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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 \***

di Simona Novaretti

“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” for the Party and the Nation, in the PRC. Deeply rooted in Chinese understanding of history, the concept has necessary had impact also on the politics about cultural relics.

Do non-governmental actors have a role in this process? 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 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 private collecting “in the public interest”, in order to preserve its enormous cultural property.

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

## **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 motto<sup>1</sup> to

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<sup>1</sup> B. Liu, *Cultural Policy in the People’s Republic of China. Letting a hundred flowers blossom*, Paris, Unesco, 1983, at 18.

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”<sup>2</sup>.

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”<sup>3</sup> – 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”<sup>4</sup>.

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 interest<sup>5</sup> – the oscillations of Chinese preservation policy can be understood in the light of the political and social upheavals that have distinguished Chinese contemporary history<sup>6</sup>.

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 tradition<sup>7</sup>, making the Central People’s Government promulgate various measures to protect cultural heritage<sup>8</sup>. 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 tradition<sup>9</sup>. 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 country<sup>10</sup>. A

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<sup>2</sup> B. Liu, *Cultural Policy in the People’s Republic of China. Letting a hundred flowers blossom*, Paris, Unesco, 1983, at 21.

<sup>3</sup> D. Gross, *The Past in Ruins: Tradition and the Critique of Modernity*, Amherst, MA, University of Massachusetts Press, 2009, p. 108.

<sup>4</sup> J. D. 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.

<sup>5</sup> J. Fresnays, *La protection du patrimoine en République populaire de Chine: 1949 - 1999*, Paris, Édition du C.T.H.S., 2001, at 21.

<sup>6</sup> *Ibid*, at 21.

<sup>7</sup> On Mao’s attitude towards cultural tradition see, more in detail, J. Ai, *Politics and Traditional Culture: The Political Use of Tradition in Contemporary China*, Singapore, World Scientific Publishing, 2015, p. 130.

<sup>8</sup> J. Ding, “China” in J. A. R. Nafzinger and R. Kirkwood Paterson, *Handbook on the Law of Cultural Heritage and International Trade*, Cheltenham, UK, Edward Edgar Publishing, 2013, at 108.

<sup>9</sup> J. D. Murphy, *op. cit.*, at 33.

<sup>10</sup> H. Silverman and T. Blumenfield, *Cultural Heritage Politics in China: An Introduction*, in T. Blumenfield and H. Silverman (eds), *Cultural Heritage Politics in China*, New York, Springer, 2013, p. 3.

new regulatory regime only began to emerge in the 1980's<sup>11</sup>, together with the Chinese political elite's renewed interest in a "selected" use of China's cultural tradition, in order to develop tourism and heritage centered economies<sup>12</sup>, on the one hand, and to resist the influence of Western ideologies and culture, on the other<sup>13</sup>.

But although, since the 1990s, official references to China's cultural tradition have been growing at a rapid pace<sup>14</sup>, 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*)<sup>15</sup> 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 could not 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 government<sup>16</sup>. The situation, however, has recently changed, in response, in particular, to the new challenges associated with the economic development.

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<sup>11</sup> J. Ding, *op. cit.*, at 108.

<sup>12</sup> J. Ai, *op. cit.*, at 137; S. Gruber, *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, in *Asia Pacific Journal of Environmental Law*, vol. 10, Issue 3 &4, p. 274; J. D. Murphy, *op. cit.*, at 70.

<sup>13</sup> J. Ai, *op. cit.*, at 135.

<sup>14</sup> On this topic, see in general J. Ai, *op. cit.*.

<sup>15</sup> 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).

<sup>16</sup> M. Dutra, *op. cit.*, at 69.

To be fair, and as we have already noticed<sup>17</sup>, 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 relics<sup>18</sup> - 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 PRC<sup>19</sup>, 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 collections<sup>20</sup>. Moreover, the need for the improvement of internal infrastructure has caused the destruction of thousands of sites with cultural value<sup>21</sup>, 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 safekeeping<sup>22</sup>. Aware of the impossibility of keeping track of all the relics within its territory, and conscious of the difficulty of preserving even the 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.

