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“Collect gold in times of trouble, collect jade in good times”: private market, public engagement and the protection of cultural property in the People’s Republic of China

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Abstract

IT *Il richiamo a “Realizzare il sogno cinese della grande rinascita nazionale” è divenuto, a partire dalla sua prima menzione, da parte del Presidente Xi Jinping, nel novembre 2012, il nuovo “manifesto politico” e la nuova “missione” (奋斗目标 fendou mubiao) del Partito e dello Stato, nella Repubblica Popolare Cinese (RPC). Profondamente radicato nella comprensione cinese dell’evoluzione storica, lo slogan – che prende le mosse dai fasti del glorioso passato cinese, e si riferisce al tortuoso percorso che ha portato la Cina dall’umiliazione delle “Guerre dell’oppio” all’attuale “rinascita”, sotto la guida del PCC – non può non avere un impatto anche sulla politica nei confronti dei beni culturali. Gli attori privati (privati cittadini, musei, ONG) hanno un ruolo, in questo processo? E’ possibile, per la nuova e sempre più numerosa classe dei collezionisti cinesi, contribuire alla tutela dell’immensa eredità culturale del proprio Paese? Quali strumenti giuridici possono essere utilizzati a tale fine?*

In questo studio, analizzerò le modalità in cui, in questi ultimi anni, si è articolato il complesso rapporto tra pubblico e privato nella tutela dei beni culturali della Repubblica Popolare. In particolare, cercherò di comprendere fino a che punto la legalizzazione delle transazioni private e la creazione di un “mercato culturale” lecito abbiano reso meno onerosi, per il governo della RPC, il recupero e la protezione delle antichità cinesi, e se il sistema giuridico di quel Paese sostenga e incentivi il collezionismo privato “nell’interesse pubblico”, al fine di preservare il patrimonio culturale della “più grande nazione-fonte di beni culturali del mondo”.

Keywords: Diritto cinese, tutela dei beni culturali, partecipazione pubblica, mercato privato

EN *“Realizing the Chinese dream of the nation’s great rejuvenation” has become, since its first mention by President Xi Jinping, in November 2012, the new “political manifesto” and “mission statement” for the Party and the Nation, in the PRC. Deeply rooted in Chinese understanding of history, the concept – which takes for granted the glorious past of China, and refers to the hard and tortuous path taken by the Country from the decline of the Opium Wars to the recent renaissance led by the CCP – has necessary had impact also on the politics about cultural relics.*

Do non-governmental actors (private citizens, museums, NGOs) have a role in this process? Is the new and growing class of Chinese collectors involved, in some way, in the protection of the PRC’s immense cultural legacy? What legal tools, if any, can be used to this end?

In this paper, I will analyze the ways in which, in the last few years, the relationship between public institutions and the private sector has been shaped, concerning the protection of cultural relics. In particular, I will try to understand to what extent the legalization of private transactions and the creation of a licit cultural market has been helping the Chinese government to keep track, recover and protect antiquities, and whether the Chinese legal system supports and facilitates private collecting “in the public interest”, in order to preserve its enormous cultural property.

Keywords: Chinese Law, Cultural Property Protection, Public Engagement, Private Market

“COLLECT GOLD IN TIMES OF TROUBLE, COLLECT JADE IN GOOD TIMES”: PRIVATE MARKET, PUBLIC ENGAGEMENT AND THE PROTECTION OF CULTURAL PROPERTY IN THE PEOPLE’S REPUBLIC OF CHINA*

SIMONA NOVARETTI**

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Introduction:

“Realizing the Chinese dream of the nation’s great rejuvenation” has become, since its first mention by President Xi Jinping, in November 2012, the new “political manifesto” and “mission statement” for the Party and the Nation, in

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the PRC. Deeply rooted in Chinese understanding of history, the concept – which takes for granted the glorious past of China, and refers to the hard and tortuous path taken by the Country from the decline of the Opium Wars to the recent renaissance led by the CCP – has necessarily had impact also on the politics about cultural relics.

Do non-governmental actors (private citizens, museums, NGOs) have a role in this process? Is the new and growing class of Chinese collectors involved, in some way, in the protection of the PRC's immense cultural legacy? What legal tools, if any, can be used to this end?

In this paper, I will analyze the ways in which, in the last few years, the relationship between public institutions and the private sector has been shaped, concerning the protection of cultural relics. In particular, I will try to understand to what extent the legalization of private transactions and the creation of a licit cultural market has been helping the Chinese government to keep track, recover and protect antiquities, and whether the Chinese legal system supports and facilitates private collecting “in the public interest”, in order to preserve its enormous cultural property.

I. Cultural property in a socialist market economy with Chinese characteristics

A- Political slogans and cultural property protection policies in the PRC

“Let a hundred flowers blossom and a hundred school of thought contend, weed through the old bring forth the new, make the past serve the present and foreign things serve China!” (Mao Zedong, 1964)

In the 1983 UNESCO publication on “Cultural policy in the People's Republic of China”, the art critic Bai Liu could not help but use the above Maoist motto¹ to explain what should have been, after the inauguration of the “reform and opening up” period, the attitude of the new Chinese leaders towards culture in general, and the protection of cultural relics in particular.

According to him:

“making the past serve the present’ means that China inherits its cultural heritage for the purpose of promoting the building of a new culture to meet the people’s need. A splendid culture was created in the country’s long years of feudalism. To carry forward this rich heritage is a necessary condition for developing a new national culture and enhancing national self-confidence”².

¹ Bai Liu: “Cultural Policy in the People's Republic of China. Letting a hundred flowers blossom”, Paris, Unesco, 1983, p. 18.

² Bai Liu: “Cultural Policy in the People's Republic of China. Letting a hundred flowers blossom”, Paris, Unesco, 1983, at 21.

This attempt at a “re-functioning” of the past – i.e.: a process whereby “*a tradition is lifted out of its previous setting, re-conceptualized and invested with meaning different from those it carried earlier*”³ – is not new in China.

As remarked by David Murphy in 1995, in the Chinese context, more than in other Countries:

*"Cultural property is infinitely bound up with political, social and economic currents"*⁴.

Undoubtedly, from the beginning of the twentieth century - when the protection of cultural relics ceased to be a problem that affected only their owners, becoming a matter of public interest⁵ – the oscillations of Chinese preservation policy can be understood in the light of the political and social upheavals that have distinguished Chinese contemporary history⁶.

This phenomenon has become even more evident since 1949. At the foundation of the PRC, Mao Zedong's theory of “*selecting the refined, discarding the dross*” (取其精华，去其糟粕, *qu qi jinghua qu qi zaopo*) became the officially advocated guideline to cultural tradition⁷, making the Central People's Government promulgate various measures to protect cultural heritage⁸. Less than ten years later, the period of the “Great Leap Forward” featured the slogan “*stress the present and slight the past*” (厚今薄古 *houjin bogu*), a principle hardly supporting the conservation of cultural tradition⁹. In 1966, then, the CCP embarked on a campaign to “*eradicate the four olds*” (破四旧, *po si jiu*), thereby initiating the “ten years of catastrophe” of the Cultural Revolution, which would lead not only to the sever interruption of the germinal regulatory regime but also to the destruction of innumerable sites of religious and historic significance throughout the country¹⁰. A new regulatory regime only began to emerge in the 1980's¹¹, together with the Chinese political elite's renewed interest in a “selected” use of China's cultural tradition, in order to develop tourism and

³ David Gross

⁴ J. David Murphy: “Plunder and Preservation. Cultural Property Law and Practice in the People's Republic of China”, Hong Kong Oxford and New York, Oxford University Press, 1995.

