

EXCLUSIVE RIGHT ON PROPERTY OF HUMANITY (!)

STATE OWNERSHIP OF CULTURAL PROPERTY IN TURKEY AND THE INTERNATIONAL DIMENSION

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Abstract

Turkey is a country that is rich in terms of cultural property. It is regarded as a source country for cultural property. Turkey endeavours to keep its cultural properties within its borders and to claim the restitution of its cultural properties which are located abroad. A successful claim of restitution or repatriation requires clear and precise laws that could be interpreted by foreign courts where the concerned object might be. Turkish law has witnessed changes which created confusions in the last decades. Whilst examining the Turkish laws, cultural internationalism and cultural nationalism are to be borne in mind. For the adherence of the State to either of the concepts would have clear impacts on how the concerned laws and regulations are to be interpreted and understood.

Intisari

Republik Turki merupakan negara yang kaya dengan benda budaya. Negara ini dianggap sebagai negara sumber benda budaya. Turki mencoba untuk menjaga benda budayanya di dalam negeri dan mengklaim restitusi untuk benda budayanya di luar negeri. Keberhasilan klaim restitusi atau repatriasi benda budaya ini membutuhkan undang-undang yang jelas dan presisi untuk diinterpretasikan oleh peradilan asing di mana benda itu berada. Hukum Turki telah menjalani perubahan yang membingungkan selama beberapa decade ke belakang. Selagi memeriksa hukum Turki, internasionalisme dan nasionalisme budaya harus diingat. Hal ini dikarenakan penganutan sebuah negara terhadap konsep ini akan berefek terhadap pengertian dan interpretasi undang-undang dan regulasi yang terkait.

Keyword: Cultural property, protection, State ownership, cultural internationalism/nationalism, repatriation, blanket legislation

Kata Kunci: benda budaya, perlindungan, kepemilikan negara, internasionalisme/nasionalisme budaya, repatriasi, legislasi umum

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A. Introduction

Cultural heritage that date from early ages constitute the heritage of all human beings. Reservation of this heritage for the next generations now stands as a highly important principle to be honoured.¹ Whilst the need for this protection is becoming clear among the peoples, the question of 'who' is going to be the protector of 'which' property still begs a definitive answer. The countries which are rich in terms of cultural property, generally adopt such legislation that designate the owner of certain cultural property as the State itself.² This measure allows these countries to claim the restitution of concerned properties by means of their claimed ownership.³ Had those countries not possessed the ownership of such property, their claim for restitution could easily be rejected on the ground that the State in question is seeking the unfair enforcement of its laws in another sovereign State. Notwithstanding the exclusive right of ownership, a successful claim for restitution requires clear laws that set the ownership of the State on such objects.

Turkey is considered a rich country in terms of cultural property. Turkey has sought the repatriation of many objects that it deems to belong to itself by claiming ownership, in an attempt to establish itself as a cultural powerhouse.⁴ However, proving ownership has been a controversial issue in some cases due to changes in Turkish law and because the Turkish laws on the matter were found not to be clear by foreign courts. Consequently, this paper aims at shedding light on the Turkish law on the State ownership of cultural property. The paper also seeks to determine if the Turkish law on State ownership adopts a cultural nationalist or a cultural internationalist approach.

Doctrinal research method will be employed in this paper.⁵ Through this method, relevant legislation will be determined and examined, also identifying problems via the case law at hand. Due to the history of the mentioned legislation being indispensable in this assessment, a historical analysis of the legislation will also be provided.

In elaborating the Turkish law on State ownership, chapter B will start by giving a general overview of what is cultural property. Chapter C will examine the cultural internationalism and nationalism. Chapter D is then going to delve into how Turkey seeks to protect cultural property by claiming ownership. The following chapter will provide the relevant Ottoman and Turkish legislation on State ownership. Chapter F is going to cover what constitutes a cultural property that requires protection. Chapter G will finally determine when the Turkish State actually owns the cultural property, followed by the assessment of Turkey between cultural nationalism and internationalism. Finally, chapter I will conclude.

B. Defining Cultural Property

¹ Merryman, J. H. (1985) *Thinking about the Elgin Marbles*. Michigan Law Review, 83(8), pp.1880, 1916. (Merryman I).

² Merryman, J. H. (1988). *The Retention of Cultural Property*. University of California, Davis Law Review, 21, p. 477. (Merryman II).

³ Scovazzi, T. (2014). *Repatriation and Restitution of Cultural Property: Relevant Rules of International Law in Smith, C. (eds)*. Encyclopedia of global archaeology. New York, NY: Springer.

⁴ Bilefsky, D. (2012). *Seeking Return of Art, Turkey Jolts Museums*. Retrieved from <https://www.nytimes.com/2012/10/01/arts/design/turkeys-efforts-to-repatriate-art-alarm-museums.html>. Accessed on 14 April 2019.

