

Chapter 1

Introduction: Collecting Art

1.1 General Comments

Studying and writing about the legal regulation of art collections is a really very interesting and not at all easy or simple work. It absolutely needs an inter- or multidisciplinary approach. Law, of course, but also art history, sociology, and economy are intervening. A perfect field for comparative law research, that is!

The word's origin is the Latin term “collectio”, derivative of the verb “colligere”—the latter comes from the verb “légere” which has its origin in the Greek verb “λέγειν”.

What is art?¹ What is an artwork? Which is the essence of an art collection? When does a compilation of artworks may be called an art collection? Which are the distinctive aspects of such an art collection?

Collecting art works has been one of the central axes on which art history has been based. One could speak about history of collectors—and, according to a point of view, of the patrons with whom collectors were somehow related.

Collecting art is a cryptic world, they say, inherent perhaps in the human instinct of gathering objects. Collecting art sometimes covers complicated and changing realities. It often served to save cultural heritage of peoples and it fed public collections. Collecting art, they say, reflects the sensibility of the society in front of the artistic fact.²

Collecting art has not only positive aspects. Negative rumors also circulate about it. It is accused, sometimes rightly sometimes wrongly, for being a crucial factor of illicit excavations and illicit trade.

Collecting creates new identities, both of the object collected and of the collector, it is argued.³

¹ “This is one of the great, sticky questions of the past hundred years”, McIver Lopes 2014, p. 1.

² Galván Romarate-Zabala 1997, pp. 11–12.

³ Van der Grijp 2006, p. 12.

Collecting is a “thoroughly creative work, not primarily a question of managing and conserving which many people tend to think”, as is declared.⁴ And so it is. Still, besides categorization and organization, management and conservation of collected objects are very important for the duration of the collections, private or public.

1.2 What Is Art? What Is an Art Work?

As it is argued in recent treatises, the question “what is art” is answered by theories of art which state what it is for an object to be a work of art.⁵

Art is not a “natural” kind,⁶ it is something that we, the human beings have created.⁷ Philosophers trying to give a definition of art, proceed to a conceptual analysis. So we try to understand the conceptual sketch of some probably not durable human practice. Human practices, as social inventions, are stable in a given time and place, they change over time, they change from culture to culture and they are often based on our biological characteristics and on our common experience.⁸

Is there a definition that could be applied in all cultures and at all times? “Fine art” is a concept that was essentially born during the Age of Enlightenment. The modern concept of art was born from this idea of the “fine art”, according to an opinion. Consequently, it is a relatively recent invention, localized in a specific social and cultural space, the so called Western one. There, the art is conceptually distinct from the practical everyday aspects of life. On the contrary, in the frame of most if not all traditional native cultures, “art” may be connected to theology, to the various cultural world views⁹ as well as to the crystallization of these views in government institutions, in law, and in material aspects of the everyday life.¹⁰

⁴ Svanberg 2008, p. 175.

⁵ McIver Lopes 2014, p. 11.

⁶ See McIver Lopes 2014, writing about “Theories and Concepts of Art” and commenting on Hillary Putnam’s showing that, “for some kinds, having a concept of the kind is consistent with considerable ignorance about the nature of the kind”, p. 69: “It does not follow from this that art is a natural kind. Probably it is not, if there would be no works of art without agents who respond to them in certain ways. However, the choice is not to find the nature of art either to be implicit in the folk concept of art or in a concept of art that figures in the hypotheses and explanations of the natural sciences. That is a false dichotomy because the natural sciences do not have a monopoly on empirical inquiry.

⁷ Moustaira 2012, p. 28.

⁸ Clowney 2011, p. 311.

⁹ See Moustakas 1989, pp. 1195–1196: “art links group members to their ancestors and heirs, thereby both satisfying a basic need for identity and symbolizing shared values”.

¹⁰ Tsosie 2009, p. 5.

Being more extreme, not inaccurate though, one could argue that artworks have lives and their lives depend on the context and the circumstances in which they are led.¹¹

Given this fact, it does not seem possible to have a general definition of art. Art, it is argued, is always based on cultural and social practices. The art work is the product of various “meetings”: meetings of ideas, of persons, of ways of thinking, of techniques, of stories. And all these meetings could be gathered in one and only creation or they could give meaning to all the works of an artist.¹²

1.3 The Importance of Cultural Property

It is with a splendid description that a Spanish scholar presents this at first sight curious phenomenon: in our times, when one speaks so much about globalization, the “local” has become very important.

