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The international circulation of works of art: how and why to regulate it

1. The 'boundaries' of an administrative function

Is there a link (and, if so, what kind?) that binds an object to a specific territory? What can be the reasons that determine the relationship between a movable good and a specific territorial context, what relationships are so deep that they can influence its appreciation and understanding by a specific community? In order to answer these questions, it is certainly necessary to first identify which type of asset is being referred to. If, in fact, the territorial location of a commonly used object does not raise any value or legal based issues, the same cannot be said when considering an asset of artistic, historical, archaeological, or ethno-anthropological interest. However, to attempt to answer the questions above, it is necessary to specify further elements, such as the type of interest that may support the need to establish a physical and regulatory link between an asset and a given geographical context, the subject who is the bearer of that interest and the legal instruments that make it possible to effectively realise that connection.

The topic of the international circulation of cultural goods is typically analysed from a twofold perspective, each concerning a proper area of intervention, governed by specific regulations and by proper rules. More specifically, we are referring to the activities aimed at contrasting the illicit circulation of cultural property and the control on the export of works of art[1]. The analysis that will follow concerns the latter dimension of the international circulation of cultural goods and, in particular, the political and ideological reasons justifying and supporting it.

In Italy, the administrative jurisprudence has highlighted how the reasons that can justify the existence of State controls over the export of works of art do not relate so much to the physical preservation of the good itself, but rather to the possibility for the State to be able to acquire it, without prejudice to the possibility that eventually the good remains in the ownership of private individuals[2]. In this regard, the Administrative Court of Lazio expressed this view in 2011, stating that

> «The "cause" justifying the retention of a cultural asset in the country does not relate to the protection of the work in itself, but rather to the possibility – hypothetical and abstract – of ensuring its future use in the country, in the event of a possible future intervention by the State aimed at acquiring the asset, a condition that may never come true. Use that is not ensured by the mere presence of the work in the country, since the destination for public use is limited, pursuant to articles 1, 2 and 3 of the Code, only to publicly owned cultural assets, whereas cultural assets owned by private individuals are not intended for public enjoyment except in the exceptional cases peremptorily provided for by law»[3].

From reading this excerpt, one can understand how the forcible detention of an asset of cultural interest is motivated by specific public purposes, meaning those of 'preserving the memory of the national community' and 'promoting the development of culture': the export ban is therefore intended to safeguard this dual interest[4].

1. For a comprehensive analysis of art export controls, see A. Pirri Valentini, *Il controllo della circolazione internazionale delle opere d'arte*, Giuffré, Milano, 2023.
2. It is important to specify that the relationship between a work of art and the State/territory evoked here is one that concerns an asset not yet subject to protection regulations (therefore not yet falling within the legal category of 'cultural assets') and that falls within the cases inherent in the regulation of its circulation in its lawful meaning. In this regard, the expression 'export control of works of art' is used. For a more detailed discussion of the relationship between a state and a good of cultural interest «that has been exported from a foreign nation contrary to that nation's laws» see the essay by Merryman J.H., *The nation and the object*, International Journal of Cultural Property 3, 1, 1994.
3. See the judgement delivered by the Regional Administrative Court of Lazio (*TAR Lazio*), Roma, sez. II quater, 24 March 2011, no. 2657.
4. *Ibid.*: «The purpose pursued by public intervention in the sector in question, as solemnly enunciated by article 1 of Legislative Decree 22-1-2004 no. 42 Code of Cultural Assets, consists in the dual function of «preserving the memory of the national community» and «promoting the development of culture», a function that the export ban is intended to safeguard.