⁵ McConville, M., & Chui, W. H. (2017). *Research methods for law*. Edinburgh: Edinburgh University Press, p.21.

There is no unified universal definition that could qualify as the exact and comprise *de facto* definition of cultural property. These varied definitions of cultural property by nations and international instruments also contribute to the lack of uniformity in cultural property protection laws. For the difference in defining what to protect in turn brings uncertainty on what is being protected by each State or entity.⁶ Nonetheless, the 1954 Hague Convention⁷ and UNESCO Convention 1970⁸, to each Turkey is a party,⁹ provide good oversight of how cultural property is defined. Article 1 of 1954 Hague Convention defines cultural property as ‘movable or immovable property of great importance to the cultural heritage of every people...’ followed by a list of cultural property.

The 1954 Hague Convention is concerned with the protection of cultural property at times of war. On the other hand, UNESCO Convention is concerned with the illicit trade of cultural property which has shown its effect on the wording of its definition of cultural property. To that end, Article 1 of UNESCO Convention seemingly focuses on movable cultural property, albeit not necessarily only movable cultural property. Examples given in Article 1 are for example; rare collections and specimens of fauna, flora, minerals and anatomy, objects of ethnological interest, parts of dismembered archaeological sites and products of archaeological excavations.¹⁰ The two Conventions give an insight on how the definition of cultural property can be altered to the aim pursued by the legal instrument at hand.

From a national perspective, the Turkish law defines cultural property in the Law number 2863 on the Conservation of Cultural and Natural Property (hereinafter 1983 Law) Article 3(a)(1) as:

“All movable and immovable properties above and under the ground or under the water, of prehistoric and historic periods that are related to science, culture, religion and fine arts or has been the subject of social life that has unique scientific or cultural values in prehistoric and historic periods.”¹¹

Definition of cultural property is crucial, for it is an important factor in determining which objects will be protected. Withal, not every cultural property is protected by law which would require further assessment that will be provided in chapter F. However, prior to the substance of what is protected, the motives behind protection will be examined in the following chapter.

C. Cultural Property from Two Perspective

⁶ Forbes, S. (1996). *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*. Transnational Lawyer, pp. 9, 235. 239.

⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict (May 14, 1954) [“1954 Hague Convention”] Art. 1.

⁸ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Nov. 14, 1970) [“UNESCO Convention”] Art. 1.

⁹ Turkey has ratified UNESCO Convention in 1983, see <<https://whc.unesco.org/en/statesparties/>> accessed 14 March 2019; Turkey has acceded to the 1954 Hague Convention in 1965, see <<https://en.unesco.org/countries/turkey/conventions>> accessed 14 March 2019.

¹⁰ Article 2 of the Convention on Stolen or Illegally Exported Cultural Objects [UNIDROIT Convention] broadens this definition of cultural property by changing the word property to objects. UNIDROIT Convention will not be used in this paper because Turkey is not a party to this Convention. See: <<https://www.unidroit.org/status-cp>> accessed 14 March 2019.

¹¹ See for the amendments in 1987 and 2004 of article 3(a)(1): Murat Volkan Dülger, (2014), *Legal Protection of Cultural Property and Work of Arts*, 1 (1) Journal of İstanbul Medipol University School of Law, pp. 107, 109.

There are two general motives behind cultural property protection. One views the cultural property as the 'components of a common human culture'¹² which is called 'cultural internationalism'. The other view is 'cultural nationalism' which regards cultural property as 'part of a national cultural heritage'.¹³ The two perspectives have legitimate expectations and they are not mutually exclusive.¹⁴ Nevertheless, they prove to be contentious at times due to opposite outcomes that derive from the choice made between the two concepts by legislatures.¹⁵

Countries have varying acceptances of the two concepts, stemming from how and where they find the protection of cultural property more suitable. The countries are divided into two groups in the literature on this topic.¹⁶ First category is the 'source nations' where the internal demand for cultural property is less than the supply of the cultural property. These countries tend to keep the cultural property within their borders by opposing to its exportations.¹⁷ The second category is consisted of the 'market nations' where the demand for cultural property exceeds the supply of valuable cultural property.¹⁸ Belonging to either the market or source nations impact countries' inclination towards differing protection regulations.

Cultural internationalism suggests that cultural property belongs to the global community as a whole and that its conservation and enjoyment are of interest for everyone. Hence, the cultural property is to stay where its preservation and care would be rendered better,¹⁹ regardless of the concerned cultural property's provenance, mired past, or to whom it originally belonged.²⁰

Cultural nationalism on the other hand awards nations a special interest by which they may imply the attribution of the objects' national character independently from where the object is located or by whom it is owned. This conception of cultural property legitimizes the national export controls and enables states to legitimately claim the repatriation of the cultural property that they deem belong to their state.²¹ This view emphasizes national interests, values, and pride.²²

The 1954 Hague and 1970 UNESCO Conventions differ in their approach. While the former emphasizes the cultural heritage to be the heritage of all mankind, the latter focuses on the interests of the states in their national cultural heritage. 1954 Hague Convention seeks to protect cultural property from destruction and harm, whilst 1970 UNESCO Convention supports retention of cultural property by source nations.²³ It must be acknowledged that the times when the two treaties formed had a strong impact on their approach towards the

¹² Merryman, J. H. (1986). *Two Ways of Thinking About Cultural Property*. *The American Journal of International Law*, 80(4), p. 831. ("Merryman III")

¹³ *Ibid*, p. 832.