As he points out, although they seem as the two opposites of one reality, one could think of them as the essential variables of an equation. Thus, more and more think that parallel to the increasing phenomenon of the globalization the local reality becomes evident, a reality which is expression of a powerful collective identity and of potential strategies of development. In this line of thought, the globalization would not have any sense or it would have poor sense, if it were not seated on local realities that nutrition the global phenomenon.¹³

Cultural property, cultural heritage, in the Western world at first had almost the same meaning as art¹⁴; culture was the “high culture”, the “opera-house” definition of it.¹⁵

The terms acquired a broader content mainly at the time International Conventions on relative issues started being discussed and adopted.

As far as issues about preservation of cultural objects are concerned, it was after the World War I that they began to receive more attention.¹⁶ In 1931, at the International Conference for the Protection and Conservation of Artistic and Historical Monuments, the Athens Charter was agreed,¹⁷ focusing on the safeguard of historic cities. Article 8 of the Charter states: “Items of sculpture, painting or

¹¹ See Carrier 2006, p. 4: “In an Indian temple a sculpture is worshipped. Transported to an American museum, that artifact becomes art. And so a theory is required to explain how an object can survive such dramatic changes. To learn what it is to lead the life of a work of art, we need to understand museums”.

¹² Somé 2007, p. 15.

¹³ Gómez Pellón 2011, p. 67.

¹⁴ “Art as the predominant genre of cultural property”, see Moustakas 1989, p. 1195.

¹⁵ Said 1993, pp. xii–xiv.

¹⁶ Scott 2013, p. 53.

¹⁷ Iamandi 1997, p. 17.

decoration which form an integral part of a monument may only be removed from it if this is the sole means of ensuring their preservation”.

The World War II and the destructions it caused “led” to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its First Protocol. A Second Protocol to this Convention was adopted in 1999.

Probably the two more important International Conventions on cultural property issues, as far as the effects they have, are the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

The discussions about many issues concerning culture,¹⁸ cultural heritage, cultural property, cultural patrimony,¹⁹ are still heated and different arguments are presented by jurists of the various countries, of the various legal systems. While others insist that there are differences between the terms cultural heritage²⁰ and cultural property, reflecting different mentalities,²¹ others state that these terms have no specific meaning and may both include “human artifacts as well as natural objects or places”.²²

Still, there is difference between the terms, but they are often used interchangeably.

Undoubtedly, both the universalist approach and the nationalist approach to the term cultural property implicate groups, values, collective production and collective meaning.²³

1.4 Are Definitions Important?

In many if not most national laws there are no legislative definitions either of the artwork or of the private collections or of the museums. There is no certainty whatever, as far as those concepts are concerned. Especially for the museums, this is brilliantly described by *Karsten Schubert*:

The museum is changing. In the past it was a place of absolute certainties, the fount of definitions, values and education in all matters artistic, a place not of questions but of authoritative answers. Today, the museum is at the center of a heated debate about its nature

¹⁸ Moustaira 2006, pp. 20–21.

¹⁹ In 1959, André Malreaux wrote about cultural patrimony (*patrimoine culture*).

²⁰ See Nafziger and Paterson 2014a, p. 1: “Broadly speaking, the term “cultural heritage” refers to the myriad manifestations of culture that human beings have inherited from their forebears. These manifestations include, for example: art, architecture, rural and urban landscapes, crafts, music, language, literature, film, documentary and digital records, folklore and oral history, culinary traditions, indigenous medicine, ceremonies and rituals, religion, sports and games, dance and other performing arts, and recreational practices such as those involving hunting and fishing”.

²¹ See Nafziger and Paterson 2014b, p. 29: “Generally, the concept of cultural patrimony leads to sovereign ownership or more limited regulatory authority over both public and private material”.

²² Sax 1990, p. 1142.

