

COMMUNITY, STATE, INDIVIDUALS AND THE OWNERSHIP OF CULTURAL OBJECTS

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Summary: I. *The 1970 Convention: a process of trial and errors.* II. *Two concepts of property rights.* III. *The basic features for a uniform legal regime for Cultural Objects.* IV. *Identifying Cultural Objects.* V. *Circulation of Antiquities.* VI. *Reasons in favour of public property of Antiquities.*

I. THE 1970 CONVENTION: A PROCESS OF TRIAL AND ERRORS

Since the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, an innovative principle favouring the preservation of cultural objects in the territory where they are located has gained worldwide acceptance. Because this Convention, like the following ones, has no retroactive effect, the above principle does not apply to new cultural objects and does not concern cultural objects that have circulated in the past. However, the preservation principle is indisputably the cornerstone of the new legal framework for the international circulation of cultural objects. The idea that States must cooperate to protect their cultural property on its own territory and fight its illicit import, export and transfer is at the core of the 1970 Convention.

Forty years later, the 1970 Convention has been ratified by the 123 Member States of UNESCO.

Most states lean towards adopting the preservation principle, which favours keeping so-called Cultural Property (CP) in the territories where it is located. I believe that this innovative principle of legal culture is blurring the distinctions between export and import states as well as those between market and source states.¹

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¹ See Schneider, Marina, "UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report", *Unif. L. Rev.*, 2001, 476; Merryman, J.H., "The re-

The 1970 Convention was later implemented by the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995 and the 2011 UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects.

However, the legal framework of the 1970 Convention is still very hard to establish. These difficulties will be extensively analysed during the 2013 Mexican Seminar, but we should bear in mind that it takes time for every significant innovation to become truly effective.

The time so far elapsed does not mean that the 1970 Convention and those that have followed it have turned out to be a failure. We all know that major legislative innovations only become fully effective decades after their formal adoption. Just to make a few examples: the 1084 French Civil Code only became the French Civil Law during the Second Empire; the egalitarian effects of the abolition of slavery in the United States only became fully enforced a century after Lincoln's Emancipation Proclamation of 1863; the UK forms of action continued to rule the British Civil Procedure from their graves² for decades following their abolition by means of the 1832 Uniformity of Process Act. Only non-innovative statutes take few years to come completely into force. The German BGB became effective shortly after its adoption in 1900, but someone stated that the German Civil Code "rather than boldly anticipating the future prudently sums up the past".³

Therefore, the relative slowness with which the 1970 Convention was implemented cannot be held to be a failure.

On the contrary, it should be noted that, like any other innovations, the Convention: a) has been met with strong resistance by vested interests; b) was adopted through a process of trial and error.

I am not going to deal with the circumstances under a) in spite of their current and past relevance because I am not an expert on this subject. I am rather going to analyse one specific aspect of the circumstances under b), i.e. property rights. This topic was initially neglected and later dealt with by way of international provisions as the difficulty in implementing the political principle laid down in 1970 became evident.⁴ However, they perhaps deserve further analysis.

tion of cultural property", 21 *U. California Davies L. Rev.*, 1988, 477.

² The expression "(the forms of action) rule us from their graves", is by Maitland; See Maitland, Frederic William, *The Forms of Action at Common Law: A Course of Lectures*, 1909.

³ See Zweigert, K. and Kötz, H., *An Introduction to Comparative Law*, 3th ed., Clarendon Press, 1998, 144 quoting an observation by Zitelmann.