¹⁴ Slijvic, A. (1997). *Why Do You Think It's Yours?: An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*. *The George Washington Journal of International Law and Economics* 31. 393.

¹⁵ Roehrenbeck, C. (2010). *Repatriation of Cultural Property- Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*. *International Journal of Legal Information* 38(2). 185, 190.

¹⁶ *Ibid*, p. 189. ("Roehrenbeck").

¹⁷ Merryman I, pp.1880, 1916.

¹⁸ *Ibid*.

¹⁹ Roehrenbeck, p.393.

²⁰ Collado, K. (2014). *A Step Back for Turkey, Two Steps forward in the Repatriation Efforts of Its Cultural Property*. *Journal of Law Technology & the Internet* (5). 5.

²¹ Merryman, 'Two Ways of Thinking about Cultural Property' (n 10) 832.

²² Roehrenbeck, p. 190.

²³ Merryman III, p. 846.

protection of cultural property. 1954 Hague Convention was signed after the massive destructions that have occurred during the Second World War and was an attempt at reaching a worldwide conception that such destruction would never re-occur. Consequently, the two treaties view the cultural property protection from somewhat different angles considering their aspiration and times of adoption.

Turkey is a party to both of the treaties.²⁴ However, it would be shallow and hard to generalize a country as a cultural nationalist or a cultural internationalist. Rather, a statement to that end may be reached on specific actions or measures pursued by a country. Therefore, the upcoming chapter will introduce the cultural property protection in Turkey followed by the specific protection measures, all of which combined will determine Turkey's place on either of the sides.

D. Cultural Property in Turkey

The protection of cultural property has long been recognized as a principle which is of great significance for the humankind as a whole.²⁵ Principles are to be honoured, which would otherwise deem them useless instruments without practical relevance. The question of who is more suitable for the protection of cultural property arises out of the pursuit in honouring the protection principle. The preference of source countries is generally to take the ownership of the cultural property that is found within their boundaries by means of an umbrella or blanket legislation.²⁶ Due to these countries' perception that they are better suited to protect and keep the concerned cultural properties. By means of such a general blanket legislation, states seek to achieve the restitution of cultural property that they consider as wrongfully exported from their respective countries.²⁷ The claim of ownership which is acquired *ipso iure*, by the operation of law, renders no need for further act of acquisition of the States. Hence, the State might not have had possession of the object, but this does not bar a claim of ownership.²⁸

The crucial issue at this point is whether the state in question has 'clearly' prescribed by its laws that the cultural property in question has been under the state ownership. Because, in case the concerned state has merely prescribed export ban on such cultural properties instead of attaching it to state ownership, the foreign courts may refuse restitution of the objects on the ground that the state is seeking the enforcement of its public laws at the host country.²⁹ This was the issue with the *Türkische Republic v Kanton Basel-Stadt und Prof. Dr. Peter Ludwig* (hereinafter *Basel Decisions*)³⁰ where Turkey claimed that five gravestones that were being exhibited at the Antiquities museum in Basel was owned by Turkish Republic pursuant to Turkish

²⁴ Turkey has ratified UNESCO Convention in 1983, see <<https://whc.unesco.org/en/statesparties/>> accessed 14 March 2019; Turkey has acceded to the 1954 Hague Convention in 1965, see <<https://en.unesco.org/countries/turkey/conventions>> accessed 14 March 2019.

²⁵ Merryman I, pp.1880, 1916).

²⁶ See for the Turkish Blanket legislation: Sibel Özel, 'The Basel Decisions: Recognition of the Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Country of Origin' 9 (2000) *International Journal of Cultural Property* 315 and Sibel Özel, 'Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey' 38 (2010) *International Journal of Legal Information* 177; for the blanket legislation and examples of its recognition see: Paul M. Bator, 'An Essay on the International Trade in Art' 34(2) (1982) *Stanford Law Review* 275.

²⁷ Özel, S. (2018). *The Ownership of Cultural Property in Turkish Laws Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*. 24(1), pp. 215, 216. ("Özel I")

²⁸ Özel, S. (2010). Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey. *International Journal of Legal Information*. 31, pp. 177, 179. ("Özel II")

²⁹ Özel I, p.220.

³⁰ The decisions are not published, hence a reference to their exact sources cannot be provided.

laws that grant *ipso iure* ownership to Turkish state. The Swiss courts have accepted to recognize and apply Turkish law. However, the claim for restitution was rejected by the argument, among the others, that the Turkish law did not provide Turkey with ownership of the objects.

