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CONTROLS ON THE EXPORT OF CULTURAL PROPERTY.

Historical and contemporary regulatory frameworks in Italy, France and England.

PhD Program in
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Agli incontri
cercati, desiderati o fortuiti
che mi hanno accompagnata.

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A. Pirri Valentini & F. Caponigri, *La Convenzione del Consiglio d'Europa sui reati contro il patrimonio culturale,* Rivista trimestrale di diritto pubblico, 2017.

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ABSTRACT

First examples of cultural heritage law reveal the concerns of the legislator for the uncontrolled outflow of artworks and other objects of cultural interest from regional and national borders. The first introduction of an art export control system dates back to the beginning of XVII century. The aim of the regulation and control of the permanent removal of cultural objects is to preserve the national identity and to make up the national cultural heritage of a given country.

Nowadays almost every country worldwide is equipped with a domestic regulatory framework aimed at elevating barriers to the unindiscriminate circulation of artworks, besides being affected also by supranational norms and soft law mechanisms.

This dissertation examines the art export control system adopted in three countries, namely Italy, France and England and at the Community and international level.

The research is conducted taking into account different perspectives, comprehending an analysis of the legislative framework; the administrative structure and organisation; and the pervasiveness of an eventual judicial review over the acts issued by the Administration. The juxstaposition of these three levels reveals to be essential since the whole regulatory framework on the export of cultural property is characterised by the interposition of three different public powers involved (the legislative, executive and, eventually, also the judicial one).

The main investigative tools used in this dissertation comprehend official legislative texts; parliamentary debates; letters and notes exchanged between politicians and experts; official reports delivered by administration offices; statistics on the number of export licences granted; judgments and doctrinal contributions.

In addition to this, documents stored in the Italian, French and English national archives have been widely used during the whole dissertation. Archival researches conducted proved to be extremely useful in order to reconstruct the history of the regulatory frameworks under esamination and, more importantly, in order to understand the backstory which lead to the adoption of official legislation and to learn about its practical implementation. For this purpose, interviews conducted by the author with different experts and civil servants working in the competent Administrations implementing the control on the export of cultural objects in Italy, France and England were instrumental for a complete understanding.

INTRODUCTION

1. The same administrative function from which different quantitative and qualitative outcomes emerges.

"National treasures worth nearly £500m have been lost abroad in the last decades as ministers seek to tighten art export rules[1]"; "*Deux sculptures de l'ancienne cathèdrale d'Arras, trèsors national, en vente chez Christie's New York*[2]"; "*No alla svendita del patrimonio culturale italiano*[3]".

These are titles of articles recently published in the English, French and Italian press and are an example of the way in which often we deal with the topic of the control on the export of artworks and other objects of cultural interest.

The expression 'art export controls' refers to the administrative function of monitoring, evaluation and, eventually, authorisation of the permanent removal of a cultural object from the country where it is located[4]. The typical situation faced is that of a private individual, owner of an artwork, willing to sell his/her property on the international art market, to permanently ship the artwork to another country (also for non-commercial purposes) or, alternatively, that concluded a sale contract with a foreign collector who wants to bring the good abroad. In all these cases, the individual shall require an export licence in order to obtain the authorisation -from the State where the item is located- to ship the object of cultural interest.

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[1] See the homonymous article by C. MILMO, inews.co.uk, 1 February 2019.

[2] See the homonymous article by D. RYKNER, La Tribune de l'Art.com, 12 April 2018.

[3] Italia Nostra, *No alla svendita del patrimonio culturale italiano*, press release of the 19 April 2016.

[4] From this theme, just to clarify, we exclude issues related to the smuggling of cultural objects and art loans. The former because it has to do with the illicit trafficking of cultural objects, and the latter since its temporary character.

Depending on the situation and according to the regulatory framework adopted, the State -trough the competent administrative office in charge for granting the export licences- can deny this authorisation, causing the impossibity for the object to leave the national soil, and can also decide to acquire it.

If the scenario presented may seem purely theoretical or unusual, some data will help us to realize the extent of the issue at stake. Italian Administration releases annually a hundred of denials to export request authorisations on average, French Ministry of Culture approximately a dozen and almost so does the overseas authity in charge to preserve English national treasures. Export denials may refer to artworks created by an author who has nothing to do with the country where the artifact is located as well as objects that have a clear reference to the country to whom is requested the release of the export authorisation.

There are known cases such as Van Gogh's *The gardner* considered to be part of the Italian cultural heritage in 1954 altough the Dutch nationality of the artist and the lack of any reference to Italian history or landscape in the artwork. The same happens in England where Asian and many Italian artworks –among the others- are considered to be national treasures and, as such, cannot be exported if not for temporary periods. But not only artworks or other artistic objects can be considered testaments of the art and history of the nation, therefore remaining within its national borders. In 1978 French Ministry of Culture incorporated cars among the objects that can be considered '*monument historiques*', making up the national cultural heritage.

How we can understand, the comparison between Italy, France and England shows a great heterogeneity, both in the amount of denials emitted and in the quality of objects considered to be of national importance. But what are due all these quantitative and qualitative discrepancies?

The research questions of this dissertation start from the observation of the different outcomes in the definition of a national cultural heritage trough the control on the export of movable cultural property. It should

be noted, indeed, that all three countries analysed feature in their domestic legislative frameworks the possibility to retain inside national borders those artworks or objects of cultural interest that are considered national treasures or cultural goods particularly important for the history and the art of the country.

Since now, we can anticipate that not only Italy, France and England share the same administrative function (the art export control mechanism), but also that this function has very similar characteristics among the three countries. Such similarities are partially reflected in the headlines quoted at the beginning of this introduction, and they include a feeling of national belonging; the importance given to the territoriality; economic consequences; and the transversal nature of the theme.

Regarding the first characteristic we have, right away, to underline the close relationship existing between the export control of cultural property and a feeling of national belonging. All the export machinery, in fact, is based on the assumption that certain cultural items are so relevant and linked with the country where they are located that their removal would cause a detriment both for the country and for the object. The country, in fact, would lose a piece relevant for the acknowledgment and the survival of its history, identity and culture. The object, on the other hand, would be deprived of its context of origin, loosing, consequently, some information needed for its fully appreciation and enjoyment[5]. This approach is sided by an apposite way of thinking, meaning the idea in favour for a fre circulation of cultural goods – considered to be treasures for the humankind and not only for a given population[6].

[5] On the relation between artifacts and territory see the seminal article of J.H. MERRYMAN *The nation and the object*, International Journal of Cultural Property, volume 3, issue 1, 1994.

[6] The existance of these two approaches has been elaborated for the first time by J.H. MERRYMAN, *Two ways of thinking about cultural property*, The American Journal of International Law, vol. 80, n. 4., 1986.

The territoriality, instead, comes into play when we look at one of the effects of the export control, namely the retention of the object into national borders. When an object proposed to the export is considered to be particularly important for the history and the art of the nation, the export licence is denied and the item changes its legal status. From being a non-classified object it becomes a classified cultural property (it can still remain in private hands) or part of a national collections. Whoever it belongs, it won't be able to leave the country except for temporary periods. It could be still subject to further purchases, but only within the national territory[7].

The economic consequences of the art export control can be appreciated by giving a look at the figures relating to the value of art trade nowadays. One of the leading observers of the art market trend, The European Fine Art Fair (TEFAF), in 2018[8] reported how (from 2000 to 2017) "The art market has evolved from a niche, connoisseur-driven collectibles market to a multi- billion global industry[9]". In 2016 the global art market sales amounted to $45 billion, with the U.S. who held the 29,5% of the global art market share; U.K. the 24% and China the 18%[10]. These numbers give us the idea of how relevant is the sector under consideration from an economic point of view, and beyond[11].

[7] For an overview of the contrasting interests insisting on the object subject to export control see E. JAYME, *Globalization in art law: clash of interests and international tendencies*, Vanderbilt Journal of transnational law, vol. 38, 2005.

[8] Quoting from their website "Established in 1988, TEFAF is widely regarded as the world's pre-eminent organization for fine art, antiques, and design"

[9] See TEFAF, Art dealer finance 2018, Chapter 4. Available online at the website https://amr.tefaf.com/assets/uploads/TEFAF-Art_Market_Report.pdf.

[10] These data are reported in TEFAF, Art market report 2017, available online at the website: http://1uyxqn3lzdsa2ytyzj1asxmmmpt.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/TEFAF-Art-Market-Report-20173.pdf.

[11] There are several studies analysing the economic consequences of a denial to an export request authorisation. The percentage of financial loss for an artwork that cannot leave national borders is calculated around the 4%. See L. ONOFRI, *Old master paintings, export veto and price formation: an empirical study*, European Journal of Law and Economics, vol. 28, 2009, 149-161.

Finally, the transversal nature of the theme is self-evident if we think that the we are dealing with exchanges that, clearly, involve more than one countries. Moreover, the need to harmonise this international trade lead to adopt supranational regulatory frameworks that, more or less intensely, influence the different domestic legislation in the matter.

Having said that, since these features are shared by all three legal systems under consideration, what are the elements that cause the quantitative and qualitative discrepancies above mentioned?

Is it simply a matter of different legislative forecasts or rather each art export control system is influenced also by other factors such as the administrative structure implementing it; the efficiency of the Administration or the kind of relations existing between public and private actors?

Often the art export control system has been evaluated taking into account only the legislative framework, neglecting all the other components that participate in its functioning. Following the same tendency, different national art export control systems have been compared one to the other only taking into accout the number of certificate of free circulations or export licences emitted by the competent domestic Administration. Also this approach takes into account only a quantitative outcomes without considering the qualitative differences existing in the functions performed by the national export certificates.

On the contrary, the investigation conducted over the course of this dissertation will cover all the different factors affecting the regulatory framework of the art export control both on a theoretical level (the legislation; the administrative structure) and on a practical one (who makes the decisions; by what procedures; the eventual judicial review over the acts issued by the Administration).

2. The structure of the dissertation and investigative tools used.

How are we going to deal with this topic? There would be many different approaches by which analysing the control on the export of cultural objects.

This dissertation addresses the subject by an administrative law perspective. By saying this, we would like to state that the fuction of the art export control is analysed with the final aim to identify some aspects that are relevant for further studies on administrative management and for administrative law, more in general.

With this in mind, the core structure of the dissertation is the following: a first chapter is dedicated to the analysis of the regulatory frameworks adopted in Italy, France and England. The focus is not only on the legislations currently at stake, rather archival research enabled us to trace the history and the origin of such regulation.

After having understood what are the legislative basis that govern the export control of cultural goods, the analysis keeps highlighting the administrative structure in charge of implementing it. For this purpose, we will investigate not only the models of administrative organisation adopted in the three countries under consideration, but we will reveal also what professional figures are in charge of evaluating the exportability of an object and following what procedures they decide if releasing or not the export licence.

Chapter 3, on its turn, is dedicated to the judicial review and, in particular, we will analyse the judgements produced by administrative courts over appeals against the refusal of the Administration to grant an export licence. This analysis will be focused on the concepts of administrative discretion, the so called 'technical discretion' and their evaluation from the part of the administrative judge.

Lastly, the fourth chapter differs from the others because, instead of analysing different aspects of domestic regulatory frameworks, addresses the topic from a supranational point of view. More specifically, we will investigate the shaping of the EU legislation aimed at regulating the exports of cultural property towards a third country and between member States. Besides this focus, international treaties and conventions on the matter will form the object of a final analysis.

3. Expected results.

The expected result of this research is that to provide a complete picture of the regulatory frameworks governing the export of cultural goods in Italy, France and England. At the present time there are no extensive researches on this topic at the national level or as a comparison between different countries.

The main novelty of this study, in fact, is that to combine the analysis of different aspects that revolve around the administrative function of authorising the export of objects having a cultural interest.

What we will try to do is adopting an 'empirical approach', meaning with that an approach devoid of any idealistic idea of what the export control system should or should not obtain[12]. The analysis conducted are aimed at investigating all the different aspects that contribute to this complex system. The objective exposition of the data and the combination of different kind of information, besides the comparison between three different legal systems, will highlight what is working and what is not in the legislative, administrative or judiciary intervention.

The dearest wish is that this dissertation could contribute to bring to light the different aspects of an administrative function that is one of the oldest, if not the oldest, pillars of cultural heritage law.

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[12] For some references on research methods in public law see V. E. ORLANDO, *Criteri tecnici per la ricostruzione giuridica del diritto pubblico. Contributo alla storia del diritto pubblico italiano nell'ultimo quarantennio 1885-1925*, Pubblicazioni della facoltà di giurisprudenza della R. Università di Modena, n°1, 1925; S. CASSESE, *Il sorriso del gatto. Ovvero dei metodi dello studio del diritto pubblico*. Rivista Trimestrale di diritto pubblico, vol. 3, 2006.

Concerning empirical research in law see F. DENOZZA, *Norme efficienti. l'analisi economica delle regole giuridiche*, Giuffré, Milano, 2002; P. G. MONATERI (edited by), *Methods of comparative law*, Edward Elgar, 2012; W. L. NEUMAN, *Social research methods: qualitative and quantitative approaches*, Pearson New International Edition, 7th ed., 2014.

CHAPTER I: THE REGULATORY FRAMEWORK, HISTORICAL AND CONTEMPORARY PERSPECTIVES

When does a State decide to provide itself with a regulatory framework that governs a specific sector? What are the specific urgencies and necessities underpinning this decision?

We will try to answer these questions by examining, from a comparative perspective, whether the factors that encourage States to establish legal boundaries on the circulation of cultural goods are comparable—and to what extent—from one country to another.

The purpose of this first chapter is to start the investigation of the topic under consideration by understanding the normative foundations for the retention of cultural assets. Knowledge of the legislative provisions at the base of the export system is necessary in order to understand the way it is implemented, namely by who (what kind of administrative structure?) and how (adopting what criteria and following what procedures?). These two investigations will be conducted respectively in the second and third chapter. The primary aim of this chapter is not simply to present historical research, but to put into relief the steps that led to the current regulatory framework in Italy, France and England.

The whole regulatory framework on the export of cultural property is characterised by the interposition of different public powers involved: the legislative, executive and, eventually, also the judicial one. If this is true for many policy areas, the importance of the checks and balances necessary to adopt the complex decisions over the exportability of an object of artistic interest is particularly evident. This is mainly due to the following reasons: the unencumbered nature of the administrative assets relying upon a legislation that is limited to the public interest; and the adoption of decisions based on soft sciences that challenge the pervasiveness of judicial review. These two factors are rooted and traceable in the typology, the essence, and the structure of the norms we are going to analyse.

ITALY: THE CRADLE OF CULTURAL PROTECTION LAW

1. Pre-unification legislation in Italy.

The first examples of cultural heritage law can be traced to the Italian peninsula. The first norms concerning the protection and management of antiquities and objects of artistic interest were not set up by the Italian Kingdom at the moment of its constitution rather by the different pre-unitary States[13]. The presence on those territories of a significant number of artworks and important artistic collections improved the awareness for their preservation and, within that framework, of their retention. In fact, the major characteristic of these pieces of legislation is exactly the focus of the whole system in banning the removal of cultural goods from their territory of origin. Even if enacted in different eras and contexts, the determination in establishing a control over the export of cultural property was the priority of almost all the Italian pre-unitary States.

The majority of this legislations was introduced at the beginning of the XIX century –although with some exceptions- and then improved during the following decades.

This legislation is available in the form of reproductions stored in the State central archives; they are collected and preserved in the folders of the Ministry of Public Education, Directorate Generale for Antiquities and Fine Arts. The presence of such collections in the documentation produced by Ministry of Public Education between 1860 and 1890 is revealing of the interest of the new-born administration towards cultural heritage. The legislative measures controlling the export of cultural goods in the pre-unitary States were, in fact, considered a source of inspiration for the regulatory framework later adopted at a national level. For this reason, the transition from the fragmentation to the unity

[13] For a comprehensive study of the legislation at stake in Italian pre-unitary states see A. EMILIANI, *Leggi, bandi e provvedimenti per la tutela dei beni artistici e culturali negli antichi stati italiani. 1571-1860*. Polistampa, Firenze, 2015.

of the nation was characterised –regarding the policy intervention under consideration- by a substantial continuity.

1.1 Reign of the Two Sicilies.

At the beginning of the XIX century the reign of the Two Sicilies was headed by King Ferdinando I, who established his residency in Naples. Since the very beginning of his realm he implemented a system to control the export of cultural objects by enacting decrees that established an export ban under certain circumstances[14].

The core of the export control was established in 1822, with the decree signed in Naples on May 15, '*Portante le disposizioni onde non sieno tolti dagli attuali siti gli oggetti ed i monumenti storici o di arte dovunque esistenti, e perché non sieno asportati dal regno senza il permesso dovuto*'. Article III established a ban on the export of all antiquities and artistic objects, even if privately owned. Export was permitted only of objects "that do not concern the adornment (*decoro*) of the nation"[15]. The following four articles of the decree specify both the procedure according to which the individual had to submit the export authorisation request and the process by which the Commission responsible for scrutinising the requests had to adopt its decisions.

The main features of the art export control did not change in the following years, so that –in substance- the principal obstacle for obtaining authorisation to remove an object of cultural interest from the Reign of the Two Sicilies was represented by the risk of detriment to the adornment of the nation. Almost twenty years later, the *Ministeriale con la quale vengono fissate talune regole da osservarsi per le estraregnazioni di*

[14] The files reproducing the pieces of legislation regulating the control on the export of cultural property at stake during the XIX century in the Reign of the two Sicilies are stored in ACS, MPI, AA.BB.AA., b. 413, f. from 50,1 to 50,14-1.

[15] The original wording of art. 3 decree of May 15th 1822 was "*È proibito inoltre asportare fuori dai nostri reali Domini ogni oggetto di antichità o di arte ancorché di proprietà privata. Ci riserbiamo di accordare il permesso di asportazione soltanto per quei tra detti oggetti, che non sieno di un merito tale che non possano interessare il decoro della nazione*".

oggetti antichi o di arte, e per le scavazioni enacted in Naples on August 30, 1843 introduced, within the criteria to take into consideration when evaluating the export requests authorisation, what we could consider the ancestor of the contemporary 'time threshold'. Article 3 of the aforementioned *Ministeriale*, in fact, established that the Commission could grant its authorisation for exporting all objects considered to be modern – "*Per la estrazione degli oggetti che si riconoscono di lavoro moderno, la Commissione rimane autorizzata ad apporre il suo suggello* (…)"-.

From an organisational perspective, some amendments to the 1822 decree were enacted on December 7, 1827, when it was established that the Commission charged to analyse the export authorisation requests was, from that moment on, to be based in Palermo rather than Naples[16].

The whole regulatory system did not change as long as the Reign of the Two Sicilies existed. Shortly after the unification of the Italian Kingdom, King Vittorio Emanuele II, on a proposal of the Ministry of Public Education, abrogated all the precedent provisions that were not compliant with those contained in the new Regulation of the Sicilian Commission for Antiquities and Fine Arts[17]. This commission, according to Article 2 of the Regulation, was responsible for implementing export control according to the established legislation.

[16] Art. 1 of the 'Real Rescritto' undersigned on December 7, 1827 by M. Favare, Ministro Segretario di Stato, Luogotenente generale, reported: "*Che si stabilisca a Palermo una Commissione composta di quattro individui forniti di somma probità, e che meritino tutta la fiducia (…)".*

Article 2 of the same Real Rescritto sanctioned as following: *"Che le dimande per l'asportazione dal regno degli oggetti di antichità e di arte siano da me inviate a detta Commissione, la quale dovrà farne accuratamente lo esame sotto la propria responsabilità, e dovrà far conoscere da me con ragionato parere quale ne sia il merito*".

[17] See '*Regio Decreto che approva il regolamento della Commissione per le antichità e le belle arti di Palermo*' issued on May 3rd 1863.

1.2 Tuscany.

The archival material regarding export controls implemented in Tuscany before the unification of the Kingdom reveals the existence of such provisions as early as the beginning of the XVII century.

The grand duchy of Tuscany, in fact, enacted the very first specimen of an export ban on artworks and other cultural objects.

The first order concerning the prohibition on export of all sorts of paintings without a licence dates back to 1602[18], it was embedded in a regulation enacted only thirty years after the constitution of the Grand Duchy[19].

As the title of the order suggests, this piece of legislation instructed customs officials not to permit export from Florence of any sorts of painting if devoid of a regular licence issued and undersigned by the Lieutenant of the Academy of Drawing (in Florence). It was further specified that export ban was effective also in case the exit from the borders of the Grand Duchy was justified by non-economic purposes, such as 'the desire to place the artworks as decoration of villas' owned by the applicant of the export authorisation request[20].

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[18] This is the '*Disposizioni del 6 Novembre 1602 riguardanti la proibizione di estrarre fuori di Firenze Pitture di sorte alcuna senza licenza del Luogotenente dell'Accademia*'. This document, and the following ones quoted in the text, are stored in ACS, MPI, AA.BB.AA., b. 391, f. 31-1.

[19] The Grand Duchy of Tuscany was established in 1569 after the enactment of Pio V's papal bull on the 27th August of the same year.

[20] Quoting from the '*Disposizioni del 6 Novembre 1602 riguardanti la proibizione di estrarre fuori di Firenze Pitture di sorte alcuna senza licenza del Luogotenente dell'Accademia*', op. cit. : "*Per ordine e mandato di S. Ill. Ser ha commesso alli Maestri della Dogana di Firenze che faccino comandamento a lor Ministri di Dogana, delle Porte di Firenze, Doganieri et passeggieri, che non gabellino e non lascino uscire di Firenze, ne etiam per condurre nelle proprie Ville, ne del resto del dominio, per estrargli fuori di esso, Pitture di sorta alcuna senza licenza del Luogotenente dell'Accademia del Disegno, sottoscritta da lui* (…)".

The piece of legislation under consideration is remarkable, especially for the accuracy by which the entire process is regulated and for the requirement to provide a reasoned opinion when an export licence was granted. Quoting from the original phrasing of the order: "*Ha finitamente comandato che il suo luogotente dell'Accademia del Disegno conceda dette licenze in scriptis col parere di uno dei principali della professione et con la sottiscrizione loro*".

But besides the general principle and the way of implementing it, what were the criteria that allowed the release of an export licence?

The main distinction was between two categories: the first one comprehended a list of those considered to be the most important artists of the time, the second the artworks produced by all the others. Regarding the latter, it was established that the artworks of any dead artist could be exported except for those believed to be worthy of remaining in the city (Florence)[21].

Concerning the former category instead, the order provided a total ban on the export of artworks attributable to these nineteen artists[22]: Michelangiolo Buonarroti; Raffaello d'Urbino; Andrea del Sarto; Mecherino[23]; Il Rosso Fiorentino, Leonardo da Vinci; il Francia Bigio; Perin del Vaga; Iacopo da Pontormo; Tiziano; Francesco Salviati; Agnolo Bronzino; Daniello da Volterra; S. Bartolomeo di S. Marco[24]; Fra Bastiano del Piombo; Filippo di Fra Filippo[25]; Antonio Coreggio; Il Parmigianino; Pietro Perugino.

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[21] Quoting from the '*Disposizioni del 6 Novembre 1602 riguardanti la proibizione di estrarre fuori di Firenze Pitture di sorte alcuna senza licenza del Luogotenente dell'Accademia*', op. cit "*Et ancora, possino concedere dette licenze per le Pitture dei Pittori defunti secondo giudicheranno espediente avendo riguardo di non le concedere per quelle che fussero degne di restare nella città*".

[22] Ibidem: "*Ma per le pitture degli infrascritti non si possa concedere licenza in modo alcuno, ne etiam per condurle in Villa, i nomi dei quali son questi, cioè*: (…)".

[23] Known as Domenico Beccafumi.

[24] Known as Fra Bartolomeo.

[25] Known as Filippo Lippi.

The list was up to date on the day when the order was issued, but a term specified that the list didn't have to be considered as comprehensive one[26].

In fact, the Academy of Drawing (of Florence) had the authority to evaluate the inclusion also of others artists after their death: "*Et che l'Accademia del Disegno abbia la facoltà di dichiarare secondo i loro ordini, per alcuno dei pittori viventi, venendo a morte, meritino di essere annessi nel numero dei Pittori famosi e soprascritti*".

Finally, while the procedure established by the order was very accurate, the criteria established to determine what artworks had to be retained in the grand duchy were rather vague. They did not indicate any useful elements to decide whether an object had to be considered worthy of remaining in the city. The commission in charge of evaluating the export authorisation requests had the major degree of discretion at their disposal.

On the other hand, the artworks produced by the nineteen mentioned artists did not need to be scrutinised; they simply could not leave Tuscany. The discretion, in this case, regarded not so much the judgment over the cultural object, as the choice of artists to include in the list. The selected artists, in fact, had little in common other than being considered the most important artists up to that moment. The connection between each of them and the Tuscany region, for example, was considered a given.

For the following years, the major concern of the whole export system was to monitor the removal of artworks outside the city of Florence. This is to say that few precautions were taken to monitor the circulation of objects of cultural interest outside the remaining part of the Grand Duchy. Once this unequal situation was finally recognized (in 1610) the

[26] In confirmation of the non-exhaustive nature of the catalogue, just a few months later the enactment of the first order a new piece of legislation amended the previous list by adding the name of other artists. This is the order enacted on October 11th 1602, titled '*Deputazione di dodici Pittori per dare la licenza di estrazione delle Pitture fuori di Firenze*'.

export ban for artworks manufactured by famous artists was extended to all the territory of Tuscany[27].

The general guidelines established by the 1602 orders remained applicable for more than a century, as confirmed by a decree of 1754, known as '*Editto del Consiglio di Reggenza del 26 Dicembre 1754 che proibisce l'estradizione dalla Toscana di ogni sorta d'oggetti d'Arte e Antichità e Monumenti Storici senza il permesso del detto Consiglio stabilendo anche le pene afflittive per i trasgressori*'.

The preamble of this decree, albeit not introducing any major novelties, made some references to concepts -such as the importance of the 'public decorum' and the 'rarity' of the artworks- that until that moment were never mentioned by the previous pieces of legislation adopted. Its wording was the following:

"*Riflettendo il Consiglio di Reggenza quanto sia importante al decoro pubblico che si conservino tanto nella città di Firenze, quanto nelle altre città e luoghi del Granducato di Toscana le Opere illustri e stimabili per la loro antichità e rarità ed altresì quanto sia pregiudizievole al medesimo la libera estrazione di esse da questi Stati*".

The norms contained in the 1602 order were confirmed and increased by the provisions of penalties to be inflicted in case of violation, representing the first examples of punishments in this area. In fact, whoever exported or attempted to export a cultural property without

[27] This is the Ordinanza titled '*Proibizione di estradizione dei quadri e pitture di celebri autori viene estesa e compresa per tutto il dominio Toscano*' enacted on March 9th 1610.

In this Ordinanza, the Lieutenant of the Drawing Academy of Florence suggested to the Gran Duke of Tuscany as follow: "*…Sentendo che in Pisa ve ne sono buon numero di diversi famosi et celebri Maestri, quali tuttavia si sente che si estraggono, quando fosse con buona grazia di s.v. a noi parrebbe che fosse a proposito che detto ordine non solo abbracciasse la città di Firenze, ma Pisa, Pistoia, Arezzo et tutte le altre città et luoghi dello Stato di Firenze dove fossero simili sorte di quadri di detti nominati pittori*".

having previously obtained the required licence, incurred in the loss of the object and in a fine corresponding to double the value of the object[28].

If a violator was unable to pay that sum, the judicial authority in charge (being the 'Magistrato della Città' in Florence and the judges administrating criminal justice in the other cities) had the option to establish a custodial sentence[29].

The legislation entered into force in 1754 continued to be applied until the unification of the Italian Kingdom, therefore creating a substantial continuity of the law throughout the course of the Grand Duchy of Tuscany. On March 12 1860, in fact, during the period of the Tuscany provisional government, the Minister of the Interior, Bettino Ricasoli, signed a law by which it confirmed the validity of the provisions contained in the 1754 decree.

Ultimately, we can affirm now that the pieces of legislation adopted in Tuscany before the unification of Italy are not only the oldest ones, but also very innovative in some respects, first and foremost because of the provision of penalties in the matter under consideration.

1.3 The Papal State.

Among the pre unitary States, the Papal one was particularly rich in artworks, antiquities and other objects of cultural interest. The Vatican collections boasted masterpieces by the greatest artists of all time; the interest in preserving this richness, therefore, was acute.

The most well-known and relevant piece of legislation intended – among other measures- to control the export of cultural objects is the

[28] This the original wording: "*E chiunque sotto qualsivoglia pretesto o quesito colore ardisse di contravvenire o far contravvenire alla proibizione espressa nel presente Editto incorra nella pena della perdita della cosa estratta o tentata di estrarre, e di più sia condannato nel doppio giusto valore della medesima*".

[29] In 1859, the Grand Duchy of Tuscany adopted another criminal law aimed at punishing the illicit export of cultural property. This was the '*Legge penale per le trasgressioni di vendita o alienazioni di quadri e tavole antiche senza uno speciale permesso*', issued on January 13, 1859.

edict issued by Cardinal Pacca on April 7, 1820, entitled 'On Antiquities and Excavations' (known also as the Pacca edict)[30]. Besides the normative provisions contained therein, the Pacca edict is highly interesting because of its Introduction, which gives an overall picture of the importance of cultural heritage vis-à-vis a State and its citizens.

First of all, the Pacca edict declares that what has made and will continue to make Rome a unique, distinguished and admirable city are its monuments. In order to maintain such precious artefacts, they had to be preserved with meticulous care, both those already existing and also those that are continually discovered thanks to new excavations. Besides a material kind of conservation, the maintenance of monuments and artefacts required also a legal protection, so that they had not be demolished or removed from the territory of the Papal State. According to the Pacca edict, all the precious artefacts located in Rome had to be protected, and this because they attracted foreigners eager to admire them; scholars who conduct research on their origin and imagery; and artists from all over Europe who emulate their models and features.

For this very reason, the popes who followed one another at the head of the Papal State enacted laws meant to deny the removal of any ancient cultural goods from Rome and the Vatican State. As reported in the preamble of the Pacca edict, these laws had been forgotten and neglected, so that Rome had been impoverished of many antiquities and artworks[31]. The enactment of this piece of legislation aimed precisely at rectifying this situation.

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[30] This is the 'Editto Cardinal Pacca *Sopra le antichità, e gli scavi*' issued on April 7th 1820. A reproduction of the original document is stored in ACS, MPI, AA.BB.AA., b. 413, f. 25.

[31] Quoting from Pacca edict: "*Gli antichi Monumenti hanno reso e renderanno sempre illustre, ammirabile, ed unica quest'alma Città di Roma. La riunione preziosa nel suo seno di sì auguste reliquie delle vetuste Arti, la gelosa cura di quelle che esistono e che novellamente si dissotterrano, le vigili severe provvidenze, perché nono si degradino o si trasportino altrove lontane, sono i costanti e principali motivi che attraggono gli Stranieri ad ammirarle, invitano la erudita curiosità degli Antiquari ad istituirne dotti confronti, ed infiammano la nobile emulazione di tanti Artisti, che d'ogni parte d'Europa*

Moving on to a closer analysis of the edict, it consisted of sixty-one articles covering both the normative and executive aspects of the subject treated. With regard to the control on the export of cultural property, articles 11[32] and 12[33] provided the general principles to be observed, according to which it was possible to freely trade antiquities and artistic objects only within Roman territory. Their removal was subject to a licensing system.

Regarding the procedure to be followed, article 13 specified that the Commission of Fine Arts (whose scope and composition is described in Articles 1 and 2 of the Pacca edict) was responsible for inspecting the objects, assessing their characteristics and voting in secrecy regarding their exportability. While deciding whether or not to grant an export licence, the Commission had to evaluate whether the object was 'necessary or of paramount importance' to the State. In case of a negative evaluation, the object could be exported with the payment of a duty corresponding to 20% of the value of the object (art. 14).

Albeit the Pacca edict did not provide for a temporal threshold above which export was forbidden, it was specified that the payment of the export tax was not due when exporting 'modern restorations'. The intention was to not adversely affect the trade involving these items[34].

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quivi concorrono per farle scopo e modello de' loro studi. Di ciò persuasi i Sommi Pontefici promulgarono savissime Leggi che impedissero il trasporto di qualunque prezioso Oggetto antico fuori di Roma e dello Stato Ecclesiastico, e dettarono norme e discipline rigorose a regolamento degli Scavi di Antichità, e pel ritrovamento qualunque di monumenti d'Arte. Ma la dimenticanza di queste Leggi e la trascurata osservanza delle medesime depauperarono Roma di molti insigni Monumenti".

[32] Ibidem: "*Sarà permessa la vendita ed il commercio degli Oggetti di Antichità e d'Arte liberamente se seguirà entro quest'alma Città di Roma*".

[33] Ibidem: "*Qualunque Articolo e Oggetto di Belle Arti, che voglia estrarsi dalle Provincie dello Stato per l'Estero, o da quest'alma città di Roma per le provincie o per l'Estero, sarà sottomesso alle più rigorose ispezioni, riserbata solamente a Noi la facoltà di permetterne la relativa estrazione, e annullando conseguentemente per espresso comando di Sua Santità ogni ordinazione, abuso, e consuetudine in contrario*".

[34] Art. 15 of Pacca edict established that: "*Gli Assessori della Scultura e della Pittura sotto la Nostra dipendenza e del Commissario delle Antichità continueranno in*

For the same reason, the payment of the tax was not required when an individual was willing to export artworks that he/she created at first hand[35]. Ultimately, articles 17[36] and 20[37] established two additional parameters to be followed by the Commission of Fine Arts when scrutinising the export authorisation requests. According to these criteria the export request authorisation had to be denied when the object belonged to the decline or the splendour of a specific Art and when it had a unique value for the history of art.

As mentioned, the Pacca edict consisted of sixty-one articles that referred to many different aspects to the protection and management of cultural heritage, both mobile and immobile. The specificity of its content is remarkable and it clearly appears from the analysis of the provisions regarding the control on the export of cultural property.

Almost all the rules introduced in the Pacca edict would be reflected in later legislations adopted by the Kingdom of Italy, in particular the

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Roma a fare le stime degli Oggetti d'Arte da estrarsi all'Estero, per regolare il pagamento del Dazio stabilito, avvertendo, come per lo passato, di non comprendere giammai i moderni restauri, poiché essendo questi una industria dei moderni Artefici, non vogliamo che ne risentano aggravo".

[35] Art. 21 of Pacca edict stated as follow: "*Quantunque ad incoraggiare le Belle Arti si osservi costantemente che ogni Artefice possa liberamente far trasportare fuori dallo Statole sue Opere senza Dazio alcuno; pure volendo Noi, che non si confondano le Opere moderne con le antiche sottoposte a Dazio di estrazione, comandiamo che ancor esse siano assoggettate alla Visita del Commissario delle Antichità e degli Assessori rispettivi della Scultura e della Pittura, e munite non meno della Nostra licenza, sotto pena della perdita delle divisate Opere*".

[36] The original wording of art. 17 was: *"I Marmi scolpiti da Autori non viventi appartenenti al decadimento ed al risorgimento della Scultura dovranno essere soggetti alle medesime Leggi che le Antichità, e quante volte abbiano qualche singolar merito per la storia delle Arti, dovranno prendersi in pari considerazione, che le cose antiche"*.

[37] Art. 20 reported: "*Non dovendosi poi trascurare le Pitture e i Musaici antichi, ordiniamo, che i Quadri di Scuole Classiche, le Tavole, le Tele ed i Musaici, che possono illustrare il decadimento, il risorgimento, e la Storia delle Arti, siano sottoposti alle medesime discipline ed allo stesso Dazio che le Sculture antiche"*.

imposition of export duties; the concept of rarity in a qualitative sense; and the importance of an object as testimony of a specific artistic period.

2. The Italian Kingdom at the turn of the XX century.

When the unification of the Kingdom of Italy was finally decreed in 1861, the different Italian provinces were already equipped with a regulatory system meant to control the export of cultural assets. This was true at both the normative and the administrative level. We have been discussing the normative structures of the various pre-unifiction states while the administrative structure in place in the pre-unitary States will be examined in the next chapter.

By virtue of this situation, the mutation of Italy into a unitary State did not disrupt the area of cultural heritage law and cultural heritage administration. The legacy of the ancient legislative texts ensured an immediate engagement of the new-born Parliament with the protection of the national cultural heritage. As highlighted by Roberto Balzani in his extensive study on the legislation protecting antiquities and fine arts at the beginning of the XX century, 'the analysis of the draft laws and parliamentary debates that occurred from 1870 to the end of the century reveals how the debates over cultural heritage were central within the Italian ruling class[38]'.

In particular, it is again Balzani who emphasizes how these debates were supported and based upon the study of the legislation in force in the ancient regional States[39]. This is a further evidence of the aforementioned deep connection between Italian legislation *pre* and *post*-unification[40].

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[38] See R. BALZANI, *Per le antichità e le belle arti. La legge n. 364 del 20 giugno 1909 e l'Italia giolittiana. Dibattiti storici in Parlamento*, il Mulino, Bologna, 2003, 39.

[39] Ibidem.

