

THE (LEGAL) CULTURE OF CULTURAL PROPERTY*

Mauro BUSSANI**

I. THE NOTION OF CULTURAL PROPERTY

A résumé of the scholarly bonanza brought to us by the speakers of the Conference and the contributors to the book cannot start but with some remarks on the notion of cultural property itself.

This notion lies at the core of the framework designed by the 1970 UNESCO Convention (“Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property”), whose achievements and challenges this conference aimed to celebrate and investigate.

Besides and beyond some attempts at defining it, cultural property is a tricky concept. First, the notion of culture itself is unsettled. What is culture? What is it made up of? Can culture be defined in terms either of the products of élite groups or of the psychology of the great mass of individuals? Can culture, instead, be defined as a means to empower socially and politically subordinate groups? Or should culture be conceived of as a multiplicity of competing ‘voices’, against which any overarching notion would incur methodological criticism?¹ But, then, which voices?

To these (and many other) questions, no clear and commonly shared answer is available. This is in part because most of the circulating answers are, in principle

* This paper is drawn from the Summary Report the author presented at the end of the Conference on “The Globalization of the Protection of Cultural Heritage. The 1970 Convention: New Challenges”, Mexico, 21-23 March 2013. Reference is made, unless otherwise necessary, only to the speakers of the above Conference and the contributors to the present book.

** Full Professor of Private and Comparative Law, University of Trieste Law School; Scientific Director, International Association of Legal Sciences (IALS-Unesco); Adjunct Professor, Faculty of Law, University of Macau, S.A.R. of the P.R.C.

¹ See —to pick up one of the many needles in a huge haystack—Sax, B.C., “Introduction: Truth and Meaning in Cultural History”, in Schine Gold, P. and Sax, B.C. (eds.), *Cultural Visions: Essays in the History of Culture*, Rodopi, Amsterdam-Atlanta, 2000, 3, 4-5.

at least, acceptable, their actual persuasiveness largely depending on the category of social phenomena on which one focuses (as well as their time and place). But this is also why ‘cultural property’ cannot but be a multifaceted concept.

It does not only relate to cultural artifacts that derive from cultural practices. It also represents the inherited values, ideas, beliefs, and knowledge that characterize social groups and their members’ behavior (Berruecos, Guerrero, Sanchez-Cordero). Cultural property is the traditional lens adopted by both national legal systems and international legal orders to protect cultural expressions. Cultural property is —and at the same time shapes— people’s past and future, memories and aspirations,² and, as such, its contents and meanings are neither stable nor necessarily neat. These contents and meanings are not only bound to change across time and space; they also inevitably convey a plurality of individual and social perspectives, which may, or may not, be easily harmonized with one another.

Yet, in recent years, the paradigm of cultural property protection has increasingly been perceived, in some quarters, as partially unable to address the complexities of cultural phenomena. For instance, it has been stressed how the notion of cultural property is rooted in the Western intellectual tradition, and prizes “material possession over process”.³ This is said to result in the notion not being able to adequately encompass non-Western visions of culture, under which cultural processes may be more important than cultural outcomes. In the same vein, another common critique to the notion of cultural property is that it assumes, implicitly, that cultural objects may always be assigned a market value (Ortiz Sovalbarro), and conveys, explicitly, the idea of “commodification of cultural artifacts and related elements by treating them as commodities to be bought and sold”.⁴ Others have noted that the property paradigm has a rather formalistic and rigid structure. Because of such a structure, the cultural property paradigm is seen as ill-suited to address cultural values, which are by definition both dynamic and incommensurable.⁵ Refining this view, however, it has been underlined how

² See, e.g., Prott, V. and O’Keefe, J., “*Cultural Heritage or Cultural Property?*”, 1 *Int’l J. Cultural Prop.* 1992, 307, 311.

³ Harding, S., “*Value, Obligation and Cultural Heritage*”, 31 *Ariz. St. L.J.*, 1999, 291, 309.

⁴ Blake, J., “*On Defining the Cultural Heritage*”, 49 *Int’l & Comp. L.Q.*, 2000, 61, 66; Brown, M. F., “*Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley’s In Defense of Property*”, 17 *Int’l J. Cultural Prop.*, 2010, 569 f.

⁵ E.g., Moustakas, J., “*Group Rights in Cultural Property: Justifying Strict Inalienability*”, 74 *Cornell L. Rev.*, 1989, 1179, 1182 ff. Mezey, N., “*The Paradoxes of Cultural Property*”, 107 *Colum. L. Rev.*, 2004 f (2007); Last, K., “*The Resolution of Cultural Property Disputes: Some Issues of Definition*”, Int’l Bureau of the Permanent Court of Arbitration (ed.), *Resolution of Cultural Property Disputes*, Keuwer, Tha Hague, 2004, 53 ff.

the acknowledgement of the existence of a variety of proprietary regimes regulating different items of cultural property, should prompt the debate to imagine a system of resource-specific rules, where different proprietary regimes apply to different kinds of cultural objects (Gambaro, and see also Cornu & Renold).