Turkey has adopted a new law after *Basel decisions* in 1983 which has brought new complications due to its rather confusing wording on when Turkey would have the ownership of the cultural properties. The difference in the wording of the 1983 Law has been put forward in *Turkey v OKS Partners* (hereinafter *Elmalı Hoard case*) where the restitution of around 2000 coins which were unearthed in Turkey in 1984 was at stake.³¹ The defendant argued that Turkey was not entitled to the ownership of the coins since the 1983 Law has prescribed that protection requiring cultural properties '*qualify as state property*'. Differently from the 1973 Law which stated that the cultural properties that are to be protected '*are state property*'. The case was settled outside the court at the end and the coins have been returned to Turkey. However, the US courts had difficulty determining the Turkish law on the issue of state ownership of cultural property.³² These cases are only the tip of the iceberg, similar cases have arisen before Swiss courts as well which has raised the importance of clarifying the stance of the Turkish law on the matter.³³

An attempt at clarifying the Turkish law of cultural property ownership would require a short historical assessment for the illustration of some disputes. In order to provide a clearer picture, the Turkish approach to the state ownership will be examined briefly from the first Decree on Antiquities in 1869 to the current day.

E. State Ownership of Cultural Property

a. During Ottoman Empire

When the Ottoman Empire seized its existence in 1923, the Republic of Turkey was formed. The protection of cultural objects was also of concern for the Ottoman Empire. The first relevant law³⁴ was the 1869 Decree on Antiquities,³⁵ prior to which the cultural property was regulated by the Islamic Jurisprudence.³⁶

1869 decree³⁷ allowed the free trade of antiquities within the Ottoman Empire, however has prohibited their exportation by giving the state pre-emption right.³⁸ 1869 decree established

³¹ *The Republic of Turkey v OKS Partners* 797 F. Supp. 64 (D. Mass. 1992).

³² Özel, 'The Ownership of Cultural Property in Turkish Laws' (n 27) 221.

³³ See for example: *Republic of Turkey v The Metropolitan Museum of Art* 762 F. Supp. 44 (N.Y 1990). For the detailed examination: Christopher Roosevelt and Christina Luke, 'Looting Lydia: The Destruction of an Archaeological Landscape in Western Turkey' in Neil Brodie (eds), *Archaeology, Cultural Heritage and the Antiquities Trade* (University Press of Florida 2006) 173.

³⁴ See for detail: Sibel Özel, *Uluslararası Alanda Kültür Varlıklarının Korunması* (Alkim Yayınları, 1998) and Sibel Özel and Ayhan Karadayi, 'Laws regarding the Protection of the Cultural Heritage of Turkey' in Marilyn Phelan, *The Law of Cultural Property and Natural Heritage: Protection, Transfer And Access* 20 (Kalos Kapp Press 1998).

³⁵ Published in 'Takvimi Vekayi, tertibi evvel 1285' (corresponding to year 1869 in the Gregorian calendar).

³⁶ Mumcu, A. (1969). *Eski Eserler Hukuku ve Türkiye*. Ankara Üniversitesi Hukuk Fakültesi Dergisi. 26(3-4). 41, 66.

³⁷ In the 1869 Decree, the Arabic rooted phrase '*Âsâr-ı Atika*' was used for the first-time meaning antiquities. See: Mustafa Önge, 'Kültür Mirasini Tanımlamak İçin Türkiye'de Kullanılan İlk Özgün Terim: *Âsâr-ı Afika*' 6 (1) *Avrasya Terim Dergisi* 8, 10.

³⁸ Articles 1-2 of 1869 Decree on Antiquities.

that antiquities that are found within the private land of individuals would belong to them.³⁹ Consequently, recognizing private ownership of antiquities within the Ottoman Empire.⁴⁰ 1869 Decree was considered to be insufficient in terms of ownership, which paved the way for the 1874 Decree.⁴¹ The new decree entitled the Empire to be the owner of all antiquities which were undiscovered. 1874 Decree has banned excavations without the permission of the Ministry of Education and the landowner. Non-obedience with these requirements led to imprisonment or fines and the found antiquities would be seized by the state.⁴² With the legal excavations; the finder, owner of the land and the Empire would get one third of the findings, in case the finder is also the owner of the land s/he would get two third and the rest would be the Empire's.⁴³

In 1884, the Empire has enacted a new Decree⁴⁴ which has expanded its ownership of the antiquities found or discovered within the territory of the Ottoman Empire including the lakes, rivers, and sea.⁴⁵ The only exception to State ownership was made when antiquities are fortuitously found on private land during the construction of bridges, sites, canals and the similar. Consequently, half of the findings were to be given to the landowner according to Article 14 of the Decree. Even then, the Ottoman Empire had the right to buy the objects and to determine which objects to choose for itself.