⁵ Jocelyne Fresnays: “La protection du patrimoine en Republique populaire de Chine: 1949 - 1999”, Édition du C.T.H.S., Paris, 2001, at 21.

⁶ Ibid, at 21.

⁷ On Mao's attitude towards cultural tradition see, more in detail, Ai Ji, *ibid.*, at 130.

⁸ James Ding: “China” in James A. R. Nafzinger and Robert Kirkwood Paterson: “Handbook on the Law of Cultural Heritage and International Trade”, Cheltenham, UK, Edward Edgar Publishing, 2013, at 108.

⁹ J. David Murphy, *cit.*, at 33.

¹⁰ Helaine Silverman and Tami Blumenfield: “Cultural Heritage Politics in China: An Introduction”, in Tami Blumenfield and Helaine Silverman (eds): “Cultural Heritage Politics in China”, New York, Springer, 2013, at 3.

¹¹ James Ding, *cit.*, at 108.

heritage centered economies¹², on the one hand, and to resist the influence of Western ideologies and culture, on the other¹³.

But although, since the 1990s, official references to China's cultural tradition have been growing at a rapid pace¹⁴, it was certainly after Xi Jinping's call to "achieve the Chinese dream of the great rejuvenation of the Chinese nation" (实现中华民族伟大复兴的中国梦, *shixian Zhonghua minxu weida fuxing de Zhongguo meng*)¹⁵ that the relevance, at least via rhetorical-sense, attributed by the CCP to Chinese past became more evident.

Indeed, the connection between Chinese cultural tradition and the new leadership's catchphrase couldn't be closer.

Testimony to China's long history and magnificent culture, Chinese antiquities have been repeatedly looted and "drained" overseas by Western powers during the "hundred years of humiliation". The "road to rejuvenation", therefore, must pass through the retrieval of Chinese cultural treasures "lost" abroad, on the one hand, and an increased emphasis on the preservation of the cultural heritage still present within PRC's borders, on the other.

But while the centrality of Chinese relics to the new Chinese political rhetoric is clear, less evident is the extent to which the Chinese government is really committed to the protection of its cultural property. Is it, in particular, exploring methods of preservation other than state monopoly? Has the emphasis on cultural tradition led to greater involvement of Chinese citizens in the conservation and promotion of their Country's antiquities?

B. Protecting cultural property in XXI Century China: challenges and evolution

The questions above could seem odd, taking into account the fact that China, like many other source nations, has always had a legal regime designed to keep the most valuable cultural objects – as well as the responsibility for their protection – in the hands of the government¹⁶. The situation, however, has recently changed, in response, in particular, to the new challenges associated with the economic development.

¹² Ai ji, cit, at 137; Stefan Gruber, "Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law", *Asia Pacific Journal of Environmental Law*, vol. 10, Issue 3 &4, p. 274; J. David Murphy, cit., p. 70.

¹³ Ai ji, cit, at 135.

¹⁴ On this topic, see in general Ai Ji, cit.

¹⁵ On this topic see, among the others, 中共中央文献研究室, "学习《习近平关于实现中华民族伟大复兴的中国梦论述摘编》", 人民日报, 2013年12月03日, *Zhonggong zhongyang wenxian yanjiushi*, "Xuexi "Xi Jinping guanyu shixian Zhonghua minzu weida fuxing de Zhongguo meng lunshu zhaibian", *Renmin ribao*, December 3, 2013, online: <http://cpc.people.com.cn/n/2013/1203/c64387-23722539.html> (last visited: April 7, 2015).

¹⁶ Michael Dutra, cit., at 69.

To be fair, and as we have already noticed¹⁷, it would not be the first time, in the PRC's history, that Chinese leaders have engaged the general public in cultural property policies. But instead of exhorting the youth to burn books and damage relics, as happened during the Cultural Revolution, the new ideology is now officially encouraging the preservation of historical sites and objects. This is not surprising. The task of preserving China's cultural heritage - already of massive magnitude, considering the amount of culturally important movable and unmovable relics¹⁸ - has become even bigger with the economic liberalization. If, as recently as 1982, Paul Bator could remark that - due to its tightly controlled and isolated society - there was little or no cultural property leaving the PRC¹⁹, in particular after the mid-1990s, the rise in demand for antiquities has increased tomb robbing, looting and smuggling of antiquities, as well as the theft of relics from state-owned museum collections²⁰. Moreover, the need for the improvement of internal infrastructure has caused the destruction of thousands of sites with cultural value²¹, while local, county and provincial governments, charged with administering most Chinese antiquities, lack the resources to adequately preserve cultural relics that have been turned over for safekeeping²². Aware of the impossibility of keeping track of all the relics within its territory, and conscious of the difficulty of preserving even the

¹⁷ See *supra*, heading I.A.

¹⁸ According to official statistics, China has nearly 400,000 known unmovable cultural relics above ground and underground. So far, the State Council has listed 1,271 cultural sites under state protection and by 2015, the number may rise to 1,800. There are over 7,000 cultural sites under provincial-level protection and more than 60,000 under municipal and county-level protection. The national database for cultural relics information will be completed by 2015. See "Preservation of Cultural Relics", online: <http://www.china.org.cn/english/features/Brief/193349.htm>

¹⁹ Paul M. Bator, "An Essay on the International Trade in Art", 34 Stan. L. Rev. 275, at 319.

²⁰ On this subject see, among others, Micheal Dutra, *cit.*, at 71-2; He Shuzong, "Illicit Exavation in Contemporary China", in Neil Brodie, Jennifer Doole and Colin Renfrew, "Trade in Illicit Antiquities: The Destruction of the World's Archeological Heritage", Cambridge, Mc.Donald Institute for Archeological Research, 2001, at 19; He Shuzhong, "The Mainland Environment and the Protection of China's Cultural Heritage. A Chinese Cultural Heritage Lawyer's Perspective", *Art Antiquity and Law*, vol. 5, Issue 1, March 2000, online: <http://www.museum-security.org/social-environment-of-protection.htm>; Hanna Beech, "Spirited Away", *Time*, Oct. 13, 2003, online: <http://content.time.com/time/world/article/0,8599,2056101,00.html>. For some recent statistics, see also: "Improved Law Urged on Cultural Relics Protection", *cit.*; Autumn L. Marton: "On Rabbits, Rats and Low-Hanging Fruit: Rethinking the impact of International Agreement on China's Domestic Cultural Property Protection", 23 Colum. J.Asian L. 217 2009-2010, at 232.

²¹Michael Dutra remarked how during the construction of the Three Gorge Dam more than 2,500 tombs and five square kilometers of ruins were excavated, while other dozens of unexcavated archeological sites were submerged by the water, once the dam was completed. See Michael Dutra, *cit.*, pag. 73. On the treats to China's heritage caused by rapid economic development see, among others, Stefan Gruber, *cit.*, at 277-9.

²² Michael Dutra, *cit.*, p. 70-1;

antiquities that have been turned over to the State, since the beginning of the new century the Chinese government has started to consider a more direct participation of its citizens in the protection of cultural property.

In 2006, thus, exactly four decades after the Cultural Revolution's calls to "Destroy the old world; build a new world" (打碎旧世界创立新世界, *dasui jiu shijie chuangli xin shijie*) China began celebrating its "cultural heritage day"²³. Even more important, from the legal point of view, in 2002 the 30th session of the Standing Committee of the Ninth National People's Congress had revised the Law on the protection of cultural property²⁴, ending the State's monopoly on the transactions of cultural relics²⁴.