⁴ See Prott, *Problems of Private International Law for the Protection of the Cultural Heritage*, in *Academie de la Haie de droit Intern. Recueil des Cours*, 1989, V, p. 219; Williams, *The International*

II. TWO CONCEPTS OF PROPERTY RIGHTS

The 1970 Convention was born in the very innovative atmosphere of the Sixties, which tended to consider property rights as an old curiosity that could be got rid of as soon as possible. As a result, the 1970 Convention was basically drawn up as a political document aimed at introducing radical changes in the current ideology and perspective. However, its main legislative objective is that of recognising property rights and awarding restitutionary remedies, which represent the other side of the coin of ownership. From a historical standpoint, the 1970 Convention was bold enough to enter the hallowed territory of Western legal tradition. In doing so, it ran the risk of falling victim to the illusion of vulgar enlightenment, which may lead to a belief that a political idea becomes law in action as soon as it takes the form of law in books. We know that it is rather the opposite: a legal system is a complex set of rules, institutions and mentalities that should be handled with extreme care.

In those years, UNESCO was not the only institution to believe that the topic of property rights should be dealt with by way of acts of political will.

In the Sixties of the last century, leading US and European schools of academic legal thought combined the 19th century radical tradition which wished to impose increasingly stricter limits on private property⁵ with the realistic criticism which led to the characterisation of property as a bundle of sticks. “Rather than understanding property as a moral entitlements and as an efficacious legal concept with the capacity to constrain judicial or leg-

and National Protection of Movable Cultural Property. A Comparative Study, New York- Dobbs Ferry, 1978.

⁵ See Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford, 1962; De Vita, A., *La proprietà nell'esperienza giuridica contemporanea. Analisi comparativa del diritto francese*, Milano, Giuffrè, rist., 1974; Suel, “La déclaration des droits de l’homme et du citoyen. L’énigme de l’article 17 sur le droit de propriété. La grammaire et le pouvoir”, *Rev. Droit Pub.* 1974, 1295; Rittstieg, *Eigentum als Verfassungsproblem. Zur Geschichte und Gegenwart des bürgerlichen Verfassungsstaates*, Darmstadt, 1975; Ackerman, B., *Private Property and the Constitution*, New Haven, 1977; Macpherson, *The Meaning of Property*, in Macpherson (ed.), *Property: Mainstream and Critical Positions*, Oxford, 1978, p. III; Donahue, *The Future of the Concept of Property Predicted from its Past*, in J. R. Pennock e J. W. Chapman (eds.), *Property (Nomos XXII)*, New York, 1980, p. 28; Thomas C. Grey, *The Disintegration of Property*, in *Nomos XXII* 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980); S. Rodotà, *Il terribile diritto, studi sulla proprietà privata*, Bologna, Il Mulino, 1981; Joseph L. Sax, “Some Thoughts on the Decline of Private Property”, 58 *Wash. L. Rev.* 481 (1983); Frison-Roche and Terré-Fornacciari, *Quelques remarques sur le droit de propriété*, in 35 *Archives de philosophie du droit - Vocabulaire fondamental du droit*, 1990, p. 237; Christman, *The Myth of Property. Toward an Egalitarian Theory of Ownership*, Oxford, 1994.

islative decisions, progressives treated property as a malleable output emerging as the end-result from those lawmaking decisions”.⁶

However, over the following years, property rights were rather conceived as moral entitlements and an essential part of the mechanism by which citizens’ freedom is protected from encroachments by the state.⁷ Both national and international supreme courts, including the European Court of Human Rights,⁸ have reinforced rather than weakened the constitutional protection of property rights. The World Bank has even made the protection of property rights a fundamental test to determine the attractiveness of a state system. In short, the 1970 Convention was conceived at a time when property rights were treated as a problem that could be neglected but it was implemented in an environment where property rights deserve to be taken seriously.

III. THE BASIC FEATURES FOR A UNIFORM LEGAL REGIME FOR CULTURAL OBJECTS

Taking property rights seriously does not mean surrendering public interest to private one; it only means that we need to be faced with some technical aspects and with the problem of suggesting a rational basis for proprietary claims.

As far as the former are concerned, one of the main difficulties stems from the structure of the 1970 Convention, which is one of mutual recognition. This implies giving up the creation of a uniform legal regime for cultural objects (“CO”). According to the ordinary pattern of international law conventions, the legal regime for the “CO” should be established by the legal system of the country of origin. Therefore, the role of international conventions is to force the other Member States to acknowledge the effects of the legal regime that the country of origin has created for the “CO”, even when these objects are located outside the borders of this country. In truth,

⁶ See Peñalver, E.M., *Property, Power, and Freedom*, in press.