[40] By saying that there is a 'deep connection between the Italian legislation pre and post-unification' we do not mean so much and not only a similarity on the substance of the law, rather than on its main features. After all, a purely

Italian Parliament was not able to regulate the matter for the first thirty years after the unification, and –apparently- the impasse was due to the difficulty to mediating between public interests and private ones. A change in the attitude of the State towards the attempts to limit the right of private property appearss in the draft law proposed by the Minister of Public Education Cesare Correnti in 1870[41]. Correnti's speech presenting the law is particularly interesting, since the minister affirms his opinion on the fact that a total ban on the export of cultural property would represent a violation of the most basic legal principles. He specifically said that 'the ownership of a painting or a statue does not differ from the ownership of an apartment or another real property. Just as the State could not suppress the latter, in the same way it cannot suppress the former, except in a matter of great public interest. And even in this case, the private individual should be compensated for the damage suffered. In fact, no matter how much we love and admire the

formal transposition was not possible since the multitude of different legislations at stake before the unification of the Kingdom. As stated by Cesare Correnti, a former minister for public education, while presenting a draft law on the control on the export of cultural property in 1870: "*Per nessuna materia vegliano nel Regno così diverse legislazioni, come per questa*".

[41] Unfortunately, it is not possible to determine the exact date in which the draft law put forward by Cesare Correnti was proposed to the Parliament. The files stored in the folders of the General Directorate of antiquities and fine arts of the State central archives contain the reproduction of the speech pronounced by Correnti while presenting the draft legislation, and its content. But the latter does not provide any indication concerning the date. It seems possible to affirm that Correnti proposed the above mentioned draft legislation in 1870 since there is a reference to this date in the record of the proceedings of the Chamber of Deputy meeting held on April 26th 1871. During this meeting, deputy Massari addressed some critics to the minister of public education regarding his policy on the export control, making specifically reference to the authorisation granted by the latter for the sale of a Raphael's painting titled 'La Madonna del libro'. It is on that occasion that Correnti made several references to a draft law on the matter he made the previous year but, unfortunately, without specifying any date or further details.

glorious Italian antiquities, the legislator cannot deflect the highest rationales of the law[42]'.

An organic law on the protection of the national cultural heritage was approved only in 1902: this is the law n° 185 '*Portante disposizioni circa la tutela e la conservazione dei monumenti ed oggetti aventi pregio d'arte e di antichità*'. The first novelty of this piece of legislation is provided by Article 1, which narrows the scope of the following provisions only to 'monuments, objects of cultural interest and buildings that are valuable because of their antiquity or artistic interest, whose author is no longer living and that were produced for more than fifty years ago'. Even though the principle of exonerating contemporary cultural objects of artistic interest from the protection laws had been already introduced by previous legislations, this is the very first time that a specific time threshold was provided.

In light of that requirement, the norms providing for a control on the export of cultural property were also limited to the object falling within these two criteria: they must be at least fifty years old and their author must not be alive. Whenever an item is covered by the scope of the 185/1902 law, its export is liable to the payment of a progressive tax determined on the economic value of the object (art. 8)[43]. The State retains

[42] Quoting from the draft law of 1870: "*E cominciando dall'esportazione, io dovei innanzitutto, nei diversi sistemi che mi si porgevano alla mente, rifiutare qualunque di essi che implicassero più o meno il concetto di proibire assolutamente la vendita all'estero che sarebbe stato un contravvenire ai più elementari principi di diritto. Chi è proprietario di un quadro o una statua è alla pari di chi possiede un campo o una casa; e come lo Stato non potrebbe per nessuna ragione ridurre sterile questa seconda specie di proprietà, così non potrebbe insterilire la prima. Solo quando un grande interesse pubblico sopravviene e si sovrapponga al far valere dove e come si crede meglio la proprietà privata, allora interesse privato si inchina al pubblico, ma sì col compenso del danno patito. Poiché per quanto amore si porti alle glorie artistiche d'Italia, e per quanta ira e vergogna a vederle mercanteggiate agli stranieri, il legislatore non può deflettere dalle supreme ragioni del diritto*".

[43] The economic value of the object was calculated after the estimation done by the applicant and then validated by the competent administrative offices. In case of disagreement the latter was established by a committee composed for the

its right of pre-empting the cultural assets within two months starting from the date in which the export was authorised. Finally, Article 23 appoints the Minister of Public Education to proceed with the drafting of catalogues listing monuments, antiquities and objects of artistic interest. These catalogues would have been divided in two parts: the first containing objects of cultural interest in public hands, and the second those privately owned (the inclusion of the latter in the catalogue could occur after a private request or *ex officio*). What kind of assets in private hands could be included in this catalogue? The fourth paragraph of article 23 specifies that the State can list them *ex officio* only if they are extremely valuable antiquities or artefacts, so that their export would cause serious detriment to the history and art of the nation.

Summing up, according to the 1902 law the Italian State could deny to a private individual the possibility to export a cultural object in his/her possession only if the property fell under the temporal threshold provided by at article 1 and in case the object was of such value that its departure would cause a serious detriment to the history and art of the nation. In order to operationalise this option, the Ministry of Public Education had to create the above mentioned catalogue, and it had at disposition one year of time to do so.

By 1903 this task was still not accomplished, so that the risk of an uncontrolled flow of artworks beyond Italian frontiers became evident.

In response to this risk, in the same year the Italian Parliament approved a specific law to control the export of cultural property that provided for an export ban of two years for all the objects found during an excavation and that were considered of archaeological or artistic importance[44]. Besides this, the same export ban had to be applied for those items considered to be extremely valuable, even in the absence of the catalogue. This scrutiny over the export authorisation requests had

halfway by experts named by the exporter and halfway by experts named by the ministry of public education.

[44] This is law n. 242 '*Sull'esportazione all'estero degli oggetti antichi di scavo e degli altri oggetti di sommo prestigio storico e artistico*' enacted on June 27th 1903.

to be conducted by the members of the export office, each of which could express his/her opposition to granting the export licence. The final decision, in any event, was adopted by the Minister after consultation with the Commission for the Protection of Monuments, Antiquities and Fine Arts of the province. Until the membership of the export office was established, the very possibility of issuing an export licence was suspended.

The catalogues called for in the 1902 and 1903 laws were never created, so the export offices kept denying the authorisation to remove a good of artistic and historic interest from national territory only on the basis of the serious detriment that this departure would have caused. This is why the new organic law of 1909, taking account of this practice, does not mention the catalogues anymore and formalises the current practice. In fact, article 8 of law n. 364/1909 stated 'it is forbidden to export from the Kingdom any items that have historical, archaeological or artistic interest, such that their removal would represent a serious detriment to history, archaeology and art'[45]. As for the procedure of submitting an export authorisation request, its evaluation and the duty to pay in case it was granted, everything remained unchanged.

3. The export regulatory framework from the Fascist period through the XX century.

In 1939, at the height of the Fascist regime, a law that introduced innovations in the Italian regulatory framework on the protection of

[45] See art. 8 of law n. 364 '*Sulle cose di interesse storico o artistico*' of June 20th 1909, also known as law Bottai by the name of his proposer.

For a in depth analysis of Bottai law see See R. BALZANI, *Per le antichità e le belle arti. La legge n. 364 del 20 giugno 1909 e l'Italia giolittiana. Dibattiti storici in Parlamento,* op. cit.

cultural heritage both in terms of its extent and, especially, with regard to its administration was enacted[46]. This was the so called 'Bottai Law'.

In order to analyse the new law's provisions on the art export control, we first need to understand the categories of items upon which the law operates. These are listed in Article 1, and are: items that have an artistic, historic, archaeological or ethnographical interest. This generic description is followed by a non-exhaustive list of samples that are taken into consideration by the law. The last paragraph of Article 1 established that cultural assets produced within the last fifty years and whose author is still alive are exonerated from the effects of the law. While the inclusion of a specific time threshold was already present in the 1902 and 1909 legislation, that of 1939 contains for the first time a more accurate description of the object of the law, in the form of the non–exhaustive list provided in Article 1[47].

The Bottai Law dedicated an entire Chapter, the fourth (entitled 'instructions over imports and exports'), to the provisions regarding the export of cultural property. The regulatory framework provided by Articles 35 *et seq.* predisposed the denial of the export in cases in case the

[46] The main innovations and the structure of law n. 1089 22nd May 1939 have been analysed by S. CASSESE in *I beni culturali da Bottai a Spadolini*, Rassegna degli archivi di Stato, 1975, n. 1-3, 116.

On the Fascist cultural policy more in general, see G. BOTTAI, *Politica fascista delle arti*, Angelo Signorelli, Roma, 1940. For an annotation of the law 1089 and the related case-law see E. CAPACCIOLI (edited by), *Rassegna di giurisprudenza Sulla tutela delle cose d'interesse artistico e storico*, Giuffré, Milano, 1962.

[47] This is particularly evident for what concern the immobile items comprehended in the cultural protection law. Paragraph 3 of article 1, in fact, specified that fell under the scope of the law also the 'villas, parks and gardens' provided with an historical or artistic interest.

In confirmation of this, it is the same rapporteur of the law (Calza Bini) that, during a meeting of the '*Commissione legislativa dell'educazione nazionale*' of the Camera dei fasci e delle corporazioni held on April 22th 1939 specified: "*Mentre nelle norme precedenti si parla di cose immobili da tutelare in modo generico, nella nuova legge è stata fatta una discriminazione molto precisa e minuziosa sull'importanza e sull'interesse delle cose e opere d'arte soggette alla tutela*'.

removal of the item would hace caused a significant detriment to the national cultural heritage protected by the law. The export authorisation requests had to be addressed to the export offices after a physical exhibition of the object. If the export licence was granted, the individual had to pay a progressive duty calculated on the economic value of the object; the progressive brackets of the duty were established at Article 37. As before, the State had the right of pre-emption over the object proposed to the export, to be exercised within two months after the export authorisation request.

What were the novelties, from a legal point of view, of this law with respect to the previous ones? Not many.

However, reading the debates surrounding the draft law that took place at the Chamber of Fascists and Corporations (in the legislative commission on the national education, held on the April 22th 1939), it is possible to detect some changes in the attitude of the legislators. In particular Manlio Goffi, the spokesperson of the Fascist National Federation of Art Dealers, requested to remove all the restrictions contrary to the flourishing of an international art market. To do so, according to him, it was necessary to revise the 1909 law, also taking into account the proposal made by the Fascist National Federation of Art Dealers that stressed the need to strike a balance between the public cultural heritage –that at the moment was superabundant- and the private one. Finally, Goffi underlined the importance of keeping alive the interest (thereafter, the possibility) of collecting art within national borders, since this activity met the same purpose of the law; namely, the protection of the national cultural heritage. The discussions that took place in the legislative commission on national education dwelt on the most suitable adjective to use in Article 35 to determine what kind of detriment to the nation would result in the denial of the request to export a cultural object. The debate turned out to be more formal than real, since the final phrasing adopted, although slightly different than before, did

not change very much in substance[48]. Finally, it is possible to say that interests of the private sector were taken into consideration in the writing of the law, and not only under the impulse of Manlio Goffi. During the presentation of the law, the Minister of Public Education himself, Luigi Bottai, gave an account of the practices to be adopted. He stated that the necessities that would have allowed the development of the art market had been taken into consideration, and this because the trade of artistic objects does not go only towards dealers' interests, but is also an important public concern. Moreover, public authorities should remembe not to underestimate the latter because it is important to strengthen the relation between nation's diverse interests, both the economic and cultural ones[49].

The main features of the Bottai Law affected Italian cultural protection law throughout the second half of XX century, given that no significant changes occurred for many years, not even after the nation's shift to a Republican regime. In the next chapter we will see how in this period, on the other hand, significant changes were adopted in the structure of the administration of cultural heritage.

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[48] According to art. 35 of law 1080/39 the detriment for the national patrimony that could justify the denial of the export licence had to be '*ingente*'. Art. 8 of law 364/1909 adopted a slightly different requirement, asking for a '*danno grave*' and the same was provided by article 23 of the 1902 law. We could argue that the adjective '*ingente*' is slightly stronger than '*grave*', but the difference is very limited.

Regarding the similarities on the substance of law 1080/39 if compared to the previous ones, see A. ROCCELLA, *Aspetti giuridici del mercato dell'arte*, Aedon, 1, 2001.

[49] See Bottai's presentation of law 1080/39, reported as a footnote in l. 1089/39, Le leggi, 1939, 892. Here an excerpt: "*Non minore considerazione (...) si è avuto per l'incremento e lo sviluppo del commercio delle cose contemplate dalle disposizioni della presente legge. Tale commercio non concerne soltanto gli interessi privati dei commercianti, ma costituisce anch'esso un importante interesse pubblico, che non deve essere trascurato e che, anzi, deve essere tutelato, pure in questa sede, in vista dell'unità in cui è necessario che si compongano gli interessi ideali e quelli economici della nazione*".

The first reorganisation of the regulatory framework was adopted in 1998, thanks to the enactment of a law that specifically concerned the circulation of cultural property. This normative reorganisation was mainly urged by the need to conform the Italian regulatory framework to the new Community export control system[50]. After the establishment of the single European market, in fact, it was necessary to set some ground rules for the circulation of cultural assets *infra* and *extra* European borders.

Even if the content of the Community regime on the export of cultural objects will be examined more in depth in Chapter IV, for now we can proceed by looking at the immediate effects that the introduction of the European norms produced on the Italian legislative framework.

Already during the negotiations for the adoption of the Council Directive on the return of cultural objects unlawfully removed from the territory of a member State and of a Council Regulation on the export of cultural goods, the Italian delegation recognized that its domestic legislation needed to be modified.

In fact, after the approval of the EU Regulation first (in 1992), and of the Directive after (in 1993), the Italian Parliament advanced three bills[51] in order to adapt its internal regulatory framework to the recent developments[52]. Because of their similarity in terms of content and

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[50] This is law 30 March 1998, n. 88 '*Norme sulla circolazione dei beni culturali*'.

[51] This is bill n. 838/92 titled '*Modifiche alla legge 1° giugno 1939, n. 1089, in relazione al mercato unico europeo*' on the initiative of senators Covatta and De Rosa; a bill by the Government (the number 1317/93) titled '*Norme sulla circolazione dei beni culturali*'; and number 1543/93 on the initiative of senators Chiarante et alt named 'Norme sulla circolazione dei beni culturali all'interno della Comunità europea o con I Paesi terzi e adeguamento e potenziamento della legislazione italiana in materia di tutela'.

[52] See C. BISCARETTI DI RUFFIA, *Il regolamento n. 3911/92 del Consiglio relativo all'esportazione di beni culturali e il trattato dell'unione europea*, in Diritto del Commercio Internazionale, n° 6, 1992. In particular 502: "*Dal punto di vista nazionale la previsione di misure di attuazione del regolamento offrirebbe al nostro paese*

proposal, the three draft laws were examined jointly in the Committee of the Senate specialised in cultural affairs[53].

The aim of these proposals was not only to transpose the EU legislation at the domestic level, but also to take the opportunity to introduce some amendments that would have placed Italy at the forefront in cultural heritage law compared to the other member States.

What emerges clearly from these draft laws is the need to reform the operation of the existing export offices. Already in July 1992, in fact, Italian politicians who were participating at the EU negotiations reported to the Senate that there would be the need to "to make internal export procedures more efficient and transparent: they will in fact be subject to EEC and other member States' assessment. And currently the performance of our export offices is anything but transparent, largely arbitrary and not infrequently capricious[54]".

In addition, the three bills confirmed that the existing export offices would be entrusted with the responsibility to enact also export licences for the shipments of goods toward an *extra* EU destination. The scrutiny about whether to release such authorisation followed the same criteria established by law 1089/1039. Because from that moment on Italian export offices became responsible also for checking the movements of objects having cultural interest coming from other member States, a better management of the former was desired.

In fact, we can assume that at the beginning of the 90s Italian politicians were already aware of the widespread dissatisfaction concerning the functioning of the domestic export offices. The discontent was mainly due to the excessive discretionary power the offices had in deciding

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l'opportunità di un riesame della L. 1 giugno 1939 n. 1089 che tenga conto del mutato contesto internazionale e comunitario in particolare".

[53] See the report of the 7th permanent Commission at the Senate held on October 21, 1993 in which the three bill were analysed and discussed.

[54] See the report of 7th permanent commission at the Senate held on July 15, 1992, p. 47.

whether or not to grant the export authorisation and to the inadequacy on an administrative level.

With respect to the discretional power, the bills put forward a proposal for the creation of a specific collegial body that would receive 'appeals' against the denial of an export licence. In other words, a non-judicial authority that could oversee the impartiality of the administration. The configuration of such authority, however, differs depending on the draft law. According to the two bills proposed by the Government and by Senator Chiarante, it was a ministerial responsibility to set up an authority with a high scientific profile and an impartial character[55]. On the other hand, Covatta and De Rosa proposed to constitute an independent authority within the Presidency of the Council[56] that would have also been responsible for judging the regional appeals against the ministerial revocation of the export licences enacted by Regions[57]. Other novelties regarded the suggestions, present in Chiarante's proposal, to set up a data base to collect and make available all the decisions adopted by export offices throughout the national territory[58] and, more in general, to undertake actions to strengthen, reorganise and enhance export offices[59].

[55] The features of the 'Autorità centrale e Commissione di garanzia' are described at article 7 of bill 1543/93.

[56] This authority, called Commissione nazionale per la tutela del patrimonio artistico e culturale nazionale, is required by Article 4 of the bill 836/1992.

[57] This attribution is a response to the sentence of the Constitutional Court n. 278/1991 that allowed Regions to release export licences for goods having a local artistic interest.

[58] This proposal is contained in Art. 5 of the bill 1543/93. It states: "*Presso il Ministero per i beni culturali e ambientali è istituito il Pubblico Registro dei beni culturali, articolato in tre banche dati (…) a cui affluiscono le decisioni degli Uffici esportazione, accompagnate dalle motivazioni e da adeguata documentazione, circa il rilascio o meno dell'attestato di libera circolazione. Tali banche dati sono immediatamente consultabili da tutti gli Uffici esportazione*".

[59] See Art. 11 "*Entro tre mesi dalla data di entrata in vigore della presente legge, il Governo presenta al Parlamento un disegno di legge contenente norme e indicazioni*

The debate over these three draft laws ended with the commitment to form a select committee with the objective to prepare an official text of the new legislation[60].

As already mentioned, major reforms to the Italian art export control system were introduced in 1998, with the enactment of law n° 88. If this law provided important changes on the content of the export control system (thanks to the compliance with the requirements of the EU Regulation and Directive), its administrative functioning was not affected significantly. The mentioned suggestions made to guarantee a bettere performance of export offices, in fact, were never implemented.

Regarding the content, articles contained in Chapter IV of the 88/98 law (Articles 17 *et seq.*) substituted some provisions regulating controls on the export of cultural property dating back to the law 1089 of 1939.

Many novelties were introduced. Article 17 (which substituted Article 35 of the 1089/39 law) modified the extent of the art export control, allowing export offices to deny authorisation to export an item of artistic, historical archaeological, documental, bibliographical, archival or ethnographical interest when its departure would cause detriment to the artistic or historical patrimony of the nation. Paragraph 5 of the same article, moreover, established that the assessments conducted by the export office had to comply with the general guidelines established by the National Committee for Cultural Property and Landscape.

If compared with the previous version of Article 35 of law 1089/39, there are two main differences: the detriment required to deny the export authorisation no longer had to be of great significance; and the civil servants working in the export offices were required to make reference

programmatiche per il riordinamento, la qualifica e il potenziamento degli Uffici esportazione".

[60] Ronchey, Minister for Cultural Heritage, suggested that Tommaso Alibrandi, head of the legislative office of the ministry, and States Attorney Piergiorgio Ferri should be part of the committee.

to guidelines valid throughout national territory while evaluating an export authorisation request[61].

Is there any connection between these two novelties? Is it possible to infer that the one is conditional upon the other?

We could argue that qualifying the kind of detriment deriving from the export of a given item is no longer necessary when the assessment procedure is less subject to individual judgment. In other words, it is possible to imagine that the necessary evaluations conducted to qualify a detriment as 'serious' or 'significant' were substituted by assessments based on some objective criteria. From this perspective, the requirement of a 'qualified' detriment in previous legislation did not demonstrate that the evaluations conducted by export offices were objective. Once the latter were obliged to conform to formal criteria, the requirement of a 'srious detriment' falls short.

Article 18 (substituting Article 36 of the 1080/39 law) regarded the procedure to submit an export authorisation request. The individual who submit the request still had to physically present the object for which the export authorisation was required to the export offices and contextually declaring the economic value of the goods. As for the export office, indeed, something changed since they had to release or deny the export authorisation by providing a reasoned opinion. And, if granted, the certificate of free circulation lasted for three years. It is worth mentioning that a statement of the economic value of the cultural property was not needed to calculate the export tax anymore[62] –but

[61] For the specification of these general guidelines and the process that lead to their adoption see chapter III.

[62] The export tax required by law 1089/39 (article 37) was abolished by the law decree of July 5, 1872, n. 288 enacted by the President of the Republic after a proposal of the Minister for public education, in agreement with the Ministers of foreign affairs, justice, finance, treasury and commerce. This law decree was then converted in the law n° 487 of the 8th August 1972, published in the Official Journal of August 28, 1972 n° 223.

rather to establish the price that the State had to pay in case it exercised its right of pre-emption[63].

Another novelty of the 1998 law is that it introduced for the first time a due time for administrative action in the process of evaluating the export authorisation requests. Article 19 specified the deadlines within which to carry out the administrative proceedings, and namely: 'the certificate of free circulation cannot be granted before fifteen and after forty days by the time of delivering of the object for inspection. The export office, after three days from the delivery, gives notice to the responsible office of the central administration so that, within ten days, they can deny the export authorisation'. It is important to underline that these timelines did not provide mandatory dates; rather, they were indicative time-frames under which the administrative proceedings had to be carried out.

Finally, paragraphs 3 to 7 of Article 19 established the modality and the timing within which the applicant could appeal the denial of the administration to release the certificate of free circulation. This inclusion is particularly important since it reveals that the interests and rights of applicants were taken into account. The State did not appear anymore as the only actor involved in the control on the export of goods of artistic and historical interest since the counterpart is also being considered. For the first time the 'knot' of the relation public/private has become evident also in the matter under consideration so that there was an attempt to find a balance between the different interests at stake.

We have seen that after 1939 the whole subject of the protection, management and valorisation of cultural heritage has been regulated with scattered measures. There have been many attempts of reorganisation, especially when the autonomous Ministry of Cultural Heritage was established, but none of them functioned effectively until

[63] The right of pre-emption, as regulated by Article 20 l. 88/98, could be exercised within 90 days starting from the submission of the export authorisation request.

the very end of the XX century[64]. It is in 1999, in fact, that the Parliament enacted the first Consolidated Law in the area of cultural heritage and landscape[65]. The reading of this piece of legislation, that contains 166 articles, immediately gives the idea of the expansion of cultural heritage law throughout the XX century[66]. This is evident both for what concerns the kind of property taken into account (mobile, immobile, landscape) and the subjects covered (at the beginning of the century major attention was focused on export control and on excavations, while later the areas of intervention increased significantly).

Chapter IV of the Consolidated Law is dedicated to the circulation of cultural property at the international level; its section I contains the norms regulating the import and export across national borders. The reading of Article 65 *et seq*. makes evident that the main features of the control on the export of cultural property remained unchanged with respect to law 88/98. The scope of the control, the kind of detriments necessary to deny the export authorisation, the timeline and the modality of the administrative procedures: everything remained unmodified.

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[64] For an overview of the legislative attempts put forward before 1999, see F. LEMME, *Limiti nella circolazione dei beni culturali: situazioni attuali e proposte* in G. FALSITTA (edited by), *Il regime tributario e amministrativo dei beni culturali. Atti del convegno svoltosi a Saint Vincent*, 1986, Il fisco, Roma-Milano, 182.

See also V. CAZZATO, T. CECCARINI, A. MARESCA CAMPAGNA, P. PIETRAROIA, *Beni cultural e prassi della tutela. Circolari ministeriali 1975-1990*, Istituto poligrafico e zecca dello Stato, Roma, 1992.

[65] This is the '*Testo unico delle disposizioni legislative in materia di beni culturali e ambientali*', legislative decree October 29, 1999, n. 490, published in the Gazzetta Ufficiale n. 302 of December 27, 1999.

[66] The Consolidated law of 1999 has been reproduced and annotated by W. VACCARO GIANNOTTI, *Il nuovo Sistema giuridico dei beni culturali: testo unico, norme non abrogate, organizzazione del ministero*, Graffiti editore, Roma, 2001.

4. The 2004 Code of cultural heritage and landscape and the '2017 reform'.

The systematisation of cultural heritage law that occurred in 1999 did not last long. Only five years later, in fact, with the legislative decree of January 22, 2004 n. 42 the Italian parliament adopted the Code of Cultural Heritage and Landscape (hereinafter, the 'Code'). The 2004 Code did not limit itself to regulate the protection, management and valorisation of cultural heritage, but also made some significant innovations in the matter under consideration[67].

The major innovation of the Code consisted in the turn from a system that provided for a generic ban on the export of objects having a cultural interest to another one that divided cultural property protection into three levels[68]. Analysing the Code we observe that objects of cultural interest can be distinguished between those for which there is a total ban on the export; others that can be exported only after receiving a certificate of free circulation; and still others that do not require any authorisation to be removed from the national territory.

The first group is regulated by Article 65, paragraphs 1 and 2, and includes objects having artistic, historical or archaeological interest that belong to the State, Regions, other kinds of public entity, or non-profit private legal individuals. Besides these goods, there is a total ban on the export of the collections of public galleries and museums, archives, and single documents belonging to the State and the collections of public libraries.

Paragraph 3 contains, instead, the list of goods that must obtain a certificate of free circulation in order to be permanently exported beyond

[67] For an overview of the major novelties introduced by the Code of cultural heritage and landscape see the analysis contained in the first issue of 2004 of Aedon, available at the web site: http://www.aedon.mulino.it/archivio/2004/1/index104.htm.

[68] See M. CAMMELLI, *Il Codice dei beni culturali e del paesaggio: dall'analisi all'applicazione*, Aedon, 2004, 2.

national borders. These are: objects belonging to anyone created more than fifty years ago and whose author is no longer living; archives or single documents privately owned which have ~~a~~ cultural interest; and the objects described at Article 11, paragraph 1 letters *f*), *g*) and *h*).

Finally, paintings, sculptures, graphics, or any other artefact that has been produced within the past fifty years or whose author is still alive are not subject to any control on their export.

As for the modality for submitting the export authorisation request and the timeline within which the administration must to conclude its evaluation and release the certificate of free circulation or communicate the denial of the request, everything remained unchanged with respect to 1999[69].

Article 70 of the Code establishes that, within forty days starting from the delivery of the object under review, the export office can recommend the Minister to purchase 'by force' the item at the price indicated in the export request. If this happens, the administration must notify the applicant accordingly, while the object remains in public custody; in this case the timeline for the release of the certificate of free circulation is extended for sixty days. During this period, and before receiving the notification of the purchase by the State, the applicant has the right to withdraw his/her export request and will receive his/her object back (Article 70 paragraph 2).

The above mentioned rules are applicable for the export of cultural property to another member State, but the Code takes into consideration also the cases in which the applicant requires an authorisation to export the item to an *extra* UE country. Article 74 addresses this case by stating that the export licence for a third country is issued subsequent to the release of a certificate of free circulation, or at maximum within the following thirty months. This export licence is valuable for six months (Article 74 paragraph 2).

[69] See article 68 of the Italian Code for cultural heritage and landscape.

Since the granting of an export licence is subject to the release of a certificate of free circulation, the assessments that the Administration has to conduct in case of export to an *extra* UE country are those prescribed at Art. 68 of the Code. What differs between the two kinds of exports (to an *infra* or *extra* EU destination) regards mainly the category of objects to whom the two regulatory frameworks (the domestic and the Community one) refer.

Paragraph 1 of Article 74, in fact, establishes that the EU control on the export of cultural property covers the objects listed at Annex A of the Code. This annex provides both for a time and a monetary threshold. This means that the applicant should submit the request to obtain an export licence when an object falls within the economic value range indicated, when it was produced more than fifty years ago, and when it no longer belongs to its author. Taking as example a painting or sculpture located in Italy whose owner wishes to export it to a third country, the applicant should submit the request for an export licence if the artwork was produced more than fifty years before, is no longer owned by the artist who created it, and is valued at more than 13.975,50 euro.

We can easily see how the criteria provided by the EU legislation and adopted by the Code in Article 74 are more liberal than those provided for export towards another member State. It could happen that an object to be shipped to a third country doesn't fall under the two EU thresholds (e.g. a painting created more than fifty years ago but with an economic value of 9.000 euros) but under the Italian ones. In this case, since the release of an export licence was subordinate to the certificate of free circulation, the applicant had to apply for it in any case.

This conclusion is due to the fact that the EU control on the export of objects having a cultural interest represents only a minimum degree of protection to be adopted by all member States. But the latter are free to adopt a more restrictive domestic legislation.

4.1 The 2017 reform.

Barely ten years after the adoption of the Code for Cultural Heritage and Landscape, requests for a modification of the national export control system started to be put forward. A group of operators comprising a large part of art market professionals[70] promoted a reform meant to adapt Italian legislation to the European approach[71]. This coordination was aimed at making improvements in the export authorization mechanism 'in the interest of operators, the administration and the integrity of cultural heritage[72]'. Specifically, three main changes were proposed: the introduction of a financial threshold below which objects having an artistic and historic interest could not be subject-to control; the revision of the limit of fifty years to free export (to be raised to one hundred as per initial proposal; and the updating of the general guidelines for export offices.

These reform proposals have led the Government, and in particular the former Minister of Cultural Heritage, Activities, and Tourism, to reconsider the regulations and introduce some important changes. In particular, the 2017 market and competition law, 'in order to simplify the procedures relating to the control of the international circulation of cultural property that concern the antiques market', in paragraphs 175 and 176 makes some changes to the Code of Cultural Heritage and Landscape[73].

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[70] In particular, this group was made up by the following bodies: Associazione Nazionale Case d'Asta; Christie's; Sotheby's; Artcurial; the Italian auction houses Il Ponte, Bolaffi, Minerva and Finarte; Associazione Nazionale delle Gallerie d'Arte Moderna e Contemporanea; Associazione Antiquari Italiani; Associazione Librai Antiquari d'Italia; Art Defender and Arterìa.

[71] This claim regarded, for example, the possibility to introduce also in Italy a financial threshold in order to stretch out the category of assets exempted from the export control.

[72] See the document titled '*Spunti e proposte per il mercato dell'arte in Italia*' written and undersigned by the proponents of the reform.

[73] This is the 'Legge annuale per il mercato e la concorrenza' of August 4, 2017, n. 124, in force since August 29, 2017.

The amendments made are the following:

- raising the time threshold for free export from fifty to seventy years;
- introducing a monetary threshold of € 13,500 below which the export of objects of cultural interest is not subject to authorization;
- raising of the duration of the certificate of free circulation from three to five years;
- introducing a new category of goods subject to export control -under point d) *bis*, paragraph 3, art. 10 of the Code – which includes 'items, belonging to anyone, of exceptional artistic, historical, archaeological or ethno-anthropological interest for the integrity and completeness of the cultural heritage of the Nation by artists no longer living, and which were created between fifty and seventy years ago[74]';
- requiring an update of the general guidelines to be followed by export offices for the assessment of the release or refusal of the certificate of free circulation as well as the conditions, methods and procedures for issuing and extending the certificates of shipment and importation;
- establishment of "a special passport" for artworks, of five-year duration, to facilitate the exit and return of the same from and into the national territory.

The full functioning of these new regulations introduced by the 2017 market and competition law required the adoption of some ministerial implementing decrees, to be elaborated by the Directorate Generale of Ministry for Cultural Heritage, Activities and Tourism. The first decree was approve on December 6, 2017 (n. 537), and it contains the updating of the general guidelines for the assessment of the release or refusal of

[74] Notwithstanding the expansion of the time limit to seventy years, the legislators wanted to maintain the right to retain, in presence of the necessary conditions, cultural goods whose author was no longer living and produced more than fifty years ago.

the certificate of free circulation by the export offices of objects of artistic, archaeological, or ethno-anthropological interest[75].

The second implementing decree necessary to allow the full operability of the changes made by l. 124/2017 was published in May 2018: this is the MiBACT decree of May 17, 2018, n. 246, containing the "Conditions, methods and procedures for the international circulation of cultural heritage". The decree lists and specifies the procedures and timescales necessary to obtain the authorization to export objects of cultural interest and it prepares the forms to be used in such circumstances.

Worthy of particular attention, given the novelty of the object, are the previsions regarding the 'procedures relating to objects created within less than seventy years and more than fifty', as well as the procedures relating to objects created over seventy years with a value below € 13,500', respectively specified in articles 6 and 7 of the Ministerial Decree n. 246 of 2018. More specifically, Article 6 provides that the export offices, in order to assess whether the objects created within less than seventy and more than fifty years fall within the definition of article 10 paragraph 3 letter d)*bis*, can require the physical delivery of the object within ten days from the submission of the export request authorization. In that case, the export office has 30 days to start the procedure of notification provided in article 64 paragraph 4*bis*. After that, the competent General Directorate has to formally deny the export authorization within the following sixty days. Article 7 of the 246/1018 decree, instead, contains the documents that the applicant can use to prove the economic value indicated. They are, among others, the invoice of the cultural property if this was purchased within the last three years from an auction house or a professional dealer; a copy of the contract undersigned by the parties if the cultural property ws purchased by a private seller etc...

But not all the changes provided for in the 246/2018 decree could be implemented, since its operativity was partially suspended by the approval of a supplementary decree signed by the Minister of Cultural

[75] The content of this Ministerial Decree will be analysed in Chapter IV.

Heritage, Activities and Tourism on July 9, 2018. In particular, this decree -n. 305- suspended the implementation of the monetary threshold, so that this is currently not applicable. This supplementary decree made the application of the provisions contained in art. 7 of the decree n. 246 of 2018 ("procedures relating to things produced over seventy years ago with a value of less than € 13,500") subordinate to the adaptation of the Export Office System (SUE), to be implemented by December 31th 2019.

We can consequently affirm that the provisions introduced by the 2017 market and competition law and the subsequent ministerial decrees are currently working halfway, and this have caused some confusion among applicants and export offices. This confusion is mostly due to the fact that the current regulatory framework concerning the control on the export of cultural property can no longer be deduced only through the consultation of the Code. The legislation in force, in fact, results from the intersection of different pieces of legislation and regulations, whose reorganization is not an easy task –especially for the layman. The lack of clarity and of specific addresses, and the uncertain pace of the reform have caused difficulties in the implementation of the export control by the export offices disseminated throughout national territory.

This is especially evident for what concerns the export of cultural property towards an *extra* EU country. At present, in fact, domestic legislation results to be less protectionist than the European one (the former allows the free export of items that have been created more than seventy years ago while the time threshold of the latter is fifty years). This case seems particularly curious since the initial aim of those proposing the reform was specifically the alignment of the Italian and EU legislation. In any case, the question to be answered now is: can Italy implement its own threshold, transgressing the minimum degree of protection required by EU law? If this was the case, artworks meant to reach an *extra* EU country would be freely shipped from Italy while subject to an export authorization from another member State. It goes without saying that this hypothesis would not be legitimate, still, the simple reading of the Italian Code for Cultural Heritage and Landscape

seems to say so. The current version of article 74 states: 'The export towards a third country of the items listed in Annex A is regulated by the EU Regulation and by this article'. Annex A reports a time threshold of seventy years.

To summarize: Article 74 and Annex A of the Code would lead to believe that when the destination is an *extra* EU country, export control is addressed only to objects created more than seventy years ago. But, as mentioned before, this would not be legally possible. This impossibility is confirmed by a Ministerial Circular sent on the July 12, 2018 from the Directorate General for Antiquities, Fine Arts and Landscape to all export offices, to clarify the exact legislation involved[76]. Concerning *extra* EU export , it is specified that 'those items produced more than fifty and less than seventy years before that do not require the certificate of free circulation provided by article 68 of the Code, could require the Community export license if falling under the monetary threshold set by the European Union. If this is the case, in order to be lawfully exported, they have to obtain the export license, without the prior release of the certificate of free circulation (as required by article 74 of the Code). This clarification was urgently needed because in its absence export offices could allow the free export towards a third country of cultural property produced more than fifty years before, thus disregarding EU law.

It should be added as a final remark, that at present time the regulatory framework in Italy is as confused as ever, with significant parts of the Code for Cultural Heritage and Landscape containing information that does not correspond to the regulatory framework currently in place.

[76] This is the Ministerial Circular MIBACT_DG-ABAP_SER. IV, 12/07/2018 n. 31 having as object '*Decreto Ministeriale del 17 maggio 2018- Repertorio n. 246 concernente "Condizioni, modalità e procedure per la circolazione internazionale di beni culturali". Decreto ministeriale del 9 luglio 2018- Repertorio n. 305 che modifica il DM 246 del 2018*'.

FRANCE: A MEASURED PROTECTIONISM

5. The retention of cultural property during the French Revolution.

As mentioned at the beginning of this chapter, behind the enactment of a cultural protection law there are almost always a number of historical reasons. Just as in Italy those reasons were ascribable to the structure of the regional States and their need to preserve their richness and authority, also in France we can trace the triggering factors of the retention of cultural property in historical-political events. From beyond the Alps this was the French Revolution.

The revolutionary events accelerated the awareness of the link between cultural property, the nation, and its population, and –by consequence- the need to preserve objects having an artistic and historical relevance. This particularly happened because in 1789 French State suddenly found itself at the head of a huge artistic patrimony, due to the nationalisation of collections previously belonging to the king and the Church and, later on, to the spoliations of foreign nations. But the ownership on its own would not be enough to stimulate the sensibility for the legal protection of artworks and other objects of cultural interest. The destruction of monuments and other sorts of vandalism towards the cultural heritage of the new-born French State laid the foundation for the enactment of a cultural protection law.

