

COMMENTARIES

Luis Javier Capote Pérez*

lcapote@ull.es
Departamento de Disciplinas Jurídicas Básicas
Área de Derecho Civil
Universidad de La Laguna
Campus de Guajara
38071 La Laguna, Tenerife, Spain

Cultural Heritage and Spanish Private Law**

Abstract: This article offers a brief analysis of the public/private law divide in relation to the legal protection of cultural heritage in Spain. First, it provides an overview of the Spanish public law regime for the protection of historic and artistic heritage, comprising the list of categories of cultural goods. Second, the article endeavours to explain the impact of this public law regime on property rights. In particular, it explores and substantiates how and to what extent the general interest of the community in safeguarding and preserving cultural heritage, provided by public law regulations and enforced by public administration, may limit the property rights of private owners of cultural assets.

Keywords: cultural heritage, civil law, contracts, ownership, private property rights

* **Luis Javier Capote-Pérez** is a Lecturer in Private Law at the Faculty of Law of the University of La Laguna, San Cristóbal de La Laguna, Tenerife, Spain. He holds a Ph.D. in Law from this university. His research interests include: tourism, Land Register, family law, cultural and intellectual property, and the gender perspective of private law. Professor Capote-Pérez is a member of many university institutions, such as the Cultural Cathedra “Francisco Tomás y Valiente” of the University of La Laguna. He is also a member of the Editorial Board of the “Santander Art and Culture Law Review”.

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Introduction

The traditional distinction and division between public and private law has been, if not disappearing, at least currently fading in many areas of the Spanish legal system.¹ The reason for this is the increasing intervention of public powers in areas traditionally assigned to private and personal legal domains. There are many public rules in force today that deeply affect the private sphere. At the same time, there are also cases where public law uses private law and, more precisely, its institutions and mechanisms. The regulation and governance of cultural heritage constitutes a good example of such current interactions, tensions, and developments in relation to the public-private law divide under Spanish law.

The importance and value of cultural, historical, and artistic heritage are widely recognized under international, regional, and national laws. In fact, cultural heritage is today perceived as one of the core elements of social, economic, and cultural development, and ever more often is guised as a global common good, to which humanity is both the custodian and beneficiary.² Art and cultural objects form separate classes of objects, which speak about the human condition and mirror the living conditions of individuals and communities. They offer knowledge about the creative process and the identity of those groups responsible for their production. Cultural heritage expresses continuity between the past and the present, introduces the idea of cultural identity, and explains our fascination with antiquities.³

Cultural heritage is a telling and concrete example of the public law/private law dichotomy. On one hand, there is the idea of “cultural heritage” as “collective ownership” or “stewardship”.⁴ On the other hand, and particularly when cultural goods are owned by private or public persons, the question of “property” comes to the fore, conceived here as a private right.⁵ This article focuses on the legal balance between the collective general interest – governed by public law – and individual rights – governed by private law – in light of the Spanish historical heritage legislation and selected court decisions.

¹ For instance, see F. Velasco Cabellero, *The Public-Private Law Divide in Spanish Law*, in: M. Ruffert (ed.), *The Public-Private Law Divide: Potential for Transformation?*, British Institute of International and Comparative Law, London 2009, pp. 123-142; for a more general discussion, see C. Harlow, “Public” and “Private” Law: Definition Without Distinction, “The Modern Law Review” 1980, Vol. 43(3), pp. 241-265. See also M.J. Horwitz, *The History of the Public / Private Distinction*, “University of Pennsylvania Law Review” 1982, Vol. 130(6), pp. 1423-1428. K. Barker, *Private Law: Key Encounters with Public Law*, in: K. Barker, D. Jensen (eds.), *Private Law: Key Encounters with Public Law*, Cambridge University Press, Cambridge 2013, pp. 3-42.

² In particular, see Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018), OJ L 131, 20.05.2017, p. 1.

³ For instance, see C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Edgar Publishing, Cheltenham 2015, pp. 1-5.

⁴ D. Gillman, *The Idea of Cultural Heritage*, 2nd edn., Cambridge University Press, Cambridge 2010, pp. 9-40.

⁵ On the dichotomy between “heritage” and “property”, see for instance V. Vadi, H. Schneider, *Art, Cultural Heritage and the Market: Legal and Ethical Issues*, in: V. Vadi, H. Schneider (eds.), *Art, Cultural Heritage and the Market: Ethical and Legal Issues*, Springer, Heidelberg 2014, pp. 2-6.

Indeed, culture and historic heritage are two interlinked areas, where the demarcation between public law and private law becomes blurred. Thus, the study of historic and artistic heritage requires a brief explanation of the actual concept of right of ownership under Spanish law. The traditional notion of ownership is enshrined under Article 348 of the Spanish Civil Code (1889 Código Civil, CC):⁶ “Ownership is the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws. The owner shall have an action against the holder and the possessor of the property to claim it”. This notion was, however, modified and complemented by constitutional regulation under Article 33 of the Spanish Constitution (1978 Constitución Española, CE):⁷

The right to private property and inheritance is recognized. The social function of these rights shall determine the limits of their content in accordance with the law. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law.