⁷ See Epstein, Richard A., *Design for Liberty: Private property, Public Administration and the Rule of Law*, 2011, 5-8.

⁸ The activities carried out by the ECHR in Europe were essential to make the trend of robust constitutional protection of property rights—which has been rather weak in recent legal history—a firm one; see Zattera, A-F., *La dimension constitutionnelle et européenne du droit de propriété*, Paris, LGDJ, 2001; Candian, A., *I diritti fondamentali in Europa*, in AA.VV., *I diritti fondamentali in Europa*, Milano, Giuffrè, 2002, p. 63; Pavegeau, S., *Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales*, Paris LGDJ, 2006; Alexander, G.S., *The Global Debate over Constitutional Property. Lessons for American Takings Jurisprudence*, Chicago, Univ.Press., 2006; Praduroux, S., *The European Dimension of Property as a Fundamental Right and its Impact on French and Italian Law*, Helsinki, 2012.

this mechanism gives rise to insurmountable difficulties, in that it is based on the false assumption that a judge living in a specific state can enforce the law of another State correctly, which seldom takes place. However, this is inevitable if one believes that states cannot identify a uniform legal regime.

The implementation of the 1970 Convention has gone through the following, easily identifiable, stages. After they had satisfactorily ratified the Convention, its Member States realised that it contained considerable legal gaps and did not provide sufficient guidelines for its implementation. Hence, the states adopted the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The stated objective of this Convention was that of supplementing the provisions of the 1970 Convention by formulating minimal legal rules on the restitution and return of cultural objects, setting out the rules of private international law and international procedure which make it possible to apply the principles set down in the UNESCO Convention.

However, given that even the more technical drafting activities did not overcome the main problem related to mutual recognition, the Model Provisions on State Ownership of Undiscovered Cultural Objects were adopted in 2011, thanks to the cooperation between UNESCO and UNIDROIT.

As can be easily noticed, the Convention was implemented through three different stages. The first stage went from the drafting of a document in terms of political principles to documents drafted in legal terms. During the second stage, a convention with a broad application range concerning all the cultural objects was turned into conventions and documents with an increasingly narrow object. The third stage went from the mutual recognition convention to uniform provisions that so far are limited to soft law.

These three stages show a departure from vulgar enlightenment and a realization that law matters and has its own autonomy in regard to legislation.

Anyway, at present (December 2012) we still wonder why it is so difficult to establish a uniform legal regime for CO.

The first problem is that of identifying a cultural object. The legal regime applicable to a cultural object is based first of all on its attribution to someone. Attribution means that the law creates a protected relationship between the resources that an object can offer and a person.⁹ The person does not have to be individual. A legal system may distribute the resources

⁹ Reference can be made to F. Cohen's famous definition of right of property, *Dialogue on Private Property*, in 9 *Rutgers L. Rev.*, 1954, 357: "That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grantor withhold. Signed: Private citizen. Endorsed: The state".

of cultural objects by way of collective, plural and individual attributions and their respective divisions.

However, the features of the object to be attributed must be clearly defined because the attribution may only take place with respect to a specific object, which must be easily distinguished from other objects.¹⁰

In the inevitable perspective of distinguishing between rights attached to natural or legal persons and the things of the outside world, the first logical step consists in investigating the features of external things. We have lost sight of this logical need for some time,¹¹ but this problem has almost been overcome.¹² Today it can hardly be doubted that property rights, or the real rights of civil law tradition, denote a position of belonging, linking a person with rights to an object, whether material or immaterial. In this perspective the intrinsic features of things are inevitably relevant to the shaping of rights granted to a specific party. It takes no sophisticated legal theory to understand that the rights that a legal system bestows on a can of beer must be different from those granted to a villa designed by Palladio. Because property rights are valid and enforceable against the rest of the world, it is impossible to neglect other people's interests. The selection of other people's interests is precisely what shapes property rights but this selection is made according to the features of the objects. This explains why recycling is all we can expect from the owner of a can of beer while we expect much more from the owner of a Palladian villa.

