

Manlio Frigo

Review of the doctoral dissertation of Mrs. Julia Stepnowska;

“The value of cultural property; the 1995 Unidroit convention on stolen or illegally exported cultural objects as an example of a value-based approach to cultural property restitution”

On June 26th 2023, I have been appointed by the Scientific Council of the Faculty of Law and Administration of the University of Gdansk as a reviewer of the abovementioned doctoral dissertation. I hereby submit my considerations and review.

1. Introduction

Mrs. Stepnowska’s work is divided into four chapters.

The first chapter is dedicated to the definition scope applicable to the field of cultural property restitution. Starting from the exam of (frequently equivalent) terms such as cultural heritage, cultural property, cultural objects, works of art, antiquities, the analysis aims at outlining similarities and differences in the domain of “cultural property law” to demonstrate the significance of linguistics in establishing common grounds for dispute resolution based on the value of goods (p. 11).

The second chapter deals with the 1995 Unidroit convention as a model instrument; the analysis includes the exam of the scope of application of the convention and the effect on State and private collections, export and import restrictions and the art market.

The third chapter explores the Unidroit convention in terms of its capacity to create a sustainable restitution model moving from the “argumentation list” created by Professor Zeidler¹ as based on moral, social, and economic aspects of past and ongoing restitution cases (p. 129).

Eventually, the fourth chapter, based on some selected case studies, aims at answering the question whether a value-based approach can be formulated at an international level and at providing an opinion on whether the aim of the model to foster international cooperation to

¹ K. Zeidler, *Restitution of Cultural Property: Hard Case – Theory of Argumentation – Philosophy of Law.*, Wolters Kluwer, 2016.

protect cultural property and to increase the number of cultural objects returned to their country of origin can be achieved (p. 11).

2. Content review

In the first chapter, the analysis concerning the object definition scope is conducted starting by comparing different terms such as cultural heritage, cultural property, objects and goods, national treasures, monuments, artworks, from both a linguistic and legal standpoint.

The linguistic discrepancies, says the author, are inevitable in the field of cultural property, the main point of reference for the specification of the objects being its value and its role (p. 35).

The legal exam considers the main international conventions in force in our domain, as well as the most relevant European Union tools. In this respect a useful summary table is proposed (p. 36.37). The only criticism in this case, concerns the omission of EU Regulation 2019/880 on the introduction and the import of cultural goods which should have been included in the table.

The classification and assessment of different values is discussed by the author referring to both extra-legal (aesthetic, philosophical, etc.) and legal experiences and analysis (p. 38-75). Her conclusion is that: i) several concepts are used interchangeably despite their different connotation; ii) the limit of particular categories and their referents is impossible to be firmly established. In spite of the above discrepancies, the analysis proves that it would be valuable to create a multi-language cultural property law dictionary including an in-depth term analysis to support not only researchers, but also parties involved in a dispute (p. 78).

The second chapter is dedicated to the assessment of the contents and role of the 1995 Unidroit convention. Particularly, the analysis not only focuses on the close relationship between the 1995 Unidroit convention and the 1970 Unesco convention; moreover, it highlights the comparison between the convention and other relevant hard-law and soft-law international instruments, with specific regard to the Icom Code of Ethics. Moving from the consideration that the Unidroit convention was drafted to respond to loopholes in national legislation in the field of cultural property restitution by expanding the scope of the Unesco convention and by providing clear due diligence standards, the conclusion is that the Unidroit convention; i) represents a comprehensive

response to issues concerning due diligence on the art market; ii) influences the way “community (*sic!*) and national laws” are amended and drafted; iii) acts as a uniform set of guidelines for restitution and return (p. 123).

