DAN WEI*
YI FU**

A COMPREHENSIVE LEGAL APPROACH TO CULTURAL HERITAGE PROTECTION IN CHINA

1. Introduction

With five thousand years of history and a total area of approximately 9.6 million square kilometres, China possesses abundant cultural heritage resources. There are 57 properties in China that have been included in the World Heritage List, while 43 elements are in the List of Intangible Cultural Heritage of The United Nations Educational, Scientific and Cultural Organization (UNESCO).[1] As a non-renewable and irreplaceable resource, Chinese cultural heritage has encapsulated the collective memories of the whole nation. When talking of cultural heritage protection, the public usually concentrate on maintaining cultural relics, displaying cultural relics in collections, standardizing the market for cultural relic trade, and strengthening the protection of cultural heritage, while scant attention is given to the examination of the legal approach. This essay mainly reflects on the legislation, its implementation, and litigation in China.

This article first introduces the legal framework of cultural heritage protection in China, which ranges from constitutional law to local laws and regulations. After examining the characteristics of the Chinese legal structure, it further discusses typical cases published by the Supreme Court and indicates that departmental laws provide a dominant legal basis for cultural heritage protection. Finally, it explores

* Professor and Associate Dean of the Faculty of Law of the University of Macau, Macau, China, ORCID: 0000-0002-2221-3600
** Master of law, PhD Candidate of the Faculty of Law of the University of Macau, China; Lecturer of Zhejiang Police Vocational Academy, China, ORCID: 0009-0003-6942-6974
DOI: 10.4467/23538724GS.24.006.19867

1 UNESCO, "Browse the Lists of Intangible Cultural Heritage and the Register of Good Safeguarding Practices", https://ich.unesco.org/en/lists (accessed: 20.03.2024); UNESCO, "World Heritage List", https://whc.unesco.org/en/list/ (accessed: 20.03.2024).

several core topics in litigation, including different verdicts, public engagement and the discretion possessed by procurators.

2. Legislation: The comprehensive legislative mode

2.1. The legal hierarchy of cultural heritage protection

On 4 December 1982, the Constitution of the People's Republic of China (hereinafter: the Constitution) was enacted, raising the protection of cultural heritage to the national level.[2] In 2006, China designated the second Saturday of June in the annual year as Cultural Heritage Day. In China, cultural heritage is mainly divided into two categories, tangible and intangible cultural heritage, with specialized legislation relating to each. This article mainly examines cultural relic protection in China.

In the last century, China introduced a dedicated law in 1982, the Cultural Relics Protection Law (hereinafter: CRPL), which has undergone multiple revisions over the years. The latest revised version of CRPL has been open for public comment since October 2023. CRPL enshrines the ownership of collectives, individuals, and state. It encompasses a wide variety of types, including sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings, and mural paintings. CRPL further proposes provisions on unmovable cultural relics, movable cultural relics, cultural relics in collections, and entry and exit of cultural relics to and from the country.The state has also introduced specialized Intangible Cultural Heritage Law (hereinafter: ICHL). Usually, intangible cultural heritage refers to various traditional cultural manifestations such as traditional rituals, festivals, arts, calligraphy, music, acrobatics, crafts, medicine, and so on. ICHL mainly addresses the issue of research using corresponding records and collections, the establishment of catalogues of representative items, and rights and obligations for the representative predecessor. CRPL and ICHL collectively constitute the fundamental basis for cultural heritage protection.

Other than legislation, there are administrative regulations published by the State Council, like the Regulation for the Implementation of the Cultural Relics Protection Law (hereinafter: RICRPL), Notice of the State Council on Strengthening Protection of Cultural Heritages (hereinafter: NSPCH), and so on. Although they are not issued by the legislative body of the nation, they are still authoritative and enforceable, with specific and concrete rules, furnishing guidance for local government entities. For instance, the NSPCH stresses the protection of cultural relics in major construction projects, with corresponding approval, ratification, and filing

[2] Art. 22 of the Constitution indicates the state's responsibility to protects scenic spots and historic sites, precious cultural relics and other important historical and cultural heritage.

systems. Other than the State Council, departments in charge are also eligible to enact rules for reference. For example, Administrative Measures for the Protection of World Culture Heritages is issued by the former Ministry of Culture (currently the Ministry of Culture and Tourism).

At the regional level, local laws and regulations are published by the local people's congress and its committee. Those local laws and regulations are much more specific and only hold jurisdiction within the scope of their administrative district. For instance, as Shanxi Province is home to numerous pieces of distinctive cave architecture and ancient buildings, it enacted Regulations of Shaanxi Province on the Protection of Famous Historical and Cultural Cities, Towns and Villages. As China consists of 56 ethnic groups and there are 155 ethnic autonomous areas, the Constitution also grants the national autonomous governments the autonomy to issue regulations, protecting and sifting through the nationalities' cultural heritage, vigorously developing cultures in their respective areas.