The last measure that was taken by the Ottoman regime prior to the emergence of the Republic was the 1906 Decree on Antiquities. The 1906 decree has strengthened State ownership of antiquities even further. Article 4 has prescribed that all monuments, movable and immovable antiquities are State property regardless of them being situated on private or public lands. For the new discoveries, an *ipso iure* ownership was thereby given to the State. The Decree did not possess retroactive effect. Therefore, from 1884 until 1906, only the discoveries from Public lands out of excavations are *ipso iure* State property. However, after 1906, antiquities that are found in any manner on either public or private lands are *ipso iure* State Property. Article 10 of the Decree states that objects obtained from clandestine excavations are to be seized by the State. Article 11 punishes such perpetrators by imprisonment. Articles 10 and 11 were referred to in *Basel Decisions*, however they only restate the principle of State ownership and the dedication of the State to fight with any act that is contrary to its ownership.⁴⁶ Article 12 was also referred to in the *Basel Decisions*. Article 12 prescribes that in case an antiquity that is found on private land is worthy of being preserved in a museum, the landowner may be rewarded a sum and the object would be taken by the State. In case such object is determined not worthy of being preserved in a

³⁹ Article 3 of 1869 Decree on Antiquities.

⁴⁰ Özel, S. (2000). *The Basel Decisions: Recognition of Blanket Legislation Vesting State Ownership over the Cultural Property Found within the Territory of Origin*. *International Journal of Cultural Property*. 9(2), p. 324. ("Özel III").

⁴¹ 7 April 1874 Decree on Antiquities, the Decree was adopted in 26 Mart 1290 according to the Islamic calendar.

⁴² Article 7 of 1874 Decree on Antiquities.

⁴³ Article 3 of 1874 Decree on Antiquities. The government had the discretion to decide whether the allocation would be made *in res* or by value according to Article 5.

⁴⁴ 21 February 1884 Decree on Antiquities, adopted in 21 Subat 1299 according to the Islamic calendar.

⁴⁵ Article 3 of 1884 Decree on Antiquities.

⁴⁶ Özel III, p. 326.

museum, it may be returned to the landowner. Crucially, Article 12 does not grant private ownership over the antiquities but merely indicates a reward.⁴⁷

b. During the Republic

The 1906 Decree has maintained its full affect until 1973.⁴⁸ In the meantime, Turkish Civil Code (hereinafter TCC) was adopted in 1926.⁴⁹ Article 697 of TCC stressed the Republic's ownership on the antiquities. The ownership of antiquities is given to the Republic *ipso iure* by TCC without the need for possession or an act of acquisition.⁵⁰ Article 697 remains in full force and has not been repealed by any other legislation.

With regards the *lex specialis* relating to cultural property, the Decree of 1906 was replaced with Law on Antiquities on 1973 with the law number 1710. 1973 Law has kept using a similar language with the 1906 decree. Article 3 of 1973 Law states that:

“All movable and immovable antiquities and every kind of monument situated on land and estates belonging to the State or owned by natural and juristic persons, whose existence is known or to become known, are State property. The discovery of such works by means of excavations, their preservation in their original places and the collection of movable antiquities in the museums will be effected in conformity with the present law.”

As it is obvious from the wording of the Article, the State is determined to be the owner of antiquities found on either private or public lands. There seem to be no complications on this matter as it is clearly established that the State has ownership. However, the 1983 Law was worded somewhat differently, leading it to be construed divergently by different courts or in any case leading to difficulties in determining its exact meaning. Article 5 of the 1983 Law states:

“Movable and immovable cultural and natural properties requiring protection that are known to exist or may be discovered in the future on immovable properties belonging to the State, public institutions and entities and natural and juristic persons that are subject to the provisions of private law, qualify as State property.”

The first noticeable difference between the 1973 and 1983 Laws may be that while in the former the word 'antiquities' is used, in the latter this term had been changed into 'cultural and natural properties'. 1983 Law itself is considered to be the outcome of a quest to achieve a fresh perspective on cultural heritage protection which is regarded as the reason for a change in the terminology. Nevertheless, the content of the two phrases remain almost the same.⁵¹ The difference is that with the 1983 Law cultural property has been divided into either movable or immovable property. In effect, the regulations on cultural property have differentiated between the two types from 1983 onwards.

⁴⁷ *Ibid*, p. 327.

⁴⁸ 06.07.1965, E. 1965/16; K. 1965/1 in the Journal of Constitutional Court Judgements 1966 v 3, p 142. Also see: Özel III, P. 325.

⁴⁹ Turkish Civil Code was derived from the Swiss Civil Code. The courts in *Basel Decisions* have chosen to interpret the equivalent Article in the Swiss Civil Code as opposed to the one included in TCC and have overlooked the consensus reached in the Turkish literature and practice regarding the issue. However, due to this matter being outside the scope this paper, no further analysis of it is going to be considered in depth.

