argumentative tools utilised by anyone in the debate.

Possibly the first similarity to catch attention between the restitution debate and New Stream theory is how each debate is carried in perpetuity. In both, the argumentation keeps repeating itself without a natural resolution. The Parthenon Sculptures are a good example: the debate has continued for decades, even centuries, and the argumentation has changed little (for a historical summary, see Greenfield 2007). These similarities could, of course, be a mere coincidence, but when looking closer at the argument patterns, more similarities begin to emerge. In fact, in the restitution debate, most of the arguments can be considered either ascending or descending, and accusations of apology and utopia can be identified on both sides.

On the simplest level, it can be argued that cultural nationalism, in Merryman’s definition, is the ascending (apologist) argument, based on the right of nations to control their property – and that cultural internationalism is the descending (utopian) argument based on higher principles of how things should be. Merryman always emphasised his three principles (preservation, integrity, distribution/access) as the guiding ideals of cultural internationalism: ideals that override the needs and wants of individual nations.

However, through examining counterarguments against the most common arguments, a strong case can be made for the opposite, as well; for example, the essential propinquity principle attempts to swing the argument away from the utopian idea that all cultural objects have a meaningful connection with cultural identity and practice into a much more controlled (i.e. political) status where such connections need to be proven via strict, pre-set criteria. Similarly, the immediate responses to Merryman’s three principles of internationalism are that they simply accommodate (i.e. act as apology for) the will of the holding nations and perpetuate imperialism.

The identification of either side as truly culturally nationalist or internationalist breaks down the longer the argumentation is examined. Much like the ascending and descending arguments in international law, cultural nationalism and internationalism only function as two entry points into the discussion, soon reversed. For example, this dynamic can be seen when examining the home culture argumentation in the Parthenon Sculptures case. The first argument from those requesting the return of the sculptures to Greece is that they are at home in Athens: they were built there, they are an essential part of Greek cultural identity and so their dislocation is like a wound that needs to be healed.

The holding side, then, has two options: arguing through descending or ascending principles. On one hand, if they argue through descending principles, their first response is to critique the original argument as apologetic to state power. They will likely claim that the opposition is only interested in local (national) benefit while they should consider higher, universal principles (preservation,
integrity/truth and access). On the other hand, with ascending argumentation the primary critique will be the utopian one, saying that the idea of the Marbles as the exclusive patrimony of the Greeks is too lofty an idea. This could be argued via Merryman’s essential propinquity principle, arguing that the benefits the Greeks claim to gain from the Sculptures’ return can be gained wherever in public view, and that only if they were returned to active ritual or ceremonial use or into their original location on the Parthenon itself could the criteria for return be fulfilled. Additionally, after either argument, the holding side could turn to the claim that via their continued presence in the British Museum, the Marbles have also gained a new home in Britain – reversing the original argument. But the turn to the new home culture argument also invalidates the idea that the retention side argues purely via internationalist principles, as the argument opens it up for a critique of apology to nationalism. Similarly, those arguing for return claim that the use of ‘internationalist’ language by the retentionists is only used to mask their search for national benefits and is an apology for imperialism, or that the higher principles of cultural internationalism are impossible to apply without a political decision, therefore rendering them utopian and subjective.

The above example already revealed how, in using the home culture argumentation, one side can flip the other’s argument around for their own benefit. Contextual argumentation reveals a similar mirroring effect where essentially the same argument is being employed by both sides. Both argue in internationalist language that their context is the most optimal for the benefit of both humanity and the object itself. Such a mirroring effect occurs eventually with any argument.

As we can see, arguments only resemble the nationalist/internationalist division for a short time, these ideas acting only as ways to open the debate. As soon as the argumentation progresses, the lines blur and each side turns to the opposite kind of argument to affirm their case. Neither side, then, can be identified as truly arguing according to cultural nationalism or internationalism – even if they were accepted as accurate descriptions of the two sides of the debate. Therefore, with this mirroring effect, neither side can be deemed superior when using the argumentation of cultural internationalism or nationalism. Instead, the concepts are merely some of the tools of the language of the debate that each side must utilise to create a convincing argument.