Given these premises, a schematisation begins to emerge according to which art export controls represent the instrument that allows the realisation of the link between an asset of cultural interest and a given territory (the territory where the asset is located), in order to preserve the possibility of its acquisition by the State (the subject, therefore, holding the primary interest) to comply with the public interest of preserving the memory of the national community and promoting the development of culture.
What remains to be identified, however, are the other parties affected by the (physical and legal) link created by export bans. To identify them, it may be useful to refer to a concrete case and, specifically, to recall the affair involving a Louis XVI-style commode brought to Italy in 1962. After a little over twenty years on Italian soil, the piece of furniture was declared to be of significant historical and artistic interest and, for this reason, subject to a protection order by a decree issued in 1986. Following an auction sale, the commode was purchased by a foundation which, in 2008, requested that the restriction be lifted in accordance with art. 128 of the Italian Code for Cultural Heritage and Landscape[5]. Following this request, with the favourable opinion of the Director General for Architectural, Historical and Ethno-anthropological Heritage and the Ministry's Technical and Scientific Committee and, finally, as a result of a court ruling, the property is revalued, no longer subject to the protection provisions of the cultural heritage legislation. Following this ruling, the commode's owner applied to the Export Office in Rome to obtain a certificate of free circulation – a document required in order to be able to permanently transfer the asset outside the national borders. The Technical Commission in charge of assessing the request expressed a favourable opinion, but «contrary to the opinions expressed, the Director of the Export Office communicated to the applicant the notice of rejection of the request to issue the certificate in question. […] The procedure therefore ended with the refusal to issue the certificate of free movement, with the simultaneous opening of a new procedure for the declaration of cultural interest of the commode in question»[6].
The triangular relationship between the object of cultural interest, the State that holds the collective interest and the owner of the object that responds to a personal interest – also of an economic nature – can already be understood. The case of the Louis XIV-style commode is one of the best-known cases concerning bans on the export of works of art in Italy, not so much and not only because of the historical, artistic, or ethno-anthropological importance of the artefact in itself, but because it is explicative of the knots between different interests and values that are proper to the administrative function under consideration.
Another relevant aspect regarding this case, concerns having as subject an asset of 'foreign' origin, not specifically linked to Italian history and yet, despite this, considered relevant for the purpose of «preserving the memory of the national community». Following the appeal lodged by the foundation owning the asset against the refusal to issue a certificate of free circulation, the Regional Administrative Court of Lazio re-examined the appropriateness of the reasons that had prompted the Exportation Office of Rome to prohibit the removal of the asset (thus, determining its perpetual stay within the national borders). Specifically, the jurisdictional scrutiny focuses on the second moment that distinguishes the administration's evaluation process: the one concerning the 'necessity' and the 'appropriateness' of denying the export permit (the first being related to the technical analysis aimed at identifying the presence of the qualified historical-artistic interest in the asset). This evaluative phase should achieve a balancing of public and private interests, since the pronouncement of an export ban does not determine (in Italy) *per se* the acquisition of the object by the State (thus not tying the export ban to any form of pecuniary compensation for the subject owner of the asset).
In this regard, the Lazio Regional Administrative Court justified its decision to annul the export ban on the Louis XIV commode as follows:

> «With regard to the merits of the decision taken on the exportability of the asset in question […] there does not appear to be any just 'cause' endorsing the forced retention of the commode within the country – requested by a country for which the commode has a particular identity value as evidenced by the request of the Director of the Louvre […] – and that the choice to relocate the asset does not entail any detriment to the public interest pursued. In fact, also in view of the proximity of the museum, any Italian visitor will be able to appreciate the valuable piece of woodwork in its natural context, inserted in the environment of origin and exposed to the view of any patron, as opposed to the alternative of forcibly keeping the same piece in Italy, but removed from public use and viewable, if at all, only by virtue of a possible, and not due, 'gracious concession' of the owner to scholars of his liking».

5. Pursuant to article 128 of the Code of Cultural Heritage and Landscape («Notifications made under previous legislation»), paragraph 3: «In the presence of elements of fact that have arisen or that were previously unknown or not assessed, the Ministry may renew, *ex officio* or at the request of the owner, possessor or holder concerned, the procedure for the declaration of the goods that have been the subject of the notifications referred to in paragraph 2, in order to verify the continued existence of the conditions for the subjection of such goods to the provisions of protection».
6. See the judgement delivered by the Regional Administrative Court of Lazio, no. 2657/2011.

The extract from the ruling just quoted recalls the need to carry out a serious comparison of the various possibilities that can, as objectively as possible, identify which is the fairest choice following a complex assessment – not as complicated but as all-inclusive of all the interests and values at stake. This passage, moreover, brings to light two other fundamental elements: first of all, it recognises that not all 'beautiful' objects should be kept in Italy, prohibiting the possibility of being exported and, secondly, it identifies the interest (especially when dealing with objects of foreign origin) of a fourth subject, to be added to the triangulation outlined above, namely the country with which the good has a particular relationship of identity and not only an accidental link dictated by the circumstance of being on national territory at a given time[7].