⁵⁰ Özsunay, E. (1997). Protection of Cultural Heritage in Turkish Private Law. *International Journal of Cultural Property*. 6(2), pp. 278, 279.

⁵¹ Çal, H. (2005). Cultural Property Legislations from Ottoman times to the Republic. Ankara: Prof. Dr. Kazım Yasar Koprıman'a Armağan, pp. 234, 237.

The other divergence between the Laws 1973 and 1983 was the entitlement of property ownership to State by using different words. Since 1906, all the movable and immovable antiquities have been determined as State property. The ownership that has been illustrated is projected for the cultural property that is known to exist nonetheless no private ownership has been established on it. The ownership also encompasses the newly found or to be found cultural properties. There has been talks at the Advisory Council prior to the adoption of the 1983 Law where it was referred that the change in terminology could lead to misunderstandings or confusions. However, the talks at the Council were on whether the protection requiring immovable properties to be encapsulated by the new legislation without the need for expropriation procedure. Hence, the change in legal terminology from 'are State property' to 'qualify as State property' has not narrowed the scope of the law, quite to the contrary it has expanded it.⁵²

1983 Law is effective to this day. Attempts have been made in order to solidify its scope of application. Especially the movable and immovable cultural properties that require protection needs to be clarified since it is the determining factor for a property to be regarded as State property pursuant to Article 5 of the 1983 Law.

F. Cultural Property that Requires Protection

Cultural property is broadly defined in Article 3(a)(1) of 1983 Law.⁵³ However, not every cultural property is deemed to be valued such as to be determined as worthy of protection. Therefore, the cultural and natural property that require protection has been specified under the same law first in Article 6 on immovable cultural property to be protected. Secondly, in Article 23 of the 1983 Law, the movable cultural and natural property that require protection is specified.⁵⁴ Once a property qualifies as one under Article 6 or 23 of 1983 Law, exporting such property is prohibited under Article 32 of 1983 Law. Exceptionally, these objects can be exported from Turkey for temporary exhibitions on the decision of the Council of Ministers which is to issue the decision on the proposal of the Ministry of Culture and Tourism.⁵⁵ The rules and procedures to be followed for taking a protected cultural property abroad is further regulated by a regulation.⁵⁶ These procedures illustrate that exporting cultural property from Turkey even for an exhibition has been regulated with high hurdles.

In the following paragraphs, firstly, Article 6 of the 1983 Law on immovable cultural property will be examined followed by Article 23 of the 1983 Law on movable cultural property.

a. *Immovable and Natural Property to be Protected*

Article 6 specifies some immovable cultural and natural property⁵⁷ to be protected as 'rock-cut tombs, stones with inscription, painting, and relief, cave paintings, mounds (höyük), archaeological sites, castle, fortress... synagogue, basilica, church, monasteries, külliye (complex of buildings adjacent to a mosque), ancient monuments and mural ruins, frescoes, reliefs, mosaics, chimney rocks'.

⁵² Özel I, p. 228.

⁵³ See Chapter B for Article 3(a)(1) of 1983 Law.

⁵⁴ Özel I, p. 217.

⁵⁵ Article 32 of 1983 Law.

⁵⁶ Regulation on Removal and Displacement of Protected Cultural and Natural Properties (16.02.1984-18314).

⁵⁷ For the definition of natural property see: Article 3(a)(2) of the Law number 2863 on the Conservation of Cultural and Natural Property 1983.

Article 6 provides that the immovable cultural properties that were exemplified or otherwise which were built or made prior to the year 1899 are considered to be cultural heritage for which protection is required without any other procedure. However, immovable cultural properties that were built after 1899, require the decision of the Ministry of Culture and Tourism to designate them as property to be protected. The immovable cultural properties that are located within conservation sites are deemed to be protected without the need for any other procedure.⁵⁸ In addition to these, the buildings that have been in some way the object of or witnessed to the National War of Independence and the Foundation of the Republic of Turkey are also protected without any procedures required. The areas that are identified as such and also the houses used by the first president of Turkey, Mustafa Kemal Atatürk, are protected properties.

b. *Movable Cultural and Natural Property to be Protected*

Article 23 of 1983 Law regulates the movable cultural and natural property that is worthy of protection. Article 23 comprises a wide range of movable objects. Almost every object that is capable of shedding light on or having an explanatory character of the cultural, historical, social, technical or scientific features of the period that it comes from is considered as movable cultural property under Article 23⁵⁹ which is worthy of protection under Turkish law. Protection-worthy objects have been classified under certain categories such as archaeological property⁶⁰ and fine arts⁶¹ under the Regulation on Classification which has been accepted on the basis of the Law number 2863.⁶²

Article 23 enumerates the non-exhaustive list of some objects such as ‘...ceramics, similar pots and pans, statues, figurines, tablets, weapons to cut, for defence and assault, icons, glassware, ornaments (hülliyyat)... reliques (muhallefat), arms(nişan) ...’.