Hence, the classic definition of ownership as the right to use and dispose of, with no limits except legal ones, is now limited by a principle defined as “the social function of property”. This adds a new dimension to the private domain, adapted to include an elastic condition which may exclude other classic aspects of the right believed to be absolute. The constitutional recognition of the right to private property does not introduce a new definition of ownership different from that contained in the CC, but provides for new limitations based on the concept of a social function – a general but variable limit, depending on the kind of ownership and the social interest – but nevertheless a concrete justification for interference into specific ownership rights.⁸

The social function of property rights is a concept with many concrete definitions. Firstly, and generally, it can be defined as an intrinsic limit on private property rights, established by the CE but carried out by laws, under the premise that there are collective interests which take precedence over individual ownership. Based on this assumption, freedoms traditionally inherent to private property ownership can be adjusted, depending on the concrete object of each ownership right.⁹ Therefore, the concretization of this social function depends on the good

⁶ Código Civil [Civil Code], 25 July 1889, Boletín Oficial del Estado, 1889, No. 206, Ref. BOE-A-1889-4763; for English translation consult: http://www.wipo.int/wipolex/en/text.jsp?file_id=221319.

⁷ Constitución Española [Spanish Constitution], 29 December 1978, Boletín Oficial del Estado, 1978, No. 311, Ref. BOE-A-1978-31229; for English translation consult: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

⁸ The evolution of right of property occurs parallel to other institutions (like unjust enrichment) under a more solidary and socially enriching perspective. G. Orozco Pardo, E. Pérez Alonso, *La tutela civil y penal del patrimonio histórico, cultural y artístico*, McGraw-Hill, Madrid 1996, pp. 7, 21.

⁹ Concrete variations of the adjustment have caused the idea of there is not one and only concept of ownership, but many definitions of ownerships and depending on each legal framework.

or the object, and establishes a different content with respect to each property right. Depending on the nature of the good the legal framework is different, and as a result, a specific property right may or may not include specific freedoms for its holder. In Spanish law there are many examples of these kinds of rules in Urban law (urban property); Ley de Montes – the 2003 Forests Act (estates adjacent to common forests);¹⁰ Ley de Costas – the 1988 Coasts Act (encompassing estates adjacent to maritime-terrestrial public domains)¹¹ or natural heritage.

So what is the social function of property rights in relation to the protection of cultural heritage? Cultural or historic-artistic heritage¹² is defined, according to the 1985 Spanish Historical Heritage Act (Ley del Patrimonio Histórico Español, LPHE)¹³ as a group of movable and immovable goods with artistic, historical, paleontological, archaeological, ethnographical, scientific, or technical interest or value. This definition includes documentary and bibliographical heritage, archaeological sites, natural sites, gardens, and parks with artistic, historic, or anthropologic value. All these goods are defined by a character of historicity, because the LPHE establishes a special status in accordance with notions of time and space. The notion of time under the LPHE includes different possibilities of application. On one hand, there is the general idea of time as an expression of an historical dimension: it is not time as an accumulation of years, but as an expression of historical value. On the other hand, there are special rules for goods where the time factor is defined by several years of existence, for instance documentary and bibliographical heritage goods. According to Article 49 LPHE, documentary heritage goods are integrated documents from public and private entities older than a concrete number of years. Under Article 50 LPHE, bibliographical heritage goods are composed of manuscripts and printed works with three or less existent copies. Cultural value is, in the end, the determinative element in defining historical-artistic heritage. One should bear in mind that there is always culture in every human activity. The presence of one person implies the existence of culture. Yet the actual “heritagization” requires

¹⁰ Ley 43/2003 de Montes [Forests Act], 21 November 2003, Boletín Oficial del Estado, 2003, No. 280, Ref. BOE-A-2003-21339.

¹¹ Ley 22/1988 de Costas [Coasts Act], 28 July 1988, Boletín Oficial del Estado, 1988, No. 181.

¹² Cultural heritage history, concept, and its deciding characters are defined by doctrine. For example, R. Parada, *Derecho administrativo*, Vol. III: *Bienes públicos. Derecho urbanístico*, Marcial Pons, Madrid 1983, p. 274; C. Barrero Rodríguez, *La ordenación jurídica del patrimonio histórico*, Instituto García Oviedo, Universidad de Sevilla, Ed. Civitas, Madrid 1990, p. 120; J. Rams Albesa, R. Moreno Flórez (eds.), *Comentarios al Código Civil*, Vol. III: *Libro segundo (Títulos I a VIII)*, J.M. Bosch, Barcelona 2001, p. 78 ff.; J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, pp. 1-6; M. Vecco, *A Definition of Cultural Heritage: From the Tangible to the Intangible*, “Journal of Cultural Heritage” 2010, Vol. 11, pp. 321-324.

¹³ Ley 16/1985 del Patrimonio Histórico Español [Spanish Historical Heritage Act], 25 June 1985, Boletín Oficial del Estado, 1985, No. 155, Ref. BOE-A-1985-12534. It has to be advertised that, according with the distribution of competences established in CE, there are also regional acts in almost every Spanish autonomous region. For a brief description of relations between national and regional historical heritage laws, *vid.* M.J. Aznar-Gómez, *Spain*, in: S. Dromgoole (ed.), *The Protection of the Underwater Cultural Heritage*, 2nd edn., Martinus Nijhoff Publishers, Leiden – Boston 2006, pp. 275-282.

an assessment of the value of a given cultural manifestation in a determined historical or artistic context. There are some theoretical constructions designed to establish a common concept or denominator for all categories of cultural heritage. One of them refers to the notion of cultural goods, where the adjective “cultural” is used to establish its belonging to the history of civilization. The historical dimension concretizes the ambiguous definition of culture; a cultural good is a testimony of the past. Thus, the concept of heritage is defined by two aspects: culture and history.¹⁴

In considering the social value of cultural heritage, this article will attempt to analyse how the idea of cultural heritage as collective stewardship and maintaining the legacy of the past for the present and future generations affects concrete private property rights and restricts the freedoms of their owners when a specific good is considered as part of the Spanish historical heritage. To this end, the application of the social function of private property rights in their concrete cultural dimensions is examined by referring to regulatory regimes and selected judicial practice.

