

Preference or Pre-Emption Right for Cultural Objects

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Abstract

Preference or Pre-emption Right means the power of one party to acquire a certain object to the detriment of another making an identical claim, we need to establish a *distinction* by looking at the different powers underlying this act of preferring. If there are many preferences, the pre-emption over cultural property, also known as artistic or cultural preference, is a true category among other preferences. After studying the exercising of pre-emption rights, as well as their respective consequences, about Portuguese Law, we must ascertain their effectiveness, not only in terms of their viability in the effective acquisition of objects but, and equally, the objectives which this aims to pursue in terms of achieving the protection of cultural heritage.

Keywords: pre-emption, preference, cultural property, public interest, archives, museums, monuments, export of cultural objects

1. General Considerations

First of all, I wish to underline the sheer importance as well as the diversity of the topics integrated into Cultural Heritage Law in the midst of issues of a historical, philosophical, ethical, aesthetic and legal nature, there is an intersection of perspectives and an interconnection of knowledge. Hence, taking into account the legal topics, there are other more transversal themes drawing on fields as distinct as Museology or Contemporary Art. All of this is Culture and, in reality, even the Law of Culture.

Secondly, a few introductory words about the subject in question - the pre-emption right over cultural assets. Not only is this a very current issue both in Portugal and abroad but it also represents a important mechanism for protecting cultural heritage. It's requires in-depth study, above all, to assess the effectiveness and validity of this protective mechanism. Studying this theme led me to revisit previous works on cultural assets so as to be able to venture deeper into this subject, which is both very interesting and contemporary but not without its own questions and perplexities.

2. Types of Pre-emption Rights

While the Pre-emption Right consists of the power of one party to acquire a certain asset to the detriment of another making an identical claim, we need to establish a *distinction* by looking at the different powers underlying this act of preferring. In fact, we immediately encounter not one but several pre-emption rights. As such, it is important to recognise this plurality of preferences corresponding to a diversity of legal regimes. We therefore consider it relevant and appropriate to firstly classify them into different categories before proceeding. In fact, there are notable differences between preferences based on agreements or pacts between the parties and those arising from normative prescriptions without any prior voluntary agreement. The preference thus derives from a normative imposition. Nevertheless, despite this impressive dichotomy, opposing the preferences resulting from agreements and those stipulated by a legal rule does not exhaust the complexity of the pre-emption right. Indeed, we must distinguish not between a simple binomial but among at least three categories or types, each mutually differentiated. In short, we thus obtain three categories of pre-emption rights.

The first, preferences of a conventional nature, places special emphasis on agreements parties enter into voluntarily. Hence, one party assumes the obligation to attribute another with an option over the sale of a certain object. Such outcomes, called pre-emption agreements, represent a preliminary contract, a purchase and sale agreement, which may or may not take effect at a later date in relation to the other signatory party. Hence, neither party issues any irrevocable declaration regarding the future contract because for this to be signed, both parties will again have to

provide their respective agreement¹. Thus, the first contract does not trigger the exercising of the preference nor does it even represent a pre-contract or condition of sale². It does, nevertheless, establish the terms for the subsequent sale, subject to the previous agreement in addition to the correlating will of the preferred party as regards the acquiring of the thing subject to agreement. This constitutes a non-reciprocal contract³ that imposes an obligation of negative content, the duty not to enter into another contract with anyone else⁴ regarding that object prior to the holder of the right renouncing the preference. Subsequently, as from notification of the plan to sell, the preferred party has an eight-day period to make the acquisition when no other deadline has been set on penalty of the forfeiture of their right⁵. In the case of default, due to the conclusion of a sale and purchase agreement incompatible with the preference attributed to another person, damages may be calculated under the general terms for the civil liability of the party in default.

The second category is legal preference. Here, the preference does not stem from any contractual clause but rather only from the normative prescriptions of a specific legal regime⁶. Thus, a person is obliged to award preference to another person not because he/she is bound to do so by contractual clauses but rather because a certain legal regime so requires. As an example, co-ownership represents a fine case. Article 1409(1) of the Portuguese Civil Code provides that joint owners enjoy pre-emption rights and take first priority among the legally preferred parties in the event of sale or payment in kind to a third party of the share held by any of the jointly interested parties. In the event of non-compliance, Article 1410(1) of the Civil Code determines that any co-owner who is not informed of the sale or the payment in kind holds the right to hold the disposed share in their own right, provided he/she requests this and then deposits the price in accordance with the established terms. Hence, and instead of the compensation due as a result of the breach of the previous agreement, a judicial action for preference may be filed with the aim of obtaining a decision that imposes the replacement of the sale agreement entered into with a third party by another in which the holder of the preference is the contracting party. As such, this second modality, recognised by law, without the correlative contractual source, is based on the attribution of a potestative right to the preferred party⁷ who may then achieve greater success in acquiring the object in contrast to preferences of a contractual nature, with merely binding effectiveness. However, it must be recognised that pre-emption rights based on contracts may be attributed real effectiveness. When such is the case, those preferences of a contractual nature also enjoy such a potestative right. In fact, any clause of actual effectiveness may justify the autonomy of the latter in relation to pre-emption rights with binding effects. Hence, either another modality is thereafter configured or we integrate these conventional rights with real efficacy into the scope of legal rights⁸.

Finally, a third category stands out. Whilst this is also not based on a covenant, but only on normative prescriptions, this nevertheless differs from the previous modality as it presupposes a public interest. Thus, the acquisition does not derive from a simple potestative right, attributed to an individual, according to any anodyne applicability of a certain legal regime but is rather based on the assessment of a correlative public interest which justifies the acquisition by the state or another administrative entity. This demonstrates the autonomy of this modality that thus constitutes a third acquisition category in addition to with the two set out above. Moreover, this category stipulates not only a consideration of private interests, as in the modalities above, but also an assessment of the public interest or a public action that justifies exercising this preference.

In sum, the preference over cultural property, also known as artistic or cultural preference, falls within this third category. This power to acquire cultural assets derives from legal precepts which, instead of prescribing a mere

¹ On this issue, Adriano Vaz Serra concurs. Cf. *Obrigaçã de Preferência*, Coimbra, 1958, p. 11.

² As regards rejection of these theories, cf. Klaus Schurig, *Das Vorkaufsrecht im Privatrecht*, Berlin, 1975, pp. 80 et seq.; Giovanni Bonilini, *La Prelazione Volontaria*, Milan, 1984, pp. 109 et seq.

³ In this regard, Carlos Barata sustains that the covenant is a source of obligations for only one party as the other party may or may not exercise the preference as later deemed convenient. Cf. *Da Obrigação de Preferência*, Coimbra, 1990, pp. 15-6.

⁴ Carlos Barata, in order to substantiate the obligation of negative content, highlights how the interests of the creditor are not at all affected by non-execution of the preferential contract. The mere abstention of the obligor from negotiating would ensure the interests of the preferential party remain unaffected, *Da Obrigação...* op. cit, pp. 150 and following; further on the negative content obligation, cf. Menezes Leitão, *Direito das Obrigações*, Vol. I, 12th ed., 2015, p. 236.

⁵ Cf. CC Article 416 (2)

⁶ On the autonomy of conventional preference in the face of legal preference, cf. Francesco Santoro-Passarelli, "Struttura e Funzione della Prelazione Convenzionale" in *Rivista Trimestrale di Diritto e Procedura Civile*, 1981, pp. 700 et seq..

⁷ In this sense, cf. Anselmo de Castro, *Direito Processual Civil Declaratório*, I, p. 108; Antunes Varela, *Das Obrigações em Geral*, 9th ed, Vol. I, Coimbra, 1996, pp. 403-4; Carlos Lima, "Direitos Legais de Preferência" in *Magazine of the Bar Association*, no. 65, Vol. III, 2005, p. 7; Lucio Moscarini, "Prelazione" in *Enciclopedia del Diritto*, Vol. 34, Milan, ..., p. 982; Benedetta Sirgiovanni, *Prelazione Legale e Acquisto della Proprietà*, Milan, 2012, p. 15

⁸ This is the option of Agostinho Guedes, *A Natureza Jurídica do Direito de Preferência*, Porto, 1999, p. 17.

potestative right to a private individual, attribute an acquisitive right to the state or another administrative entity provided that they establish the pursuit of the public interest or, at the least, the presence of the state's *jus imperii*. This precisely constitutes the public interest⁹ or the state actions¹⁰ that form the foundations for the autonomy of this third preference type. All the more so as this right, founded on reasons of a public nature, does not even imply another public interest based acquisition category, specifically expropriation. It is sufficient to note that this pre-emption right is not constantly in effect but only when the hypothesis of transferring a particular cultural asset to the legal sphere of a third party arises. Furthermore, the assumptions of expropriation acquisition radically differ to those of cultural preference.

3. Preference in the Portuguese Legislation on Cultural Assets

We therefore recognise the preference of cultural assets as an autonomous category based on the public interest. However, the respective legal regime is nevertheless plural, complex and somewhat contradictory and hence the importance of ascertaining its specific characteristics. This becomes particularly the case as the Basic Law, Law no. 107/2001¹¹, enshrines a rule regime while simultaneously allowing for the subsistence of partial regimes that differ from its own. Some of these predate the Basic Law itself while others are more recent but that nevertheless also accentuate the dissimilarities.

As regards the regime-rule, we should here underline that Basic Law Article 37 determines that the co-owners, the State, the Autonomous Regions and the Municipalities benefit from, in the order indicated, a pre-emption right in the case of sale or payment in kind of classified assets or assets in the process of being classified or assets located in the respective protection zones¹². Moreover, should the provisions of Articles 416 to 418 and 1410 of the Civil Code, with the necessary adaptations, apply to this pre-emption right, the same precept recognises the pre-emption rights attributed to the public authorities by separate legislation¹³.

We would also note how this Basic Law retained legislation predating its own enactment on 8 November 2001¹⁴. Apart from explicitly repealing Laws no. 2032 of 11 June 1949 and no. 13/85 of 6 July, as well as making an imprecise reference to any other provisions contradicting its respective clauses¹⁵, the Basic Law also determines the partial revocation of certain pieces of legislation while recognising, *contrario sensu*, the complete validity of the terms not mentioned therein. Such is the case of Decree-Law no. 16/93 of 23 January, the General Regime of Archives and Archival Heritage, when the Foundation Law prescribes, *expressis verbis*, the revocation of paragraph b) of Article 9(1), Articles 21 to 30 of Decree-Law no. 16/93 of 23 January, as well as Articles 6 and 46A, as amended by Law no. 14/94 of 11 May¹⁶. Hence, several other precepts of that diploma, in particular Articles 31 and 32 of Decree-Law no. 16/93, remained in effect.