Under the previous law (effective as of November 1982), private citizens were only allowed to purchase cultural treasures from certified shops and auction houses, or obtain them through inheritance or donation²⁵. During the review process, on the contrary, some legislators had remarked how private transaction in cultural objects would help "collect those treasure that may have drained"²⁶, and ease the burden on the state in preserving cultural relics²⁷. The decision to "appropriately" open the cultural market – taken by the NPC after a fierce debate²⁸ – therefore, was not only a way to meet the increasing demand of private cultural relics collectors, but also an implicit recognition of private collecting as an alternative to state protection for cultural objects.

We briefly notice how, even in this case, the references to nationalistic values were not given up. Indeed, a few months before the approval of the final draft, the equal dignity of private and public collecting - a concept very often cited by Western authors, in particular by those coming from the so-called "market Countries" – was expressed in these terms:

*"The protection of cultural relics has a patriotic flavor, but also the private collecting of cultural relics is a kind of patriotism. [...] A kind of patriotism shouldn't be used to control another kind of patriotism. Private collections of cultural relics and national museums are both patriotic behavior"*²⁹.

²³ Helaine Silverman and Tami Blumenfield, cit., at 3.

²⁴ "Chinese lawmakers Fiercely Debated Whether the Country Should Open Its Cultural Property Market to Private Collectors", May 8, 2002, online: <http://www.museum-security.org/02/058.html#4>

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Michael Dutra, cit., at 82, note 88. The same opinion was expressed by J. David Murphy in 1995. See J. David Murphy, cit., at 170-2.

²⁸ "Chinese lawmakers Fiercely Debated Whether the Country Should Open Its Cultural Property Market to Private Collectors", *ibid.*

²⁹ 叶青, "文物保护与文物买卖是法律的尴尬还是实践的尴尬", 中国质量万里行, 2001年7月, Ye Qing, "Wenwu baohu yu wenwu maimai shi falü de ganga haishi shijian de ganga" (cultural relics protection and cultural relics selling is a legal or a practical embarrassment?), *Zhongguo zhiliang wanli xing*, July 2001, at 3.

In the following sections, we will see how the Chinese government, to recover some of the treasures “lost” overseas, is recently using this “patriotic behavior”³⁰.

For the moment, I would only like to remark how David Murphy’s prediction – according to which, in the early 21st century, the art market would have been dominated by China³¹ – has, after 20 years, come true.

Nowadays not only is the PRC “*the richest source of cultural property of all [the source nations of the world]*”³²; it has also become one of the most important market nations. This is quite understandable, as the tradition of antiquarianism in China dates back at least to the Song Dynasty, reflecting the Confucian veneration and respect for the past³³. Moreover, in a situation in which a majority of Chinese people do not trust the Chinese stock market, and the housing boom has slowed tremendously³⁴, investing in art has proved to be the most convenient and profitable option. Indeed, few assets, in recent years, have experienced such a rapid (and amazing) revaluation as Chinese antiquities³⁵.

Following the old saying: “one should collect gold in troubled times, but treasures in a flourishing age” (乱世藏金、盛世藏宝, *luanshi cang jin, shengshi cang yu*), with economic growth, an expanding segment of China’s population has begun to dabble in collecting antiquities. The data are quite impressive, for a country that hardly had an art market, in the mid-90s³⁶. According to the “Art Collector Report 2014”, China now has the third highest number of private

³⁰ According to official statistics, about 10 million pieces of Chinese cultural relics have been flowing or “drained” overseas, mainly to the Europe, the US, Japan and Southeast Asian Nations. For more details, see: “How many Chinese cultural treasures “lost” overseas?”, *People’s Daily Online*, January 30, 2007, online: http://en.people.cn/200701/30/eng20070130_346095.html.

³¹ J. David Murphy, cit. at 9.

³² John Henry Merryman, “Foreword”, in J. David Murphy, cit., at XIII.

³³ For a brief history of private collecting in China, see Jocelyne Fresnays, cit., at 29-31. On the topic see also Michael L. Dutra, cit., at 68-9; 王琛, 民间收藏文物流通法律规制研究, 博士学位论文, 西南交通大学, 2013年5月, Wan Chen, “Minjian shoucag liutong falü guizhi yanjiu” (the regulations on the circulation of private collections of cultural relics), Boshi xuewei lunwen (master thesis), Xi’nan Jiaotong Daxue, May 2013, at I.

³⁴ 王琛, Wan Chen, cit., at 1.

³⁵ For example, in 2005, during a Sotheby’s auction in London, a “shuang’er” amphora dating from the Qing period was sold at the incredible price of 122,408,800 RMB, more than 500 times the price it was purchased 30 years before. See 吴树: “谁在收藏中国”, 山西出版集团·山西人民出版社, 2008年, Wu Shu, “Shui zai zhocang Zhongguo”, Shanxi chuban ji tuan, Shanxi Renmin chubanshe, 2008, at 32. On Chinese antiquities boom, see also: “Chinese Buyers Fuel Auction House Boom”, *The Guardian*, August 18, 2005, online: <http://www.theguardian.com/uk/2005/aug/18/arts.artsnews2>.

³⁶ Veronica Mendez, “How China Became the World’s Second-Largest Art Market”, *Highbrown Magazine*, July 28, 2014, online: <http://www.highbrowmagazine.com/4172-how-china-became-world-s-second-largest-art-market>.

collectors and museums of the world³⁷, being preceded only by the US and Germany. Since 2011, it has even surpassed the United States in reported art sales, while China Poly Auction House – a major Chinese auction house, associated with the People’s Liberation Army³⁸ - rose, in 2013, to become the third-largest auction house in the world, behind Christie’s and Sotheby’s³⁹.

It is interesting to notice that, while luxury-buying habits in China often mimic those in the West, the demand for art uniquely reflects Chinese tastes⁴⁰. As remarked by Barboza, Bowley and Cox in 2013: “Chinese buyers typically pursue traditional Chinese pieces, some by 15th masters, and others by modern artists [...] who have chosen to work in that old style”.

For international art dealers this attitude could prove a nightmare⁴¹, but is certainly a lucky occurrence for the Chinese government. Since Chinese collectors “*want to keep [Chinese antiquities] in China*”⁴², alongside gathering back the relics that streamed out of China as the Qing dynasty crumbled⁴³, they could – now, more than in the past - become useful allies in the protection and recovery of Chinese cultural property.

In section II we will discuss if and how the PRC’s leaders are taking advantage of this opportunity. But, first of all, what is considered to be “cultural property” in the PRC?

C. The definition of cultural property

As is well known, the legal notion of cultural property emerged, for the first time, at international level, with the approval of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, where it is defined as “*movable or immovable property of great importance to the cultural heritage of every people*”. The 1970 Unesco Convention on the Means of Prohibiting and

³⁷ Respectively: the 7% of the world’s collectors, and 17 private museums (6 only in Beijing). See “Art Collector report 2014”, online: <https://www.larryslist.com/art-collector-report/>.

³⁸ For more details on recent developments connected to Poly Auction House, see: Cultural Property Observer, “China MOU Raises Value of Chinese Auction House Linked to the PLA”, March 3, 2014, online: <http://culturalpropertyobserver.blogspot.it/2014/03/china-mou-raises-value-of-chinese.html>; Committee for Cultural Policy: “China’s State-Backed Art Auction Company Takes in \$331M in I.P.O.”, online: <http://committeeforculturalpolicy.org/chinas-state-backed-art-auction-company-takes-in-331m-in-i-p-o/>; Frederick Balfour and Fox Hu, “Military-Linked Chinese Auction House to IPO in Hong Kong”, BloombergBusiness, February 27, 2014, online: Military-Linked Chinese Auction House to IPO in Hong Kong

³⁹ Veronica Mendez, *ibid.*

⁴⁰ David Barboza, Graham Bowley and Amanda Cox: “Forging an Art Market in China”, The New York Times, October 28, 2013, online: <http://www.nytimes.com/projects/2013/china-art-fraud/>

⁴¹ See Scott Reyburn: “Larry’s List, l’identità non più segreta dei collezionisti”, La Repubblica, February 13, 2015, at 45.