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<sup>17</sup> See *supra*, heading I.A.

<sup>18</sup> 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* [<http://www.china.org.cn/english/features/Brief/193349.htm>], in *China.Org.Cn*.

<sup>19</sup> P. M. Bator, *An Essay on the International Trade in Art*, in *Stanford Law Review*, 34/2, pp. 275-384, at 319.

<sup>20</sup> On this subject see, among others, M. Dutra, *op. cit.*, at 71-2; H. Shuzong, *Illicit Excavation in Contemporary China*, in N. Brodie, J. Doole and C. Renfrew (eds.) *Trade in Illicit Antiquities: The Destruction of the World's Archeological Heritage*, Cambridge, McDonald Institute for Archeological Research, 2001, at 19; H. Shuzong, *The Mainland Environment and the Protection of China's Cultural Heritage. A Chinese Cultural Heritage Lawyer's Perspective*, in *Art Antiquity and Law*, 5/1, March 2000, also available online at: <http://www.museum-security.org/social-environment-of-protection.htm>; H. Beech, *Spirited Away* [<http://content.time.com/time/world/article/0,8599,2056101,00.html>], in *Time*, October 13 2003. For some recent statistics, see also: *Improved Law Urged on Cultural Relics Protection* [[http://www.chinadaily.com.cn/china/2012-11/19/content\\_15941366.htm](http://www.chinadaily.com.cn/china/2012-11/19/content_15941366.htm)], *China Daily*; A. L. Marton: *On Rabbits, Rats and Low-Hanging Fruit: Rethinking the impact of International Agreement on China's Domestic Cultural Property Protection*, in *Columbia Journal of Asian Law*, 23/1, pp. 217-239, 2009-2010, at 232.

<sup>21</sup> Michael 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 M. Dutra, *op. cit.*, at 73. On the threats to China's heritage caused by rapid economic development see, among others, S. Gruber, *op. cit.*, at 277-9.

<sup>22</sup> M. Dutra, *op. cit.*, at 70-1. On the topic, with particular reference to the contradictions, at local level, on the one hand between old city re-development and protection of cultural relics and, on the other between tourism development and protection of monuments see L. Shuguang, *Substantial Progress and Important Impacts: Achievements, Problems and Policy Response in the Administration of Chinese Cultural Heritage*, in G. Yinxiang, L. Zan, L. Shuguang, *The Management of Cultural Heritage in China. General Trends and Micro-focus on the Luoyang Municipality*, Milano, Egea, 2008, pp. 33-34.

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 chuanglei xin shijie*) China began celebrating its "cultural heritage day"<sup>23</sup>. 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 property* [[http://www.unesco.org/culture/natlaws/media/pdf/china/china\\_lawprotection\\_clt\\_entof](http://www.unesco.org/culture/natlaws/media/pdf/china/china_lawprotection_clt_entof)], ending the State's monopoly on the transactions of cultural relics<sup>24</sup>.

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 donation<sup>25</sup>. 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"<sup>26</sup>, and ease the burden on the state in preserving cultural relics<sup>27</sup>. The decision to "appropriately" open the cultural market – taken by the NPC after a fierce debate<sup>28</sup> – 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"<sup>29</sup>.

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"<sup>30</sup>.

<sup>23</sup> H. Silverman and T. Blumenfield, *op. cit.*, at 3.

<sup>24</sup> *Chinese Lawmakers Fiercely Debated Whether the Country Should Open Its Cultural Property Market to Private Collectors* [<http://www.museum-security.org/02/058.html#4>], May 8, 2002, [museum-security.org](http://www.museum-security.org).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> M. Dutra, *op. cit.*, at 82, note 88. The same opinion was expressed by J. David Murphy in 1995. See J. D. Murphy, *op. cit.*, at 170-2.