Chapter 3 on “Value-based restitution” probably represents the most ambitious part of the dissertation. In fact, moving from the statement that cultural property restitution is a matter of social justice, the author declares that, as opposed to mere ownership rights, the notion of cultural heritage protection in its broad sense refers to maintaining equality as opposed to the Western idea of individuality (p. 125). The assessment of the “cultural heritage law principles” and of the “restitution arguments” (based on professor Zeidler’s argumentation list) is carried out in line with a concurrent analysis of the 1995 Unidroit convention. The author highlights that the 1995 Unidroit convention is a direct response to both cultural heritage principles and restitution arguments discussed in chapter 3 (p. 138). Value matrix for social utility, for integrity, for diversity are outlined in separate tables elaborated by the author aiming at outlining a “value-based restitution model” (p. 153), after referring to some interesting alternative solutions to restitutions based on different doctrinal contributions (p. 146-152).

Again, the principles of cultural heritage law (e.g. cultural heritage protection, sustainable development, social utility of cultural heritage, change of social utility of heritage over time, protection of integrity, protection of diversity, property protection, social utility of cultural heritage, good faith and equity, financing monuments from public funds and/or by the owner) are indicated as a point of reference for cultural property restitution arguments and may “play a fundamental role in the value based restitution model” (p. 156). The conclusion is that restitution arguments reflect the principles of cultural heritage law and, the other way around, the same principles are based on actual cases involving sustainable restitution arguments”. In this sense, according to the author, the 1995 Unidroit convention represents a value-based restitution model as it reflects general principles of international cultural heritage law and its values (p. 160).

The last chapter is entirely dedicated to a set of case studies. The declared aim of the author is to illustrate the use of specific values in restitution arguments to complement the value-based restitution model proposed in the previous chapter (p. 161). To provide greater guarantees of

completeness, the exam includes examples taken from both continental and common law systems.

The analysis is inspired by a subdivision made by the author into four different investigation value-drivers of the restitution process: i) the value of integrity (Bust of Diana -Poland and Auktionshaus im Kinsky, Neuchatel Museum of Ethnography and Egyptian Antiquities service p.162-168); ii) the value of social utility (The Last Judgment by Hans Memling, *Beyeler v. Italy*, p. 169-182); iii) the preservation (The Parthenon Marbles, the Makondé Mask (Tanzania v. Barbier-Mueller Museum) Banksy Mural – Bioresource, Inc. and 555 Nonprofit Studio/Gallery, p. 182-202); iv) the strategic value of cultural property (U.S. v. Cambodian Sculpture, Benin Bronzes p. 204-213).

In all the above cases the author examines the relevant social significance of the “properties”, the ways they were removed from the original context, the arguments on both sides of the dispute based on the values assigned to each property. The conclusion of the author is that, regardless of public or private ownership issues, “the main value behind every single restitution dispute *should be* its preservation in the best conditions possible” (emphasis added). According to the author, this would be the reason why the 1995 Unidroit convention plays such an important role in the protection of cultural property (p. 214).

3. The final conclusions of the dissertation

The final conclusions are concentrated in the last five pages of the dissertation (p. 215-220). The leading driver apparently inspiring the author’s conclusions is that to answer the question of what values lie behind cultural property, one should need to go “beyond positive law to realise that the solution to restitution disputes often lays in the values that each individual objects hold, not only objectively but from the perspective of each party in the dispute. The thesis of the dissertation is that every restitution argument is a reflection of the values assigned to the object in question and that these values refer to both collective and individual interests” (p. 215).

Particularly, the author concludes that:

- i) Despite linguistic discrepancies between various legal terms and their translations, under international law, EU law, domestic law, the bottom line for the terms used in the realm

of the broad category of cultural law, *“it is the value and the interest of particular parties in a dispute that can determine the scope of application for a given term”*. The further consequence is that *“the above statement proves that the creation of a multi-language cultural property law dictionary that would also include an in-depth value analysis could be a helpful tool for parties to a dispute concerning cultural property”* (emphasis added, p. 217);