The first piece of legislation enacted during the revolutionary period is a decree adopted by the *Comité d'instruction publique de la Convention nationale* on July 27, 1793, by which the State apportions to itself the budgetary resources to purchase the artworks ready to be sold by private entitites –especially if the destination of the sale was a foreign country[77].

[77] See A. HERITIER, *Genèse de la notion juridique de patrimoine culturel*, 1750-1816, Harmattan, Paris, 2003.

In order to do so, Article IV of this decree allocates funds for a total of 100.000 lires per year at disposition of the Minister of the Interior and the National Treasury. With this sum the named government bodies were entitled to acquire the paintings and the statutes considered important to the Republic[78].

One year later this provision was strengthened by the provision of an export ban for thos objects of value for the art of the nation and the collections of national museums.

More precisely, the 1794 decree established that the Comité d'Instruction Publique had to adopt « *toutes les meseures convenables pour empecher l'exportation des objets qui peuvent intéresser les arts et enrichir le muséum national*[79] ».

We must not forget that the norms meant to protect the national cultural heritage enacted during the French Revolution were conceived in a context of war, or at least of civil unrest. This is probably why the full implementation of the export control was guaranteed by military decree, such as those enacted by the Committee for Public Safety on the 20 *ventose*. According to the latter, the Transitional Executive Council had the responsibility to give instructions to the armed forces and to customs offices in order to prevent any export of books, paintings or other items that contributed to the development of arts and the enrichment of the National Museum and Library[80]. But, notwithstanding the general scope of this diecree- aimed at denying the export of almost

[78] See *Procès-verbaux du Comité d'instruction publique de la Convention national*, Volume 2, edited and noted by M. J. GUILLAUME, 154.

[79] A reproduction of the 1974 decree is stored in the NA, b. AF 67, f. 495, p. 10.

[80] « *Le Conseil exécutif provisoire donner sur le champ les ordres et prendra toutes les mesures nécessaires, soit auprès des armées, soit aux douanes, soit dans les ports, pour empêcher toute exportation, par toutes les frontières, de livres, tableaux et autres ouvrages qui tiennent au perfectionnement des arts et au complément du muséum et de la bibliothèque nationale* ». Reported in F. AULARD, *Recueil des actes du Comité de salut public avec la correspondance officielle des représentants en mission et le registre du Conseil exécutif provisoire*, Imprimerie Nationale, Paris, vol. XI, 1897, 627-628.

all objects of cultural interest, archival material reveals how the Transitional Executive Council did not apply this export ban literally. It seems that the objects of cultural interest that were retained within national borders were only those particularly important because of their rarity or economic value. The reason for this distinction is probably attributable to the intention of not damaging the commercial business of the Republic[81]. But the concern for the trade in artefacts and antiquities was not the only obstacle for an accurate and widespread implementation of the regulatory framework concerning the retention of cultural property. Annie Heritier, in her volume *Genèse de la notion juridique de patrimoine culturel*, provides the text of different letters stored in the national archives that demonstrate the limited applications of the protection laws, especially by local authorities[82].

This situation of little care for the protection of the national cultural heritage is well depicted and confirmed in the famous world of Abbé Grégoire, who wrote the well known *Rapport sur les destructions opérées par le Vandalisme, et sur les moyens de le réprimer*[83].

6. French legislation at the turn of the XX century.

We have seen how the revolutionary experience represented, for the legal protection of cultural property, both an advancement and a partial failure. If on one hand, in fact, the new-born Republic showed a sense of responsibility toward its national cultural heritage, on the other hand its implementation was not very consistent[84].

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[81] See the document stored in the NA, b. AF II 67, f. 495, p. 12.

[82] A. HERITIER, *Genèse de la notion juridique de patrimoine culturel*, op. cit., 204-205.

[83] H. GREGOIRE, *Rapport sur les destructions opérées par le Vandalisme, et sur les moyens de le réprimer*, Séance du 14 Fructidor, l'an second de la République une et indivisible, imprimé et envoyé par ordre de la Convention Nationale.

[84] For an analysis of the impact of French Revolution over cultural heritage law and its legacy see T. STAMMERS, *The homeless heritage of the French Revolution, c.1789–1889*, International Journal of Heritage Studies, 2018.

Moving to almost a century later, we can find the first organic law concerning the protection and the management of cultural heritage enacted in France. This is the law of March 30, 1887, entitled '*Loi pour la conservation des monuments et objets d'art ayant un interet historique et artistique*[85]'. Although the concept was already present in its essence in the decrees issued during the Revolutions, it is the law of 1887 that coined the requirement that in order to be categorized as such, cultural property must have '*un intérêt national au point de vue de l'histoire ou de l'art*' (art. 8[86]). This definition pertains to any moveable object that could be classified as cultural property by the Minister of Public Education and of Fine Arts. So, the law of 1887 provided a legal basis for the classification of movable property, but only for those properties belonging to public persons.

Objects belonging to the State or other public authorities which presented an interest for the history or art of the nation were inalienable. The content of the law was limited to eighteen articles in total, and none of them made specifically reference to export controls. In the absence of any specific provision, we can only take for granted that the prohibition to move cultural property of interest for the history or the art of the nation was appliccable to exchanges both within and beyond French borders.

This lack of provision regarding export control deserves to be highlighted, since the permanent removal of ojects having a cultural interest from the country has always been one of the main concerns of every authority that provides a regulatory framework concerning the protection of cultural heritage. Moreover, we have seen how the export

[85] Law of March 30, 1887 was published in the Journal Officiel of Marc 31th 1887, n. 30.

[86] The original wording of art. 8 l. 30/1887 was : '*Il sera fait par les soins du ministre de l'instruction publique et des beaux-arts un classement des objets mobiliers appartements à l'Etat, aux départements, aux communes, aux fabriques et autre établissements publics, dont la conservation présente, au point de vue de l'histoire ou de l'art, un intérêt national*'.

ban was specifically the central issue of the decrees enacted during the revolutionary period.

The 1887 law *pour la conservation des monuments et objets d'art ayant un interet historique et artistique* was later amended in 1909 by a law, with the same title, enacted on July 19. The major novelty of this amendment consists in the authority of the minister of public education to determine the *classement* also for privately owned cultural property. This restrictive measure, however, could not be established without the previous agreement of the owner. This detail, again, contrasts with the Italian legislation of the time which, instead, put in the foreground the public interest over that of individual collectors.

6.1. Law of December 31, 1913 '*Sur les monuments historiques*'.

The law of 1913 represents the pillar of cultural heritage law in France; it enlarges the scope of the protection for the national cultural heritage; it contains relevant measures that will be the basis for future legislation[87]; and it repeals the preceding laws (the ones of 1887 and 1909)[88].

Adopted by the Chamber of Deputies on November 20, 1913 (on the report of Théodore Reinach, deputy of Savoy) and by the Senate on December 29, 1913, the law relating to historic monuments was signed on December 31, 1913 by Raymond Poincaré -President of the Republic, René Viviani -Minister of Education and Fine Arts- and René Renoult -Minister of the Interior.

[87] The provisions contained in the 1913 law covered many of the biggest challenges of cultural heritage protection, such as: illicit alienations; faithful execution of restoration; maintenance of an optimal physical status of notified cultural property; control on the export of objects having an artistic or historical interest; penalties in case of misconducts.

[88] For an extensive analysis of the 1913 law see M. CORNU, J.P. BADY, J. FROMAGEAU, J-M LENIAUD, V. NÉGRI (edited by), *1913. Genèse d'une loi sur les monuments historiques*, La Documentation française, Paris, 2013.

At this stage of French history, the need and urgency to protect the national cultural heritage was perceived as one of the essential tasks of the State. In the words of Théodore Reinach, *rapporteur* of the law:

« À mesure qu'une nation arrive à la pleine conscience de sa personnalité morale, elle ne tarde pas à reconnaitre que les monuments qui reflètent les phases de son développement artistique, ou qui se rattachent à quelque souvenir précieux de son histoire, font partie de sa substance au même titre que ses fleuves, ses montagnes, ses vallées, ses forets … »[89]

In order to identify the scope of the law, it is essential to recall its article 1, since it introduces for the very first time (with respect to non-moveable objects) the notion of *monument historique*. This is a key concept in the construction of French cultural heritage law and it is still its core. The wording of article 1 is the following : '*Les immeubles dont la conservation présente, au point de vue de l'histoire ou de l'art, un intérêt public, sont classés comme monuments historiques*'.

But not only non-movables can fall into this category; the 1913 law makes no distinction between non-mobile and mobile cultural property. The concept of *monument historique* also covers artifacts, if they have an interest for the nation from the point of view of the history or art. And, more specifically, there is no distinction between public and private property: the *classement* may concern both. Cultural property subject to the special protection of the legislation we are analysing, due to its artistic or historical interest, is identified in a special list published in the official journal of French Republic of April 18, 1914.

What are the consequences that follow the *classement*? Concerning the export controls, the law *Sur les monuments historiques* provides a specific article, the 21, that states 'the export outside France of the notified objects is forbidden'. For what concerns cultural property privately owned, its

[89] See the communication made by Théodore Reinach on behalf of the Committee for Public Education and Fine Arts that was charged with examining the draft law concerning the protection of monuments and objects of artistic or historical interest.

sale remains free within the national territory; the seller must only notify the administration of the concluded sale but is not required to obtain a prior authorisation for it. The purpose of this requirement is to let the State know in which hands cultural property is, at every moment.

Some final considerations are needed to understand the kind of relationship between the State and its citizens, and the extent of public authority in this sector. According to article 16 paragraph 1, if the object of cultural interest is in private hands, the prior consent of the owner is required in order to allow the State to register it[90].

« *Les objets mobiliers, appartenant à toute personne autre que celles énumérées à l'article précédent, peuvent être classés, avec le consentement du propriétaire, par arrêté du ministre d'Etat, chargé des affaires culturelles* »

Paragraph 2 specifies, however, that in the absence of the owner's agreement, the notification can be pronounced by a decree of the Council of State ('*A défaut de consentement du propriétaire, le classement est prononcé par un décret en Conseil d'Etat*'). However in cases of unilateral *classement* the administration had to offer pecuniary compensation to the recalcitrant owner ('*Le classement pourra donner lieu au paiement d'une indemnité représentative du préjudice résultant pour le propriétaire de l'application de la servitude de classement d'office*')[91].

We can easily imaginable the reluctance- due to the resources ceiling- of the administration to proceed in this way.

Finally, the picture of the situation resulting from this overview is that of a State trying to balance public and private interests. If, on the one hand, the national cultural heritage is for the first time the object of a significant public intervention, on the other hand the intervention is

[90] Notwithstanding the necessity to obtain the prior consent of the owner, the Administration could bypass this obligation by simply notifying its intention to classify, triggering- this way- a preventive measure that will have the same effects as the *classement*.

[91] Economic compensation was not due in the case of publicly owned cultural property.

designed in a way to not disrespect the interests of collectors. The typology of public-private relationship that the legislature wanted to configure in 1913 is reflected in the speech of the *rapporteur* of the law:

« *C'est au contraire ce droit de propriété qu'on se propose de sauvegarder pour l'avenir, tout en assurant l'espèce de droit de copropriété idéale que la nation tout entière exerce sur les monuments classés où se reflète un moment important de son génie ou de son histoire*[92] »

7. French export control system during the past century.

The outbreak of World War I created the conditions for the demand of a stronger art export control. The instable political conditions, the high demand from the American art market,[93] and the fragility of the export system in use jeopardised the French cultural heritage. In light of these factors, three proposals to amend the current norms governing the international circulation of cultural property were carried out in the immediate aftermath of 1913. Moreover, the archival material analysed shows how these proposals were accompanied by an important press campaign, a visible sign that the topic was a sensitive one[94].

Two of the three proposals were signed by M. André Honnorat. The first suggested to establish a catalogue listing the artworks that deserved public protection and whose removal from national soil was forbidden. The criticism levelled towards this proposal concerned mostly the difficulties and cost needed for its realisation[95].

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[92] See the first communication of Théodore Reinach, cit.

[93] « *Le péril est encore plus menaçant aujourd'hui qu'autrefois. Les 'rois' d'Outre-Atlantique, gorgés d'or et de dollars songent à garnir leurs galeries et à dégarnir du même coup nos collections !* ». In this way P. PERREAU-PRADIER, in the article *Pour nos Œuvres d'Art*, La vie politique et littéraire, stored in NA, b. 50 AP/28.

[94] The National Archives store a series of articles published throughout 1916 containing comments on the draft laws proposed. They are stored in NA, b. 50 AP/28.

[95] « *Le Répertoire que M. André Honnorat propose d'établir serait général et comprendrait tous les objets d'art. Cela provoquerait un travail énorme, dont*

His second proposal, instead, envisaged the imposition of a duty on the export of artworks produced more than twenty-five years before. Its content was reported in a unique article, which stated the following: "*Pendant un période de cinq années, à compter du jour de la promulgation de la présente loi, l'exportation de tout objet présentant un intérêt artistique ou historique, sera soumise à une taxe proportionnelle à sa valeur (…). La présente loi ne s'applique pas aux œuvres d'artistes vivants ou décèdes depuis moins de 25 ans* ». Reactions to the possibility of introducing a tax on export were rather negative. Commentators suggested that this would lead to a reduction in the price of artifacts and a consequent weakening of the right of property[96]. To support this criticism, a parallelism with the system adopted in Italy was made in order to outline its weakness. To this regard, the February 15, 1916 edition of the art journal *Le Cousin Pons* contained an article entitled *Le commerce des objects d'art menace* that, commenting on Honnorat's draft proposal, stated as following:

« *Nous avons d'ailleurs un exemple, celui de l'Italie, où une loi analogue fonctionne à son grand détriment. Ce pays, si riche en objets d'art, ne possède plus rien, puisqu'il n'a plus d'acheteurs. Tous, par peur du classement de leurs objets, qui supprime leur valeur marchande, viennent vendre tout ce qu'ils peuvent à la France et à l'étranger, en fraude* ».

The third (we could call it 'the second', since the first of Honorat's proposals was quickly dismissed) bill, proposed by M. Perreau-Pradier, grew out of the observation that between 1906 and 1907 more than 2.800 boxes filled with artworks and fragments of architecture had left France for reaching the United States. In order to stop this flow of cultural

l'établissement, photographies, exécution des fiches de toutes les œuvres entraineraient à de très grosses dépenses ». Excerpt taken from the article '*Le commerce des œuvres d'art en France doit-il rester libre ? Réflexion sur trois projet de loi*', in La renaissance politique, littéraire, artistique, March 1916, stored in NA, b. 50 AP/28.

[96] Ibidem « *Un impôt sur l'exportation des objets d'art causerait un grand préjudice à la valeur de ces objets (…). Attendu que les objets d'art sont d'une grande valeur et qu'ils représentent une partie de la fortune de leur possesseur, un impôt de ce genre entrainerait une diminution notable de cette fortune et constituerait, de ce fait, un attentat à la propriété privée* ».

property, he put forward the proposal to allow for the registration of those goods having a particularly important public interest without the prior consent of the owner. This eventuality would give the owner the right to receive a compensation measured according to the detriment suffered from the prohibition on exporting his/her properties. This draft proposal, moreover, included the provision of free circulation for those items produced more than fifty years before[97]. This last point raised some criticism, since it seemed that modern art would not be valuable enough to be protected[98].

As a result of these proposals, the French Parliament approved – *avec la soudaneité d'un orage determinant una catastrophe*[99]- on August 20, 1920, a law that contained many of the suggestions-just analysed. This new piece of legislation, in fact, created an export system based on three fundamental features: 1) the export of the objects falling under certain categories established by the law was forbidden without previous authorisation. 2) once the export authorisation was granted, the applicant was obliged to pay a tax calculated on the economic value of the object that could amount to 100% of its price. 3) The administration retained a right of pre-emption of the object to be exported at the price declared by the applicant. This last provision had the objective to create

[97] The original wording of Perreau-Predier's draft proposal was: « *A défaut de consentement du propriétaire, le classement est prononcé par décret du conseil d'Etat. Le classement pourra donner lieu au payement d'une indemnité représentative du préjudice causé. Sont exclus, toutefois, les objets dont les auteurs sont encore vivants ou dont l'exécution ne remonte pas à plus de cinquante ans* ».

[98] Ibidem : « *D'autre part, ce projet de loi si sévère, qui marque une volonté si sérieuse de garder nos œuvres d'art, laissera sortir librement les tableaux de moins de 50 ans. Les étrangers en profiteront pour emporter tous nos Degas nos Cézanne, nos Manet, nos Renoir. Est-ce à dire que nos peintres modernes ne sont pas des artistes de talent ? Que nous ne tenons pas à conserver leurs œuvres ?* » Ibidem.

[99] See Syndicat des Merchands de Tableaux, Objets d'Art et Curiosité, *La loi sur l'exportation des œuvres d'art. Extrait du discours prononcé le 6 octobre 1921, à la réunion des syndicats, par M. Nicolle, président*. The document is stored in NA, b. 50 AP/28.

a deterrent effect to declare a lower price in order to pay a lower sum as export duty[100].

The enactment of this law provoked an immediate reaction from French art dealers, who started publishing reports and articles with titles like '*Ruine d'une branche importante commerce Françaispar une loi nefaste*'. As reported by the Beaux-Arts director in a memo entitled '*Sur les modifications proposées à la loi du 31 Aout 1920 sur l'exportation des œuvres d'art*', the 1920 law caused –especially because of the significant extent of the export tax- an important decrease in the art exports to foreign countries. Following these complaints the Minister of Finance agreed to reduce the percentage of the export tax through the inclusion in the 1921 financial law of some articles meant to substitute the 1920 law[101]. Its articles 29 to 32 re-establish the free trade in cultural property and substitute the export tax with the standard tax on luxury items (of the 1%). Article 33, instead, confirms the export ban for those objects, including privately owned ones, that could be considered as *monuments historiques*, namely those items of extreme interest from the point of view of history and art. These items had to be so important that the administration had to register them immediately, since they had to be already known to public authorities. To stress this point, the trade union of art dealers asked the State to avoid conducting any further investigation with the aim of listing cultural property that they were unaware of. They requested, in fact, that '*L'Etat s'interdit formellement tout procédé d'inquisition pour découvrir qu'il aurait pu ignorer*[102]'.

For the following twenty years the French export control system remained almost unchanged, up to the outbreak of the Second World War. We can begin to recognize the strong connection between the

[100] See P-L- FRIER, *Droit du patrimoine culturel*, Presse universitaire de France, Paris, 1997, 258.

[101] See the Rapport du directeur des Beaux-Arts '*Sur les modifications proposées à la loi du 31 Aout 1920 sur l'exportation des œuvres d'art'* stored in NA, b. 50 AP/28.

[102] See Syndicat des Merchands de Tableaux, Objets d'Art et Curiosité, *De l'interprétation qu'il convient de donner aux articles 33 à 38 de la loi de Finance du 31 décembre 1921*, Paris, 1922, NA, b.50 AP/28.

instability of external frontiers and the political willingness to strengthen the protection of the national cultural heritage. Just as happened in 1913, in 1940 also civil servants in the French government started reflecting on the necessity to enact a new piece of legislation that would prevent and stop the plundering of artworks from German occupants.

On June 23, 1941 the French parliament approved the law '*Relative à l'exportation des oeuvres d'art*', called the *Loi Carcopino* from the name of the Secretary of State of Public Education at the time[103].

Article 1 established the need for the owners of cultural objects to obtain an authorisation in order to export artworks having an interest for the nation from the point of view of history or art. Once an export authorisation request was submitted, the administration had at its disposal one month to decide whether to grant or to deny the delivery of an export licence.

As concerns the scope of the export control, it was referred to paintings, sculptures and other artifacts produced before January 1, 1900[104]. Once an export authorisation request was submitted, the State retained a right of pre-emption of the object -to be exercised within six months starting from the date of the request submission- at the price declared by the applicant (article 2)[105]. Finally, in case the export was

[103] Published in the *Journal Officiel de l'Etat Français* on July 19th 1941, n°3030.

[104] The original version of art. 1 was « *Les objets présentant un intérêt national d'histoire ou d'art ne pourront être exportés sans une autorisation du secrétaire d'Etat à l'éduction nationale et à la jeunesse, qui devra se prononcer dans le délai d'un mois à parti de la déclaration fournie à la douane par l'exportateur.*

Ces dispositions sont applicables aux objets d'ameublement antérieurs à 1830, aux œuvres des peintres, graveurs, dessinateurs, sculpteurs, décorateurs, antérieurs au 1er janvier 1900, ainsi qu'aux objets provenant de fouilles pratiquées en France ou en Algérie ».

[105] Art. 2 : « *L'Etat a le droit de retenir, soit pour son compte, soit pour le compte d'un département, d'une commune ou d'un établissement public, au prix fixé par l'exportateur, les objets proposés à l'exportation. Ce droit pourra s'exercer pendant une période de six mois* ».

authorised, the latter had to pay a tax equal to 5% of the economic value of the object (art. 3)[106].

In general, the control system adopted in 1941 re-introduced some of the limitations on the art trade that had been abolished by the financial law of 1921, but more moderately with respect to the severe and criticised law of 1920. The balance of the relationship between public and private sector was leaning in favour of the former. The State, in fact, was free to deny the export authorisation without being obliged either to buy the item or compensate the owner. Moreover, the administration protecting the national cultural heritage could suggest the pre-emption of the object by paying the applicant the price declared in the export authorisation request.

The main setting of this law remained in force until the beginning of the '90s, with the exception of the requirement to pay the export tax, a provision abolished by decree in 1958[107]. Even though the export control system in use since 1941 lasted for some decades, a half-century after its implementation it began to be considered unclear and arbitrary[108].

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[106] Art. 3 : « *Les objets d'ameublement antérieurs à 1830 et les œuvres de peintres, sculpteurs, graveurs, dessinateurs, décorateurs, antérieurs au 1er janvier 1900, ainsi qu'aux objets provenant des fouilles frappées, dans le cas ou leur exportation est autorisée, d'un droit de 5p. 100 de leur valeur* ».

[107] See article 1 of the Décret n° 58-1963 November 7th 1958 '*Modifiant la loi du 23 juin 1941 relative à l'exportation des œuvres d'art*' « *Les dispositions de l'article 3 de la loi du 23 juin 1941 relative à l'exportation des œuvres d'art sont abrogées* ».

[108] These criticisms were raised by the same Minister of Culture and Communication in a note written in 1989 containing draft legislation concerning the export of cultural property. Quoting from the document : « *Le régime actuel présent, en effet, de graves inconvénients juridiques et pratiques et se caractérise notamment par l'incertitude qu'il fait régner sur les transactions et l'apparence d'arbitraire qu'il donne à l'exercice des droits de l'Etat. L'incertitude résulte à la fois de l'exercice de deux dispositions juridiques parallèles et de l'absence, néanmoins, d'une procédure claire et précise* ». See Ministère de la Culture et de la Communication, *Note de présentation des projets de loi et décret relatifs à l'exportation des œuvres d'art et des objets présentant un intérêt national d'art et d'histoire*, 1989, NA, b. 19920638/5.

7.1 French reaction to the institution of the European single market.

With the enactment of the Single European Act in 1986, EU authorities had selected 1993 as the deadline for the realisation of the European single market, meaning the vision of the Community as "one territory without any internal borders or other regulatory obstacles to the free movement of goods and services".

The fall of internal barriers between member States would have had repercussions also on the art trade and on the protection of member States' national cultural heritage. There was the need to settle how the implementation of the free movement of goods would affect the protection of the items that each country considered to be their own national cultural treasures.

Preliminary meetings and negotiations needed to reach a shared compromise between all member States started in 1989 under the initiative of the EU Commission. In parallel, in France also the main protagonists involved in the administration of cultural heritage and ~~in~~ the trade of artworks started to consult with each other in order to reach a satisfactory compromise[109].

The requests put forward by French delegations sitting at the EU meetings and the content of the Community legislation regarding controls on the export of cultural property in the aftermath of the removal of internal barriers will be analysed in chapter IV. What we are going to highlight now is the French export control system implemented in consequence of these events.

As we can read in the explanatory statements of the legislative proposals concerning museums and the circulation of artworks drafted on June 24 1992, there was an urgency to amend the legislation since the 1941

[109] The national archives store memos of art dealers' associations and draft legislations on the subject, produced around 1988-89. These documents are mostly stored in NA, b. 19920638/5.

law was inappropriate[110]. Since the Treaty of Rome allowed member States to have restrictions in their trade if this was justified by the need to protect their national treasures, all French parliament had to do was to comply with this. In this regard, the above-mentioned explanatory statements specifies: « *Les dispositions proposes dans le présent chapitre* (Chapitre 1- La sortie des biens culturels du territoire nationale) *ont pour but the compléter le diapositive communautaire en soumettant la sortie des biens culturels du territoire national à un régime de certificat attestant que le bien n'a pas le caractère de trésor national*[111] ».

We will proceed now with an analysis of the content of law n° 92-1477 of December 31, 1992 '*Relative aux produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie et de douane*'.

Article 4 states which objects must be considered national treasures, and they are: objects having a cultural interest belonging to public collections; assets that have been registered according to the 1913 law, and any other items that have a significant interest for the national cultural heritage from the point of view of history, art or archaeology. The objects classified as cultural treasures cannot leave the country other than momentarily and only after a specific authorisation (art. 10).

On the other hand, article 5 established that all items not considered to be national treasures but that still have an historical, artistic, or archaeological interest and that fall under one of the categories fixed by a Council of State decree must obtain an export certificate before leaving the country, whether permanently or for a fixed period. The purpose of this certificate, which has a validity of five years, is to testify that the item to which it is referred does not have the characteristics of a national

[110] Art. 14 of the 1992 law states « *La loi du 23 juin 1941 relative à l'exportation des œuvres d'art (…) sont abrogés à compter de la date de publication des décrets visés aux articles 5, 7, 8 et 10, et au plus tard à compter du 1er février 1993* ».

[111] See Ministère de la Culture et de la Communication, *Note de présentation des projets de loi et décret relatifs à l'exportation des œuvres d'art et des objets présentant un intérêt national d'art et d'histoire*, cit.

treasure. As a consequence, once the competent administration receives an export authorisation request, its denial can occur only if the commission evaluating the export requests finds the item to have significant interest for the national cultural heritage, such that it should be considered a national treasure. In any case, the denial of the export certificate must be justified by the commission (art. 7).

If the export certificate was not granted, what could an applicant do? We must keep in mind that economic compensations were no longer envisaged. Article 9 provides that, in case of denial, the applicant could not re-submit a request to export the same item for a period of three years. After this time limit, the administration could no longer refuse to release an export licence unless by proceeding with the *classement* of the item according to the law of December 31, 1913.

After this overview, we can already appreciate some innovations in the new export control system. First of all, movable cultural heritage was divided into two different categories: national treasures and items of artistic, historical or archaeological interest that could be, after an evaluation, considered as such. For the first category, the 1992 law provided a total ban on export. The second category, instead, was submitted to a system of authorisation to be conducted case by case. Another novelty concerned the regimen of a 'temporary' prohibition on the export of the object of cultural interest from the nation. Once the first refusal occurred, the object had a temporary status as a cultural treasure since the applicant –after three years- could re-submit the export authorisation request and receive a certificate to ship the item abroad— unless the State had the funds to purchase the artwork for including in in national collections. This solution seemed to represent a good compromise between the State's interests and those of collectors.

What kind of objects were subject to this authorisation mechanism? The categories mentioned in Article 5 were established in 1993 and are listed in the Annex of Décret n°93-124 of January 29, 1993 '*Relatif aux*

biens culturels soumis à certaines restrictions de circulation'[112]. There are 14 categories, among which the main are the following:

1. Objets archéologiques ayant plus de 100 ans d'âge provenant de fouilles et découvertes terrestres et sous-marines ; sites archéologiques ; collections archéologiques.
2. Eléments faisant partie intégrante de monuments artistiques, historiques ou religieux et provenant du démembrement de ceux-ci, ayant plus de 100 ans d'âge.
3. Tableaux et peintures faits entièrement à la main sur tout support et en toutes matières ayant plus de 50 ans d'âge et n'appartenant pas à leurs auteurs.
4. Gravures, estampes, sérigraphies et lithographies originales et leurs matrices respectives, ainsi que les affiches originales, ayant plus de 50 ans d'âge et n'appartenant pas à leurs auteurs.
5. Productions originales de l'art statuaire ou de la sculpture et copies obtenues par le même procédé que l'original, ayant plus de 50 ans d'âge et n'appartenant pas à leurs auteurs.
6. Photographies, films et leurs négatifs ayant plus de 50 ans d'âge et n'appartenant pas à leurs auteurs.

Besides the specification of the typology of objects and the time threshold, the decree also indicates a monetary threshold below which the export control was not applied. Regarding the categories listed above, the value established was of 0 ECU (European Currency Unit) for the number 1 and 2; and of 15.000 ECU for the remaining ones[113].

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[112] Article 1 of the decree 93-124 established that "*Les biens culturels dont l'exportation est subordonnée à la délivrance du certificat prévu à l'article 5 de la loi n° 92-1477 du 31 décembre 1992 susvisée sont ceux qui entrent dans l'une des catégories définies à l'annexe au présent décret et dont la valeur, à la date de la demande du certificat, est égale ou supérieure aux seuils définis par cette annexe*".

Subsequent articles of the decree contain some specifications concerning the submission of the export authorisation request and its evaluation. They will both be analysed in next chapters.

[113] Decree 93-124 specified that the equivalent amount in the national currency had to be established at the exchange rate applicable on January 1, 1993

What we need to underline is that the categories in the decree under examination are exactly the same as the ones in the EU legislation regulating controls on the export of cultural property. What does this overlap mean? It means that France implemented its export control over the same categories of goods, both for exports to another member State and for the shipments to a third country. This transposition of the Community categories into the national regulatory framework represented not only a considerable liberalisation of domestic export control, but also a willingness to simplify the effort required to applicants when submitting an export request authorisation.

The liberalisation of the regulatory framework introduced in 1992 is particularly due to the introduction of the system of thresholds that impose two necessary conditions in order to make assets of artistic and historic interest subject to export control. These are a certain number of years that have to have passed since the production of the item and an established economic value for the artwork in question. If the object is not antique enough or if its value remains below a certain threshold (both criteria must be met) can be freely exported without any previous authorisation from the administration. It goes without saying that this system exempted a great number of objects that until then were subject to the scrutiny of the administration protecting the national cultural heritage.

Evidently, these novelties, and especially the introduction of the monetary threshold, raised some criticism. In particular, the exemption of an export control on the grounds of the economic value of the cultural property was not considered adequate for several reasons. First of all because this obliged the applicant to know the exact price of the item (which is not always easy); secondly because the introduction of such a threshold could encourage fraud; and finally since it was held by some

('*La valeur de conversion en monnaies nationales des montants exprimés en ECU est celle en vigueur au 1er janvier 1993*').

that the evaluation of the importance of a cultural property should be based only on artistic and historical factors[114].

8. Setting the borders of the new millennium.

The beginning of the new millennium determined some changes to the legislation concerning controls on the export of cultural goods in France; this was due to adoption of the law n. 2000-643 of July 10, 2000[115].

This piece of legislation fit within the overall framework established by the 1992 regimen, even while introducing numerous radical changes. First of all, article 1 provided that the export certificate issued if the item was found not to have the characteristics of a national treasure was granted on a permanent basis. This allowed the possessor of the object for which the export certificate was issued to freely import and export it without submitting an authorisation each time. Besides this, the item that obtained an export certificate could maintain its appeal on the market since the possible purchaser was sure that not administrative restrictions could be imposed on it. But the permanent validity of the certificate was limited for objects of cultural interest produced less than one hundred years before. In these cases, once released, the certificate had a validity of twenty years and it could be renewable. This precaution was needed so that the State could maintain a control on artistic production that was still not recognized as historically significant.

The second landmark amendment that occurred in 2000 is the abolition of any economic indemnity when the State refused the export authorisation requested by the applicant[116]. This major change was

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[114] See J. F POLI, *La protection des biens culturels meubles*, Librairie générale de droit et de jurisprudence, Paris, 1996, 79.

[115] This is the law '*Relative à la protection des trésors nationaux et modifiant la loi no 92-1477 du 31 décembre 1992 relative aux produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie et de douane*'.

[116] Article 2 of the the law 2000/643 amended article 7 of the law 92/1477 by stating: «*Aucune indemnité n'est due en cas de refus de délivrance du certificat*».

considered necessary in order to allow the administration a smoother exercise of its right to retain objects in order to protect and enhance the national cultural heritage. Scarce economic resources, in fact, made it quite difficult to refuse an export authorisation request.

As a counterbalance, article 3 introduced a novelty that was rather favourable for collectors and dealers of antiquities and objects of artistic interest, since it shortened from three years to thirty months the period during which the applicant could not re-submit an export request after having received a first refusal. In light of this amendment, the new version of article 9 law 92-1477 stated: '*En cas de refus du certificat, les demande présentées pour le même bien sont irrecevables pendant une durée de trente mois*'. If this change facilitated the individual who wanted to export the item of cultural interest, at the same time it left less time (and less opportunity) to the administration to raise the amount of money needed to buy the object proposed for export.

Regarding the possibility that the State during this period made a purchase offer, paragraph 1 of article 4 specified that the price offered to the applicant had to equal the price offered on the international art market[117]. In doing so, the applicant was not required to know the exact price of the objects he/she wanted to export and, moreover, he/she was not temped to commit fraud in order to elude the monetary thresholds. Moreover, the individual did not suffer any economic detriment by the purchase of the object by the State instead then from another actor[118].

The overall picture of the new regulatory framework adopted in 2000 reveals an attempt and an effort by the State not to alter the normal development of the national art trade. The main amendments

[117] The original version of article 4.1 was : « *Dans le délai prévu au premier alinéa de l'article 9, l'autorité administrative peut, dans l'intérêt des collections publiques, présenter une offre d'achat. Cette offre tient compte des prix pratiqués sur le marché international* ».

[118] Subsequent paragraphs of Article 4 regulated the procedure to follow in case the offer made by the Administration did not satisfy the applicant for the export authorisation request.

introduced, in fact, more than on the scope of the legislation—that remained unchanged—intervened on the relations between the public authority and the individuals who entered into a relationship with the authority. The perception that comes from reading the legislation under examination is the will to maintain control over cultural heritage at the national borders while adopting a position sympathetic to the private citizen.

Barely four years after the adoption of this legislation, in a parallelism with Italy, France adopted an organic legislation on the protection, management and valorisation of cultural heritage by enacting a Code of Cultural Heritage[119].

The regulatory framework for the control of the export of cultural property is found in laid down at Chapter I of the legislative part, entitled '*Régime de circulation des biens culturels*'. The general approach to the topic is the same as that adopted in 1992, with the distinction between two categories of objects (national treasures[120] and all other objects having an artistic, historical or archaeological interest[121]) being subject to two different export control systems. An export ban was established for the former, while the latter were subject to an administrative authorisation to be determined case by case.

[119] The legislative part of the *Code du Patrimoine* was enacted with the ordonnance n. 2004/178 of February 20, 2004.

On the parallelism with Italy see L. CASINI, *La codificazione del diritto dei beni culturali in Italia e Francia*, Giornale di diritto amministrativo, 2005, n. 1, 98. In the same issue see also S. CASSESE, *Codici e codificazioni: Italia e Francia a confronto*, 95.

[120] The features that characterise the category of national treasure are listed in Article L111-1 of the *Code du Patrimoine*.

[121] Article L111-2 *Code du Patrimoine* specifies that the categories of objects taken into consideration by the present law are listed in the decree of the Council of State.

The procedure to obtain the export certificate, its scope, temporal validity and period before which the applicant cannot re-submit a second request are the same as those established in 2000.

Regarding the objects having an artistic, historical or archaeological interest mentioned at article L111-2, what are the categories taken into consideration by the Code? They have been listed at decree n° 2011-574 of May 24, 2011 and then reported, according to article R111-1, at Annex I of the Code[122]. As in 1992, the Code provides both a time and a monetary threshold –to be met cumulatively- below which the export is free and no authorisation request is needed. Different from the categories established in 1993, those listed in the *Code du patrimoine* could differ depending on whether the export is to an *infra* or *extra* EU destination[123]. Annex 1 to articles R. 111-1 lists 15 categories, of which the most relevant are:

1. *Antiquités nationales, à l'exclusion des monnaies, quelle que soit leur provenance, et objets archéologiques, ayant plus de cent ans d'âge, y compris les monnaies provenant directement de fouilles, de*

[122] Article R111-1 states as following: « *Les biens culturels dont l'exportation est subordonnée à la délivrance du certificat mentionné à l'article L. 111-2 sont ceux qui entrent, à la date de la demande de certificat, dans l'une des catégories qui figurent à l'annexe 1 du présent code. Pour la délivrance du certificat, cette annexe prévoit, pour certaines catégories, des seuils de valeur différents selon qu'il s'agit d'une exportation à destination d'un autre Etat membre de l'Union européenne ou d'une exportation à destination d'un Etat tiers* ».

