The Problematics around Protecting Cultural Heritage: Virtues and Shortcomings

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Abstract

This article aims to study the issue of protecting cultural heritage. Thus, taking as a starting point the growing relevance of the cultural property as a witness to the past, the imperative of its respective legal protection is unavoidable. Thus, in addition to preservation and restoration, it is interesting to assess other legal instruments conductive to fulfilling such desideratum. Above all, cultural preference and other restrictions, as crucial mechanisms of the new protective dogmatics of cultural goods.

Keywords: Cultural Heritage, Tangible Goods, Restrictions, Cultural Preference.

1. General Considerations

The problems around cultural assets feature increasingly on the agenda. Given the importance of preserving memory, there is a corresponding need to protect tangible assets, the true witnesses of the past. Thus, the protection mechanisms that have emerged brought about a Law of Cultural Goods designed to safeguard the preservation, conservation, restoration, protection, theft and plundering of cultural assets.

When we consider the various mechanisms, consolidated in prominent legal regimes, we encounter not only cultural nationalism and internationalism, the importance and adaptability of cultural preference, but also export restrictions ranking among the key means of protecting cultural assets.

2. The cultural heritage as a core reference

Therefore, having set out the study's underlying assumptions, let us advance somewhat deeper into each topic listed above. As regards sharing, we should recall that laws represent human practices that therefore do not address man in isolation. In other words, this constitutes a social phenomenon.[1] Our interrelationships are extremely relevant to the Law; all the more so as the entirety of the social is normative as is its direct and immediate constituents.[2] Therefore, we may quite naturally understand that events related to Cultural Rights presuppose something worthy of sharing and for sharing with someone. Should we so wish, we share these with others. In this sharing, the interrelationship inherent to Cultural Rights, and even to Culture as a whole, emerges. In fact, should Law be understood as a relationship between subjects, not only within the framework of Obligations but also in other fields of Civil Law or even in the domain of Public Law itself, and in accordance with the perspective that there is no law without a subject, it is no less true that this same Law needs memory.[3] Furthermore, it is not only the trial that requires a reconstruction of facts, the fight for Memory is intrinsic to Law, given that, according to some authors, following the anarchy of norms, the new law plays out against a kaleidoscope of past images.[4]

We should add that, in terms of the facets of cultural property law we intend to address here - protection and preservation - the classic distinction between movable and immovable property does not hold merely circumstantial or typological interest. On the contrary, it is of extreme relevance given this distinction conditions the legal regime for the protection of cultural assets in clearly differentiated fashions.

[1] On this aspect, Oliveira Ascensão recalls the motto *ubi ius ibi societas*. Cf. *O Direito: Introdução e Teoria Geral*, 13th ed., Coimbra, 2005, p. 23.
[2] In this sense, João Baptista Machado emphasises human conduct as meaningful conduct and the normative as a constituent of the social. Cf. *Introdução ao Direito e ao Discurso Legitimador*, Coimbra, 2007, pp. 22 et seq.
[3] On this aspect, Paulo Ferreira da Cunha, *Iniciação à Metodologia Jurídica: Memória, Método e Direito*, 2nd ed., Coimbra, 2009, pp. 27 et seq..
[4] Cf. Paulo Ferreira da Cunha, *Iniciação*…op. cit., p. 42.

In fact, under the Portuguese legislative framework, there are not only the formally autonomous legal regimes, Decree-Law no. 309/2009 of 23 October and Decree-Law no. 148/2015 of 4 August. This stems from clear and specific protection characteristics for the classification of immovable property as opposed to movable property. It suffices to state that only under the immovable property regime are there protection zones, such as special protection zones.[5] The same applies to safeguard plans, not to mention the problems relating to assemblies or sites.[6] Moreover, only movable property, and not immovable property, can be subject to export, dispatch or import measures.[7]

3. Public Protection Mechanisms: Cultural Preference

In other words, acquisition does not derive from any simple potestative right, something attributed to an individual in accordance with the anodyne applicability of a certain legal regime but is rather based on the assessment of a correlative public interest which justifies acquisition by the state or another administrative entity. This demonstrates the autonomy of this mode, prefiguring it as a third acquisitive category in conjunction with the other two set out above. Moreover, there is not only a consideration of private interests in this category, as in the previous modes, but also an assessment of the public interest or a public action that justifies the exercising of this preference.

In short, it is this third mode that contains the right of preference over cultural assets, also known as artistic or cultural preference. This power to acquire cultural assets is based on legal precepts which, instead of prescribing a mere potestative right to a private individual, attribute an acquisitive right to the state or other administrative entity provided that the pursuit of the public interest is asserted or at least the grounds of the state's *jus imperii*. It is precisely the public interest[8] or the action of the state[9] that underpins the autonomy of this third form of preference. This right, based on reasons of a public nature, is not even comparable with another acquisition mode based on public interest, specifically expropriation. It suffices to note that any pre-emptive right is not constantly in effect but rather only arises when the hypothesis of transferring the cultural asset to the legal sphere of a third party arises.