¹⁰ Traditionally common law experience in this sector is rather confusing both semantically (because the word property may refer both to the object and the right) and theoretically. However, law in action in common law systems follows hidden rules that do not produce different results from those obtained by civil law, which distinguishes very clearly the object (Bien, Sache, gooderen, buonos) from the right that an entity is granted (propriété; eigentum; ownership).

¹¹ This was due to the convergence between the approach of critical idealism and that of a specific branch of European and American legal doctrine which considers property rights as a relationship between persons, disregarding the object; see Bierling, E.R., *Zur Kritik der juristischen Grundbegriffe*, Gotha, 1877; Salmond, J.W., *Jurisprudence or the Theory of the law*, 2th ed. London, 1907, 222; Hohfeld, W.N., *Fundamental Legal Conceptions as Applied in Legal Reasoning, and Other Legal Essays*, Yale Univ. Press, 1919; Roguin, E., *La règle de droit. Etude de science juridique pure*, Lausanne, 1889; Ginossar, S., *Droit reel, Propriété et création*, Paris, LGDJ, 1960; Zenati, F., *La nature juridique de la propriété. Contribution à la théorie du droit subjectif*, These, Lyon, 1981; Zenati-Castaing, F. and Revet, T., *Les biens*, Paris, PUF, 1997; S.R. Munzer, *Property as Social Relations*, in Munzer, S.R. (ed.) *New Essays in the Legal and Political Theory of Property*, Cambridge Univ. Press, 2001, p. 37.

¹² See Smith, H.E., "Property as the Law of Things", in 125 *Harv. L. Rev.*, 2011, 1691; Dross, William, *Droit civil. Les choses*, Paris, L.G.D.J., 2012; Gambaro, A., *I beni*, Milano, Giuffrè, 2012.

It is not surprising that legal practice shapes property rights according to the features of the things they relate to, but it should be underlined that this practice requires categories of things to be legally defined.

Therefore, when it comes to cultural objects, we expect their features to be identified *a priori* by their legal source. Otherwise, it will not be possible to fill the category of CO with concrete objects and there would be no legal framework applicable to them. In other words, every cultural object should be identified as such. A cultural object is identified through a syllogistically logical procedure whereby a reasonable person includes a single object that he, or she, has a full observational experience in the abstract category of cultural objects. To do so, the category of cultural objects must be defined by using a catalogue of all the features that an object should have, in order to be considered as part of this category, but also by using a catalogue of the features that would exclude it from belonging to this category.

The importance of this rule is clearer if we consider what would happen if it was not applied.

A borderline case can be traced in Italian legal history. In the Sixties and Seventies of the last century, a fashionable definition of cultural objects was given by a parliamentary committee (*Commissione Franceschini*) as “all that represents material evidence with the value of civilisation”. This definition was received with enthusiasm by experts of history and arts, although its application to administrative acts and court decisions proved confusing.

Generally speaking, when a State adopts vague and undefined criteria for identifying cultural objects it becomes hard if not impossible for single concrete objects to be included in a specific category. In this case, the decision must be arbitrarily made by an authorised person. Under national law, this causes the usual destabilising effects brought about by legal uncertainty. At an international level, the result is non-enforcement of the applicable provisions. This is due to most countries’ requirement that the entities authorised to make decisions about property should decide according to legal criteria, i.e. following rules of law rather than making arbitrary choices. If the rule of law is completely vague, these entities will not be able to attribute ownership of an object and the position of the current possessor of the cultural object will prevail. The main point is that, according to the 1970 Convention, the country, or party, illegally deprived of a cultural object transferred abroad must appear as a plaintiff before the courts of the foreign country to claim remedies to recover possession. In this respect, there is a remarkable difference between civil law systems that provide for the typical remedy called *rivendicazione*, *revendication*, *Vindikation*, and common law systems that do not allow for actions asserting property. However, this