In practice, the aforementioned Articles 31 and 32 refer to the transfer and exercise of pre-emption rights for archival items, either already classified or undergoing classification. Within these terms, the intention to alienate one such asset must be communicated to the management body, as well as the price and remaining contractual

⁹ In this respect, Michele Cantucci integrates the pre-emption right into the category of the coercive transfer that extends beyond contractual terms to take into account strict obedience to the public interest. Cf. "La Prelazione dello Stato nelle Alienazioni Onerose delle Cose di Interesse Artistico e Storico" in Rivista Trimestrale di Diritto Pubblico, 1952, pp. 581 ff. "Cose d'Arte" in Enciclopedia di Diritto, Vol. XI, Milan, 1962, p. 107. In turn, Maria Cozzuto Quadri refutes, as regards the pre-emption right over cultural assets, that this merely leads to a common law legal preference... In her opinion, the preferred state does not represent a private contracting party but rather a public law business of an ablative nature, founded on the public interest. Cf. "La Prelazione Artistica" in La Nuova Giurisprudenza Civile Commentata, Padua, 1985, pp. 450-1. In a similar sense, emphasising the autonomy of the preference over cultural assets, on the grounds of public interest, cf. Armando Calogero "La Prelazione Artistica sui Beni Culturali di Proprietà Privata" at www.innovazione.diritto.unina.it, 2009, p. 8. Mauro Loosli also holds that this pre-emptive right represents a state sovereign competence necessary to accomplishing public interests. Cf. *Kulturgüterschutz in Italien: Rechtliche und Instrumente*. Handel and Verkehr, 1996, n.ed., p. 100. In Portugal, João Canelhas Duro, after recognising the existence of a public interest, which he calls cultural interest, does not draw the proper consequences, refusing to autonomise the preference over cultural assets in contrast with other legal preferences. Cf. "O Direito Legal de Preferência Sobre Bens Culturais" in *Revista do Ministério Público*, no. 123, 2010, pages 117 et seq..

¹⁰ Mathias Plutschow, in turn, stresses the contrast between a preference based on a legal transaction or a legal determination of a privatistic nature and, in contrast, a public preference in favour of the state that, nevertheless, still pursues the public interest. Cf. *Staatliche Vorkaufsrechte im Internationalen Kulturgüterschutz*, Zurich, 2002, pp. 171 et seq.. In a similar vein, Doris Binz-Gehring, *Das gesetzliche Vorkaufsrecht im schweizerischen Recht*, Bern, 1975, pp. 140 et seq..

¹¹ Law no. 107/2001 of 8 September 2001 enacts the Basic Law for Cultural Heritage Policy and its Protection and Enhancement System.

¹² Cf. Article 37(1) of the Basic Law.

¹³ Cf. Article 37(2) and (3).

¹⁴ Cf. Article 115.

¹⁵ Cf. Article 114(1).

¹⁶ Cf. Article 114(2).

conditions¹⁷. Subsequently, the state may exercise, within thirty days of the aforementioned notification, through holding an auction or other sale by public auction, the pre-emption right in the sale of a classified or under classification archival property when undertaking to meet the price and other required conditions¹⁸.

In addition, it is important to mention another set of rules also surviving the Basic Law and similarly concerning pre-emption rights. In fact, in addition to the aforementioned Article 114, Article 113(2) determines a relevant transitory measure. Thus, until further legislation is enacted, the applicable norms of Decree no. 20985 of March 7, 1932, with its successive alterations, shall be considered to still remain in effect. We may recall that the said legislation attributed to the General Directorate for Higher Education and Fine Arts, through cooperation with the National Academy of Fine Arts, the Higher Council of Fine Arts, the General Inspectorate of Libraries and Archives and other entities, both public and private, responsibility for drafting the inventory of movable and immovable property with artistic, historical, archaeological and numismatic value¹⁹. This inventory, in itself, was already a system tracing its origins back to at least the early 20th century taking into consideration the inventory of artistic objects and historic monuments then carried out²⁰. Moreover, according to Decree no. 20985, furniture belonging to private individuals, of major financial cost and recognised historical, archaeological or artistic value and whose exportation from the national territory would represent a serious loss to the historical, archaeological or artistic heritage, should further be included in the inventory²¹. Inclusion on this inventory would correspond to any alienation being dependent on governmental authorisation, as well as the exercise of preference at a price not dependent on that stipulated in the sale project but rather for a value determined by an arbitral decision²². In addition, Decree-Law no. 38906 of 10 September 1952, without revoking the previous diploma, determined that the Ministry of National Education might determine that furniture either already inventoried or undergoing inventorying, should be transferred to the custody of state libraries, archives and museums²³. Whenever such happened, the respective owners might request, once the inventory was completed, that the state acquire them according to the terms of arbitration provided for in Article 6 of Decree no. 20985²⁴.

Furthermore, we should also reference Decree-Law no. 103/2012 of 16 May that stipulates the mission and duties of DGLAB – the Directorate General of Books, Archives and Libraries. In particular, Article 2(3) determines, as attributions of DGLAB in the area of archives, the exercising of pre-emption rights on behalf of the state in case of disposal, e.g., by public auction or auction, of valuable archival materials or documents of historical and cultural interest to archival and photographic heritage regardless of their classification or inventorying. Hence, this law extends the scope of preference to items that are not yet classified or even under the process of being classified.

In turn, Article 2(2) and (4) of the same diploma, Decree-Law no. 103/2012, prescribes attributions for the area of books and libraries but nevertheless fails to provide for anything equivalent as regards preference rights. However, the diploma does not revoke Decree-Law no. 90/2007 of 29 March that establishes the organic structure of the National Library (BNP). Article 2(3)(f) grants the BNP the right to exercise, on behalf of the state, the right of pre-emption for bibliographic assets. This right also extends beyond assets either already classified or undergoing classification. On the contrary, it simply covers each and every bibliographic item regardless of the opening of any classification procedure. This should come as no surprise as this has been the recurrent mission of the National Library since at least 1931 when the law²⁵ first granted it the right of option in all auctions of historical, literary and scientific books and manuscripts. Moreover, courts have repeatedly recognised and upheld this prerogative²⁶.

Furthermore, the Framework Law for Portuguese Museums, Law no. 47/2004 of 19 August 2004, also grants the state and/or the autonomous regions a pre-emption right when disposing of or creating another real right over a cultural asset incorporated into a private museum regardless of the classification status of the respective object²⁷.

¹⁷ Cf. Article 31(1)

¹⁸ Cf. Article 32(1).

¹⁹ Cf. Article 2 of Decree 20985 of 7 March 1932.

²⁰ On this subject, particularly the bases for the classification of monuments and for inventorying works of art, approved between 1901 and 1910, cf. Jorge Custódio, *Renascença Artística e Práticas de Conservação e Restauro Arquitectónico em Portugal, Durante a I República*, Vol. I, Lisbon, 2011, pp. 605 et seq..

²¹ Cf. the sole paragraph of Article 3 of Decree 20985.

²² Cf. Article 6 of Decree no. 20985.

²³ Cf. Article 5 of Decree-Law no. 38906 of 10 September 1952.

²⁴ Cf. sole paragraph of Article 5 of Decree-Law no. 38906.

²⁵ In particular, Article 74 of Decree no. 19 952 of 27 June 1931.

²⁶ Cf. judgment of the Lisbon Administrative Court of ...2011

²⁷ See Article 66(1).

In fact, this preference is not even restricted to purchases, sales or payments in kind but rather encompasses any other right in rem. Moreover, the preference, to be exercised in any judicial sale or auction, reaches further than any asset incorporated in a private museum to encompass any other asset that is undergoing transaction and is eligible according to the incorporation policies of any of the museums belonging to the Portuguese Museum Network²⁸.

Within this same framework, the Fund for the Safeguarding of Cultural Heritage, abbreviated as the Safeguard Fund, plays an important role as this is intended not only to respond to situations of emergency or public calamity in relation to classified assets or assets undergoing classification but also to finance the exercising of the state's pre-emption right over both classified cultural assets and assets in the process of classification²⁹. We should additionally mention the diplomas related to the classification of movable and immovable assets of cultural interest as these also consecrate aspects, albeit partially, of the pre-emption right. Nevertheless, while Decree-Law no. 309/2009 of 23 October 2009³⁰ establishes the procedure for the classification of immovable properties of cultural interest, as well as the zonal protection regime and the detailed safeguarding plan, Decree-Law no. 148/2015 of 4 August covers the classification and inventorying of movable property of cultural interest as well as the regime applicable to the export, dispatch, import and admission of movable cultural property.

Regarding the former legislative act, we must emphasise the protection zones. The legal terms then subdivide these zones into general zones, special zones and special protection zones³¹, which, in fact, do not even correspond to three protective thresholds. Rather, they amount to two levels of protection as the special zone is only an alternative to the general zone³². Thus, the protection zones are established according to two stages³³. As such, buildings in the process of being classified automatically benefit from a general zone or, alternatively, from a special temporary protection zone. Classified buildings, on the other hand, have a special protection area³⁴. Moreover, it is precisely in relation to this special area that we may specify immovable property or groups of immovable properties which may be subject to pre-emption rights in the case of sale or payment in kind³⁵. However, those immovable properties or groups of immovable properties are not cultural assets but merely objects located in the aforementioned special protection zone. In short, this requires recognition that, due to the need to preserve the context of the monument or the area surrounding immovable properties³⁶, the preference in this case does not concern cultural property but rather any other property simply by virtue of its location and not its qualitative characteristics.

As regards the latter, Decree-Law no. 148/2015 sets out the procedures for classification and inventorying for the instance of movable cultural assets. As the law aims to establish an effect equivalent to Decree-Law no. 309/2009 but applicable to movable assets, it unsurprisingly allocates a pre-emption right. Under these terms, the classification of assets as in the national and/or the public interest implies the duty to provide written notification to the competent patrimonial administration, prior to any alienation, constitution of another right in rem of enjoyment or payment in kind in order to ensure the scope for exercising the pre-emption right as enacted by Article 37 of the Basic Law³⁷. The classification as property of municipal interest also implies the duty of prior notification to the municipal council of the alienation, constitution of another right in rem of enjoyment or payment in kind, for the same purpose of exercising the right of preference³⁸. This Basic Law also contains provisions on the conversion of the previous forms of movable cultural asset protection in effect throughout the period of validity of the Basic Law in accordance with the terms of its Article 112. However, while this may represent an opportunity to proceed with a re-evaluation, in particular of the revocation of any previous listing or inventorying, it does not seem to enjoy any great autonomy as a mechanism for protecting cultural assets.

In summary, alongside the regime-rule in Article 37 of the Basic Law, we encounter two other regimes legally recognised by that diploma: the precepts of Decree no. 20985 of 1932 and those of Decree-Law no. 16/93. In

²⁸ Cf. Article 69(1) and (3).