As we can see, the legal framework of cultural heritage encompasses various levels, including the central, provincial, municipal, and county (district) levels, with laws and regulations effective within respective jurisdictions. As is shown in the figure below (fig. 1), China has established a legal hierarchy for cultural heritage protection. Among the various modes of protection, the Constitution takes the leadership with limited articles outlining principles of cultural heritage protection. The second level is the two specific pieces of legislation, the CRPL and the ICHL. The third level mainly consists of administrative regulations issued by the State Council like PICRPL. The fourth level consists of local regulations, autonomous

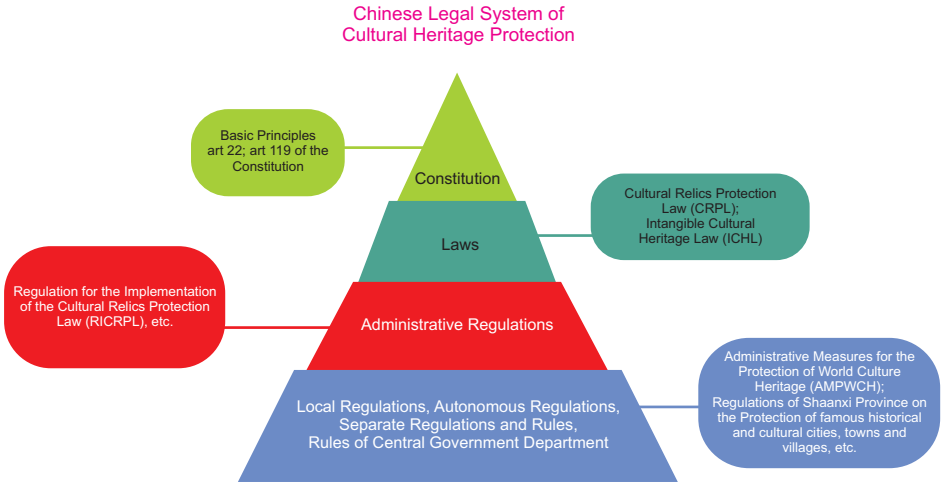

Fig. 1: Chinese Legal System of Cultural Heritage Protection
Source: Author's own elaboration.

regulations, separate regulations and rules in the national autonomous regions, and rules from the Central Government Department. As the hierarchy descends, the scope of application and legal enforceability gradually narrows down.

2.2. Characteristics of Chinese legal culture heritage protection

Upon examination, Chinese legal culture heritage protection is characterized by a broad scope with meticulous classification and pronounced administrative management.

On the one hand, ancient China has a long-standing history with a prosperous economy and robust national achievements. Consequently, it bequeathed a wealth of valuable tangible and intangible cultural treasures. For instance, the Forbidden City, which served as the royal palace in the Ming and Qing Dynasties for five centuries, contains nearly 10,000 rooms with their furnishings, crafts, numerous temples, and garden views. It acts as a treasure chest with extremely valuable relics, containing both movable and unmovable relics. Other than items of tangible cultural heritage, there are also many extrordinary inventions, traditions, and other intangible relics. For instance, the well-known Four Great Inventions – paper making, gunpowder, printing, and the compass-encapsulate the wisdom of the ancient Chinese people. In the contemporary era, creations like the Four Great Inventions are eligible to be protected by intellectual property rights or as commercial secrets. As these inventions are historical, techniques are no longer shrouded in secrecy and are shared worldwide. Their intrinsic value in the past has far transcended time and space, and the dedication to preserve them also serves as a respectful acknowledgement of their historical significance. Consequently, the current Chinese cultural heritage system is very broad, encompassing both tangible cultural heritages and intangible cultural heritages with historical, artistic, and scientific value.

On the other hand, the two basic laws, the CRPL and the ICHL, try to impose specific rights and obligations on entities concerned. For example, the CRPL focuses on the protection, rescue, reasonable utilization and management of cultural relics. The Department of Cultural Relics Administration is responsible for preserving unmovable cultural relics by designating historical and cultural sites, planning preservation projects, delimiting a certain area for construction control, and keeping the ruins of relics free from reconstruction. Under the CRPL, archaeological excavations shall be permitted, registered, appropriately kept, and their findings transferred to state-owned cultural relics collections. There are also many rules for cultural relics in institution collections, like setting different grades with compiled files, holding exhibitions, conducting scientific research, and imposing specific requirements for allocation, exchange, and borrowing of state-owned cultural relics. As cultural relics hold scientific, historical, and cultural value and are matters of public interest, they pertain to matters of an administrative nature. This character is part

of the distinction from other legislation like the Civil Code in China (hereinafter: the Civil Code), which adjusts civil relationships among entities of equal standing.

However, excessive intervention and management on the part of the administrative authorities might lead to the "nine dragons in charge of water" phenomenon.[3] For instance, when the cultural relics to be protected have the attributes of cultural resources, ecological environment, state-owned property, and heroic protection objects simultaneously, administrative bodies such as the Cultural Relics Protection Bureau, the Ecological Environment Bureau, and The Veterans' Affairs Bureau are involved.[4] They may conduct administrative inspections, make administrative decisions, and publish regulations, bringing about administrative and management overlap. Once one body encounters difficulties in management, it may shirk responsibility. Various bodies may behave as if they are kicking a ball one to the other.

2.3. Comparative study with other jurisdictions

Upon reviewing the legislative status quo of cultural heritage protection in major countries (regions) in the world, we can find the legislative mode mainly includes three types: the separate legislative mode, the comprehensive legislative mode, and the unified legislative mode. In some European countries, protection is dispersed across various pieces of legislation but ultimately converges towards unified legislation. For instance, France has issued a specified French Cultural Heritage Code (*Code du Patrimoine*), as the result of a significant endeavour to compile laws and regulations formulated previously.[5] In the meanwhile, other countries like Great Britain and the United States prefer to adopt separate legislative modes. For example, the USA issued the Native American Graves Protection and Repatriation Act in 1990. Based on the hierarchy analysis, China adopts a comprehensive mode, that is, issuing a basic law as guidance, supplemented by specific rules formulated in separate departmental laws.[6]

---

[3] J. Jiao, "Unified Measures Drive Successful Conservation", *China Daily*, 15.08.2023, https://www.fujian.gov.cn/english/news/202308/t20230815_6227867.htm (accessed: 22.03.2024).