difference is almost irrelevant because the plaintiff is always asked to prove that he or she has good title to the object. On the contrary, when an object cannot be associated to any specific legal framework, it becomes almost impossible to claim title to it, because title is nothing more than a right over that object bestowed on a person according to the relevant and applicable rules of attribution. The problem is not the presence of rules protecting the good faith owner of movable property transferred by a person who does not own it. It is rather an institutional one: one cannot ask for the restitution of property taken from its legitimate owner if the provisions regulating the identification of title are not sufficiently precise.¹³

IV. IDENTIFYING CULTURAL OBJECTS

Therefore, what does it take to have a good definition of CO?

It should be noted that the standards used to identify various types of CO may only be fixed within specific guidelines including good analysis and research methods, which is not always the case. The difficulties that all courts are faced with when it comes to attributing a work of art to a specific artist provide good evidence of the vagueness of the criteria adopted. In this regard, the wording: “original artistic assemblages and montages in any material” to the list under section 1 of the 1970 Convention is certainly problematic.

It should also be noted that many historical and artistic disciplines do not require any completely precise criteria to identify the objects within their scope because identification of these objects is only made for the purpose of studying them. When it comes to associating an object to a specific legal framework for the purpose of attributing property rights, the preciseness of these criteria becomes essential.

The notion of a cultural object is actually the sum of various indexes used as markers. If these indexes are in great numbers and vague, the identification of a single cultural object will prove difficult and uncertain.

This explains why the preservation principle works better, i.e. is more effective, when we move from a general consideration of all possible cultural objects to a specific type.

A good example is that of cultural objects from archaeological excavations (both regular and clandestine) or archaeological discoveries.

Recognizing the archaeological value of an object is rather easy. The methods followed in archaeological research for the identification of an archaeological find, along with those adopted in the fields of physics and

¹³ See *U.S. v. Mc Clain*, 593 F2d 658, 1979.

chemistry, allow experts to establish with reasonable precision whether an object may be attributed archaeological value, where it comes from and its dating. Therefore, the indexes available for the attribution of archaeological value to a single object are precise and sufficiently univocal. If many archaeologically valuable objects had not already been transferred far from their countries of origin when the above conventions came into force, their identification would not be a problem at all.

V. CIRCULATION OF ANTIQUITIES

Choosing the regime applicable to easily identifiable cultural objects and the rationale for it is paramount and a prerequisite for creating a uniform regime.

Many States believe that the most suitable legal regime for archaeological CO is State Ownership, but there is no universal agreement on this choice and even less on the fact that State Ownership should be that of the country of origin.¹⁴

The State ownership regime is obviously the easiest to manage. If all the archaeologically valuable objects must belong to the State they come from or in which they have been found, this means that ownership cannot circulate and these objects are extra commercium. Furthermore —with the exceptions that will be explained below— State Ownership is directly linked to the features of the object and we can therefore state that *res ipsa loquitur*.

Understandably, States that gave birth to brilliant civilizations, which left long-lasting traces of their architectural and artistic achievements, agree with the implementation of the regime of state ownership by the country of origin. However, the claim that these objects should be left to their state community must be supported by sound arguments.¹⁵

As a matter of fact, the desire for beauty is universal¹⁶ and handmade works of art have circulated beyond political borders since they were created. This circulation obviously depends on transport capacities. Therefore,

¹⁴ See Fish, S. (ed.) *National Approaches to the Governance of Historical Heritage over Time*, Oxford, 2008.

¹⁵ The idea that historical and cultural objects should belong to their country of origin is quite a recent one, dating back to the aftermaths of the French Revolution, when the need was felt to minimise damages caused by the destruction of revolutionaries; see Sax, J.M., *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 Mich.L. Rev. 1142(1990); M. Graziadei, *Beni culturali (circulation dei)*, in *Enciclopedia del Diritto- Annali*, II, t.2, 91, 2009.