4. Preference not limited to the classification of cultural assets

The general provision under the Framework Law grants the state, autonomous regions and municipalities the right of preference in case of sales or payment in kind for objects either already classified or under the process of classification. Decree-Law no. 16/93 also grants the state and municipalities a right of preference in sales of already classified archival assets or assets undergoing such classification.

[5] Cf. articles 43 et seq of Decree-Law no. 309/2009.
[6] Cf. articles 53 et seq of Decree-Law no. 309/2009.
[7] Cf. articles 49 et seq of Decree-Law no. 148/2015.
[8] In this respect, Michele Cantucci includes the right of preference in the category of the coercive transfer that reaches beyond the contractual scope through taking into account strict obedience to the public interest. Cf. "La Prelazione dello Stato nelle Alienazioni Onerose delle Cose di Interesse Artistico e Storico" in *Rivista Trimestrale di Diritto Pubblico*, 1952, pp. 581 et seq. Giorgio Piva is also of a similar opinion, cf. "Cose d' Arte" in *Enciclopedia di Diritto*, Vol. XI, Milan, 1962, p. 107. In turn, Maria Cozzuto Quadri refuses, with regard to the right of preference over cultural goods, to consider them as a mere legal preference under common law. In her opinion, the state, when exercising this right of preference, does not operate as a private contracting party with her instead perceiving this as a public law business of an ablative nature based on public interest. Cf. "La Prelazione Artistitica" in *La Nuova Giurisprudenza Civile Commentata*, Padua, 1985, pp. 450-1; In a similar vein, emphasising the autonomy of the preference over cultural assets, on the grounds of public interest, cf, Armando Calogero "La Prelazione Artistica sui Beni Culturali di Proprietà Privata" in www.innovazionediritto.unina.it, 2009, p. 8. Mauro Loosli also maintains that this right of preference represents a state sovereign power in order to act in and achieve the public interest. Cf. *Kulturgüterschutz in Italien: Rechtliche und Instrumente. Handel und Verkehr*, 1996, p. 100. In Portugal, João Canelhas Duro, while recognising the existence of public interest, which he refers to as cultural interest, does not draw the proper consequences in refusing to make the preference over cultural assets independent and in contrast with other legal preferences. Cf. "O Direito Legal de Preferência Sobre Bens Culturais" in *Revista do Ministério Público*, no. 123, 2010, pp. 117 et seq.
[9] Mathias Plutschow, in turn, emphasises the contrast between a preference based on a legal transaction or a legal determination of a privatistic nature in contrast to a public preference in favour of the state, which nevertheless pursues the public interest. Cf. *Staatliche Vorkaufsrechte im Internationalen Kulturgüterschutz*, Zurich, 2002, pp. 171 et seq. In a similar direction, Doris Binz-Gehring, *Das gesetzliche Vorkaufsrecht im schweizewrischen Recht*, Bern, 1975, pp. 140 et seq.

Furthermore, the classification regime for immovable property, Decree-Law no. 309/2009, as well as the movable property regime, Decree-Law no. 148/2015, frames such a preference option as a restrictive measure in the classification procedure.

However, the right of preference over cultural assets is not exhausted by the universe of either already classified assets or those undergoing classification processes. On the one hand, the Framework Law for Museums grants the state and the autonomous regions a right of preference over any cultural object incorporated into a museum irrespective of whether this object has already been classified or is undergoing processes either for classification or for inventorying. A similar situation prevails in relation to bibliographic assets, as under the terms of Decree-Law 90/2007, the right of preference is not restricted to assets that are already classified or in the process of being classified. This is also the orientation prescribed for archives. The legislation establishing the mission and attributions of DGLAB – the Directorate-General of Books, Archives and Libraries, Decree-Law no. 103/2012, grants DGLAB with the right to exercise preference on behalf of the state in the case of the disposal of archival specimens deemed valuable or of historical-cultural interest due to their archival and photographic heritage regardless of their classification or inventorying status.

However, this framework extends further and we should in no way overlook the aforementioned Decree no. 20895 of 7 March 1932 and its corresponding amendments. Because such inventories corresponded to an alienability dependent on government authorisation, as well as to the exercising of rights of preference, the prices should therefore be determined by an arbitrated decision.[10] In addition, Decree-Law no. 38906 of 1952, attributed the Ministry of National Education with the power to transfer inventoried goods to the custody of state libraries, archives and museums while their respective owners might then request the state acquire those assets.