²⁹ Cf. Article 3(2)(c) of Decree-Law no. 138/2009 of 15 June 2009.

³⁰ Amended by Decree-Law no. 115/2011 of 5 December and no. 260/2012 of 28 December.

³¹ Cf. Article 36 of Decree-Law no. 309/2009

³² Cf. Article 36(2).

³³ In this sense, cf. Flávio Lopes, *Zonas de Proteção ao Património Arquitectónico: Para Que Servem?* Casal de Cambra, 2013, p. 21..

³⁴ Cf. Article 36(3).

³⁵ Cf. Article 43(1).

³⁶ Also regarding the context of the monument or the restrictions prevailing over the surrounding area, cf. Flávio Lopes, *Zonas de Proteção...* op. cit., pp. 50 et seq..

³⁷ Cf. Article 26(2)(d) of Decree-Law no. 148/2015.

³⁸ Cf. Article 33(2)(d).

addition, there are those arising from Decree-Law no. 103/2012, aiming at the protection of bibliographic or integrated archival assets in addition to the provisions of the Museums Law as well as the diplomas relating to the classification of movable and immovable properties. Nevertheless, we must also duly acknowledge that not even all of the different preference regimes outlined above provide a complete legal regime for exercising the power to prefer.

4. The Virtual Facets of Preference Unrestricted by the Cultural Property Classification

The Basic Law regime-rule grants the state, the autonomous regions and municipalities the right of pre-emption in cases of sale or payment in kind for objects either already classified or undergoing classification. Decree-Law no. 16/93 also grants the state and municipalities pre-emption rights in the sale of archival property when already classified or in the process of classification. In addition, the immovable property classification regime, Decree-Law no. 309/2009, as well as the movable property regime, Decree-Law no. 148/2015, frame pre-emption as a restrictive measure inherent to the classification procedure.

However, pre-emption rights over cultural assets are not exhausted by these universes of either classified assets or those undergoing classification. On the one hand, the Framework Law on Museums attributes the state and the autonomous regions with pre-emption rights over any cultural asset incorporated into a museum regardless of whether or not the assets are classified or undergoing classification or inventorying processes. A similar case holds for bibliographic assets as, under the terms of Decree-Law no. 90/2007, pre-emption rights are not restricted to those assets either already classified or subject to classification processes with the same orientation prescribed for archives. Decree-Law no. 103/2012, the legislation stipulating the mission and attributes of DGLAB, awards the exercising of pre-emption rights to this institution acting on behalf of the state in the case of any alienation of valuable archival contents or items of historical-cultural interest to archival and photographic heritage regardless of their classification or inventorying status.

However, this extends still further. Decree no. 20895 of 7 March 1932, as subsequently amended, still needs taking into consideration as inventorying corresponds to alienability becoming dependent on governmental authorisation in conjunction with the right to exercise preference with the price determined by an arbitral decision³⁹. Indeed, Decree-Law no. 38906 of 1952 granted the Ministry of National Education with the power to transfer inventoried assets into the custody of state libraries, archives and museums, with the respective owners able to request state acquisition of their assets.

As the regime rule circumscribes pre-emption rights to those cultural assets already classified or undergoing classification, this avoids the exaggerated stance enshrined by Decree-Law 140/2009 regarding studies, projects, reports, works or interventions in cultural assets, which intends to limit the scope of cultural assets to movable and immovable assets, whether classified or in the process of classification, in the national, public or municipal interest⁴⁰. Whereas the Basic Law recognises the existence of other cultural assets beyond the limits of classification, this does not share the overreach of the constitutive theory in which Decree-Law 140/2009 is immersed and within which part of the doctrine⁴¹ cedes before other argumentative orientations⁴².

There is a universe of cultural assets outside the set of the already classified assets or those undergoing classification. Therefore, we may reject the idea that the government administration attributes the quality of

³⁹ Cf. Article 6 of Decree no. 20985.

⁴⁰ Under the terms of paragraph Article 3(b) of Decree-Law no. 140/2009 of 16 June 2009, cultural assets are movable and immovable property classified, or in the process of classification, as of national interest, public interest or municipal interest under the terms of Law no. 107/2001 of 8 September 2001, as well as any integrated movable heritage.

⁴¹ According to this orientation, the law determines what cultural assets are through the act of classification. Thus, although artistic or other characteristics may previously exist, the classification enacts legal effects which imply a correlative transformation in the legal nature of those assets, accordingly granting them the status of cultural assets that they did not before attain. On this matter, Massimo Giannini, "I Beni Culturali" in *Rivista Trimestrale di Diritto Pubblico*, no. 26, 1976, pages 21 et seq.; Aldo Sandulli, "Natura e Funzione della Notifica e della Pubblicità delle Cose Private d' Interesse Artistico e Storico Qualificato" in *Rivista Trimestrale di Diritto e Procedura Civile*, 1954, pages 1023 et seq.; Sêrvulo Correia, "Procedimento de Classificação de Bens Culturais" in *Direito do Património Cultural*, coord. by Jorge Miranda, João Martins Claro and Marta Tavares de Almeida, Lisbon, 1996, pages 336 et seq.; Miguel Nogueira de Brito, "Sobre a Legislação do Património Cultural" in *Revista Jurídica da AAFDL*, no. 11 and 12, 1989, page 165; Miguel Nogueira de Brito "O Novo Regime do Procedimento de Classificação de Bens Culturais Imóveis" in *Em Homenagem ao Professor Doutor Diogo Freitas do Amaral*, Coimbra, 2010, p. 1098

⁴² José de Melo Alexandrino prefers to return a nuanced answer to the question of whether the nature of the act of classification is declaratory or constitutive. In addition, he seeks to distinguish cultural assets in the strict sense, in the broad sense and in the improper sense, stressing the non-coincidence between cultural heritage and cultural assets. See "O Conceito de Bem Cultural" in *Direito da Cultura e do Património Cultural*, coordinated by Carla Amado Gomes and JL Bonifácio Ramos, Lisbon, 2011, pp. 234 et seq.

cultural asset to objects that previously did not hold such a status⁴³, thus confirming the validity of the declarative theory⁴⁴. Furthermore, we refuse to differentiate between cultural heritage and cultural property and instead argue that these terms can and should be used interchangeably⁴⁵.

Furthermore, analysis of the regime for books, archives and museums confirms the idea that preference is not restricted to assets classified or in the process of classification. In addition to this, there comes the previous regime for inventoried and non-inventoried assets. Thus, as much as the rule regime intends to limit preference to classified assets or those undergoing classification, the special regimes promote another level of diversity, imposing preference on non-classified assets as well as on those subject to classification processes.

In short, the preference of the state and other public entities may apply to valuable bibliographic or archival items or items of historical and cultural interest in terms of archival and photographic heritage. This may also apply to assets incorporated in museums alongside a plurality of inventoried or non-inventoried items under previous regimes. Thus, the right of preference extends over a very wide range of cultural assets. In fact, when we refer to bibliographic assets, we are not even limiting the acquisition prerogative to books, given that the bibliographic field includes manuscripts, documents and other media placed in the care of libraries. The diversity of assets incorporated into museums is certainly not restricted to the paintings or works of famous painters with a similar case holding for archives. We therefore encounter an idea, albeit perfunctory, of the multitude of tangible objects on which the cultural preference of the state or another administrative entity may fall which, as we have seen above, reaches far beyond the limits of classified assets or those in the process of being classified.

5. The Scope of Cultural Preference

As a tangible item assumes the quality of a cultural object, we must ascertain whether this quality shapes the scope and the extent of the preference right itself. If, as we have seen, this preference right reaches beyond the narrow boundaries of already classified assets or those undergoing classification, we must therefore inquire whether it terminates within the universe of cultural assets.

In order to respond to this question, we must first revisit, albeit very briefly, the issues surrounding the notion of cultural asset while nevertheless knowing how difficult it has been to define a notion acceptable either by doctrine or by positive law. Thus, without intending to reproduce the already detailed panoply of notions, we shall rather recall the methods or principles of definition: in particular, the methods of enumeration, classification and categorisation. As is general knowledge, while enumeration draws up a list of assets, classification presents a nucleus, based on certain assumptions or requirements⁴⁶, whereas the categorisation method derives from the generic description of a type of object for protection⁴⁷. However, as already demonstrated on another occasion, none of the methods indicated returns, either on its own or from an eclectic perspective, satisfactory results⁴⁸. Hence the natural emergence of negativist ideas or the defence of a broadly inclusive notion⁴⁹. Within this scope, there have even been considerations around whether a submerged soft drinks can could be ranked as an underwater cultural asset⁵⁰.

Indeed, while it certainly seems extremely difficult to establish consistent guidelines for the contours of the notion of cultural asset, we must underline that the Basic Law itself does not ignore the problem as it does in fact set out a position combining several of the aforementioned methods⁵¹. Nevertheless, that legislative formulation did not

⁴³ In a constitutive sense, attributing that power to the administration, cf. Sérvulo Correia "Procedimento..." in op. cit..

⁴⁴ The declaratory theory does not limit the universe of cultural assets to those classified or in the process of classification. On this subject, Cf. Tommaso Alibrandi, Pergiorgio Ferri, *I Beni Cultural e Ambientali*, 3rd ed, Milan, 1995, pp. 219 et seq.; Giancarlo Rolla, "Beni Culturali e Funzione Sociale" in *Scritti in Onore di Massimo Severo Giannini*, Milan, 1998, pp. 563 et seq. 563 and following; Vieira de Andrade, "Rapport Portugais" in *La Protection des Biens Culturels (Journées Polonaises)*, Vol. XL, 1989, pages 473 and following; JL Bonifácio Ramos, "Bens Culturais: Posse Não Vale Título" in *O Direito*, no. 142, V, 2010, pages 908 et seq.

⁴⁵ As regards this, Casalta Nabais identifies the terms *cultural asset* and *cultural heritage* while expressing a preference for the second term. Cf. *Introdução ao Direito do Património Cultural*, Coimbra, 2004, pp. 10-1. From our perspective, while recognising the identification, we have opted for the term cultural asset because of its undeniable advantages. Cf. *O Achamento de Bens Culturais Subaquáticos*, Lisbon, 2008, pp. 353-4

⁴⁶ Cf. Astrid Müller-Katzenburg, *Internationale...* op. cit., pp. 134 et seq..

⁴⁷ Cf. Gerte Reichelt, "La Protection Internationale des Biens Culturels" in *Révue de Droit Uniforme*, 1985, pp. 72 et seq..

⁴⁸ JL Bonifácio Ramos, *O Achamento...* op. cit., pp. 409 et seq..

⁴⁹ JL Bonifácio Ramos, *O Achamento...* op. cit., pp. 413 et seq..