Article 23 allows coins from the time of the last six Ottoman Sultans to be bought and sold domestically. However, the coins dating prior to the six Sultans would automatically be within the ambit of the protected movable cultural property.⁶³ Movable cultural objects from the Independence war and Foundation of the Turkish Republic are also protected with the addition of the personal belongings of Mustafa Kemal Atatürk.

G. Turkish State’s Actual Scope of Ownership

The objects which are worthy of protection are very wide in scope as has been exemplified in chapter F. Not every object that require protection can be regarded as State property though. In order for a movable or immovable cultural property to be regarded as State property, it initially needs to be a cultural property under Article 3 of the 1983 law. This movable or immovable cultural property needs to be worthy of protection under either Article 6 or 23 of the 1983 law.

Article 5 of the 1983 Law states that immovable or movable property that require protection and are known to exist would be State property. In case a new property is found, it becomes

⁵⁸ For the definition of conservation sites see: Article 3(a)(3) of the 1983 Law.

⁵⁹ Özel, ‘The Ownership of Cultural Property in Turkish Laws’ (n 27) 219.

⁶⁰ Article 3(a) of Regulation on Classification, Registration and Acceptance to Museums Movable Cultural and Natural Property which needs Protection’ (20.04.2009-27206) Article 3(a).

⁶¹ *Ibid* Article 3(d).

⁶² Published in the Official Gazette of Turkey on 20.04.2009 with the number of the Gazette being 27206.

⁶³ Özel I, p.219.

ipso iure owned by State. However, in Turkish administrative law, a property is either a State property or the property of an individual.⁶⁴ Hence, if a property is owned by an individual it cannot be State property.⁶⁵ Therefore, if an ownership has already been established on a property, this would not become the property of the State. The way for such a property to be owned by the State is by expropriation pursuant to Article 15 of the 1983 Law.

Whilst it may seem from the outset of Article 5 of 1983 Law as if the State owns every protection worthy cultural property, that is in fact not the case when private ownership has been established on such objects.

H. Turkey: Cultural Nationalist or Internationalist with Regards the Ownership

Turkey is a source nation of cultural property,⁶⁶ also described as an open-air museum.⁶⁷ In order to preserve this richness, Turkey has issued blanket legislation throughout years in order to allocate the ownership of cultural property to the State. For instance, 1983 Law has allocated ownership of the newly found cultural property as well as the non-owned ones to the State. Turkey has also banned the possibility of exporting cultural property with minor exceptions such as when it is for an exhibition, which is nevertheless heavily regulated.

China is a similar example with Turkey, for China is a source country that is rich of cultural artifacts like Turkey. China is considered to be a cultural nationalist country, seeking to keep its cultural property within its borders where it deems them to be best protected and understood.⁶⁸ However, China cannot successfully protect its cultural properties. For example, a security employee of a museum in China was accused of stealing 158 cultural objects from the museum over six years.⁶⁹ The cultural and monetary values of these objects were very high. Additionally, it is estimated that between 1998 and 2003 around 220.000 tombs were looted and the found objects were illicitly traded across the world.⁷⁰ In 2004, China requested the US to employ an importation restriction on Chinese cultural objects pursuant to Article 9 of the 1970 UNESCO Convention.⁷¹ With these endeavors China seeks to prevent cultural properties that originated from within its land from leaving. The seemingly not sufficient protection that is provided in China does not change the policy that is implemented. Much like China, Turkey has been facing difficulties protecting its cultural properties within its borders or even destructing them itself. Preparing to flood the ancient Hasankeyf under water

⁶⁴ State property is interchangeably expressed as public property in Turkish administrative law. See: Kemal Gözler and Gürsel Kaplan, *Idare Hukuku Dersleri* (Bursa 2017) 674; Tayfun Akgüner and Kahraman Berk, *Idare Hukuku* (İstanbul 2017) 824; İsmet Giritli (eds) *Idare Hukuku* (İstanbul 2015) 998.

⁶⁵ Yıldırım, T. (eds), *Idare Hukuku* (7th edn, 2018) 320; Gülan, A. Kamu Malları in Özay, İ. (2004). *Günüşiğinde Yönetim*. İstanbul, p. 664.

⁶⁶ Price, K. (2010). Who Owns the Past - Turkey's Role in the Loss and Repatriation of Antiquities. *International Journal of Legal Information*. 38. 201, 203.

⁶⁷ Özdoğan, M. (1998). Ideology and Archaeology in Turkey in Meskell, L. *Archaeology under Fire: Nationalism, Politics and Heritage in the Eastern Mediterranean and Middle East*. London and New York: Routledge. 111, 113.

⁶⁸ Liu, Z. (2015). *Repatriation of cultural objects: The case of China*. Springer. 131.

