

# BOOK REVIEWS

Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*. Pp. xiv, 245. University of Michigan Press, Ann Arbor 1999. ISBN 0-472-11044-6. US\$32.50. Reviewed by Patrick J. O'Keefe.\*

This book should be required reading for all those with an interest in the preservation of cultural heritage. As we enter the twenty-first century, it is evident that control of that heritage is going to be at the centre of arguments over its existence and use. On the one hand, there is the right of the owner to control his or her property, a right that is often taken as the distinguishing feature of ownership itself. On the other hand, there is a public interest in the continued preservation of heritage and in having access to it. As Sax ably demonstrates through examples drawn from many and varied fields of heritage, the private right and the public interest often conflict. We are now at a stage when rules must be established to resolve this situation.

*Playing Darts with a Rembrandt* is divided into three parts: "The Fine Arts," "Paper Trails," and "Skins and Bones." The first deals with a variety of situations involving such diverse subjects as murals, site-specific sculpture, paintings, buildings, and collecting. The second covers archives, using this term in a very broad sense to include American presidential papers, papers of United States Supreme Court Justices, and various other documentary collections held by a variety of institutions. The final part concentrates on antiquities, with special reference to the Dead Sea Scrolls and commercial exploitation.

The common theme running through the three parts and the many examples given is a dual one of destruction and access. Issues surrounding the papers of United States Supreme Court Justices illustrate some of the tensions involved. Given the pivotal position of the Court in American society, these papers can help to explain how a decision on a matter of great public significance was reached. They are of major historical value. The author calls them "an artifact of the Supreme Court's institutional processes and its history." On the other hand, awareness of their potential disclosure could inhibit free exchange of views among the justices and thus affect the workings of the Court. Some justices have destroyed their papers; others have deposited them in public institutions with strict conditions on access. It has proved impossible to establish a uniform policy on what

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legally is purely personal property. The author comments on “how unsatisfying the use of mere proprietorship can be in dealing with things in which there is a great public stake.”

The book is distinctly oriented toward the United States of America, with most of the examples drawn from that country and an emphasis on its laws and institutions. To be fair, this is not wholly so. There is a discussion of Lady Churchill’s destruction of Graham Sutherland’s portrait of Sir Winston Churchill. The extraordinary affair of the Chauvert cave in France is treated at some length. This involved the discovery of a cave containing prehistoric paintings, the rights of the owners of the land under which it lay, the rights of the finders in the distribution of photographs they had made, and the right of the state to claim all of these. Nevertheless, in spite of these and a few other examples, the emphasis is American. One is left wondering how similar matters are dealt with in other countries. The status of the presidential papers is the subject of almost a full chapter. The fact that legally these were private papers and the implications of this are studied at some length. For example, documents recording events in one president’s term of office were needed to understand something occurring in his successor’s term but would not be made available if the former president did not agree. It would be interesting to see how the papers of heads of state and government are treated in other countries. The author gives us only a tantalizing glimpse from the episode in England of the Churchill papers, which his heirs wanted to sell, creating a public outcry.

This reviewer would have liked to see more analysis of the issues involved. There are suggestions for how matters might be arranged throughout the book and a short conclusion, but little in-depth treatment. Perhaps one way to approach such an analysis would be through the emerging concept of cultural rights as opposed to private property rights. Both of these are human rights, but the latter has been developed much more than the former. Nevertheless, in recent years attention has come to focus on cultural rights, and it is here that there may be a way forward.

The above observations are intended to indicate something of what might next be done. In terms of its self-proclaimed objective, they should not be taken as a criticism of *Playing Darts with a Rembrandt*. As the author notes, his intention “has not been to enunciate a set of rules, but rather to draw attention to issues that have largely languished untended, and to illuminate the common themes they display. This book does have an agenda: it calls for recognition of a species of qualified ownership founded on the recognition that some objects—modern versions of the relics mentioned in the opening pages—are constituent of a community, and that ordinary private dominion over them insufficiently accounts for the community’s rightful stake in them.” Sax has succeeded admirably in establishing this agenda.