II. MULTIPLE IDENTITIES

There is of course much more that could be, and has been by the speakers, added to what I have just sketched about the notion of cultural property. Yet, even in a Summary Report, some further features of this notion cannot go under-noticed.

These features show that the very notion of cultural property —beyond being fragmented from within— is crisscrossed by the multiplicity of identities that its producers, users, and traders embody and convey into it.

The point is not only that cultural property attracts the interest of governments and indigenous communities, treasure hunters and museum curators, thieves and guards, art collectors and economists (to mention only a few). The point is also that, in most societies, be they Western or not, individual identities are spread over different layers of affiliation, dictated, for instance, by the belonging to an ethnic, linguistic, or territorial community, to a professional group, to an economic class of the society itself. These affiliations, though with varying intensity and range of action, drive people's needs, choices, and claims, including those regarding cultural property.⁶

A simple and clear example has been made by many distinguished speakers coming from federal States such as the United States, Canada and Mexico (Nafziger and Kouroupas for the United States; Paterson for Canada; Diener Salas and Becerril, in their respective reports on Mexico). In the above federal States (but this holds true elsewhere as well)⁷ one cannot take it for granted that the central government is the guardian of an allegedly 'national' view of cultural property. Nor can this guardianship be always

⁶ See, in general, Bussani, M., *Il diritto dell'Occidente. Geopolitica delle regole globali*, Einaudi: Torino, 2010, 25 ff., 144 ff.

⁷ Suffice it here to recall the various indigenous groups living in Peru, or the Sami people of Lappland, spread over the boundaries of Norway, Sweden and Finland. See respectively, Roberts, J.C., "The Protection of Indigenous Populations Cultural Property in Peru, Mexico and the United States", 4 *Tulsa J. Comp. & Int'l L.*, 1997, 327 ff. and Wiessner, S., "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges", 22/1 *Eur. J. Int'l L.*, 2011, 121 ff. See also, in general, Nafziger, J. A. R. *et al.*, *Cultural Law. International, Comparative, and Indigenous*, CUP, Cambridge, 2010, 273-288.

taken in charge by the single States/provinces. In States/provinces made up by different ethnic or linguistic communities, which only partially identify themselves with the ‘national’ identity, people belonging to those communities may adhere to cultural values which are indifferent, if not opposed, to the so-called ‘national’ ones. We have seen this with regard to Mexico, which, in the 21th century, has shifted from a ‘nationalistic’ approach to cultural property (whereby cultural property was entrusted to the central state, and based on a monolithic, monocultural view of the Mexican identity and heritage) to a ‘multicultural’ approach, which places special emphasis on the variety and richness of indigenous cultures underlying the pluralistic Mexican identity. We saw the tension between centralized and local views of cultural property also in James Nafziger’s description of the U.S. experience in protecting native-American indigenous heritage, as well as in Robert Pateron’s account of the difficulties of implementing uniformly the UNESCO Convention in Canada, which is not only federalized but also includes in its territory indigenous people and a mixed jurisdiction, Québec – both presenting cultural traits that are fairly different from those of the rest of the Canadian people/provinces.

Another example. Professional affiliations may be equally powerful in shaping both visions of cultural property, and understandings of what its protection requires. Lyndel Prott and Jérôme Fromageau, for instance, showed us that museums, art dealers and private collectors have their own set of values to defend, and abide by their own codes of conduct, which most of the time are in conflict with what the (official) laws require them to do. In countries where professional groups are strong and well-established —typically countries such as the United States and the United Kingdom—, professional affiliations influence the economic actors’ self-representation of what they do, and of what society expects them to do. These representations may deprive cultural property of most of its symbolic meaning, and may also tend to conceive of cultural objects simply as special commodities – with their own price, market, and rules for exchange (this is the target of a criticism we already mentioned: above, n. 1).

But cultural identities and demands for their protection may be conditioned by other economic contingencies. As many of the speakers pointed out (Prott, Huo & Zhu, Ortiz Sovalbarro), economic dependency can lead people to give priority to present needs and economic interests in cultural property, over transgenerational aspirations of protection for cultural heritage. This explains why illicit traffic of cultural property usually affects severely poor countries, where people are either unaware of their rights over cultural property, or obliged by poverty, violence, or war to give them up.