[123] There are two different financial thresholds, depending on whether the destination of the shipment is an *infra* or *extra* EU country. Having said that, the difference is minimal and it concerns only two categories of items:

1) *Incunables et manuscrits, y compris les lettres et documents autographes littéraires et artistiques, les cartes géographiques, atlas, globes, partitions musicales, isolés et ayant plus de cinquante ans d'âge ou en collection comportant des éléments de plus de cinquante ans d'âge qui n'appartenant pas à leur auteur. Etat membre : 1500 €; Etat tiers: quelle que soit la valeur.*

2) *Archives de toute nature, autres que les documents entrant dans la catégorie 8 et comportant des éléments de plus de cinquante ans d'âge, quel que soit le support. Etat membre : 300€; Etat tiers : quelle que soit la valeur.*

découvertes terrestres et sous-marines ou de sites archéologiques. Etat membre : quelle que soit la valeur ; état tiers : quelle que soit la valeur.

2. *B) Objets archéologiques ayant plus de cent ans d'âge et monnaies antérieures à 1500 ne provenant pas directement de fouilles, découvertes ou de sites archéologiques. Etat membre: 1 500 € ; état tiers : 1 500 €.*
3. *C) Monnaies postérieures au 1er janvier 1500 ne provenant pas directement de fouilles, découvertes ou de sites archéologiques. Etat membre : 15 000 €; état tiers : 15 000 €.*

4. *Tableaux et peintures autres que ceux entrant dans les catégories 4 et 5 ayant plus de cinquante ans d'âge n'appartenant pas à leur auteur. 15 000€.*

5. *Aquarelles, gouaches et pastels ayant plus de cinquante ans d'âge n'appartenant pas à leur auteur : 30 000 €.*

6. *Dessins ayant plus de cinquante ans d'âge n'appartenant pas à leur auteur: 15 000 €.*

7. *Gravures, estampes, sérigraphies et lithographies originales et leurs matrices respectives, isolées et ayant plus de cinquante ans d'âge ou en collection comportant des éléments de plus de cinquante ans d'âge n'appartenant pas à leur auteur : 15 000 €.*

8. *Productions originales de l'art statuaire ou de la sculpture et copies obtenues par le même procédé que l'original ayant plus de cinquante ans d'âge n'appartenant pas à leur auteur, autres que celles qui entrent dans la catégorie 1. 50 000 €.*

9. *Photographies isolées et ayant plus de cinquante ans d'âge ou en collection comportant des éléments de plus de cinquante ans d'âge n'appartenant pas à leur auteur : 15 000 €.*

10. *Films et leurs négatifs isolés et ayant plus de cinquante ans d'âge ou en collection comportant des éléments de plus de cinquante ans d'âge n'appartenant pas à leur auteur : 15 000 €.*

ENGLAND, THE MATCHING OF PUBLIC AND PRIVATE INTEREST

9. Deferring the adoption of a cultural protection law.

"This is a matter which has frequently been considered in recent years. A committee of the National Gallery Trustees reported on the subject in 1913 and recommended that such legislation is inadvisable". In this way on 1929 Britain prime minister Mr. Mac Donald replied to Captain Cazalet, who asked whether he contemplated introducing any legislation which would prevent the sale or removal from the country of buildings, relics or works of art which were of national and historic or artistic importance[124].

From this little excerpt we can draw two main impressions. The first is that in the early '30s England was still not provided with a regulatory framework to control the export of goods having an artistic and historic interest[125]. The second is that English government seemed not to have any intention of adopting legislative measures to prevent the removal of objects of cultural interest from national borders. Apparently this topic was not a cause of national concern since governments, for at least twenty years, had been allocating funds to the National Gallery to purchase (and so retain in the country) pictures of primary importance. Demonstration of the positive trend of the regime were—according to the prime minister- the recent purchases of the Cornaro Titan and the Wilto Diptych under this arrangement.

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[124] See the report of French Minister of Foreign Affairs to the French General Director of Fine Arts regarding English control on the export of cultural property submitted on August 2nd 1929. The document is stored in NA, b. F21/3987.

[125] While no legislative measure was in force before 1939, some voluntary actions or other regulatory measures were undertaken. On the existing system of control before 1952 see Section I of the *Waverly Report on the export of works of art*. A reproduction of the Report is stored in TNA, b. FO 371 98998.

The National Gallery allocation led to the belief that 'it is not practicable or desirable to introduce further legislation on the subject at the present time'. Thus said, however, the prime minister did demonstrate an interest in the topic and an openness to further suggestions.

But let's take a step back. As mentioned, these statements were made in 1929 but considerations regarding the advantageousness of legislation on export control had been taken into consideration also earlier. Mr Mac Donald made reference to a study conducted towards the beginning of the XX century by a committee of the National Gallery Trustees[126]. This survey, requested by the Board of the National Gallery at the end of 1911, was motivated by the high volume of exports of artworks from England to third countries, first and foremost to the United States. This high demand for artistic assets, due to American economic strength and the growing importance of the art market overseas, made it difficult for English government and the National Gallery, to compete. Since the request concerned mainly artworks by the Old Masters, the focus of the study conducted by the National Gallery's trustees was called the 'Old Masters question'[127]. The result of this investigation was the drafting of a list of five hundred "Important pictures sold out of the United Kingdom in recent years[128]". The amount of paintings that left England in the period from the last years of 1800 to the first-fifteen years of 1900s is not insignificant; and it gives a clear idea of the flows and the tendencies of the art market at the turn of the XX century. But despite this great number of exports and a certain concern from the State regarding this phenomenon, no legislative measure to protect the

[126] *Report of the Committee of Trustees of the National Gallery on the retention of important pictures in this country* (Curzon Report), 1914-1915, TNGA, NG15/26. The Report was published by His Majesty's Stationary Office, London in 1915, as command paper 7878.

[127] See H. REES, *Art export and the construction of National Heritage in late-Victorian and Edwardian Great Britain*, in N. DE MARCHI and C. D.W. GOODWIN (Edited by), *Economic Engagement with Art*, Duke University Press, London, 1999, 187.

[128] The list is stored in TNGAA, 52-60.

national cultural heritage was adopted at the time. This choice to stand down was in contrast with the one adopted by the French government which, alarmed for the same reasons, in the same period enacted legislation to reduce the outflow of artworks from national borders.

Although the need to protect the national cultural heritage was not neglected by English authorities, no legislative intervention to control the international circulation of objects having a cultural interest took place until 1939 when Britain's Parliament enacted the Import, Export and Customs Powers (defence) Act.

This piece of legislation had a clearly military purpose. It was adopted to control the nature of goods that were imported and exported across national frontiers, so as to avoid any trading with the enemy. The nature of this Act emerges both in the premises of Chapter 69[129] and also in a later description by the Waverly Committee. The latter would write in 1952: "Control came into being as a war-time measure, intended primarily to safeguard the nation's resources in foreign exchange and at the same time to prevent the flight of capital abroad. It had in its conception no direct relation to the problem of safeguarding national treasures[130]".

In such a context, cultural property or objects of artistic interest were not mentioned directly, but the category—and by consequence its import and export control—was implied in the general description in Article 1, 'all goods or goods of any specified description'. It was therefore the responsibility of the Board of Trade to evaluate if and when the cross-border trade of artworks may fall under the provisions of that law.

One year after its enactment, the Import, Export and Customs Powers (defence) Act was linked with the provisions of the 1939 Defence

[129] "An Act to provide for controlling the importation, exportation and carriage coastwise of goods and the shipment of goods as ships 'stores; to provide for facilitating the enforcement of the law relating to the matters aforesaid and the law relating to trading with the enemy; and to provide for purposes connected with the matters aforesaid".

[130] Section I point 3 of the *Waverly Report on the export of works of art*, cit.

(Finance) Regulation, so that antiquities and works of art began to be subject to export licensing control. In 1940 the terms of this licensing control were still vague and rather broad, but it came to be more specific four years later when the topic was addressed in the House of Commons. During a debate occurred on May 26, 1944, Captain Charles Waterhouse—the Parliamentary Secretary to the Board of Trade—made a statement which clarified the procedure to authorise the export of an object of cultural interest from England. He said: "In the case of pictures and portraits, anything…of intrinsic value at all is always brought to the notice of both the National Gallery and the National Portrait Gallery. If they raise any doubt, automatically the licence is not granted; there is no question of proving a case, they only have to say 'we do not think this is a proper thing to export' and straightaway the licence is not granted[131]".

10. The Waverly Report on the export of works of art.

In the middle of the XX century the attitude of the British government towards the subject under consideration started to change. The necessity to stop the outflow of British national treasures became ever more evident. Because of that in 1950 Sir Stafford Cripps appointed a committee to 'Consider and advise on policy to be adopted by His Majesty's Government in controlling the export of works of art, books, manuscripts, and to recommend what arrangements should be made for the practical operation of the policy[132]'. At the head of the committee was the viscount of Waverly, John Anderson, from whence comes the name of the Report release by this Committee[133].

The committee submitted the final result of the Report two years after its appointment, in 1952, after having held thirty meetings in which it

[131] See Hansard, House of Commons, O.R. Col. 1173.

[132] See the *Waverly Report on the export of works of art*, cit.

[133] For an analysis of the activity carried out by the Waverly committee see C. MAURICE and R. TURNOR, *The export licensing rules in the United Kingdom and the Waverly Criteria*, International Journal of Cultural Property, 1, 1992 273; F. WANG, *Whose responsibility? The Waverly system past and present*, International Journal of Cultural property, 15, 2008, 227.

received oral and written testimony from individuals and bodies involved in the art system.

After having analysed the existing export control systems and underlined their weaknesses, the Waverly Report proceeds by stating the grounds on which the control on the export of cultural property should be based. These grounds are: 1) Export control is best applied to a small number of objects of high importance, and becomes progressively less effective and more irksome the larger the number of objects it seeks to control. 2) Great uncertainty and unfairness can result without a clear statement of policy and adequate safeguards. 3) Export control operating at a late stage is bound to cause frustration and disappointment.

Another assumption on which to base the export control system was the opinion according to which the system had to be based on 'purchasing the desired objects on the market in the ordinary way'. Only in this way, in fact, the State could avoid the disruption of the ordinary channels of trade, without causing a detriment to the willing to be buyer of the object. Moreover, it was pointed out that the system could not present any administrative complications and must remove the incentive to fraud and evasion. In this regard, the Waverly Committee stressed that 'in every case in which export is prevented the owner must be assured of an offer to purchase at a fair price'. And on the same point: 'We think that the State has a clear right to forbid the export of objects which it regards as of national importance. But we think that it has the equally clear duty to see that particular individuals are not unfairly treated as a result'.

It results evident, already from these initial assumptions, the difference between this system and the Italian and French ones. In the latter, in fact, the public interest and therefore the authority of the State to overcome private individuals' rights has never been called into question so emphatically.

Since the recommended export control system should be based on the principle of 'no prohibition without an offer to buy', the question of the

allocation of funds was of primary importance. Given that 'private resources are necessarily limited, and the special grant machinery is only suited to purchase occasionally for an object of the highest importance', the Waverly Committed affirmed that 'there is an urgent need for increased regular financial assistance to the national collections so that they can be more active in the pursuit of what they need, can carry out their programme of acquisitions in accordance with a long-term plan, and can accumulate reserves with which to meet exceptional demands as they arise' (par. 135).

Regarding the scope and the extent of the control, we have already noted the urgency to limit the number of objects subject to control, so as to make the controls as efficient as possible. The first enforceable mechanism to reduce the scope and the extent of the control was the introduction of an age limit, and the recommended one was 100 years. The Waverly Committee was aware of the existence of national treasures less than 100 years old, but since they were relatively few in number, it would be undesirable to safeguard them by decreasing the age limit.

Besides an age limit, the option to provide monetary limit was also taken into consideration. Finally, after having taken into account the possible negative effects arising from the provision of such a threshold (evasion by undervaluation, the breakup of collections that should remain intact, the variations in art market trends), the committee suggested its adoption. Paragraph 172 stated: "We realise that our recommendation will exclude a large number of objects, some of them of high importance (…). But all our evidence goes to show that the object of low value cannot satisfactorily be safeguarded by licensing control, and that the loss resulting from the change we propose will be more than outweighed by its advantage".

Once established the extrinsic criteria (age and monetary limit) that circumscribed the number of objects subject to control, some further criteria (regarding the possibility of being considered a national treasure)

were also established. The latter –known as the Waverly criteria- will be examined in detail in Chapter IV [134].

What were the reactions to the release of this report? D. R. Hud, in a note of October 2, 1952 commented, 'the report is fascinating and its recommendation satisfactory, but it would be most unwise to assume that if they are carried out we shall receive no more complaints from would-be purchasers[135]'. Two days later, Roger Makins—from the Foreign Office—offered his personal view, saying: "I have gone into this subject very carefully in the last three years and I consider that Lord Waverly's report is quite admirable—balanced, fair and sensible. (…) I recommend that the Secretary of State should accept the recommendations of the Report as far as the Foreign Office is concerned, and urge the Chancellor that he should do the same as far as the Treasury is concerned'. Concerning the latter we know, from a letter sent on the September 20 from the Treasury Chambers to Roger Makins, that his first reaction was that the Report should be accepted as it stood.

The recommendations put forward in the Waverly Report were accepted in their entirety, setting in this way the foundations for the export control system in England up to today.

11. Post Waverly.

As just said, English control on the export of cultural goods was never subject to substantial amendments; its essential features have been maintained although other pieces of legislation have been approved since its adoption.

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[134] The Waverly report also made recommendations regarding the 'machinery of the export control', meaning with this expression both the administrative structure in charge of implementing the regulatory framework in use and also the procedures that the framework would follow.

[135] See this document and other comments referred to the Waverly Report in TNA, b. FO 371 98998.

Towards the end of the '70s, the age limit below which the export control was not applied was reduced from 100 to 50 years for works of art, antiquities, and manuscripts. More problematic was the reduction of such a limit for photographs and documents, for which the age limit of 50 years seemed to be excessively short[136].

In 2002 the Export Control Act gave general rules to be followed in the export of goods, but a control order more specifically referring to the circulation of movable cultural heritage would be enacted one year later. The 2002 Export Control Act established the general rule according to which "the Secretary of State may by order make provision for or in connection with the imposition of export controls in relation to goods of any description" (article 1, chapter 28, section 'Export controls'). Section 4, 'Trade controls', provides that the Secretary of State is able to intervene while goods of any description are being acquired, moved or subject to any other actions that facilitate their acquisition, disposal or movement. Finally, section 10 of the Annual Reports contains a direct reference to cultural property, stating—at article 1—that 'the Secretary of State shall lay before Parliament in respect of each year a report on the operation during the year of any order under section 1 so far as relating to the export of objects of cultural interest.' We will soon see how important this provision is.

As already described, in 2003 the English parliament approved the Export of Objects of Cultural Interest (Control) Order 2003[137] which confirmed the application of a licensing system as the way to control the international circulation of objects of cultural interest. This principle is contained in its article 2, which stated that 'All objects are prohibited to be exported to any destination except under the authority of a licence in writing granted by the Secretary of State, and in accordance with all the

[136] See the letters stored in TNA, b. EP 1/72 reporting the discussions in 1978 between the Treasury, the Department of Trade, the Reviewing Committee and the Minister for Art.

[137] The Export of Objects of Cultural Interest (Control) Order 2003—signed by the Secretary of State for Culture, Media and Sport—was enacted on November 17, 2003 and it entered into force on May 1, 2004.

conditions attached to the licence'. With respect to the previous licensing system, the Objects of Cultural Interest (Control) Order of 2003 provided different typologies of licences that could be granted, corresponding to different kinds of authorisation[138]. Article 3 lists them by stating: "A Community Licence or licence granted by the Secretary of State under article 2 may be: (a) general or specific; (b) unlimited or limited so as to expire on a specified date unless renewed; and (c) subject to or without conditions, and any such condition may require any act or omission before or after the exportation of objects under the licence".

As regards the extent of the control, it remained the same as that established in 1954, including the extrinsic (age and monetary limit) and intrinsic (in order to assess if the object can be considered a national treasure) criteria taken into consideration, with the exception of the amendment made in 1978.

The piece of legislation under examination is still in force, although in 2009 it was subject to an amendment, more in form than substantce[139].

In conclusion, we have seen how the English export control system is quite 'young', having been enacted just over sixty years ago. If compared with the Italian and French legislation, the difference in terms of operational period is significant. What most characterises the Cross-Channel regulatory framework is the overlapping of the interests of private individuals with the implemented provisions: the retention of national treasures in the public interest, in fact, does not generally provoke any economic detriment to the applicant for an export licence.

[138] The difference between these kinds of licences will be examined in the next chapter.

[139] See the Export of Objects of Cultural Interest (Control) (Amendment) Order 2009, signed on August 5th 2009 which came into force on the 28th of the same month.

12. Post 'Brexit'?

As everybody knows, on June 23, 2016 more than 50% of voters opted for the so-called 'Brexit'; in other words for the exit of the United Kingdom from the European Union. It seemed initially that the process that would lead to the independence of the UK would have to be completed by March 29, 2019. This did not happen because member State agreed to grant the UK an extension. At present, it is still not known whether the 'Brexit' will be ever completed or not and, in case of fulfilment, with what kind of agreements.

In preparation for the so-called 'Brexit', English Parliament approved in 2018 'The Export of Objects of Cultural Interest (Control) (Amendment etc.) (EU Exit) Regulation', which was to enter into force on January 1, 2019. Its main provision is that contained in Article 2, entitled 'Revocation of retained EU regulation', which revokes the EU legislation concerning the control on the export of cultural property. More precisely, the revocation concerns the Council Regulation (EC) No. 116/2009 of December 18, 2008 on the export of cultural goods and the Commission Implementing Regulation (EU) No 1081/2012 of 9 November 2012 for the purposes of Council Regulation (EC) No 116/2009 on the export of cultural goods.

The mention of these provisions brings us to one of the major consequences that an eventual exit of the UK from the European Union will have on the sector of cultural heritage: the circulation and the trade of assets having an artistic interest across the Channel. Until now, in fact, England—like all member States—was subject to a Community regulatory framework that set norms both for the circulation of cultural property within EU territory and also the shipment towards a third country (EU Regulation n. 116/2009).

What would determine an eventual disapplication of the EU export control regimen in the UK[140]? It has been pointed out that—since the UK

[140] For an analysis of the different cultural heritage sectors that will be affected by an eventual Brexit and its outcomes see K. HAUSLER and R. MACKENZIE-

is the most important exporter among all member States---the European Community has every interest in 'retaining the UK part of this export-licensing scheme in order to protect the national treasures of its other member States, which could be exported from the UK[141]'. At the same time, the 'remaining' option will have advantages also for the United Kingdom, such as the possibility to claim an object considered to be a national treasure of England which is situated in the territory of another member State[142].

Besides all possible speculations, the reality is that at the present time it is not possible to know or anticipate what will happen or what kind of agreements concerning the export of cultural property will be adopted (if any). For the moment the only sure thing is the great sense of instability and uncertainty that surely does not have positive effects on many aspects of activities and trade connected with cultural heritage.

GRAY SCOTT, *Outside the debate? The potential impact of Brexit for cultural heritage in the UK*, Art Antiquity and Law, Volume XXII, Issue 2, 2017.

[141] Ibidem, 109.

[142] There are also contrary opinions on this point, especially dictated by market reasons. In this regard see C. MCANDREW, *Why Brexit Is a Golden Opportunity for the U.K. Art Market*, published on Artsy on August 30, 2018. The article is available online at the website: https://www.artsy.net/article/artsy-editorial-brexit-golden-opportunity-uk-art-market

FACTORS THAT INFLUENCE THE POLICY-MAKING PROCESS.

As closing remarks to this chapter, it is worthwhile to conduct a final reflection on our analysis thus far and make an overall comparison of the three systems analysed.

Regarding the latter, we have seen how different in their premises and the solutions adopted are the regulatory frameworks concerning controls on the export of cultural property in Italy, France and England. For the sake of clarity we might highlight such differences by distinguishing two aspects: the continuity or discontinuity with the past and the combination of different elements affecting the legislations.

13. Continuity or discontinuity with the past.

The purpose of this first subsection is to understand whether or not the countries under examination have changed their approach towards the protection of national cultural heritage through the retention of cultural assets since legislation was first implemented. As mentioned at the very beginning of this chapter, the reasons why a State decides to regulate a specific sector are linked, most of the time, to historical and social factors. Are the social and political factors that were present when the legislation was first enacted still the same or not? And if not, has the legislation changed accordingly?

Italy is an example of historical continuity. Analysing the evolution of the regulatory frameworks from the pre-unitary States until the contemporary age, we notice that the *ratio* underpinning export control has always been the same. The main purpose, in fact, has always been the greatest possible retention of antiquities and works of art within national borders by imposing an export ban. What it is considered the public interest, moreover, has always been considered predominant with respect to private rights and necessities.

The reasons for this protectionist attitude are traceable to the well-known presence of cultural items in Italian territory. The primacy of this country in the realm of artistic production has been and still is one of the most important reasons of pride for the nation. Moreover, the presence of artifacts, monuments and different kinds of cultural property is one of the most important—if not the most important—reason why an enormous number of foreigners visit Italy.

If it has been possible to preserve and, especially, maintain all this ccultuural heritage, it is certainly thanks to the foresight and wisdom of the sovereigns who ruled over the Italian Regional States. As we've observed, in fact, Italy is the cradle of cultural protection law worldwide. The approach of the first legislations enacted has never been contested or greatly amended; it was handed down without interruption first to the new-born Italian Kingdom at the end of the XIX century, and then to the republican governments of today. It is evident that in such a long period many elements have changed, but the approach has remained the same.

While the major grounds of the legislation remain the old ones, is it possible to say the same for the social, political and economic context? Of course not. We live now in a period of greater stability compared to the previous century, national frontiers are not under threat, and the supremacy of Italy in the artistic field is well-established. The problem is that this supremacy could fail if the whole administrative, bureaucratic, and—not last—legislative system does not evolve in response to political and economic evolution. Speaking specifically about export control, a narrowing of its extent, for example, would probably lead to a speed-up of the administrative procedures by which the authorisation to export an object is granted or refused. Of course, all the masterpieces that make Italy so famous would not be affected by such a revision, as well as almost all the very important cultural items located in the nation.

But, regardless of what aspect of the export control system should be changed, what really matters is the fact that a serious reflection about what approach to implement has never been conducted since the State's foundation. Italy seems to live off the legacy of the pre-unitary States

rather than initiating a reflection about what kind of export control is the most appropriate for its present and future. There would be nothing to object to if the result of such reflection would be the maintenance of the current system, but the problem is that any reflection on this specific issue has never taken place. The inherited approach has never been fundamentally questioned but only adjusted in reaction to occasional negative effects.

In terms of continuity, we cannot say the same for France which, starting from a political and social situation similar to the Italian one when first adopting export controls, has evolved over the centuries. This discontinuity is visible in the distance from an initial protectionist approach toward another more sensible to the necessities of actors other than the State, such as museums, collectors and dealers.

The different legislation adopted in France has often been linked to remarkable historical events, such as the two world wars and the constitution of the European single market. This temporal overlapping is symptomatic of a reactivity and a sense of adaptation of the French legislature to what happens at the domestic and international level. The greater or lesser opening of the national borders for cultural property was also a response to what the country needed most in that specific period. It goes without saying that political and legislative changes are counterproductive if they happen too frequently and are shown to be volatile, but the same could be said for a regulatory framework that proves to be impervious to any change.

Another element that has characterised and still characterises French legislation on export control is that it is the result of a permanent connection between politicians, civil servants, dealers, and collectors. The consciousness of all the aspects of the domain under consideration, together with the knowledge of the necessities required by different sectors, is likely a prerequisite to ensure the adoption of a regulatory framework responsive to the real needs of the art system and the cultural heritage sector in general.

Lastly, with respect to England it could seem strange talking about continuity or discontinuity, given the recent adoption of legislation to regulate the export of cultural property. Sixty years are not very long in historical terms. But if we must pick one predominant feature, this would surely be continuity. We highlighted repeatedly during the analysis of the English system how the one currently in force is fully based on the recommendations provided by the Waverly Report, the document that established the English export control system since its inception.

Of course the possibility that the United Kingdom might leave the European Union could represent a great element of discontinuity. But the current situation of uncertainty does not leave room for further speculation.

14. The combination of different elements affecting the legislation.

'Changing the order of the addends does not change the result'. If this is undoubtedly true in mathematics, this is less obvious for what concerns legislation. In this domain, in fact, changing the order of the addends could lead to very different outcomes.

We can see this by considering the regulatory frameworks that govern export control in the three countries analysed. All three, in fact, currently control the export of objects of cultural interest and which are located on their territory by the means of a licensing system. Besides this licensing system, moreover, all three adopt an export ban for items considered to be national treasures. None of them any longer implement a tax on the export or any listing system.

What we would like to stress here is that the three adopt almost the same criteria in order to decide whether or not an object of cultural interest can be permanently removed outside the national borders. The addends underpinning the licensing system are in fact pretty similar. They all implement an age and monetary limit (with the exception of

Italy, where currently the monetary threshold is suspended) and apply intrinsic criteria to evaluate if the item has value as a national treasure. We will discuss the criteria identifying national treasures in detail in Chapter IV, but we can anticipate that their formulation and scope do not significantly differ from one country to the other. What changes considerably, on the other hand, is the value at which the two thresholds that determine the extent of export control are set.

The time threshold is of 50 years from the creation of the item in both France and England, while in Italy it was increased to 70 years in 2017. The value of the monetary limit marks a big dividing line between the number of objects subject to the licensing system in one country with respect to the others. Taking as example only the category of a painting to be exported toward another member State, it is subject to export control if its price is higher than 15.000 € in France; 180.000 £ in England (the equivalent of more or less 198.000 €); and 13.500 € in Italy (to be in effect when the economic threshold is fully implemented).

Besides the different values set for the age of the cultural property and the onetary thresholds, what really affects the regulatory framework is the kind of procedure established for implementing the licensing system. The amount of time permitted for the administrative process; the possibility for the applicant to be heard; the transparency of the motivations that lead the administration to adopt a certain decision; the deadline by which the request must be made; and the validity of the certificate eventually granted; the consequences of a denial of the export authorisation request…all these elements are taken into consideration by the three States, but their solutions differ significantly. Such differences will be highlighted in the next chapter.

CHAPTER II: THE ADMINISTRATIVE STRUCTURE, ITS PROCEDURES, AND THE CERTIFICATES PRODUCED

The study and analysis of the administrative structures responsible for controlling the export of goods having a cultural interest proves to be particularly necessary.

The close connection between fine arts and state administration has been recognised for a long time. At the end of the XIX century this interdependence was so evident in France that, for the first time, a treatise was published on fine arts administration. This volume collected the legislation regulating the protection and management of cultural heritage together with the related case law. Its interest lies not only for being a pioneer in the sector, but also for the multidisciplinary background of the authors, a State Councillor (Paul Dupré) and the president of the Department of Fine Arts (Gustave Ollendorff). The combination of their experience is well summed up in the introduction, which affirms the close and necessary relation between culture and the law.

Herewith an excerpt:

« *Car, n'en déplaise à ceux qui considèrent l'art et l'administration comme inconciliables, il y a une administration des beaux-arts*[143] ».

Therefore, after having affirmed a first relation between fine arts and administration, the second aspect to highlight is the interdependence between the changes in cultural heritage regulations and its administrative implementation. Just as the connections between legislative and executive power are the result of choices driven by different needs and necessities, similarly, the internal organisation of the administrative structure reflects different approaches adopted by the State.

The close interconnection between cultural heritage legislation and the associated administrative structure was highlighted also by Luigi Gui, the Italian Minister for Public Education and president of the Superior

[143] P. DUPRE' & G. OLLENDORFF, *Traité de l'administration des Beaux- Arts*. Tome premier, Paul Dupont èditeur, Paris, 1885, Introduction.

Council for Antiquities and Objects of Cultural Interest. In 1962 he stated:

"*Nel nostro Ministero le Antichità e le Belle Arti hanno sempre costituito il settore forse più delicato, indubbiamente più sensibile, ai mutamenti di carattere amministrativo, poiché sia l'accentramento autoritario sia il decentramento non disciplinato, producono riflessi sulla intima vitalità e sull'efficacia funzionale dell'intero organismo*[144]".

Since the authorisation to permanently remove an object of artistic interest from its national territory is the result of a balance of powers and interests, it is relevant to observe how, in practical terms, how this balance is achieved.

The findings that will be analysed in this chapter will illustrate the importance, for the final decision that will be adopted, of the organisational structure of the administrative offices in charge to control the export of cultural property. A considerable part of the rationales underpinning the exportability of an object of cultural interest is strictly connected with the expertise involved, the procedures adopted, and the resources available.

Key concepts of this analysis are the possible nuances between a more centralised or decentralised administrative system, as well as the leeway connected to the so called 'technical discretion' that plays a role in administrative decisions. Mutual influences and interdependences between these two categories (the degree of decisional centralisation and the level of 'technical discretion') will be traced and analysed.

Even though some of the elements that make up this chapter have already been individually studied by scholars, a holistic approach of the

[144] L. GUI, *Formazione del consiglio superiore delle antichità e belle arti per il quadriennio 1962- 66*, Bollettino d'Arte, Ministero dei Beni e delle Attività Culturali, IV series, II-III issues (April- September), 1962, 98.

topic and their comparison can be regarded as an empirical study[145]. We use the adjective 'empirical' to emphasize how the analysis of export offices performances is based on the re-creation of their procedural practices.

The following paragraphs supply an overview of the multiple factors that compose the complex system of administering the export of cultural property.

Besides this analysis of export control as a complex system, an in-depth study of the internal organisation of the export offices, from both an historical and a contemporary perspective has never been conducted. The lack of attention to this specific topic is notable in the three countries analysed.

These are the reasons why the following paragraphs are dedicated to an analysis of the historical roots, political necessities, and political will that drove the building and shaping of the administrative structures in charge of protecting and managing the national cultural heritage.

In light of the purpose of this dissertation, major attention will be dedicated to the structure of the offices/branches/institutions that govern the control over the export of cultural assets.

The comparison conducted between the three countries will prove even more the close relations between a given administrative form and the final outcome of the decisions adopted[146].

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[145] According to the Oxford dictionary, 'empirical' is something "based on, concerned with, or verifiable by observation or experience rather than theory or pure logic".

See S. CASSESE, *La costruzione del diritto amministrativo: Francia e Regno Unito*, in S. CASSESE (edited by), *Trattato di diritto amministrativo*, Diritto amministrativo generale, I, 2, Giuffré, Milano, 2000. "Le istituzioni non sono, dunque, solo il prodotto di una volontà, quella del legislatore. Esse sono anche il frutto di un passato (o, meglio, di più passati, costantemente reinterpretati) e il risultato di commistioni di ordinamenti diversi, tra i quali sono frequenti importazioni ed esportazioni".

Finally, the aim of this comparison is also to detect the level of reciprocal influence of one country with regard to the other Administrative structures to manage the national cultural heritage have been established in Italy, France, and England in different periods of time. Despite the fact that their organisation is justified by their own legislative and governmental history, it is interesting to trace which aspects they have in common and which ones are not taken as a model to be followed[147].

The same essay is available in French, see S. CASSESE, *La construction du droit administratif. France et Royaume-Uni*, Montchrestien, 2000.

[147] See S. CASSESE, *Lo studio comparato del diritto amministrativo in Italia*, in Rivista Trimestrale di Diritto Pubblico, 1989, XXXIX, 678. Esp. 683 "Istituzioni trapiantate cambiano, adattandosi all'ambiente giuridico, e prendono nuove forme, conservando soltanto il nome dell'istituzione originaria. Le culture nazionali e le strutture sociali prendono il sopravvento. Ciò non vuol dire che la comparazione dei diritti amministrativi non sia possibile. Vuol dire che, come tutte le comparazioni, deve tener conto che le istituzioni giuridiche debbono essere viste nella loro funzione sociale, come il prodotto di più fattori, uno dei quali è l'imitazione, mentre un altro è l'ambiente sociale e culturale in cui si sviluppano".

THE ADMINISTRATIVE STRUCTURES TO CONTROL THE EXPORT OF CULTURAL PROPERTY

1. The administration of export offices in Italy at the turn of the XX century.

Alarm over the permanent removal of antiquities and objects of artistic interest was acutely felt by Italian pre-unitary States from the beginning of the XIX century. Andrea Emiliani, who focused his studies on the history of cultural heritage legislation, highlighted this major attention devoted to the art export control. Analysing the legislation enacted during the XIX century, he noticed that the preeminent aspect of the whole regulatory framework concerned imposing limits on the export of antiquities or objects of cultural interest.

"(…) Con riguardo alle attività del commercio e soprattutto, per quel che ci riguarda, dell'extraregnazione dell'opera d'arte. Questo dell'esportazione è nella storia, infatti, il maggiore e più evidente abuso possibile che viene evidenziato nella stesura di quelle grida[148]".

This major and early attention, in Italy, on the exportat control system-with respect to the other administrative practices we are going to analyse[149]- lead to the possibility to trace a history of the administrative structures overseeing this control. The existence of a regulatory framework already at the beginning of the XIX century, in fact, allowed for the construction of a bureaucratic system responsible for the implementation of export controls.

Information concerning the location of the different offices throughout the territory of the peninsula, their internal organization, and the practical issues they had to face have been collected over the

[148] A. EMILIANI, *Leggi, bandi e provvedimenti per la tutela dei beni artistici e culturali negli antichi stati italiani. 1571-1860*. Polistampa, Firenze, 2015, XIII.

[149] With regard to the legislative protection of cultural heritage, Italy had one of the most—if not the most—advanced regulatory system worldwide, not only in comparison with France and England.

years by the ministries involved and are now stored in the State central archive.

The huge amount of official documents, letters, decrees, statistics, licences that are stored reveal all the passages needed for the construction of the administrative structure that the new-born Kingdom wanted (and needed) to apply to the task at hand.

The archival material illustrates the switch from the existence of different legislations in force before 1861, and the need of a unique law and a uniform administration after the unification of Italy (completed in 1871 with the annexation of the Roman State). As mentioned, the implementation of this unique regulation (both in terms of norms and also with regard to their application) did not immediately follow the political unification of the Kingdom.

Only in 1902, in fact, Italy provided itself with a legislation for the protection of cultural heritage that substituted once and for all the pre-existing regulatory frameworks.

Before this achievement, the bodies in charge to control the export of objects having a cultural interest continued to operate with more or less the same rules in place before the unification of the Kingdom.

This doesn't mean that the newborn administration (the Ministry of Public Education[150]) did not try to establish a common regulatory framework for all the ex-provinces.

In the State Central Archive are stored the letters sent during 1862 from the Ministry of Public Education in order to collect evidence of the different norms in place up to that moment in the Italian regional

[150] The responsibility for the protection of cultural heritage was entrusted to the Ministry of Public Education and, more specifically, to the General Directorate of Fine Arts and Antiquities. The latter, in turn, was divided into several specialised internal departments.

states[151]. These documents are interesting not only because they reveal how prominent was the need of maintaining a control on the export of cultural property, but also because they contain important statistics and information concerning the activity of the pre-unitary States. The letters are almost all sent by the Ministry of Public Education and addressed to the local prefecture of the different provinces, revealing that they were the bodies implementing export control procedures.

Besides the need to determine what legislation was in force, another preeminent concern of the newly unified Kingdom was the form that the administrative authorities should take.

Major doubts regarded the question of whether to inherit the administrative structures effective in Italy's pre-unitary States or to develop new ones[152]. During this transitional phase, even if the need of a new national administrative structure was perceived at different levels, the management of cultural heritage was still mainly carried out by the administrative organisation put in place before 1861[153].

A first attempt to unify the implementation of the administrative actions concerning cultural heritage occurred in 1874 with the enactment

[151] Letter of January 15th 1862, stored in ACS, MPI, AA.BB. AA., b. 387, f. 25-01 "*Questo Ministero ha bisogno di conoscere le legislazioni applicate nelle diverse province italiane intorno alla materia della conservazione e dell'alienazione delle opere di belle arti*".

[152] See A. EMILIANI, *Una politica dei beni culturali*, Einaudi, Torino, 1974, especially 68-94.

[153] See A. ROSSARI, R. TOGNI (edited by), *Verso una gestione dei beni culturali come servizio pubblico. Attività legislativa e dibattito culturale dallo stato unitario alle regioni (1860-1977)*, Garzanti, Milano, 1978. Esp. 37: "I primi decenni dell'unità sono comunque caratterizzati da una parte dalla vitalità di alcune maglie della struttura amministrativa degli stati pre-unitari, che ancora svolgono il loro ruolo nel campo della tutela storica e artistica, dall'altra parte dalla esigenza avvertita chiaramente di una nuova organizzazione statale centrale per l'amministrazione della tutela artistica, che sia in grado di offrire una metodologia unitaria di intervento su tutto il territorio nazionale".

of the royal decrees of August 7, n. 2032[154], 2033[155]. They established that from that moment on both the 'provincial committees for the conservation of monuments and artworks' and the 'central council for archaeology and fine arts', were under the control of the Ministry of Public Education.

But despite this intervention there was still a lack of a holistic and general administrative intervention. This situation of 'administrative instability' was in contrast with the scientific contributions, in the same sector, produced by many intellectuals[156]. This led to a fracture between political and scholarly activity, strengthening the idea that it was

[154] Royal decree August 7, 1874, n. 2032 '*Col quale sono nominate commissioni conservatrici dei monumenti e delle opere di arte*'. These structures, one for each Italian province, were composed of four/six members, one half elected by the government and the second half by the provincial council. They were entrusted with the protection of monuments, cultural objects and historical memories existing in the area; they also had to list all those properties.

[155] Royal decree August 7, 1874, n. 2033 '*Col quale è istituito presso il ministero della pubblica istruzione un consiglio centrale di archeologia e belle arti*'. The two sections, archaeology & fine arts, had the duty to manage economic resources destined to excavations, restorations, acquisitions of antiquities, and the control of their export. Both sections met twice a year under the chair of the Minister of Education.