This last consideration highlights another element that helps to define the borders of the discipline concerning the control on the international circulation – or export control – of works of art and other objects of cultural interest. Here we refer to the concept of 'territoriality'. The goods of cultural interest subject to the assessment by the administration that will have to decide on the possibility of their leaving national borders, are those that are located within the State not necessarily for historical reasons, but also by chance[8]. In fact, it may well be works of art created in Italy by Italian artists that have never left the national territory, as well as objects created by a foreign author or owned by a person who later moved with her collection to Italy, but which – in both cases – have nothing to do with the history and art history of the country. The applicability of public law is triggered by the mere fact, therefore, of being within the country's borders.

It seems important to emphasise this aspect as it is conceptually distant (and with different repercussions) from a requirement that comes to the fore when talking about the other type of circulation of objects of cultural interest, *i.e.*, the concept of the 'place of origin', which is applied especially in requests for the restitution of works of art or archaeological finds illegally removed, precisely, from the country of origin or belonging. In these cases, in fact, the link and the relationship that the object of the restitution request has with the territory, history, community and traditions where the re-location is desired, comes to the fore. In these circumstances, there is a need to identify a connection that relates the asset to the place where it belongs; a different situation, with respect to the evaluations on the subject of art export controls.

Willing to summarise what are therefore the 'boundaries' of the administrative function under consideration, we can then identify three main elements: the subjects (who); the criteria (how/when); the reasons (why). The first group relates to the triangulation outlined between the work of art, the State and the subject owning the good (in the case of works of art of foreign origin, a fourth subject could be added, *i.e.*, the State of origin of the good). On the other hand, the second group, concerns the factual conditions for public control to be activated and, therefore, the need for the asset to be located within the national territory and to fall within the value and time thresholds identified by the legislation at stake (these are the objective criteria that determine whether or not the asset is subject to the protection discipline). Finally, within the third group are the reasons, or the inspiring principles of the discipline and the purposes that the administrative function in question is intended to achieve.

2. Art export controls in practice. An overview

In an increasingly globalized world, exchanges of cultural goods have become always more consistent and cross-border from decade to decade: statistics monitoring trades of cultural objects and products, elaborated both by public and private institutions, confirm this trend. Over the past fifty years we can observe considerable variations in the volume of trade in this sector: The United Nations Educational, Scientific and Cultural Organization (UNESCO) in a report published at the beginning of the 21st century estimates that «between 1980 and 1998, world

7. Thus, again the decision of the Regional Administrative Court of Lazio, n° 2657/2011 «The relevant decisions of the administrative authority are, as is well known, the result of a technical-discretionary assessment, which also implies a component of administrative discretion, which varies over time – also in consideration of the need to deepen the links with different foreign civilizations […], especially in the case in which the decision subject to the review of legitimacy concerns assessments made at the time of the request for transfer abroad of an asset that assumes a significant importance.), all the more so when the decision subject to the administrative judge's review of legitimacy concerns assessments made on the occasion of a request for the transfer abroad of an asset that has a very significant identity value for another country and therefore involves a comparative assessment of the interests at stake, in which the competent authority may also consider prevailing with respect to the interest in the forced detention of a 'beautiful object' that happens to be present within the State, the need for its relocation in the State of 'cultural belonging' for which it has a strong identity value (the interest in the national cultural identity of the requesting State must also be taken into account, since these are founding values recognised of a constitutional nature also at community level)».

8. In some national regulatory frameworks, such as the French one, it has been established a time threshold below which the property – although physically present on the national territory – cannot be subjected to the public discipline because the years during which the good remained in that State is not considered sufficient for a close connection between the good and the territory to have developed-and thus for that work to be considered relevant to the nation.

imports of cultural goods have increased by 347% going from 47.8 to 213.7 billion of dollars»[9].

If from one side it is possible to observe that this international circulation is always more important and it is increasing in terms of volume, at the same time we can notice that this circulation is highly concentrated in some countries. It is still UNESCO that, in 2005, specifies how «an interesting characteristic of these cultural trade flows is their high concentration: most of world trade in cultural goods is the fact of a remarkably small number of countries. In 2002, the United States, the United Kingdom, China (including Hong Kong and Macao), Germany and France accounted for 55.5% of total exports and 53.5% of total imports»[10].