[4] J. Dong, T. Ming, "Wén wù hé wén huà yí chǎn bǎo hù jiǎn chá gōng yì sù sòng de fǎn sī yǔ jìn lù – yǐ 33 gè diǎn xíng àn lì wéi qiè rù diǎn" 文物和文化遗产保护检察公益诉讼的反思与进路 – 以33个典型案例为切入点 [Reflection and Approach of Procuratorial Public Interest Litigation on the Protection of Cultural Relics and Cultural Heritage: based on the 33 typical cases], *Shànghǎi fǎ xué yán jiū* 上海法学研究 [Shanghai Law Research Collection] 2023, vol. 12, p. 222.

[5] M. Cornu, N. Wagener, "L'objet patrimoine: Une construction juridique et politique?", *Vingtième siècle* 2018, vol. 1, p. 42.

[6] R. Chai, Y. Liang, "Wǒ guó wén wù bǎo hù lì fǎ mó shì yán jiū" 我国文物保护立法模式研究 [A Study on Legislative Models of Cultural Relics Protection of China], *Xī běi dà xué xué bào (Zhé xué shè huì kē xué bǎn)* 西北大学学报(哲学社会科学版) [Journal of Northwest University (Philosophy and Social Sciences Edition)] 2016, vol. 46, no. 1, p. 77.

Different countries enact specific characteristic designs. France has placed a strong emphasis on expert involvement in the process of restoration, extension, and demolition of peripheral buildings. Italy has developed a comprehensive and strong theory of preventive conservation of architectural heritage, which is specifically shown in the maintenance and restoration in the 2004 National Code of Cultural Heritage and Landscape.[7] Britain embraces diverse funding, which includes fiscal appropriation, loans, and donations.[8] Since 1994, the National Lottery Heritage Fund has awarded £ 8.8 billion to more than 51,000 heritage projects across the UK.[9] In Recent years, China has placed significant emphasis on cultural retrieval. According to statistics from UNESCO, more than 1.6 million cultural relics from China are scattered in 200 museums in 47 countries, and "millions are in private collections."[10] Consequently, the latest draft for the CRPL grants the state the right to reclaim cultural relics lost abroad through theft or other illegal exit, and this right is not subject to limitation. The recovery of lost cultural heritage is intertwined with China's national interests and cultural sentiments. In the long term, China will dedicate itself to fostering an international legal framework that is increasingly conducive to the repatriation of cultural heritage.

3. Implementation: A doctrinal approach to department law

3.1. Three typical cases relating to cultural heritage protection

In February 2023, The Supreme People's Court in China issued verdicts on 15 typical cases relating to cultural heritage protection, covering a wide range of cultural relics, including movable relics of various grades and immovable relics of various types.[11] Among the 15 cases, 6 are criminal cases, 5 are civil cases, 2 are criminal cases collateral to civil proceedings, and 2 are administrative cases, as the chart shows below (table 1).

---

[7] S. Della Torre, "Italian perspective on the planned preventive conservation of architectural heritage", *Frontiers of Architectural Research* 2021, vol. 10, pp. 108–116.

[8] Y. Wang, "Wén huà yí chǎn fǎ jiào chéng" 文化遗产法教程 [Guide to Cultural Heritage Law], Shāng wù yìn shū guǎn 商务印书馆 [Commercial Press], Beijing 2012, pp. 286–287.

[9] Heritage Fund, https://www.heritagefund.org.uk/ (accessed: 28.04.2024).

[10] UNESCO, "The Fight against the Illicit Trafficking of Cultural Objects: the 1970 Convention: Past and Future, information kit, 2013, https://unesdoc.unesco.org/ark:/48223/pf0000227215_eng (accessed: 20.04.2024).

[11] The Supreme Court of China, 7 February 2023, https://www.court.gov.cn/zixun/xiangqing/388291.html (accessed: 12.04.2024).

Table 1. Typical cases from the Supreme Court

	Plaintiff	Defendant	Case type	Cause of action
1	procurator	Jiao and 14 other individuals	criminal case	theft, concealing the proceeds of crime
2	procurator	Lu, Luo	criminal case	vandalism
3	procurator	Zhang, Wang	criminal case	negligent destruction of cultural relics
4	procurator	Huo and 10 other individuals	criminal case	resale of cultural relics
5	procurator	Yao and 11 other individuals	criminal case	robbing, excavating ancient cultural sites, ancient tombs, and reselling cultural relics
6	procurator	Miao and 2 other individuals	criminal case	excavation of ancient tombs
7	procurator	Wang and 2 other individuals	criminal incidental civil litigation	excavation of ancient tombs
8	procurator	Sun and 14 other individuals	criminal incidental civil litigation	excavation of ancient tombs
9	procurator	Chen	civil case	disruption of ecological environment
10	procurator	a stone processing limited company	civil case	disruption of ecological environment
11	two village committees	Oscar van Overeem (Dutch collector)	civil case	property rights disputes
12	Xuanfang Investment Management Company	Lv	civil case	breach of contract
13	Liu and 3 other individuals	Ruijin Central Revolutionary Memorial Hall	civil case	property rights disputes
14	procurator	Veterans Affairs Bureau in Jingyu County	administrative case	dereliction and neglect of duty
15	a building materials company	Culture and Tourism Sports Bureau in Lintong	administrative case	disobedience to an administrative decision

Source: The Supreme Court of China, 7 February 2023, https://www.court.gov.cn/zixun/xiangqing/388291.html (accessed: 12.04.2024).