⁵⁰ Cf. Ronald Herzog, *Kulturgut unter Wasser*, Aachen, 2001, pp. 34 et seq..

⁵¹ See Articles 2 and 14.

satisfy those who felt it was important to characterise the cultural asset itself⁵². In fact, the Basic Law does not even provide a framework suitable for developing legislation. We may simply sift through Articles 72 et seq. of the Basic Law to note the omissions of important cultural sectors, which then require the subsequent development of specific legislation.

In any case, we must recognise the difficulties in defining anything tangible as a cultural asset. Moreover, we maintain doubts over whether the assets subject to incorporation are, always and in any case, cultural assets. While an archive represents a cultural institution or an administrative unit of documentation of recognised historical and cultural interest, it is no less true that the policy of compulsory incorporation implies the necessary integration of documents hardly susceptible for consideration, per se, as cultural assets. Examples of this would include documentation produced by the state's central administration services, due to be incorporated in the Torre do Tombo archive, or the documentation produced by public companies, which will be incorporated in the district archives⁵³. It is precisely due to the exaggerations brought about by automatic incorporation that archives are subject to selection processes in order to assess the historical interest of the incorporated documentation⁵⁴.

In addition to these doubts, there remains another area in which, as is commonly known, pre-emption rights do not get exercised over a cultural asset but rather only over an object located in a zone of protection. Indeed, were the object not located there, it would not be subject to cultural preference. Hence, cultural preference reaches not only beyond the scope of already classified cultural objects and those undergoing classification but also extends beyond the boundaries of the cultural object itself. In short, the granting of pre-emption rights over assets located in protected areas demonstrates very clearly that the scope of preference incorporates assets which do not even class as cultural assets.

6. Exercising the Cultural Pre-emption Right

In view of the diversity of applicable regimes, it is necessary to specify the exercising of a pre-emption right in the sense of just how the state and other administrative entities acquire ownership over cultural assets subject to alienation, transfer in lieu of payment or even the creation of minor rights in rem. Furthermore, such pre-emption rights are not limited to classified assets, assets in the process of being classified or even the cultural assets themselves. Indeed, in keeping with the vastness of this scope, we shall only highlight those aspects we deem most relevant in order to characterise the exercising of a cultural pre-emption right.

As we know, the Basic Law stipulates the duty to communicate in writing any sale, establishment of in rem right of use or payment in kind of classified cultural assets or those undergoing classification⁵⁵. The *mortis causa* transmission, by inheritance or bequest of classified property, either in the process of classification or located in protected areas, must also be communicated by the estate's executor within three months from opening the succession process⁵⁶. Nevertheless, the preference does not apply to all situations with this duty of communication incurred only for sales and payments in kind.

Moreover, there was a broader purpose underlying the Basic Law, including other rights of enjoyment, in particular usufruct and surface rights⁵⁷. Nevertheless, we would also point out other contingencies that, despite not even implying this duty to communicate and the correlative pre-emption right, enable the conveyance of the asset. We may correspondingly refer to donations⁵⁸, exchanges⁵⁹ and the establishing of rights in rem as a guarantee, otherwise known as pledges or mortgages. That is not to mention the creation of other rights in rem, in particular possession as well as personal rights of enjoyment.

This arises despite cultural preference not being conventional in nature. Although distinct from the strictly legal

⁵² Melo Alexandrino feels the need to distinguish between the Basic Law and the notion of cultural asset in order to promote a practical application of the texts, in the strict sense, the broad sense and the improper sense. Cf. "O Conceito de Bem Cultural" in *Direito da Cultura e do Património Cultural*, Lisbon, 2011, pp. 236-7.

⁵³ Cf. Articles 3(1) and 4(1) of Decree-Law no. 47/2004 of 3 March 2004.

⁵⁴ Cf. Article 5 of Decree-Law no. 47/2004.

⁵⁵ Cf. Article 36(1).

⁵⁶ Cf. Article 36(2) and (3).

⁵⁷ Article 34(2) of Draft Law no. 228/VII stipulated the following: "The provisions of Articles 414 to 423 of the Civil Code shall apply to exercising the right of pre-emption provided for in this Article, except for the time limit for reply which is three months"

⁵⁸ In this regard, Tommaso Alibrandi and Piergiorgio Ferri have raised doubts about the removal of donations from the scope of state preference, taking into account the coercive nature and the protection of this institute's public interest. Cf. I Beni...op. cit.

⁵⁹ On refuting any extending of the preference in relation to exchange, cf. Lucio Moscarini, "Prelazione" in op. cit. pp. 990 et seq., To the contrary, cf. Roberto Invernizzi, "Prelazione" in *Codice dei Beni Culturali e del Paesaggio*, coord. by Maria Sandulli, 2nd ed, Milan, 2012, p. 521.

preference by virtue of affirming the public interest, and thus rendered autonomous as a *tertium genus*, the legislator surprisingly decided on the correlative applicability of Articles 416 to 418 and 1410 of the Portuguese Civil Code by express reference to Article 37 of the Basic Law. However, Civil Code Article 416(1) prescribes that the communication to be made by the obliged party⁶⁰, by means of judicial⁶¹ or extrajudicial notification, implies the identification of the object, its price and other contractual clauses⁶². Upon receipt of the communication, the preferred party shall be obliged to exercise its right within eight days on penalty of the right expiring⁶³.

Indeed, this less successful remission emphasises the exiguity of the deadline set for the exercise of the preference. This becomes all the more so as the eight-day period prescribed in the Civil Code is unique and not exactly for the best of reasons. It is unique due to the previous legislation providing longer periods or not even adopting any fixed period. Indeed, while the Seabra Civil Code stipulated a period of six months,⁶⁴ the inventory regime of furniture and buildings of considerable artistic, historic or archaeological value did not even stipulate any fixed deadline⁶⁵. Further uniqueness arises from how the time limits established in other Civil Codes also do not contain such a short deadline⁶⁶. Still further uniqueness stems from not finding anything similar in special legislation⁶⁷ or in international legislative acts adopting the cultural preference systems⁶⁸. As a matter of fact, the debate in the doctrine rather revolves around considering whether the sixty or ninety day period is too short for effectively exercising cultural preference. In fact, we may find, specifically in the Swiss doctrine, comments describing the ninety day term as too short, especially in cases of successive alienations requiring investigation⁶⁹. The Italian legal doctrine also approaches the sixty day period as too short given the rigidity of the procedure and the preferences exercised at the level of the various regions⁷⁰. In summary, although it is inappropriate to establish a preference favouring the state without any time limit, as this would be abusive for individuals⁷¹, we must recognise the relevance of the difficulties raised regarding sixty or ninety day deadlines. Hence, we may only ever have the greatest of difficulties in understanding the extreme brevity of the Basic Law's eight day deadline. Furthermore, it correspondingly becomes especially important to underline the following: the time limit consecrated in the draft legislative proposal, the origins of this legal instrument, was far broader putting forward a period of three months⁷², and not eight days. This draft law also referred to the regime set out in the Civil Code but made an exception to the time limit, thereby departing from the requirement of eight days. Nevertheless, in a somewhat inexplicable manner, the subsequent parliamentary debate imposed a pure and simple remission on the provisions of the Civil Code not only as the method for exercising preference but also as regards the applicable time limit.

⁶⁰ Pires de Lima and Antunes Varela reject communication by the prospective buyer unless acting as a proxy for the party obliged under the preference. Cf. *Código Civil Anotado*, Vol. I, Coimbra, 1987, p. 390.

⁶¹ Judicial preference notification as a process of voluntary jurisdiction, regulated by Articles 1028 and following of the Code of Civil Procedure, is recommended by Menezes Cordeiro for potentially contentious situations. Cf. *Tratado de Direito Civil Português: Direito das Obrigações*, Tom II, Coimbra, 2010, pp. 502-3.

⁶² On this matter, Carlos Barata explains that notice of the sale project implies that the essential elements constituting the type of negotiation are indicated, in particular the clauses in the respective contract. It thus becomes necessary for the holder of the pre-emption right to know about the most relevant aspects of the planned transaction. In a similar vein, Menezes Cordeiro supports the need to include the essential aspects of relevance to establishing the desire to prefer, including the identification of the third party interested in acquiring. Cf. *Tratado...op. cit.*, pp. 499-500.

⁶³ Cf. Article 416(2) of the Civil Code.

⁶⁴ Cf. Article no. 1566 of the Civil Code of 1867.

⁶⁵ Cf. Articles 1 to 9 of Decree no. 20985 of 7 March 1932.

⁶⁶ The French Civil Code provides for a period of one month. Cf. Article 815-14 of the *Code Civil*. The Swiss Code stipulates a period of ninety days from the day on which the party becomes aware of the sale. Cf. Article 681(2) of the Swiss Civil Code. The German Code distinguishes between buildings and other objects. For buildings, it sets a time limit of two months. For other objects, it is one week. Paragraph 510 of the German Civil Code.

⁶⁷ As for the Law of Museums, there is a sixty-day deadline, except in the case of judicial sale or auction, where the deadline is fifteen days. Cf. Articles 66(4) and 69(2).

⁶⁸ Italian legislation provides for a period of sixty days from receipt of notification. Cf. Article 61 of the Code of Cultural Property, approved by Legislative Decree no. 42 of 22 January 2004. Spanish legislation stipulates a similar period (two months) from notification. Cf. Article 38(2) of Law 16/85 of 25 June 1985, the Spanish Heritage Law. French legislation on auction sales, (*Règlementation des Ventes Volontaires de Meubles aux Enchères Publiques*, Law no. 2000-642 of 10 July 2000), in Article 9 provides for a period of fifteen days within which the Cultural Affairs Minister must be informed of the characteristics of the objects and thus be able to exercise the corresponding cultural preference. Swiss cantonal sales and purchases generally adopt a ninety day time-limit for exercising preference.

⁶⁹ Cf. Mathias Plutschow, *State...op. cit.*, p. 199.

⁷⁰ Cf. Antonio Mansi, *La Tutela dei Beni Culturali e del Paesaggio*, 3rd ed., Padua, 2004, p. 267.

⁷¹ Cf. Armando Giuffrida, *Contributo allo Studio della Circolazione dei Beni Culturali in Ambito Nazionale*, Milan, 2008, pp. 311-2..

⁷² Cf. Article 34(2) of Draft Law no. 228/VII.

As regards the price, this now reflects the amount equivalent to that considered in the proposed contract instead of fixing the price by arbitration as was the case under the current legislation in effect since 1932 until almost the present day. In our opinion, such a rule penalises the state and other administrative entities as it may lead to acquisitions at prices that are clearly superior to the asset's real value. This is not to mention the procedures potential leading to simulated prices. Moreover, the law does not regulate the guarantees and forms of payment, in contrast to other acquisition regimes, in particular that for expropriation⁷³. Hence, we encounter sharp rigidity regarding the term and the price and, on the other hand, gaps regarding other aspects that also require regulation.