In fact, I argue that both cultural nationalism and internationalism are simply mischaracterisations of the ascending and descending principles of the New Stream theory: the attribution of fluid argumentative tools to fixed positions. In other words, while cultural nationalism and internationalism act like the ascending and descending arguments – they are malleably and necessarily used by both sides of the debate to form a convincing case – they are defined as if they were on opposite sides of the argumentative spectrum. Therefore, there is dissonance between their definition and true use. However, I also argue that due to their too-narrow definition, cultural nationalism and internationalism cannot be directly translated as the cultural heritage equivalents of the ascending and descending principles either, because – as shown above – the true field of argumentation extends far beyond simple nationalism and internationalism. Therefore, at most the terms are useful as argumentative entry points into the debate in some cases.

Central to the debate in both international law and cultural heritage restitution is the desire to keep the subject separate from politics. Yet in both cases this is futile as politics are ingrained in both the subject and the resolution of the conflicts. No channel of resolution is ever non-political, and all decisions (in international law) are necessarily political on some level due to the indeterminacy of the system (which requires the introduction of external factors). The presence of politics also leads to accusations of politicism from both sides. In the restitution debate this often translates to accusations of imperialism/nationalism. This indeterminacy has also kept much of the restitution debate from moving forward, yet it is also the reason for newfound progress in some areas. The impossibility to solve each case from within cultural heritage language has meant that trends such as human rights and restitution for the injustices of colonialism have come to act as the external factors that bring about new resolutions.

Jenkins (2010) describes how the campaign to return human remains was framed as an issue of making amends for colonial wrongdoing and of contemporary human rights, internalized by the
museum staff themselves (see also Curtis 2014). I would argue that – while framing the debate through the New Stream theory – the main difference between the return of human remains and indigenous objects on the one hand, and most other cases of cultural objects on the other, is the introduction of human rights thinking as the external factor which could resolve the indeterminacy in a mutually satisfactory way (on human rights in museum policy, see, e.g. Barrett 2015). This thinking was internalized through mounting pressure (external and internal) by the museum staff themselves, bringing about a change in policy. But in state-to-state cases, while for example ‘Greeks view the return of the Marbles principally as an issue of human and cultural rights’ (Fouseki 2014, 164), this view is not shared by many other parties, most importantly the holding institutions. There is a noted difference between the power dynamics in cases between sovereign states, and cases between states (or institutions) and indigenous groups – though between former colonies and colonisers this gap is noticeably narrowing as witnessed by the Sarr-Savoy report and the recent decision by the Netherlands to unconditionally return objects stolen from Dutch colonies (Government of Netherlands 2021).

In contentious cases the rise of human rights thinking means that indigenous claims tend to have very different entry points than state claims, focusing more on the restorative possibilities and human rights aspects of restitution and existing on a wide base of cultural and historical meanings (beyond merely Merryman’s ‘essential propinquity’). As an example, we can look at the unresolved case of the Gweagal Shield. Keenan (2017, 285) notes that in requesting the return of the Shield from the British Museum, Rodney Kelly (of the Gweagal) argued that ‘Aboriginal Australians have had their land, their language, their health and their culture stolen by British Colonial forces and their white Australian descendants’ and that ‘the Gweagal Shield is something that a contemporary British institution can actually give back.’ In other words, although most of the wrong that was committed can no longer be undone, this one thing can be physically restored. Keenan also points out how the Shield can act as physical reminder of resistance against colonialism. While these arguments deviate from Merryman’s cultural nationalism, the British Museum’s response followed cultural internationalism quite purely: using contextual argumentation, the deputy-director argued that the shield helps in depicting the interconnectedness of human cultures, also emphasizing the way the shield’s presence in the collection acts as a cultural ambassador for Indigenous Australian communities (Keenan 2017). However, nowadays in many cases of successful return of indigenous objects there is little institutional opposition (e.g. see the National Museum of Finland’s recent returns to the indigenous peoples of the Mesa Verde region and to the Sámi museum Siida) and the objects are seen not in terms of property values but as cultural agents, part of restorative policies based on cultural rights.