Yet similar effects may occur in rising economies, where abrupt change may dilute people's capacity to react against limitations of their cultural property rights. Zhangxin Huo & Ye Zhu, and Lee Keun-Gwan, for instance, recalled how China's economic growth in the past three decades has revived the Chinese domestic art market, boosted also by a renovated interest for historical artefacts. These phenomena, however, ended up pushing poor farmers and rural families to seek windfalls by illegally excavating countless cultural relics to sell them on the black market, thereby imperilling the Chinese archaeological heritage. The case of China's rapid urbanization, which is actually destroying or threatening to destroy thousands of sites with cultural value, provides another dramatic example of possible conflict between economic development on the one hand, and protection of cultural property on the other.

III. HISTORICAL PROPERTY VS. PROPERTY OF HISTORY

All these identities, and the reach of cultural property they embrace, may overlap and combine with one another. They may be acquired and lost, though with different timings. They may be re-shaped by the power of law or by that of its actors. From this point of view, the history of cultural property, and of cultural property claims, is —as both Gambaro and Paterson reminded us— necessarily a history of transmigration of people and stratification of cultures; a history of assimilation, fractures, métissages. But it also is a history of violence, of exploitation and domination, of plunder — claims and social demands for the use and protection of cultural property being related, as they inevitably are, to the changing balance of countries' economic and political power (Bokova). This is a situation in which one could even see a clash between those who claim 'historical property', and those whose claim is 'property over history' (their own or that of others).

In Merryman's well-known categories,⁸ there are, on the one hand, 'source' countries, *i.e.* the countries which are rich in cultural property but often poor in economic resources, and on the other hand, 'market' countries, *i.e.* those which do not have a great deal of cultural property, but which are often rich and will seek to acquire cultural objects. There may be, it goes without saying, more than one overlap between the two categories⁹, but the

⁸ Merryman, J. H., "*Two Ways of Thinking About Cultural Property*", 80/4 *Am. J. Int'l L.*, 1986.

⁹ Italy, for instance, is both a "source" and a "market" country, which may explain why it has a long tradition —perhaps the longest in the world— of cultural property regulation:

distinction between ‘source’ and ‘market’ countries tells us something about economic inequalities between States shaping their (reciprocal) relationship with cultural property. In this regard, the case of the illegal traffic in cultural objects is illuminating. Illegal traffic of cultural property is a lucrative market, whose annual turnover (in the grim ranking of black markets) is second only to that produced by the illegal trafficking of arms and drugs. But the point is that the implications of this traffic do not impact the different State economies with benevolent indifference. The risk always is that the costs of illegal trafficking be put upon source countries, while offering to the market states (and/or to their most influential economic actors) the power to affect the choices of their less economically strong counterparts.

IV. LAYERS

In such an articulated field, it comes to no surprise that the rules controlling cultural property, from its production to its acquisition and circulation, fragment themselves into different layers, whose solutions flourish indifferent to, or even in contrast with, the law posited by the State and by international law instruments.

This has been forcefully stressed by Francesca Fiorentini, who analysed the international trade in cultural property from the perspective of legal pluralism. Fiorentini, in particular, noted that cultural property law may be seen as a transnational, multilayered and multi-centric body of law, consisting of layers of rules with different origins and rationales. These different layers coexist, each having a different purpose, some of them even avoiding the usual dispute-resolution mechanisms, meaning that the majority of controversies arising among the users of a given layer are not heard by State’s courts.¹⁰

In this perspective, only one of the cultural property horizons is contained in what can be named the “official formal layer”, to which the West-

see, e. g., Cassese, S., *La proiezione europea dello Stato italiano*, in Bussani M. (ed.), *Il diritto italiano in Europa, Annuario di diritto comparato*, Esi, Napoli, forthcoming 2014.

¹⁰ Obviously, in speaking of these layers, one should not take into account the all-Western debate (and its positivist inspiration) that concerns the role performed by the so-called social norms, social or cultural rules as something different from the law strictly intended. Legal anthropology teaches us that the law is made up of the rules that a specific community (no matter how large and socially or economically sophisticated) adopts to govern itself, and that any distinction between legal rules and social/cultural rules disappears, as long as the social rules respond to the above-mentioned requirements. See, in general, Bussani, M., *Il diritto dell’Occidente. Geopolitica delle regole globali*, Einaudi, Torino, 2010, 6 ff., 25 ff.

ern legal discourse usually refers. It is the only stratum where we encounter positive, or would-be positive (as is the case for most soft-law initiatives) legal rules, *i.e.* the rules enacted by the State, or to be acknowledged by an officially recognized authority, and usually set out in national and local regulations, treaties, other international law instruments, and subsequently worked out in arbitral and judicial decisions based on the same texts. It is here that behaviours, entitlements and disputes are controlled by official law and official circuits of adjudication.