Characteristics of Cultural Heritage in Spanish Law

Every historical-artistic good is defined by its value in a spatial-temporal perspective and in its cultural dimension. Heritage is a concept to which most people assign a positive value, and the preservation of material and intangible culture is generally regarded as a shared common good by which everyone benefits.¹⁵ These conditions constitute the basis for special regulations under the general expression of cultural heritage law,¹⁶ because of their objective to conserve, divulge, and spread culture. Beyond individual rights there is a general interest: there could not be liberty, equality, or real democracy without a culture solidly established in society.¹⁷ In Spanish law, Article 46 CE requires public powers to assume and promote the protection of Spanish cultural heritage, giving them great powers to undertake that mission.¹⁸

¹⁴ C. Barrero Rodríguez, op. cit., p. 119 ff. and 171. L. Díaz Vilela, *¿Qué es esa cosa llamada cultura?*, part of the university extension course “Ciencia y pseudociencias 2006”, Universidad de La Laguna, March – May 2006. C. Barrère, *Cultural Heritages: From Official to Informal*, “City, Culture and Society” 2016, Vol. 7, pp. 87-94.

¹⁵ H. Silverman, D.F. Ruggles, *Cultural Heritage and Human Rights*, in: H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007, p. 3.

¹⁶ In Spanish law, there are other regulations concerning historical and artistic heritage, not only in the previously-mentioned autonomous regions laws, but also in other national acts, such as the 2015 Protection of Intangible Heritage Act (Ley 10/2015 para la salvaguardia del Patrimonio Cultural Inmaterial, 26 May 2015, Boletín Oficial del Estado, 2015, No. 126, Ref. BOE- 2015-5794).

¹⁷ G. Orozco Pardo, E. Pérez Alonso, op. cit., p. 42.

¹⁸ Article 46 CE: “The public authorities shall guarantee the preservation and promote the enrichment of the historical, cultural and artistic heritage of the peoples of Spain and of the property of which it consists, regardless of their legal status and their ownership. The criminal law shall punish any offences against this heritage”. This constitutional precept has its origin in the 1931 Spanish Second Republic Constitution, which via Article 45 introduced the first rule in Spanish law to combat the pillaging and plundering of Spanish heritage. A. Pérez de Armiñán y de la Serna, *Las competencias del Estado sobre el Patrimonio Histórico Español en la Constitución de 1978*, Cuadernos Civitas, Madrid 1997, p. 37.

The historical value of a good implies granting it a special status to enable its protection. Accordingly, the formal classification of a good as a cultural one includes an array of obligations and charges. That imposition is a direct consequence of the axiological and policy objective, enshrined in the 1978 Constitution and the LPHE, to enable more and more people to be able to benefit from the cultural value of the good. Cultural heritage includes goods in private hands, in which case the cultural stewardship should be managed together with ownership rights. Thus, private property rights in cultural goods are demarcated by the general limits of the social function. In this context, that limit is the defence of culture as a collective interest of everyone¹⁹ and particularly affects the freedoms of disposal. In this context, “everyone” includes present and future generations, and not only Spaniards, because *voluntas legis* conceives culture as an universal good (an “universal universality”).²⁰ The discussion about the universal, national, or local nature of cultural heritage is very interesting and transcends national law rules.²¹ The constitutional duty to protect and encourage culture introduces a limit defined by the “pro-monument” principle – that the cultural value of every good declared as part of historical-artistic heritage takes precedence over private rights to it; or the “pro-culture” principle – that the preservation of cultural heritage goods is more important than private interests. In private property rights over these kind of goods, the ancient *ius abutendi* or “right to abuse” is forbidden and marks the frontier between the possibilities for use and the prohibitions placed on a private owner of a cultural good. The social function of ownership acts here as a concrete form of the objective of preservation of historical-artistic goods, in the name of their cultural value. The collective benefits derived from their conservation justifies the imposition of limitations on ownership.

The establishment of a special set of rules for certain goods belonging to private owners places additional limits alongside the general ones that define contemporary property rights. As a result, some freedoms or rights normally held by owners are going to be restricted. In this scenario, activities which are legal for goods not defined as cultural heritage could be declared as illegal for goods considered as cultural heritage. Public rules thus affect the validity and execution of private contracts signed to record the transfer of ownership of historical-artistic goods.

¹⁹ Article 1 LPHE declares that the purposes of historical heritage regulation are “the protection, promotion and transmission to future generations of Spanish Historical Heritage”, in accordance with the duty imposed by Article 46 CE.

²⁰ The definition of culture as the right of everyone (*droit subjetif de tous*) in Spanish law can be found in M. Cornu, J. Fromageau, C. Wallaert (coords.), *Dictionnaire comparé du droit du patrimoine culturel*, CNRS Éditions, Paris, 2012, pp. 63.