[156] The reference to 'intellectuals' here is made with regard to those art historians and scholars who focused their research on practical issues of the protection of artifacts and monuments, by coming forward with proposals that could have been as model for strengthening the legislation. See G.B. CAVALCASELLE, *Sulla conservazione dei monumenti e degli oggetti d'arte e sulla riforma dell'insegnamento accademico*, Rivista dei Comuni italiani, Roma, 1863, 2; A. VENTURI, *Catalogo delle opere d'arte nelle Marche e nell'Umbria di G.B. Cavalcaselle e G. Morelli* (1861-62), Le Gallerie Nazionali italiane, 1895, n.1, 192-348; *L'inventario della miseria*, il Marzocco, Firenze, January 23, 1904, n. 43, 1; *Il Ministero delle Belle Arti*, il Marzocco, Firenze, January 24, 1904, n.4, 1; M. CALVESI, *La prima difesa è la nostra coscienza*, Corriere della Sera, February 9, 1975.

impossible to achieve excellent scientific results when bureaucratic interests were at stake[157].

As mentioned, the newborn administrative structure still had some troubles in its daily workings, not being clearly established the duties of each officer and how to allocate responsibilities between central and local levels.

We find a good example of this confusing situation in the functioning of the Lucca export office around 1886. During this year, in fact, it happened that the '*Ispettore dei monumenti*'—the person in charge of granting the export licenses for antiquities and objects of cultural interest—was missing. The '*Ispettore dei monumenti*' at the time was Prof. Enrico Ridolfi, but he left Lucca for Florence, where he had been appointed '*Segretario alle Gallerie*'. In the meantime, and because of this lack of personnel, export authorisation requests had to be submitted to the 'Regio Istituto di Belle Arti', chaired by Luigi Morfini.

On June 8, 1886 Morfini sent a latter to the General Directorate of Fine Arts and Antiquities, describing the chaos in the present circumstance.

He explained how:

"*Accade di continuo che si presentino a questo R. Istituto di Belle Arti quelle persone che vogliono spedire oggetti all'Estero e io, come ne fui incaricato da questo Regio Prefetto, rilascio i richiesti permessi, ma ignoro più quali*

[157] See See A. ROSSARI, R. TOGNI (edited by), *Verso una gestione dei beni culturali come servizio pubblico. Attività legislativa e dibattito culturale dallo stato unitario alle regioni (1860-1977)*, op.cit., 43: "*E' su queste premesse che si va rafforzando la convinzione che coloro che hanno a che fare con la politica si 'sporcano le mani', con la conseguente frattura, operante ancora oggi, fra attività politica e attività di studio; si instaura così quella equazione per cui c'è scientificità soltanto se c'è apoliticità. Questa pretesa neutralità della cultura incide particolarmente nell'ambito della tutela del patrimonio storico e artistico, dove molto forte è la tendenza a rifarsi a un concetto di conservazione asettico e a priori, alieno da ogni scelta politica e disancorato da ogni riferimento concreto*".

successive pratiche debba compiere mancandomi in proposito ogni istruzione o regolamento[158]".

His request to obtain instructions on how to regulate the export control system was left without answer. Two other letters were sent to the Ministry of Public Education, one on August 31 from the head of the Lucca prefecture on behalf of prof. Morfini, and a second, on December 17, again by Morfini. Quite worried for the fact that he had to manage the export office for the next year as well, Morfini expressed doubts about the appropriateness of his management of the office, lacking any information on the norms regulating the export of goods having an artistic and historic interest.

"*Quest'ufficio che richiede zelo non poco, conoscenza stessa dell'arte e della sua storia e pone nel capo di fare delle parti non sempre piacevoli dando non poca perdita di tempo (…). Torno qui nuovamente a chiedere le istruzioni opportune poiché sono costretto a rilasciare questi permessi e temo di errare, sprovvisto come sono di qualunque norma*[159]".

Only on January 5, 1887 Morfini obtained an answer to his letters. The reply was sent from the prefecture of Lucca who had been appointed by the Minister of Public Education to give some instructions concerning export controls.

The interest of this letter is in the statement, made at its beginning, concerning the lack, at the time, of a unique law or regulation governing all export offices of the Kingdom[160]. What comes out is that the authorisation to permanently remove an object of artistic interest from the Kingdom was granted, at the time, on the basis of customary practices. It goes without saying that, in the absence of a complete set of

[158] Letter addressed to the Ministry for the Public Education, General Directorate of Fine Arts and Antiquities, from Luigi Morfini, ACS, MPI, AA. BB. AA., b. 409, f. 44-1.

[159] Ibidem.

[160] "*L'ufficio di esportazione non ha per ora leggi e regolamenti generali per tutto il Regno, ed è a desiderare che vi sia provveduto. Si governa con transizionali consuetudini, non eguali in tutto nelle varie province, e poche circolari*". Ibidem

norms or regulations, each province of the Kingdom acted differently from the other.

The prefecture, as a general recommendation, wrote to Prof. Morfini as following:

"*Lo scopo suo è di non lasciare che escano dallo Stato opere d'arte di pregio insigne, quindi la persona che è incaricata di rilasciare i permessi di esportazione, deve esaminare gli oggetti per i quali si richiede il permesso, e accordarlo per quelli di minor valore e di mediocre merito, trattenendo quelle che abbiano un merito singolare, e dandone comunicazione al ministro*[161]".

Lucca was not the only peripheral administration in this situation. At that time in Italy export control was completely handed over to local authorities. They had a high degree of freedom in evaluating the export authorisation requests they received and in adopting the final decision. In case the decision was to grant an export licence, no kind of consultation with the central administration was requested. On the contrary, the ministry had to be informed only when the export offices refused to issue the authorisation to export the cultural item.

Besides this, the degree of autonomy of the local authority was strengthened by the fact that they did not have at their disposal any general indications or guidelines to refer to. The evaluations were made according to the individual judgement of the civil servant; and the decisions were adopted on on the basis of customary practices. It is easy to guess that many different approaches were adopted in each part of the Kingdom.

1.1 Internal regulations of the export offices.

It is possible to detect, towards the end of the XIX century, a first attempt to harmonise the functioning of the export offices disseminated across Italian territory.

[161] Letter dated January 5, 1887 from the prefecture of Lucca to Prof. Luigi Morfini. Stored in ACS, MPI, AA. BB. AA., b. 409, f. 44-1.

In 1891, the XII Department of the General Directorate of Fine Arts and Antiquities drafted a Regulation for the functioning of all the offices in charge of the export of objects of cultural interest[162].

Art. 1 of the Regulation ordered the creation of special commissions in charge of evaluating export authorisation requests. The membership of these commissions was made of representatives of the local institutions responsible for the study and protection of the Kingdom's cultural patrimony[163]. These commission were chaired by the president of the institution where the export office had its headquarters.

Art. 1 of the Regulation also contained the list of selected institutions involved in the study and protection of cultural heritage in each province[164].

Articles 2 and 3 specified that each commission had the duty to select, within its members, two assessors in charge of issuing export licences. To do so they had to establish whether the item uder esamination could be considered 'extremely important for the history and the art of the Kingdom' ("*de' quali risulti la eccezionale importanza*") or not. If this was the case, the assessors had to turn the *dossier* over to the president of the Commission in order to analyse the case collectively. In this decision-making phase, the commission enjoyed complete autonomy; there was no requirement to inform or consult the Ministry[165]. The Ministry had to

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[162] '*Regolamento per gli uffici d'esportazione degli oggetti d'arte all'estero*', ACS, MPI, AA. BB. AA., b. 326.

[163] In almost all the provinces those institutions are: Regio commissariato per gli scavi e le antiquità; Commissione conservatrice dei monumenti; Museo nazionale / di antiquità; Pinacoteca comunale; Accademia di Belle Arti…

[164] The list is very exhaustive and comprehends information regarding the following provinces: Regione Veneta; Lombardia; Piemonte; Liguria; Emilia e la Romagna; province di Parma e Piacenza; Toscana; Umbria; Marche; Roma; province meridionali; Sicilia; Sardegna.

[165] Art. 2 of the above mentioned Regulation required as follows: "(*Gli assessori) avranno il compito di rilasciare, sotto la loro responsabilità, le licenze per tutto quanto non presenti un'importanza notevole per l'arte e la storia. In caso diverso, dovranno riferirne al Presidente della Commissione, il quale dovrà radunarla per*

be consulted, however, in case of objects found to be relevant for national collections with regards to the history of the Italian regions ("*secondo la la etnografia e la storia delle regioni italiane*").

In general, the Regulation was extremely detailed and the ensemble of the clauses covered globally all the different steps of export control: from the submission of the export authorisation request to the decision-making phase, the means of collecting the export tax, and finally the administrative procedures to be observed to maintain a link between the local and the central administrations.

Art. 10 listed the data that the individual had to provide when applying for an export licence. They were: personal information of the applicant; address of the applicant or person in charge of the export; typology and economic value of the object; details of shipping (quantity of the boxes, address of destination).

Art. 11 required the applicant to physically bring the item—as part of the submission of the export authorisation request—to the competent office for its examination.

At that point, assessors at the export office had the responsibility to make the first evaluation of the object (in order to assess whether it corresponded or not to the description provided in the request) and of its economic value. In case the value indicated by the applicant did not correspond to the real value of the item, the export office could modify it.

Finally, Articles 17 and 18 established procedures to be adopted in order to maintain a link between the peripheral and central administrations. First of all, the assessors of each export office were asked to send to the Ministry, on a monthly base, a copy of all the *dossier* concerning objects for which an export license was released. Similarly,

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deliberare se possa o no permettersi la estrazione, secondo le leggi veglianti, e senza interpellarne preventivamente il Ministero".

export offices were asked to store pictures of all cultural goods for which the removal from national borders was denied (art. 18).

The *ratio* of these two requirements was to allow for a complete knowledge of all the items that were authorised to be permanently exported.

As far as it is possible to deduce from the archival material collected, the Regulation we have described was intended to establish common operational activities for all export offices located in the different Italian provinces[166]. However, it is not easy to understand how the regulations were implemented. Archival research has not provided any specific information on this point. Nevertheless, the feeling is that its application was rather limited.

It is possible to make this assumption because the State Central Archives saved records of the internal regulations of other export offices, issued later than the one of 1891[167]. These are internal regulations meant to organise the daily procedures of individual export offices. Because they differ one from another in various ways, we may deduce that the guidelines emitted by the central Administration were not uniformly implemented.

Herewith some examples: The export office located in Bologna (whose headquarters was in the city's Pinacoteca) described itself as

[166] This assumption is made for two principal reasons: first of all, it is conserved in a binder containing files produced by the XII departments of the General Directorate for Antiquities and Objects of Cultural Interest, and not by a specific local office. This could lead us think that this is a general disposition enacted by the central Administration and one to be adopted by all the offices operating at the peripheral level. Secondly, the Regulation's general provisions describe the functioning of the Commissions in charge of issuing the export licences in plural terms ("*Sono istituite per il rilascio delle licenze d'esportazione all'estero d'oggetti d'arte antichi e moderni, speciali Commissioni*..."). Article 1, moreover, contains a list of the institutions involved in this activity throughout the territory of the Kingdom.

[167] These files are stored in ACS, MPI, AA. BB. AA, b. 327, f. 7.

observing a regular operational activity ("*L'ufficio nostro di esportazione funziona colla maggiore desiderabile regolarità*")[168]. It followed specific internal regulations that, overall, reflected the rules contained in the 1891 Regulation enacted by the central Administration. Notwithstanding this similarity, some differences are traceable: in Bologna the assessors did not have to grant the export licence if the object was of '*altissimo pregio*' (art. 3). If this was the case, the assessors notified the Minister who was in charge of making the final decision. Basically this is mainly a terminological difference, since the 1891 Regulation required referring the dossier to the Minister in case the object was of '*eccezionale importanza*'.

This may simply seem a minor detail, but such a terminological difference induces us to assume that, even when implemented, the guidelines coming from the central administration were subject to interpretation by each local office.

As a further example, Siena export office declared—in a letter sent on April 12, 1899 to the Minister of Public Education—that they never provided themselves with an internal regulation[169]. The operational activities of this office were guided by the instructions coming from the Ministry. An excerpt from a letter makes explicit reference to the general guidelines of the central adminiistration, saying:

"*Essendo sembrato sufficiente per l'adempimento di tale importante servizio le istruzioni importategli da cotesto Ministero, alle quali istruzioni ha sempre proceduto di attenersi con la più scrupolosa osservanza*".

In contrast, the export offices of Turin, Brescia, Milan and Rome did not adopt any specific internal regulation to guide their activities.

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[168] Letter sent from the president of the Pinacoteca di Bologna (A. Guadagnini), also president of the export office, to the Ministry of Public Education on April 1, 1896, ACS, MPI, AA. BB. AA, b. 327, f. 7.

[169] "*Questo ufficio, sin dalla sua istituzione, avvenuta il 9 dicembre 1879, non ha mai avuto nessun regolamento interno relativo all'esportazione degli oggetti d'arte*".

Finally, it is worth mentioning the cases of the export office of Naples and Syracuse. The former was provided with a very detailed internal regulation that not only complied with the general guidelines issued by the central administration, but was even more specific. The Syracuse export office, instead, with a letter sent on April 14, 1899 informed the Ministry of Public Education that they did not have any internal regulation since they had never felt the necessity of getting one. This was in particular due to scarce activity carried out, because almost all the objects of cultural interest and antiquities were illicitly exported. They stated:

"*Il meglio del materiale artistico e archeologico che va all'estero sfugge al nostro controllo, così che non si è vista la necessità di redigere un Regolamento interno in questo ramo di servizio*".

This brief overview of the internal rules governing the practical activity of the export offices was needed to illustrate the overall level of administrative organisation at the end of the XIX century in Italy. We can say that, even if not harmonised at a national level, the necessity of having rules governing export procedures was felt in (almost) the entire territory of the Kingdom.

2. Structure, staff and duties of the peripheral administration offices: the Superintendence.

In 1907, the Senate and Chamber of Deputies approved a law—signed by King Vittorio Emanuele III—which regulated the organic structure of those field offices in charge of the 'protection of archaeological and artistic interests'[170]. This law has the merit of having

[170] This is law n. 386 of June 27, 1907, entitled '*Legge sul consiglio superiore, uffici e personale delle antichità e belle arti*'; published in the Official Journal of the Kingdom on July 4, 1907, n. 158.

We should mention also the royal decree n. 431 of July 17, 1904, published in the Official Journal of the Kingdom, n. 201, on August 27, 1904. This royal decree '*Approva il regolamento per la esecuzione della legge sulla conservazione dei monumenti e degli oggetti di antichità e d'arte, e di quella sulla esportazione dall'estero degli oggetti*

established, for the first time in Italy, a solid bureaucratic organisation. This merit was recognised by the doctrine and confirmed as follow:

"*La legge del 27 giugno 1907 (…) ha il merito di avere per la prima volta creato un saldo organismo laddove era il caos, di avere sviluppato un sistema di decentramento burocratico encomiabile sotto molti riguardi, di avere in fine chiamato a dirigere e a comporre gli uffici antiquari e artistici elementi giovani e valorosi*[171]".

According to this law, the peripheral administrative offices in charge of the protection of cultural heritage under the Ministry of Public Education were the following: Superintendence for Monuments; Superintendence for Archaeological Museums and Excavations; Superintendence for Galleries, Mediaeval and Modern Museums, and Artistic Objects. The role of the Superintendence in the context of the general organisation of the management of cultural heritage, would remain the same, in its overall characteristics, to the present day[172].

According to art. 3 of the law 386/1907, the Superintendence for monuments was entrusted with the custody, conservation and administration of monuments under the responsibility of the Ministry of

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antichi di scavo e degli altri oggetti archeologici od artistici'. Notwithstanding the explicit mention of export offices (art. 1 letter d) as one of the offices in charge of the protection of the national cultural heritage within the Ministry of Public Education, we have to remember they are embedded within the Superintendence. The personnel as well as their tasks are the same of those laid down in the law 386/1907.

[171] V. LEONARDI, *L'organizzazione generale delle amministrazioni*, in *Atti del 1° Convegno degli Ispettori Onorari dei Monumenti e Scavi*, Ministero delle Belle Arti Direzione Generale delle Antichità e Belle Arti, Roma, 1912, 430, quoted in A. ROSSARI, R. TOGNI (edited by), *Verso una gestione dei beni culturali come servizio pubblico. Attività legislativa e dibattito culturale dallo stato unitario alle regioni (1860-1977)*, op. cit., 63.

[172] See A. EMILIANI, *Una politica dei beni culturali*, op.cit., 96: "*Nel primo decennio del secolo è finalmente giunta ad assumere qualche forma quella stessa struttura amministrativa delle belle arti che è destinata a perpetrarsi, nei suoi caratteri generali, fino ai nostri giorni*".

the Interior. With regards to monuments in private hands, the Superintendence was responsible solely for their surveillance and supervision. At that time there were eighteen Superintendencies in charge of monuments, disseminated throughout the territory of the Kingdom.

Art. 5 described the role of the fourteen Superintendencies in charge of excavations and archaeological museums, responsible for the following activities, among others:

a) to oversee and administer State-owned terrains in which the excavations were conducted and the monuments within them;
b) to conduct archaeological excavations on behalf of the State;
c) to safeguard governmental collections of antiquities;
d) g) to supervise the export offices as far as antiquities were concerned;
e) to update the inventories and maintain catalogues.

Art. 7 listed the duties of the fifteen Superintendencies spread across the national territory in charge of galleries, medieval, modern museums, and artistic objects. Their main responsibilities consisted in safekeeping and administering the governmental collections of artistic objects belonging to the Middle Ages, Renaissance, and the Modern age. They were also responsible for the supervision of the same categories of objects privately owned, and they served as export offices.

Chapter IV l. 386/1907 outlined the structure and tasks of the export offices. With respect to their tasks, art. 42 entrusted them with the following activities:

a) to deal with the illicit export of cultural property;
b) to issue the necessary documentation needed to legally export antiquities and objects of artistic interest;
c) to calculate and collect the export tax as required by this law;
d) to foster the State right of pre-emption on assets having an artistic ad historic interest submitted to the export offices.

According to art. 43, the Ministry of Public Education had to determine whether to embed the export offices in a Superintendence in charge for monuments, in a Superintendence responsible for galleries, gallery, or in a Superintendence for museums.

Another element of novelty of the law 386/1907 is that it delineated the composition of export offices in terms of personnel and duties to perform. In this regard, Article 44 described the membership of the Superintendence, made up by 'the Superintendent (the person in charge of the field office); the Director; the Inspector and the Architect living in the city where the office is located'.

As far as the realm of expertise of these civil servants, the Superintendent and the Director played essentially a role of coordination and they were accountable for all the tasks of the office (Art. 14 and 15 law 386/1907). On the other hand, inspectors were required to carry out technical-scientific activities (Art. 16), while architects had more a technical-artistic role (Art. 17).

With respect to the internal hierarchy, art. 44 paragraph 3 established that 'the power to conduct the assessment of the object and the other procedures needed to evaluate the export authorisation request were entrusted to the Superintendent and the Director. If needed, they had the possibility to ask for a consultancy with another civil servant of the same export office, if she/he was more competent to analyse the case under consideration[173]'.

The final decision whether to permit export of an antiquity or object of artistic interest or not was taken by three civil servants working in the export office, by a majority vote (art. 45).

Finally, Art. 46 dealt with granting the go-ahead needed to permanently export a contemporary artwork. This go-ahead could be

[173] The original version of Art. 44 paragraph 3 l. 386/1907 was "*È riservata sempre ai sopraintendenti ed ai direttori la facoltà di eseguire essi stessi la stima e le altre operazioni relative alla esportazione o di consultare altro funzionario che ritengono singolarmente competente*".

released by different actors (export offices, academies, or individuals); a royal decree established who among them could fulfil this specific task.

Summing up, the reading of law 386/1907 gives an idea of the general structure characterising the control over the export of objects having a cultural interest at the beginning of the XX century in Italy.

There are some aspects that strike our attention. First of all, we can notice the net division, both in terms of procedures and responsible institutions, between the controls on the export of antiquities and those of contemporary artworks. While the procedure to follow in order to authorise or to deny the permanent removal of a cultural good is very detailed, contemporary artworks are not equally treated.

The major distinction lays in the fact that the control on the export of antiquities and objects of artistic interest is under public control. The permanent removal of a contemporary item, instead, is not under the supervision of a peripheral administrative office; on the contrary, it is remanded to other kinds of institutions (such as academies or other 'offices or institutions' not further specified) or, even to private individuals.

Another aspect of the law that summons our attention is the significant separation between a technical and a political/discretional approach in the analysis of export authorisation requests. The role played by civil servants responsible for the technical-scientific evaluation (Inspectors and Architects) in the decision making phase is not entirely clear.

Art. 45 stated that "the judgement over the exportability of the objects is to be made by three officers, by a majority of vote[174]". Neither this article nor the following ones specified the qualification of these three officers so that it is not clear, for example, whether the Superintendent and Director were one of those or not. It would be relevant to know how

[174] The original version of Art. 45 l. 386/1907 was "*Il giudizio sull'esportabilità delle cose presentate per l'esportazione sarà pronunziato da tre funzionari dell'ufficio a maggioranza di voti*".

this commission was composed because the presence of one member rather than another could alter the balance between a more technical or political assessment.

Given this legislative framework, it is interesting to examine how the regulatory framework introduced in 1907 was actually implemented.

We can have an idea of these practical aspects by reading some documents of the time stored at the State Central Archive. Important information can be obtained from a file produced in 1909 by the General directorate for Antiquities and Objects of Cultural Interest[175] which lists all the headquarters of the Italian export offices. The most important information we have from this list are the institutions in which export offices were located. Almost all the export offices for antiquities and objects of artistic interest had their headquarters in a Pinacoteca or in a national museum[176]. Export offices in charge of authorising the export of contemporary artworks were located, in the majority of cases, in the city's municipal offices. Only a few of them were located in the local Academy or institute of fine arts[177].

2.1 The Superintendence under the Fascist regime.

Fifteen years after the enactment of l. 386/1907, while Italy was under the Fascist regime, the structure of the Superintendence was modified by royal decree n° 3164/1923[178].

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[175] More precisely, the survey was conducted by the department in charge of the conservation of monuments, artistic objects, galleries and museums (the X division) of the General Directorate for Antiquities and Objects of Cultural Interest.

[176] As previously mentioned, according to art. 43 law 368/1907 the export office could be embedded both in a Superintendence in charge of monuments, in a gallery or in a museum.

[177] The mentioned document is stored in ACS, MPI, AA. BB. AA., b. 324.

[178] This is the royal decree of December 31, 1923, n. 3164, entitled '*Nuovo ordinamento delle Soprintendenze alle opere di antichità e arte*'; published in the Official Journal of the Kingdom on February 18th 1924, n. 37.

The first novelty consisted in merging the Superintendence in charge of antiquities with those dealing with artistic objects. These field offices were entrusted with the administrative functions of protection and conservation.

Exceptions to this general rule were accepted, since it was possible to still have two different superintendencies, one for antiquities and another for mediaeval and modern art.

The composition of the staff working in the Superintendence for antiquities and artistic objects was regulated by Article 11, and included:

1) Scientific and technical personnel (Superintendent; Director; Inspector; Architect);
2) Technical and executive personnel (Draftsman; Restorer);
3) Administrators;
4) Archivists;
5) Custodians.

The first three articles of Chapter IV[179] were specifically dedicated to export offices. According to art. 26, the duties of the latter remained essentially the same as those established by art. 42 l. 386/1907[180]. Export offices were still located in the same cities of the Superintendence, and the Government was authorised to establish supplementary export offices if needed.

Article 27 paragraph 3 established that the go-ahead for the export of contemporary artworks could be granted by 'offices, institutions, academies or private individuals acting as export offices'. We detect, therefore, the same kind of separation between the export of antiquities/

[179] The title of Chapter IV was 'Degli uffici di esportazione e di altri uffici speciali'.

[180] The tasks of the export offices were: to monitor the illegal exportation of antiquities and artefacts; to issue the necessary documentation needed to legally export antiquities and objects of artistic interest; to calculate and collect the export tax as required by the of law June 20, 1909, n. 364; to foster the State's right to purchase objects of cultural interest submitted to the export offices.

objects of artistic interest and contemporary artworks previously mentioned.

Regarding the composition of the personnel working in export offices, it was under the responsibility of the Superintendent to appoint civil servants from among those working in the superintendency. The only request was that they must had a scientific or technical background (meaning that the choice was limited to the superintendents, directors, inspectors and architects). The appointment lasted two years.

Article 28 envisaged the possibility for the Minister to call additional staff, such as professors of fine arts academies or 'other capable and skilled individuals'. This is a novelty with respect to previous legislation, in which it was possible to call other experts for the evaluation of specific *dossier*, but the choice was limited to personnel already working in the same Superintendency[181].

The final decision over the possibility to export an antiquity or an object of artistic interest was taken by three officers of the export offices, by a majority vote[182].

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[181] See Art. 44 paragraph three l. 386/1907.

[182] Archival material reveals aspects of precariousness in the daily functioning of the export offices.

On this point, a letter sent by the head of the accountancy office within the Ministry of Public Education to the General Directorate for Antiquities and Fine Arts on November 22, 1935 described the situation of poverty in the export office in Bari. The most interesting element of this letter is the request for a salary, even if minimal, for the official: "*Il Sopraintendente alle opere di antichità e arte della Puglia (…) ha chiesto se è stato disposto per l'assegnazione di una somma necessaria per il funzionamento dell'ufficio di esportazione e a compensare, sia pure in misura modesta, il funzionario che se ne occupa*".

This single reference clearly cannot be taken as a clue of a condition affecting all export offices in Italy at the time; still, it is ~~a~~ significant evidence from which some information could be deduced. It would be bizarre if the Superintendent in Bari was the only person among his/her colleagues of the other Italian export offices not to receive a salary for the activity carried out. If this was a general condition, it would be an evidence of the difference in treatment between the

3. The 'independent authority' outlined by the Franceschini Committee.

The protection and the management of the national cultural heritage remained, during the following decades, under the administration of the Superior Council for Antiquities and Objects of Cultural Interest. In the same way, the structure of the internal offices, as well as the tasks and duties carried out did not change significantly.

The so called 'Bottai Law'[183] introduced in 1939 if on one hand provided for major changes on the legislative level, on the other it did not significantly amend the administrative organisation of cultural heritage[184].

The mid-1950s witnessed a growing preoccupation with the state of Italy's national cultural heritage since the historic, artistic and environmental patrimony risked collapse. The reasons for this decay were partly attributable both to the inappropriateness of the legislation at stake and the inadequacy of the administration implementing it[185].

This increased awareness ensured that the governing political forces started to grasp the necessity of adopting some measures to protect the national cultural heritage.

In this context on April 26, 1964 Parliament enacted the Law n. 310[186] that instituted a Committee (the so called 'Franceschini Committee' by

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staff working in the Superintendency and, for example, other expert in the same field working as university professors.

The letter mentioned is stored in ACS, MPI, AA. BB. AA., b. 131, f. 667.

[183] Law June 1, 1939, n. 1089, '*Tutela delle cose d'interesse artistico o storico*'.

[184] Law May 22, 1939, n. 823 '*Riordinamento delle soprintendenze alle antichità e all'arte*' did not modify the main structure and duties of the Superintendence.

[185] See F. FRANCESCHINI, *Presentazione* in *Relazione della commissione d'indagine per la tutela e la valorizzazione del patrimonio storico, archeologico, artistico e del paesaggio*, Milano, Giuffré, 1966, 8.

[186] The 'Commissione di indagine per la tutela e la valorizzazione del patrimonio storico, archeologico e del paesaggio' was appointed by the Council

the name of its president) of inquiry with the purpose of studying the situation of the artistic, historic and environmental patrimony, and "to put forward concrete proposals to achieve the following objectives:

a) to revise the actual legislation for the protection of cultural heritage and the corresponding administrative structure;
b) to better organise the personnel especially in relation with real necessities;
c) to adapt financial resources to actual needs[187].

In order to conduct its mandate, the Franceschini Committee divided up into groups, each with a specific duty. One was in charge of conducting analysis with respect to the administrative structure and personnel. This was group number VII, named "*Formazione del personale; strutture e ordinamenti amministrativi*, and was composed by Carlo Ludovico Ragghianti and Giulio Maier.

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of Ministers pursuant to a proposal by the Ministry of Education and the Ministry of Public Works.

The Committee was chaired by Francesco Franceschini (thus Committee was called the 'Commissione Franceschini'). The members were both political figures (G. Bergamasco; G. Bisori; G. Granata; C. Levi, G. Maier; T. Romagnoli; A. Grilli; F. Loperfido; R. Lucifredi; V. Marangone; C. Scarascia Mugnozza; A. Seroni; G. Vedovato) and experts (G. Astengo; A. Barbacci; F. Benvenuti; A. Campana; E. Cannada Bartoli; B. Forlati Tamaro; M. Severo Giannini; M. Maccari; E. Onorato; M. Pallottino; C. L. Ragghianti).

The Committee's work ended two years after its appointment, on March 1966.

[187] The mission and the composition of the Franceschini Committee was strongly criticised some years later by Cesare Brandi, whom underlined that the approach of the Committee was more political than technical. See C. BRANDI, *Commissione Franceschini Commissione Papaldo: anno zero*, Futuribili, n. 30-31, January- February 1971, 44-52. Esp. p. 44 "*(La Commissione) fu pensata politicamente, come una pezza da mettere ad una falla che si era aperta, e senza tenere nel minimo conto il fatto fondamentale che l'oggetto della Commissione e i futuri provvedimenti erano di materia tecnica e non politica, con tale dispregio delle competenze (…)*".

Regarding the general administration of cultural heritage, the survey conducted by the Franceschini Committee highlighted a situation of structural weakness. This was mainly due to the non-conformity of the administrative structure to the specific needs of the sector.

The level of bureaucratic burden compared to the functioning of other public administrations was found to be inadequate for the protection and management of cultural heritage. All the bureaucratic procedures typical of a ministerial organisation were fund to be unsatisfactory compared to the necessity for prompt intervention, disbursement of budget, and recruitment of staff required for the best protection and management of cultural heritage.

In this regard, the Franceschini Committee stressed the necessity of having an administrative structure tailored to the specific kind of activities to be conducted.

This situation was described as the following:

"*Una concezione amministrativa che, non distinguendo adeguatamente la specifica e differenziale qualità dei beni culturali da ogni altra categoria di beni, ha assoggettato fino ad oggi la disciplina dei beni culturali stessi a ordinamenti, norme contabili, stati giuridici del personale, erogazioni di bilancio etc., indifferenziati da quelli propri genericamente a tutte le altre amministrazioni pubbliche: in contrasto palese, stridente e gravemente pregiudizievole con le esigenze affatto proprie a questo specialissimo settore; dal che deriva la maggior parte delle disfunzioni con le deplorevoli conseguenze sopra ricordate*[188]".

In light of these considerations, two possible remedies were suggested:

1) to foster dialogue with external experts in order to have always at disposal the best qualified support;

[188] See *Presentazione in Relazione della commissione d'indagine per la tutela e la valorizzazione del patrimonio storico, archeologico, artistico e del paesaggio*, cit., 18.

2) to grant agility and flexibility to the administrative structure[189].

Aware of the importance of the topic they were facing and also of the novelty of their proposals[190], the members of the Committee produced a very detailed description of the model suggested. More specifically, their suggestions concerned the structure of the new administration; its functions; liabilities; and the relations and hierarchies the different bodies forming it. All these indications were divided in several 'statements'[191].

The administrative structure was outlined in Part II, titled 'Organisation'. Statement LVIII outlined the main characteristics of the central administration in charge of the protection of cultural heritage. Its main structure would have been the following:

"The National Council of Cultural Heritage, chaired by the Ministry of Education, presides over the protection and enhancement of the cultural patrimony, which provides for an Independent Authority, which is headed by the Minister of Education who reports to Parliament".

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[189] Some years before the same hope for a more efficient administrative structure in charge of the protection and management of cultural heritage was formulated by Mario Salmi, vice-president of the Superior Council for Antiquities and Objects of Cultural Interest.

See *Formazione del consiglio superiore delle antichità e belle arti per il quadriennio 1962- 66*, cit., 99 "*Meglio sarebbe invece trasformare l'attuale Amministrazione in Azienda Autonoma dello Stato come avviene per altre Amministrazioni statali*".

However, the priorities at that time seemed to be others, in particular, the improvement of the conditions of the personnel working in the peripheral offices of the Administration. "*Ma in questa sede si può esprimere solo un voto: che si pensi definitivamente a dare al personale tranquillità economica ed aumento di prestigio*".

[190] Ibidem, 27: "*Essendo le consimili figure nel nostro ordinamento tutte atipiche. (…). Appaiono evidenti le caratteristiche moderne che la Commissione ha concepito come proprie dell'Amministrazione e che nettamente la distinguono, perfezionandola, da ogni altro analogo organismo operante nel paese (…)*".

[191] The outcome of the research conducted by the Franceschini Committee consisted in a list of 'statements' from I to LXXXIV-, each accompanied by a comment.

The comment that goes with this article pointed out how the realisation of an independent authority like the one they were advocating was in line with the reform of the public administration under discussion at the time. The latter, in fact moved towards a model of decentralisation[192].

According to this model, the Minister of Public Education would remain entitled with political responsibility while the National Council for Cultural Property (chaired by the same minister) would be in charge of administrative oversight.

Regarding the operational organisation, the independent authority so outlined contained an Administrative Board; a General Superintendence in charge of the different categories of cultural property; a college of auditors, and other General Services.

Statement LIX stressed the fact that the independent authority and the Ministry of Public Education had to be considered as two separate bodies. Such a scheme did not provide for a relationship of hierarchy between them but only for a supervisory power on the activity of the independent authority[193]. The role of the Minister of Public Education was to provide a link between the policy guidelines of Parliament and the Government and the political-administrative guidance of the National Council.

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[192] In the mentioned article Cesare Brandi criticised the proposal of enrusting management of the national cultural heritage to an independent authority. This was, he charged, only a way to favour certain political parties. "*Un'amministrazione autonoma, che rescindeva dallo Stato il patrimonio artistico e naturale, non già per potenziarne la tutela, ma per mettere a disposizione del partito regnante o dei partiti comunque inclusi nell'establishment un altro potentato*".

[193] According to this supervisory power, the Ministry of Education could: annul any illegitimate provisions if provided with a consistent motivation; hold the independent authority to observe the norms and regulations of the National Council; and dissolve the Administrative Board for serious breach of the regulations.

The National Council for Cultural Property, whose composition was described in statement LX, had to be considered a separate body with respect to the independent authority. Its membership would have consisted of experts chosen among art historians, curators and scholars in different disciplines.

Statement LXII outlined the structure of the Independent Authority of Cultural Property[194]. According to the Franceschini Committee, it would implement the legislation in force under the political-administrative guidance of the National Council. Moreover, it was entrusted with the responsibility to carry out studies and research on cultural heritage issues; to maintain relations with international and national institutions; and to provide for economic resources.

The internal organisation of the independent authority included five General Superintendencies and several General Services (Statement LXVI). The former were the core organisational units, entitled with functional autonomy, and each one was specialised in a specific sector: Archaeology; Objects of historic and artistic interest; Environment; Archives; Libraries.

The General Services, instead, had the duty to carry out more practical activities such as dealing with administrative tasks or implementing measures meant to guarantee the safekeeping of the cultural patrimony.

Major focus was dedicated to assure that the independent authority did not end up representing a 'classical' bureaucratic institution. In order to guarantee the best possible level of expertise, collaboration with specialised institutions or experts was encouraged.

On a similar point, Statement LXXIV required that the staff working for the independent authority be composed of highly specialised civil servants. In order to achieve this objective, the role of schools, universities and other kind of institutions was fundamental. The latter

[194] The expression 'Independent Authority of Cultural Property' is used as a translation of '*Amministrazione autonoma dei Beni Culturali*.

were not only supposed to train the future personnel of the administration, but also to support those already hired.

Regarding the situation of the staff working in the administration of the national cultural heritage, the situation at the time was not exactly optimal.

We have a picture of how the situation was at the time thanks to the tesstimony of Mario Salmi, Vice President of the Superior Council for Antiquities and Objects of Cultural Interest. His major complaint regarded the shortage of highly qualified staff in the peripheral administrative offices dealing with cultural heritage[195].

The main obstacle was the lack of appeal in this kind of career, perceived as 'devoid of economic advantages and full of bitterness'[196] To face this problem, Salmi suggested placing superintendents on an equal footing with academics in terms of salary and administrative grade. Such asn action might avoid the 'exodus' of excellent professionals and specialists to other career positions.

It is worth underling how the suggestions of the Franceschini Committee regarding personnel referred to all civil servants working in the administration, not only to those having a managerial position. On this point, the comment that accompanies Statement LXXIV specified that:

"*Pur nelle particolari istanze proposte dal valore primario e dalla delicatezza specialistica nelle funzioni scientifiche e tecniche delle Amministrazioni, non possa concepirsi un complesso organico di servizi impacciato dal dislivello di comprensione e di preparazione dei diversi ruoli del suo personale; e che pertanto ogni funzione amministrativa, contabile, di sicurezza, di concetto, di esecuzione, ausiliaria e operaia deve essere affidata a personale sceltissimo e specializzato in rapporto ai suoi compiti in*

[195] See *Formazione del consiglio superiore delle antichità e belle arti per il quadriennio 1962- 66*, cit., 99.