In the six criminal cases, criminals are accused of stealing, robbery, disruption, and excavation. According to the Criminal Law in China (hereafter: Criminal Law), criminal liability can be divided into principal punishment and supplementary punishment. The principal punishments usually include control, criminal detention, fixed-term imprisonment, and the death penalty, while the supplementary punishments include fines, deprivation of political rights, and confiscation of property. In Yao's case, Yao was sentenced to death with a two-year suspension of execution. The crime of obstructing the administration of cultural relics is regulated in Criminal Law under a specific section in chapter 4. Articles 324 to 329 address illegal acts like intentional destruction of cultural relics, illegal sale, gifting precious cultural relics to foreigners, trafficking in cultural relics, private gifting of cultural relics, ancient culture or ancient tomb excavation and robbery, as well as theft from state-owned archives. If a certain illegal action falls within these articles, it will definitely constitute a criminal offence. According to legal doctrine, even if an action does not violate the articles stipulated in the section, it may also not be exempted from the penalties set forth in other general criminal provisions like stealing in art. 264.

In the five civil cases, the causes of the action predominantly fall into three types: ecological damage, property rights dispute, and rental contract dispute. As the CRPL stipulates and recognizes three types of legal ownership, the nation, collectives, and individuals, disputes over property rights and rental contracts inevitably arise. In this sense, the Civil Code can largely solve conflicts through its concrete chapters on contracts, property rights, and infringement.

The two administrative cases originate from failure in administration and disobedience to an administrative decision respectively. Under the CRPL and the ICHL, the relevant administrative departments are obligated to supervise and administer protection of cultural relics within their respective administrative jurisdictions. During the process, the administrative departments may impose administrative penalties upon a citizen, legal person, or another organization. If the concerned person deems that the administrative action infringes upon his/her lawful rights or interests, he/she can file an administrative lawsuit with a court. In addition, if the administrative department has neglected to fulfil its duties, it would be indicted by the prosecution who is obligated to supervise the case.

3.2. Application of departmental law

Law is inherently limited, and it cannot encompass all kinds of legal relations within a single statute. As mentioned, the provisions of the CRPL and the ICHL mainly pertain to administrative management clauses. However, the intricacies of social life dictate the diverse branches of law, bringing about the application of other departments of law. It is also an important approach to realize substantial fairness. For instance, the Civil Code indicates the remediation liability of the tortfeasor, who

shall afford compensation for: the permanent damage, loss of service functions until complete remediation is possible; expenses of investigation, authentication; the assessment fee relating to ecological and environmental damage and pollution removal; and the remediation fee, and other reasonable expenses. Even though there is no specific legislation for cultural heritage infringement, once cultural heritage is deemed to be an environmental site, the Environmental Protection Law (hereinafter: EPL) would be applicable, consequently giving rise to civil liabilities.

As the traditional legal model of judicial decision-making suggests, the application of law is to find a "reasoned response to reasoned argument."[12] During the process, the doctrinal analysis shall be applied to clarify the content of legal facts, while the "judicial process is the exemplification of reason".[13] Different department laws have a mission to regulate corresponding legal interests. It is natural to allocate private disputes to the Civil Code, while those that severely disrupt public order are dealt with under administrative or criminal law. During the process, precedence is accorded to specific statutory provisions, prioritizing special laws over general law ("*Lex specialis derogat generali*" in Latin). That is if the CRPL and other specific laws already contain provisions relating to a certain action, general legislation like the Civil Code or even the Constitution shall not be prioritized.

3.3. Legal lacunae: Deficiency in legal clauses and dilemmas

Although the application of departmental law and doctrinal methods is capable of solving the vast majority of cases, there are still some legal loopholes. In fact, relying solely on tenuous legal clauses to address issues may not be sufficient, and not all abstract legal principles align sufficiently with specific cases.

For instance, art. 9 of the Civil Code indicates the classic green principle that civil activities shall contribute to the conservation of resources and protection of the environment. This principle poses a duty on all civil subjects to behave in an ecological and environmentally friendly manner. It is quite understandable to apply the principle to natural resources, but this may not be suitable for application in cultural heritage protection, whose spirit lies in heritage preservation and cultural diversity.[14] As we can see, the current legal system has its deficiencies, and sometimes, the

---

[12] F. Cross, E. Tiller, "What is legal doctrine", *Northwestern University Law Review* 2006, vol. 100, issue 1, p. 518.

[13] D.L. Shapiro, "In defense of judicial candor", *Harvard Law Review* 1987, vol. 100, issue 4, pp. 731.

[14] Y. Zhang, "Cù jìn wén huà yí chǎn fǎ lǜ tǐ xì jīng xì huà jiàn gòu", 促进文化遗产法律体系精细化建构 [Promoting the Elaboration of a Legal System for Cultural Heritage], 8 February 2023, https://www.cssn.cn/gjgc/hqxx/202302/t20230208_5586711.shtml (accessed: 23.04.2024).

principles and clauses in other pieces of legislation may not be suitable for cultural heritage protection under every set of circumstances.

Thus, it is recommended that some specific rules for cultural heritage be set. For instance, the Civil Code specifies and lists several tort liabilities, including motor vehicle traffic accidents, product liability, environmental pollution, ecological damage, ultra-hazardous activity, harm caused by a domestic animal, and harm caused by buildings or objects. It also suggests three kinds of liability: fault liability, no-fault liability, and fault presumption liability. The law has enumerated several situations for no-fault liability and fault presumption liability without specifying fault liability. This leaves uncertainty and discretion for cultural heritage infringement. If the judge considers cultural heritage infringement is not one of the specified situations, then fault liability would be applied. If the judge assumes that cultural heritage falls within the legal scope of the environment, then no-fault liability would be applied. The differences between the two liabilities would cause a tremendous burden for the infringer. Thus, it is necessary for lawmakers to consider which kinds of rules are most suitable for cultural heritage protection and to specify them.

