A World of Its Own

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The field of cultural heritage is dominated by numerous heterogeneous interests (see for instance Starrenburg, Baradi and Anthony). When cultural property is at stake, debates may arise if, for instance, privately owned significant works of art leave the territory of the state of origin or are disposed of in a way that may cause them irremediable damage. The different interests accruing from cultural heritage have been divided into global interests (i.e. interests of the international civil society as a whole. An example is public access to the artwork); national interests; the communities of origin's interests (i.e. interests of indigenous people to the recognition of a special link with objects part of their cultural heritage); private interests (i.e. interests of private parties – as collectors, artists, researchers – to fully exercise their rights, without restrictions); interests of the artworks themselves (this is the case of sacred objects produced for specific goals, whose original functions may be completely frustrated by an incompatible use); and, finally, interests of the art market (that strives for free trade).

The clash among all these factors has been – to different extents – influencing the development of the regulatory framework of proprietary rights over cultural propriety. What this brief blog post wants to underline is the importance of the exceptions to ownership rights over cultural property vis-a-vis the traditional property laws. In a sociocultural context in which ownership has typically been seen as the archetype of absolute rights, the duty and limits imposed on owners have led to ownership over cultural property being understood as a *right that binds*.

The starting point is the understanding that the fate of cultural property – contrary to other goods – is relevant not only to its owner, but to a larger community, encompassing present and future generations. Of course, such an idea can lead to opposite consequences depending on the different interests emerging in the specific set of rules (leading, for instance, either to favour or to limit international trade) (see Mattez). However, it is precisely this understanding that has led to the creation – both at the national and the supranational level – of rules affecting proprietary rights over cultural propriety in a way diverging from the ordinary legal regime.

In recent years, the development of new technological tools has brought into the limelight a brand-new set of tools able to shape and legally affect rights over cultural property. NFT technology is one of the most prominent examples.

In such a scenario, it seems important to take stock of legal provisions shaping proprietary rights over cultural property, in preparation for new *ad hoc* legislation, likely to be enacted in the near future.

Sketching Traditional *ad hoc* Provisions

There are five major aspects of private rights that are addressed by cultural property legislation.

First, the national interest of countries to preserve their cultural patrimony. [On the underlying distinction between “cultural nationalism” and “cultural internationalism”, see Merryman (1986); Prott (2005)]. The ensemble primarily consists of rules setting limits to the export of cultural property. Such restrictions affect the right of the owner to freely dispose of their property citing their personal interests alone. Furthermore, it may also potentially interfere with the decision of an individual private owner to move abroad, insofar as a dilemma may arise whether to abandon a work of art when its removal is prohibited.

Second, the perception of cultural heritage as part of the common heritage of mankind. This norm has led to the prioritisation of public rights over privately owned cultural properties. For instance, the universal importance of cultural manifestations has led to the creation of specific provisions granting public access to private property. Such a norm can be found in the Italian Code of Cultural Heritage and Landscape (legislative decree, n. 42/2004). Specifically, art. 38 dictates the compulsory creation of agreements governing the public accessibility of a cultural property when said cultural property has been restored thanks to public contributions. The agreement establishes the modality of the access, and is directly concluded between the Ministry of Culture and a private owner.

Third, the right of disposal. Even if the right of disposal is *influenced* by the first group of provisions on patrimony, disposal rules in essence speak to a different aspect of engagement with cultural heritage. In fact, on the one hand, the former group of rights affects the right of disposal *indirectly* by limiting the physical transfer of the object. On the other hand, the disposal rights affect the underlying sales contract directly. This can be seen in the case of rules establishing a state’s right of pre-emption. The right of pre-emption interferes with one of the main components of party autonomy: the freedom to determine whether and with whom to enter into an agreement. In this group belong those rules conferring to public-owned cultural property the status of *res extra-commercium* (i.e. non tradeable objects), thus declaring void all the contracts concluded in violation of the prohibition. These dispositions impair public entities’ possibility to dispose of their assets to realise their strategic goals.

Fourth, the establishment of ownership. Around the globe, legislators have addressed the topic in several ways, including the possibility of expropriating a property for national cultural interest (cf. Art. 4(3) Eritrean Cultural and Natural Heritage Law; Proclamation n. 177/2015). It should be noted that here I am not referring to the traditional expropriation of a property for the benefit of the overall public (such as in the cases of important infrastructural projects). This rather concerns a particular case in which the justification for expropriation can be found in the very cultural nature of the property and in the pursuit of cultural *interests*. Peculiar to the field are also *umbrella laws* that create state ownership over *undiscovered* cultural objects. Umbrella laws generally contradict traditional national treasure trove legislation (i.e. rules regulating the rights of the finder of valuable objects of unknown ownership, discovered hidden in the ground or elsewhere). Their

global impact is far-reaching, to the point that in 2011 UNIDROIT established the Model Provisions on State Ownership of Undiscovered Cultural Object to assist national legislators in the drafting of such discovery rules.