[196] M. SALMI, ibidem, 99, described the career of the superintendents as a "*carriera di scarsi vantaggi economici, nè priva di amarezze*".

modo da formare un <<corpo>> unitario, capace di agire all'unisono, con sicura consapevolezza, per il conseguimento dei suoi fini".

The suggestions put forward by the Franceschini Committee, as seen, aimed at reaching a turning point in the day-by-day functioning of the administration of fine arts. This radical change, both in the structure and in the professionals involved, was perceived as the only way to avoid the loss of national cultural heritage. As explained by the following statement, the deteriorating status of culture was due to multiple mutually reinforcing factors:

"(…) Lo stato di generale precarietà e decadenza del patrimonio archeologico, artistico, storico, ambientale, librario e archivistico italiano non può essere attribuito esclusivamente, e neppure prevalentemente, ad una deficienza quantitativa di personale e di finanziamento delle competenti Amministrazioni pubbliche di tutela, come si è spesso affermato e si afferma; ma deve essere spiegato, soprattutto, come conseguenza di un basilare difetto d'impostazione del sistema stesso della tutela dei beni culturali, tale da esigere non miglioramenti o perfezionamenti, bensì rimedi di natura radicale[197]".

In order to handle such a complex situation, the administration responsible for the protection and management of the national cultural heritage needed both qualitative (in terms of professions) and quantitative (with reference to financial resources) actions.

As a closing remark we can say that, even if the Franceschini Committee did not enter into details concerning the internal organisation and tasks of the Superintendence in charge of Archaeology and Objects of Historic and Artistic Interest, it is possible to deduce that they would have performed also as export offices for the respective items of competence.

Also, although we do not have any further specifics on their means of functioning, we can perceive the independence, flexibility, and high level of professionalism that would have characterized these offices.

[197] Ibidem, 16.

4. Towards the birth of the Italian Ministry for Cultural Property and Landscape.

The proposals elaborated by the Franceschini Committee, and some years later by the Papaldo Committee[198], were never finally converted into legislative measures. Notwithstanding this, some of the suggestions put forward, as well as the surveys conducted on the status of the national cultural heritage, have proved to be extremely useful for future actions[199].

One of the merits of these studies is the fact of having revitalised the debate on cultural heritage issues and, in particular, on its administration.

In such a context, the Chamber of Deputies carried out in 1871 an investigation meant to detect how to efficiently manage the tasks and duties allocated by the Constitution to the three General directorates (Fine Arts, Libraries and Archives)[200] of the General directorate of antiquities and objects of artistic interest.

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[198] The Papaldo Committee was established in April 1968. Its official title was "*Commissione di studio per la revisione per il coordinamento delle norme di tutela relative ai Beni Culturali*". It was composed of 44 members, chaired by the President of the Council of State A. Papaldo. The outcome of the researchches conducted were presented on March 1971.

[199] With respect to the former, ROSSARI, R. TOGNI (edited by), *Verso una gestione dei beni culturali come servizio pubblico. Attività legislativa e dibattito culturale dallo stato unitario alle regioni (1860-1977)*, op.cit., 154: "*La Commissione Franceschini si qualifica così come il primo tentativo serio del dopoguerra di una revisione e insieme di un consolidamento del potere centrale*".

[200] The research ('Ricerca sulla tutela dei beni culturali') conducted by the Ufficio Studi, Legislazione e Inchieste Parlamentari of the Chamber of Deputy, was released in 1971. The members of the working Committee: P. Bellini; V. Cappelletti; G. Carettoni; E. Croce; P. D. Pergola; G. Donato, G. Ioppoli, G. Limiti. The outcome of the survay is stored in AGS, Beni Culturali, Iter Legislativo.

This research was conducted in preparation of the review by Parliament of the entire matter concerning the administration of cultural heritage.

The rationales and principal purposes of this investigation were summarised in its preamble, that states:

"La necessità di una ristrutturazione dell'Amministrazione preposta alla salvaguardia del Patrimonio Culturale italiano (…) è stata da tempo recepita da questo ufficio Studi, Legislazione e Inchieste Parlamentari. A tal fine è stata presa l'iniziativa di preparare un Dossier documentato sulle esigenze legislative, funzionali, strutturali e il relativo potenziamento dell'organico, tenendo conto di ciò che le tre Direzioni Generali attuali (Belle Arti, Biblioteche e Archivi) hanno esposto in varie sedi e tempi per assolvere in modo efficiente e funzionale i compiti loro assegnati dalla stessa Costituzione".

How to carry out this investigation? The selected Working Committee elaborated a questionnaire with multiple options (approved by the Ministries of Public Education[201] and of the Interior) that was sent to the Superintendency and other cultural institutions disseminated in the Italian regions.

The answers received were collected and elaborated so as to have a complete picture of the necessities and needs expressed by the main bodies operating in the cultural sector. The first result highlighted by the survey was the necessity to completely reorganize the administration of cultural heritage by setting up a specific Ministry.

The form consisted of five questions (each of them listing multiple options), covering the administrative structure (n.1); the activities/services to be performed (n.2;5) and the personnel (n.3;4).

The questions embedded in the questionnaire were the following:

1) In order to achieve an efficient administrative functioning, what administrative structure is preferable?

[201] With memo n. 28406 issued on July 7, 1971 the Ministry of Education authorised the office in charge of conducting the research to maintain direct relations with the Superintendents and with the directors of cultural institutions.

a) The current Ministry.
b) Another existent Ministry.
c) A new Ministry.
d) An independent institution to be constituted.

2) What kind of activities/services should the office or institution you are working in perform?

a) Protection and conservation
b) Scientific documentation (cataloguing; inventory…)
c) Research
d) Restoration
e) Didactic activities
f) Public relations
g) Publications

3) In the context of each sector, what is the amount of personnel that you consider strictly necessary?

4) Do you have any other suggestions, proposals, requirements to point out regarding the services to be carried out by the future administration and with respect to the personnel and the equipment?

On the number of answers received, from the Superintendence in charge of antiquities we count thirteen replies out of a total of twenty-five offices. Eight answers from the archival Superintendencies in a total of nine. Eleven from a total of fifteen from the Superintendencies in charge of galleries and three answers from the eleven mixed Superintendencies (for monuments and galleries). Summing up: of over one hundred and seventeen questionnaires sent, the collected replies were more or less seventy.

Regarding the administrative structure, most of the Superintendencies involved in the survey expressed their preference for the creation of a new administrative structure to replace the Superior Council for Antiquities and Objects of Cultural Interest currently embedded in the Ministry of Public Education. The majority of them were in favour of the establishment of a Ministry of Cultural Property

or, as an alternative, of an independent authority that could fulfil the same functions.

Turning to the second question, the offices involved reported their preferences for the following activities to be carried out: protection and conservation; scientific documentation; research and restoration.

With regard to personnel, the combined replies put in evidence the necessity of having 3350 positions to add at various levels.

Finally, the suggestions and requirements expressed demonstrate what were the real needs in the day by day functioning of offices and institutions dealing with the protection and the management of cultural patrimony.

The Superintendency in charge of antiquities stressed the necessity to establish a stronger and permanent link with universities. This would allow for a better qualified staff and access to training for the managerial-scientific personnel. A specific education, theoretical and practical at the same time, for all the staff working in the peripheral administrative offices dealing with cultural heritage was indicated as a necessity.

Secondly, more than one institution expressed the necessity to create a position of Administrative Director, and administrative staff, so that he/she could conduct all the bureaucratic and financial tasks that required specific capabilities.

Last but not least, almost all the replies stressed the importance to increase the salary of the civil servants. An assimilation with the salary received by academics was advocated by most.

The Mixed Superintendency (for monuments and galleries), on their part, considered the independence of museums as a priority. More than one, moreover, advocated reaching a 'modern decentralised model'. The same streamlining of bureaucratic procedures was urged also by the Superintendenct responsible for monuments.

4.1 The 1972 proposal of the Tuscany region.

The need for an intervention in the reorganisation of the administration of cultural heritage was felt not only at the central level. In 1972 the Tuscany Committee in charge of cultural heritage drew up a document for Parliament with proposals for a better management of the sector[202].

The document opens with a general reflection on the meaning of the expression 'cultural heritage' and its function. On this point, the committee took sides for an 'active concept' of the administrative function of protection. Conducting an active protection means giving back to cultural property the role that is proper to it and that distinguishes it from other commodities.

This concept was expressed by the Tuscan committee in these terms:

"*Non può difendersi una testimonianza storica di civiltà, se non si riesce a farla vivere come elemento necessario nel divenire delle generazioni: un museo e un archivio in quanto mezzi di maturazione umana, e istituti che producono nuova cultura; un tempio, un castello, un palazzo comunale, in quanto servono a educare l'uomo ai suoi compiti, a renderlo più consapevole; una biblioteca in quanto scuola, centro di ricerca e di addestramento. Non magazzini, e quasi obitori, ma istituti di progresso culturale; non centri storici imbalsamati, ma punti di equilibrio fra doverosa conservazione di un patrimonio eccezionale e feconda funzione attiva (…)*".

The consequences of a forceful administrative structure and its results in terms of management of the national cultural heritage were highlighted in the document. In particular, its character of hyper-bureaucratic centralisation, in sharp contrast with the multi-centred character of Italy, was pointed as one of the main causes of decay.

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[202] The Committee, chaired by the Tuscan Assessor for Education and Culture, Silvano Filippelli, was composed of: R. Abbondanza; G. Barbieri; R.B. Bandinelli; E. Casamassima; S. D'Albergo; M. Ferrari; E. Garin; R. Gizdulich; I. Insolera; E. Lo Pane; E. Luporini; E. Mrri; G. Nudi; A. Predieri and G. Previtali. The draft document is stored in AGS, Beni Culturali, Iter legislativo.

"*Il non aver puntato sul momento dinamico della conservazione delle testimonianze storiche, il non aver stabilito con chiarezza e sfruttato con forza il nesso fra conservazione, godimento e uso, ha contribuito da un lato all'infecondità dei beni stessi e, quindi, non di rado, all'indifferenza nei loro confronti; dall'altro, a una degradazione indiscriminabile del patrimonio*".

Because of this situation, a democratic process of decentralisation and a comprehensive reorganisation of the administrative structure in charge for the protection of cultural heritage was urged.

As a proposal to rectify such a situation, the document under consideration suggested increasing the responsibilities entrusted to the Regions. The latter were considered as more appropriate to perform the duties of protection and valorisation of cultural heritage because more aware of the concrete problems and more prompt to intervene with respect to an overcentralised administration.

The proposal of the Tuscany region suggested new organisational models both for the central and the peripheral level. Regarding the latter, the administrative structure comprehended a Regional Council for Cultural Property and Landscape[203] provided with two executive bodies: a Scientific-Technical-Administrative Council and an Executive Committee. These executive bodies would have had under their direction the Superintendency in charge of the protection of artistic, archaeological and historic objects.

The structure described is strongly driven by a decentralised model, with the operational administrative functions entrusted to the Superintendency and the national level responsible mainly for the general directorates. The control on the export of items having a cultural interest was carried out by the Superintendency, endowed with a great degree of independence from the central administration.

[203] Ibidem, art. 8 and 9.

4.2 1974 and 1975: years of parliamentary debates.

In this reorganizational phase Italian politicians looked also at the functioning of foreign institutional models.

France, in particular, was taken as point of reference. In 1973 a briefing note regarding the structure of the French Ministry of Cultural Affairs was delivered with the purpose of making a comparison with an already existing institutional body in charge of the management of cultural heritage[204].

After conducting surveys and research to better understand the organization model to adopt, the debate moved to Parliament[205].

On April 12th 1972 the deputy Badini Confalonieri presented a legislative proposal for the institution of the Ministry of Cultural Property and Activities in which he highlighted how, after all the preliminary studies conducted, it was no longer possible to postpone the establishment of the new Ministry[206].

Badini Confalonieri repeated the idea of establishing a limited administrative bureau of the type proposed by the Franceschini Committee. But rather than an 'independent authority' he preferred an 'independent agency' based on the Anglo-Saxon example.

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[204] Francia, Ministero degli Affari Culturali. Nota informativa 1973, AGS, Beni Culturali, Iter legislativo.

[205] The legislative proposals, reports of parliamentary debates and the conclusive piece of legislations are collected in the volume edited by the Ministero per I beni culturali e ambientali, *I beni culturali. Dall'istituzione del ministero ai decreti delegati*, with an introduction by Giovanni Spadolini, Roma 1976, Ufficio centrale per i beni ambientali architettonici archeologici artistici e storici nel centenario della Direzione Generale delle antichità e belle arti.

[206] Proposta di legge d'iniziativa del Deputato Badini Confalonieri '*Istituzione del Ministero dei beni e delle attività culturali*', http://www.camera.it/_dati/leg06/lavori/stampati/pdf/29090001.pdf .

Such a structure could guarantee a high degree of autonomy and operational dynamism in the management of cultural heritage while remaining subjected to serious controls.

The need for a greater level of autonomy for the peripheral offices of the administration of cultural heritage was explained by making reference to the actual functioning of the export offices. Deputy Badini Confalonieri illustrated how 'the traditional red tape needed to obtain a certificate of free circulation, which often leads to illicit exportation, will stop thanks to a more appropriate apparatus, a better qualified staff and more simplified procedures provided for the independent agency[207]'.

One month later, Senator Valitutti submitted another draft law which reflects, in its essentials, the content of Badoni Confalonieri's proposal[208]. According to this second draft, the Ministry for Cultural Property and Activities would incorporate the functions previously carried out by the Ministry of Tourism and Entertainment. The ministry would be composed of two General directorates, one for antiquities and objects of cultural interest and another for libraries and academies.

Political-administrative guidance would come from the Ministry and then implemented by the General Directorate of Cultural Property. The management of activities connected to the knowledge, valorisation and protection would be under the responsibility of an independent agency. According to the draft law, the latter, governed by an Administrative

[207] The Agency as designed would have been structured as follow: central institutes –carrying out services of general interest-; general superintendence – responsible on the national level of technical/administrative tasks; local superintendence –with the same duties of the latter but on a peripheral level and regional committees – coordinating the activities of the different local superintendence and the other cultural institutions. National libraries, museums and archives were designed as autonomous bodies that received only general guidelines by the general superintendence.

[208] Valitutti legislative proposal '*Istituzione del Ministero dei beni e delle attività culturali*', https://www.senato.it/service/PDF/PDFServer/DF/308475.pdf .

Board, was structured in: Central Institutions; General and Local Superintendence and Regional Committees.

Export Offices come under the Local Superintendence, entrusted with the task of scientific knowledge; surveillance, use and conservation of the cultural objects falling within their jurisdiction and dissemination of information concerning those goods (art. 15).

More specifically with regard to export control, art. 21 point 2 of Valitutti's legislative proposal specified that the Superintendent, at the request of the private owner, could issue a declaration establishing that the item under consideration did not have the requirements for being considered a cultural property[209].

This way the property in question could be sold within the national territory and also be permanently exported.

In general terms, the personnel involved in the independent Agency had to have a high technical and scientific qaulifications. Art. 9 mentioned also the possibility to hire foreigners and external experts among the administrative and technical staff.

The urgency to adopt some legislative measures for the protection of the national cultural heritage was shared by the Government, led by Aldo Moro, which on December 14, 1974 enacted a Decree-Law (DL) for the institution of the Ministry for Cultural Property and Landscape[210].

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[209] The French 'export certificate' (the so-called passport), that will be analysed in the following paragraphs, performs –more or less- the same function here described. It contains a negative declaration (attesting that the good doesn't have the characteristics of a national treasure) rather than a positive one (that it can be exported).

[210] Law decree December 14, 1974, n. 657 '*Istituzione del Ministero per i beni culturali e per l'ambiente*'. Published in the Official Journal of December 19, 1974, n. 332.

On December 19, 1974 the President of the Council of Ministers, Aldo Moro, in agreement with the ministers Rumor, Gui, Colombo, Malfatti, Bucassoli, Marcora, Donat-Accatin and Sarti enacted the draft legislation n. 1848

According to art. 77 of the Italian Constitution, the Government can enact a DL only in situations of extraordinary necessity and emergency. Once enacted, the DL has to be discussed in both the Chamber of Deputies and the Senate before being finally adopted by the Parliament within 60 days in order to be converted into law. If this does not happen, the provisional effects of the Decree expire.

The six articles forming the DL describe the main duties of the new Ministry, specifying that it is going to embed the functions previously carried out by the Ministry of Education with regards to antiquities and objects of cultural interest and by the Prime Minister's Office as concerns the State Records Library (art. 2.2).

The definition of the outline concerning the general structure, the internal divisions in offices and the allocation of the staff was postponed to the final adoption of the law.

The debates concerning the DL started in the Senate on January 15, 1975 before moving to the Chamber of Deputy in the following days. All political parties were asked to comment, make suggestions or proposals regarding the institution of the Ministry for Cultural Property[211].

In general, the main critiques made against the DL concerned the choice of the legislative instrument rather than the opportunity to establish a new administrative structure in charge of the protection and management of cultural heritage[212]. Going into details, other doubts

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'*Conversione in legge del decreto-legge 14 dicembre 1974, n. 657, concernente l'istituzione del Ministero per I beni culturali e per l'ambiente*'.

[211] For the the parliamentary debates during the sixty days before the final conversion of the DL see Resoconto sommario mercoledì 15 gennaio 1975, 373 seduta pubblica Senato della Repubblica; Resoconto sommario giovedì 16 gennaio 1975, 374 and 365 seduta pubblica Senato della Repubblica; Resoconto sommario mercoledì 22 gennaio 1975, 327 seduta pubblica Camera dei Deputati.

[212] There was criticism of the lack of the prerequisites required by the Constitution for the enactment of a DL, especially because the state of emergency in the area of national cultural heritage had been well-known for a while.

regarded the possible efficiency of the nascent Ministry since there was concern that it was going to be only a transfer of duties from some bureaucratic structures to another.

To prevent this, many members of the Parliament demanded to provide the new Ministry with sufficient financial resources and an appropriate staff, both numerically and qualitatively.

Regarding the structure of the Ministry to be established, Giovanni Spadolini –appointed Minister of Cultural Property and Landscape-, during the session of the Senate of January 16, confirmed his intention to create an administration with as little bureaucracy as possible.

Notwithstanding this, he reaffirmed the impossibility of completely eliminating an administrative structure. Here a part of his speech:

"*Sono del pari convinto che è impossibile rinunciare del tutto alla amministrazione. Voi per primi, rappresentanti del potere politico che trae la sua origine dal paese e dal popolo, sapete che l'idea di amministrare un ministero senza la burocrazia urterebbe contro le difficoltà insormontabili e non avrebbe, in uno Stato che ancora ha i regolamenti che conosciamo, la possibilità neanche di compiere uno dei passi avanti che è mia intenzione di compiere*[213]".

Senator Plebe, among others, during the discussion of January 15 said: "*Ci si trova oggi di fronte alla creazione di un nuovo ministero con la procedura abnorme del decreto-legge. Osserviamo quindi che il Governo si accorge dell'urgenza di un provvedimaneto quando questa urgenza esiste già da anni, ci si domanda se era necessario agire con tale frettolosità per risolvere un problema vivo da tanto tempo*".

Similarly, Senator Valitutti (during the debates of January 16): "*Non si poteva scegliere procedimento più ingiusto per creare tale istituzione. Le condizioni di fatto che hanno indotto ad utilizzare lo strumento del decreto-legge non possono palesemente ricondursi a quei casi di straordinaria necessità e urgenza che l'articolo 77 della Costituzione richiede come presupposto per l'emanazione di questo tipo di provvedimento. (…) Il ricorso al decreto legge rappresenta un atto di forza che scaturisce in realtà da uno stato di debolezza, consistente nella mancanza della volontà politica che sarebbe occorsa per realizzare l'obiettivo dell'istituzione del Ministero con strumenti più legittimi*".

[213] In addition to the Summaries of the parliamentary debates available in the Senate (https://www.senato.it/3065?voce_sommario=35), a full collection of

The bureaucratic structure of a Ministry was, according to Spadolini, the only institutional model that could reach the envisaged objectives. The independent authorities or agencies that Italy had previously depended on head turned out to be, he said, in complete failures[214].

5. 'A Ministry of wise men'[215]: Giovanni Spadolini and the structure of the Ministry for Cultural Property and Landscape.

On January 19, 1975 the Italian parliament enacted the law n. 5 that bound the Government to adopt, by December 31, 1975, the delegated rules for the institution of the Ministry for Cultural Heritage and Landscape, its attributes and structure. In particular, art. 2.2 specified

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Spadolini's speeches concerning the institution of the Ministry and cultural heritage policies more in general, is gathered in G. SPADOLINI, *Beni culturali. Diario interventi leggi*, Vallecchi, Firenze, 1976.

For an analysis of Spadolini's role in the constitution of the Ministry for Cultural Heritage and Landscape see C. CECCUTI, *Giovanni Spadolini e la nascita del Ministero per i Beni Culturali*, in C. CECCUTI (edited by), *Cento anni di tutela. Atti del convegno di studi, Firenze 19 settembre 2005*, Polistampa, Firenze, 2007.

[214] During the debates in the Chamber of Deputies on January 22, Rep. Badini Confalonieri reaffirmed his disappointment with the choice of establishing a Ministry instead of an Independent Agency. This, according to him, would have managed the cultural heritage sector in a more functional way. Here is an excerpt of his speech: "*Il settore resta sostanzialmente immutato, con il suo elefantiaco apparato burocratico, con le sue lungaggini, senza la benché minima modifica alla vigente disciplina*".

[215] During Spadolini's reply at Chamber of deputies on January 23, 1975, he said: "(…) *Temono che questo possa diventare un ministero burocratico più che di competenti. Ebbene, deve diventare un ministero di competenti partendo da quella che mi sembra essere la premessa indispensabile, cioè dal punto di partenza di una amministrazione autonoma*".

that before the end of the year the parliament had to outline also the internal structure and organisation of the ministry[216].

A Committee, chaired by the professor of administrative law Massimo Severo Giannini, was instituted for this specific purpose[217].

The following analysis of the research conducted by the 'Giannini Committee' will underline, in particular, the organisation of the bodies in which the export offices would be embedded.

If, on one side, the committee recommended to maintain the same structure of the Superintendency[218], on the other side their internal organisation had to change in major ways. This change was especially aimed at emphasizing the scientific and technical aspect of the activities carried out[219].

The draft structure of each Superintendence provided for a Superintendent with a task of guidance and coordination and the responsibility of enacting administrative acts; a technical-administrative office and one or more scientific laboratories. A suggestions was also put forward to establish a 'Superintendence Council', formed by the Superintendent and representatives of the offices covering different functions. This Council, characterised by a multidisciplinary orientation,

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[216] "*Con le stesse norme sarà provveduto a disciplinare la struttura degli uffici per il definitivo assetto funzionale del Ministero ed a riorganizzarne gli organi consultivi relativi alle materie trasferite*".

[217] The Committee '*Per l'elaborazione delle norme delegate relative alla istituzione dei ruoli, alla struttura degli uffici ed alla riorganizzazione degli organi consultivi del ministero per i bei culturali e ambientali*' was formed by members of the Ministry, academicians, representatives of the Regions, of the unions and of other ministries.

[218] The suggestion was to mantain, in each Region, at least one Superintendency for cultural and historic goods; one for landscape and another for antiquities. With regard to the archival and librarian Superintendence, it would be possible to merge offices into an interregional body.

[219] The minutes of the meetings (held on March the 21st; April the 7th and the 29th; May the 15th and 28th; June the 19th) of the Giannini Committee are stored in AGS, Beni Culturali, Iter legislative.

would be useful in providing a proper scientific and technical analysis needed, in most of the cases, before the adoption of administrative acts.

Concerning export control, such a Council would be particularly important since its multidisciplinary composition could analyse in a proper manner the export authorisation requests submitted.

On November 30, 1975 the Council of Ministers, one month before the deadline, approved the delegated rules outlined by the Giannini Committee, establishing the organisation of the nascent Ministry for Cultural Property and Landscape in less than one year[220].

This is the '*Decreto del Presidente della Repubblica 13 dicembre 1975, n. 805. Organizzazione del Ministero per i beni culturali e ambientali*[221]'.

[220] See *I decreti delegati in porto*, in G. SPADOLINI, *Beni culturali. Diario interventi leggi*, op. cit., 172-176.

[221] Published in the Official Journal of the 27th January 1976, n. 23.

Some years later, Sabino Cassese underlined how the Ministry for Cultural heritage and Landscape is one of the few examples, in Italy, in which Parliament is responsible for internal administrative organisation. Other than that, the other ministries that at the beginning of the '80s were organically regulated as far as their organisation and personnel were the ministry of Employment (1961); the ministry of Foreign Affairs (1967); the department for the State holdings (1971) and that one for the Budget (1972). All the others were organised on the base of multiple regulations.

See S. CASSESE, *Prospettive per il riordinamento delle funzioni amministrative dello Stato*, in *Per il riordinamento della Pubblica Amministrazione. Atti della Conferenza Nazionale sulla Pubblica Amministrazione. Roma 29 e 30 giugno- 1 luglio 1982*, Formez, Roma, 1983, 57-72. In particular: "*Il Parlamento ha sostanzialmente rinunciato ad esercitare la funzione organizzatrice della Pubblica Amministrazione. V'è, dunque, la prescrizione costituzionale, secondo la quale l'amministrazione è ordinata dalla legge (art. 97). Ma questa rappresenta solo il folklore. Se si guarda alla realtà, si nota che norme senza rapporto apparente, provenienti da periodi e da fonti eteroclite, scivolano le une sulle altre e all'improvviso si immobilizzano in un'architettura organizzativa di cui non si riesce a discernere il disegno*".

Art. 30 l. 305/75 specified that the four typologies of Superintendence[222] and the State Archive constituted the field offices of the Ministry in charge of the protection and valorisation of cultural heritage.

In this scenario, the Superintendence was the office responsible for controlling the export of cultural property.

This means that, on one hand the presence of export offices was guaranteed over the whole national territory, in a perspective of decentralisation. On the other, since the export offices were under Ministerial control, they were embedded in the state bureaucratic system.

This final outline of the administrative structure resulted from a compromise among all the necessities and requests gathered over the years that preceded the constitution of the Ministry for Cultural Property and Landscape.

The analysis of the research conducted and the legislative proposals put forward seemed to be necessary in order to better understand where the final administrative structure of the Ministry (especially at a peripheral level) comes from. This kind of organisation, in its essential structure, is almost the same today.

The debates that took place in Italy in the decades which preceded 1975 allowed for the consideration of different options, each responding to different necessities and coming from diverse political and cultural perspectives.

[222] They are: Superintendence for antiquities; for goods of cultural and historic interest; for landscape and architecture and the archival Superintendence.

6. The current peripheral organisation of the Italian Ministry for Cultural Heritage and Activities.

As mentioned, the peripheral organisation of the Ministry for Cultural Heritage and Activities did not change its basic structure or the export offices embedded in it.

Currently (October 2019), the administrative structure of the Ministry is outlined by the Ministry for Cultural Heritage and Landscape's decree (DM) n. 44 enacted on January 23, 2016[223], pursuant to Art. 1 point 237 of the law of December 28, 2015, n 208.

Art. 2, in order to improve the performance of the Administration in charge of the protection and of the enhancement of cultural heritage, decreed the merging of the previous Archaeological Superintendence and Superintendence for Fine Arts and Landscape into a single agency[224], with offices spread across the national territory.

The peripheral organisation of the Ministry is outlined in Chapter III of the DM, in which it is specified that the Superintendence for archaeology, fine arts and landscape are entrusted, locally, with the administrative function of the protection of cultural heritage[225].

[223] MiBACT decree January 23, 2016, '*Riorganizzazione del Ministero dei beni e delle attività culturali e del turismo ai sensi dell'articolo 1, comma 327, della legge 28 dicembre 2015, n. 208*', published in the Official Journal of the Italian Republic of the March 11, 2016, n. 59. It entered into force on March 26, 2016.

[224] The original version of article 2 DM 44/2016 is: "*Al fine di migliorare il buon andamento dell'amministrazione di tutela del patrimonio culturale, sono istituite le Soprintendenze Archeologia, belle arti e paesaggio, quale risultato della operazione di fusione e accorpamento, su tutto il territorio nazionale, delle Soprintendenze Archeologia e Belle arti e paesaggio*".

[225] Currently in Italy there are 39 Superintendencies for archaeology, fine arts and landscape, plus an additional one especially for Rome.

Within all its responsibilities listed at art. 4.1, point v) indicates that the Superintendence for archaeology, fine arts and landscape must carry out the functions of an export office.

All other details concerning the internal organisation of the office or the qualification of the staff involved in the procedures of evaluating the export authorisation request are specified.

Art 4.3 lays down general benchmarks of transparency to be followed by the Superintendence in carrying out their tasks. According to the law, the latter should make public, by uploading them in their website or in the website of the Ministry, all the proceedings having an external relevance and all the measures adopted in performing the tasks entrusted to them.

More specifically, for each measure adopted it should be publically communicated what stage has been reached, including its starting date, the deadline for the conclusion and its outcome. All these requirements should be available, besides complying with a requirement of transparency, so that the General Directorates could produce statistics on the performances of the Superintendence.

With regard to the staff involved, it is up to each Superintendence to specify the membership of the export office. There are no general rules to be observed at a national level concerning the professional figures to involve in the scrutiny of the export authorisation requests received[226].

[226] Point 25 of the premises of DM 44/2016 states that each Superintendence for archaeology, fine arts and landscape should guarantee the presence of all professional figures required for carrying out the ensemble of activities needed for the protection of cultural property. In particular, the following areas of interest should be covered by specific professionals: archaeology; historic and artistic patrimony; architecture; landscape and ethno-anthropological patrimony.

The organisational chart of the Italian Ministry for Cultural Heritage and Activities[227] set the abovementioned Superintendence under the General Directorate for Archaeology, Fine Arts and Landscape which is structured in different sections[228]. One of these sections, the IV, deals with the matter of 'circulation'. Its main duty is to coordinate and monitor issues related to the international circulation of cultural property.

One important point of the reorganisation of 2016 is, as already mentioned, the merging of the Superintendence of Antiquities and Fine Arts into a single administrative body. This implies also the merging of the export offices previously embedded in the two different Superintendencies.

In this way the applicant for an export licence has, as interlocutor, a single office for export requests of all kind of objects with the exception of books and archives that are still under the responsibility of two separate Superintendencies[229].

7. The centralisation of the French administration of cultural heritage.

"Relation between the State and the arts world in France are marked- in appearance, at least- by a tradition of centralized hierarchical policy-

[227] The updated organisational chart of the Italian Ministry for Cultural Heritage and Landscape is reproduced in the MiBAC web-site at the following address: http://www.beniculturali.it/mibac/multimedia/MiBAC/images/Organigramma2019.jpg.

[228] The different sections of the DG ABAP are listed at https://www.beniculturali.it/mibac/export/MiBAC/sito-MiBAC/Luogo/Uffici/Struttura-organizzativa/visualizza_asset.html_17806464.html.

[229] They are the Archival Superintendence and the Bibliographic Superintendency, both under the General Directorate for Archives. Currently in Italy there are 12 bibliographic and 3 archival Superintendencies.

making, the origins of which can be traced back to the absolutist monarchs of the seventeenth and eighteenth centuries[230]".

French Administration is characterized by a high degree of centralization and this is due mostly to historic reasons that, along with the consequent organisational structure assumed by the State, have been highly analysed by scholars.

In such a context, the organisational structure for the protection and management of cultural heritage, as highlighted by Kim Eling in the previous quotation, is not an exception.

The analysis of the French administrative structure and organisation for the control on the export of cultural goods follows a very different model in comparison with the Italian one previously illustrated.

While the latter is based on a highly decentralised control, France relies on officers and structures operating at the central level of the Ministry of Culture.

The following paragraphs will trace the origin of the contradistinctive features of French administration of cultural heritage, focusing the investigation on the branch of the latter dealing with controls over the export of cultural objects.

As briefly mentioned, studies on the relation between State and fine arts, from an administrative point of view, have an early origin in France. Towards the end of the XIX century Paul Dupré and Gustave Ollendorff, in their seminal 'Treaty on the Administration of Fine Arts' raised some of the major questions which, even if from a specific point of view, this dissertation seeks to answer.

These are:

[230] See K. ELING, *The politics of cultural policy in France*, Macmillan Press, 1999, London, 17.

« Quelle place est faite aux beaux-arts dans nos institutions publiques ? Quelle part prend l'Etat dans leur conservation ? L'Etat doit-il protection aux beaux-arts[231] *? »*

France put in place a functional and in many sectors efficient administrative structure dealing with the State's responsibility for the protection, conservation and dissemination of culture among its citizens. This is to say that, without doubt, the French State engaged itself in the protection of culture in general, and fine-arts in particular.

However, the administrative function of protection can assume many different shapes and can be carried out with different aims.

In this respect, we notice how in France, in contrast to Italy, the conservation and protection of the national cultural heritage is achieved with less stress on the retention of objects of cultural interest.

Since this chapter focuses on administrative structures, it will be possible to observe how the implementation of the control on the export is hardly never mentioned within the tasks of the different administrative structures dealing with the protection of cultural heritage.

Given this condition, a preliminary question could be: how is it possible to trace the story of an administrative task (control of the export of cultural property) and its practical implementation given the lack of direct references?

Our effort here is to present the evolution of different ministerial structures that, even if on a theoretical level are meant to fulfil other tasks, on a practical level they put in place the same effects that in Italy are achieved by the regulations concerning the retention of cultural property.

[231] P. DUPRE, G. OLLENDORFF, *Traité de l'administration des beaux-arts*, op. cit., 4.

To analyse the very nature of the administrative centralization and its origins, it is necessary to make reference to historical and social factors that contributed to this outcome[232].

Until the French Revolution the administration of fine arts was under the control of the monarchy. During the reign of Louis XIV, Colbert was appointed as '*Surintendand des Batiments, Arts et Manufactures*', that is "what may be termed France's first Minister of Culture" according to Eling[233]. Apart from this 'honorary title', it is possible to affirm that before 1792 there wasn't any systematic organisation in place for the protection and the management of cultural heritage.

8. The Administration of Beaux-Arts under the *Ministére de l'Instruction publique, des Cultes et des Beaux-Arts* during the Third Republic.

Up to the beginning of the Third Republic (1870), we notice a great intervention in the cultural sector in terms of actions carried out[234]. At

[232] Dupré and Ollendorff took for granted the centralised structure of French Administration in the cultural sector. See *Traité de l'administration des beaux-arts*, op. cit., 10 : « *Il faut prendre notre histoire telle qu'elle est et juger des choses en France, de celles de l'art comme de celles de la politique, en tenant compte de cette marche constante vers la centralisation absolue ; il ne faut jamais oublier que ce centre unique où tout vient aboutir aujourd'hui, ne s'est pas substitué à une vie fédérative* ».

[233] K. ELING, *The politics of cultural policy in France*, op. cit., 2.

[234] The intense activity in the management of the cultural sector took place almost immediately after the outbreak of the Revolution. Among the activities of the 'Convention' we can cite the opening of museums and the suppression of academies (Décret of July 28th 1793); the establishment of Conservatories of Music (Décret of 18th Brumaire year II) and of Arts (Décret 19th Vendémiaire year II) etc… Notwithstanding all these actions in the cultural sector, it is not possible to detect any references of an administrative organisation aimed at controlling the export of cultural property.

the same time, the whole domain experienced many *bouleversements* as regards its administrative organisation[235].

As in Italy, also in France the administration of cultural heritage and cultural activities was preceded, before the constitution of an autonomous Ministry, by a prior embedding in the Ministry of Public Education[236].

This embedment was seen as perfectly functional for the particular tasks of the two sectors, education and culture.

In the context of a general inquiry conducted in 1875 regarding the administrative services in effect, Edouard Charton delivered to the Chamber a very significant report in which he underlined the importance of the administration of fine arts within the Ministry of Public Education.

Here below an extract:

« A quelle ministère l'administration des beaux-arts doit-elle être annexée ? Il n'y a en réalité que trois grandes classes de services :

1. *Les services qui doivent pourvoir à la sureté intérieure et extérieure (…)*
2. *Les services qui intéressent la vie physique ou matérielle du pays (…)*
3. *Enfin, les services qui ont pour objet les intérêts de l'éducation générale du pays, de la culture de ses forces intellectuelles et morales, et qui sont dans les attributions du ministre de l'instruction publique et des cultes.*

(…) C'est donc notre conviction qu'il ne peut être qu'avantageux à l'administration des beaux-arts de voir se consolider ses rapports avec le ministère de l'instruction publique (…). »

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[235] Edouard Charton said in his report on fine arts Administration in 1875 : « *(L'administration des Beaux-Arts) Tant de déplacement et d'accroissements ou d'amoindrissements successifs pendant près d'un siècle* ».

[236] At the beginning of the III Republic the administration of fine arts was constituted of five 'bureaux': 1) fine arts, museums, exhibitions, acquisitions and restorations; 2) historical monuments; 3) manufacture; 4) theatres and 5) accountability.

This situation seemed to be functional until 1881 when, probably as a result of the greater prestige and expansion of the Ministry of Public Education, the administration of fine arts came to be weakened with respect to other functions. The necessity of more independence led to the establishment of an autonomous *Ministère des arts*, created with a decree issued on November 14, 1881.