4. Litigation: Public and private engagement

4.1. Different verdicts in administrative and civil lawsuits

When talking of public litigation, the best-known case is *China Biodiversity Conservation and Green Development Foundation v. Huazhuang Village Committee of Xuedian Town and People's Government of Xuedian Town*.[15] In this case, the defendant illegally felled a large number of ancient date trees, which fall within the scope of cultural heritage protection. During transplanting, a substantial number of ancient jujube trees perished due to non-compliance with scientific requirements. The court ultimately rendered a judgment against the defendant with corresponding liability for damages. Firstly, the defendant should cease the infringing behaviour and pay compensation of 3,616,818.9 yuan for the loss of service functions during the restoration of the ecological environment as a result of damage done to its original state. Secondly, the defendant should display an ancient jujube tree that died as a result of transplantation at the site of its relocation and set up warning signs as propaganda. Thirdly, a public apology should be conducted in the national media within 30 days after review by the court.

This case marks the success of public litigation initiated by social organizations, and served as a paramount example for the public. Usually, the administrative authority only shows up in administrative cases as a defendant. However, the cause

[15] Zhengzhou Intermediate People's Court of Henan Province (2016) Yu 01 No. 705, Minchu.

of action in this case was civil infringement, which holds that if a government authority occasions infringements on public interests, it can also be recognized as a civil party and incur corresponding liability. This marks a crucial triumph for the social organizations initiating legal action. Another significant aspect of this case lies in the formality of the liability. As we can see, the judgement placed multiple liabilities on the defendant, including compensation, apology, and setting up warning signs. According to the Civil Code, tort liability mainly includes the cession of the infringement, removal of any obstruction, and elimination of danger. It is quite common to impose compensation and fines in judgements. However, this particular judgment stands out as it mandates that the defendant carry out specific actions like setting up warning signs. This constitutes a distinctive system exclusive to public interest litigation. Traditionally, in private interest litigation, Chinese courts consistently adhere to the principle of "No Trial Without Complaint" and come to a judgment from a neutral position.[16] As public interest litigation entails the interest of the nation, the court is allowed to engage in legal proceedings in a more proactive and active manner. If the court considers the plaintiff's claim insufficient to safeguard public interests, the court has the right to require the plaintiff to change its claim or directly decide to stop the infringement and to restore the ecological environment to the original state.

On the contrary, in the same year in Zhejiang Province, five plaintiffs, as members of the Hangzhou Ancient Capital Culture Research Association, initiated an administrative claim against the Hangzhou Municipal People's Government.[17] In this case, the Southern Song Imperial City site was listed as a national critical cultural preservation unit in June 2001. Accordingly, the land plot of Southern Song Imperial City should be stringently protected. However, the government authorized a company to construct a building on this land, resulting in the destruction of the surrounding atmosphere. The five plaintiffs filed an administrative reconsideration, which was then rejected by the defendant. When the cases were brought to the court, the court considered the eligible applicants stipulated in the administrative reconsideration should be administrative counterparts or interested parties. As the plaintiffs do not have specific legal rights on the historical sites, the court considered the administrative review decision made by the defendant to be legally justified. Finally, the court dismissed the plaintiffs' claim.

The key reason lying behind the two contradictory judgements is the different causes of the action. There is no denying the fact that both plaintiffs brought the lawsuit in the public interest. However, as there are no uniform rules on cultural

[16] C. Zhang, *Win in Chinese Courts: Practice Guide to Civil Litigation in China,* Springer, Singapore 2023, p. 135.

[17] Hangzhou Intermediate People's Court, Zhejiang Province (2016) No. 579, Zhejiang 01, Xing Chu.

heritage that can be applied, the plaintiffs of the two cases had to utilize other departments of law. Various causes of action lead to distinct law applications, accompanied by various burdens of proof. Traditional tort theory in China requires fault, conduct, damage, and causation in fault liability,[18] and if there is no reversion of the burden of proof, the plaintiff is obliged to produce evidence. Correspondingly, in an administrative lawsuit, according to the Administrative Litigation Law, the court can revoke the alleged administrative action if there is insufficiency in primary evidence, erroneous application of any law or regulation, violation of statutory procedures, overstepping of power, abuse of power, or evident inappropriateness. When the two cases are compared, the case brought by China Biodiversity Conservation and the Green Development Foundation belongs to civil infringements, while the case brought by five plaintiffs is an administrative litigation. The different burden of proof in the two cases consequently yields different judicial outcomes. Thus, it is necessary to consider the causes of action and burden of proof when initiating public interest litigations, which also raises an issue regarding litigation skills.

4.2. Public engagement

When considering public engagement in public interest litigation, there are usually two circumstances. One involves the public acting as the plaintiff, while the other pertains to public supervision.

On the public website of "Chinese Judgement Online," when we type the words "cultural relic" and "public interest litigation" in Chinese, there are a total of 142 judgements and verdicts. Among them, 83 criminal cases actually do not fall into the scope of traditional public interest litigation.[19] In the remaining 59 judgements and verdicts, there are 12 civil lawsuits and 14 administrative lawsuits, with another verdict on the execution of a criminal case. As is shown, seldom do social organizations initiate lawsuits for the sake of public interest.