²¹ Compare J. Blake, *op. cit.*, p. 12. Also, and linked with the return of the cultural artifacts debate, see A. Taşdelen, *The Return of Cultural Artefacts. Hard and Soft Law Approaches*, Springer International Publishing, Cham 2016, pp. 1-6.

In Spanish law, the concept of historical-artistic heritage includes different categories of goods (see Table 1 below). First, there are properties of cultural interest (*bienes de interés cultural*; Articles 9 to 39 LPHE), comprising both immovable property and movable objects. In reference to immovable property (*bienes inmuebles de interés cultural*; Articles 14 to 25 LPHE) there are five specific categories of protected sites and buildings:

- 1) historical monuments (*monumentos históricos*; Article 15(1) LPHE) – immovable property comprising architectural or engineering work or works of colossal sculpture shall be monuments provided they are of historical, artistic, scientific, or social interest;
- 2) historical gardens (*jardines históricos*; Article 15(2) LPHE) – delimited areas resulting from the organization by mankind of natural elements, sometimes complemented with constructions and considered of interest because of their origins or historical past or their aesthetic, sensory, or botanical value;
- 3) historical unities (*conjuntos históricos*; Article 15(3) LPHE) – groups of immovable properties forming one continuous or dispersed unit of settlement, distinguished by a physical structure representing the development of a human community, in that it testifies to their culture or constitutes a value for public use and enjoyment;
- 4) historical sites (*sitios históricos*; Article 15(4) LPHE) – places or natural landscapes linked to events or memories of the past or to popular tradition, cultural, or natural creations and works of mankind having historical, ethnological, paleontological, or anthropological value;
- 5) archaeological areas (*zonas arqueológicas*; Article 15(5) LPHE) – places or natural landscapes where there are movable or immovable objects that can be studied using archaeological methodology, whether or not they have been extracted and whether they are to be found on the surface, underground or below Spanish territorial waters.

With respect to movable (chattel) property (*bienes muebles de interés cultural*; Articles 26 to 34 LPHE), movable goods defined by their cultural interests should be recorded in a special inventory.²² Owners or possessors of these kinds of goods shall notify the public administration of the existence of such objects before proceeding to sell or transfer them to third parties. The same obligation is established for individuals or entities that habitually carry out trade in movable property forming part of the Spanish historical heritage, who are also required to formalize with the administration a register of any transfer made of such objects. This is a concrete example of a limitation on the traditional freedom of owners due to the protection of cultural heritage.

²² According to Article 26(1) LPHE, the elaboration and control of the Inventory depends on State Administration, collaborating with Autonomous Administrations.

The second large category is archaeological heritage (*bienes del patrimonio arqueológico*; Articles 40 to 45 LPHE). This category includes movable or immovable properties of a historical nature that can be studied using archaeological methodology, whether or not they have been extracted or whether they are to be found on the surface or underground, in territorial seas or on the continent itself. The category also encompasses geological and paleontological elements relating to the history of mankind and its origins and background, including caves, shelters, and places containing expressions of cave art.

The third large category is ethnographic heritage (*bienes del patrimonio etnográfico*; Articles 46 and 47 LPHE). This category includes movable or immovable properties and knowledge and activities that are or have been a relevant expression of a traditional culture of the Spanish nation in its material, social, or spiritual aspects. Under this category, the legal regulation distinguishes:

- 1) immovable properties (*bienes inmuebles*; Article 47(1) LPHE) – any buildings and installations whose method of construction is an expression of knowledge acquired, established, and transmitted by custom, and whose creation belongs totally or partially to a type or form of architecture traditionally used by communities or human groups;
- 2) movable properties (*bienes muebles*; Article 47(2) LPHE) – all objects that constitute the expression or the product of labour, aesthetic, and pleasure activities of any human group that are established and transmitted by custom;
- 3) knowledge and activities (*conocimientos y actividades*; Article 47(3) LPHE) – this includes knowledge and/or activities derived from traditional models or techniques used by a specific community.

Finally, there is another category: documentary and bibliographical heritage (*bienes del patrimonio documental y bibliográfico*; Articles 48 to 58 LPHE). This category includes a great number of elements which have in common cultural testimony through all types of data formats, concretized in concepts like “document” and “library”.

There are many differences between these categories. However, the LPHE establishes a system of rules whereby any object possessing the character of historic heritage is subject to defined limitations on the rights inherent in all private property rights over these special goods. These restrictions have consequences in the domain of private law, in particular in contractual relations where the object of the contract concerns things defined by their cultural value. The above-mentioned categories encompass a variety of cultural manifestations: tangible – movable or immovable – properties; and intangible – traditional activities, knowledge, and practices. These include goods whose value is defined by the course of time, and goods protected for their intrinsic historical and artistic significance. They encompass properties subject to private ownership rights, properties which are part of the public domain, and traditions linked to a community and not conceived as prop-

erty. The common factor of “cultural value” is concretized in various ways, so the specific influence of heritage value and its precedence over private property rights depends on the specific category to which each good has been classified.