Should the obliged party wish to sell, in conjunction with one or more other assets, for an overall price, the preference may be exercised in relation to the price proportionally attributed with it being licit to demand the preference covers the remaining assets whenever these are not separable without appreciable loss⁷⁴. Therefore, the most correct procedure would be that of limited preference under the terms of which preference is awarded to all the respective objects on penalty of the right lapsing, pursuant to Article 1029(3) of the Portuguese Civil Procedure Code. The problem regarding the ancillary benefit, enshrined in Article 418(1) of the Civil Code, is different. This must be respected or, alternatively, be the object of monetary compensation. However, we view another aspect of the same legal precept as already problematic. That is to say, were we to agree on the sale when there is the presumption that the ancillary benefit was intended to avoid this outcome, we find it difficult to accept the exclusion of the preference when the ancillary benefit cannot be valued in cash. In fact, whenever such an impediment is included in a preference of a contractual nature, we encounter still more difficulty in excluding a legal preference simply because the buyer and the seller contracted an ancillary service non-assessable in financial terms. Otherwise, were we to accept the contrary understanding, we would be frustrating the very assumptions of cultural preference.

We must also mention Article 1410 of the Civil Code not only because it articulates with Articles 416 to 418 but also and above all because the Basic Law explicitly refers to it. Under these terms, the preferred party assumes the potestative right⁷⁵ to possess the disposed of asset as the third party purchaser cannot be classed as a third party in good faith. Nevertheless, the preferred party must act by submitting the request within a maximum period of six months as from the date when becoming aware of the core details of the purchase and sale and depositing the price due within fifteen days of commencing the action⁷⁶. Furthermore, failure to comply with the duty to notify represents an obstacle to executing the respective deeds and the corresponding registration in the relevant registers⁷⁷. In addition, non-compliance with this duty may imply the annulment of the purchase and sale or the payment in kind agreement in accordance with the initiative undertaken by a competent government representative within a period of one year as of gaining knowledge about the non-compliance⁷⁸.

Decree-Law no. 309/2009, on the procedure for classifying immovable properties of cultural interest, as well as on the regime for protected areas and detailed safeguard plans, also adopts important prescriptions on the exercising of pre-emption rights. Thus, the government authorities may identify the real estate over which it intends to exercise the pre-emption right. This especially applies to the areas of special protection in cases of sale or payment in kind⁷⁹. Additionally, in defining a group or site, the Directorate General of Patrimony, in articulation with its territorially competent regional directorates and the municipal council hosting the respective property, specifies the immovable properties or groups of immovable properties on which pre-emption right are claimable in the case of sales or payments in kind⁸⁰. However, this administrative transparency raises a difficulty which cannot be ignored. When the government indicates which properties or groups of properties it may exercise preference over, it is simultaneously declaring it will not exercise any pre-emption right over the other properties or groups of properties. This means an early waiver of the right to pre-emption which, as we know, is forbidden by law⁸¹. Furthermore, in the case of cultural preference, it makes even more sense to avoid early renunciation

⁷³ In this sense, cf. João Canelhas Duro, “*O Direito...*” in op. cit., p. 123

⁷⁴ Cf. Article 417(1) of the Civil Code.

⁷⁵ In this regard, emphasising the potestative right to acquire the thing, claiming it from any possessor, Menezes Cordeiro considers it wrong to view CC Article 1410 as a reaction to non-compliance with the obligation to attribute preference. Cf. *Tratado...* op. cit.

⁷⁶ Cf. Article 1410(1) of the Civil Code

⁷⁷ Cf. Article 38(1).

⁷⁸ Cf. Article 38(2).

⁷⁹ Cf. Article 43(1)(c) of Decree-Law no. 309/2009.

⁸⁰ Cf. Article 54(1)(c).

⁸¹ Pires de Lima and Antunes Varela accept the anticipated waiver in the case of conventional pre-emption rights. In relation to legal preferences, the holder could not waive the legal right or power but only its exercise in keeping with a determined and concrete circumstance. Cf. *Código Civil Anotado*, Vol. I, 1987, Coimbra, p. 392

because the act of preference is based on the public interest and not only on the value of the property⁸².

We would also reference the legal instruments arising out of the regime-rule. On the one hand, Decree-Law no. 16/93 determines that the voluntary or forced alienation of an archival item must be communicated within a maximum period of thirty days, pursuant to Article 31(2) and (5). Following notification, the state authorities, or municipal councils in the case of items likely to become part of municipal archives, receive a period of thirty days to exercise a pre-emption right over the sale of an archival item either classified or under classification, undertaking to pay the price and meet any other required conditions within two months of exercising the preference, unless otherwise agreed⁸³. Nevertheless, when the sale takes place by auction or public auction and ten days prior notice has been given, the intention to prefer may be expressed at the time of the auction or public auction⁸⁴.

However, as is accepted, preference extends beyond the universe of classified cultural assets or those undergoing classification. Thus, Articles 66 et seq. of the Framework Law on Museums grants the state, the autonomous regions and municipalities with preference rights over cultural assets incorporated in museums or individually considered when alienated in auction or judicial sale. These preference rights derive from a specific regime instead of the unfortunate option of the Framework Law to refer to the rules handed down by the Civil Code. Thus, the legal instrument not only covers unclassified assets but also grants the IPM – the Institute of Museums a period of sixty days to exercise preference on behalf of the state and the autonomous regions⁸⁵. Nevertheless, whenever these entities do not exercise the pre-emption right, this prerogative is transferred to the municipality where the museum is located, which may then exercise the right at any time over an equal period of sixty days counting from the end of the previous period⁸⁶. Nevertheless, this becomes a period of fifteen days whenever a judicial sale or auction is involved and the preference right is exercised by museums belonging to the Network of Portuguese Museums⁸⁷.

In addition, the non-fulfilment of the duty to communicate the sale or constitution of another right in rem results in the annulment of the act or legal transaction pursuant to Article 66(3). As the municipality's preference is only exercised in the event the national state or the autonomous regions do not exercise their rights, it is understandable that Article 68 does not expressly provide for an autonomous cause of annulment. It is also important to underline that the exercise of preference by the state or the autonomous regions determines the incorporation of the cultural asset into a museum belonging to the Network of Portuguese Museums⁸⁸. However, when the state or the autonomous regions do not exercise their pre-emption rights and the municipality does, the cultural object shall necessarily be incorporated into a municipal museum⁸⁹. In the case of preferences exercised in judicial sales and auctions, when there is competition among museums belonging to the Network of Portuguese Museums, the IPM is responsible for determining which museum acquires the asset⁹⁰.

Furthermore, the preference requires justification. That is, any preference over judicial sales and auctions can only be exercised when the asset falls under the auspices of the museum's incorporation policy on penalty of the annulment of the acquisition act⁹¹. In fact, when the incorporation policy is based on a program designed to provide coherence and continuity to enriching the museum's collection, there needs to be reflection on whether the preference is better exercised by the state or the municipality outside of judicial sales or auctions. Clearly, this should also take into account the respective incorporation policies. In the case of cultural assets, regardless of their classification status, it is also worth recalling Article 2(3)(f) of Decree-Law no. 90/2007 that grants the BNP the right to exercise, on behalf of the state, the pre-emption right over the alienation of bibliographic assets. However, that diploma does not foresee a special regime for exercising the pre-emption right and contrary to the aforementioned decree-laws. Therefore, although there is a preference for unclassified bibliographic assets, it seems that the respective exercise must obey the less favourable regime of Article 37 in the Framework Law. Hence, the eight-day deadline is applicable as prescribed in the rule regime as well as the grounds for annulment as an invalidity regime.

⁸² Such is the understanding of João Canelhas Duro, “*O Direito...*” in op. cit., p. 121.

⁸³ Cf. Article 32(1) and (3)

⁸⁴ Cf. Article 32(2).

⁸⁵ Cf. Articles 66(4) and 68(2) of Law no. 47/2004.

⁸⁶ Cf. Article 68.

⁸⁷ Cf. Article 69(1) and (2) of Law no. 47/2004.

⁸⁸ Cf. Article 67 of the Law of Museums

⁸⁹ Cf. Article 68(1) of the Law on Museums.

⁹⁰ Cf. Article 69(2).

⁹¹ Cf. Articles 12 and 69 of the Law of Museums.

7. The Consequences of Cultural Preference

Exercising cultural preference rights invalidates the disposal project and may even determine the annulment of the transfer itself. Nevertheless, when the transfer is effectively carried out without the corresponding communication, it will become valid apart from in case of any subsequent annulment within a period of one year. That is, unless the nullity regime described above applies. On the contrary, whenever the preference is not requested within the applicable period or the price is not deposited, the pre-emption right lapses under the general terms. Moreover, depositing the price will have to be consequent to exercising the pre-emption right. This also applies to the pre-emption action; to be filed within six months of receiving knowledge about the essential data of the sale. In this case, the financial deposit falls due fifteen days after filing the action⁹². In the case of judicial notification, whenever the notified party so prefers, the preferred party shall request, within the following ten days, that a date and time be designated for the opposing party to receive the price providing the grounds for being able to make the price deposit on the day following the end of that period⁹³. On this point, this understands that the actual amount paid to the seller is at stake⁹⁴ and any broader idea of price, in the sense of covering any other expenses incurred, is rejected⁹⁵. A different issue emerges in the circumstances involving successive disposals, with each for a price higher than that of the previous transaction. Should this so occur, the preferred party will pay the price paid for the first transaction⁹⁶.

The question of simulated deals also arises, especially as regards the transaction amounts in order to discourage potential interested parties. Thus, this involves stating a higher price, either in the sale project or in the actual transfer, than the real price. In fact, such actions would represent a simulation, the consequence of which will be annulment under the terms and for the purposes of Article 240. However, as we know, simulation is difficult to prove. Nevertheless, on understanding the criticism formulated as regards the restrictions on testimonial evidence⁹⁷, we maintain doubts around any restrictive interpretation of Civil Code article 394(2) according to which a principle of documentary evidence would be sufficient while accepting complementary witness evidence⁹⁸. This would mean undermining the emerging veracity of an authentic document through an illegal validation of testimonial evidence, the testimony of a party or even a deed of justification⁹⁹.

Another not negligible aspect, while we are alluding to public entities, concerns payment of the price and committing the sum necessary to exercise the preference. We should note that, regarding the exercise of preference by Italian regions, one of the legal assumptions precisely incorporates the existence of the respective budgetary coverage for incurred the corresponding expense required by any acquisition procedure¹⁰⁰. However, such financial availability should not be restricted only to those regions but represents, on the contrary, at least in certain cases, a limit likely to condition the state's activities in terms of exercising cultural preference¹⁰¹. We believe this constitutes an aspect that deserves considering in greater detail as it may represent a serious obstacle to exercising pre-emption rights.