²³ Mezey 2007, pp. 2010–2011.

and methodology. At the most extreme, the museum's very purpose is questioned – and denied. It is a perpetually inconclusive discussion, yet it profoundly affects the way museums are perceived and run.²⁴

A rather rare exception to the absence of legislative definitions of the museums, is Portuguese law according to which the museum is “an institution of permanent character, with or without legal personality, non-profit, endowed with an organizational structure that allows it to: (a) Ensure a unitary destination to a set of cultural assets and value them through research, incorporation, inventory, documentation, conservation, interpretation, exhibition and publicizing, with scientific, educational and recreational aims; (b) provide regular access to the public and foster the democratization of culture, the promotion of person and the development of Society” (Article 3, para 1, Museums Act).

As it is stated,²⁵ the Portuguese legal museum's concept seems to have been inspired by the Code of Ethics for Museums, of the International Council of Museums (ICOM),²⁶ according to which, the museum is a “non-profit” making permanent institution in the service of society and of its development, open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, the tangible and intangible evidence of people and their environment”.

In France too, the Museums' Law (*loi relative aux musées de France*) of 4.1.2001, contains a juridical definition of museum.

“The museums are worlds”, says poetically J.M.G. Le Clézio, mentioning at the same time that they are the result of conquests, of plunders, of legs, of exchanges.²⁷

In Italian law there is no legislative definition of the artwork. On the contrary, there is a legislative definition of cultural object (*bene culturale*) in the Article 10, c. 1 of the *Codice dei Beni Culturali*—a definition absolutely bureaucratic, as it is stated: “Cultural goods are the movable and immovable objects that belong to the State, to the regions, to other territorial public entities, as well as to every other public entity and institute and to private non-profit legal persons, which present an artistic, historical, archaeological or ethno-anthropological interest”.²⁸

²⁴ Schubert 2009, p. 15.

²⁵ Laureano 2014, p. 10.

²⁶ ICOM was created in 1946. It is a non-governmental organization and the only organization in the world, of museums and museum professionals committed to the promotion and protection of tangible and intangible cultural heritage.

²⁷ “Les musées sont des mondes, n'en doutons pas. Nés du hasard ou, si le mot effraie, forgés comme nous-mêmes dans la fantaisie. Objets flottants, réunis par la vague et poussés par le flux sur le rivage, au gré des conquêtes, des pillages, des legs et des échanges. ... Les mondes dont ils proviennent, où sont-ils? Oubliés, effacés, revenus à la poussière, avec les mains, les yeux, les visages qui les ont créés.”, Le Clézio 2011, p. 15.

²⁸ “Sono beni culturali le cose immobili e mobili appartenenti allo Stato, alle regioni, agli altri enti pubblici territoriali, nonché da ogni altro ente ed istituto pubblico e a persone giuridiche private senza fine di lucro, che presentano interesse artistico, storico, archeologico o etnoantropologico”.

According to one opinion, the existence of this legislative (bureaucratic) definition obliges the legislator to stabilize a mechanism via which an object is recognized as cultural object (Articles 12, 13 and 14 of the Code) and at the same time to make lists of possible categories of cultural objects (Articles 10 and 11), something that entails the danger to exclude certain objects or to wait some years until the object can “enter into the big family of cultural goods”.²⁹

However, Italian law is one of the few who have a definition of the museum. Thus, the *Codice dei Beni Culturali* defines the museums as a “permanent structure which acquires, conserves, orders and exhibits cultural objects with the aim of education and study” (Article 101, c. 2a).³⁰

It is argued that the fact that in most national laws there are no normative definitions has consequences on the production of the necessary documents that rule the art transactions, national and international, creating perplexity and uncertainty.³¹ On the other hand, there are those who oppose to the above complaint that art transactions are almost everywhere notable for their relative informality.

1.5 Identity of Collectors

Every object has two functions, it is stated: we can use it and we can appropriate it. These two functions are mutually exclusive. When an object stops being defined on the basis of its practical utility, it acquires exclusively subjective value: its fate is to become a collection's object.³²

What does this need of accumulating parts of an aimed whole reveals³³?

According to an opinion, not far from the truth for certain time periods and for certain people, collecting is a way for the rich people to pass their time. According to this opinion, collection means accumulating unnecessary objects and through this, provocatively showing off to the others that some people can dispose freely their time as well as the “material translation” of this time too.³⁴

According to another opinion, someone who has too much money is a bad collector, since this economic wellbeing facilitates exorbitantly the acquisition of art works therefore the pleasure of hunting is lost. The collector, it is stated, has “the olfaction of a hunter, the soul of a policeman, the objectivity of a historian, the prudence of a horse merchant”.³⁵ Often, though, as it is pointed out, the collector is

²⁹ Pinna 2005, p. 48 and n. 9.