Table 1. Historic-artistic heritage under Spanish law

HISTORIC-ARTISTIC HERITAGE UNDER SPANISH LAW						
Properties of cultural interest		Archaeological heritage	Ethnographic heritage		Documentary and bibliographical heritage	
Articles 9 to 39 LPHE		Articles 40 to 46 LPHE	Articles 46 and 47 LPHE		Articles 48 to 58 LPHE	
Immovable properties	Movable properties		Immovable properties	Movable properties		Knowledge and activities
Articles 14 to 25 LPHE	Articles 26 to 34 LPHE		Article 47(1) LPHE	Article 47(2) LPHE		Article 47(3) LPHE
IMMOVABLE PROPERTIES OF CULTURAL INTEREST						
Historical monuments Article 15(1) LPHE	Historical gardens Article 15(2) LPHE	Historical unities Article 15(3) LPHE	Historical sites Article 15(4) LPHE	Archaeological areas Article 15(5) LPHE		

Source: Author’s own elaboration.

Historical Heritage Law and Private Property Rights

As already mentioned, the enumeration of historical heritage categories under the LPHE creates a multiplicity of goods that can be included into the general concept of historical heritage. Therefore it should be pointed in advance that the effects which take precedence over private property rights in any given object will be different, depending on the specific type of cultural heritage to which the object is ascribed. While the nature of such limits vary, they can be assembled into the following groups.

If immovable properties are defined by their character as archaeological heritage, Spanish law establishes that they belong to public property.²³ Private ownership is thus substituted by the public domain.²⁴ Next, there is an important limitation on the freedom of management of immovable properties of cultural interest, which

²³ Article 44(1) LPHE: “All objects and material remains possessing the values of the Spanish Historical Heritage that are discovered as a result of excavations, earth moving or works of any type or by chance are considered to be part of the public domain”.

²⁴ For more on the public property/public domain concept in Spanish law, see L. Capote Pérez, *Dominio público y Registro de la Propiedad*, “Revista General de Legislación y Jurisprudencia” 2006, Vol. 1, pp. 107-126. For more on the regulation of archaeological heritage as part of the public domain, and its origins, see J.F. Gabardón de la Banda, *La regulación del Patrimonio Arqueológico como dominio público a raíz de la promulgación de la ley de 1911: un antecedente de la Ley 16/1985*, “Anuario Jurídico y Económico Escurialense” 2014, Vol. 47, pp. 263-284. See also J. Barcelona Llop, *El dominio público arqueológico*, “Revista de Administración Pública” 2000, Vol. 151, pp. 133-165.

imposes on private owners the duties of conservation, maintenance, and integrity. Cultural properties cannot be separated from their surroundings unless there are *major* causes.²⁵ Private owners are not free to execute modifications over these immovable properties, and must avoid or minimize risks relating to a loss of their cultural value.²⁶ Private owners are also responsible for preserving and safeguarding.²⁷ These duties are also extended to holders of limited real rights or possessors of such properties. Finally, there is also a limitation on the freedom of disposal of properties of cultural interest, ethnographic, bibliographic, and documentary heritages. This restriction is established under different legal formulas by the LPHE.

The first one consists in the prohibition of disposal via international art markets. Accordingly, private owners are not allowed to freely sell properties of cultural interest and export them outside Spanish territory. Their freedom of disposal is thus restricted, and contracts signed concerning the disposal of these goods in violation of that restriction are null and void.²⁸ According to Articles 6(3)²⁹ and 1255 CC,³⁰ this public prohibition has precedence over private rights, and such contracts may be annulled.³¹ This interdiction is extended to both movable and immovable properties, because modern techniques allow for the removal of both categories of property from their original places. One example of this kind of removal can be found in the operation to save the Abu Simbel monuments and temples during the construction of the Aswan Dam in the 1960s. One of the preserved properties was the Temple of Debod, dismantled and rebuilt in Madrid.

The second restriction refers to the rights of pre-emptive purchases and redemption (on the national art market) vested in the Spanish State and Autonomous

²⁵ Article 18 LPHE: "An immovable property considered to be of cultural interest is inseparable from its surroundings. It cannot be displaced or moved unless this is essential for reasons of *force majeure* or social interest".

²⁶ Articles 19 to 22 LPHE.

²⁷ Article 36(1) LPHE: "Property forming part of the Spanish Historical Heritage shall be preserved, maintained and safeguarded by its owners or, where appropriate, by the holders of real rights or the possessors of such property".

²⁸ The LPHE also sanctions the violation of this interdiction by its attribution to the State of the ownership of any movable property exported without authorization. Article 29(1) LPHE: "Any movable property belonging to the Spanish Historical Heritage that is exported without the authorization required under Article 5 of this Law belongs to the State. It is inalienable and cannot lapse". For more on the characteristics of this interdiction, see F. Gómez Galligo and V. Domínguez Calatayud in: M. Albaladejo, S. Díaz Alabart (eds.), *Comentarios al Código Civil y compilaciones forales*, Vol. VIII,4: *Artículos 18 a 41 de la Ley Hipotecaria*, Editoriales de Derecho Reunidas, Madrid 1999, pp. 182, 195.

²⁹ Article 6(3) CC: "Acts contrary to mandatory and prohibitive legal provisions shall be null and void by operation of law, unless such legal provisions provide for a different effect in the event of a breach".

³⁰ Article 1255 CC: "The contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, to morals, or to public order".

³¹ J. Delgado Echeverría, M.A. Parra Lucán, *Las nulidades de los contratos. En la teoría y en la práctica*, Dykinson, Madrid 2005, p. 51.