But the necessity of having an autonomous Ministry for the Management of Cultural Property and Activities apparently was not well supported or justified by the current necessities. This is why this experience lasts only for a few months. On February 2, 1882 the General Directorate of Fine Arts was re-established within the Ministry of public education.

The ministerial decree of March 29, 1882[237] regulated the internal organisation of the *Direction Générale des beaux-arts*, divided in two departments (Fine Arts and Civil Buildings) and, within them, in services.

The Fine Arts Department, for its part, dealt with:

- Artistic works (decorations of public buildings; commissions and purchases of artworks; restorations of artifacts stored outside museums etc…);
- Education (the management of the different national academies of fine arts, drawing etc…);
- Museums and exhibition (organisation of the national museums; purchases and subscriptions of artworks; restoration of museum art collections; publication of the inventory listing French cultural patrimony etc…). In general terms, in France the notion of museum implies an administrative service with double functions: maintenance of the artistic collection and its exhibition;

[237] Ministerial decree of March 29th 1882 '*Réglant l'organisation intérieure de la direction générale des beaux-arts*'.

- Historic monuments (direction of the committee dealing with the examination of historic monuments to be classified; monitoring of the restoration of historic monuments and purchases of the same);
- Theatres (management of the national theatres and opera houses; regulation of the professional aspects of musicians, actors etc…);
- National manufactures (management of the classification, purchase and exposition of manufacture).

We can notice that none of the services which make up the Fine Arts Department dealt directly with the control of the export. The 'artistic works' and 'museums' services are those responsible for the protection and management of objects of artistic interest. They have to take care of their conservation both in a material (through restoration when needed) and a legal (through the publication of the inventory list and the taking care of their legal depositories) perspective. Moreover, the museums service was responsible for the constitution, maintainance and expansion of public museum collections.

All these diverse administrative functions also pursue–the goal of preserving the national cultural heritage. By a comparative point of view we can point out that the same goal is carried out, in Italy, by export offices through the retention of cultural assets within national borders[238].

[238] The attempt here is to make a parallelism between the measures undertaken by the Italian and the French State in pursuing the same objective: the protection and the conservation of the national cultural heritage. While the former has 'always' pursued this aim by adopting a severe control on the export of cultural objects, the latter put in place other administrative functions for obtaining the same goal.

The self-evident consequence of this legislative attitude is the existence of two different administrative structures: in Italy we can detect the existence, since the XIX century, of export offices, mainly in charge evaluating the export authorisation requests. In France, instead, we do not find the same bureaucratic structures, but others responsible for differentiated tasks united by the aim of enhancing and increasing the national museum collections.

The administrative function of 'conservation' performed by the French Administration of Fine Arts seemed to assume, already in this early stage, an 'active' meaning. The French verb *conserver* in English is translated by: maintaining, keeping, retaining, preserving. All these connotations that could lead to a misinterpretation of the effectual role assumed by the tasks performed by the Fine Arts Department mentioned above.

8.1 The *Conseil Supérieur des Beaux-Arts*.

In addition to the administration of fine arts embedded within the Ministry of Public Education it's worth mentioning also another body that contributed to the management of cultural heritage during the Third Republic. This is the *Conseil Supérieur des Beaux-Arts*[239] (CSBA).

The function of this body, created in 1875[240], was to gather together all the different actors[241] dealing with the management of the national

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The above speculation seems to find a match in Dupré and Ollendorff's analysis regarding the role of the Administration of Fine Arts during French III Republic. Quoting from *Traité de l'Administration des Beaux-Arts*, 44:

« *Que demande, en effet, l'Etat à ses services de beaux-arts (…) ? C'est de garder et d'entretenir toutes les richesses matérielles de l'art que lui ont léguées les acquisitions successives des générations passées, les musées et les collections précieuses d'objets d'art, dessin, peintures, sculptures (…) de les classer, de les inventorier (…). D'enrichir graduellement ces foyers d'art, à l'exemple de ceux qui les ont créés et de disputer aux collections étrangères rivales ces grands modèles* ».

[239] For a general overview of the history and the role of the Conseil Supérieur des Beaux-Arts see also M-C. GENET-DELACROIX, *Le Conseil Supérieur des Beaux-Arts: Histoire et fonction (1875-1940)*, Le mouvement Social, 1993, issue 2, number 163, 45-66.

[240] The Conseil Supérieur des Beaux-Arts was established with a decree enacted on May 22, 1875, on an initiative of the Ministry of Public Education, published on the Official Journal of May 23, 1875.

[241] Among the members of the Conseil Supérieur des Beaux-Arts there were administrative officials, scholars specialised in art history; artist etc.

This was, quoting Marie-Claude Genet-Delacroix, '*a veritable résumé du système des Beaux-Arts*'. See M-C. GENET-DELACROIX, *Art et Etat sous la IIIe*

cultural heritage with the aim of suggesting new regulations and laws. The coexistence in a single institution of members with many different backgrounds was seen as ideal for providing an adequate consultancy to the administration.

The composition of the *Conseil* has changed a lot over the years, both in qualitative and quantitative terms. In general, three main categories of members can be traced[242]:

1) Members designated personally thanks to the duties they perform: The Minister of Public Education; the director of the *Direction Général des beaux-arts*, and other officials at the head of the services of the Administration of fine arts.
2) Ex-officio members who represented other institutions: particularly personnel drawn from the different artistic Academies.
3) Members elected because of their skills and expertise: artists and scholars.

As can be seen from this list, an effort was made to represent all the different 'souls' (politicians, technicians and experts) that could have a say in proposals regarding cultural issues.

According to Article 4 of the founding decree enacted on May 22, 1875, the CSBA had advisory functions on different topics.

With particular reference to the administrative function of export control, intended in a larger sense according to the meaning of the verb 'conserver', article 4 stated that:

« *Le Conseil peut être appelé à donner son avis sur les commandes et l'acquisition d'œuvres d'art* ».

République. Le système des Beaux-Arts 1870-1940, Publication de la Sorbonne, Paris, 1992, 7.

[242] Article 1 of the decree enacted on May 22, 1875 contained the list of the Conseil Supérieur des Beaux-Arts' members.

This specific advisory function was further specified three years later by a decree enacted on September 9, 1878 that, in article 3, incorporated also national museums within the CSBA's competences. The same article established also a sub-committee specialised in giving advice on the purchase of artworks[243].

Because of the existence of this additional, pluralistic and multidisciplinary body that had a say- together with the Ministry- in the protection of cultural heritage, is itpossible to affirm that during the III Republic there was an attempt to 'expand' and conduct a process of democratisation in pursuing the conservation of the national cultural heritage? The model followed was still a centralised one, but it should imply the involvement in the decision-making phase of a larger number of actors, going beyond solely the bureaucratic staff of the Ministry.

This assumption could be contradicted by the fact that, apparently, the vast majority of the members of the *Conseil* was also appointed to be part of other ministerial committees.

An example of this is the special committee instituted before the service of Museums and Exhibition under the *Direction Général des beaux-arts*, entrusted with listing the inventory of French cultural heritage[244]. As reported by Genet-Delacroix, the majority of the 27 members of this committee belonged also to the CSBA[245].

The same situation occurred also with another Committee, established to oversee the subscription of artworks (*Commission des souscriptions aux ouvrages d'art*). It was formed by 18 people, all members

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[243] Article 3 of the decree enacted on September 9, 1878 reported: « *Le Conseil peut être appelé à donner son avis sur les questions qui lui seront soumises par le ministre, et notamment : (…) sur les musées nationaux (…). Une sous-commission nommée par le ministre pourra être consultée sur les commandes et les acquisitions d'œuvres d'art* ».

[244] This is the *Commission de l'Inventaire des Richesses d'Art de la France*, established by a decree enacted on May 5, 1874.

[245] M-C. GENET-DELACROIX, *Art et Etat sous la IIIe République. Le système des Beaux-Arts 1870-1940*, op. cit., 123.

of the *Conseil Supérieur des Beaux-Arts*. The task of this Committee, established in 1881, was to offer advice on the proposals of subscriptions for artworks formulated by the service of Museums and Exhibitions.

These two examples are significant for a twofold reason: first of all, what is the point in establishing another institution- independent from the ministerial structure but, at the same time, formed by the same people involved in the ministerial general directorate? With such a configuration, the scope of obtaining independent advices or external feedback to take into account regarding new legislation and regulations waned.

This is the reason why, probably, while in theory it could be possible to detect a process of 'democratisation' with the institution of the CSBA, in practice this possibility fell short.

Besides this, the doctrine highlighted the importance of the multidisciplinary composition of the CSBA. In this respect Genet-Delacroix affirmed:

« *Le CSBA est à la fois le laboratoire et le Parlement souverain où s'élaborent, se formalisent et se légitiment ces nouvelles conceptions de rationalisation administrative appliquée aux arts. D'où l'intérêt d'une telle institution, lieu privilégié pour observer des interfaces entre les problèmes culturels, artistiques, politiques, administratifs et sociaux, trop souvent dissociés*[246] ».

The second, and more important, element to underline is the role assumed by the Committee examining the subscription of artworks in connection to the service of Museums and Exhibitions.

This collaboration was particularly interesting since this mechanism reproduced *-ante litteram-* the mechanism by which the different *Direction Générales* of the Ministry of Culture cooperate among themselves when exercising the control over the export of cultural property.

[246] Ibidem, 140.

Finally, following an initial period of intense activity in which the CSBA was meeting regularly, starting from 1892 there was been a decline in their periodical meetings. This factor, in addition to a consistent growth of sub-commissions within the administrative structure, led to the dismantling of the council, which became official in 1940 under a new law (*Loi du 12 juillet 1940 Relative a la composition des cabinets ministeriels*) issued by Pétain.

9. The establishment of the *Ministére chargé des Affaires culturelles*.

We have seen how the administration of Fine Arts was managed, until the mid-XX century, under the Ministry of Public Education (renamed 'Ministry of National Education' in 1932).

After the end of the III Republic, in the context of a reorganisation of the Ministry of National Education we witness the creation of an important administrative body within the ministry.

This was the *Direction Générale des arts et des lettres* (DGAL)[247]. The DGAL was entrusted with all the different tasks concerning humanities, visual arts, theatre, libraries and archives[248]. Internally, it was structured in five directorates (visual arts; museums; music; libraries and archives) and subdivided into services. Throughout the duration of its existence, until 1969, this administration has undergone many different structural changes.

[247] The Direction générale des arts et des lettres was established with the ordinance of November 20, 1944, titled '*Reorganisation de l'administration centrale du ministere de l'education nationale*' published on the Journal Officiel of November 23rd 1944, n. 1444.

[248] See decree n° 45-1889 of August 18, 1945 that defined both the mission and the organisational structure of the DGAL.

The need to establish an autonomous ministry for the management of the national cultural heritage started to be taken into consideration in France under the Fifth Republic[249].

Just as happened in Italy, its creation was a challenge undertaken, mostly, by an individual politician to whom the history of the Ministry for Cultural Affairs will remain forever associated. While in Italy the origins of the autonomous Ministry for Cultural Heritage is associated to the figure of Giovanni Spadolini, in France it was Andre Malraux[250].

On February 3, 1959 Malraux, who was already minister, was entrusted with the direction of the administrative functions connected to the management of the national cultural heritage and activities previously carried out by the Ministry of Public Education (*Direction générale des Arts et des Lettres*; *Direction de l'Architecture*; *Direction des Archives de France*) and the services dealing with cultural activities embedded in the High Commission for Sport and Youth[251].

The same decree, besides establishing this transfer of competencies, in its Article 1 paragraph 3 established a Committee entrusted to «*étudier les mesures relatives à l'organisation de l'ensemble des services mentionnés ci-*

[249] For an overview of the administrative changes in the Ministry of Culture since its establishment see M. DARDY-CRETIN, *Histoire administrative du ministère de la culture et de la communication (1959-2012)*, Collection du Comité d'histoire du ministère de la culture et de la communication, Paris, 2012.

[250] Malraux had been charged with managing cultural affairs already before his appointment as Minister of Culture. According to the decree n° 58-630 of July 25, 1958, published in the Journal Officiel of July 26, 1958:

« *André Malraux, ministre délégué à la présidence du Conseil, connaît de toutes les affaires qui lui sont confiées par la président du Conseil (...) Il peut être chargé, par délégation personnelle et directe du président du Conseil, de la réalisation de divers projets, et notamment de ceux ayant trait à l'expansion et au rayonnement de la culture française* ».

The phase in which Malraux was appointed Minister without portfolio recalls the initial role covered by Giovanni Spadolini prior to the establishment of the Italian Ministry for Cultural Heritage.

[251] See decree n° 59-212 of February 3, 1959.

dessus»[252]. There was a limited time to draw up this administrative structure; the deadline for submitting the results was fixed on March 25, 1959.

We can see here a parallelism with the studies regarding the internal structure of the ministry conducted in Italy by the Committee chaired by Massimo Severo Giannini.

In this transitional phase, and until the Ministry of Cultural Affairs was fully established, the administrative and financial tasks of the general directorates and the departments dealing with culture continue to be managed by the Ministry of Education.

It is possible to trace some similarities and differences between France and Italy in such a similar administrative transition. First of all, both of them perceived the building of an autonomous ministry dealing with culture as something challenging and uncertain ('*Le développement de ce ministère a tenu de l'imprévisible et, en quelque sorte, du mystère*[253]').

On the other hand, differences are traceable in the steps taken to define the administrative model to adopt for the nascent institution. In Italy, the choice for the creation of a new ministry was preceded by proposals supporting for different institutional options, such as the constitution of an independent agency. By contrast, in France the same evaluation phase doesn't seem to have taken place. The creation of a new ministerial structure was never questioned.

« (Malraux) *Dans ses discours, ses interventions, ses instructions, il donnait la vision, mails il n'explicitait jamais les chainons du passage au réel, de la mise en forme*

[252] Formally this Committee was established with decree n° 59-414 of March 12, 1959. The presidency of the Committee was entrusted to Pierre Chatenet, Secretary of State delegate of the prime minister. In addition to the latter, the Committee was formed by 10 other members, coming from the Ministries of Finance; National Education and the Court of Auditors.

[253] A. GIRARD, *Prèsentation des journées*, in *Les Affaires culturelles au temps d'André Malraux 1959-1969*, Paris, La Documentation française, 1996, 5.

administrative. (…) Il appartenait à ses collaborateurs d'inventer en toute liberté les formes de l'exécution[254] ».

But what were the necessities underpinning the constitution of the Ministry for Cultural Affairs? This was seen as the first and necessary step for the establishment of better relations between the nation, its population, and its national cultural heritage.

This objective, by the way, can be can be detected in the mission entrusted to the ministry by its founding decree[255]:

« *Le ministère chargé des Affaires culturelles a pour mission de rendre accessibles les œuvres capitales de l'humanité, et d'abord de la France, au plus grand nombre possible de Français ; d'assurer la plus vaste audience à notre patrimoine culturel, et de favoriser la création des œuvres d'art et de l'esprit qui l'enrichissent* ».

For what concerns the internal organisational structure, at the time the ministry was formed by: a cabinet of the Minister[256]; a general secretary; two departments (press office and for the general administration); and three general directorates (*Arts et Lettres*; *Architecture*; *Archives*); and the national centre for the cinematography.

The DGAL previously embedded in the Ministry of Public Education was therefore moved into the new autonomous ministry as a general directorate, internally organised in 4 sub-sections. These were : *direction des musées de France ; sous-direction des spectacles et de la musique ; services des lettres ; service de l'enseignement et de la production artistique*.

In general terms, it is possible to notice how the structure of the administration of culture maintained its centralised basic feature, in line with its organisation under the Ministry of National Education.

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[254] Ibidem.

[255] This is the decree n° 59-889 of July 24, 1959, titled '*Décret sur la mission et l'organisation du ministère chargé des Affaires culturelles*'.

[256] The main function of the cabinet was to implement political projects into administrative actions; it is a body in-between political and administrative structures.

One of the major changes that occurred was budgetary autonomy, necessary to gain broader independence to pursue cultural initiatives[257].

To frame the organisation of the Ministry for Cultural Affairs within the context of the administrative structure of the State in France, we will briefly mention the peculiar differences between central and peripheral administration.

According to the regulations concerning the territorial administration of the French Republic, the State is composed by central administrations entrusted with operations of national responsibility[258].

More specifically, central administrations carry out duties having national character or whose realisation cannot be delegated to a local level. According to article 2-1 of the decree n° 92-604 of the 1st July 1992, central administrations have a duty of '*conception, d'animation, d'orientation, d'evaluation et de controle*'.

The sub-organisation of these central administrations is structured in: general directorates (*directions générales*), directorates (*directions*) and departments (*services*)[259]. The general directorates, for their part, can be divided, upon a decision made jointly by the prime minister and the

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[257] Speaking in front of the National Assembly on November 17, 1959, Malraux said:

« Il n'y avait pas jusqu'ici d'affaires culturelles, avant tout parce qu'il n'y avait pas de budget particulier aux affaires culturelles. Le fait qu'inévitablement les crédits réservés aux opérations culturelles vinssent à la fin de l'énorme et parfois dramatique budget de ce que l'on appelait jadis l'instruction publique, impliquait que, chaque fois qu'il était nécessaire d'obtenir un crédit supplémentaire, celui-ci était refusé, non pour de mauvaises raisons, mais parce qu'il était plus nécessaire ailleurs. L'autonomie du budget permet l'autonomie de l'action. Cette action se développe par des phases successives, avec des hommes qu'il s'agit de mettre en place ».

See Journal Officiel, Débats Assemblée nationale, n° 79, November 18, 1959, n. 2498-2500.

[258] This is article 1 of the decree of July 1, 1992, n. 92-604, stating : « *Les administrations civiles de l'Etat se composent, d'une part, d'administrations centrales et de services à compétence nationale, d'autre part, de services déconcentrés* ».

[259] See decree June 15, 1987 n. 87-389.

responsible minister, into *sous-directions*. If this occurs, the internal organisation of the latter, in terms of personnel and procedures to be adopted, can be established by the responsible minister.

The peripheral departments, on the other hand, perform functions of administration and management.

From an historical point of view, the administration of fine arts in France started implementing peripheral departments quite late, and their functions are mostly circumscribed to the realisation of cultural activities.

The administrative function of controlling the export of cultural assets has always been, and still is, in charge of the central administration.

10. Control on the export of cultural property within the Ministry of Cultural Affairs.

Having illustrated the general distinctive features of the Ministry, the analysis can proceed with a more in-depth focus on the administrative departments that implement the control on the export of cultural property.

As mentioned, at the time of the establishment of the Ministry of Cultural Affairs, the *Direction générale des arts et des lettres* was one of its main administrative entities. In 1959 it was internally subdivided into one *sous direction des spectacle et de la musique*, three offices in charge of visual arts, and a *direction des musées de France* (DMF).

It is this directorate that we are now going to analyse more in-depth, since it still pursues (as it did under the III Republic) the duties of controlling the export of cultural property.

10.1 Controls on the export under the *Direction Générale des Musées de France*.

In 1959 the DMF was structured in different internal offices, each covering a specific aspect concerning the administration of museums and their collections. In particular, the *Bureau des mouvements des collections* –BMC- was charged with the management of loans and exchanges of artworks between museums; restoration projects in national museums; and control over the export of artworks and objects of collections[260]. These tasks, in the context of an internal reorganisation of the DMF, were then embedded in the DMF/1, office in charge of the organisation, regulation, purchase, and protection of artistic objects for the national museums.

This kind of organisational chart, in which the *Direction musées de France* was embedded in the DGAL- and thus oversaw export control, remained unchanged until 1969. In this year the DGAL was terminated.

The reasons which led to this change can be traced to the economic situation of the DGAL which rendered it incapable of fulfilling the diverse and relevant tasks under its responsibility[261]. At the end, the only way to face this situation was the suppression of the DGAL and its substitution with different general directorates with duties that were more limited and specific.

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[260] See B. BEAULIEU and M. DARDY, *Histoire administrative du ministére de la culture 1959-2002*, La Documentation française, Paris, 2002, 100.

[261] In the context of a survey regarding the administrative conditions of the DGAL in 1960, Emile-Joseph Biasini said « *La mission qui incombe à la Direction générale est vaste et complexe (…) Il est donc de première nécessité de lui donner les moyens d'assurer pleinement ses responsabilités nouvelles. Elle doit être réorganisée sans délai sous peine de compromettre la politique culturelle voulue par le gouvernement* ». Reported by BEAULIEU and M. DARDY, *Histoire administrative du ministére de la culture 1959-2002*, op. cit. , 179.

Starting in 1969 the *Direction des musées de France* acquired the status of an autonomous general directorate under the sole control of the Ministry of Cultural Affairs[262].

The role of the DMF consisted in both making legislative proposals and putting into practice the public policy regarding the patrimony of the museum collections. In doing so, the DMF put into contact and coordinated all the different public authorities operating in the sector[263].

It could be said that, following its historic roots, this General Directorate was responsible for the implementation of the regulation concerning all the aspects of museum collections. The kind of protection that falls under the operating zone of the DMF is to be intended in a global sense. It encompasses, in fact, both a physical responsibility (restoration, custody etc…) and a legal one (implementation of the pre-emptive rights of the State; organisation and management of loans, and control on exports).

More specifically, control over export as well as the monitoring concerning all the different 'movement' of artworks were implemented by the internal department responsible for the museum collections. The organisational chart of the DMF in 2002 included a *département des collections* structured in two different offices: one for monitoring the movement of artworks (including the control of the export of cultural property) and another especially dedicated to the inventory of artworks.

10.2 Controls on the export under the *Direction générale des patrimoines.*

The management of museum collections continued to be carried out by the *Direction générale des musées de France* for forty years (from 1969 to 2009).

[262] Decre April 2, 1969, n. 69-297.

[263] The mission of the General Directorate of Musées de France was established by a decree of the Council of State enacted on August 5, 1991, modified by another decree of January 22, 1992.

The need to reset the internal structure of the central administration of the Ministry of Culture and Communication led in 2009 to, among other changes, the suppression of the DMF.

From that time on, the central administration of the Ministry for Culture and Communication encompassed the following general directorates: *direction générale des patrimoines*; *direction générale de la création artistique*; *direction générale des médias et des industries culturelles*[264].

For the purpose of this dissertation the analysis will be focused on the first of these general directorates, the *Direction générale des patrimoines* (DGP).

The mission and main tasks of the DGP are defined at article 3 of the decree n° 2009- 1393, November 11, 2009. The general objective was to coordinate and examine public policies on architectural patrimony; archives; museum collections; and monuments and archaeology.

More specifically, paragraphs I and II of article 3 list some of the activities by which this objective is pursued. The DGP is responsible for (I) the protection, conservation, restoration, valorisation, and the transmission to future generations of the cultural patrimony and museum collections of the nation. Moreover, the DGP, through its activity, contributes to the enrichment of the public collections.

On a more theoretical level (II), the DGP draws up, in collaboration with the general secretariat, the legislation and regulations concerning the circulation of cultural property and the general inventory of the latter. It was also responsible for monitoring the implementation of its programs. Paragraph II of article 3 specified also that the DGP exerted the State's right of pre-emption and ensured the development of the art market.

[264] Article 1 of the decree 11th November 2009, n. 2009- 1393 '*Relatif aux missions et à l'organisation de l'administration centrale du ministère de la culture et de la communication*'.

As seen, the DGP sphere of responsibility is very broad, both qualitatively (in terms of kinds of 'objects') and quantitatively (in terms of number of activities)[265].

The decree establishing the organisational chart of the central administration of the Ministry of Culture and Communication doesn't go any further in establishing the internal structure of the DGP. As seen above, general directorates could be organised into subsections and personnel selected by decision of the responsible minister.

Currently, the DGP encompasses four internal departments (*services*), respectively responsible for architecture; archives; museums; and patrimony[266].

Even though from a bureaucratic perspective the management of the museum collections is now entrusted to a department while before it was under a General Directorate, the tasks to carry out did not change significantly.

In fact, the *Service des musées de France* (SMF) is still today the administrative body responsible for proposing and implementing state policy with regard of the museological patrimony[267]. Under the *sous-direction des collections* were undertaken most of the activities concerning the purchase of artworks, their conservation, restoration, and the enrichment of the collection. The *sous-direction de la politique des musées*, instead, is responsible for the enactment and implementation of the regulatory framework regarding both the museums and public collections and the circulation of cultural assets.

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[265] The DGP gathers together all the duties that were previously the responsibility of three different *Direction Générales* (*Musées*; *Archives* and *Architecture et Patrimoine*).

[266] See http://www.culture.gouv.fr/Nous-connaitre/Organisation/La-direction-generale-des-patrimoines.

[267] See http://www.culture.gouv.fr/Nous-connaitre/Organisation/La-direction-generale-des-patrimoines/Service-des-Musees-de-France.

As becomes clear, the major changes regarding the administrative implementation of control over the export of cultural property concerned mostly the nature of the bureaucratic body (a Directorate, then a General Directorate, and finally a Department of French Museums) rather than the responsibility or the tasks undertaken.

The role of the *Service des musées de France,* that currently is the major administrative entity responsible for implementing export controls, doesn't differ from the previous *Direction générale des musées de France* except in their structure. The major change is that the SMF doesn't have the same degree of (budgetary) autonomy and independence compared to the DMF[268]. Today the export of objects having an artistic and historic interest is under the control of four departments (*services*) that had previously been four General Directorates[269].

By the way, in this scenario the SMS is still in the lead for the control of exports, considering that they deliver around the 60/70% of the export licences compared to the other services. Moreover, the legislative initiative concerning the circulation of goods of artistic interest falls under the responsibility of the SMF and it is always the SMF that leads the secretariat of the *Commission Consultative des Trésors Nationaux* (CCTN).

10.3 The *Commission Consultative des Trésors Nationaux.*

According to article L111-4 paragraph 3 of the *Code du Patrimoine*, the denial to grant an export certificate may only take place after a reasoned opinion expressed by a committee. It is again the *Code du Patrimoine* that, at article R111-22, names this committee as *Commission consultative des trésors nationaux* (CCTN) and establishes its qualitative and quantitative composition. The latter provides for a mixed and balanced presence of civil servants and experts, plus the presidency entrusted to a member of

[268] From an interview of the author with Claire Chastanier, adjointe au sous-direecteur of the SMF, held in Paris on July 20, 2018.

[269] The reference to the four departments is due to the fact that the export authorisation requests may regard also archival material, books or other goods that are not taken into account extensively in this dissertation.

the Council of State. The CCTN is nominated by decree and lasts for four years.

The five civil servants holding a position in the Committee are: a) the director of the DGP; b) the managing director of the SMF; c) the managing director of the Archive department under the DGP; d) the director of the General Directorate of the Media and Creative Industries under the Ministry of Culture; e) the director of research and innovation under the Ministry of Research and Higher Education[270].

In addition to these five members, Art. R111-22 mentions the presence of six experts within the composition of the CCTN, without specifying anything else beyond the duration of their appointment, also lasting four years.

What is the background and the expertise of the 'six experts' on the Committee? Are they always representatives of certain institutions or specific fields of interest (historians, archaeologists, curators, economic or legal experts etc…)?

Since their selection and designation is not specifically regulated, the cabinet of the Minister- who formally appoints the members of the CCTN after a proposal made by the SMF- could, hypothetically, choose freely what expertise to include. In practice, the attempt is always to find a balance between the different capacities, knowledge, and skills required to analyse the export authorisation requests submitted. It goes without saying that, depending on the period, the balance can change[271].

Even if the law does not specify the background of the 'experts', it is possible to say that there has always been particular attention to involve representatives of the art market within the CCTN.

[270] The civil servant members of the Commission almost always have scientific-technical expertise, being selected among the heritage officers (*conservateurs*).

[271] From an interview of the author with Claire Chastanier, cit.

Archival material confirms this. In a letter sent by the Director of the Musées de France -Mr. Jacques Sallois- to the Minister of National Education and Culture on February 11, 1993, the possible composition of the commission was under discussion[272]. At the time the consultation of the CCTN was required by Art. 7 of the law n° 92-1477 of December 31, 1992[273], which stated that:

« *Le refus de délivrance du certificat ne peut intervenir qu'après avis motivé d'une commission composée à parité de représentants de l'Etat et de personnalités qualifiées et présidée par un membre du Conseil d'Etat. Un décret en Conseil d'Etat fixe ses modalités de désignation et les conditions de publication de ses avis* ».

The Council of State decree n° 93-124 of January 29, 1993[274] would specify that the CCTN should be formed by six *ex-officio* members and five experts named for a period of four years.

The purpose of the letter sent by Mr. Sallois was, therefore, that of suggesting the names of the five experts required by the decree. The choice fell on four experts of the art market and an art historian. The involvement of the art dealers was apparently strongly supported by the same representatives of the Administration[275]. According to them, the presence of experts coming from the art market could guarantee open debates, a balance between the different interests within the Commission and, consequently, the proper functioning of the whole export control system.

With the passage of time the balance inside the Commission slightly changed. Currently[276] the duties of the five 'expert members' are

[272] The letter is stored in NA, b. 19940399/7.

[273] Law n. 92-1477 of December 31, 1992 '*Relative aux produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie et de douane*'.

[274] Decree January 29, 1993, n. 93-124 '*Relatif aux biens culturels soumis à certaines restrictions de circulation*'.

[275] Quoting from page 1 of the letter « *Les conservateurs de leur côté ont également reconnu dans leur majorité la nécessité de la présence forte des représentants de marché a sein de la commission* ».

[276] The following information dates back to July 2018; further changes may have occurred.

performed by: an art historian (the ex-director of the Louvre); an expert who long worked in an important action house; an archaeologist; an expert in the field of manuscripts; and an auctioneer.

There is always the attempt to strike a balance between the many types of specialised knowledge needed.

The appointment of the CCTN lasts, as said, four years, but each positon can be renewed. This renewal allows for the establishment of 'long-lasting' experts with great experience in how the Committee works; in the kind of information, details and qualities taken into account in deciding whether or not to grant an export certificate. For example, with the exception of two members that have been recently appointed, the other components of the Committee have been members of the CCTN for ten years now.

This long duration is symptomatic, apparently, of a good rapport among the current members and, even though many different points of view are raised, the final decisions are mostly adopted by a large majority[277].

11. The retention of national treasures in England at the beginning of the XX century: discretion and private initiative.

As seen in the previous chapter, in England there has always been a different attitude, as compared to Italy and France, towards the retention –or the conservation- of artworks within national borders and national collections.

This different attitude reveals itself clearly in the regulatory frameworks thus far compared. We will similarly observe a diverse arrangement in the nature and structure of the administration in charge of implementing the legislation in force.

[277] Ibidem.

The comparison between countries that have such different administrative systems and that entrust the idea of State with such different meanings may require a preliminary in-depth review of the public, constitutional and administrative law of the contexts addressed. However, since this is not the purpose of this dissertation, we will proceed directly to the analysis of the organisational structure by which controls on the export of cultural property is regulated.

Such a 'bottom-up' way of proceeding, in any case, will bring out the main structural differences in the civil law of countries analysed.

Reviewing English legislation concerning the control of the export of cultural goods illustrates that before the outbreak of World War II (and even more, after 1952) in England a specific regulation for the retention of national treasures was not implemented. And the Report of the Committee on the Export of Works of Arts, the first relevant survey conducted on that particular topic (issued on September 6, 1952), confirmed this evidence.

Quoting from the Report of the Committee on the export of Works of Art:

"Before the war there was no control at all; with the exception of modest duties on certain classes of imports, both exports and imports of works of art, etc. were entirely free[278]".

A licensing system controlling the export of artworks was put in place at the beginning of the XX century as a reaction to the loss of artworks of national importance.

The first attempt to control the export of objects having a cultural interest was the constitution of the National Art-Collections Fund. It was established in 1903 as a voluntary organisation. It received no financial support from the State and was run as a private association. No public intervention with regard to the procedures to adopt, the staff to hire, the expertise to involve, or the category of objects to 'protect' was foreseen.

[278] Report of the Committee on the Export of Works of Arts, cit., 2.

The initiative on how to deal with the retention of artworks considered of national importance was left to the discretion of the Fund.

Twenty years later, concern for the loss of important works of art aroused the attention of Parliament. After being urged by the trustees of the National Gallery, the Chancellor of the Exchequer took action.

On that occasion the system adopted to prevent the permanent removal of national treasures was the creation of a Paramount List containing a "very few outstanding pictures towards the purchase of which the Treasury has undertaken to recommend Parliament to vote reasonable sums of money if they were in danger of being sold abroad[279]".

This kind of remedy, besides placing the responsibility for the retention of national cultural patrimon in the hands of Parliament, did not provide for a specific administrative institution dealing with these issues.

The outbreak of World War II pushed English Parliament to take further measures regulating the import and exports of goods that, even if indirectly, affected the international circulation of artworks.

On September 1, 1939, the English Parliament adopted the Import, Export and Customs Power (Defence) Act "to provide for controlling the importation, exportation and carriage coastwise of goods and the shipment of goods as ships' stores; to provide for facilitating the enforcement of the law relating to the matters aforesaid (…)".

According to this piece of legislation, the implementation of export controls relied on a body called the Board of Trade. But beyond this prevision, the Act did not further specify its composition or its procedures, apart from some vague and general guidelines.

Article 1, for instance, with regard to the subject of controls, stated:

[279] Report of the Committee on the Export of Works of Arts, 4.

"The Board of Trade may by order make such provisions as the Board think expedient for prohibiting or regulating, in all cases or any specified classes of cases, and subject to such exceptions, if any, a may be made by or under the order, the importation into, or exportation from, the United Kingdom (…) of all goods or goods of any specified description".

Moreover, the Board was allowed to adopt its resolutions with the highest degree of discretion, not being bound to justify its decisions with any specific kind of proofs or motivations. In case of a Board's refusal regarding the possibility to import or export some good, the burden of proving the lawfulness of the trade depended solely only the private individual[280].

Attention to the risks of not controlling the export of cultural assets started to increase in that period, thanks also to the enactment of a licensing system put in place for the export and import of 'valuable goods' (in 1940). Thus we can see some progresses for what concerns the regulatory framework, but the same cannot be said for the implementation of a satisfactory administrative structure allowing for the implementation of these measures. The latter, in fact, was still under the control of the Board of Trade –depending, in its turn, on the Department of the Treasury.

In this context, the awareness of the need to implement an appropriate control system gradually became more evident, going at the

[280] Article 3 of the Import, Export and Customs Power (Defence) Act states as following: "If any goods are imported, exported, carried coastwise or shipped as ships' stores, or are brought to any quay or other place, or waterborne, for the purpose of being exported or of being so carried or shipped, an officer of Customs and Excise may require any person possessing or having control of the goods to furnish proof that the importation, exportation or carriage coastwise of the goods or the shipment of the goods as ships 'stores, as the case may be, is not unlawful by virtue either of an order under this Act or of the law relating to trading with the enemy; and if such proof is not furnished to the satisfaction of the Commissioners of Customs and Excise, the goods shall be demanded to be prohibited goods unless the contrary is proved".

same speed with concerns linked to massive purchases of British artworks by American collectors.

An interesting debate that developed in the House of Commons in 1944[281] –from which some excerpts are reported below- proves what has just been said.

The issue was raised by Mr. Alexander Walkden[282] with the following consideration:

"I would remind hon. Members that there was a period when England bought up lots of works of art from Europe. Then came a period when America bought up works of art from England. Art kept going Westward. I hope that we shall be able to retain in our country such works of art as show the inspiration of our own people".

Mr. Hamilton Kerr, who shared the same concerns[283], put forward a practical proposal to curtail this problem, anticipating one of the key feature of English administrative control on the export of cultural property:

"What is the exact position in this country at the present time? Let me make a practical proposal. I would like to see a Commission of art experts set up, composed of, let us say, the directors of the National Gallery, and the Tate Gallery, as well as some representative of provincial galleries, and some well-

[281] See the Hansard of the House of Commons of May 26th 1944 from column 1166 until 1173, https://hansard.parliament.uk/Commons/1944-05-26/debates/8004d0da-3722-4730-83f1-c30f6d62f680/CommonsChamber .

[282] Ibidem, column 1166.

[283] Ibidem, column 1167: "I feel that we are losing some of our most precious artistic inheritance, all for the sake of the dollar exchange. (…) One may argue that this is according to a natural process, owing to the rise of great American industrial fortunes, and the heavy taxation of this country, which have made it inevitable. In the eighteenth and nineteenth centuries, this country did the same towards Italy. (…) What happened as a result of that draining of artistic treasures from Italy? The Italian Government exercised a total prohibition, and no valuable work of art could leave Italy in the years before the war, without a licence from the Italian Government".

known picture expert well versed in prices, who would go round the country listing works of art of first-class national importance[284]".

The emergence of such preoccupations was symptomatic of a lack of knowledge regarding the administrative structure in charge of the control against indiscriminate removal of national treasures.

Captain Waterhouse, the Parliamentary Secretary to the Board of Trade, reported to the House of Commons how the system currently in place was working under its authority:

"I just remind the House that this control of which we are speaking was put on in August, 1940, with the object of preventing the uncontrolled exportation of capital in the form of valuables. (…) In the case of pictures and portraits, anything—not these £5 or £25 articles—of any intrinsic value at all is always brought to the notice of both the National Gallery and the National Portrait Gallery. If they raise any doubt, automatically the licence is not granted; there is no question of proving a case, they have oily to say, "We do not think this is the proper thing to export," and straight away that licence is not granted[285]".

The high degree of discretion at disposal and the absence of a settled procedure to follow when analysing an export authorisation request can be clearly deducted by the intervention of the Secretary of the Board of Trade.