<sup>28</sup> *Chinese lawmakers Fiercely Debated Whether the Country Should Open Its Cultural Property Market to Private Collectors*, *cit.*

<sup>29</sup> 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?), Zhongghuo zhiliang wanli xing, July 2001, at 3.

<sup>30</sup> 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?* [[http://en.people.cn/200701/30/eng20070130\\_346095.html](http://en.people.cn/200701/30/eng20070130_346095.html)], in *People's Daily Online*, January 30, 2007.

For the moment, I would only like to remark how David Murphy's prediction – according to which, in the early 21<sup>st</sup> century, the art market would have been dominated by China<sup>31</sup> – 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]”<sup>32</sup>; 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 past<sup>33</sup>. Moreover, in a situation in which a majority of Chinese people do not trust the Chinese stock market, and the housing boom has slowed tremendously<sup>34</sup>, 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 antiquities<sup>35</sup>.

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 jing, 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-90s<sup>36</sup>. According to the “Art Collector Report 2014”, China now has the third highest number of private collectors and museums of the world<sup>37</sup>, 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 Army<sup>38</sup> -

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<sup>31</sup> J. David Murphy, *op. cit.*, at 9.

<sup>32</sup> J. H. Merryman, “Foreword”, in J. D. Murphy, *op. cit.*, at XIII.

<sup>33</sup> For a brief history of private collecting in China, see J. Fresnays, *op. cit.*, at 29-31. On the topic see also M. L. Dutra, *op. 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, W. Chen, *Minjian shoucag liutong falü guizhi yanjiu* (the regulations on the circulation of private collections of cultural relics), Boshi xuwei lunwen (master thesis), Xi'nan Jiaotong Daxue, May 2013, at I.

<sup>34</sup> 王琛, Wan Chen, *op. cit.*, at 1.

<sup>35</sup> 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 chubanshe, 2008, at 32. On Chinese antiquities boom, see also: *Chinese Buyers Fuel Auction House Boom* [<http://www.theguardian.com/uk/2005/aug/18/arts.artsnews2>], in The Guardian, August 18, 2005.

<sup>36</sup> V. Mendez, *How China Became the World's Second-Largest Art Market* [<http://www.highbrowmagazine.com/4172-how-china-became-world-s-second-largest-art-market>], Highbrow Magazine, July 28, 2014.

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

<sup>38</sup> 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* [<http://culturalpropertyobserver.blogspot.it/2014/03/china-mou-raises-value-of-chinese.html>], March 3 2014; Committee for Cultural Policy, *China's State-Backed Art Auction Company Takes in \$331M in I.P.O.* [<http://committeeforculturalpolicy.org/chinas-state-backed-art-auction-company-takes-in-331m-in-i-p-o/>]; F. Balfour and F. Hu, *Military-Linked Chinese Auction House to IPO in Hong Kong*, Bloomberg Business, February 27, 2014.

rose, in 2013, to become the third-largest auction house in the world, behind Christie's and Sotheby's<sup>39</sup>.

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 tastes<sup>40</sup>. 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 nightmare<sup>41</sup>, but is certainly a lucky occurrence for the Chinese government. Since Chinese collectors "want to keep [Chinese antiquities] in China"<sup>42</sup>, alongside gathering back the relics that streamed out of China as the Qing dynasty crumbled<sup>43</sup>, 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 Preventing the Illicit Import, Export and Transfer of Cultural Property* [<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/>], 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 property<sup>44</sup>. According to the first (referred to by Merryman as "cultural internationalism", and typical of market nations<sup>45</sup>) cultural property is a component of common human culture, while the second (the so-called "cultural nationalism", which characterizes source nations<sup>46</sup>) considers it as a part of a national cultural heritage.

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<sup>39</sup> V. Mendez, *op. cit.*.

<sup>40</sup> D. Barboza, G. Bowley and A. Cox, *Forging an Art Market in China* [<http://www.nytimes.com/projects/2013/china-art-fraud>], The New York Times, October 28, 2013.