Regions.³² The LPHE and regional legislation on the protection of cultural heritage entitles national or regional administrations to pre-emptively purchase cultural properties if their owners decide to sell them. These public authorities are established as the holders of these rights, which gives them the right of first purchase of cultural property alienated by private owners. Moreover, they may also exercise the right of redemption, which provide for the “re-purchase” of those properties from the purchaser if the original owner (seller) failed to notify the administration of the sale of a cultural property, thus preventing the authorities from exercising their right of pre-emptive purchase.³³ Hence it seems clear that the significance of a given property to historical heritage may result in the imposition of limitations on the freedom of its disposal. These restrictions operate in both the external and domestic commerce areas. All contracts in external commerce which violate the prohibition on disposal, or in domestic commerce which violate or contravene public rules which place legal limits on property rights, shall be declared void. Thus, it can be seen that contracts with respect to international circulation of property of cultural interest are burdened with a public law interdiction with private law consequences. Public penalties, nullity of contractual operations, and expropriation are the sanctions for violations of this prohibition. In domestic commerce, violation of pre-emption rights does not nullify contracts concerning cultural property of heritage significance.

Limitations on the freedom of alienation contained in the LPHE are developed in the 1986 Historical Heritage Ordinance (“1986 Ordinance”).³⁴ This legal instrument provides for mechanisms to control the exportation of cultural heritage goods. It also establishes a specialized body: the Committee for Qualification, Valorisation and Exportation of Spanish Historical Heritage Goods (Junta de Calificación, Valoración y Exportación de Bienes del Patrimonio Histórico Español). Its competences

³² For more on these kinds of real rights under Spanish private law, see M. Albaladejo, *Derecho civil*, 10th edn., Vol. III: *Derecho de bienes*, Edisofer, Madrid 2004, pp. 799 ff.; R.M. Roca Sastre, L. Roca-Sastre Muncunill, *Derecho hipotecario, fundamentos de la publicidad registral*, 8th edn., revised and actualized, Bosch, Barcelona 1995, pp. 525. J.L. Lacruz Berdejo et al., *Elementos de derecho civil*, 2nd edn., Vol. III(2): *Derechos reales. Derechos reales limitados. Situaciones de cotitularidad*, revised and actualized by A. Luna Serrano, Dykinson, Madrid 2004, pp. 327 ff.; L. Díez-Picazo, A. Gullón, *Sistema de derecho civil*, 7th edn., Vol. III: *Derecho de cosas y derecho inmobiliario registral*, Editorial Tecnos, Madrid 2001, pp. 511 ff.; M.A. Pérez Álvarez et al., *Curso de derecho civil*, Vol. III: *Derechos reales*, Ed. Colex, Madrid 2004, pp. 624 ff.; F. Blasco Gascó et al., *Derecho civil. Derechos reales y derecho inmobiliario registral*, Tirant lo Blanch, Valencia 2001, pp. 417 ff.

³³ Article 38 LPHE: “1. Any person wishing to sell a property declared of cultural interest or included in the general Inventory referred to in Article 26 shall duly notify the organizations mentioned in Article 6 and declare the price and conditions proposed for the sale. Auction houses must also give due notification in advance of public auctions in which it is planned to sell any property forming part of the Spanish Historical Heritage. [...] 3. When the intention to sell is not properly notified, the State Administration may, on the same terms as those for the right of pre-emption, exercise its right of redemption within a period of six months after the date on which it receives reliable information concerning the sale”.

³⁴ Real Decreto 111/1986 de desarrollo parcial de la Ley 16/1985 del Patrimonio Histórico Español, 10 January 1986, Boletín Oficial del Estado, 1986, No. 24, Ref. BOE-A-1986-2277.

include: 1) to decide on petitions for exportation, pursuant to Article 5(2) LPHE; 2) to inform the appropriate institutions about petitions for temporary exportation outside Spanish territory, in accordance with Article 31 LPHE; 3) to establish the value of unlawfully exported cultural goods in order to determine sanctions. Furthermore, the 1986 Ordinance establishes rules to control and guarantee the efficiency of restrictions on freedoms of disposal in both their national and international dimensions. On one hand, it imposes a procedure for requesting authorization to export cultural heritage properties outside of Spanish borders. On the other hand, it reinforces the effectiveness of pre-emption and redemption rights.

Following this brief summary of the regulatory regime for the protection of cultural heritage and its effects on private property rights, the practical operationalization of these regulations is examined and contextualized by reviewing five different cases which refer to specific categories of cultural property.

The first case concerns the fate of General Yagüe's documentary heritage (Judgment of the Appellate Court of Soria No. 56/2009, 27 March 2009).³⁵ This arose from a controversy between brothers and sisters, children of General Juan Yagüe Blanco (1891-1952) about the end use of their father's documental archive. The General was a Spanish army officer during the Spanish Civil War and one of the most important soldiers of Francisco Franco Bahamonde. After the war, he held important positions in the dictatorial Franco government and his heritage contains many documents from that period. This heritage includes many public records, related to the fact that General Yagüe held several official positions. The claimants and defendant acted as private owners of this documentary heritage, with both sides invoking private law rules about co-ownership. However, the judgments in both the first and second instance courts declared the cultural heritage nature of this documentation, according to public law rules. As a result, the Appellate Court's judgment concluded that the inheritors of Yagüe's archive were not the co-owners of that archive, but mere co-possessors. The cultural value of this file took precedence over the private interests of the heirs, because it was composed primarily of public documents possessed by the General owing to his public position, and remained in his possession beyond the time he held the posts by which he collected them. The right of ownership was refused to the inheritors and their legal status was reduced to having only the right of possession.