⁴² “Chinese Buyers Fuel Auction House Boom”, cit.

⁴³ David Barboza, Graham Bowley and Amanda Cox, cit., *ibid.*

Preventing the Illicit Import, Export and Transfer of Cultural Property, on the contrary, considers it as “*property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science*”. These different emphases characterize, according to Professor Merryman, the two main ways of thinking about cultural property⁴⁴. According to the first (referred to by Merryman as “cultural internationalism”, and typical of market nations⁴⁵) cultural property is a component of common human culture, while the second (the so-called “cultural nationalism”, which characterizes source nations⁴⁶) considers it as a part of a national cultural heritage.

The analysis of these two approaches is beyond the scope of this article⁴⁷. Here, I only would like to observe that the reference, in the 1970 Convention, to the “specific” designation of each State is not accidental, given the diversity of definitions and regimes to which these goods are subjected in the world⁴⁸. After all, it is for this very reasons that the topic has always intrigued comparative lawyers⁴⁹.

Indeed, the critical feature, in “cultural property” is “*the ‘culture’ inherent to this kind of objects*”⁵⁰, or – to quote Antonio Gambaro – their capacity to convey “*a meta-individual message*”⁵¹. As culture changes in space and time, so also does the relevance of this message will change⁵².

⁴⁴ John Henry Merryman, “Two Ways of Thinking About Cultural Property”, in 80 Am. J. Int’l L. 831 (1986), at 832-3.

⁴⁵ John Henry Merryman, “Two ways of Thinking about Cultural Property”, cit., at. 846.

⁴⁶ Ibid.

⁴⁷ On the topic, see, in general John Henry Merryman, cit., and, of the same author “Cultural Property Internationalism”, 12 International Journal of Cultural Property 11 (2005); Nora Niedzielski-Eichner: “Art Historians and Cultural Property Internationalism”, 12 International Journal of Cultural Property 183 (2005); Kelly Elizabeth Yasitis: “National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in United States v. Schultz”, 12 International Journal of Cultural Property 95 (2005).

⁴⁸ On the subject see, in general: Michele Graziadei: “I beni culturali: alcuni temi e motivi di interesse comparatistico”, in Guido Alpa, Giuseppe Conte, Valentina Di Gregorio, Andrea Fusaro, Ubaldo Perfetti (eds): “I beni culturali nel diritto. Problemi e prospettive”, Napoli, Jovene, 2010, at 17.

⁴⁹ Ibid. The same concept is expressed by Li Xiaodong, in 李晓东: “文物与法律研究”, 河北人民出版社, 2006 年, Li Xiaodong, “Wenwu yu falü yanjiu” (Research on cultural Relics and the Law), Hebei remin chubanshe, 2006, at 5. On the reasons of the interest on cultural property trade by comparatist lawyers, see also Francesca Fiorentini, “A Legal Pluralist Approach to International Trade in Cultural Objects”, in James A. R. Nafzinger and Robert Kirkwood Paterson, cit., at 589.

⁵⁰ Inbal Baum: “The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?”, 24 Cardozo Arts & Entertainment 119 (2006), at 923.

⁵¹ Antonio Gambaro: “Il diritto di proprietà”, in “Trattato di diritto civile e industriale”, Milano, Giuffrè, 1995, at 426.

⁵² Francesca Fiorentini, cit., ibid.

The multiple use of the term may, of course, lead to conflicting understandings of the meaning⁵³.

To be precise, even the three expressions we are using as synonyms in the present study (i.e.: cultural property, cultural heritage and cultural relics) according to some authors would emphasize different aspects of the problem. In particular, Janet Blake considers that “cultural heritage”, if compared to cultural property, would be broader in scope, as it expresses a “*form of inheritance to be kept in safekeeping and handed down to future generations*”⁵⁴, while Prott and O’Keefe notices that it includes matters in relation to which the concept of cultural property would be “*inadequate and inappropriate*”⁵⁵ as, inter-alia, those non-material cultural elements (dance, folklore, etc.), which have more recently been deemed entitled to legal protection at the international level⁵⁶.

It is worth noticing that these opinions do not take into the due account the fact that the term “cultural relics” - considered “equivalent” to the international understanding of cultural property⁵⁷ - certainly encompasses not only immovable but also intangible and/or non-material elements, at least for the civil law countries⁵⁸.

And this very expression, “cultural relics” (文物, wenwu), is that adopted by the PRC’s legislator.

The Chinese Scholar Li Xiaodong - author of many monographs on the subject - considers the Chinese term even broader, in meaning, than the phrases “cultural property” and “cultural heritage”, as they are employed in the above cited International Conventions⁵⁹.

According to Professor Li, the concept of “*wenwu*” – mentioned, for the first time, in the “Zuo zhuan” (左传, commentary of Zuo)⁶⁰, during the Warring States Period – refers to “*visible materials of certain historical, artistic and scientific value, created by human beings or related to human life*”.

As he sums up, in China, to be considered as a cultural relic, and deserve the State’s protection, an object – regardless of its age, or typology - must possess the following characteristics:

1) Having historical, artistic and scientific value, or at least two of these qualities;

⁵³ Inbal Baum, cit., ibid.

⁵⁴ Janet Blake, “On defining the cultural heritage”, *International and Comparative Law Quarterly*, Vol. 49, n. 1, Jan. 2000, at 83.

⁵⁵ Lyndel Prott and Patrick J. O’Keefe, “ ‘Cultural heritage’ or ‘cultural property?’”, *International Journal of Cultural Property*, Vol. 1, 1992, p. 319.

⁵⁶ Manlio Frigo: “Cultural Property v. Cultural Heritage: A “Battle of Concepts”, in *International Law?*, 86 *Int’l Rev. of the Red Cross* 347 (2004), at 369.

⁵⁷ Inbal Baum, cit., ibid.

⁵⁸ Manlio Frigo, cit., ibid.

⁵⁹ 李晓东, Li Xiaodong, cit., at 6

⁶⁰ 李晓东, Li Xiaodong, cit, at 1. The Zuozhuan 左传 "Commentary of Zuo" is a commentary and parallel version to the chronicle Chunqiu 春秋 "Spring and Autumn Annals". It is attributed to a certain Zuo Qiuming 左丘明,

2) Being important and representative;

3) Being widespread, i.e.: reflecting past generations' social system, social production, social life, civilization and art, science and technology *etc.*

Thus, the recording of President Mao's voice declaring the foundation of the People's Republic⁶¹, a Ming Dynasty vase, a fossilized dinosaur egg⁶², the Forbidden City or the "Daqing first oil well" all constitute "cultural relics"⁶³.

These objects differ from ordinary goods in at least one feature: they cannot be reproduced or replaced, once lost⁶⁴. This is the reason why the PRC, as many other source nations, created a regime of cultural property, and gave it a separate treatment in legislation⁶⁵.

But while, as early as 1961, the PRC's State Council enacted the Provisional Regulations on the Protection and Control of Cultural Relics⁶⁶, it was only in 1982 that, as we have already mentioned, the first Cultural Relics Protection Law (文物保护法, *Wenwu baohu fa* - hereinafter: CRPL) was promulgated⁶⁷.

Indeed, the notion of *wenwu* provided for by the Law closely follows the scheme described by Prof. Li.