We can then put into comparison these two different orders of figures: the amount of goods that are circulating in the world and the countries where this circulation happens. What is interesting to understand and should be reflected upon (both in terms of causes and consequential effects) are the reasons behind these figures: why is this flow of cultural goods specifically concentrated in some countries? What are the political, regulatory, legislative reasons underpinning this situation?

Looking closer at the norms regulating art export controls in Italy, it should be clarified that denying permission for the permanent export of a work of art entails its subjection to the national cultural heritage and, among other things, its perennial permanence within national borders, as the work will no longer be able to circulate internationally except for a limited period of time and only for specific reasons (for exhibition, study or restoration purposes).

Pursuant to article 65 paragraph 3 of the Italian Code for Cultural Heritage and Landscape, a private individual who intends to permanently remove a good of cultural interest from the territory of the Republic, must apply for either a certificate of free movement or an export license. Depending on the nature of the property, we can distinguish different situations governed by different legal regimes: there is a «prohibition of definitive exit from the territory of the Republic» for publicly owned movable cultural property and for privately owned property if the declaration of cultural interest has already taken place (these are so-called already 'notified' property). On the other hand, the removal of the following: «things, to whoever they belong, that are of cultural interest, or are the work of an author who is no longer living and whose execution dates back more than seventy years, the value of which exceeds 13,500 euro; archives and individual documents, belonging to private individuals, that are of cultural interest; of photographs whose production is more than twenty-five years old; means of transportation that are more than seventy-five years old; and goods and instruments of interest to the history of science and technology that are more than fifty years old, whoever they belong to» can occur only if the competent administration delivers a specific export authorisation. Lastly, the exit of paintings, sculptures, graphics, and any art object created by a living author or whose execution is not more than seventy years old; of things that are of cultural interest, that are the work of an author who is no longer living and whose execution is more than seventy years old, the value of which is less than 13,500 euro, is not subject to authorization.

The implementation of a given regime of export controls can determine different kinds of consequences, depending also on how – from a normative point of view, but not only – this regulatory framework is conceived. Among the effects generated by the application of art export controls, it should be taken into consideration the kind of economic impact the latter can generate. This kind of regulation, in fact, plays a decisive role in the qualitative and quantitative definition of trade in objects of historical and artistic interest. If we look at the statistics monitoring the trend of art transactions, we can realise that Italy only holds the 2% of the share of the total international art market sphere[11]; and this is strongly connected to the possibility for many economic subjects and actors to conduct their own business activity. Whether or not the art market sector can exist and develop efficiently has repercussions on a supply chain that can be considered increasingly important, composed of such diverse realities as the world of art galleries, auction houses, collecting but also, in parallel, support for contemporary artistic creation.

3. Looking back and looking forward in relation to a prominent State function

The legal dilemma underlying the controls that the public power places on the removal of works of special historical and artistic interest outside its national borders recalls the issue of ownership[12]. Works of art that are privately owned, and especially those that potentially fall into the

9. UNESCO, *International flows of selected cultural goods 1980-98*, Paris: UNESCO Institute for Statistics, 2000.
10. UNESCO, *International flows of selected cultural goods and services, 1994-2003*, Montreal: UNESCO Institute for Statistics, 2005.
11. See *The Art Market 2019*, report available at artseconomics.com/wp-content/uploads/2021/11/The_Art_Market_2019-5.pdf (last accessed 20 Sept. 2023).
12. The ownership of cultural assets has been defined, not by chance, as 'a constitutionally sanctioned disgrace'. See Merusi F., *Art. 9*, in Branca G. ed., *Commentario della Costituzione*, *vol. 1 Principi Fondamentali*, Bologna: Zanichelli, 1975, p. 452.

category of national treasures, pose – under various aspects – complex legal questions.

This critical area of ownership deserves to be analysed carefully because, while it is true that the works of art for which export authorisation is requested can only be those not yet subject to restrictions (*i.e.*, belonging to private individuals), the possibility of their remaining private property or (necessarily) acquisition by the State – once authorisation has been denied and after being subject to public control – varies from country to country. By way of example, while in England the entire regulatory system is based on the impossibility of denying exportation in the absence of an adequate offer to purchase (meaning that the State can only deny the private individual the possibility of taking their object of cultural interest outside the national borders only if it is able to purchase the object for the national collections), in Italy the private individual who is denied a certificate of free circulation or an export licence does not necessarily receive an offer to purchase the object from the public authority[13].