While the general rule restricts the right of preference to already classified cultural assets or those undergoing classification, this does not reach as far as Decree-Law 140/2009 on studies, projects, reports, works or interventions on cultural assets, which seeks to limit the scope of cultural assets to movable and immovable assets, either already classified or in the process of being classified in the national, public or municipal interest.[11] While the Framework Law recognises the existence of other cultural assets beyond the boundaries of the classification processes, this does not engage in the exaggeration of the constitutive theory which Decree-Law 140/2009 plunges into and on which the doctrine[12] is partially based leading onto other argumentative orientations.[13]

However, there remains a universe of cultural assets beyond the sets of already classified assets or those undertaking classification processes.

[10] See Article 6 of Decree 20985

[11] Under the terms of paragraph b) of article 3 of Decree-Law no. 140/2009 of 16 June, cultural assets are movable and immovable assets, classified, or about to be classified, as in the national interest, public interest or municipal interest under the terms of Law no. 107/2001 of 8 September, as well as the respective integrated movable heritage.

[12] According to this orientation, the law determines, through the act of classification, what the cultural assets are. Thus, although artistic or other characteristics may previously exist, the classification operates legal effects which imply a correlative transformation of the legal nature of those assets, accordingly granting them the status of cultural goods which they did not have before. In this sense, Massimo Giannini, "I Beni Culturali" in *Rivista Trimestrale di Diritto Pubblico*, nº 26, 1976, pp. 21 et seq.; Aldo Sandulli, "Natura e Funzione della Notifica e della Pubblicità delle Cose Private d' Interesse Artistico e Storico Qualificato" in *Rivista Trimetrale di Diritto e Procedura Civile*, 1954, pp. 1023 et seq.; Sérvulo Correia, "Procedimento de Classificação de Bens Culturais" in *Direito do Património Cultural*, coord. por Jorge Miranda, João Martins Claro e Marta Tavares de Almeida, Lisboa, 1996, pp. 336 e segs; Miguel Nogueira de Brito, "Sobre a Legislação do Património Cultural" in *Revista Jurídica da AAFDL*, no. 11 and 12, 1989, p. 165; Miguel Nogueira de Brito "O Novo Regime do Procedimento de Classificação de Bens Culturais Imóveis" in *Em Homenagem ao Professor Doutor Diogo Freitas do Amaral*, Coimbra, 2010, p. 1098

[13] José de Melo Alexandrino prefers to proffer a nuanced answer to the question on whether the nature of the act of classification is declaratory or constitutive. Furthermore, he seeks to distinguish cultural assets in the strict sense, in the broad sense and in the inappropriate sense, correspondingly stressing the non-coincidence between cultural heritage and cultural asset. Cf. "O Conceito de Bem Cultural" in *Direito da Cultura e do Património Cultural*, coord. by Carla Amado Gomes and JL Bonifácio Ramos, Lisbon, 2011, pp. 234 et seq.

Therefore, we would reject the perspective that it is a government responsibility to attribute the status of cultural asset to objects that have not yet received this,[14] thereby confirming the validity of the declaratory theory.[15] We furthermore refuse to differentiate between *cultural heritage* and *cultural asset* and would maintain these terms can and should be used interchangeably[16].

Still furthermore, taking into consideration the regime for books, archives and museums, this confirms the position that preference is not restricted to already classified assets or those undergoing classification. In addition to this, there is the previous regime of inventoried and non-inventoried assets. In other words, in as much as the rule regime intends to limit preference to already classified assets or those undertaking classification processes, the special regimes advocate greater diversity, imposing preference on assets undergoing classification processes and even to those non-classified assets.

In short, the preference of the state and other public entities may apply to valuable bibliographic or archival items or items of historical and cultural interest within the scope of archival and photographic heritage. They may also apply to assets incorporated in museums. Additionally, this includes the plurality of items inventoried or non-inventoried under previous regimes. Thus, the preference extends across a very wide range of cultural assets. In fact, when referring to bibliographic assets, the acquisition prerogative is not even limited to books given the bibliographic range extends to manuscripts, documents and other media placed in the care of libraries. Furthermore, the diversity of assets incorporated into museums reaches beyond paintings or other works by famous artists with a similar application prevailing in the archives. Therefore, we arrive at an idea, albeit perfunctory, of the multitude of tangible objects over which the cultural preference of the state or any other administrative entity may extend which, as already noted, reaches far beyond the limits of already classified assets or those in the process of being classified.

5. The Effectiveness of Cultural Preference

After studying the applicable scope of the rights of preference, as well as their respective consequences, we should now ascertain their effectiveness not only in terms of the viability of the effective acquisition of assets but also, and equally, the objectives such actions aim to pursue in order to achieve another desired outcome - the protection of cultural assets. As regards the former aspect, assessing the acquisitive efficacy of the cultural preference, we would state that, after analysing the legislation in effect, we consider there are two differentiating levels. One results from the contents of the Framework Law with the other deriving from some sparse legislation. As a matter of fact, in our opinion, the Framework Law consecrates a less favourable regime for cultural preference than that established under some other legislation. We shall now attempt to demonstrate the reason for this.