According to article 2 of the CRPL:

"The state shall place under its protection, within the boundaries of the People's Republic of China, the following cultural relics: (1) sites of ancient culture [...]; (2) important historical sites, material objects and typical buildings of modern and contemporary times [...] (3) valuable works of art and handicrafts article dating from various historical periods (4) important documents [...] of historical, artistic or scientific value [...] (5) typical material objects reflecting the social system, social production or the life of various nationalities in different historical periods".

We only briefly mention that this basic definition is, then, complicated by article 3 of the same Law, which stipulates a grading of cultural relics according to the

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⁶² On the protection of this kind of relics in China, see in general Anne Carlisle Schmidt, cit.

⁶³ 李晓东, Li Xiaodong, cit., at 6, 8.

⁶⁴ Ibid., p. 16-17.

⁶⁵ See David J. Murphy, at 83.

⁶⁶ Jocelyne Fresays, cit., at 86.

⁶⁷ The Law, adopted at the 25th Session of the Standing Committee of The Fifth National People's Congress on November 19, 1982, was amended in 1991, revised in 2002, and amended again in 2007 and 2013.

“preciousness of the property”⁶⁸, similar to those implemented in Japan and South Korea⁶⁹.

But to what extent, then, can Chinese citizen contribute to the protection of this kind of object?

II. The involvement of Chinese citizens in the protection of cultural property

A. The involvement of Chinese citizens in the protection of the “treasures lost abroad”

Since the PRC’s government first realized the value of its cultural heritage, it has taken positive steps to reclaim Chinese cultural treasures lost abroad, on the one hand, and to stem the outward flow of cultural objects across the Country’s borders, on the other.

Indeed, in the last thirty years the PRC has signed and implemented several international conventions that are dedicated, or at least related to, the protection of cultural relics. These conventions include the above-mentioned 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (accessed by China in 2000); the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage (ratified by China in 1985); the 2003 Convention for the Safeguarding of Intangible Cultural Heritage (ratified by China in 2004) and – with particular reference to the protection of movable cultural relics – the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (accepted by China in 1989) and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects⁷⁰, of which China became a State Party in 1997.

Notwithstanding these efforts, restitution still remains a problematic issue. Even though, in particular, the 1954 Hague Convention, the 1970 UNESCO Convention and the 1995 UNIDROIT Convention have dealt with destruction, appropriation, theft and illegal exportation of cultural treasure, these treaties do not directly assist China in recovering its lost relics within the existing

⁶⁸ According to it, movable cultural relics are divided into valuable cultural relics and ordinary cultural relics. Valuable cultural relics are divided into Grade 1, Grade 2, Grade 3 cultural relics. This system is used within a wide range of regulation with different purposes, as to distinguish between the administrative protections given to relics of different grades, or the level of public exposure and access. The use of the grading system also extends into criminal law. On the subject, see, in general Timothy Lau: “The Grading of Cultural Relics in Chinese Law”, 18 *International Journal of Cultural Property* 1 (2011).

⁶⁹ Bunkazai hogohō (Cultural Property Protection Law), Law n. 214 of 1950 (revised in 2004); Cultural Heritage Administration of Korea. “Heritage Classification” cited by Timothy Lau, *cit.*, at 5. On the influence of the Sovietic, Japanese and Korean systems on Chinese cultural policy see also Jocelyne Fresnays, *cit.*, at 14.

⁷⁰ For a brief but comprehensive analysis of these Conventions, see Stefan Gruber, *cit.*, at 256 - 271.

international legal regime, as they do not cover cultural treasures removed historically (like the cultural relics looted during the Opium Wars), and – moreover - most of the marked states that hold Chinese cultural artifacts have not signed the conventions⁷¹.

To this end, even the agreements that China may individually conclude with one or more market states to enhance cooperation in the protection of cultural property – such as those signed, in recent years, with Chile, India, Peru and Philippines⁷², or the Memorandum of Understanding signed with the US in 2009, and renewed in 2014⁷³ – could be of little help.

Nor is it the guideline passed by the Association of Art Museum in 2008, according to which museums should not buy or accept artifacts which lack an export permit from the country of origin, or do not have a documented history dating back at least to the 1970⁷⁴. The guideline undoubtedly shows a changed attitude in market states' museums⁷⁵, and demonstrates their willingness to support original states' claims for recovery. However, it cannot be of assistance in the (very frequent) case of Chinese cultural relics “lost” abroad, and owned by individuals.

Given the above mentioned difficulties, the Chinese government has been forced to find new solutions to get back its treasures, playing on grounds other than international. This has meant, practically, trying to take advantage of its increasing international position and its huge profit market, on the one hand, and using methods that very often imply the (real or fictional) involvement of

⁷¹ Hui Sarah Zhong: “The return of Chinese Treasure Taken From the Second Opium War (1956-1860)”, DOI: 10.7763/IPEDR. 2014. V71, online: http://www.ipedr.com/vol71/007-ICCKS2014_S00019.pdf, at 31. For a brief analysis of the limitation of the Conventions on securing the return of Chinese treasures, see Jason M. Taylor: “The Rape and Return of China’s Cultural Property: How can Bilateral Agreements Stem the Bleeding of China’s Cultural Heritage in a Flawed System?”, 3 Loyola University Chicago International Law Review 233, at 239-43; James Ding, cit., at 120-1

⁷² For example, agreements on the protection and recovery of cultural property were signed, respectively, with Peru in 2000 and with Chile in 2001; agreements on the prevention of theft, clandestine excavation and illicit import and export were signed, respectively, with Italy and India in 2006, and with Philippines in 2007.

⁷³ On this MOU, and the problems related to it, see, among others: Nancy M. Murphy: “The Art of Importing Chinese Objects”, China Business Review, March 1, 2010, online: <http://www.chinabusinessreview.com/the-art-of-importing-chinese-objects/> and, of the same author: “Establishing the Mandate of Heaven through the Protection of Cultural Relics, Orientations, Vol. 40 Issue 6 Sep 2009, Vol. 40, Issue 6, p. 129; Autumn L. Marton, cit.; Inbal Baum, cit.

⁷⁴ Hui Sarah Zhong, cit., at 33.

⁷⁵ Ibid.

Chinese citizens, such as purchasing, donating and reclaiming through judicial procedure⁷⁶, on the other⁷⁷.

To be fair, also seeking the return through civil litigation can give rise to a few problems. As remarked by Hui Sarah Zhong, to (successfully) do it, the claimant must not only be able to prove ownership of the removed cultural relic, but also that the relic in question was looted or stolen⁷⁸. As most of the Chinese treasures lost abroad were removed decades ago, it is not easy, for the plaintiff, to supply these kinds of evidence, and it is even harder to make a court accepting the lawsuit, once the limitation period expires⁷⁹.

In this situation, buying back has become the most feasible approach⁸⁰. This is not surprising since, as we have seen, the development of the Chinese economy and the prosperity of the Chinese auction market have provided, from the beginning of the new century, favorable conditions for returning through private purchases. Already in 2005 – when the China Cultural Relics Recovery Program launched a large-scale project, aiming to inventory and (possibly) claim Chinese cultural relics scattered around the world⁸¹ – private purchases made up over 80 per cent of the total antiquities recovered⁸².

To date, the situation has not changed. Also buying-back, however, is not free from problems: the first of which is the lack of funds.

Undoubtedly, funds for counter-purchases are not in proportion with the current skyrocketing prices of Chinese cultural relics, and the trial efforts very often cannot be prevented from failing. These difficulties arose especially after the 2009 Christie's Auction controversy, when the State Administration of Cultural Heritage declared that it would not support domestic institution and individuals to bid for or purchase any Chinese treasures "*that have been plundered, stolen or illegally exported*", as cultural treasures are state property, and purchasing them would be a "*second looting*"⁸³.