Franz Smola, *Die Fürstlich Liechtenstein'sche Kunstsammlung. Rechtsfragen zur Verbringung der Sammlung von Wien nach Vaduz in den Jahren 1944/45* [*The Art Collection of the Prince of Liechtenstein. Legal Questions with Respect to the Removal of the Collection from Vienna to Vaduz in 1944/45*]. Rechtshistorische Reihe, Band 197. Lang, Frankfurt am Main 1999. Pp. 327. ISBN 3-631-34683-2. SFr. 79.00. Reviewed by Kurt Siehr.\*

Affiliated with the House of Habsburg, the Liechtenstein family was one of the leading families of Austria. The members of the Liechtenstein family became princes in 1608. They held vast territories in Bohemia, Moravia, and Lower Austria. In 1719 the Liechtensteins acquired two neighboring counties, Vaduz and Schellenberg, in the west of the Holy Roman Empire and thereby became an independent member of the Holy Roman Empire. In 1815 the Principality of Liechtenstein was elevated to a complete sovereign state, and the princes became independent rulers of this small territory, only three times as big as Manhattan, one of the five boroughs of New York City.

The Liechtenstein family had begun collecting art objects and books as early as the Middle Ages. In later years Prince Johann Adam Andreas (1662–1712) acquired a complete set of paintings of Rubens and several works of van Dyck and assembled them in the Vienna city palace. Other members of the family collected as well. The means for this princely passion were drawn from the proceeds of large farms owned by the family. Prince Josef Wenzel (1696–1772) commissioned several pieces of art, among them two views of Bernardo Bellotto, and also bought Leonardo da Vinci's *Portrait of Ginevra de Benci*, which was sold to the National Gallery of Art in Washington 200 years later, in 1967.<sup>1</sup> In 1807 the art collection, comprising about 700 paintings, was transferred to the garden palace of Rossau in Vienna. The Liechtenstein art collection, including the art gallery building, had formed a family trust (entailment) since 1711/22. This means that it could not be dispersed, sold, or encumbered and was subject to primogeniture succession.

For princes to own big important art collections is not unusual. What was unusual about the princes of Liechtenstein was that they as sovereign princes and heads of an independent state continued to reside until 1938 in Vienna, and not in Vaduz, the capital of the principality. In 1851 Austria, as the host state, recognized the sovereign immunity and extraterritoriality of the princes of Liechtenstein and confirmed this attitude during the following years.

With the guns of August 1914 and their silence in November 1918, the good old days ended for the Houses of Habsburg and Liechtenstein as well as for many other people of Austria. The Liechtenstein Art Collection was also affected by

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postwar legislation. Four different statutes were passed that created problems for the collection. The Austrian Act of 5 December 1918 on the Prohibition of Export and Sale of Objects of Historical, Artistic, and Cultural Significance was passed, later to be changed by the Monuments Protection Act of 25 September 1923; on 1 October 1938 the German Statute on Family Trusts took effect in Austria; and finally, the German Regulation of 1919 on the Export of Art Objects was extended to Austria in 1938. In application of these provisions, the competent authorities in Vienna ordered on 31 October 1938 that the Liechtenstein art collection would be protected against any sale and dislocation without government permission under the 1923 Monuments Protection Act. The same restrictions were intended when on 10 July 1944 the Liechtenstein art collection was registered as a collection of national importance under the German Export Regulation of 1919. Another restriction was, however, abolished, and the Liechtenstein family trust was finally dissolved in 1948.