Instead, other levels of legal experience are grounded in different rules – which could naturally turn out to be more or less consistent with the principles that shape the official law.¹¹

We find, for instance, the variety of rules and schemes through which (as Fiorentini showed us) museums, collectors, and art institutions manage art loans and exchanges to satisfy temporary exhibition or research purposes. Another layer is the one made up of the rules adopted by international professional organizations. These organizations, which can be private or mixed (private-public) entities, act both as rule-makers and addressees of rules that are set forth by unofficial codes of conduct for professionals in the global art market. A third example of unofficial legal layer comes from those areas of illicit trafficking whose rules are the result of customs developed over the time by trading actors, such as (again) museums, art dealers and collectors. Consider, for instance, the museums' practice of encouraging acquisitions of antiquities even when their provenance is dubious. Or, think of the art dealers' practice of respecting the 'don't ask, don't tell' rule with regard to illegally obtained cultural objects - all aspects that have been mentioned by Lyndel Prott.

In all the above layers, the actors not only operate by their own (often unwritten) rules, but also adopt 'home-made' regimes for dispute-settlement, establishing their own 'courts' and nominating their own 'judges'. As Prott, Fiorentini, and Fromageau, persuasively maintained, the informality of these layers does not mean that they are less effective than the official ones in dealing with cultural property issues. To the contrary, the actors participating in them are often able to safely navigate the (official) legal obstacles they face.

V. ON-GOING PROMISES OF THE UNESCO CONVENTION

Amidst this variety of unofficial layers, what is the historical and actual meaning of the 1970 UNESCO Convention ?

¹¹ See Bussani, M., "A Pluralist Approach to Mixed Jurisdictions", 6 *J. Comp. L.*, 2011, 161-167.

Let us begin by recalling the obvious. While legal protection of culture is as old as the humanity itself, it was only in the twentieth century, and especially after World War II, that cultural property entered the mainstream national and international legal and political debate.

On the national side, almost all national reporters (Diener Salas, Beceril and Berruecos with regard to Mexico; Ortiz Sovalbarro in his presentation about Guatemala; Kaye and Nafziger as far as the United States are concerned, Huo & Zhu for China, and Keun-Gwan for East-Asia generally; Paterson for Canada) showed that, since the 1960s, States' governments have considerably changed their attitude towards cultural property. Nowadays, national rules on cultural property consist of a complex set of domestic (and, in federal states, federal) rules – ranging from the Constitutional level to ordinary laws and administrative regulations.

On the international law side, suffice it here to recall how, ever since the Constitution of United Nations Educational, Scientific and Cultural Organization was signed (on November 16, 1945), a growing body of international law instruments has been enacted under the aegis of UNESCO. This body of law covers areas as differentiated as that of international cultural law, including cultural diversity; the illicit traffic of cultural goods; and the protection of natural, intangible, and underwater cultural heritage, to mention but a few. But a plethora of supra-national (global and regional) regimes,¹² like UNIDROIT,¹³ the WTO¹⁴ and the EU¹⁵ ones, have stepped into the process (Guerrero, Schneider, Planche, Cornu, Fiorentini).

¹² Casini, L., “*Italian Hours: The Globalization of Cultural Property Law*”, 9(2) *Int. J. Constitutional Law*, 2011, 369 ff., also available at: ssrn.com/abstract=1793410.

¹³ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

¹⁴ Article XX, lit. f) GATT (the so-called “cultural exception”) allows restrictions on the free trade of goods if they are “imposed for the protection of national treasures of artistic, historic or archaeological value”. Yet, the derogation is subject to compliance with the non-discrimination principle, reciprocity between states, and non-disguised restriction on international trade.

¹⁵ The traditional core of EU policy on the free movement of goods—including cultural property—is embedded in Articles 28, 30 and 34-36 of the TFEU. Articles 28 and 30 prohibit customs duties on imports and exports between Member States, including charges having an equivalent effect and customs duties of a fiscal nature. Articles 34 and 35 prohibit quantitative restrictions on the import and export of goods between Member States, including measures having an equivalent effect. Article 36 (similarly to the WTO regime under Article XX, lit. f) GATT mentioned at the previous note) exempts “national treasures possessing artistic, historic or archaeological value”. Nevertheless, these restrictions must not constitute a means of “arbitrary discrimination” or a “disguised restriction” on trade between Member States (Article 36). With regard to EU secondary legislation on cultural property, one can see Regulation 3911/1992, now substituted by Regulation 116/2009 “on the export of cultural

Despite this flourishing of positive law, all the speakers agreed that the capacity of both domestic official measures and international official legal regimes to effectively protect cultural property and regulate its cross-border flow remains limited.