The second case concerns the relationship between movable or immovable dimensions of cultural heritage (Judgment of the Supreme Court No. 305/2000, 30 March 2000).³⁶ More precisely, it rules on the movable or immovable nature of

³⁵ Appellate Court of Soria (Spain), *Santos et al. v. Teodora*, Judgment of 27 March 2009, No. 56/2009. The case law discussed in this article can be found using the search engine of Spanish Judicial Power Documentary Center (CENDOJ). In this first case, the reference is: ROJ: SAP SO 44/2009 – ECLI: ES:APSO:2009:44.

³⁶ Supreme Court (Spain), *Pedro Jesús v. the State of Spain*, Judgment of 30 March 2000, No. 305/2000, ROJ: STS 2607/2000 – ECLI: ES:TS:2000:2607.

some tiles made by Juan Ruiz de Luna (1863-1945), a famous Spanish ceramist. He was the heir of the pottery tradition of the town of Talavera de la Reina, famous and well known since the Spanish Golden Age. The works subject to the judgment of the Supreme Court consisted of tiles that covered walls in one of the rooms of Palacio de Velada in Talavera de la Reina. The palace was built in the 16th century by Gomez Dávila y Toledo, Marquis of Astorga and Velada, and its walls depicted many curious episodes in the history of Spanish Royal Families, in the form of little stories like honeymoons or births, all of them in an ambience of cultural and artistic curiosity. In 1972, the owners sold those ceramics to the Spanish State, but maintained their possessions until their removal to a projected museum dedicated to Ruiz de Luna's oeuvre. In 1985, the owners sold the palace to a private buyer. The purchaser claimed that the tiles are immovable goods because they were joined to the room on a fixed basis and could not be separated without breaking them. In support of this position, the new owner of Palace invoked the rules contained in Article 334(3) CC: "The following are immovable goods: anything which is joined to an immovable good on a fixed basis, so that it cannot be separated therefrom without breaking the material or impairing the object". According to Spanish private law, these kinds of goods are called immovable goods by incorporation (*bienes inmuebles por incorporación*). The Supreme Court did not recognize this argumentation and held that tiles constituted an independent object of property rights if they could be removed without deterioration or destruction, separated from the immovable structure. Therefore, it held that the LPHE rules on movable objects should apply.³⁷ The consequence of the Court's ruling was the reiteration of the ownership of the Spanish State over the collection of tiles, because this right is imprescriptible according to Article 28(3) LPHE,³⁸ and the ceramics could be separated from the room's walls.

The next case relates to the movable and immovable characteristics of a sculpture by Salvador Dalí i Domènech (Judgment of the Supreme Court No. 5183/2009, 22 July 2009).³⁹ *Dolmen*, a monumental sculptural unity created by Dalí, was placed in a square in Madrid dedicated to this Catalanian artist. In this case, the cultural value of the property was not disputed, due to the fame and prestige of the author. Instead, the case concerned the private law sphere: Are the two sculptures which

³⁷ LPHE uses the concept of immovable goods established in Article 334 CC, according to its Article 14(1): "For the purpose of this Law, all elements that can be considered inherent to buildings and that form, or formed part of them or their environment shall be considered immovable property, in addition to those listed in Article 334 of the Civil Code, even if they can be separated constituting a perfect unit that can be easily applied to other constructions or to other uses apart from their original use, whatever they are made of, and even if such separation does not visibly affect the historical or artistic merit of the property to which they are joined".

³⁸ Article 28(3) LPHE: "[...] Under no circumstances shall the provisions of Article 1.955 of the Civil Code be applicable to such property". This CC paragraph introduces rules concerning the prescription of ownership of movable goods.

³⁹ Supreme Court (Spain), *City Council of Madrid and Autonomous Community of Madrid v. the State of Spain*, Judgment of 22 July 2009, No. 5183/2009, ROJ: STS 5183/2009 – ECLI: ES:TS:2009:5183.

comprise this creation movable or immovable objects? The description of the unity as an immovable good implied it was permanently connected to the ground where the monument was erected. Thus it involved an imperative delimitation of the environmental area, effected by the application of the rules governing immovable properties of cultural interest. The description of the unity as a movable good disregarded the imposition of these regulations and the consequent limitations to private owners' rights whose properties were located near the monument. The Supreme Court held that the sculpture constituted immovable property and confirmed the application of private law rules about the classification of goods.⁴⁰ The Court's discussion contained physical, structural, and artistic arguments, with the Court finding that this kind of monument creation was designed taking into consideration its future placement.