Moreover, the state or other administrative entity does not assume the position of the other party, nor does it subrogate itself to the position of the private buyer, but rather acquires the property autonomously by virtue of the powers granted by the preference right¹⁰². Therefore, while acquiring ownership under the same proposed conditions, the state authority is not bound by the clauses contracted between the seller and the prospective buyer. This reiterates the autonomy of artistic preference, as a coercive acquisition, in relation to legal preference¹⁰³. Furthermore, acquisition of ownership constitutes a true acquisition of the property right in favour of the state, the autonomous regions or the municipality, implying the correlative expiry of the transfer of ownership to the third

⁹² Cf. Article 1410(1) of the Civil Code.

⁹³ Cf. Article 1028(2) of the Civil Procedure Code.

⁹⁴ In this regard, cf. Menezes Cordeiro, *Tratado...* op. cit., p. 518; Menezes Leitão, *Direito...* op. cit., p. 232

⁹⁵ This is the line taken by Pires de Lima and Antunes Varela, *Código...* op. cit. pp. 374 et seq..

⁹⁶ Mathias Plutschow, *Staatliche...* op. cit., pp. 199-200.

⁹⁷ A In this connection, Menezes Cordeiro considers that preventing testimonial evidence, with regard to evidence of simulation, is equivalent to indirectly restricting the nullity of the simulation itself. Cf. *Tratado...* op. cit., p. 527

⁹⁸ Cf. Carvalho Fernandes, "A Prova da Simulação pelos Simuladores" in *O Direito*, no. 124, 1992, pp. 593 et seq..

⁹⁹ Cf. Luís Menezes Leitão, *Direito das Obrigações*, op. cit., pp. 234-5.

¹⁰⁰ Cf. Article 62(2) of the Italian Code of Cultural Property

¹⁰¹ According to Nicola Assini and Giovanni Cordini, this would constitute a decisive limitation, of a quantitative nature, on the state exercising its pre-emption rights. Cf. *I Beni Culturali e Paesaggistici*, Padua, 2006, p. 146.

¹⁰² Cf. Armando Giuffrida, *Contributo allo Studio della Circolazione dei Beni Culturali in Ambito Nazionale*, Milan, 2008, p.238.

¹⁰³ Cf. Tommaso Alibrandi, Piergiorgio Ferri, *I Beni Culturali e Ambientali*, 3rd ed., Milan, 1995, pp. 457 et seq..

party and the consequent obligation to deliver the asset by the seller.

8. The Effectiveness of Cultural Preference

After studying the exercising of pre-emption rights, as well as their respective consequences, we must ascertain their effectiveness not only in terms of their viability in the effective acquisition of assets but, and equally, the objectives which this aims to pursue in terms of achieving another desideratum - the protection of cultural assets. As regards the former aspect, assessing the acquisitive efficacy of the cultural preference, we would say that, on analysing the legislation in force, we consider there are two differentiating levels. One results from the contents of the Basic Law with the other produced by some sparse legislation. As a matter of fact, in our opinion, the Basic Law consecrates a less favourable regime for cultural preference than that provided for in other legislation. We shall now try to demonstrate why.

Firstly, the exercise of preference, according to the Basic Law, only covers assets that are already classified or undergoing classification. Whereas the Museums Act and the Decree-Law establishing the organic structure of the National Library cover assets outside any classification procedure. As such, should we refuse the constitutive theory, recognising that the universe of cultural assets extends far beyond the scope of classified assets or those in classification processes, we may even recognise that there are reasons for limiting this preference only to already classified assets or those undergoing classification. This is also the case in Italian legislation as preference is attributed to assets already declared to be of cultural interest¹⁰⁴, not to any universality of cultural assets in contrast with French law¹⁰⁵. In fact, Portuguese law prefers the second approach.

Secondly, the Basic Law only allows the pre-emption right to be exercised in the event of transfer of ownership or payment in kind. The Museums Act, on the other hand, extends the scope of pre-emption so as to allow its exercise in the event of the creation of a minor right in rem. However, this does not even extend to cover transmission mortis causa, free transfer, exchange, etcetera. Although some doctrine advocates a broad interpretation so as to include all onerous transfers¹⁰⁶ or even, in a still more radical perspective, species of transfer free of any charge¹⁰⁷.

Thirdly, we may emphasise the deadline limitations alongside the invalidity regime. While the Basic Law refers to the Civil Code regime, setting a short and ultra-limitative deadline of eight days, some special laws prescribe longer deadlines. However, this *distinguo* reveals an irreconcilable contradiction. This runs as follows: we might encounter a classified cultural asset over which the state is subject to a strict eight-day deadline for claiming its preference while there may actually be a longer time limit for an unclassified cultural asset. Thus, the state gains more time to decide whether to attribute preference to an unclassified property than when seeking to attribute preference to a classified property. The Basic Law also enshrines a more benevolent regime for those who infringed on their duties deriving from the applicability of the preference regime. In fact, there can only be annulment of the act of transfer when challenged by a competent member of the central, regional or municipal administration within a period of one year. Whereas the Museums Act regime seems more beneficial to the state as any failure to comply with the duty to communicate generates the annulment of the legal transaction. Thus, in addition to the short deadline for registering preference, this would not be the most appropriate option to consecrate annulability as nullity would better protect the Administration's interests¹⁰⁸.

Nevertheless, there is one aspect in which the Basic Law regime does not seem less favourable in terms of cultural

¹⁰⁴ Cf. Articles 10 and 13 of the Italian Code of Cultural Property

¹⁰⁵ This is the advantage underlined by Jean-François Poli when emphasising the scope for the French National Library to exercise preference over unclassified cultural assets. Cf. *La Protection des Biens Culturels Meubles*, Paris, 1996, p. 267.

¹⁰⁶ According to Adriano Pischetola, only through a broad interpretation in the sense of any disposal for consideration, would the ratio legis of instituting cultural preference be achieved. Cf. "Circolazione dei Beni Culturali e Attività Notariale". in *Quaderni Notariato*, no. 15, 2006, p. 45.

¹⁰⁷ This would at least be the case of *negotium mixtum cum donatione* that would justify the applicability of the preference. Cf. Tullio Ascarelli, "Contrato Misto, Negozio Indiretto, Negotium Mixtum cum Donatione" It would be, at least, the case of *negotium mixtum cum donatione* that would justify the applicability of the preference. Cf. Tullio Ascarelli, "Contrato Misto, Negozio Indiretto, Negotium Mixtum cum Donatione" in *Studi in Tema di Contratti*, Milan, Milan, 1952, p. 90.

¹⁰⁸ Roberto Invernizzi, after assessing the violation of the prescriptions relating to cultural preference, considers nullity to be the most appropriate consequence when taking into account the content of Article 164 of the Code of Cultural Property in Italian law. Cf. "Violazioni in Atti Giuridici" *Codice dei Beni Culturali e del Paesaggio*, Milan, 2012, p. 1221. Giuseppe Celeste, however, puts forward the hypothesis that the state may end up not exercising the preference and, for this reason, he questions the corresponding nullity due to a lack of notification of the project to sell the property. Cf. "Beni Culturali: Prelazione e Riscatto" in *Rivista del Notariato*, 2000, pp. 1105 et seq. It should also be recalled that Giovanni Passagnoli had raised the hypothesis of relative nullity taking into account the special relationship between the state and private parties. *Nullità Speciali*, Milan, 1995, p. 176. However, this hypothesis was rejected by several others, such as Tommaso Alibrandi and Piergiorgio Ferri, who insisted on the verification of the nullity of the transfer in the case of any lack or incompleteness of communication. Cf. *I Beni ... op. cit...*

preference. We are here referring to the grounds and justifications for exercising cultural preference. In fact, while under this legal framework the state or another public entity does not require any justification or demonstration of the public interest to exercise its preferences right, this is not the case under the Museums Act. In the latter case, at least as regards judicial sales and auctions, preference may only be exercised when the purpose aligns with a museum's incorporation policy. As we have already referenced, a similar situation should also occur when the state or municipalities exercise pre-emption rights for acquisitions through procedures distinct from auctions and judicial sales. As the Basic Law does not foresee any similar provisions, it should be understood that the state does not have to justify the public interest deriving from its exercising of cultural preference¹⁰⁹.

9. Preference as an Instrument for Protecting Cultural Assets

In addition to the levels of effectiveness of the cultural preference rights resulting from the applicable legislation, we also need to ascertain whether or not preference represents a suitable instrument for nurturing the protection of cultural heritage. All the more so as the distinctive feature of public interest or, at the least, of public action, do not permit the state or other government administrative entities to act with identical motivations to those of private actors when seeking to acquire cultural assets. This implies that exercising the acquisitive prerogative not only seeks to enrich the collection of a museum, for example, but that it ultimately also pursues more appropriate protection of the respective cultural asset.

Hence, while the immediate objective was the efficacy of preference, it is now important to consider another dimension in terms of the mediated level of protection of cultural assets. Indeed, protection cannot be limited to preserving their substance¹¹⁰ simply in order to prevent their destruction or damage and ensure their preservation, to the greatest possible extent, in their entirety for future generations¹¹¹. Nor is such protection limited to restoration policies or the production of replicas to encourage and develop cultural tourism. There is another level of protection that involves taking care not only of the substance but also of the cultural linkage¹¹². Indeed, the preservation of property must take into account the relationship between the object, the community and the people of a given historical period. Protection should also take into account the relationship of the asset to its surroundings, to its host territory. Protection means maintaining the asset in a given place and taking into account the meaning that the place bestows on the cultural object considered in itself. As such, any removal from a determined place may compromise the meaning of the cultural asset as it makes sense to interpret such objects in terms of their relationships with their territories and makers, the people and the nation to which they belong.

If the right to plunder or simple looting holds ancestral origins, it is no less true that censorship and condemnation of such acts also stretches back into Antiquity and has contributed to reducing and condemning such attitudes¹¹³. While conquerors appropriated assets in the name of established customs and even rules, it is no less true that there were prescriptions to try to protect the integrity of monuments and other historical objects¹¹⁴ and even attempts to prohibit the illicit trafficking of cultural assets¹¹⁵. Furthermore, in the 19th century, there was renewed interest in interpreting and protecting historical heritage¹¹⁶ and, correspondingly, by the beginning of the 20th century, we may encounter specific cultural heritage protection legislation in various legal systems¹¹⁷.