³⁰ “struttura permanente che acquisisce, conserva, ordina ed espone beni culturali per finalità di educazione e di studio”.

³¹ Sandretto Re Rebaudengo 2011, pp. 90–91.

³² Baudrillard 1994, p. 8.

³³ Moustaira 2012, p. 54.

³⁴ Attali 1997, p. 19.

³⁵ Rheims 2002, p. 19.

a simple person who wants to find, the same as André Breton, “the gold of time” (*l’or du temps*).³⁶

“Collectors and museum curators act like treasurers”, it is stated and this often is true—too simplistic an opinion for such a complex activity, though. Collecting, both private and public, transcend the individual lives of the human participants: Private collectors withdraw artworks from the circulation at the latest until their death, public collections do that usually forever.³⁷

Furthermore, the fact that during the last decades several private collections turn into [public] museums, in many parts of the world, according to the options that each law may provide, is somehow evidence that the line between private and public property was and is constantly being displaced.³⁸

The same had happened in the past, especially in USA, but also in Europe, at the last quarter of the 19th century and until the World War II, a period when “extreme collectors” were buying both for themselves and for a museum. Their aim was to accumulate as much art as would be needed for museums of their own, structured at their individual will.

These “collections museums” became public after the collectors’ death. Regardless of their differences, they share common elements. As it is perfectly described:

“Is there one name that fits them all? Certainly they should not be called house museums because, though they may appear, superficially, like private houses, they were all intended, from the start, to become public museums of art. Private museums? They are all public. Personal museums? More accurate, because they are personal, even though they are public. Personal art collection museums? Very accurate, but cumbersome. Perhaps collection museum is the best solution, with an occasional reminder that the collection is of art”.³⁹

1.6 Collecting Contemporary Art

Art objects, as a sub-category of cultural objects, may be considered as having a double identity: private, when they belong to a private collector and public, because of their cultural essence which demands that all people—should have access to them.⁴⁰ Being so specific, normally they are regulated by both public and private law—in different quotas, according to the “mentality” of each legal system.

In any case, private collectors who acquire art objects, not only become the owners of them for their own enjoyment but they also possess objects that,

³⁶ Cabanne 2003, p. 8.

³⁷ van der Grijp 2006, p. 8.

³⁸ Higonnet 2010, p. 169.

³⁹ Higonnet 2010, p. xii.

⁴⁰ Galván Romarate-Zabala 1997, p. 101.

according to a certain opinion, could be considered as part of the artistic treasures of their countries.

Furthermore, collectors have rights and duties, such as: care and conservation of the art objects, loan for exhibitions, taxes for possession or alienation of the art objects, etc.

In most countries—if not all—there is no specific legislation on [private] collecting art, even less on collecting contemporary art. But even in those countries, one may try to locate the rules which concern collectors in the regulations of protection and conservation of cultural objects, alienation of them, import and export, etc.

Is “collecting the new” possible or not? Doubts have been expressed mostly in the past and mostly about collecting the new by museums,⁴¹ since an art object is a creation of an artist but at the same time “a complete narrative unto itself”.⁴²

Ernst Gombrich was remarking in 1999: “I think that a museum of modern art is a contradiction in terms”. The traditional view about museums’ objects was that they should have withstood the test of time, so that they could have a particular place in “the future’s past”. Therefore, contemporary artworks, by entering a museum’s collection “are in a sense projected into the future”.⁴³

Famous examples of museums that were created in the past with the aim to collect and exhibit contemporary paintings are: the room of contemporary paintings, at the opening of the Museo Nacional del Prado, in Madrid, the Musée des Artistes Vivants, in Paris in 1818, the Gallery of Living Art, in USA, at New York University in 1927.

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⁴¹ Altshuler 2005, p. 1, states that Gertrude Stein believed that a museum of contemporary art was impossible.

⁴² Bonneau 2013, p. 74.

⁴³ Altshuler 2005, p. 2.

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