¹⁶ See Scott, J., *The Pleasure of Antiquity*, New Haven, 2003.

it is best to focus on archaeologically valuable cultural objects that may be transported using means available during the various ages. Hence, the circulation addressed here concerns, primarily, jewellery and pottery, including that which decorated tombs, which are, on the contrary, difficult to transport. However, it should be noted that even stone or marble objects such as obelisks, columns and friezes have always broadly circulated. These objects circulate because in countries far from their country of origin there is someone willing to pay more than the people living in the country of origin.

Archaeology is above all a sort of mapping of the circulation of cultural objects.

In truth, alongside this evident circulation, based on exchange by way of mutual consent, there has always been another type of circulation directly linked to plundering. Historically, plunder is the by-product of war and as such was customary recognised and has two variations. The first one is the so-called “private sacking”. Individual victorious fighters put in their sacks all the objects of value that they manage to pinch in the place (almost always a town) they have conquered. It does not matter if private sacking is immediate and direct or originates from the distribution of collective booty. When sackers come back home, or stop somewhere along the way, they resell the pieces of their booty to the best bidder. The market model thus undergoes renewed vigour.

The second form of plundering is public. The winning political side gets hold of good quality handmade products that were produced or found in the conquered territory, to embellish its own sites, especially those in which the symbols of its power and glory are concentrated.

San Marco’s horses in Venice are a good example of this kind of circulation.¹⁷

Removal *manu militari* can be replaced by less violent sacking. If war is the continuation of politics (among States) using other means, sacking can be carried out by politicians without necessarily resorting to war. The balance of power among States can allow for sacking without violence,¹⁸ but

¹⁷ San Marco’s horses are four bronze horses, originally part of a quadriga (chariot). They were somehow removed from their production place (which is still uncertain) by Emperor Teodosio II (408-450), who put them in Constantinople’s hippodrome; they were later taken to Venice in 1204 after the sacking of the town by the IV crusade. They were then removed by Napoleon after the conquest of the Venetian Republic by the French in 1797 and stayed in Paris until 1815, when they went back to Venice after Napoleon’s defeat.

¹⁸ The most famous case is that of Elgins marbles, but we can also quote the various obelisks removed from Egypt at various times and the Pergamon altar, which was partially taken to Berlin in 1886 with the consent of sultan Abdul Hamid II.

we are still dealing with a model for the circulation of cultural objects that excludes the correct operation of market exchanges.

However, antiquities are distinguished by their long duration.

Therefore, time is essential when dealing with the circulation of objects but also with the circulation of peoples and cultures.

The map of the transmigration of peoples is too well-known to be quoted here, but with regard to cultural objects we should distinguish between the circulation of peoples and stratification of cultures.

The transmigration of peoples only has an impact on the relationship between a community and the traces left in the territory where it settled in exceptional circumstances. This is due to the fact that new settlers mix with the existing population, tend to assimilate at least some of the local customs, identify with the territory where they settle permanently and create new emotional relationships with the landmarks therein.¹⁹ The stratification of cultures is even more important because sometimes it entails high levels of discontinuance that may lead a population to lose its attachment to the antiquities located in its territory.

Historically, this kind of discontinuity, which divides the culture of a population from messages originating from the traces of its past, has been linked to changes in religious orientation which leads to an aversion to remnants of the previous religion. The destruction of Bamiyan's Buddhas in Afghanistan in 2001 or the tearing down of Timbuctu's mausoleums in 2012 are examples of this trend. However even the French revolution witnessed the destruction of churches, convents and monasteries.

In this case the basis of the claim to retain title to archaeologically valuable CO is more problematic.

VI. REASONS IN FAVOUR OF PUBLIC PROPERTY OF ANTIQUITIES

Generally speaking, cultural objects have a peculiar status due to the fact that the protection requirements of at least four different individual positions are attached to them.