And it is exactly this famous controversy that, in my opinion, reveals the complexity of the interests involved in Chinese cultural relic recovery in the

⁷⁶ "Reclaiming cultural relics from overseas", China Daily, June, 14 2005, online: http://www.chinadaily.com.cn/english/doc/2005-06/14/content_451186.htm

⁷⁷ 难追回、买不得：海外流失文物回归前路漫，中国文化报，2015年03月27日，online: <http://sd.people.com.cn/n/2015/0327/c370387-24302030.html>

⁷⁸ Hui Sarah Zhong, cit., ibid.

⁷⁹ Ibid.

⁸⁰ 李金河，中国海外流失文物的回归之路，<http://www.chinaqw.com/news/200910/27/178198.shtml>， at 2.

⁸¹ The project focused, in particular, on items that were stolen, excavated or looted and trafficked abroad between 1840 and 1949. For more details, see On this project, see in general: "Reclaiming Cultural Relics from Overseas", cit.

⁸² Ibid.

⁸³ "The Effort to Bid for or Purchase Any Chinese Treasure That Have Been Plundered, Stolen or Illegally Exported Are not Encouraged", Wenwu China, November, 12 2010, online: <http://www.wenwuchina.com/news/list7/detail37/71320.html>, cit. in Hui Sarah Zhong, cit. note 47, at 36.

most striking manner. Let us take a quick look at the incident.

On February 23, 2009, Christie's began the three-day auction of the personal collection of Yves Saint Laurent and his partner Pierre Bergé. Among the most valuable work at the auction, there were the bronze heads of a rabbit and a rat, dating to China's Qing Dynasty. The two castings – based on the design of Italian missionary Giuseppe Castiglioni - constituted two of the twelve fountainheads made for the zodiac fountain of the Old Summer Palace, and (probably) looted during the Second Opium War, when the palace was razed by the invading French and British forces⁸⁴.

The announcement that they were to be auctioned, therefore, outraged the Chinese government, which immediately requested the castings be recognized as stolen property and returned to China⁸⁵. Pierre Bergé's answer further inflamed the Chinese public opinion: not only did he declare that he had a valid title to the objects, but he also offered to trade the bronze heads for political concessions, such as the liberty of Tibetan people⁸⁶.

At this point, all the above mentioned techniques of (and problems connected to) recovery came into play: the Chinese government refused a private offer from Christie's to purchase the heads in advance; the French administrative court rejected the standing of the Global Aixinjueluo Family Clan (representing the descendent of the imperial family) and denied the injunction requested by the Association for the Protection of Chinese Art in Europe; the Chinese government issued tighter customs rules against Christie's⁸⁷.

The auction, nevertheless, took place. The two heads were sold for 31.49 million Euros, but the deal collapsed when the winning bidder, Cai Mingchao – probably not by chance a collection advisor of the quasi-governmental Nation Treasure Funds of China⁸⁸ – refused to pay, describing his “guerrilla” bidding tactic as a patriotic effort to halt the sale of the objects “on behalf of the Chinese people”⁸⁹.

It was, thus, only with the purchase by the Pinault family – owner of auction house Christie's, and majority shareholder of PPR, whose brands include Gucci, Yves Saint Laurent - which the story came to the end. On April 26, 2013, Francois- Henry Pinault promised to donate the relics to China on behalf of the

⁸⁴ On the topic, see:

⁸⁵ Zhuang Hua: “Auction of Looted Chinese Relics Hurts China's Cultural Rights”, February 26, 2009, online: <http://english.sina.com/china/2009/0226/221567.html>.

⁸⁶ Barbara Demik: “Bronze heads gnaw at China”, Los Angeles Times, February 24, 2009, online: <http://articles.latimes.com/2009/feb/24/world/fg-zodiac24>.

⁸⁷ Gillian Wong: “China punishes Christies's for auction of relics”, Foxnews, February 26 2009, online:

http://www.foxnews.com/printer_friendly_wires/2009Feb26/0,4675,ASChinaSaintLaurentAuction,00.html

⁸⁸ Chinese bidder of Looted Sculpture Refuse to Pay, Xinhua, March 2 2009, online: http://www.chinadaily.com.cn/china/2009-03/02/content_7526153.htm

⁸⁹ Ibid.

family; early that month, Christie's had been granted a license that enabled it to become the first international auction house to operate independently in the PRC⁹⁰.

The two heads are now on display in the first room dedicated to the "road to rejuvenation" of the National Museum of China, just below another symbol of the struggle to "never ever forget national humiliation"⁹¹: the picture of "American invaders sitting on the Forbidden City's Emperor's throne".

Humiliating as their vicissitudes might have been, their more recent fate seems, on the contrary, to testify to the PRC's current immense economic power, and the complex interweaving of national, international, public and private interests in the recovery of Chinese cultural relics.

B. The involvement of Chinese citizens in the protection of Chinese cultural relics within China borders

The commitment of the PRC's leaders to the protection of cultural heritage has led, since the beginning of the opening up and reform period, to the enactment, at a national and local level, of hundreds of provisions more or less connected to the protection and management of cultural relics⁹². Some of these rules seem to encourage Chinese citizens to take part in the protection of Chinese cultural relics, and in particular of those still within the Country borders.

According to article 7 of the Cultural Relics Protection Law, "*all government organs, public organizations and individuals have the obligation to protect cultural relics pursuant to law*", while art. 11 explicitly affirm that is duty of the state "*strengthen the propaganda and education on cultural relics protection and enhance the sense of cultural protection of the people*". Article 12, moreover, specifies the performances connected to the protection of cultural property to which the state must give "*more encouragement or material awards*" as, for example, the "*donation of important cultural relics in one's own collection to the state or making donation for the cause of cultural relics protection*" (art. 12, point 3); *the timely communication of information on, or delivery of, the cultural relics discovered, which facilitates their protection* (art. 12, point 4) and *meritorious service in rescuing cultural relics in danger of being destroyed* (art. 12, point 7).

Indeed, in the last thirty years, there have been attempts to spread, among the general public, the awareness of the importance of Chinese cultural heritage, as provided for by the above mentioned article 11. Since 1989, the Ministry of

⁹⁰ Lin Shujuan, Relics to be returned, China Daily, April 27, 2013, online: http://usa.chinadaily.com.cn/china/2013-04/27/content_16454737.htm.

⁹¹ The China Beat: "James Hevia on Summer Palace Relics", February 24, 2009, online: <http://thechinabeat.blogspot.it/2009/02/james-hevia-on-summer-palace-relics.html>

⁹² According to the statistics, besides the CRPL, there are more than 500 laws, regulations and regulatory documents related to the protection and administration of cultural relics in force in the PRC, while the laws, regulations and regulatory documents which regards specifically cultural relics protection are more than 400. See 邹建良.当前文物行政执法存在的问题及其对策研究[D].苏州大学,2010, 09.

culture and the State Administration of Cultural Heritage⁹³ have issued the Promotion Outline for the Program of Everyone Cherishing the Cultural Heritage of the Motherland, while newspapers and journals have been reporting recent finds and commenting on the importance of China's cultural past, and major periodicals have dedicated special sections to the Cultural Relics Protection Law, and published articles on the protection of cultural relics⁹⁴.

Nevertheless, it seems to me that further efforts would be needed in order to make the involvement of Chinese citizens more effective.

The system, for example, would benefit from a more detailed legislation on private collecting and museums.