There are mainly two reasons. Firstly, Chinese social organizations are not as well developed as other jurisdictions, which is significantly related to the political system. In some developed countries with democratic politics, interest groups represent the interests of their members and are eager to initiate claims. Although these claims are quite controversial, and the litigations are regarded as a tool to obtain tactical advantages, particularly gaining relatively cheap publicity, attracting public consciousness, and generating political influence,[20] the claims can still

---

[18] S. Wang, "Zhōng huá rén mín gòng hé guó qīn quán zé rèn fǎ shì yì", 中华人民共和国侵权责任法释义 [Explanations to the Tort Liability Law of the People's Republic of China], Fǎ lǜ chū bǎn shè 法律出版社 [China Law Press], Beijing 2010, pp. 39–56.

[19] China Judgements Online, https://wenshu.court.gov.cn/ (accessed: 18.04.2024).

[20] D. Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective", *The Modern Law Review* 1992, vol. 55, no. 1, pp. 44–46.

induce constraints and supervision. Despite the fact that China does not have powerful interest groups because of its national conditions, Chinese people are also reluctant to initiate claims in the public interest without any encouragement. The lack of public engagement also imposes a substantial burden upon the procurator, who is meant to undertake public prosecution over criminal cases. Secondly, neither the CRPL nor the ICHL has left room for public engagement in cultural heritage protection. As mentioned, government departments play the dominant role in the whole process of cultural heritage protection, from project initiation, design, and implementation to review, acceptance, and settlement. Neither in the decision-making, implementation, or supervision process, does the relevant system have any reserved approaches for public participation.[21] Consequently, the public is in an information blind spot, and information asymmetry has led to the absence of public engagement.

In fact, China has a population of more than 1.4 billion, laying a robust personnel foundation for public litigation. By encouraging and stimulating the public, tragedy in cultural protection can largely be avoided. Here, similar experiences in the U.S.A. can be drawn upon for reference. In the U.S.A., citizen suits and the politics of private enforcement provide two models for the public to get engaged in environmental protection. The public may not sustain any injury or minimal injury-in-fact, but they play the role of "private attorneys general."[22] In recent years, China has already acknowledged the importance of public engagement, and the latest draft of the CRPL has introduced an enhanced system for public filing, complaints, and reports. It also suggested that the news media should carry out supervision through public opinion on cultural heritage protection. However, the CRPL Draft still does not induce social organizations and individuals' engagement in litigation, which remains to be further improved.

4.3. Prosecutor's discretion

In December 2023, the Supreme People's Procurator's Office issued Typical Cases of Public Interest Litigation for the Protection of Cultural Relics and Cultural Heritage, providing national guidance for local litigation practice. Among the 8 cases published, only one case is a civil lawsuit, and the others are administrative lawsuits. These cases involve a variety of illegal types and basically cover common problems

[21] X. Li, "Gōng zhòng cān yù wén huà yí chǎn bǎo hù de gōng yì sù sòng jìn lù yán jiū" 公众参与文化遗产保护的公益诉讼进路研究 [The Way on How the Public Participate into the Cultural Relic Protection through the Approach of Public Interest Litigation], *Zhōng guó gāo xiào shè huì kē xué* 中国高校社会科学 [Social Sciences in Chinese Higher Education Institutions] 2019, issue 6, p. 81.

[22] M.S. Greve, „Private Enforcement of Environmental Law", *Tulane Law Review* 1990, vol. 65, pp. 340–374.

in cultural heritage protection, such as the destruction of cultural relics in the process of carrying out repairs.[23]

In a prosecutorial lawsuit, the procurator would firstly investigate by means of unmanned aerial photography, field investigation, and other forms of identification to confirm the illegal actions based on clues. Subsequently, it would normally issue pre-trial procuratorial advice. If the relevant administrative authority is reluctant to make corrections within the time limit set, the procurator will bring a lawsuit to the court. Typically, upon pre-trial procurator advice, most administrative authorities would make necessary corrections as recommended. This is the tacit understanding among the authorities. Different from the mechanism of separation of the powers, procurator offices and administrative organs in China are both responsible to the People's Congress, and they are reluctant to break the collegial relationships. Consequently, the procurator offices are not prone to readily file lawsuits against the administrative authorities, while the administrative authorities are also reluctant to be sued, something that might affect their annual assessment.

In fact, the procurator has quite flexible discretion on whether an administrative authority has satisfied the requirements upon pre-trial procurator's advice. Theoretically, there are three standards: behavioral standard, outcome standard, and compound standard. The behavioural standard theory implies that if the administrative authority has executed the actions as mandated by law through the designated procedures, in other words, exhausting all statutory measures, it can be considered as fulfilment of its duty.[24] The outcome standard holds that if the public interest is still in a status of infringement or risk of infringement, it can be inferred that the administrative authority has not fulfilled its statutory duties. The compound standard combines the former two theories and pays attention simultaneously to the process of administrative action and to the result.[25] Currently, there is no definitive standard for judging the legitimacy of the administrative authority's behaviour.

---

[23] G. Ding, "Gōng zhòng cān yù wén huà yí chǎn gōng yì sù sòng de lǐ lùn yǔ shí jiàn" 公众参与文化遗产公益诉讼的理论与实践 [Theories and Practices of Public Participation in Public Interest Litigation relating to Cultural Heritage], *Zhōngguó wénhuà yíchǎn* 中国文化遗产 [China Cultural Heritage] *2*023, vol. 4, p. 60.