<sup>41</sup> See S. Reyburn: *Larry's List, l'identità non più segreta dei collezionisti*, La Repubblica, February 13, 2015, at 45.

<sup>42</sup> *Chinese Buyers Fuel Auction House Boom*, *cit.*.

<sup>43</sup> D. Barboza, G. Bowley and Amanda Cox, *op. cit.*.

<sup>44</sup> J. H. Merryman, *Two Ways of Thinking About Cultural Property*, in *American Journal of International Law*, 80/4, pp. 831-853, 1986, at 832-3.

<sup>45</sup> *Ibid.*, at 846.

<sup>46</sup> *Ibid.*



The analysis of these two approaches is beyond the scope of this article<sup>47</sup>. 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 world<sup>48</sup>. After all, it is for this very reasons that the topic has always intrigued comparative lawyers<sup>49</sup>.

Indeed, the critical feature, in “cultural property” is “the ‘culture’ inherent to this kind of objects”<sup>50</sup>, or – to quote Antonio Gambaro – their capacity to convey “a meta-individual message”<sup>51</sup>. As culture changes in space and time, so also does the relevance of this message will change<sup>52</sup>.

The multiple use of the term may, of course, lead to conflicting understandings of the meaning<sup>53</sup>.

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”<sup>54</sup>, while Prott and O’Keefe notices that it includes matters in relation to which the concept of cultural property would be “inadequate and inappropriate”<sup>55</sup> as, inter-alia, those non-material

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<sup>47</sup> On the topic, see, in general John Henry Merryman, and, in particular: J. H. Merryman, *Cultural Property Internationalism*, in *International Journal of Cultural Property* 12/1, pp. 11-39, 2005; N. Niedzielski-Eichner, *Art Historians and Cultural Property Internationalism*, in *International Journal of Cultural Property* 12/2, pp. 183-200, 2005; K. E. Yasitis, *National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in United States v. Schultz*, in *International Journal of Cultural Property* 12/1, pp. 95-113, 2005.

<sup>48</sup> On the subject see, in general: M. Graziadei, *I beni culturali: alcuni temi e motivi di interesse comparatistico*, in G. Alpa, G. Conte, V. Di Gregorio, A. Fusaro, U. Perfetti (eds), *I beni culturali nel diritto. Problemi e prospettive*, Napoli, Jovene, 2010, at 17. For a brief analysis on the evolution of the concept in the Italian legal system see M. Ainis, M. Fiorillo, *L’ordinamento della cultura. Manuale di legislazione dei beni culturali*, Milano, Giuffrè, 2015, pp. 186 ss.; S. Fo, *La gestione dei beni culturali*, Torino, Giappichelli, 2001, pp. 17 e ss.. On the definition(s) of the concept, with particular reference to the Italian and Chinese legal systems, see S. Novaretti, *Che il passato serva il presente: tutela giuridica dei beni culturali e partecipazione pubblica nella Repubblica Popolare Cinese*, Napoli, ESI, 2017 (forthcoming), Chapter 2, section 2.3.1.

<sup>49</sup> 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, L. 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 comparative lawyers, see also F. Fiorentini, *A Legal Pluralist Approach to International Trade in Cultural Objects*, in J. A. R. Nafzinger and R. Kirkwood Paterson, *op. cit.*, at 589.

<sup>50</sup> I. Baum, *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, *Cardozo Arts & Entertainment Law Journal*, 24/2, 919-952, 2006, at 923.

<sup>51</sup> A. Gambaro, *Il diritto di proprietà*, in *Trattato di diritto civile e industriale*, Milano, Giuffrè, 1995, at 426. On the topic, with particular reference to the material and immaterial values carried by cultural objects see Massimo Severo Giannini’s authoritative opinion in M. S. Giannini, *I beni culturali*, in *Rivista trimestrale di diritto pubblico*, 26/1, 1976, p. 24.

<sup>52</sup> F. Fiorentini, *op. cit.*, at 589.