Firstly, the exercise of preference, according to the Framework Law, only covers assets either already classified or undergoing a classification process. On the other hand, the Museums Act or the Decree-Law stipulating the organic structure of the National Library covers assets outside any classification procedure. As such, should we reject the constitutive theory on the grounds that the universe of cultural assets extends far beyond the scope of assets already classified or those undergoing classification, we may still recognise there are reasons for limiting preference to assets either already classified or undergoing classification.

[14] In a constitutive sense, attributing that power to the administration, cf. Sérvulo Correia "Procedimento…" in op. cit., p. 339.

[15] The declaratory theory does not limit the universe of cultural assets to those already classified or in the process of being classified. In this respect, cf. Tommaso Alibrandi, Pergiorgio Ferri, *I Beni Cultural e Ambientali*, 3rd ed., Milan, 1995, pp. 219 et seq; Giancarlo Rolla, "Beni Culturali e Funzione Sociale" in *Scritti in Onore di Massimo Severo Giannini*, Milan, 1998, pp. 563 et seq; Vieira de Andrade, "Rapport Portugais" in *La Protection des Biens Cuturels (Journées Polonaises)*, Vol. XL, 1989, pp. 473 et seq; JL Bonifácio Ramos, "Bens Culturais: Posse Não Vale Título" in *O Direito*, no. 142, V, 2010, pp. 908 et seq.

[16] On this matter, Casalta Nabais identifies both the terms cultural asset and cultural heritage before expressing a preference for the latter. Cf. *Introdução ao Direito do Património Cultural*, Coimbra, 2004, pp. 10-1. From our perspective, in recognition of this identification, we have chosen the expression cultural asset in keeping with its undeniable advantages. Cf. *O Achamento de Bens Culturais Subaquáticos*, Lisbon, 2008, pp. 353-4.

In fact, such is the case in Italian legislation as preference is therein attributed to assets declared to be of cultural interest[17] and not to all cultural assets. Unlike the French[18] case, however, Portuguese law prefers this latter approach.

Secondly, the Framework Law only allows for exercising the right of preference in cases of transfer of ownership or transfer in lieu of payment. The Museums Act, on the other hand, extends the scope of preference to enable its exercising through the issuing of a minor right in rem. Nevertheless, this does not even cover transmission *mortis causa*, free transfer, exchange, etcetera. Although some doctrine advocates for a broad interpretation so as to include all onerous transfers[19] or even, from a still more radical perspective, some species of free transfer.[20]

Thirdly, we would emphasise both the time limits and the regime of invalidity. While the Framework Law refers to the regime of the Portuguese Civil Code, establishing a short and highly limitative deadline of eight days, some specific legislative acts prescribe longer deadlines. However, this distinction incorporates an irreconcilable contradiction as follows: we may have a classified cultural asset for which the state is subject to a strict eight-day deadline for claiming preference while for an unclassified cultural asset, there may be a longer timeframe. In other words, the state has a longer timeframe at its disposal for deciding over an unclassified asset than when seeking to exercise the right of preference over an already classified asset. The Framework Law also enshrines a more benevolent regime for those whose actions do not correspond to the duties deriving from the applicability of the regime of preference. In fact, there can only be the annulment of the act of transfer when the defect is challenged by the competent member of the central, regional or municipal administration within a period of one year. While the regime provided by the Museums Law appears more beneficial to the state as any failure to comply with these duties to communicate results in the nullity of the legal transaction. Thus, in addition to the short deadline for exercising the right of preference, the Framework Law also does not include the most appropriate option for counteraction as nullity better defends state interests than the annulment.[21]

Nevertheless, there is also one facet in which the Framework Law regime does not seem less favourable for cultural preference. We refer here to the grounds and justifications for exercising cultural preference. In fact, while the law states that the exercising of preference by the state or other public entity does not require a justification to demonstrate the public interest, which is not the case in the Museums Act. In fact, at least as regards judicial sales and auctions, the right of preference may only be exercised when in accordance with the museum's prevailing incorporation policy. Something similar should also occur, as we demonstrated above, when central or municipal government entities exercise the right of preference in other acquisition situations that differ from auction and judicial sale. As the Framework Law does not foresee anything similar, we may thus understand that the state does not have to justify the public interest deriving from any exercising of the cultural preference right.[22]

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[17] Cf. articles 10 and 13 of the See articles 10 and 13 of the Italian Code of Cultural Assets

[18] This is the advantage underlined by Jean-François Poli, when emphasising the possibility for the French National Library to exercise preference over unclassified cultural assets. Cf. *La Protection des Biens Culturels Meubles*, Paris, 1996, p. 267.