[24] P. Qin, J. He, "Lùn huán jìng xíng zhèng gōng yì sù sòng de qǐ dòng zhì dù – jī yú jiǎn chá jī guān fǎ lǜ jiān dū quán de dìng wèi" 论环境行政公益诉讼的启动制度－基于检察机关法律监督权的定位 [Based on the Legal Supervision from the Procuratorial Organ], *Jī nán xué bào (zhé xué shè huì kē xué bǎn)* 暨南学报(哲学社会科学版) [Jinan Journal (Philosophy & Social Science Edition)] 2018, vol. 3, pp. 77–80.

[25] Y. Yang, X. Lei, "Wén wù bǎo hù jiǎn chá gōng yì sù sòng de kùn jú yǔ chū lù – Jī yú gān sù děng bù fèn dì qū diào chá shù jù de fēn xī" 文物保护检察公益诉讼的困局与出路－基于甘肃等部分地区调查数据的分析 [The Dilemma and Approach of Public Interest Litigation of Cultural Relics Protection Prosecution–Based on the Analysis of Survey Data in Gansu and Other Regions], *Gān sù lǐ lùn xué kān* 甘肃理论学刊 [Gansu Theory Research] 2021, vol. 6, pp. 104–112.

However, the recognition of cultural heritage is comprehensive and professional, and the prosecutors may not be professional enough to certify the performance of the administrative organ, which afforded considerable discretionary latitude. Although the current system has introduced public hearings, they usually take place subsequent to the issuance of pre-trial procurator's advice.[26] In order to keep a sustaining evaluation, it is strongly advised to conduct a preliminary hearing, which involves the whole-process engagement of archaeologists, conservationists, legal experts, historians, and community representatives who are dedicated to this area and hold authoritative qualifications in this field. As the pre-procurator's advice is currently kept secret and circulated among governmental authorities, it is imperative to bring it under public supervision, as a constraint to discretion on the part of the prosecutor and as a way of preventing the abuse of power.

5. Conclusions

Cultural heritage stands as the shared treasure of the entire nation, encapsulating its history, traditions, and values. In terms of protection, China gives priority to salvage, making rational use of heritage, and strengthening administration. From the legal perspective, although various hierarchies of cultural heritage protection have been provided, there are still legal loopholes and upcoming challenges in the digital and commercial world. Judicial litigation also appeals for the active and scientific engagement of the prosecutor and the public. In fact, cultural heritage protection is not a simple task and requires sustained efforts of protection. China is dedicated to satisfying the aesthetic needs of the public, making available its profound history, and enriching the global mosaic of human civilization.

References

Chai R., Liang Y., "Wǒ guó wén wù bǎo hù lì fǎ mó shì yán jiū" 我国文物保护立法模式研究 [A Study on Legislative Models of Cultural Relics Protection of China], *Xī běi dà xué xué bào (Zhé xué shè huì kē xué bǎn)* 西北大学学报(哲学社会科学版) [Journal of Northwest University (Philosophy and Social Sciences Edition)] 2016, vol. 46, no. 1

Cornu M., Wagener N., "L'objet patrimoine: Une construction juridique et politique?", *Vingtième siècle* 2018, vol. 1

Cross F., Tiller E., "What is legal doctrine", *Northwestern University Law Review* 2006, vol. 100, issue 1

[26] J. Liu, C. Li, "Xíng zhèng gōng yì sù sòng sù qián jiǎn chá jiàn yì de guī zé tiáo shì" 行政公益诉讼诉前检察建议的规则调适 [The Rule Adjustment of Pre-Litigation Procuratorial Advice of Administrative Public Interest Litigation], *Hé běi fǎ xué* 河北法学 [Hebei Law Science] 2023, vol. 41, no. 11, p. 77.

Della Torre S., "Italian perspective on the planned preventive conservation of architectural heritage", *Frontiers of Architectural Research* 2021, vol. 10

Ding G., "Gōng zhòng cān yù wén huà yí chǎn gōng yì sù sòng de lǐ lùn yǔ shí jiàn" 公众参与文化遗产公益诉讼的理论与实践 [Theories and Practices of Public Participation in Public Interest Litigation relating to Cultural Heritage], *Zhōngguó wénhuà yíchǎn* 中国文化遗产 [China Cultural Heritage] *2*023, vol. 4

Dong J., Ming T., "Wén wù hé wén huà yí chǎn bǎo hù jiǎn chá gōng yì sù sòng de fǎn sī yǔ jìn lù – yǐ 33 gè diǎn xíng àn lì wéi qiè rù diǎn" 文物和文化遗产保护检察公益诉讼的反思与进路 – 以33个典型案例为切入点 [Reflection and Approach of Procuratorial Public Interest Litigation on the Protection of Cultural Relics and Cultural Heritage: based on the 33 typical cases], *Shànghǎi fǎ xué yán jiū* 上海法学研究[Shanghai Law Research Collection] 2023, vol. 12

Feldman D., "Public Interest Litigation and Constitutional Theory in Comparative Perspective", *The Modern Law Review* 1992, vol. 55, no. 1

Greve M.S., "Private Enforcement of Environmental Law", *Tulane Law Review* 1990, vol. 65

Jiao J., "Unified Measures Drive Successful Conservation", *China Daily*, 15.08.2023, https://www.fujian.gov.cn/english/news/202308/t20230815_6227867.htm (accessed: 22.03.2024)

Li X., "Gōng zhòng cān yù wén huà yí chǎn bǎo hù de gōng yì sù sòng jìn lù yán jiū" 公众参与文化遗产保护的公益诉讼进路研究 [The Way on How the Public Participate into the Cultural Relic Protection through the Approach of Public Interest Litigation], *Zhōng guó gāo xiào shè huì kē xué* 中国高校社会科学 [Social Sciences in Chinese Higher Education Institutions] 2019, issue 6