<sup>53</sup> I. Baum, *op. cit.*, at 923.

<sup>54</sup> J. Blake, *On defining the cultural heritage*, in *International and Comparative Law Quarterly*, 49/1, pp. 61-85, 2000, at 83.

<sup>55</sup> L. Prott and P. J. O’Keefe, *‘Cultural heritage’ or ‘cultural property’?*, in *International Journal of Cultural Property*, 1/2, pp. 307-320, 1992, at 319.

cultural elements (dance, folklore, etc.), which have more recently been deemed entitled to legal protection at the international level<sup>56</sup>.

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 property<sup>57</sup> - certainly encompasses not only immovable but also intangible and/or non-material elements, at least for the civil law countries<sup>58</sup>.

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 Conventions<sup>59</sup>.

According to Professor Li, the concept of “*wenwu*” – mentioned, for the first time, in the “Zuo zhuan” (左传, commentary of Zuo)<sup>60</sup>, 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;
- 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 Republic<sup>61</sup>, a Ming Dynasty vase, a fossilized dinosaur egg<sup>62</sup>, the Forbidden City or the “Daqing first oil well” all constitute “cultural relics”<sup>63</sup>.

These objects differ from ordinary goods in at least one feature: they cannot be reproduced or replaced, once lost<sup>64</sup>. 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 legislation<sup>65</sup>.

But while, as early as 1961, the PRC’s State Council enacted the Provisional Regulations on the Protection and Control of Cultural Relics<sup>66</sup>, it was only in 1982 that, as we have already mentioned, the first Cultural Relics Protection Law

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<sup>56</sup> M. Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, in *International Review of the Red Cross*, 86/854, pp. 347-378, 2004, at 369.

<sup>57</sup> I. Baum, *op. cit.*, at 923.

<sup>58</sup> Manlio Frigo, *op. cit.*, *ibid.*

<sup>59</sup> 李晓东, Li Xiaodong, *op. cit.*, at 6

<sup>60</sup> 李晓东, Li Xiaodong, *cit.* at 1. The Zuo zhuan 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,

<sup>61</sup> 李晓东, Li Xiaodong, *op. cit.*, at 6.

<sup>62</sup> On the protection of this kind of relics in China, see in general Anne Carlisle Schmidt, *op. cit.*

<sup>63</sup> 李晓东, Li Xiaodong, *op. cit.*, at 6, 8.

<sup>64</sup> *Ibid.*, p. 16-17.

<sup>65</sup> See D. J. Murphy, *op. cit.*, at 83.

<sup>66</sup> J. Fresays, *op. cit.*, at 86.

[[http://www.unesco.org/culture/natlaws/media/pdf/china/china\\_lawprotection\\_clt\\_entof](http://www.unesco.org/culture/natlaws/media/pdf/china/china_lawprotection_clt_entof)] (文物保护法, *Wenwu baohu fa* - hereinafter: CRPL) was promulgated<sup>67</sup>.

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 “preciousness of the property”<sup>68</sup>, similar to those implemented in Japan and South Korea<sup>69</sup>.

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* [<http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>] (accessed by China in 2000); the 1972 UNESCO *Convention on the Protection of the World Cultural*

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

<sup>68</sup> 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 T. Lau, *The Grading of Cultural Relics in Chinese Law*, in *International Journal of Cultural Property*, 18/1, pp. 1:35, 2011.

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

*and Natural Heritage* [<http://whc.unesco.org/archive/convention-en.pdf>] (ratified by China in 1985); the 2003 *Convention for the Safeguarding of Intangible Cultural Heritage* [<https://ich.unesco.org/en/convention>] (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* [[http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html)] (accepted by China in 1989) and the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* [<http://www.unidroit.org/instruments/cultural-property/1995-convention>]<sup>70</sup>, 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 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 conventions<sup>71</sup>.