First of all, we must consider the interests of owners of cultural objects, who may be either state or private entities. These owners are definitively worthy of protection because they encourage the commissioning of cultural objects, which obviously must not only be preserved but also produced.

¹⁹ This explains why the contemporary English consider Stonehenge as part of their cultural heritage; the contemporary French feel the same about the less famous mausoleum of Glanum and the Tuscans consider Etruscan finds as their own.

Secondly we must consider that most citizens are interested in accessing cultural objects with a view to making intellectual use of them.

Likewise, future generations are interested in making the same use of cultural objects, and this is worthy of protection because these objects represent evidence of civilization and cultural tradition, which has an evident trans-generational value.

Finally, the interests of authors of cultural objects are worthy of protection for the same, if specular, reason that the commissioning of such works is worthy of such protection. These interests sometimes take the form of the same *droit de suite* which is recognised to some art works such as paintings.

The combination of the protection tools available to these four different types of interests generates the special legal ontology for cultural objects, which is better understood if viewed within the context of the general ontology of cultural objects, which cannot disregard their symbolic value.

Conferring a symbolic value to cultural objects should not result in any vague and broadly inclusive categorization; it just means recognizing that cultural objects are the source of messages addressed to those who can contemplate or make use of them. Therefore, it also means firstly recognizing that cultural objects are collective in nature due to their connection with the culture of entire communities and not single individuals, and, secondly that their forms of enjoyment are basically not rivalry, given that their use does not imply the exclusion of other individuals from the same enjoyment.

Relational categorization is not the only aspect that contributes to the general ontology of cultural objects. Another essential aspect can be inferred when we consider that these objects are embedded in a broad cultural framework which explains their own essence. As a matter of fact, a cultural object can be considered as such when it stimulates certain emotions or stimulates the intelligence of a whole community. However, to do so, this object must be linked, perhaps dialectically, to other objects that make it possible to design an itinerary, a story, a tradition.

Therefore, it is understandable that, when we move from the dialogical perspective to the legal one, which prevails when assessing circumstances regarding ownership, symbolic values become axiological factors with a view to evaluating the best ownership structure.

In fact, the ontological features of cultural objects explain why the way in which the legal status of cultural objects is perceived results in strongly favouring the idea that they must belong to their state of origin.

This inclination however can be the result of the popular image of private property rather than the outcome of a careful analysis of the requirements of the legal system.

Jus excludendi is widely considered as the basic element of private property. To this we may add *jus abutendi*, which basically consists in the legal right to destroy the object owned. These features of rights of property are evidently incompatible with the essence of cultural objects. In my opinion, however, *jus abutendi* is not a problem in itself. The idea that the owner of an object with great historical value may destroy it with impunity is obviously terrifying in that it openly contradicts the above axiological factors. However, it is also true that the right to destroy things stopped being seriously considered as a property right a long time ago.²⁰ That image is thus more imaginary than scientific.

Jus excludendi is the alarming factor and the true force that drives to consider private ownership of cultural objects at the very most as a temporary situation.

If we analyse this point, we will notice that the breaking point of all the ownership models is when the cultural object enters the commerce network. At that particular moment, both the seller and the buyer become interested in giving the latter as many powers, authorities, privileges and immunities with respect to the object as possible.

In contrast with this union of interests, it should be noted that the right to prevent other people from using a culturally valuable object (which is definitively the case with archaeological finds) cannot be granted to any individual owner in absolute terms, because that would contradict the cultural value of the object and would be equivalent to destroying it, even if temporarily.

This means that ownership of cultural objects cannot coincide with private property in its classical meaning.

However, we should not forget that so-called classical ownership is more legendary than real. When William Blackstone wrote his famous sentence included in the introduction to Book Two of his Commentaries about the Rights of Things, which has been quoted so many times, he was well aware that this form of ownership was not provided for by English positive law.²¹

²⁰ Just take the case of house ownership. This is definitively a case of exclusive ownership, but it does not give the owner any right to destroy it. If it is a house inside a block of flats, this will surely be the case. Even if it is a single family home, the right to tear it down will only be recognised with many restrictions. Many more examples can also be given.