This holds true even for the 1970 UNESCO Convention (and similar remarks can be made with regard to its UNIDROIT counterpart, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - as Marina Schneider explained to us).

It is well known, for instance, that the UNESCO Convention has not been universally ratified. The search for compromise and consensus, as well as the need of enacting brief, approachable and intelligible rules, produced a (non-retroactive) text filled up with amphibological language and vague provisions - a text which leaves room for unsettled interpretations and may boost legal uncertainty. Moreover, the Convention lacks clear norms facilitating its transposition into national law, and does not provide for the establishment of control mechanisms for its application.

However, what many speakers vigorously highlighted is that the 1970 UNESCO Convention, notwithstanding its imperfections and ambiguities, has had a remarkable success. Not only has it been ratified by an exceptionally high number of States (currently they are 123), including many market states. It has also shaped laws and decisions of both States parties and non-States parties.

Paterson, for instance, explained how Canadian courts usually resort to the 1970 UNESCO Convention to resolve interpretive issues regarding international and domestic rules about cultural property. Nafziger reminded us that the cooperation of the U.S. with its neighbours (especially Mexico) in the framework set up by the UNESCO Convention was instrumental in prompting the U.S. Congress to enact the famous Native American Grave Protection and Repatriation Act (NAGPRA) in 2008 – “an all-too-rare example of international law inspiring significant domestic or municipal law within the U.S.” (Nafziger).

Moreover, and undeniably, the Convention has raised the public consciousness and inspired the establishment of bilateral and regional regimes of cooperation, as well as the preparation of well-respected ethical codes and guidelines.

goods”, that establishes a common export policy for cultural goods exported outside EU borders and which are subject to an export license; and Directive 1993/7/EEC, modified by Directive 2001/38/EEC (and currently under revision), “on the return of cultural objects unlawfully removed from the territory of a Member State”, setting up a complementary regime to that of Regulation 116/2009.

VI. CONCLUSIONS

In my view, however, the greatest achievement of the UNESCO Convention —an achievement which, according to many (Gambaro, Planche, and especially Nafziger), is likely to be replicated by the ‘Model Provisions on State Ownership of Undiscovered Cultural Objects’¹⁶— is that the Convention successfully penetrated the legal layers where official law usually does not have a say.

While it is true that (as Prott stressed) there still is a great deal of professional resistance (i.e., of resistance from museums, art dealers and collectors) against the changes brought by the Convention, it is equally true that the Convention gave rise to a new rhetoric, a new narrative; it provided a model and a vocabulary for public education concerning the importance of protecting heritage, and instilled a diffuse sense of responsibility in both the public and the private sectors. The world now takes the problem of illegal trafficking far more seriously than it did before the Convention. In the words of James Nafziger, “it is no exaggeration to identify the Convention with the emergence of a new international legal order of cultural heritage”.

In this perspective, it is not important that not all States have ratified it. The Convention’s most helpful contribution to the protection of cultural property lies in its capacity to clarify and enlighten national law and policy; to establish interconnections and linkages between the various layers; to offer frameworks and horizons for negotiation, compromise, and dialogue; to educate and promote a legal culture of protection of cultural property across art collectors and art dealers, museums, and auction houses, governments, administrative officials, bureaucrats and policemen, the press and the general public (Bokova, Nafziger, Prott, Kaye).

To sum up and strike a balance: if protecting cultural property is our problem, spreading the legal culture of ‘cultural property’ is part of the solution. Without the UNESCO convention, even this part of the solution would be a much harder job to do.

¹⁶ The Expert Committee on State Ownership of Cultural Heritage approved in 2011 a set of model provisions to assist domestic legislative bodies in the establishment of a legislative framework for heritage protection, for the recognition of the State’s ownership of undiscovered cultural objects, and for facilitating restitution in case of unlawful removal. The Committee was convened in 2011 by the UNESCO and UNIDROIT Secretariats, and was composed by the following experts: Jorge Sánchez Cordero (Mexico) and Marc-André Renold (Switzerland) - co-chairs; Thomas Adlercreutz (Sweden), James Ding (China), Manlio Frigo (Italy), Vincent Nègri (France), Patrick O’Keefe (Australia), Norman Palmer (United Kingdom) and Folarin Shyllon (Nigeria). The UNIDROIT and UNESCO Secretariats were represented by Marina Schneider and Edouard Planche respectively.