- ii) Restitution arguments and principles of cultural heritage law reflect the values assigned to cultural property. For instance, the arguments relating to social utility of cultural property, are related to the corresponding principle of social utility of heritage and that stem from the value of social utility of property; therefore, the restitution model may be seen as a matrix of corresponding elements. The conclusion is that restitution as such is not only necessary to achieve sustainable development goals, but also the process itself should respect the principle of sustainability (p. 218);
- iii) The 1995 Unidroit convention reflects general principles of international cultural heritage law and its values in the broadest sense possible. Moreover, the convention not only responds to the problem of legal gaps between different legal systems, but also encourages interstate cooperation to find balanced solutions for restitution or return disputes (p. 219);
- iv) A value-based approach is already (at least) partially established by the 1995 Unidroit convention, but to achieve the goal of strengthening international cooperation to protect cultural property the model should *be applied regardless of the legal grounds assumed by the parties to a dispute as it is in the process of alternative dispute resolution that many of these disputes can be settled* (p. 219, emphasis added). Particularly, the role of restitution disputes in promoting the value of cultural property concerned cannot be overlooked; the model far from being exclusively intended to answer questions in the context of restitution disputes, also serves as a point of reference for cataloguing cultural values for promoting culture and its social significance to a wider audience, serving as an example of inter-disciplinary bridge between the fields of study and cultural activities concerning the question of what the value of cultural property is (p. 220).

4. Assessment

The assessment of this thesis will be carried out in the light of some indicators that can be helpful in order to provide an overall evaluation that is as objective and reliable as possible. The criteria that will be used hereafter are as follows: i) methodology, ii) balance between the parties of the dissertation; iii) clarity in exposition; iv) legal analysis and consistency; v) bibliography; vi) correspondence between stated goals and results achieved.

i) Methodology

From the very beginning, the declared aim of this dissertation is to indicate the values assigned to cultural property in order to propose a reference framework for their value-based restitution (p. 9). The author explains that the thesis is based on both theoretical-normative descriptions referring to the notion of cultural property and restitution, but also adds that the thesis includes empirical descriptions. While the difference between theoretical and empirical approach is clear (and correctly the author includes both in her analysis plan), the (apparent) juxtaposition between a *theoretical* and a *normative* description (p. 10) is unclear and should be possibly better elaborated.

The character of “inter-disciplinary study” of the thesis is clearly highlighted. Despite its strong focus on legal theory and practice – explains the author – the dissertation finds its inspiration also from other fields, such as art theory, archaeology, philosophy, and sociology (p. 12). Considering the object of the investigation, this contamination (cross-fertilization?) between different sectors of scientific investigation is welcome and appreciable. It is also correct and appropriate that the author declares in the opening the method that inspires her dissertation. However, this declaration of intents remains too vague and would require – here and there - greater precision in delimiting the respective boundaries between the interpretative criteria used and the scientific sectors explored all along the work.

Balance between the parts of the dissertation

From this point of view the work appears substantially very balanced. The subdivision into four chapters corresponds to a quantitatively distributed treatment in a substantially similar way in each chapter.

ii) Clarity in exposition

This is definitely a very positive aspect of the dissertation. The writing is smooth and flowing and is easy for the reader.

iii) Legal analysis and consistency

This profile of the work has some weaknesses; here and there the legal analysis is not always conducted in depth and sometimes the author's assessments appear superficial, unmotivated, and/or purely assertive. By way of example of each of the three categories indicated:

1. p. 62: "Provenance record is essential for the statement of authenticity": this statement is inaccurate and confuses two different issues (provenance and authenticity) whose difference should deserve more attention (and space). It is not by chance that any due diligence concerning the purchase of an art-work deals with both (separate) aspects; the investigation about provenance deals with the story of the object and the validity of the titles; conversely, the exam of the authenticity has to do with the attribution of the art-work.
2. p. 60: "The main conclusion is that restitution as such is not only necessary to achieve sustainable development goals, but also the process itself should respect the principle of sustainability"; this statement, which concludes chapter 3 of the dissertation might certainly be shared, but it represents a declaration which is not supported by an adequate set of motivations to support it. In which sense the principle of sustainability should be respected in such a context?
3. p. 218: "[the] 1995 Unidroit convention reflects general principles of international cultural heritage law and its values in the broadest sense possible...". This optimistic statement – which recurs here and there in other parts of the dissertation – would perhaps fit better in this sector with the 1970 Unesco convention and, in any case, does not appear to be based on a detailed legal analysis. Particularly, the author should answer the easy