**Conclusion**

What can be gained from understanding the indeterminacy of the restitution debate? The New Stream theory does not provide with solutions or roadmaps out of it. In fact, the point of Koskenniemi and the others is that the indeterminacy is so ingrained in the system and language of international law that it is unavoidable, barring a complete rebuilding of the system. But it also does not need a resolution. The indeterminacy does not mean that there can be no solutions to cases or that those solutions would be arbitrary, but rather that there needs to be a greater understanding of where and how they come about.

For a long time, much of the legal cultural heritage restitution debate has been stuck, the different sides of the debate using the same arguments, caught in an argumentative loop. This loop is maintained by the persistent notion of the oppositeness of cultural nationalism and internationalism, as the failure to recognise the nature of the argumentation has misled the participants and those attempting to find new solutions. This mischaracterised polarity makes the debate seem much more narrow and straightforward than it is, creating an illusion of contending principles from which a resolution to any dispute can be drawn. In reality, the scope of approaches and motivations is
much wider, and the governing principles of the so-called cultural nationalism and internationalism appear in the arguments of both sides, none inherently hierarchically above the others.

As the New Stream theory asserts, the only way to break this indeterminacy cycle is to introduce external factors to resolve each case. Arguably the biggest reason why cases involving indigenous heritage have taken an unprecedented step forward is the introduction of human rights into the decision-making. As human rights have highlighted and bolstered indigenous protection (Esterling 2020), so has the rise of human rights thinking in museums brought about new collaborations for museums and the indigenous peoples whose objects and remains have been on display. Access to cultural heritage is one key aspect of cultural rights, and the restitution of objects — many taken under questionable circumstances — has become one way to actualise these cultural human rights and to rectify past injustices against indigenous peoples (see, e.g. Bolton 2015). For state-to-state demands, however, the factor often needs to be sought elsewhere, as the power dynamics are different between sovereign states.

The application of the indeterminacy theory also reveals that politics is inseparable from cultural heritage. It is impossible to resolve any cultural heritage restitution case through reference to completely impartial, internal principles. There will always be a need to refer to something beyond pure heritage values to decide between hierarchically equal principles. Such a decision also depends on where the case is settled: a court of law will likely refer to a law or legal principle, while diplomatic mediation could refer to the morality of the situation, co-operation or the ruling international opinion on the matter. The accusation of politicising cultural heritage is a common argument in the restitution debate, but, as seen, it is ultimately irrelevant: the debate is inseparable from politics. In fact, even cultural heritage at large is inseparable from politics as revealed by the expanding critical heritage studies movement (Gentry and Smith 2019).

Although beyond the scope of this article, it is not impossible to envision alternative approaches to cultural heritage that do away with this indeterminacy. However, the greatest hurdle in introducing such approaches is that they need to be persuasive enough to solidify themselves as a new standard of thinking, and to overcome the nationalism/internationalism paradigm especially in legal and property-oriented argumentation. Understanding the restitution debate through the New Stream theory can help prevent new cases such as the Parthenon Marbles from emerging. By addressing the debate in a less polarized manner, the debate can be progressed in a more nuanced manner as well. Resolving these debates is not a case of finding the right argument to convince others but finding the factor which can resolve the indeterminacy of equal principles in a satisfactory way for both sides. From the changes in policies towards indigenous heritage, we can see that change can happen by working ‘with, rather than on, people’ (Barrett 2015, 96). Similar collaboration is possible between states. But while human rights have been key in indigenous claims, they are not as persuasive between states, and other factors need to be sought. But only by acknowledging the plurality of approaches and not framing the debate as between two competing principles can such factors for a more sustainable and equal cultural heritage policy be found.

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