As we have seen, the opening of trade in cultural goods has led to what has been defined as a “fever of collecting” among Chinese people, and to the emergence of a growing (and heterogeneous) class of collectors. Indeed – and in accordance with the expectations of the government which had led to the revision of the law, in 2002 - not all Chinese collectors see antiquities as a mere investment opportunity, or as the latest “must-have” in chic interior decoration⁹⁵. Some take a genuine scholarly interest in the material they collect, and deplore the damage that illegal excavation and pillage cause to archeological heritage. We observed above that a few of them (backed or otherwise by the government) have been, over the last few years, engaged in the recovery of the treasures lost abroad⁹⁶. Here, we briefly remark that there are also “good collectors”⁹⁷ operating within China's borders, i.e. collectors committed to making their collections available as an educational resource, and/or to supporting initiatives that aim to benefit Chinese cultural heritage, such as rescuing goods which have a cultural value.

This is, for example, the case of Jeffrey Wong, a businessman who in the past few decades has spent tens of millions of US dollars buying up more than 600 structures destined for destruction. Conscious of the fact that, due to the construction boom in Shanghai in 1990s, many buildings of historical value have been lost and replaced by skyscrapers – Mr. Wong has sought out buildings of this sort, taken them apart, and reassembled them in his garden in Tongli (Jiangsu), a site he hopes will become a “museum of buildings”⁹⁸.

⁹³ For a list of the institutions in charge of cultural property's protection and administration, in China, see Appendix: A Guide to Art and Cultural Heritage Resources, in Barbara T. Hoffman: “Art and Cultural Heritage. Law, Policy and Practice”, Cambridge, Cambridge University Press, 2006, at

⁹⁴ *Ibid.*, at 500.

⁹⁵ On the different typologies of collectors, see more in detail Neil Brodie: “An Archaeologist's View of the Trade in Unprovenanced Antiquities”, in Barbara T. Hoffmann, *cit.*, at 56.

⁹⁶ See *supra*, heading II.A.

⁹⁷ On this concept, see in general R.T. McIntosh, T. Togola and S.K. McIntosh, “The Good Collector and the premise of Mutual Respect Among Nations”, *African Arts* 27 (1995); R.T. McIntosh: “Proposition”, *Public Archaeology* 1 (2000).

⁹⁸ On the subject, see Duncan Hewitt, *Getting Rich First. Life in a Changing China*, London, Vintage, 2008, pp. 25-31, and the

His efforts, however - like those of the other wealthy citizens, keen to invest their assets in the protection of cultural heritage - risk underperforming, in a system that does not seem to incentivize any form of participation of private actors in the management and operational matters related to heritage⁹⁹ (such as, for example, cultural patronage or sponsorship, as provided for in the legislation of many other countries¹⁰⁰), and in which even the rights of the private collectors on their own antiquities are still unclear, due to the lack of coordination between the Property Law and the Cultural relics protection law¹⁰¹ and, more in general, to the vague definition of property rights on heritage¹⁰². Moreover, few local government bodies have followed the indications contained in the “Opinions on the further development of private museums” (关于促进民办博物馆发展的意见, Guanyu cujin minban bowuguan fazhan de yijian, jointly issued, in 2010 by the State Administration of Cultural Relics, the Ministry of Civil Affairs, the Ministry of Finance, the Ministry of Land, the Ministry of Housing and Urban-Rural Construction, The Ministry of Culture and the General Administration of taxation), and implemented policies to support the creation of private museums, allowing them, for example, tax benefits, or rights to use the land and supply of water, gas, etc. on favorable terms¹⁰³.

<http://libweb.lib.buffalo.edu/emro/emroDetail.asp?Number=3208>. See also: “Millionaire rebuilds Chinese history”, online: <http://www.aparchive.com/metadata/-HZ-China-Garden/d04abdf57756602e8c5711d1cb655159?query=Mao+Zedong¤t=2&orderBy=Relevance&hits=3&referrer=search&search=%2Fsearch%3Fquery%3DMao%2520Zedong%26allFilters%3DAP%2520Television%3ASource%2CCultural%2520preservation%3ASubject&allFilters=AP+Television%3ASource%2CCultural+preservation%3ASubject&productType=IncludedProducts&page=1&b=655159>.

⁹⁹ Tang Zijun, cit., at 28.

¹⁰⁰ For a brief description of the situation in France, see François Priet: “Acteurs privés et protection patrimoniale: entre association et partenariat”, in 王云霞 (主编): “公众参与文化遗产的法律机制”, 北京, 文物出版社出版发行, 2014, Wang yunxia: “Gongzhong canyu wenhua yichan de falü jizhi”, Beijing, Wenwu chubn she chuban faxing, 2014, at 16 - 30. For the incentives to sponsorship in Italy, see, Lucia Starola: La sponsorizzazione dei beni culturali: opportunità fiscali”, Aedon, n. 1, 2010, online: <http://www.aedon.mulino.it/archivio/2010/1/starola.htm>.

¹⁰¹ 王琛, Wan Chen, cit., at 5-19. On the subject, see also Tang Zijun: “Does the Institution of Property Rights Matter for Heritage Preservation? Evidence from China”, in Helaine Silverman and Tami Blumenfeld, cit., at 27-30.

¹⁰² Tang Zijun, cit., at 28.

¹⁰³ 彭文静: “民办博物馆发展政策研究”, 硕士学位论文, 复旦大学, 2012年5月30日, Peng Wenjin: “Minban bowuguan fazhan zhengci yanjiu” (Research on the policies for the development of private museums), Shuoshi xuewei lunwen (Master’s thesis), Fudan University, May 30, 2012, at 19. On the subject, see also: 刘爱河: “法律和制度视角下的文化遗产保护公众参与”, 在 王云霞 (主编): “公众参与文化遗产的法律机制”, 北京, 文物出版社出版发行, 2014, Liu Aihe: “Falü he zhidu shijiaoxia de wenhua yichan baohu

The caution which can be observed in such cases, however, can be understandable. Indeed, Chinese scholars have often expressed concerns regarding the introduction of market mechanisms in the conservation and utilization of cultural heritage, remarking that such a choice could impair the function of cultural property as a public good¹⁰⁴. Moreover, the suspicion towards private museums could be justified, considering the important role attributed by Chinese leaders to museums in “*promot[ing] the national vision of nation-ness and nationalism*”¹⁰⁵, on the one hand, and the fact that, in recent years, cases of illicit trafficking of antiquities have been discovered, in which private museums were used as a front¹⁰⁶, on the other.

More difficult to explain is, instead, the reluctance of the Chinese government to encourage the general public to participate in conservation activities, when this does not seem to undermine its control over cultural property.

This is the case, for example, of the rules on the discovery of relics remaining underground. According to article 5 of CRPL, such relics shall belong to the state, while – as provided for by the above-mentioned art. 12(3) – the state should give the person who facilitates their protection “*moral encouragement or material awards*”. An elaborate scheme of rewards, to a maximum of RMB 5,000, was set forth as early as in 1991¹⁰⁷, but this sum must have seemed negligible even then, if only four years later, Murphy noted that “*there are virtually no real incentive to ordinary citizens to respond*”¹⁰⁸ to article 12.

Indeed, the rewards offered by the government are insufficient in comparison to the potential profits that a finder can make from the illicit trade in cultural property¹⁰⁹, even though what a black market middle man would pay for a relic is only a very small fraction of its value¹¹⁰.

To solve this problem – and try to stop the looting and destruction of so many artifacts from archeological sites and monuments – Chinese and Western scholars have proposed various solutions, over the last few years, such as, for example, to give the finder a reward proportional to the value of the relic found,

gongzhong canyu”, in Wang Yunxia (zhubian): “Gongzhong canyu wenhua yichan de falü jizhi”, Beijing, Wenwu chubn she chuban faxing, 2014, at 37.

