

Property Law – Part II

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To start with, Professor Marc-André Renold (University of Geneva) spoke about the interplay between property rights in works of art and public control on their circulation. He analysed the effectiveness of the countries' rules to restrain the exportation of what they consider their cultural heritage.

From a national standpoint, the State wants to prevent the dissemination of major works of art but at the same time it must respect the right to property of the owner and consequently indemnify him in case of a restriction to his right. To demonstrate the harm caused to the Country by the indemnification despite the effectiveness of the measure, he mentioned a French case in which the French authorities by forbidding a Van Gogh painting (« Le Jardin à Auvers ») to be sent abroad ended up paying 25 million to the claimant for the difference between the amount he received on the French market and what he could have obtained on the international market had the limitation not been in place. From an international standpoint, he observed that national export's limitations appear unlikely to be effective due to two international rules. The first consisting in the international private law principle *lex rei sitae* meaning that the judge applies the law of the country on which the chattel is situated without taking into consideration the law related to the place of origin of the good. The second barrier lies within the inapplicability of foreign public law. Both scholars and case law tend to favour the application of the law of the country of provenance so as to solve one part of the problem. Nevertheless, Professor Renold remarked on the difficulty of determining the chattel's place of origin. After showing the disadvantages of the current systems and their weaknesses, he concluded that a work of harmonization of the laws would improve the effectiveness of the measures.

Then Dr Stefan Gruber (Sydney University) continued with a presentation on illicit export and trade in cultural property. Apart from being ranked as the third most profitable illegal trade by INTERPOL, the illicit trade in cultural artefacts harms the cultural heritage of the countries of origin. He formulated damages caused by looting and art theft. Listed among other things were the destruction of archaeological and historical sites and the fact that looters destroy 90 per cent of the valuable goods. Asia is considered the main hotspot nowadays in terms of illicit art trafficking and many antiquities leave China through its Special Administrative Zone of Hong Kong and Macau. Therefore measures against illicit trade and export must be implemented both at a national and international level. In the first case, problems can appear because of the cooperation between authorities and thieves. Another issue lies in the lack of protection of the archaeological sites. Moreover, he insisted to solve this it is important to make local populations regard cultural heritage as their common property and educate them on the matter but also to involve them into the process of protection. For instance, China provides a tax exemption to donors of cultural heritage. Then he emphasised that the success of these measures lies within the cooperation between source countries and market countries, although they might not share the same interests. To illustrate the preceding, he spoke about Honk Kong's port of transit where he recently travelled and witnessed the control difficulties arising due the gigantic size of it. In a way, discovering illegal exportations and trade relies on luck. However, he noted the good outcome of measures adopted by UNESCO and

UNIDROIT as well as certain bilateral agreements, either at an international level – between the USA and China or at a regional level (e.g. between Thailand and Cambodia). On top of the public side, people such as auctioneers and art dealers were referred to as playing a big role in the process of protecting cultural heritage for they deal directly with the chattels. Dr Gruber showed the prevention of illicit export and trade of national treasures remains a big issue and must be enhanced as well as guaranteed at multiple levels – private, national, regional and international – and that the keyword is *cooperation*. To the question «What about the restitution of national treasures?» both Stefan Gruber and Marc-André Renold argued that rather than thinking about returning the goods one must focus on preventive actions. In fact repatriation implies complicated diplomatic procedures and no guarantee of restitution. To adduce the preceding the case of chattels belonging to France but illegally exported out of South Korea was taken. South Korea negotiated with France to get its property back. As a result only a renewable five year loan was offered to the claimant and the ownership remained French.

Another facet of cultural property was introduced by Prof. Isabelle Schulte-Tenchkoff (The Graduate Institute of Geneva). Adopting a legal-anthropological approach, she raised the problem of indigenous land claims in common law and international law. A few conflicts emerge due to a differing conception of property between indigenous customs and legal norms. Consequently when indigenous people want to make claims against the majority (the State) they are forced to claim relying on legal concepts they do not use. Referring to Canada and two landmark decisions, she underlined the dispute taking place over the interpretation of the treaties concluded in the past and hence how territories were effectively ceded by the Native. Then she demonstrated the existence of Aboriginal title by saying that the Court distinguished two types of rights: aboriginal title (related to exclusive occupation at the time of contact with Europeans) and site-specific rights (e.g. fishing or hunting) in order to determinate it. Furthermore, she affirmed legal history doesn't impede the coexistence of common law with indigenous law and most importantly Europeans treating Natives on an equal footing. In the end, she referred to international law as a possible way of recognizing indigenous legal system and decentring property even though its approach to proprietary rights is mainly western.

Cultural property is a difficult topic namely because of its public importance and the diversity of sources. What I particularly found interesting was the multicultural approach reflected throughout the conference, but also the need for specific rules. I think it a crucial point to improve *cooperation* and *harmonization* within the international community to protect cultural property and to reduce related infringements.

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This contribution was reviewed by [Steve Barela](#) and [Marc-André Renold](#).