The fourth case concerned the export of an old painting (Judgment of the Supreme Court No. 3154/2002, 6 May 2002).⁴¹ In this case, the Supreme Court dealt with the prohibition against disposal and consequent restrictions on the freedom to sell of a private owner of a picture, when it constitutes a part of Spanish cultural heritage. The owner of the painting, featuring a view of Dresden by a famous Italian artist, Bernardo Bellotto (also known as Canaletto, 1721-1780) was denied permission, in an administrative procedure, to export it from Spain to the United Kingdom. The value of Bellotto's paintings of Dresden and Warsaw lies in the fact that they evoke the beauty of these cities before their destruction during the Second World War, and they were used as an important source of information during the post-war reconstruction. In this case, the owner claimed that the prohibition of its export was against European Union's rules on free movement of goods and asserted the loss of a benefit by being deprived of his freedom of disposal, questioning also the whole declaration of his property as part of Spanish artistic heritage. He underlined that the artist was not Spanish, nor did the canvas have any relation with the history of Spain. However, the Supreme Court found that the painting belonged to the Spanish cultural heritage and, as a result, the owner's freedom was legitimately restricted, circumscribing it to the national art market and constricting it in international dealings even within the European Single Market. The judgment also refused to consider the validity of the declaration itself, as this point was deemed to be outside the juridical controversy.

Finally, the fifth case dealt with the cultural heritage value of a private letter (Judgment of the Madrid High Court No. 48/2015, 11 February 2015).⁴² In this case, the regional court reiterated the arguments and reasoning concerning previous

⁴⁰ Again, LPHE's referral to CC rules about movable and immovable goods.

⁴¹ Supreme Court (Spain), *Jesus Miguel et al. v. the State of Spain*, Judgment of 6 May 2002, No. 3154/2002, ROJ: STS 3154/2002 - ECLI: ES:TS:2002:3154.

⁴² High Court (Spain), *Fundación Casa de Alba v. the Ministry of Education, Culture and Sport*, Judgment of 11 February 2015, No. 48/2015, ROJ: STSJ M 696/2015 - ECLI: ES:TSJM:2015:696.

issues about the restriction of property rights and ratified the denial of an export permission to a foundation which was owner of a personal letter written by Christopher Columbus and addressed to Diego, his son. Its character, private and personal, was presented as a justification for its sale, aimed at obtaining funds for the conservation of other cultural heritage goods owned by the requesting foundation. The Court's decision considered Columbus to be a leading figure in Spanish history and, as a result, it justified the declaration of this personal letter as documentary heritage and the application of the resulting limitations on private ownership.

Conclusions

The Spanish regulation of cultural heritage constitutes an example of how public law rules can place inherent limits on private ownership rights. Historical and artistic goods have a special value because of their role as links between past, present, and future. Cultural heritage is a way to understand why we are who we are, so it is justified as belonging not to an individual person, but to a collective. We are not owners, but mere holders of this heritage. We received it from our predecessors and we are responsible for maintaining it, conserving it, and increasing it in both quantitative and qualitative ways. The constitutional order to preserve and promote cultural heritage can be designated to public authorities, but people are also involved in these objectives. This is the first conclusion, but obviously an insufficient one when it is examined from the perspective of the premise of this article.

The initial purpose of this article was to focus on the fading of frontiers between public and private law, using the example of the interaction between historical-artistic heritage rules and private property rights in cultural goods. The traditional concept of private property as introduced in Spanish Civil Code – the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws – has been complemented with the constitutional recognition of private property rights, but while maintaining the idea of legal limits thereon by introducing an intrinsic restriction under the concept of the “social function” of ownership. The contents of owners' private rights and freedoms can be restricted, or even erased, in the name of the general interest. The extent of this limitation varies, depending on the nature of the good that is the object of private ownership, and therefore it is sometimes difficult to talk about a single unique concept of a private property right, but rather necessary to acknowledge many different rights, i.e. ownership versus ownerships. With respect to cultural heritage goods, the limits of the social function are defined by cultural/historical/temporal values and the necessity of their preservation. The multiplicity of categories in Spanish historical-artistic heritage adds to the diversity of restrictions on ownership rights, which depend on concrete nature of the good. If we look again to the five examples examined in the previous section, we can observe how the concept of a “social function” is made concrete. In the controversy about the destiny of Yagüe's legacy, the ownership rights of the

inheritors were judicially “reduced” to mere possession, due to the public nature of the documentary heritage and the manner of its possession. In the judicial rulings concerning Ruiz de Luna’s tiles and Dalí’s *Dolmen* placement, private law descriptions concerning immovable goods by fixation and by destination were applied, while keeping in mind the cultural value of each good. Tiles that were physically joined to the walls of a palace were treated separately because of their condition as representative works of a famous ceramist, and thus were declared to be movable goods (instead of immovable goods by fixation or by destination). In the case of the *Dolmen* placement, a monument made by the famous sculptor and physically movable was declared to be an immovable good by destination, according to the original idea of its creator. The presence of the *Dolmen* in its present place also has effects on the private property rights in the estates situated in the surrounding area, and the definition of the *Dolmen* as an immovable good determines that these effects will be permanent. In the last two cases, the freedom of disposal was seriously restricted because of the declaration that Canaletto’s painting and Columbus’s letter constitute movable properties of cultural interest. Their owners cannot sell them freely.

These are different examples of the limitations on ownership rights resulting from application of public rules about cultural heritage. The order contained in Article 46 CE to guarantee the preservation and promote the enrichment of the historical, cultural, and artistic heritage and of the property of which it consists, clearly demonstrates the stewardship of these goods by public authorities, regardless of their legal status and their ownership. Thus, this constitutional commandment contributes to limiting private property rights to cultural goods because of their social function. The conservation, promotion, and the divulgence of historical and artistic value places intrinsic limits on the private ownership of cultural goods, and the recognized value of our past legacy, as well as the obligation of transmitting it to future generations, justifies these restrictions.

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Luis Javier Capote Pérez

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