[19] According to Adriano Pischetola, only a broad interpretation, in the sense of any consideration for the act of disposal, would achieve the *ratio legis* of the institute of cultural preference. Cf. "Circolazione dei Beni Culturali e Attività Notariale" in *Quaderni Notariato*, no. 15, 2006, p. 45.

[20] It would at least be the case of *negotium mixtum cum donatione* that would justify the applicability of the preference. Cf. Tullio Ascarelli, "Contrato Misto, Negozio Indiretto, Negotium Mixtum cum Donatione" in *Studi in Tema di Contratti*, Milan, 1952, p. 90.

[21] Roberto Invernizzi, after evaluating violations of the requirements falling due under cultural preference, considers nullity to be the most appropriate consequence in Italian law taking into account the content of Article 164 of the Code of Cultural Assets. Cf. "Violazioni in Atti Giuridici" *Codice dei Beni Culturali e del* Paesaggio, Milan, 2012, p. 1221. In contrast, Giuseppe Celeste hypothesises that the state does not then exercise its preference and therefore questions the corresponding nullity on the grounds there was no notification of the plan to sell the asset. Cf. "Beni Culturali: Prelazione e Riscatto" in *Rivista del Notariato*, 2000, pp. 1105 et seq. It should also be recalled that Giovanni Passagnoli had raised the hypothesis of relative nullity in view of the special relationship between the state and private parties. Cf. *Nullitá Speciali*, Milan, 1995, p. 176. However, that same hypothesis has been rejected by several others, such as Tommaso Alibrandi and Piergiorgio Ferri, who insist on the verification of the nullity of the transfer in case of a lack of or incomplete communication. Cf. *I Beni* …op. cit., pp. 418 et seq.

[22] Cf. Antonio Mansi, *La Tutela dei Beni Culturali e del Paesaggio*, 3rd ed., Padua, 2004, p. 245

6. Preference as a Protective Instrument for Cultural Goods

In addition to the levels of effectiveness of the cultural preference rights resulting from the legislation applicable, it is important to ascertain whether preference emerges as an instrument appropriate to bringing about the protection of cultural heritage. This especially applies as the distinctive feature of public interest, or at least of public action, does not allow the state or other administrative entities to act, when seeking to acquire cultural assets, with identical motivations to those of private subjects. The legal framework implies that exercising this acquisitive prerogative seeks to enrich the collections of a museum, for example, but which also ultimately aims at more adequate protection of the cultural asset.

In other words, should the immediate objective be gauging the effectiveness of the preference right, we now need to focus on another level; a level mediated by the protection of cultural assets obtained. However, protection must not be limited to preserving their substance[23] in order to prevent destruction or damage while striving as far as possible to ensure their availability, in their entirety, to future generations.[24] Protection is not even limited to restoration policies or the production of replicas with a view to encouraging or developing cultural tourism. There is another level of protection that involves taking care not of the substance but rather of the cultural link.[25] Indeed, this asset preservation must take into account the relationship between the object, the community or the people of a given historical period. Protection should also take into account the relationship between the asset and its surroundings, its territory. Protection means keeping the asset in a given place, taking into consideration the meaning that place represents for the cultural object considered in its own right. As such, removal from a determined place may compromise the meaning of the cultural asset whenever this involves interpretation within the relationship it bears to the territory, the tribe, the people or the nation of its respective location.

Just as the right to plunder or simple looting find ancient origins, it is no less true that censorship of such actions, reaching back to Classical Antiquity, has contributed to suppressing and repudiating such attitudes.[26] While conquerors appropriated goods in the name of established customs and even rules, this took place against a backdrop of prescriptions to defend and protect the integrity of monuments and other historical objects[27] as well as seeking to prohibit illicit trafficking in cultural assets.[28] Furthermore, in the 19th century, there emerged renewed interest in interpreting and protecting historical heritage,[29] and it is thus hardly surprising that we find specific legislation to protect cultural heritage in various legal systems by the beginning of the 20th century.[30]

Furthermore, this legal protection did not only seek to prevent property damage in the event of armed conflict,[31] such legislation also strove to ensure peacetime preservation.

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[23] On the conservation of the substance of a cultural asset as a primary objective of the protection of cultural assets, cf. Frank Fechner, "Prinzipien des Kulturgüterschutzes" in *Prinzipien des Kulturgüterschutzes: Ansätze im deutschen, europaïschen und internationalen Recht*, coord. by Frank Fechner, Thomas Oppermann and Lyndel Prott, Berlin, 1996, pp. 26-7.

[24] On this issue, John Merryman underlines the importance of cultural objects as historical memory of past eras, even taking on the role of survivors of such times. Cf. "The Public Interest in Cultural Property" in *California Law Review*, Vol. 72, 1989, pp. 347-8.

[25] On the protection of the cultural links of assets, cf. Kai Grenz, *Rechtliche Probleme des internationalen Kulturgüterschtzes*, Frankfurt am Main, 2013, pp. 73 et seq.