⁶⁹ US State Department, Bureau of Education and Cultural Affairs, Public Summary: Request Of The People's Republic Of China To The Government Of The United States Of America Under Article 9 Of The 1970 UNESCO Convention (2004).

⁷⁰ Hannah Beech, 'Spirited Away' Time (October 13 2003) <<http://content.time.com/time/world/article/0,8599,2056101,00.html>> accessed on 17 January 2020.

⁷¹ Notice of Receipt of Cultural Property Request From the Government of the People's Republic of China, 69 Federal Register No 171 Department of State (August 26 2004).

due to the construction of a dam,⁷² reburying a well preserved 2000-year-old Roman Spa⁷³ and major thefts from State museums only form part of the insufficient protection allocated for cultural property in Turkey.⁷⁴

When the matter comes down to who is worthy of protection of these objects these countries unreservedly deem themselves as the righteous protectors of these objects. Regardless of the fact that under certain circumstances the cultural properties in question are better protected where the source country claims them from. The strict adherence to cultural nationalism sometimes leads to these outcomes, which clearly disregard the cultural internationalism arguments. The reasons for this are manifold, among others, it has been argued that nationalism that has been in rise in Turkey might have had an impact on such behavior.⁷⁵ Besides, Turkey also believes that these objects can best be understood where they have originated. Considering the strict approach towards the ownership of cultural properties and the given reasons, Turkey seems to have adopted the cultural nationalism view when it comes to the protection of cultural property regardless of being a party to the UNESCO Convention.

I. Conclusion

Cultural property protection laws have existed in the territory where Turkey is situated today, even before the establishment of the Republic of Turkey in 1923. The first law to protect cultural property, among other measures, by entitling the State as the owner of some antiquities was 1869 Decree on Antiquities. 1869 Decree allowed individuals to own the antiquities that have been discovered on their lands. The following Decree was adopted in 1874, which has expanded the ownership of the State to include every undiscovered antiquity regardless of being located on private or public land. 1884 Decree then has provided the State with ownership right on the antiquities found within the Territory of the Ottoman Empire including the lakes, rivers, and sea. An exception was made to the State ownership when antiquities were fortuitously found on private land during construction for public use. The last Decree of Ottoman Empire was in 1906 which has granted the State ownership of every undiscovered antiquity regardless of where and how it was discovered.

1906 Decree has remained in force after the establishment of the Republic until 1973. In 1973 the law restated the long effective principle that the State is the owner of known or to be known cultural property. Until 1983, no major change has occurred with the antiquity protection by giving the State right of ownership. The 1983 Law has changed the stance taken by Turkish law towards antiquities. First, the word antiquities have been superseded by the term 'cultural property' which encompassed the same objects. Secondly, the cultural property was divided into movables and immovables, shaping the adopted legislation to take them separately. Nevertheless, 1983 Law contentiously prescribed that protection-worthy cultural

⁷² Tessa Fox, 'They are barbaric' Guardian (September 12 2019) <<https://www.theguardian.com/cities/2019/sep/12/they-are-barbaric-turkey-prepares-to-flood-12000-year-old-city-to-build-dam>> accessed on 17 January 2020.

⁷³ 'Pictures: Ancient Roman Spa City Reburied in Turkey' National Geographic (December 30 2010) <<https://www.nationalgeographic.com/news/2010/12/101229-roman-spa-city-filled-sand-allianoi-turkey-pictures/>> accessed on 17 January 2020.

⁷⁴ 'Ministry admits grand theft from art museum', Hurriyet Daily News (August 8 2012) <<http://www.hurriyetdailynews.com/ministry-admits-grand-theft-from-art-museum-27288>> accessed on 17 January 2020.

⁷⁵ Turkish news proudly announce the repatriated cultural property: <<https://www.haberturk.com/kultur-sanat/haber/707940-binlerce-tarihi-eser-yurda-dondu>> accessed 15 March 2019.

property would 'qualify as State property'. Interpretation of which has been problematic in cases such as *Elmalı Hoard* case. The *travaux préparatoires* prior to 1983 Law has reached a consensus that the new wording has not resulted in narrowing the scope of State ownership, but it has expanded the ownership of State also to the newly emerged category of immovable cultural property.

Finally, Turkey is found to belong to a cultural nationalist view with regards the cultural property protection by allocating State ownership to a very wide range of cultural objects and restricting the export of cultural property rather severely. A strict adherence to cultural nationalism has the risk of disregarding cultural internationalism. For instance, when a cultural object can be restored better outside its country of origin, the requirement need not be to repatriate such property to the source nation due to risks of the object being damaged. Therefore, striking the right balance is of utmost importance for the property of humanity to be restored better for the future generations.

In spite of the cultural property protection laws going a long way in history for Turkey, the scope and the exact definitions of the used concepts need clarifications. Further research on the field could focus on the differentiation in Turkish administrative law between State and private ownership of property. Clarifications on this matter could be extremely helpful in determining the ownership of objects that are the cultural heritage of all human beings.

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