Liu J., Li C., "Xíng zhèng gōng yì sù sòng sù qián jiǎn chá jiàn yì de guī zé tiáo shì" 行政公益诉讼诉前检察建议的规则调适 [The Rule Adjustment of Pre-Litigation Procuratorial Advice of Administrative Public Interest Litigation], *Hé běi fǎ xué* 河北法学 [Hebei Law Science] 2023, vol. 41, no. 11

Qin P., He J., "Lùn huán jìng xíng zhèng gōng yì sù sòng de qǐ dòng zhì dù – jī yú jiǎn chá jī guān fǎ lǜ jiān dū quán de dìng wèi" 论环境行政公益诉讼的启动制度 – 基于检察机关法律监督权的定位 [Based on the Legal Supervision from the Procuratorial Organ], *J3 nán xué bào (zhé xué shè huì kē xué bǎn)* 暨南学报(哲学社会科学版) [Jinan Journal (Philosophy & Social Science Edition)] 2018, vol. 3

Shapiro D.L., "In defense of judicial candor", *Harvard Law Review* 1987, vol. 100, issue 4

UNESCO, "The Fight against the Illicit Trafficking of Cultural Objects: the 1970 Convention: Past and Future, information kit", 2013, https://unesdoc.unesco.org/ark:/48223/pf0000227215_eng (accessed: 20.04.2024)

UNESCO, "Browse the Lists of Intangible Cultural Heritage and the Register of good safeguarding practices", https://ich.unesco.org/en/lists (accessed: 20.03.2024)

UNESCO, "World Heritage List", https://whc.unesco.org/en/list/ (accessed: 20.03.2024)

Wang S., "Zhōng huá rén mín gòng hé guó qīn quán zé rèn fǎ shì yì", 中华人民共和国侵权责任法释义 [Explanations to the Tort Liability Law of the People's Republic of China], Fǎ lǜ chū bǎn shè 法律出版社 [China Law Press], Beijing 2010

Wang Y., "Wén huà yí chǎn fǎ jiào chéng" 文化遗产法教程 [Guide to Cultural Heritage Law], Shāng wù yìn shū guǎn 商务印书馆 [Commercial Press], Beijing 2012

Yang Y., Lei X., "Wén wù bǎo hù jiǎn chá gōng yì sù sòng de kùn jú yǔ chū lù – Jī yú gān sù děng bù fèn dì qū diào chá shù jù de fēn xī" 文物保护检察公益诉讼的困局与出路 – 基于甘肃等部分地区调查数据的分析 [The Dilemma and Approach of Public Interest Litigation of

Cultural Relics Protection Prosecution – Based on the Analysis of Survey Data in Gansu and Other Regions], *Gān sù ǎ lùn xué kān* 甘肃理论学刊 [Gansu Theory Research] 2021, vol. 6
Zhang C., *Win in Chinese Courts: Practice Guide to Civil Litigation in China,* Springer, Singapore 2023
Zhang Y. Cù jìn wén huà yí chǎn fǎ lǜ tǐ xì jīng xì huà jiàn gòu, 促进文化遗产法律体系精细化建构 [Promoting the Elaboration of a Legal System for Cultural Heritage], 8 February 2023, https://www.cssn.cn/gjgc/hqxx/202302/t20230208_5586711.shtml (accessed: 23.04.2024)

SUMMARY

Dan Wei, Yi Fu

A COMPREHENSIVE LEGAL APPROACH TO CULTURAL HERITAGE PROTECTION IN CHINA

As one of the four ancient civilizations, China possesses a very large cultural heritage. China's current legal framework has adopted comprehensive legislation, covering a broad scope with meticulous classification and emphasis onadministrative implementation. Comparisons reveal that different jurisdictions exhibit distinct legislative frameworks and practices that reflect their respective national circumstances. Cases relating to cultural heritage can be divided into three types: criminal, civil, and administrative lawsuits. Specific rules are expected to be enacted on cultural heritage protection because of existing legal lacunae. Currently, litigation practice has yielded different verdicts on different causes of action in heritage-related cases. Public interest litigation necessitates the collective engagement of the entire society. The procurator system predominates in heritage-related litigation with pretrial procurator's advice, which is expected to be made available to the public.

Key words: cultural heritage protection, litigation, Chinese law

STRESZCZENIE

Dan Wei, Yi Fu

KOMPLEKSOWE PODEJŚCIE PRAWNE DO OCHRONY DZIEDZICTWA KULTURY W CHINACH

Jako jedna z czterech starożytnych cywilizacji Chiny posiadają ogromne zasoby dziedzictwa kultury. Obecne ramy prawne Chin przyjęły kompleksowe ustawodawstwo obejmujące m.in. skrupulatną klasyfikację dóbr kultury i kładące nacisk na wyraźne zarządzanie administracyjne. Z badania porównawczego wynika, że różne jurysdykcje mają odrębne ramy prawne i praktyki, które odzwierciedlają ich krajowe uwarunkowania. Sprawy dotyczące dziedzictwa kultury można podzielić na trzy rodzaje: sprawy karne, cywilne i administracyjne. Oczekuje się, że ze względu na luki prawne zostaną uchwalone szczegółowe przepisy dotyczące ochrony dziedzictwa kultury. Obecnie sądy wydają różne werdykty w różnych sprawach.

Spory sądowe w interesie publicznym wymagają zbiorowego zaangażowania całego społeczeństwa. Prokuratura dominuje w postępowaniach sądowych, udzielając porad przedprocesowych, które powinny być publikowane.

Słowa kluczowe: ochrona dziedzictwa kultury, spory sądowe, prawo chińskie