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 Philippines<sup>72</sup>, or the Memorandum of Understanding signed with the US in 2009, and renewed in 2014<sup>73</sup> – 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 1970<sup>74</sup>. The guideline undoubtedly shows a changed attitude in market states' museums<sup>75</sup>, 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

<sup>70</sup> For a brief but comprehensive analysis of these Convention, see S- Gruber, *op. cit.*, at 256 - 271.

<sup>71</sup> H. S. 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](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 J. 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?*, in *Loyola University of Chicago International Law Review*, 3/2, pp. 233-255, 2006, at 239-43; J. Ding, *op. cit.*, at 120-1

<sup>72</sup> 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.

<sup>73</sup> On this MOU, and the problems related to it, see, among others: N. M. Murphy, *The Art of Importing Chinese Objects* [<http://www.chinabusinessreview.com/the-art-of-importing-chinese-objects/>], *China Business Review*, March 1, 2010, and, of the same author, *Establishing the Mandate of Heaven through the Protection of Cultural Relics*, in *Orientations*, 40/ 6 Sep 2009, p. 129; A. L. Marton, *op. cit.*; I. Baum, *op. cit.*

<sup>74</sup> H. S. Zhong, *op. cit.*, at 33.

<sup>75</sup> *Ibid.*

international position and its huge profit market, on the one hand, and using methods that very often imply the (real or fictional) involvement of Chinese citizens, such as purchasing, donating and reclaiming through judicial procedure<sup>76</sup>, on the other<sup>77</sup>.

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 stolen<sup>78</sup>. 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 expires<sup>79</sup>.

In this situation, buying back has become the most feasible approach<sup>80</sup>. 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 world<sup>81</sup> – private purchases made up over 80 per cent of the total antiquities recovered<sup>82</sup>.

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”<sup>83</sup>.

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 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,

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<sup>76</sup> *Reclaiming cultural relics from overseas* [[http://www.chinadaily.com.cn/english/doc/2005-06/14/content\\_451186.htm](http://www.chinadaily.com.cn/english/doc/2005-06/14/content_451186.htm)], China Daily, June, 14 2005.

<sup>77</sup> 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>

<sup>78</sup> H. S. Zhong, *op. cit.*, at. 33.

<sup>79</sup> *Ibid.*

<sup>80</sup> 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.

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

<sup>82</sup> *Ibid.*

<sup>83</sup> *The Effort to Bid for or Purchase Any Chinese Treasure That Have Been Plundered, Stolen or Illegally Exported Are not Encouraged* [<http://www.wenwuchina.com/news/list7/detail37/71320.html>], Wenwu China, November 12, 2010; H. S. Zhong, *op. cit.* note 47, at 36.

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 forces<sup>84</sup>.

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 China<sup>85</sup>. 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 people<sup>86</sup>.

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's<sup>87</sup>.

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 China<sup>88</sup> – 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”<sup>89</sup>.

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 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 PRC<sup>90</sup>.

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

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<sup>84</sup> On the topic, see: J. L. Hevia, *English Lessons: The Pedagogy of Imperialism in Nineteenth Century China*, Durham and London, Duke University Press, 2003, pp. 74 – 118. For more details on the “Two Zodiac Case”, with particular reference to the different methods that could be employed to bring back “Chinese treasures lost overseas” see: L. Ji, *The Two Zodiacs: Possible Methods for Returning Lost Relics to China*, *Art Antiquity and Law*, IV, 2, June 2009, pp. 178-181.

<sup>85</sup> Z. Hua, *Auction of Looted Chinese Relics Hurts China's Cultural Rights* [<http://english.sina.com/china/2009/0226/221567.html>.], February 26, 2009.

<sup>86</sup> B. Demik, *Bronze heads gnaw at China* [<http://articles.latimes.com/2009/feb/24/world/fg-zodiac24>], Los Angeles Times, February 24, 2009.