²¹ Cfr. Blackstone, W., *Commentaries on the Laws of England. Book the Second, Of the Rights of Things*: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe". Note however that a few pages after this famous statement, illustrating a positive English right of his time, Blackstone was forced to sadly confess

Bernard Windscheid's definition of the notion of Eigentum/Dominium²² was equally a property without properties,²³ i.e. an abstract void and all-purpose concept, which (rhetorically) meant a tool to protect individuals and their freedom.²⁴

There is no need to criticize these ideas about the notion of property here. Suffice it to say that on no account can they be held to be reasonably suitable for cultural objects.

This conclusion, however, does not imply that State ownership should be considered as the only appropriate legal regime. Between the Blackstonian concept of property and State ownership there is a plethora of legal regimes that can adapt to the features of the object they relate to.

However, with respect to archaeologically valuable objects found underground, we can identify two main attribution models. Firstly, they may belong to the State with territorial sovereignty and this is the model usually adopted in continental Europe. Secondly, they may belong to landowners and this is the model adopted by classical common law systems. However, it should be noted that, in case of adoption of the principle whereby the shaping of property rights must be rationally adapted to the nature of the object, there are few arguments in support of their attribution to the individual landowner.

As regards archaeological objects, for example, the main argument in support of the need to recognize private property ceases to be relevant. The manufacture of archaeological objects is not commissioned and, when it is, it means that the objects are copies or fakes. The appropriateness of promoting excavations and the discovery of archaeological finds is also uncertain.

that absolute and total property is found in the case of the allodium: "this is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seized thereof absolutely in *dominio suo*". Unfortunately: "this allodial property no subject in England has".

²² See Windscheid, B., *Diritto delle pandette*, Italian translation by Carlo Fadda and Paolo Emilio Bensa, Vol. I, Torino, Utet, rist., 1930, p. 589-590: "property means that a (material) object belongs to someone under the law; therefore, it would be more appropriate to talk about right of property. If an object belong to someone under the law this means that the will of the owner will be decisive in all his or her relationships".

²³ Cfr. Roos, N.H.M., *On property without Properties. An Inquiry into the Metaphysical Foundations and the Coherence of Property Law*, in Van Maanen, G.E. and Van der Walt, A.J., *Property Law on the Threshold of the 21st Century*, Proceedings of the International Colloquium "Property Law on the Threshold of the 21st Century", 28-30 August 1995, Maastricht, Antwerpen, 1996, p. 161.

²⁴ Così: Grossi, P., "Un grande giurista del nostro tempo- Franz Wieacker (1908-1994)", *Riv. dir. civ.*, I, 1995, p. 487.

Past excavations commissioned by private enterprises mostly led to the above-mentioned forms of sacking.²⁵

Finally, it should be noted that State ownership of archaeological objects has some advantages as to their legal management. It makes it easier to recognize that the country of origin has a valid claim to regain possession thereof. It also makes it easier to recognize that their possession in private hands does not correspond to any possible attribution rule. It is not necessary to verify if the objects are the product of a theft. It will suffice to verify the quality and origin of the objects, because they are not *res furtive*, but rather *res extracommercium* which cannot be validly transferred or acquired by any means.²⁶

²⁵ See P. Gerstenblith, Schultz and Barakat: *Universal Recognition of National Ownership of Antiquities*, 14 *Art Antiquity &L.*, 21 (2009); K.D. Vitale, *The War on Antiquities: United States law and Foreign Cultural property*, 84 *Notre Dame L. Rev.* 1835 (2009).

²⁶ See M. Frigo, *Model Provisions on State Ownership of Undiscovered Cultural Objects — Introduction*, *Unif. L. Rev.* 2011, 1024.