¹⁰⁴ Tang Zijun, cit., at 23.

¹⁰⁵ Helain Silverman and Tami Bumenfield, “Cultural Heritage Politics in China: An Introduction” cit., at 11

¹⁰⁶ Wang Yunxia and He Shuzhong: “Can NGOs Change the Status of Cultural Heritage Protection in China? The Case of CHP as an Example”, in Lyndel Prott, Ruth Redmond-Cooper and Stephen Urice: “Realizing Cultural Heritage Law”, Institute of Art and Law, 2013, online: <http://en.bjchp.org/?p=5088>.

¹⁰⁷ David J. Murphy, cit., p. 95

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. See also Anne Carlisle Schmidt, cit., at 206.

¹¹⁰ On the topic, see Hanna Beech, cit., ibid.

as provided for by other jurisdictions¹¹¹, or to establish a national fund for the protection of cultural relics, which could finance the monetary awards under article 12¹¹². Furthermore, some authors have remarked that monetary incentives are not the only answer, and suggested that the government could also provide public recognition for the finders of cultural relics, as happened for the men who, in 1974, discovered Emperor Qing Shi Huang's terracotta warriors¹¹³.

None of the recent amendments (the last dated 2013), have however followed these suggestions, nor does it seem that Chinese leaders are planning to take them into consideration, in the near future.

The impression that the preservation of cultural property is not - despite the declamations – one of the Chinese government's priorities, then, is reinforced by their failure to list the protection of cultural heritage among the fields in which – under 2012 PRC's Civil procedure law - it is possible to file “public interest litigation”¹¹⁴.

Indeed, according to article 55 of the new law:

“For conduct that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court”.

It is true that damage to cultural heritage is certainly also a violation of public interest, and could therefore fall in the general case provided for by art. 55. The provision, however, only allows “*relevant organizations as prescribed by law*” to file this kind of lawsuits.

Certainly, at the approval of the Civil Procedure Law, in the whole Chinese legislation there was no mention of such a right for any social organization¹¹⁵. But while the laws regulating the fields specifically mentioned by article 55 (i.e.: environment and consumer protection) have subsequently been amended, in order to grant to at least some NGOs the right of standing in case of violation of the general interest of their concern, the aforementioned amendment of the CRPL has left the situation unchanged.

¹¹¹ 中国特权法研究课题组: “中国物权法草案建议稿附理由”, [M].社会科学文献出版社,2007,03, at 345-47.王琛, Wan Chen, cit., at 24. For example, in Italy, the award cannot be higher than a quarter of the value of the property. See art. 92, “Codice dei Beni Culturali” (Law on cultural relics), d.lgs. 22 gennaio 2004, n. 42.

¹¹² Amanda K. Maus, cit., at 421, .

¹¹³ Michael L. Dutra, cit., at 46.

¹¹⁴ On the impact of the revision on the possibility to file “public interest litigation in China” see, in general, Simona Novaretti: “La riforma della procedura civile nella RPC e le “azioni nel pubblico interesse”: un balzo in avanti? Diritto con caratteristiche cinesi e società civile”, in Rivista di Diritto Civile, n. 2, marzo – aprile 2013, pp. 343 – 371.

¹¹⁵ On the subject, see Simona Novaretti: ““Social Governance vs. .Social Management: Towards a New Regulatory Role for Social Organizations in China?”, CDCT working paper 32-2014/ Comparative and Transnational Law 11, pp. 1 – 29.

At the moment, therefore, no NGOs involved in the preservation of cultural heritage can engage in public interest litigation in mainland China¹¹⁶.

Conclusions:

Bai Liu, in the publication cited at the beginning of this paper, observed that, in ancient China, the term “culture” (文化, *wenhua*) signified both “rule by culture” and “education through culture”¹¹⁷. This etymology, to his mind, would explain the reason for which, during the imperial era, the “*feudal rulers of various dynasties made the culture created by the people to serve the ruling clique’s own interest*”¹¹⁸, using it as an important tool to govern and educate their subjects.

Undoubtedly, from the times referred to by prof. Bai, China has experienced many (often radical) ideological upheavals. As shown by the analysis above, however, the attitude of Chinese leaders towards cultural heritage has not changed too much. Nowadays, as in the Maoist era, or even before, cultural property serves the state, and its policy is dictated by the state’s objectives.

In this sense, the call to “achieve the Chinese dream of the great Nation’s rejuvenation” has simply emphasized the link between Chinese tradition and the national interests, as interpreted by current Chinese leaders.

Since Xi Jinping’s seizure of power, not only have the official references to China’s glorious past become more frequent, but the knowledge of Confucian classics has also come back in fashion among Chinese bureaucrats, being critical to understanding the messages - explicit or hidden - contained in the speeches of the new President.

The new emphasis on cultural heritage, however, seems more a reflection of the PRC’s leaders’ will to reaffirm Chinese “soft-power”, than the expression of a genuine concern for the destruction/conservation of cultural relics within the Country’s borders. This is quite evident, if we consider the ways in which citizens can (or cannot) take part in cultural heritage protection, in today’s China. As we have seen, over the last few years the Chinese government has not hesitated to support the “patriotism” of the new class of Chinese collectors - and its particular fondness for the remains of China’s ancient culture - when this could be advantageous for the repatriation of the “Chinese treasures lost overseas”. Not surprisingly, this has been especially true in the case of relics - such as the Old Summer Palace’s fountainheads - which were taken abroad during the “hundreds years of humiliation”, and which, once recovered, could be easily presented, at the same time, as milestones in the “road to rejuvenation”, and symbols of China’s new political and economic power.

¹¹⁶ On the topic, see, in general: 王云霞 (主编), cit., part three.

¹¹⁷ Bai Liu: “Cultural Policy in the People’s Republic of China. Letting a hundred flowers blossom”, Paris, Unesco, 1983, p. 15.

¹¹⁸ Ibid.

The PRC's leaders, on the contrary, do not seem to sustain private actors so much, when they stop acting as government vassals in the international arena, and try to become autonomous players in the field of the maintenance/display/protection of the cultural property already under Chinese government's control.

Undoubtedly, the desire to keep, at best, the state's monopoly in the management of their cultural heritage may be understandable in a (socialist) source nation. But the limited incentives provided to ordinary citizens to report the discovery of relics remaining underground, and – above all – the failure to include, at the legislative level, the possibility for NGOs to participate in the determination and supervision of cultural policies regarding cultural heritage protection (e.g. filing “public interest litigation), put the question in another perspective.

Not only have these choices impaired the possibility, for Chinese civil society, to assist in the protection of cultural heritage. They also appear in striking contrast with the policy of “public participation” currently implemented by the PRC in other fields (probably deemed more crucial), as demonstrated, for example, by the “(Test) Measure for Public Participation in Environmental Protection”, published for comments by the Ministry of Environmental Protection on April 13, 2015¹¹⁹.

Obviously, for Chinese leaders, not all the “public interests” are equal, and deserve the same efforts for their preservation.

Nevertheless, Chinese cultural heritage is at serious risk. Before it disappears, it would be worth trying to reverse the Maoist motto, and use all the means available today – including the increasing awareness of the Chinese people of the value of their past - to protect it adequately. It would probably be the first time, in Chinese history, in which the present serves the past; but it could also be its last chance to do so.

¹¹⁹关于《环境保护公众参与办法（试行）》（征求意见稿）公开征求意见的通知, online: http://xjs.mep.gov.cn/gzcy/201504/t20150413_298993.htm.