[26] In this sequence, Ridha Fraoua demonstrates how Polybius, in antiquity, and many others thereafter spoke out against the appropriation of objects representative of other peoples' culture. Cf. *Le Trafic Illicite des Biens Culturels et Leur Restitution*, Friburgo, 1985, pp. 34 et seq.

[27] Michele Cantucci considers that the 1425 Bull issued by Pope Martin V, entitled "*Etside Cunctarum*" and repudiating the destruction of historic buildings of a religious or secular nature, marks the beginning of legislation to protect cultural assets. Cf. *La Tutela Giuridica delle Cose di Interesse Artistico e Storico*, Padua, 1953, p. 9.

[28] Manlio Frigo, in this respect, identifies protective standards in the 17th century legislation of the Netherlands. Cf. *La Protezione dei Beni Culturali nel Diritto Internazionale*, Milan, 1986, p. 6.

[29] This was largely due to the triumph of Romantic ideas that attributed great importance to the past and thus adopted a new perception on historical heritage. Hence the need to emphasise the need to recover and protect the assets that formed part of the heritage of a given country. Cf. Ignacio González-Varas, *Conservación de Bienes Culturales*, Madrid, 1999, pp. 34 et seq.

[30] Cf. Ridha Fraoua, *Le* Traffic…op. cit., p. 44.

[31] Cf. Hans Wehberg, "Der Schutz der Kunstwerke im Kriege", im *Museumskunde*, Vol. XI, 1915, pp. 49 et seq; Paul Clemen, *Kunstschutz im Kriege*, Vol. I, Leipzig, 1919, pp. 19 et seq.

As regards this final aspect, the intention was moreover to regulate a restrictive approach to issues around the transfer of cultural assets, both internally and beyond the respective national borders. In fact, from early on we may encounter rules attributing states with preference over privately owned cultural assets.[32] In the wake of two world wars and the systematic looting of cultural assets, it is also hardly surprising that there was a perceived need for mechanisms to prevent further destruction[33] of cultural assets and bring about their restoration.[34] However, this does not mean that the national level of protection has lost any of its importance either in terms of states importing or states exporting cultural assets, even justifying the greater refinement of that distinction,[35] as it was noted in 1979 that an overwhelming majority of states had already passed legislation restricting the export of cultural assets.[36]

Thus, in addition to confiscation or nationalisation,[37] there emerges the right of preference. This preference has been understood as a protective mechanism for cultural assets both by legal doctrine[38] and by the legislators themselves. In fact, in this latter scope, the Framework Law makes this clear by inserting the right of preference in Section V under the following title: The General Regime for the Protection of Cultural Property.[39] In other words, the Italian legislators distinguish between protection and conservation measures, within which they consider the environmental impact and issues around movement, in which they specifically highlight the right of preference.[40]

Nonetheless, the value of preference, as an instrument for the protection of cultural assets, does not even gain consensus. Indeed, unlike French, Italian, Swiss, Spanish and Portuguese legislation, German law does not generally provide for preference as a measure to protect cultural assets. Moreover, just as the national framework does not stipulate provisions on preference,[41] the recent governmental proposal, which aims not only to transpose the latest version of the European directive on the restoration of cultural assets but also to unify the legal diplomas in effect,[42] does not envisage adopting such a protective mechanism. Even at the level of federal state legislation, we find preference in only two *Länder*.[43]

[32] Cf. Armando Giuffrida, *Contributo*…op. cit., p. 17.

[33] The Hague Convention of 14 May 1954 enshrines the duty to prepare in peacetime for the safeguarding of cultural property, situated on their own territory, against the foreseeable effects of armed conflict by taking such measures as they deem appropriate. Cf. Article 3 of the Convention

[34] Cf. the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in Paris, on 14 November 1970 and the UNIDROIT Convention on Stolen or Illicitly Exported Cultural Property, adopted in Rome on 24 June 1995

[35] Indeed, the notion of states from which the cultural assets originate, the exporting states, and those to which the objects are transported or sold, the importing states, has lost some of its meaning, particularly as regards the idea exporting states had no legislation to protect their cultural heritage. Cf. Quentin Byrne-Sutton, *Le Trafic International des Biens Culturels Sous l' Angle de leur Revendication par l' État d' Origine*, Zurique, 1988, pp. 38 et seq.

[36] Cf. *La Protection du Patrimoine Culturel Mobilier (Recueil de Textes Législatifs)* Vol. I, UNESCO, Paris, 1979, p. 149

[37] On nationalisation, confiscation and expropriation as instruments restricting trade in cultural assets, cf. Kurt Siehr, "International Art Trade and the Law" in *Recueil des Cours*, Vol VI, 1993, pp. 132 et seq.