It is quite clear, therefore, that the possibility of placing limits on the free exercise of private property must be supported, on the one hand, by a strong public interest, which is also made explicit in regulatory sources of equal rank to those of the set of rights that are going to succumb, and on the other, by a state action that is well identified in its various constituent elements. With respect to the first point, it is necessary to identify whether there are, and what are, the regulatory references that allow the construction of the regulatory system conceiving export control on works of art. As far as Italy is concerned, the type of relationship that binds the State and cultural heritage can be referred to the exercise (by the former) of a real subjective legal position: «Art protection, exercised by the public administration, expresses and implies a real subjective legal position of the State which, in this sector, acts as the centre of its own interest, defending a differentiated and specified interest»[14].

The identification of the State as a legal person owning an «ideal heritage belonging to the national community» therefore implies that it pursues its interests «not with the mere objective discipline of norms, but with the immediacy of its personal interest»[15]. The possibility of framing the State's interest in cultural heritage as a personal legal interest is possible by virtue of article 9 of the Italian Constitution, which posits the need for public protection of cultural heritage as «the exercise of a real personal right of the State»[16].

The inalterability of the administrative function inherent in the control of the export of works of art in Italy – at least in its ideological cornerstones – is therefore to be found in the presence of article 9 of the Constitution which places not only the protection but also the identification of the «set of goods generically determined» as the exercise of a personal and immediate interest of the community.

In conclusions, there are some general elements that could be understood by the analysis of this specific and peculiar administrative function. We realise, for example, that Italian regulation in this field is very ancient and that pre-unification Italian states built their set of norms on the protection of cultural heritage by foreseeing art export controls as one the firsts measure to be implemented. We are, therefore, dealing with a regulatory function which is essential for Italy, from a cultural historical and normative point of view – this also made possible by the very existence and surviving of the Italian cultural heritage law and the possibility for our museums, monuments, and cities to be so appreciated all over the world. We need then to look back, to understand how to keep and maintain this regulation, but also to look forward, taking, if this is necessary, also other foreign regulatory frameworks as models. We know that in comparative law we are not dealing with the possibility of importing another legislative system into our own, but still, we should refer to best practices and good examples that we have at disposal.

Something very important in cultural heritage legislation and regulation is to avoid ideology, this is why the Italian

13. Regarding the dilemmas posed by works of art with respect to the issue of 'ownership' see Santaniello G., *Gallerie, Pinacoteche e Musei*, Enciclopedia del diritto XVIII, 1969, esp. paragraph 5. The theory of goods of public interest; the theory of bi-ownership; the theory of divided property, where he states «Society's attitude towards the work of art is determined by two essential factors: the consciousness that the conservation of the thing of art is necessary and the aspiration that the enjoyment of it should be possible for everyone. Given the pre-eminence of the community's interest in the art object and the hypothesis of a very easy conflict arising between the community and the owner regarding its disposition, the elimination of private ownership presented itself as the simplest, albeit radical, solution. This, however, was not accepted in our legal system for obvious reasons, above all because in the thing of art, historical-artistic value and economic value had to be kept distinct, giving rise to the possibility of the emergence of two different subjective situations. The first in the public interest in the conservation of the thing and its enjoyment by the community, the second in the power of disposal». Of equal interest is the position of Grisolia M., *La tutela delle cose d'arte*, Rome: Il Foro Italiano, 1952, in which works of art are described as «characterised by being the property of the private individual but belonging to the public administration. From the point of view of artistic protection, relations are established between the State and the owner that can be of collaboration or separation. These relations place two powers over the same good in front of each other: the public power of protection and the private power of ownership. They are both rights guaranteed by the legal system, but the first has functional characteristics and the other seigniorial».

14. *Ibid.*
15. *Ibid.*
16. *Ibid.*

regulator dealing with art export controls should be able to look at the future by modifying some behaviours. This means, for example, to include all the stakeholders concerned by export controls (as also art market representatives) to open a discussion that should be permanent, accessible, and transparent. We should also increment the use of statistical data that tell us the trends, performances, and repercussions deriving from the implementation of this regulation. This would allow central government to adopt more evidence-based decisions, that could possibly re-enforce ideologies and policy assumptions at the base of art export controls regulation or, on the other hand, could lead to possible change or reform of the whole regulatory framework.