<sup>87</sup> G. Wong, *China punishes Christies's for auction of relics* [[http://www.foxnews.com/printer\\_friendly\\_wires/2009Feb26/0,4675,ASChinaSaintLaurentAuction,00.html](http://www.foxnews.com/printer_friendly_wires/2009Feb26/0,4675,ASChinaSaintLaurentAuction,00.html)], Foxnews, February 26, 2009.

<sup>88</sup> *Chinese bidder of Looted Sculpture Refuse to Pay* [[http://www.chinadaily.com.cn/china/2009-03/02/content\\_7526153.htm](http://www.chinadaily.com.cn/china/2009-03/02/content_7526153.htm)], Xinhua, March 2 2009.

<sup>89</sup> *Ibid.*

<sup>90</sup> L. Shujuan, *Relics to be returned* [[http://usa.chinadaily.com.cn/china/2013-04/27/content\\_16454737.htm](http://usa.chinadaily.com.cn/china/2013-04/27/content_16454737.htm).], China Daily, April 27, 2013.

the struggle to “never ever forget national humiliation”<sup>91</sup>: 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 relics<sup>92</sup>. 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 culture and the State Administration of Cultural Heritage<sup>93</sup> 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 relics<sup>94</sup>.

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

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

<sup>92</sup> 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.

<sup>93</sup> 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 B. T. Hoffman, *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge, Cambridge University Press, 2006.

<sup>94</sup> *Ibid.*, at 500.



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 decoration<sup>95</sup>. 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 abroad<sup>96</sup>. Here, we briefly remark that there are also “good collectors”<sup>97</sup> 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”<sup>98</sup>.

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 heritage<sup>99</sup> (such as, for example, cultural patronage or sponsorship, as provided for in the legislation of many other countries<sup>100</sup>), 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

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<sup>95</sup> On the different typologies of collectors, see more in detail N. Brodie, *An Archaeologist’s View of the Trade in Unprovenanced Antiquities*, in B. T. Hoffmann, *op. cit.*, at 56.

<sup>96</sup> See *supra*, heading II.A.

<sup>97</sup> 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*, in *African Arts*, 27, 1995; R.T. McIntosh: *Proposition*, in *Public Archaeology*, 1, 2000.

<sup>98</sup> On the subject, see D. Hewitt, *Getting Rich First. Life in a Changing China*, London, Vintage, 2008, at 25-31, and the <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&current=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>.

<sup>99</sup> T. Zijun, *op. cit.*, at 28.

<sup>100</sup> For a brief description of the situation in France, see F. 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 chubn faxing, 2014, at 16 - 30. For the incentives to sponsorship in Italy, see, L. Starola, *La sponsorizzazione dei beni culturali: opportunità fiscali* [<http://www.aedon.mulino.it/archivio/2010/1/starola.htm>.] in *Aedon*, 1/2010.



Law and the Cultural relics protection law<sup>101</sup> and, more in general, to the vague definition of property rights on heritage<sup>102</sup>. 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 terms<sup>103</sup>.

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 good<sup>104</sup>. 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”<sup>105</sup>, 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 front<sup>106</sup>, 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 1991<sup>107</sup>, 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”<sup>108</sup> to article 12.

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<sup>101</sup> 王琛, W. Chen, *op. cit.*, at 5-19. On the subject, see also T. Zijun, *Does the Institution of Property Rights Matter for Heritage Preservation? Evidence from China*, in H. Silverman and T. Blumenfield, *op. cit.*, at 27-30.

<sup>102</sup> T. Zijun, *op. cit.*, at 28.

<sup>103</sup> 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 gongzhong canyu*, in Wang yunxia (zhubian), *Gongzhong canyu wenhua yichan de falü jizhi*, Beijing, Wenwu chubn she chuban faxing, 2014, at 37.

<sup>104</sup> T. Zijun, *cit.*, at 23.

<sup>105</sup> H. Silverman and T. Blumenfield, *Cultural Heritage Politics in China: An Introduction*, *op. cit.*, at 11

<sup>106</sup> W. Yunxia and H. Shuzhong, *Can NGOs Change the Status of Cultural Heritage Protection in China? The Case of CHP as an Example*, in L. Prott, R. Redmond-Cooper and S. Urice, *Realizing Cultural Heritage Law*, Institute of Art and Law, 2013, online: <http://en.bjchp.org/?p=5088>.