objection that indicates in the relatively low number of ratifications – compared to other conventions in this sector - an element of weakness of the Unidroit convention. This justifies a more thorough explanation of why the convention must be regarded as reflecting principles generally accepted by States.

The approach to the legal aspects of the investigation is essentially descriptive and sometimes not complete (see the referred omission of considering the EU Regulation 2019/880 on the introduction and the import of cultural goods which is not even included in the table at p. 36-37).

Eventually, the analysis of the restitution cases - mainly except for the case of the Benin bronzes – has practically disregarded the rich practice of the post-colonial requests for restitution and return, particularly (but not exclusively) by African States and local communities (see for example of not-concerning-Africa-cases, the omission of any reference to the case of the Korean Royal Archives (France-Korea 2011)).

iv) Bibliography

The dissertation of the candidate is the outcome of a serious research and appears to be solidly based on a rich documentation and bibliography. I could not blame the candidate for having privileged English-language literature, as unfortunately it is now happening more and more frequently with serious prejudice to the completeness of the scientific investigation. French-language literature is, for example, absolutely neglected, but on the other hand, the linguistic knowledge of a jurist may well have limits and those of the author of this dissertation are certainly not negligible.

Despite the overall positive evaluation of the bibliography, however, I must complain about a serious gap.

Had the author have the opportunity of reading Francesco Francioni's essay about the *Custom and General Principles of International Cultural Heritage Law*, (F. Francioni, A. F. Vrdoljak eds, *The Oxford Handbook of International Cultural Heritage Law*, Oxford, 2020, p. 531 ff,) she would have probably better explored the realm of principles *vis-à-vis* the main international conventions

including the 1995 Unidroit convention) and would have come to better based conclusions about the role of values assigned to cultural property.

v) Correspondence between stated goals and results achieved

As stated before, the thesis seeks to answer the question whether a value-based approach can be formulated at an international level and to provide an opinion on whether the aim of the model to foster international cooperation in protecting cultural property and to increase the number of cultural objects returned to the country of origin can be achieved.

The impression is that the dissertation only partially comes to convincing conclusions that correspond to the declared goals. Not only some conclusions are not assisted by concrete theoretical or empirical basis (as is the mentioned case of the conclusion that restitution as such is not only necessary to achieve sustainable development goals, but also the process itself should respect the principle of sustainability (p. 218). Moreover, in other cases the author appears assertive about the achievement of an objective without providing any demonstration, evidence, or element to explain how this outcome would be concretely achievable. This is the case, for instance, when the author claims that to achieve the goal of strengthening international cooperation to protect cultural property the model should *be applied regardless of the legal grounds assumed by the parties to a dispute as it is in the process of alternative dispute resolution that many of these disputes can be settled* (p. 219, emphasis added). The same goes when the author highlights the role of the proposed model that should be applicable “also regardless of the legal grounds assumed by the parties” (p. 219) or immediately after when she stresses its importance “as an example of inter-disciplinary bridge between the fields of study and cultural activities concerning the question of what the value of cultural property is (p. 220).

Even considering the indicated limits - which it would be desirable for the candidate to remedy before the discussion – this is a positive review. Conclusively, the doctoral dissertation demonstrates the candidate’s general theoretical knowledge in the discipline of international law and the ability to conduct research or artistic work independently.

Manlio Frigo

A handwritten signature in black ink, appearing to read 'Manlio Frigo', with a large, sweeping flourish extending to the right.

Milano, September 11, 2023