¹⁰⁹ Cf. Antonio Mansi, *La Tutela dei Beni Culturali e del Paesaggio*, 3rd ed., Padua, 2004, p. 245

¹¹⁰ On the conservation of the substance of a cultural asset, as a primary objective of the protection of cultural assets, cf. Frank Fechner, "Prinzipien des Kulturgüterschutzes" in *Prinzipien des Kulturgüterschutzes: Ansätze im deutschen, europäischen und internationalen Recht*, coord Frank Fechner, Thomas Oppermann and Lyndel Prott, Berlin, 1996, pp. 26-7.

¹¹¹ On this issue, John Merryman underlines the importance of cultural objects as the historical memory of past eras, even assuming them as survivors of such times. Cf. "The Public Interest in Cultural Property" in *California Law Review*, Vol. 72, 1989, pp. 347-8.

¹¹² On protecting the cultural linkage of assets, cf. Kai Grenz, *Rechtliche Probleme des internationalen Kulturgüterschutzes*, Frankfurt am Main, 2013, pp. 73 et seq..

¹¹³ Within this framework, Ridha Fraoua demonstrates how Polybius, in Antiquity, and many others since, spoke out against the appropriation of objects representative of the cultures of other peoples. Cf. *Le Trafic Illicite des Biens Culturels et Leur Restitution*, Freiburg, 1985, pp. 34 et seq..

¹¹⁴ Michele Cantucci considers the 1425 Bull, "*Etside Cunctarum*", issued by Pope Martin V, deploring the destruction of historic buildings of a religious or secular nature, marks the beginning of legislation protecting cultural assets. Cf. *La Tutela Giuridica delle Cose di Interesse Artistico e Storico*, Padua, 1953, p. 9.

¹¹⁵ Manlio Frigo identifies, in this respect, protective standards in the 17th century legislation of the Netherlands. Cf. *La Protezione dei Beni Culturali nel Diritto Internazionale*, Milan, 1986, p. 6.

¹¹⁶ This was largely due to the prevalence of Romantic ideas that attributed great importance to the past and thus driving a new look at historical heritage. Hence the need to emphasise the recovery and protection of the assets forming part of the heritage of any given country. Cf. Ignacio González-Varas, *Conservación de Bienes Culturales*, Madrid, 1999, pp. 34 et seq..

¹¹⁷ Cf. Ridha Fraoua, *Le Trafic...op. cit.*, p. 44

Furthermore, while legal protection sought to prevent property damage in the event of armed conflicts¹¹⁸, such protection did not neglect peacetime preservation. In terms of the latter, attention moreover extended to regulating and restricting the transfers of cultural assets, both internally and beyond the respective national borders. Hence, from an early phase, there emerged rules and regulations attributing the state with preference over privately owned cultural assets¹¹⁹. Now, following the aftermath of two world wars and the systematic looting of cultural assets, it is hardly surprising that there is a need for mechanisms that seek to prevent destruction in this field¹²⁰ and opening up the scope for returning cultural assets¹²¹. However, this does not reflect in the national level of protection having lost any importance, whether in terms of states importing or exporting cultural assets and even driving the decline in the *distinguo*¹²² as an overwhelming majority of states had already passed legislation restricting the export of cultural assets by 1979¹²³.

Thus, the pre-emption right stands out alongside confiscation or nationalisation¹²⁴. Pre-emption rights have been understood as a protective mechanism for cultural assets both by the doctrine¹²⁵ and by legislations. As a matter of fact, in this latter sense, the Basic Law makes this clear by inserting the pre-emption right in title V under the following title: Do Regime Geral de Protecção dos Bens Culturais¹²⁶. Furthermore, the Italian legislation distinguishes between measures for protection and conservation, with the emphasis on environmental impacts, and measures for circulation highlighting the pre-emption right¹²⁷.

Nevertheless, the value of preference, as an instrument for protecting cultural assets, does not even generate consensus. In fact, unlike French, Italian, Swiss, Spanish or Portuguese legislation, German law does not generally provide for preference as a means to protect cultural assets. Moreover, while the national provisions do not contain provisions on preference¹²⁸, the recent German government proposal, aiming to not only transposing the latest version of the European directive on the return of cultural assets but also unify the existing legal texts,¹²⁹ still does not provide for the adoption of any such protective mechanism. Even at the level of the federal states, we may find legislation on preference in only two *Länder*¹³⁰. Nonetheless, there is an interesting development in the Saxony-Anhalt system where the exercise of preference is subject to the objective existence of a public interest in the protection of the cultural object¹³¹. Such particularism means, according to some doctrine, a qualified public

¹¹⁸ Cf. Hans Wehberg, "Der Schutz der Kunstwerke im Kriege", in *Museumskunde*, Vol. XI, 1915, pp. 49 et seq.; Paul Clemen, *Kunstschutz im Kriege*, Vol. I, Leipzig, 1919, pp. 19 et seq..

¹¹⁹ Cf. Armando Giuffrida, *Contributo...* op. cit., p. 17.

¹²⁰ The Convention.

¹²¹ The Hague Convention of 14 May 1954 enshrines the duty to prepare in peacetime for the safeguarding of cultural assets, situated on their own territory, against the foreseeable effects of armed conflict by taking such measures as they deem appropriate. Cf. Article 3 of the Convention.

Cf. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in Paris on 14 November 1970, and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Property, adopted in Rome on 24 June 1995.

¹²² Indeed, the idea of the states from which cultural assets originate, exporting states, and those to which the objects are transported or sold, importing states, has lost some of its sharpness, especially as regards the perspective that exporting states lacked the legislation to protect their cultural heritage. Cf. Quentin Byrne-Sutton, *Le Trafic International des Biens Culturels Sous l' Angle de leur Revendication par l' État d' Origine*, Zurich, 1988, pp. 38 et seq..

¹²³ Cf. *La Protection du Patrimoine Culturel Mobilier (Recueil de Textes Législatifs)* Vol. I, UNESCO, Paris, 1979, p. 149

¹²⁴ On nationalisation, confiscation and expropriation as instruments restricting the trade in cultural assets, cf. Kurt Siehr, "International Art Trade and the Law" in *Recueil des Cours*, Vol VI, 1993, pp. 132 et seq..

¹²⁵ Cf. Mathias Plutschow, *Staatliche...* op. cit., pp 49 et seq.; Mathias Albrecht, "Der Vorkauf im Denkmalschutzrecht" in *Landes-und Kommunalverwaltung*, 2005, pp. 151 et seq.; Jean- François Poli, *La Protection...* op. cit., pp. 255 et seq.; José Luis Álvarez, "El Tanteo y el Retracto en la Nueva Ley del Patrimonio Histórico Español" in *Estudios Jurídicos sobre el Patrimonio Cultural de España*, Madrid, 2004, pp. 167 et seq.; María del Rosario Ibañez, *El Patrimonio Histórico, Destino Público y Valor Cultural*, Madrid, 1992, pp. 313 et seq..

¹²⁶ Cf. Articles 30 and following of the Basic Law.

¹²⁷ See Articles 20 and following of the Code of Cultural Property.

¹²⁸ Cf. Law on the Protection of Cultural Property of 6 August 1955 *Kulturgüterschutzgesetz* (KultgSchG); Guarantee law transposing the Community Directive, *Kulturgütersicherungsgesetz* (KultgutSiG) of 15 October 1998; New version of the Law for the Protection of German Cultural Property, *Gesetzes zum Schutz deutschen Kulturgutes gegen Abwanderung* of 8 July 1999; Law on the Return of Cultural Property, *Kulturgüterrückgabegesetz* (KultGüRückG) of 7 January 2007.

¹²⁹ Cf. *Entwurf eines Gesetzes zur Neuregelung des Kulturgutschutzrechts* of 14 September 2015.

¹³⁰ We find preference norms in only two *Länder* (Federal States), Bavaria and Sachsen-Anhalt. Cf. Article 19 of the Bavarian State Cultural Property Protection Act, *Gesetz zum Schutz und zur Pflege der Denkmäler*, (DSchG), of 27 July 2009, as amended on 27 November 2014; § 11 of the Law on the Protection of Cultural Property of the State of Sachsen-Anhalt, *Denkmalschutzgesetz* (SachsAnhDenkmSchG) of 21 October 1991, amended on 20 December 2005.

¹³¹ Cf § 11.1 of the Sachsen-Anhalt Law.

interest that must take into account the welfare of the general public¹³². Nevertheless, in the lively debate that has very recently arisen around the government initiative referenced above, for reformulating the federal legal regime, we do not find any defence on behalf of the doctrine invoking the contribution of cultural preference rights. On the contrary, we may note that the proposal to restrict the exportation of cultural assets, subject to greater controls and authorisations, has faced criticism by jurists¹³³ and famous collectors without preference ever having come in for consideration.

However, despite the symptomatic lack of enthusiasm for cultural preference in Germany, this does not underpin any decisive extrapolations. Instead, it becomes necessary to place preference in the context of the other measures existing to protect cultural assets. Within this framework, we would say that such a right constitutes a soft measure¹³⁴ when compared with others of an ablative nature, such as expropriation. In fact, opting for preference serves to avoid expropriation¹³⁵. Moreover, the owner of the cultural asset holds no obligation over selling, lending, restoring or conserving the respective property¹³⁶. Should he/she decide to sell, he/she is only subject to the eventuality that the holder of the cultural preference right may step in and acquire the asset. Moreover, we should recognise how the pre-emption right mechanism reveals proportionality¹³⁷ in weighing up the balance between the protection both of cultural assets and of private property rights.

Nevertheless, it is equally important to highlight the disadvantages and limitations of which there are several. First of all, the capacity to act only in the event of a transfer in ownership to another person. Even then, not every transfer justifies exercising the pre-emption right. Under the terms of the Basic Law, this extends only to purchases and sales or payments in kind. In addition to the unjustified and unacceptable exiguity of the terms, the calculation of the price to be paid by the preferential entity as that set by the market, in particular by auctions, may also limit or even subvert the exercising of the pre-emption right. In fact, in addition to eventual simulations, the equalisation of the price is not only a disadvantage to exercising the preference but also an invitation to speculative prices. It would be more appropriate for the amount payable to be that resulting from a rigorous evaluation, eventually through a court of arbitration.

It is also important to underline the generally resigned attitude of the state towards triggering mechanisms to protect cultural assets. The inexplicable authorisation granted to the departure of important cultural assets, in particular the Champalimaud collection, represents an unfortunate example of the Portuguese state's attitude¹³⁸. In fact, even when preference is exercised, the panorama becomes no more encouraging. By way of example, we may refer to the paradigmatic case of the "Burial of the Lord" by Giovanni Tiepolo in the wake of the Basic Law taking effect. The owner reportedly informed the Ministry of Education of her intention to sell Tiepolo's painting for 1 million euros in 2003. Nevertheless, exercising the right of preference was firstly rejected due to the inability of the IPM to undertake the acquisition of the work either through its own funding or recourse to cultural patronage¹³⁹. Following consideration of launching a public subscription campaign, the shipment and export of the painting was prohibited, which brought about a long and protracted lawsuit against the state. Several years later, more precisely in 2007, the state handed over the sum of one and a half million euros, plus the auctioneer's commission of twenty per cent¹⁴⁰, without having to bid against any other interested party. Thus, the state acquired this work of art under much more onerous conditions for the public purse.