[38] Cf. Mathias Plutschow, *Staatliche*…op. cit., pp 49 et seq; Mathias Albrecht, "Der Vorkauf im Denkmalschutzrecht" in *Landes-und Kommunalverwaltung*, 2005, pp. 151 et seq; Jean- François Poli, *La Protection*… op. cit., pp. 255 et seq; José Luis Àlvarez, "El Tanteo y el Retracto en la Nueva Ley del Patrimonio Histórico Español" in *Estudios Jurídicos sobre el Patrimonio Cultural de España*, Madrid, 2004, pp. 167 et seq; Maria del Rosario Ibañez, *El Patrimonio Historico, Destino Publico y Valor Cultural*, Madrid, 1992, pp. 313 et seq.

[39] Cf. articles 30 et seq of the Framework Law.

[40] Cf. articles 20 et seq of the Code of Cultural Property.

[41] Cf. Law for the Protection of Cultural Property of 6 August 1955 *Kulturgüterschutzgesetz (*KultgSchG); Law of guarantee transposing the Community Directive, *Kulturgutsicherungsgesetz* (KultgutSiG) of 15 October 1998; New version of the Law for the Protection of German Cultural Property, *Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung* of 8 July 1999; Law on the Restoration of Cultural Property, *Kulturgüterrückgabegesetz* (KultGüRückG) of 7 January 2007.

[42] Cf. *Entwurf eines Gesetzes zur Neuregelung des Kulturgutschutzrechts* of 14 September 2015.

[43] We find preference rules in only two *Länder* (Federal States), Bavaria and Schasen-Anhalt. Cf. article 19 of the Bavarian State Cultural Property Protection Act, *Gesetz zum Schutz und zur Pflege der Denkmäler*, (DSchG), of 27 July 2009, amended on 27 November 2014; § 11 of the Law for the Protection of Cultural Property of the State of Sachsen-Anhalt, *Denkmalschutzgesetz* (SachsAnhDenkmSchG) of 21 October 1991, amended on 20 December 2005.

Furthermore, the regime of Sachsen-Anhalt takes an interesting approach: exercising preference conditionally on the objective existence of a public interest in protecting the cultural object.[44] According to some doctrinal thinking, such a particularity means a qualified public interest must take into account the welfare of the public at large.[45] Notwithstanding this, in the lively debate that has recently arisen around the aforementioned government initiative regarding the reformulation of the federal legal regime, we do not encounter any doctrine defending the contribution of cultural preference. On the contrary, we would note that the proposal to restrict the export of cultural assets, subject to greater controls and authorisations, has come in for criticism from both legal experts[46] and renowned collectors without preference ever being raised in the debates taking place meanwhile.

However, despite the symptomatic lack of enthusiasm for cultural preference in Germany, this does not enable any decisive extrapolations. Instead, this needs to first place preference within the context of other measures to protect cultural assets. To that extent, we would say that this constitutes a soft measure,[47] compared to other measures of an ablative effect, such as expropriation. In fact, opting for preference avoids any question of expropriation.[48] In practice, the owners of cultural assets fall under no obligation to sell, lend, restore or conserve their assets.[49] Should they decide to sell them, such acts only become subject to the eventuality that the cultural preference holder may step in and acquire them. Moreover, this must also acknowledge that the right of preference mechanism incorporates proportionality[50] and weighs up the balance between protecting cultural assets and protecting the right to private property.

Nevertheless, the several different disadvantages or limitations also require highlighting. Firstly, the scope only covers action in the event of a transfer of ownership to another person. Even then, not every transfer justifies exercising the right of preference. The terms of the Framework Law only provide for purchases and sales or transfers in lieu of payment. In addition to the unjustified and unacceptable exiguity of this term, the setting of the price to be paid by the preferential entity to that established by the market, particularly by auction, may limit or even subvert exercising the preference right. In fact, in addition to possible simulation, the price setting process not only generates a disadvantage to the authority exercising the preference but also amounts to an invitation to speculative prices. It would certainly be more appropriate for the sum to be paid to result from a rigorous evaluation process, possibly involving recourse to arbitration.

We should also duly underline the state's generally dismissive attitude towards enacting the mechanisms for protecting cultural assets. The inexplicable authorisation for the departure of important cultural assets, such as the Champalimaud collection, represents an unfortunate example of the attitude of the Portuguese state.[51] Indeed, even when preference does get exercised, the panorama proves no more encouraging. By way of example, we may refer to the paradigmatic case of the "Burial of the Lord" by Giovanni Tiepolo, when the Framework Law was already in effect. The owner reportedly informed the Ministry of Education, in 2003, of her intention to sell Tiepolo's painting for 1 million euros.

[44] Cf § 11.1 of the Law of Sachsen-Anhalt.

[45] Cf. Mathias Albrecht, "Der Vorkauf …" in op. cit., p. 152.