Franz Smola's book, Vienna University Faculty of Law, a doctoral thesis, focuses on these national restrictions imposed on the Liechtenstein art collection. After treating the history, extraterritoriality, and trust aspects of the art collection (pp. 25–164), the author discusses the fascinating question whether the art collection of a sovereign prince residing in a foreign host state can be protected against export like every other art collection of a private art collector. This is a unique situation with no precedent whatsoever. Even the treatment of the Sacral Treasure of the Guelphs, owned by the Duke of Cumberland and brought to Austria in 1866, differs inasmuch as the owners, of the House of Hannover-Braunschweig, were no longer a reigning dynasty, nor could the Guelphs' treasure qualify as part of the Austrian cultural heritage. It had been collected by the Saxon or Guelph emperors and located in Marienburg (Lower Saxony) before the German state of Hannover became a Prussian territory in 1866. According to Smola, the Liechtenstein art collection could be protected as a national treasure under the Austrian and German statutes because the extraterritoriality and immunity granted to the House of Liechtenstein in 1851 did not extend to the private property of the Liechtensteins. Less doubtful is the conclusion that the export prohibitions of 1938 and 1944 were not tainted by the acquisitive Nazi policy directed toward Jews and fugitive opponents. Even before 1938, the Austrian government had tried to immobilize the art collections of noble families in Vienna. Here, too, the question was never raised whether such a restriction amounted to a quasi-expropriation without any compensation.

It was again the guns of war that changed the situation completely. Since 1940 the prince of Liechtenstein had been applying to the authorities in Vienna for a permission to remove important parts of the art collection to Vaduz, or subsidiarily, for safekeeping to Austria or Germany. A permission was finally granted to store the art collection in Germany, close to Switzerland and the Principality

of Liechtenstein. During this delocation activity the prince managed to smuggle his own treasures into Liechtenstein. After World War II, Austria asked the prince to relocate his treasures to Vienna and even considered suing the principality in the International Court of Justice. The Austrian government was wise not to pursue this avenue. It finally agreed to the unification of the dispersed collection and permitted the export of Liechtenstein treasures still located in Austria. This happy ending for the prince of Liechtenstein might be a less happy solution for the public because—as the author stresses in his summary—large parts of the collection are still stored in Vaduz depositories. Highlights are exhibited in a gallery and also shown abroad.<sup>2</sup> The deposited art objects should indeed be made accessible to the public. But before this can be done, the prince of Liechtenstein has to fight another dispute. The prince's collection in Czechoslovakia was nationalized in 1945 as the property of Germany and its allies. When one of the nationalized paintings was exhibited in Cologne, the prince seized it as his property. He lost in the German courts.<sup>3</sup> The German decisions were heavily criticized,<sup>4</sup> and the prince filed a suit against Germany in the European Court of Human Rights on the ground of violation of human rights.<sup>5</sup> Smola's thesis did not have to deal with this litigation. He diligently describes the exodus of the princely collection from Vienna to Vaduz and adds an annex of almost fifty pages of chosen documents to his well-written piece of research. Correctly, he does not try to draw parallels between this affair and similar problems in cases of secession of states.

## NOTES

1. Cf. David A. Brown, *Ginevra de' Benci*, in *Leonardo: La Pittura* 30–32 (Giunti Martello, Florence 1985).

2. *Metropolitan Museum of Art, The Princely Collection: The Collection of the Prince of Liechtenstein* (Metropolitan Museum of Art, New York 1985–86).

3. Landgericht Köln 10 Oct. 1995, *Praxis des Internationalen Privat- und Verfahrensrechts* 1996, 419; Oberlandesgericht Köln 9 July 1996, *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1996* No. 123b; Bundesverfassungsgericht 28 Jan. 1998, *Europäische Grundrechte-Zeitschrift* 1998, 408, and English translation in 93 *American Journal of International Law* 215 (1999).

4. Ignaz Seidl-Hohenveldern, Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich "deutsches" Eigentum, *Praxis des Internationalen Privat- und Verfahrensrechts* 1996, 410–12; Karl Döhring, Völkerrechtswidrige Konfiskation eines Gemäldes des Fürsten von Liechtenstein als "deutsches Eigentum": Ein unrühmlicher Schlußpunkt, *Praxis des Internationalen Privat- und Verfahrensrechts* 1998, 465–67; Bardo Fassbender, note in 93 *American Journal of International Law* 217 (1999).

5. Bilderstreit, *Frankfurter Allgemeine Zeitung*, 3 Aug. 1998, p. 41.