¹³² Cf. Mathias Albrecht, "Der Vorkauf ..." in op. cit., p. 152.

¹³³ Cf. Henrike Weiden, "Kulturgutschutzgesetz: deutsche Bilder nicht mehr handelbar?" In *Gewerblicher Rechtsschutz und Urheberrecht*, 2015, pp. 1086 et seq.; "Sinnloser Behördenaufwand oder drängende Notwendigkeit? Der Entwurf zur Neuregelung des Kulturgutschutzrechts" in *Zeitschrift für Rechtspolitik*, 2016, pp. 15 et seq. lenski, DöV 2015, 677, pp. 683 et seq.

¹³⁴ Cf. Mathias Plutschow, *Staatliche...* op. cit., p. 184.

¹³⁵ On this subject, cf. Astrid Müller-Katzenburg, *Internationale Standards im Kulturgüterverkehr und ihre Bedeutung für das Sach- und Kollisionsrecht*, Berlin, 1995, pp. 239 et seq..

¹³⁶ In this sense, cf. Mathias Plutschow, *Staatliche...* op. cit., p. 184.

¹³⁷ Cf. Yvo Hangartner "Grundsätzliche Probleme der Eigentumsgarantie und der Entschädigung in der Denkmalpflege" in *Rechtsfragen der Denkmalpflege*, St. Gallen, 1981, p. 62.

¹³⁸ On this issue, Elsa Garrett Pinho argued that the state should have made every effort to ensure the purchase of certain works from that important collection, in particular a painting by Canaletto. Cf. "A Evolução das Coleções Públicas em Contexto Democrático. Políticas de Incorporação e Vetores de Crescimento nos Museus de Arte da Administração Central do Estado (1974-2010), Vol. I, n.ed., 2013, pp. 92 et seq..

¹³⁹ This represents an extract from the Order of the Minister of Culture of 26 May 2003, quoted in the Judgment of the Supreme Administrative Court of 9 December 2004.

¹⁴⁰ The large sum paid by the General Secretariat of the Ministry of Culture came from part of the amount paid out by an insurance company as compensation for the theft of jewels from the Ajuda Palace collection. Cf. Elsa Garrett Pinho, *A Evolução...* op. cit., pp. 177 et seq..

Therefore, we would stress the need for reflection on how to strengthen the cultural preference mechanism, *de jure constituendo*, and correspondingly making changes to certain actions and omissions. In fact, it matters little whether there is a preference right appropriate for such action if there is no political will or financial means to deploy it. It is therefore important not only to change the legislation on exercising pre-emption rights but also to change mentalities.

10. The Pre-emption Right Versus the Export of Cultural Objects

Should we accept that preference assumes a protective function, alongside other mechanisms with identical desideratum and variable levels of efficacy, it is no less true that there is a tendency to look at each mechanism autonomously. This applies all the more due to the assumption that they constitute distinct and separate realities. However, this stagnant approach is not the most correct, especially regarding preference and export authorisation. Preference grants the state or a different government entity with the option of acquiring ownership of a cultural object at the time of its respective transfer of ownership whether by purchase and sale or in lieu of payment. Export licences provide the opportunity for the state to authorise whether or not a cultural object may leave the country or face the penalties for illegal exporting cultural assets.

Moreover, there is general recognition of the need to return illegally exported cultural objects not only in the case law of various states but also in certain international conventions, European standards and various national provisions. However, as regards preference, this is perceived as a protective mechanism incorporating a sovereign act limited to the national territory¹⁴¹. In fact, as a sovereign act, of an administrative nature, this goes unrecognised by the domestic laws of other states and even by international law¹⁴². Furthermore, in actual fact, jurisprudential decisions recognising the claims of other states, based on these *ju imperii* prescriptions, are sparse¹⁴³. The dominant trend runs in an opposite direction, with claims on cultural assets¹⁴⁴ and requests for the return of illegally exported assets.

Hence, while preference accounts for one method of acquisition by the state, in conjunction with expropriation, claiming ownership or the return of assets has become understood as a matter appropriate to the trade in cultural assets¹⁴⁵. Nonetheless, we might inquire whether there is such a huge difference. Or, alternatively, is there justification for such a distinction? Hence, can preference be reconciled with this trade in cultural assets? From our perspective, we clearly opt for a positive response to the latter hypothesis. Preference can and must be made compatible with the trade in cultural assets. As a matter of fact, this position is hardly innovative and has been supported by doctrine which persists in demonstrating the close relationship between preference and export authorisation¹⁴⁶ or, even more broadly, preference as a phase prior to other protective instruments, such as export or expropriation¹⁴⁷. Moreover, this is also not just a doctrinal approach. We find this perspective enshrined in legal systems, in particular in Swiss cantonal legislation, where pre-emption rights are extended to cases of export of cultural assets even when such export does not imply any act of sale¹⁴⁸. Thus, in the event of sale or export outside the Swiss Confederation, the state may exercise a pre-emption right over a given cultural object.

Moreover, there is another level; the European Directive on the return of cultural objects unlawfully dispatched or exported¹⁴⁹ which incorporates consideration of this issue. Furthermore, the European Commission's Report of 30 May 2013 clearly recognises the need to improve on the facet spanning the return of classified assets subject to illegal exportation. This is understandably linked to this issue and naturally involves the strengthening of

¹⁴¹ Cf. Mathias Plutschow, *Staatliche...* op. cit., p. 234.

¹⁴² Cf. Kurt Siehr, "Öffentliches Recht und internationales Privatrecht beim grenzüberschreitenden Kulturgüterschutz" in *Rechtsfragen des internationalen Kulturgüterschutzes: Symposium vom 22/23. Juni 1990 im Internationalen Wissenschaftsforum Heidelberg*, coord. by Rudolf Dolzer, Erik Jayme and Reinhard Mussgnng, Heidelberg, 1994, p. 102.

¹⁴³ On this issue, Mathias Plutschow describes the intentions of the Italian state, as a sovereign state, towards cultural assets. Cf. *Staatliche...* op. cit., p. 238-9.

¹⁴⁴ Cf. Quentin Byrne-Sutton, *Le Trafic...* op. cit., pp. 80 et seq..

¹⁴⁵ Cf. Antonio Mansi, *La Tutela...* op. cit., pp. 239 et seq..

¹⁴⁶ Cf. Christoph Joller, *Denkmalpflegerische Massnahmen nach schweizerischem Recht*, Entlebuch, 1978, p. 131, Patrick O' Keefe and Lyndell Prott, *Law and the Cultural Heritage*, Vol. III, London, 1989, pp. 215 et seq..

¹⁴⁷ In this sense, Mathias Albrecht, *Der Vorkauf...* op. cit., p. 152-3.

¹⁴⁸ This is the view taken by Mathias Plutschow after interpreting the Swiss cantonal prescriptions, particularly those of Bern, Lucerne, Appenzell, Nidwald, St Gallen, Jura. Cf. *Staatliche...* op. cit., p.192 et seq..

¹⁴⁹ Cf. Directive 93/7/EC of 27 March 1993, revised in 1997 (Directive 96/100/EC) and in 2001 (Directive 2001/38/EC).

preference rights in those legal systems that provide for them¹⁵⁰.

In our view, this evolution would seem sensible and appropriate to correcting the inefficiencies pre-emption rights face when taken in isolation. Hence, this may allow for preference to become an option even when there is no intention of alienating the asset within the national territory but only the intention to transfer it to another country. In fact, export authorisation may adopt any subsequent sale abroad as a criterion. Moreover, this to a certain extent guarantees the rights of private individuals. A simple refusal to grant an export authorisation may not even give rise to any compensation. Thus, it may be hypothesised that private individuals would receive a form of compensation through acquisition by the state for an appropriate value. We acknowledge, however, that the proposed solution is not without difficulties. These would arise in cases when export is not designed to enable any future transfer of the asset as would be the case with the transfer of an oil painting by a famous painter from A's house in Lisbon to A's house in New York.

11. Conclusions

The study of cultural preference or pre-emption right for cultural objects is very important. First of all, it helps to understand the need to distinguish different modalities or categories of pre-emption rights. We thus consider the pre-emption right according to three distinct categories, placing cultural preference in the modality corresponding to an acquisition by the state or other administrative entity, based on reasons of public interest or, at least, a preference based on *jus imperii* in contrast to a mere legal preference or a preference of a contractual nature.

As regards preference in the Portuguese law on cultural assets, the Basic Law enshrines a regime-rule which is, in the last resort, a remission to certain precepts of the Civil Code. However, this simultaneously allows for the subsistence of other, very diversified regimes. Furthermore, while some of these predate the Basic Law, others are more recent. However, these have served to accentuate the dissimilarities as far as preference is concerned. Thus, although the regime-rule grants the pre-emption right in the case of sale or payment in kind for either classified assets or assets undergoing classification, via the other regimes, this pre-emption right reaches far beyond the strict universe of classified or under classification assets. In fact, its amplitude is such that the pre-emption right, commonly known as cultural preference, ends up affecting assets that cannot even be qualified as such. They only become the object of pre-emption rights due to their location within the perimeter of a zone of special protection.

Secondly, as regards exercising cultural pre-emption rights, the short period of time lapsing since the enactment of the general regime stands in contrast to the periods of time since specific legislative frameworks were handed down as well as their inclusion in other legal systems, particularly in Italian, French and Spanish law. The restriction on the preference to purchase and sale and payment in kind transactions also seems very significant from our perspective in contrast to other regimes which are more open to preference both as regards minor rights in rem and even certain personal rights of enjoyment. As regards eventual consequences, the invalidity regime stands out and, above all, the difficulty of proving price simulation designed to rule out the actual action of pre-emption.

Finally, while we understand preference as an instrument for protecting cultural assets, we do not ignore its shortcomings and limitations. Therefore, we consider evolution to be very positive in keeping with the need to more consistently interrelate preference rights and export authorisations in order to thereby reinforce the respective protection over the return of assets effectively subject to pre-emption rights held either by the national state or by another government entity.

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¹⁵⁰ In this sense, cf. Susanna Quadri, "Il Regime dell' Unione Europea in Materia di Restituzione dei Beni Culturali Illecitamente Esportati" in *La Restituzione dei Beni Culturali Rimossi con Particolare Riguardo alla Pratica Italiana*, coor. by Tullio Scovazzi, Milan, 2014, pp. 238 et seq..