[46] Cf. Henrike Weiden, "Kulturgutschutzgesetz: deutsche Bilder nicht mehr handelbar?" In *Gewerblicher Rechtsschutz und Urheberrecht*, 2015, pp. 1086 et seq; "Sinnloser Behördenaufwand oder drängende Notwendigkeit? Der Entwurf zur Neuregelung des Kulturgutschutzrechts" in *Zeitschrift für Rechtspolitik*, 2016, pp. 15 et seq; lenski, Döv 2015, 677, pp. 683 et seq.

[47] Cf.. Mathias Plutschow, *Staatliche*…op. cit., p. 184.

[48] On this issue, cf. Astrid Müller-Katzenburg, *Internationale Standards im Kulturgüterverkehr und ihre Bedeutung für das Sach- und Kollisionsrecht*, Berlin, 1995, pp. 239 et seq.

[49] In this sense, cf. Mathias Plutschow, *Staatliche*…op. cit., p. 184.

[50] Cf. Yvo Hangartner "Grundsätzliche Probleme der Eingentumsgarantie und der Entschädigung in der Denkmalpflege" in *Rechtsfragen der Denkmalpflege*, St. Gallen, 1981, p. 62.

[51] On this issue, Elsa Garrett Pinho argues the state should have made every effort to purchase some works from this important collection, in particular one of Canaletto's paintings. Cf. "A Evolução das Coleções Públicas em Contexto Democrático. Políticas de Incorporação e Vetores de Crescimento nos Museus de Arte da Administração Central do Estado" (1974-2010), Vol. I, ed. 2013, pp. 92 et seq.

However, exercising the preference right was ruled out, first and foremost, due to the impossibility of the Portuguese Museums Institute to ensure the acquisition of the work either through its own funds or through recourse to cultural patronage.[52]

Subsequently, there was also consideration of activating the public subscription mechanism before the shipment and export of the painting was forbidden. This led to long and protracted litigation against the state. Several years later, in 2007, the state handed over the sum of 1.5 million euros, plus a twenty per cent commission for the auctioneer[53] without having to bid against any other interested party. In other words, the state ended up acquiring this work under far more onerous conditions to the public treasury. Thus, it is important to reflect on how to broaden the cultural preference mechanism, *de jure constituendo*, and necessarily requires important changes both to certain types of actions and to counter the omissions existing. In practice, just what difference does it make having an applicable preference right when there is neither the political will nor financial means necessary to such acquisitions? This therefore involves not only changes to the legislation, in terms of exercising preference rights, but also changes to mentalities.

7. Conclusions

Should we accept that the preference right assumes a protective function, alongside other mechanisms with identical objectives and purposes and varying levels of effectiveness, it is no less true there is a tendency to look at each mechanism autonomously. This becomes particularly the case given the presupposition that they represent distinct and separate realities. However, such a rigid approach does not prove appropriate especially as regards preference and export authorisation. A preference right grants the state or a different administrative entity the option to acquire ownership of a cultural asset when that ownership is undergoing transfer by purchase and sale or in lieu of payment. The export licence regime allows the state to decide on the exit of cultural objects from the respective country and otherwise facing liability for the penalties resulting from illegally exporting cultural assets. Moreover, there is also a generally recognised need to return illegally exported cultural assets. This not only gains recognition in the legislative frameworks of various countries but also under certain international conventions, European standards and various national provisions. However, regarding preference, this is understood as a protective mechanism representing a sovereign act but limited to the national territory. Hence, as a sovereign act of an administrative nature, this does not gain recognition in the domestic law of other states or even in international law. Correspondingly, jurisprudence recognising the claims of other states, based on those *jus imperii* prescriptions, is only sparse. The dominant trend runs in the opposite direction, whether claiming ownership of cultural assets or requesting the restoration of illicitly exported goods.

In other words, while the right of preference is one method of state acquisition, in addition to expropriation, taking action to bring about the restoration of assets has been regarded as a matter pertaining to the trade in cultural assets. However, we must ask whether there is such a stark difference. Alternatively, is there furthermore justification for any such distinction? In other words, can preference be reconciled with trading in cultural assets? From our perception, we would clearly opt for the latter hypothesis. Preference can and must be made compatible with the trade in cultural assets.

As a matter of fact, this idea does not even class as innovative. It has received support from the doctrinal position that insists on demonstrating a close relationship between preference and export authorisation or, still more broadly, preference as a stage prior to enacting other protective instruments, such as export prohibition or expropriation.

[52] This represents an extract from the Minister for Culture Order dated 26 May 2003 quoted in the Judgment handed down by the Supreme Administrative Court on 9 December 2004.

[53] This large sum paid by the General Secretariat of the Ministry of Culture was partially met by an insurance company payment in compensation for a jewellery theft from the Ajuda Palace collection. Cf. Elsa Garrett Pinho, *A Evolução*…op. cit., pp. 177 et seq.