<sup>107</sup> D. J. Murphy, *op. cit.*, p. 95

<sup>108</sup> *Ibid.*

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 property<sup>109</sup>, even though what a black market middle man would pay for a relic is only a very small fraction of its value<sup>110</sup>.

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, as provided for by other jurisdictions<sup>111</sup>, or to establish a national fund for the protection of cultural relics, which could finance the monetary awards under article 12<sup>112</sup>. 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 warriors<sup>113</sup>.

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”<sup>114</sup>.

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”.*

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<sup>109</sup> Ibid. See also A. Carlisle Schmidt, *op. cit.*, at 206.

<sup>110</sup> On the topic, see H. Beech, *op. cit.*,

<sup>111</sup> 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, W. Chen, *op. cit.*, at 24. For example, in Italy, the award cannot be higher than a quarter of the value of the property. See art. 92 of the Italian d.lg. 22 gennaio 2004, n. 42, *Codice dei Beni Culturali e del Paesaggio* [<http://www.aedon.mulino.it/archivio/2015/3/codice.htm>]. In this regard, it is worth mentioning that the Chinese authors very often take the Italian experience as reference, seeming to appreciate a lot the successes in terms of “social education to cultural heritage” and incentives for public participation reached by our Country. This is not surprising, considering that Italy and China are both Source-Nations, with a huge cultural heritage. On the topic, see 张国超: “意大利公众参与文化遗产保护的经验和启示”, 中国文物科学研究, 第 1 期, 2013 年-03 月 15 日, Z. Guochao, *Yidali gongzhong canyu wenhua yichan baohude jingyan yu qishi* (The Italian model and experience in public participation in the protection of cultural heritage), *Zhongguo wenwu kexue yanjiu*, n. 1, 15 marzo 2013. Italy and China, however, are completely different from the administrative point of view, as the Italian system is highly centralized, while the Chinese system is highly decentralized. On the topic see in general, L. Zan, S. Bonini Baraldi, *Managing Cultural Heritage in China. A View from the Outside*, in *The China Quarterly*, 210, 2012, pp. 456–481 and P. Ferri and L. Zan, *Economia e gestione delle partnership nei Beni culturali. Riflessioni sull'esperienza di Ercolano* [<http://www.aedon.mulino.it/archivio/2014/3/zan.htm>], in *Aedon*, 3/2014.

<sup>112</sup> A. K. Maus, *op. cit.*, at 421, .

<sup>113</sup> M. L. Dutra, *op. cit.*, at 46.

<sup>114</sup> On the impact of the revision on the possibility to file “public interest litigation in China” see, in general, S. 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.

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 organization<sup>115</sup>. 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.

At the moment, therefore, no NGOs involved in the preservation of cultural heritage can engage in public interest litigation in mainland China<sup>116</sup>.

## 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”<sup>117</sup>. 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*”<sup>118</sup>, 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.

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<sup>115</sup> On the subject, see S. 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.

<sup>116</sup> On the topic, see, in general: 王云霞 (主编), *op. cit.*, part three.

<sup>117</sup> B. Liu, *Cultural Policy in the People’s Republic of China. Letting a hundred flowers blossom*, *cit.*, at. 15.

<sup>118</sup> *Ibid.*

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.

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 "Measure for Public Participation in Environmental Protection" (环境保护公众参与办法 *Huanjing baohu gongzhong canyu banfa*) enacted by Ministry of Environmental Protection on July 13, 2015<sup>119</sup>.

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.

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<sup>119</sup> See "Measure for Public Participation in Environmental Protection" (环境保护公众参与办法 *Huanjing baohu gongzhong canyu banfa*) enacted by Ministry of Environmental Protection with order n. 35 on July 13, 2015.