Besides, the fourth group's most significant example pertains to the protection of good-faith purchasers. The international community itself has perceived the necessity to deal specifically with the protection of good-faith purchasers of cultural objects. Dedicated provisions can be found within the two international conventions devoted to fighting illicit trafficking: Art. 7(b)(ii) of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and Arts 3 and 4 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. These rules balance the protection of good-faith purchasers differently as compared to the one offered in the case of ordinary goods (on the topic see, *ex plurimis*, Fiorentini (2014); Kurjatko (1999); Merryman (2008); Schwartz, Scott (2011)). Examples can be found also at the regional level in the Directive 2014/60/UE of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State (cf. Art. 30).

Fifth, the safeguarding of cultural heritage as a goal in itself. It consists of all those rules imposing a *duty of* protection or recognising an *interest in* the protection, other than that of the owner's. A clear example of the former (duty of protection) can be found in Arts 30-32 of the Italian Code of Cultural Heritage and Landscape, that dictate conservative obligations to private owners and possessors. With respect to the latter (interest in the protection), an example can be found in the California Civil Code, which expressly recognises the existence of "a public interest in preserving the integrity of cultural and artistic creations" (California Civil Code, sec. 989). The provision imposes a duty on owners to inform the public in all those cases in which they want to remove a cultural object being part of a real property insofar as the removal may damage the work of art. The scope of the norm is to guarantee the preservation of the object by offering to third parties the possibility to remove the work of art by themselves. The third parties are requested to cover the costs, but they acquire the ownership over the object by law (*see*, California Civil Code, sec. 989, *e*).

Re-Thinking Property Rights?

The peculiarities shown by the above-mentioned aspects of private rights on cultural property forms a rather unique regulatory framework. This short round-up shows that rules affecting proprietary rights over cultural property affect both private and public ownership. This is not to say that public and private ownership are separate but to acknowledge their entanglements. For instance, the *extra commercium* nature of a public property, by preventing the transfer of the property to a private owner, affects the traditional legal regime on public ownership.

Compared to rules dedicated to ordinary goods, this unique framework has been perceived by part of the legal literature to be divergent – in terms of quantity and quality of exceptions – to the point of requiring a distinctive theoretical categorisation. In particular, it has been said that the specific characteristics of cultural property

ownership would result in a new legal model meeting a specific socio-cultural function. With respect to this, over the years, several theories have been advanced, both in a *de lege lata* and *de lege ferenda* perspective. Among these, the idea of cultural property as a fourth estate; the qualification of cultural property as a good of public interest that overshadows private prerogatives; the idea that private rights over cultural objects are characterized by a distinct ownership over the cultural property, creating a useful domain of the private party flanked by an eminent domain of the state; the suggestion to include cultural property within the concept of commons (cf. Art. 1, Italian Bill n. 2031/2010) (Carpentieri (2011) R. Crewdson, 'Cultural Property-A Fourth Estate', 81(126) *Law Society's Gazette* 6 (1984); Ferrazzi (2023); Giannini, 'I beni culturali', 1 *Rivista trimestrale di diritto pubblico* 8 (1976); Grisolia, 'La tutela delle cose d'arte', Soc. ed. del Foro italiano/Roma, 1952, p. 205 ff.; Ruggero (2019), p. 155 ff.).

The booming of NFTs and blockchain technology in the art market has recently raised new possibilities for disposal of cultural property and related rights. This has brought public and private interests at odds once again. News of the Uffizi Gallery in Florence selling an NFT version of Michelangelo's *Tondo Doni* and of the Italian Ministry of Culture impeding the transaction caused great furore. Even if the news was not accurate and the Uffizi never actually created an NFT, it may be only a matter of time before such an event occurs. The British Museum has already begun investing in this tool for raising funds, by creating NFTs of Hokusai's and Turner's works.

In the near future, new rules – taking into consideration the evolution of the field – are likely to appear in national legislations. In sponsoring the above-mentioned California rules recognising the existence of a public interest in privately owned cultural creations, it has been affirmed that "[t]o pass this law, you have to get legislators to rethink their concepts of property rights" (A. Sieroty, cited in (Sax (2001), p. 21). This may be the case also for rules dealing with NFTs and new technologies.

Whatever path national legislators will decide to take when they will introduce the next reforms in the field, it seems like the time may have come to critically consider the different theoretical approaches already proposed and to comprehensively re-think property rights over cultural property.