12. Implementation of a regulated licensing system.

12.1 The establishment of the Reviewing Committee.

As illustrated above, the system to control the export of cultural property in force in England until 1945 raised doubts from several parties. Both the political awareness of this situation and the increase of competition in the art market (which provoked a hike in the number of applications for export licences) ensured a change in the regulation of the licensing system.

[284] Ibidem.

[285] Ibidem, 1173.

With regard to its administrative implementation, the major change that occurred was the creation of the Reviewing Committee (RC).

Files of the Treasury now stored in the English National Archives help to reconstruct the establishment of the RC[286].

The unsatisfactory situation regarding the control of exports of works of art led, in 1949, to two main reactions:

1) The setting up of an independent committee, chaired by Sir J. Anderson, with the duty to consider policy and advise what future arrangements should be.

2) The creation of a small reviewing committee, as an interim measure, entrusted to consider any disputed cases, consisting of officials of Treasury, Foreign Office and Board of Trade, assisted by a panel of experts from the National Museums and Galleries. This body, called the 'Reviewing Committee", was established after an interdepartmental meeting held on October 26, 1949. At the meeting were present proponents of the following museums and galleries: National Gallery; Tate Gallery; Victoria & Albert Museum; British Museum and National Portrait Gallery. The attempt was to include in the committee experts on different kind of artistic objects.

Apart from the experts coming from the institutions just listed, the RC also included delegates from museums and galleries located outside London.

Some letters of engagements stored in the National Archives reveal interesting details regarding the people invited and the operating method of the Committee.

[286] TNA, b. Ep 1/36, f. of the Treasury n. SS 349/ 356/ 04.

One of these[287], for example, provides a cross-section of the composition of the Committee:

"The Committee meets here in the Treasury under my chairmanship. Its proceedings are informal. The expert membership on any given occasion is composed of the Director who has advised the Board of Trade against the issue of a licence and two other Directors or Keepers chosen as independent members from among the Directors of the national collection in London".

It continues, explaining the will also to involve members from outside London:

"The present members of the Committee all feel that we should be greatly strengthened if there were added to our number to our number a representative from outside London. We do not want to make the Committee too large- the smaller it is the better it works- and our idea is to create a small panel of Directors from outside London from which on each occasion one person would be chosen to act as a third independent member".

Finally, some information regarding the periodicity of the meetings was provided:

"You are not likely to be called on very often since at present few cases come up. So far we have met three times this year (N.B. the letter is written on the 7th May). (…) We usually meet at a short notice because the exporter is always in a bit of a hurry".

From this letter and other archival material it becomes clear how, in this preliminary phase, the major concern of the Treasury was to establish the membership of the RC. No internal regulations in terms of procedure to follow or criteria to adopt were taken.

We can draw this conclusion after the reading of a letter sent from E.W. Playfar in response to a curator, worried for her 'lack of competence' to join the RC ("You will realise, of course, that I have no great knowledge of

[287] Letter sent to David Baxandall, director of the City Art Gallery of Manchester, from E.W. Playfair, member of the Treasury, on May 7, 1951, TNA, b. Ep 1/36, f. of the Treasury SS 349/ 356/ 04.

this matter of export of works of art"[288]). The answer from the Treasury is as follow: "I do not think that you will find that previous knowledge is required to any greater extent than can be imparted as you go: common sense is really the thing. (…) The Export of Goods (Control) (Consolidation) Order, 1949, is pretty uninformative as it stands and will not be of much help to you[289]".

12.2 The machinery of export control under the Waverly Committee on the Export of Works of Art.

Notwithstanding this initial implementation aimed at creating a better-regulated licensing system, during the 50s the difficulties continued and this is the reason why in October of 1950 the Waverly Committee (WC) was appointed[290].

While the regulatory framework proposed by the latter has been already analysed in the previous chapter, we will now consider the main features of the designed 'machinery of export control[291]'.

The release of the Waverly Report represented a pivotal moment for the British administrative system in the retention of artworks. This is confirmed by the Report's initial statement, in the part dedicated to the administrative system: "Our final task is to consider what administrative arrangements are needed to give effect to our recommendations[292]".

The WC was convinced that the Export Licensing Branch of the Board of Trade was the appropriate body to implement the regulatory framework at stake. In order to better conduct its work, it had to enjoy a great level of independence from the legislative power. This was

[288] Letter sent to E.W. Playfair from Miss G.V. Barnard, curator of the Castle Museum and Art Gallery of Norwich, on May 9, 1951, TNA, b. Ep 1/36, f. of the Treasury SS 349/ 356/ 04.

[289] Letter sent to Miss G.V. Barnard from E.W. Playfair on May 10, 1951, TNA, b. Ep 1/36, f. of the Treasury SS 349/ 356/ 04.

[290] Report of the Committee on the Export of Works of Arts, cit., 6.

[291] Report of the Committee on the Export of Works of Arts, Section VIII.

[292] Ibidem, 57.

summarised as follow: "The rules should be such as to enable the Export Licensing Branch to do as much as possible without reference to others".

Reading this passage, we gather the impression that the aim was that of providing the Board of Trade with quasi self-executing rules, maybe in an attempt to limit the discretion of the board as much as possible.

In such a system, the activity of the Export Licensing Branch of the Board of Trade had to remain under the authority of Parliament by means of the Chancellor of the Exchequer. According to the WC, in fact: "A Minister who can be questioned in Parliament is essential in a field where public money is at stake and private rights may be affected".

The basic features of the British machinery of export control were appearing already, and they are: a strong independence of the executive body that implements the regulatory framework in force, and a formal responsibility ivis-à-vis Parliament for the activities carried out.

Moving forward, the Report contains some paragraphs (274-279) regarding the expert advice and the process to be adopted for their consultation. Paragraph 275 states: "It will be for the advisers to settle, in consultation with the Export Licensing Branch and the Reviewing Committee, how much information is required about each class of object referred". Any general criteria were provided by the legislator.

Regarding the procedure for inspection of the referred objects, paragraph 277 aligned a very different position as compared to Italian and French systems. Quoting from the WC's Report: "We are not in favour of any system requiring objects to be sent to a central point for inspections, or packed under supervision. Such systems penalise the legitimate trade (…). We look to the development of close and friendly relations between owners, the trade and the directors and keepers of the national collections".

The role of the applicant for an export licence was very much emphasised in the whole procedure; his/her involvement was considered an essential step in the whole procedure.

The involvement of the applicant took different forms. First of all, it was necessary to get in touch with him/her (or his/her agent) as soon as the Reviewing Committee expressed doubts regarding the possibility to grant the export licence (paragraph 280). In addition to this, the applicant was granted the opportunity to negotiate the terms of the sale, including the price (281-282).

In general, the approach adopted is built on the attempt to avoid as much as possible any interference with the ordinary performance of the art market.

This concern is evident especially in the attention devoted to the opportunity of granting an advance ruling regarding the release of the export licence[293]. Debate on this point analysed all the different options and the repercussions arising. Not giving an advance indication could produce a feeling of frustration in case an object did not ultimately receive the licence to leave the country after a transaction had already been proposed. On the other hand, "if they (the advance rulings) are given, and become public knowledge, the effect is at once to remove any possibility of the owner receiving a genuine offer from abroad, and as a result the establishment of a fair value may become much more difficult".

The inclination of the WC was to devalue the practice of giving advance indications.

Finally, the Report made some suggestions also with regards to the procedures to be followed by the Reviewing Committee while analysing the export authorisation requests received. Such an attitude marks a difference compared to Italian and French regulations which provide no

[293] Report of the Committee on the Export of Works of Arts, paragraph 284: "The question whether advance indication should be given, either by the Reviewing Committee or by the expert advisers, that particular objects will not be allowed to leave the country presents considerable difficulties".

indications on procedures to implement in their own licensing systems[294].

Paragraph 296 recommended that "the procedure should be kept informal, and efforts made to reach agreed decisions wherever possible. The Committee should sit in private and do not make public the reasons for its decisions. Its task is to advise the Chancellor, and it is for him to decide how much to make public".

13. The Non-Departmental Public Body in the English administrative system.

The administrative implementation of the British licensing system has remained pretty much the same as it was designed by the WC Report.

The main difference concerns the department responsible before the Parliament for the Reviewing Committee, which is no longer the Treasury but the Department for Digital, Culture, Media and Sport. The latter was created in 1997 and originates from the Department of National Heritage.

Export licensing is one of the responsibilities entrusted to the Department for Digital Culture, Media and Sport that arranges for its implementation to be carried out through an executive NDPB (Arts

[294] Regarding Italy, we have seen that during the XIX century there was an attempt carried out by the central Administration to provide export offices with internal regulations. However, it is not clear whether this succeeded or not, since there is evidence of different internal regulations adopted individually by each office. Currently, no public regulations regarding the internal organisation or way of proceedings of the export offices are available.

Even in France it is possible to find only minor regulations with regards to the internal procedures to adopt in the evaluation of an export authorisation request.

Council England) and an advisory NDPB (the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest)[295].

The permanent members who make up the latter, as well as the starting and ending date of their appointment, are public and available online on the website of the Arts Council England[296]. The membership of the RCEWA is designed as to include experts in different disciplines and with varied interests, in order to take into account all the different aspects affecting export control.

Currently (May 2019), besides the chairman who performs a role as guarantor and supervisor, the permanent members of the RCEWA are: the former Head of Cartographic and Topographic Materials at the British Library; the Director and Senior Curator of the Gagosian Gallery; an art dealer; a furniture curator and staff of the National Trust; a scholar expert of Medieval and Later Antiquities; the Senior Curator of the early medieval collections at the British Museum; and a staff member of the National Gallery of Scotland specialised in Spanish and Italian art.

In addition to their expertise, it is relevant to underline the duration of their appointment: with the exception of one member, all the others sits on the Committee for 8 years. This is a rather long time, allowing for a deeper awareness of the responsibilities entailed, and insuring a certain regularity in the interpretation and application of the regulations in effect.

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[295] Quoting from the official website of the UK government (https://www.gov.uk/government/organisations/the-reviewing-committee-on-the-export-of-works-of-art-and-objects-of-cultural-interest), the "Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA) advises the government on the export of cultural property. If an artwork is sold to a foreign buyer, it also advises on whether to delay the granting of an export licence in order to allow time for a British buyer to raise funds to buy the work instead and keep it in the UK".

[296] See https://www.artscouncil.org.uk/sites/default/files/RCEWA%20members%20April%202019.pdf .

The role of the RCEWA is to give advice regarding whether to grant an export licence or not but, even if its recommendations are usually followed, the final decision is formally taken by the Secretary of State for Digital, Culture, Media and Sport.

At this point, it seems relevant to describe the characteristics, from an administrative and organisational point of view, of the Non-Departmental Public Bodies (NDPB). Solely through the scrutiny of their nature it is possible to appreciate the functioning of the RCEWA, its powers, and the limits of its action in implementing the policies adopted by Parliament.

This different administrative structure, far from the ministerial institutions existing in Italy and in France, is probably the element that most determines the different implementation of export control among the three countries under consideration.

In confirmation of such diversities, we should recall the typical organisational feature of the State in England. Although the Ministries existed as administrative structures, historically "Ministerial government was not the standard procedure in the XIX century[297]". A preference for a major degree of independence prevailed, opting for a Board system form of administration that allowed for less intense parliamentary control. At the same time, each board was under the final authority of a minister who could be called to account for some of the actions carried out by the board[298].

As just mentioned, the XIX century was characterised by an administrative organisation structured in boards and agencies, distinguished by their great degree of autonomy. This specific feature would gradually change over the years, modifying accordingly the form

[297] P. CRAIG, *Administrative law*, 7th edition, Sweet & Maxmell, London, 2012, 37.

[298] In English administrative law "the term Ministry is used to denote a department of state where the power is vested in a single person who sits in one of the Houses of Parliament and is responsible to Parliament for departmental action", Ibidem.

of administration adopted. To provide an idea of this variability, we might mention Parliament's desire for a more direct accountability that led to incorporating many existing agencies into governmental departments during the XX century. And again, after 1980, there was "a rapid expansion of public bodies outside the strict confines of government"[299]. This 'yo-yo' effect concerning the degree of autonomy directly influenced the State administrative structure.

With regard to the typology of bodies 'outside the strict confines of government', they can be of different nature. The principal division is between the executive agencies and the non-departmental public bodies (NDPBs). The former are described as agencies of the Crown, normally without a legal identity and therefore acting under the direction of a minister or a department in a very direct relationship.

The NDPBs, instead, are characterised by a separate legal identity and usually operate accordingly to a statute. In order to perform their functions, a legislative measure must confer their functions[300].

The NDPBs, in their turn, can perform different tasks and, according to these different functions (administrative, regulatory and commercial), they adopt a specific title, such as: executive NDPB or advisory NDPB. In particular, the latter (as the RCEWA) is not usually provided with its own staff as well as its own budget but is supported, in pursuing its tasks, by the department of belonging.

Historically, England has a long tradition of and particular attention to promoting a strong sense of efficiency in the activities carried out by the State. This is exactly why the overall State administrative functions have been object of many different analyses in order to attain the

[299] Ibidem, 75.

[300] It seems appropriate to recall the *Ultra Vires* principle, according to which "an agency must have a capacity to act on a subject matter: an institution given power by Parliament to adjudicate on employment should not take jurisdiction over non-employment issues".

organisation that best could allow the achievement of the designated objectives.

Since the '60s the need to run certain administrative functions outside the departmental framework, and to assign them to external bodies, was highlighted by the Fulton Committee. The purpose of the survey conducted by the latter (appointed on February 8, 1966) was: "to examine the structure, recruitment and management, including training, of the Home Civil Service and to make recommendations[301]". An in-depth analysis of the structure of the Civil Service was conducted, stressing all the different aspects that could influence the final efficiency of the activity to be carried out by the State[302].

In response of the findings contained in the Fulton Report, different actions to enhance the efficiency of the civil service were taken.

Just to quote some examples, under Margaret Thatcher's government the Rayner Unit[303] was established (in 1979) with the aim of enhancing efficiency within the bureaucracies of the State. Among all these surveys,

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[301] See *The Civil Service* (Vol. I), Report of the Committee 1966-8 drafted by Her Majesty's Stationery Office in June 1968.

For the debates in the House of Commons on June 26, 1968 regarding the Civil Service (Fulton Committee's Report) see the Hansard available on the website: https://api.parliament.uk/historic-hansard/commons/1968/jun/26/civil-service-fulton-committees-report .

[302] The completeness of the analysis conducted can be appreciated by looking at the structure of the Report, reproduced in its table of contents: The Civil Service today; The tasks of the modern Civil Service and the men and women they need; Recruitment, training and career management; Mobility, pensions and a career service; The structure of departments and the promotion of efficiency; The structure of the Civil Service; The central management of the Civil Service and relations with staff associations; The Civil Service and the community.

All the chapters making up the Fulton Report are available on the website: https://www.civilservant.org.uk/csr-fulton_report.html

[303] Also known as 'the Efficiency Unit'.

it is worth mentioning the Next Steps Report produced in 1987[304]. Launched by Sir Robbin Ibbs, this can be regarded as a cornerstone for the next form of the bureaucratic structure. The two main novelties introduced regarded:

1) The necessity to divide services delivery and policy-making into two separate entities, entailing a strong devolution of power to executive agencies in the area of service delivery.
2) The formal recognition that the minister shouldn't be held responsible for everything done by officials under his/her authority.

Indeed, the separation between a political responsibility and an administrative one was reaffirmed. In order to follow up this archetype, an administrative structure that was inspired by this model was needed.

Moving on, it seems relevant to mention the rethinking of the NDPBs that occurred during the first decade of the XIX century under the government of David Cameron. This is "the biggest rethinking of the NDPB model since it was first introduced in 1980[305]".

The need to have efficient bodies performing public functions was accentuated. In order to fulfil this goal and understand what institutions

[304] Among the other achievements it's worth mentioning the Management Information System, a tool that allowed the minister to have a closer look at each activity carried out, analysing "who does what, why and what does it cost?".

Another tool that was conceived on the occasion was the Financial Management Initiative, aimed at strengthening the individual responsibility of each civil servant from a managerial perspective: "all managers were intended to have a clear view of their objectives, well defined responsibilities for making the nest use of their resources, and the information, training and expertise necessary to exercise their responsibilities effectively".

For an overview of the Civil Service organisation in Britain from 1980 until the beginning of the XXI century, see the Institute for Government's Report "The Next Steps Initiative", available on the website: https://www.instituteforgovernment.org.uk/sites/default/files/case%20study%20next%20steps.pdf

[305] P. CRAIG, *Administrative Law*, op. cit., 80.

were currently needed and which were not, some criteria were agreed upon. If the body under consideration satisfied the criteria, it could continue to operate.

Expressed as questions, the criteria were the following: 1) Does the body perform a technical function? 2) Does its activity require political impartiality? 3) Does it need to act independently to establish facts?

After such analysis many public bodies were re-evaluated because they did not meet the criteria above mentioned. Both the Arts Council England and the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest still exist today as NDPBs. This means that they were recognized as bodies performing technical functions, requiring political impartiality and in need of acting independently from a department.

EXPORT LICENCES: DIFFERENT CERTIFICATES FOR DIFFERENT PERFORMANCES

The analysis conducted in the first part of this chapter was meant to understand the administrative structures dictated by the State to the decision-making bodies that monitored requests to permanently removeobjects of artistic interest from the national territory.

It was possible to appreciate how the history and tradition of each public system was revealed in the administrative organisation put in place. We underlined what professional figures were involved in the implementation of the regulations concerning the export of cultural property and what procedures they followed.

Finally, we underlined the degree of autonomy of each body that implemented the decreed regulations.

If the administration, on a formal level, exercised State control over the export of cultural assets; on a practical level this control was performed by issuing export licences or certificates.

This second part, therefore, is intended to illustrate the 'different kind of certificates and their different performances'. It seems obvious to mention, in fact, that each of the countries analysed adopted its own ensemble of export licences/certificate, and they differ not only in terms of denomination and quantity, but especially with regard to the functions fulfilled.

Only a specific understanding of their proper function, in fact, will grant the possibility to appreciate whether a comparison between the three countries analysed, in terms of number of granted certificates, is possible or not. If the findings prove that the nature of export certificates emitted in Italy, France and England differ a lot one from the other, we

will need to reflect on whether it is appropriate, possible or functional to compare them[306] only in quantitative terms.

14. The required documentation to export an object of cultural interest from Italy after the unification of the Kingdom.

Both the analysis of the regulatory framework and that of the administrative structure has shown how export control was implemented in Italy since the very beginning of the XIX century. Obviously, over the centuries this control imposed different solutions and, accordingly, also the certificates in use changed over time.

The first traces of export licence models go back to the end of the XIX century. Before that moment most of the Italian provinces implementing an export control decreed a total ban on certain categories of objects (identified with specific thresholds or by their author). With regulations of this kind, export licence models were not designed because they were not even necessary.

The State Central Archive has preserved many samples of export licences emitted by export offices in the first decades after Italian unification. These documents, issued in 1890, allow us to observe the form to be filled out in order to apply for an export licence[307].

The first part of the form, called 'licence' (*licenza*), required the date of submission; the personal information of the applicant (name, surname, address); the nature of the object, its date of production, its author and a description. Regarding the object, the applicant had to specify the dimension, the state of conservation and any charateristics of

[306] The reference here is to a tendency that experts and professionals have to compare the trend of the export control between countries taking into account merely the number of licences/certificates emitted.

[307] Export licences stored in the ACS, MPI, AA. BB. AA., b. 390, f. 26,9-2 / 26,9-5.

particular importance such as the presence of signatures or other symbols.

The last part of the form asked the price declared by the owner and the price attributed to it by the Administration.

There is no evidence of different kind of licences distinguishing contemporary objects from all the other objects submitted for export authorisation. Apparently, this was the only form in use and was used by the export offices located in the different superintendencies disseminated throughout Italian territory. Because of this homogeneity, we can deduce that they were designed by the central administration and sent to the regional offices.

15. Export certificates and licences currently in use in Italy.

As time has gone by the procedures, as well as the certificates and licences used, have grown in number, resulting in the production of different kind of documents, each with its own specificity.

The overview of the current regulatory framework reveals the heterogeneity of situations the owner of an artwork might find him/herself in when seeking export authorisation. The request might entail a request for permanent or temporary export and, within these cases, differentiation must be made between objects falling within certain temporal thresholds, and those to be classified as contemporary. Moreover, the documentation designed by the central administration for submitting an export authorisation request makes a distinction between objects of artistic interest (e.g. paintings, sculptures, watercolours etc…) and manuscripts, for example[308].

[308] Considering the topic and the objective of this dissertation, the analysis that will follow will consider only the certificates and licences allowing for a permanent export.

As a premise we have to describe the system adopted by the Italian Ministry for Cultural Heritage and Activities to implement the licensing system.

This is the online platform SUE (*Sistema Uffici Esportazioni*), and is the official tool to use for interacting with the export offices of MiBAC[309]. This platform contains the models of all the export certificates and licences and the applicant who wants to submit an export authorisation request must submit it online as first step. Only once the request has been received in digital format and processed by the export offices will the applicant be required to physically bring the item of cultural interest to the export office for examination.

Registration is required to use SUE platform: the user has to provide his/her personal information and, after a validation of the request, a personal account will be created. This account will allow the individual who has to submit an object to an export control to download the form of the certificates, file the required forms, and then track the progress of the request.

15.1 Self certification for contemporary art objects.

As mentioned in Chapter I, the current legislation provides that objects of artistic interest attributable to a living author or that have been produced no more than seventy years before are not subjected to any export authorisation. However, this does not mean that the owner of an object having such characteristics can freely transport the latter outside the national borders simply carrying it out. According to Article 64, point 4 of the Italian Code of Cultural Heritage and Landscape, the interested party (e.g. the owner of the object) has the duty to demonstrate that the object falls within this category and can be classified as 'contemporary'. In order to comply with these requirements, the interested party has to present to the competent export office a substitutive declaration of certification entitled 'Self certification of contemporary art objects" (*Autocertificazione di arte contemporanea*).

[309] https://sue.beniculturali.it/SUENET/SUE/frmsuelogin.aspx

The self-certification includes the personal data of the applicant, a list of the objects to be exported, and the applicant's signature. In addition to this information, the request should be completed with a number of files (one for each object) containing a detailed description of the objects and a photograph. In completing these descriptions, the applicant should be particularly careful in indicating the exact date of production of the object, this being a sensitive topic with respect to the export control.

During this first phase the applicant must indicate the export office to which the self-certification is submitted, due to the fact that no compulsory indication in this regard is provided for. Once the request on-line is complete, the applicant can print the form and bring it personally to the selected export office.

As mentioned, this category of contemporary objects is not subject to any export authorisation, meaning that there is no provision for the Administration to prevent their exit from national territory. In such cases, therefore, why all this 'red tape'? A possible reason is that the State, even without the right to prevent their export, considers it necessary to monitor and record the contemporary artworks leaving the country.

Special attention is dedicated to submissions of self-certification for objects produced more than fifty but less than seventy years before (taking the 2019 as our basis this time-frame encompasses objects produced between 1949 and 1969). This is because, accordingl to article 10 point 3 letter D*bis* of the Italian Code of Cultural Heritage and Landscape, the objects having artistic, historic, archaeological or anthropological interest that fall within this specific temporary threshold cannot be exported if they are considered 'exceptional for the integrity and the completeness of the national cultural heritage'.

In other words, this exception makes the objects *infra* 70 and *ultra* 50 years likely to be retained in Italy if the Administration considers their exit a loss for the integrity of the national cultural heritage. In this case, the applicant, together with the self-certification, has to also submit

'form D1': a specific model for objects falling within the above mentioned category. After this virtual submission, this documentation must be physically delivered to the chosen export office.

Finally, we can deduce that currently only objects produced less than 50 years ago (meaning objects produced between 1969 and 2019) or those whose author is living are subjected only to a notification (self-certification of contemporary art) and not to an authorisation by the administration.

15.2 Certificate of free circulation.

The Certificate of free circulation (*Certificato di libera circolazione*) is the required document for the export of the objects listed at article 65 point 3 of the Italian Code of Cultural Heritage and Landscape toward a state member of the European community. This certificate is required to export objects of artistic interest produced more than seventy years before, whose author is no longer alive, which are privately owned and have not been yet declared by the MiBACT as 'particularly important' or of 'exceptional interest' (art. 13 of the Code for Cultural Heritage and Landscape).

Once released, this certificate is valid for five years from the date of issue and is not renewable. For clarity's sake, a specification is needed: the certification of free circulation can be obtained at any time, with no need to demonstrate the reason why the application for the certificate has been submitted. No certificate obliges the owner to remove the object from national territory. The release of the certificate of free circulation is merely an authorisation given by the Administration granting the possibility to export the given property outside the national soil.

The owner of an object of artistic interest that falls within the category listed at Art. 65 point 3 could, for example, ask for a certificate of free circulation and subsequently never export the piece[310]. In this case, after

[310] This could occur when the owner of an artwork produced more than seventy years earlier and whose author is not living would like to sell the item on the international market and wants to be sure-that the object is free to exit the

five years the authorisation given by the Administration expires and a new request should be submitted. It goes without saying that this hypothesis occurs only in case the property is still located in Italy; it is not the case if the object has already been moved abroad.

In the process to file the request, also in this case, a first submission must be made online through the SUE platform and a second time in person in person at the export office. During the latter step the applicant should bring with him/her the objects that need to be examined, unless their dimension or other characteristics necessitate an evaluation at the applicant's[311] residence instead.

In filling the online form the applicant has to indicate, in addition to his/her personal data[312] and the description of the objects (including the economic value), an address in Italy[313] where the objects will be stored during the period when the request of certificate is under consideration.

With the submission of a single request the applicant can for several certificates of free circulations to be issues. The possible amount is not established by the central administration; rather it varies according to each export office (the export office in Rome, for example, authorises the release of no more than fifteen certificates for each request).

15.3 Permanent export licence.

The release of a permanent export licence (*Licenza di esportazione definitiva*) is required to export, toward an *extra* UE destination, an object of artistic interest that falls within the categories established by the

national borders. If the attempted sale fails, it may happen that the owner will never export the object abroad.

[311] The request for a certificate of free circulation can be submitted by several actors: the owner of the objects or, on his/her behalf, by the shipper or a staff member of the gallery or of the auction house.

[312] In case the request is submitted on behalf of the owner, both the personal data of the latter and those of the applicant have to be reported.

[313] The necessity to indicate an address in Italy exists even in the case where the applicant or the owner of the object is resident abroad or is not an Italian citizen.

European Council Regulation (EC) No 116/2009 of December 18, 2008 on the export of cultural goods[314] and that are present in Annex A of the Italian Code of Cultural Heritage and Landscape[315].

Being a State member of the European Union, Italy has to comply with the existing Community legislation that, on the subject of exportation outside EU borders, was first regulated by the aforementioned Regulation.

Article 74 of the Italian Code for Cultural Heritage and Landscape, furthermore, specifies that the export licence is issued by the same export office that grants the certificate of free circulation. In case the two documents (certificate of free circulation and export licence) are not issued simultaneously, the latter cannot be issued more than forty-eight months after the former (paragraph 3). In general, the meaning of this paragraph is that an export licence can be released only after the release of a certificate of free circulation[316].

The export licence, finally, is effective for one year.

[314] The full text of the Regulation is available on the website https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0116&from=GA.

[315] Article 74 of the Italian Code of Cultural Heritage and Landscape governs the export of cultural property *extra* UE. The first paragraph of Article 74 states that: "The exportation outside European Union territory of the cultural properties indicated in Annex A of this Code is governed by the EEC Regulation and the present article".

[316] The reason of this subsidiarity is due to the fact that the Administration implements its qualitative and discretional control on the export when issuing a certificate of free circulation. Given the criteria taken into consideration in order to authorise or deny the export, there is no room for not granting an export licence once the certificate of free circulation has been issued. On the contrary, when the latter is denied, even the export toward an *extra* UE destination will be forbidden. In such a situation, the distinguishing element is the possibility for an object to leave the country permanently, rather than its destination.

Annex A of the Italian Code of Cultural Heritage and Landscape[317], submits to export control (only taking into account the temporal threshold) objects having an artistic interest produced more than seventy years before and no longer belonging to their author.

European regulation 116/2009, instead, is applicable to objects having an artistic interest 'which are more than 50 years old and do not belong to their originators'.

As it can be seen, the two categories do not coincide, with the result, as discussed in Chapter I, that the current Italian regulatory framework is less restrictive (in terms of retention) than the European one.

The question to be answered at this stage is: which documentation is needed to reconcile these two legislations? Article 74 of the Italian Code of Cultural Heritage and Landscape, taken literally, seems to subordinate the release of an export licence to the issuance of a certificate of free circulation[318]. But now there could be a situation in which, in order to export an object having cultural iterest from Italy toward a destination *extra* UE, pursuant to law, only an export licence would be needed and not also a certificate of free circulation. Think of the case of an artwork located in Italy, no longer belonging to the author and produced between 1949 and 1969 –*ultra* 50 and *infra* 70. In this case, the applicant should submit a request for an export licence according to the EU legislation, but not for a certificate of free circulation, taking into consideration Annex A of the Italian Code of Cultural Heritage and Landscape.

This legislative difference has created quite a few problems, leaving the export offices in confusion concerning the documentation needed when a request for an export toward an extra UE destination was submitted.

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[317] Annex A of the Italian Code of Cultural Heritage and Landscape is available, in Italian, on the website http://www.bosettiegatti.eu/info/norme/statali/2004_0042.htm#Allegato_A .

[318] This was the case also when the Italian Code of Cultural Heritage and Landscape established a temporary threshold of fifty years, until the changes that took place in 2017.

Given this situation, the IV department (the department dealing with issues related to the 'circulation' of cultural property) of the General Directorate of Archaeology, Fine Arts and Landscape on July 12, 2018 released a newsletter addressed to the export offices in order to provide them with an authoritative interpretation of the norm and to give precise instructions[319]. Paragraph 3.4 of the newsletter specifies that in case of the submission of a request for an object having an artistic interest that falls within the threshold of *ultra* 50 and *infra* 70, the export licence should be issued after the submission of form D1 (self-certification of contemporary art for an object produced more than fifty and less than seventy years before).

16. The required documentation to export an object of artistic or historic interest from France.

It has become clear so far that the 'Italian case study' can be analysed with a more historical approach than the other two. As already highlighted, this is due to the legislative history of the three States in this specific sector, dating back to different periods.

This very brief preamble is needed to 'justify' the direct transition, with respect to France, to the analysis of the different kind of export certificates actually in use. Archival research, in fact, does not reveal models or form used in the past, so that is not possible to have an idea of the design of French export certificates in an earlier period[320].

[319] This is the newsletter of the DGABAP of July 12, 2018, n. 31 titled '*Decreto ministeriale del 17 maggio 2018 – Repertorio n. 246 concernente "Condizioni, modalità e procedure per la circolazione internazionale di beni culturali". Decreto ministeriale del 9 luglio 2018- Repertorio n. 305 che modifica il DM 246 del 2018'*.

[320] Regarding this point, it is interesting to highlight a difference between France and Italy in this specific context.

The Italian State Central Archives preserves samples of the export licences in use during the XIX century and after, while in France there is no trace of such documentation. On the contrary, in France the National Archive preserves many

16.1 Export certificate *infra* UE.

As analysed in Chapter I, in France the exportation of an object having an artistic interest is subject to restrictions, and consequently to a previous authorisation by the competent Administration, only if it is under certain financial and temporary thresholds[321].

The latter tend to be the same of the Community ones established by the EU Regulation, n. 116/09, even if some differences persist. With regard to objects of artistic interest, those that have been produced at least from fifty years are subjected to obtain an authorisation in order to be exported. The financial threshold, instead, changes accordingly to the nature of the object being: 150'000 € for paintings; 50'000 € for sculptures; 30'000 € for watercolours and 15'000 € for engravings.

The request for obtaining an export certificate (*certificat d'exportation*) should be submitted only in the case the object, in addition to falling into the categories above mentioned, is located on the French soil for more than two years. Objects that are located in French for less than two years can exported without any previous authorisation.

According to article R111-4 of the French *Code du Patrimoine*, the request for obtaining an export certificate should be addressed to the Ministry of culture by the owner of the object or by someone else on his/her behalf.

Before proceeding with analysing how to submit a request, it is relevant to mention the key features of this kind of certificate. The first and most relevant characteristic concern is its duration: once issued, the

samples of written analysis and considerations carried out by the central Administration regarding whether or not to grant an export licence.

In light of this, it seems possible to affirm that in Italy there has been, and perhaps still is, more attention to the moment of the request submission and less to the evaluation phase by the responsible Administration, while in France the opposite holds true.

[321] This is stated by article Article L111-2 paragraph 1 of the *Code du Patrimoine*.

certificate is valid on a permanent basis. This is explained by the very nature of the French export certificate, being an accreditation in negative more than a certification in positive. This last phrase is perfectly clarified by the wording of article L111-2 paragraph 1 of the Code du Patrimoine: « *Ce certificat atteste à titre permanent que le bien n'a pas le caractère de trésor national*[322] ».

However, the permanent validity is effective only for those goods that were created at least one hundred years before the issue of the certificate; for the others it is effective for twenty years and once expired it can be renewed[323]. It seems evident that this difference is justified by the the State's wish to maintain a stronger control over more recent cultural properties. This is especially understandable given the variability of values (financial, aesthetic, social…) that, even within a short period of time, can be attributed to the same artwork.

The second relevant characteristic of the French export certificate is that, within its period of validity, it allows an unlimited number of temporary exportations (or, obviously, a permanent removal).

These two key features have made that the export certificate is also known as the '*passeport des œuvres d'art*', a kind of passport for artworks.

Once issued, the export certificate has to be associate with the object to which it is related and in fact it is strictly connected to the object rather than to the owner of the object or the person who requested it on the owner's behalf. For example, the export certificate does not report the name of the object's owner and there is no need to request another certificate after a resale. Even then the documentation is transferred to the new purchaser together with the good.

[322] The English translation could be "This certificate certifies on a permanent basis that the property does not have the character of a national treasure".

[323] Article L111-2 paragraph 2 of the *Code du Patrimoine*.

Finally, the export certificate cannot be considered a warranty of the financial value and authenticity of the object or even of the legitimacy of the property deed of its possessor.

From the distinctive elements now we will move on to the modality of submitting the request to the Ministry of Culture.

There are two main modalities: an online submission and a submission by mail[324]. Both solutions do not provide for a phase in which the applicant should physically go to the responsible administration, not even to bring in the object for review[325].

In order to proceed with the online application, one must create an account on the specified website[326]. Once that is done, the applicant will be able to submit all the requests through this online platform, together with the documentation required. The Administration automatically receives all the requests submitted in that way[327] and can also communicate through the same system the progress of the application.

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[324] In both cases the form to be filled out in order to submit a request for an export certificate is the same, and this is available online on the website: file:///C:/Users/Utente/Downloads/Cerfa020075_demande+de+certificat+d'un+bien+culturel.pdf.

[325] This solution, apparently, is also due to the fact that, differently than Italy, in France the Administration implementing the export control has only one office, located in Paris.

[326] It is possible to create an account on the following website: https://mesdemarches.culture.gouv.fr/loc_fr/mcc/account/newaccount/?callback=requests/POLIT_CIRCU_information_01/&__CSRFTOKEN__=a2c2a008-573a-4a46-ae39-0ff661b18b0a.

[327] According to article R111-5 of the *Code du Patrimoine*, the Administration can urge the applicant to complete the request in case it lacks part of the required documentation.

The full text of the article states: « *Lorsque la demande n'est pas accompagnée de tous les renseignements et pièces justificatives, le ministre chargé de la culture requiert la production des éléments manquants, par lettre recommandée avec demande d'avis de réception, avant l'expiration du délai mentionné à l'article R. 111-6, qui est suspendu. Le demandeur dispose de deux mois pour produire les pièces et renseignements requis.*

Otherwise, as mentioned, it is also possible to submit the request for an export certificate by mail, sending the envelope to the competent administrative offices, being in this case:

1) Service des Musées de France (SMF) – Sous-direction des collections - Bureau de l'inventaire des collections et de la circulation des biens culturels.
2) Service interministériel des Archives de France (SIAF) - Sous-direction de la politique archivistique - Mission archives privées.
3) Service du livre et de la lecture (SLL) - Bureau du patrimoine.
4) Service du patrimoine (SP) – Sous-direction des monuments historiques et des espaces protégés - Bureau de la conservation du patrimoine mobilier et instrumental.
5) Service du patrimoine (SP) – Sous-direction de l'archéologie - Bureau de la gestion des vestiges et de la documentation archéologique.

16.2 Export certificate *extra* UE.

In the event that the export is to a destination outside EU territory, the issue of an export certificate is not enough: this because France~~,~~ also~~,~~ musr comply with the relevant European legislation in force.

In addition to the export certificate, the applicant should obtain also an export licence issued by the Ministry of Culture[328]. Some information can be traced looking at its content: first of all, it can be granted only once and if the export certificate has already been issued (this is evident since in the form the applicant has to specify the number and duration of the '*Autorisation d'exportation*'). This is the same sequence we observed in Italy. Secondly, the export licence can be granted either on a temporary basis or definitively.

Le demandeur qui ne fournit pas ces éléments dans les deux mois à compter de la réception de la lettre du ministre les réclamant est réputé avoir renoncé à sa demande ».

[328] The form of the export licence is available online on the website: file:///C:/Users/Utente/Downloads/Cerfa+1103303_Demande+d'autorisation+d'exportation+d'un+bien+culturel+du+territoire+europ%C3%A9en.pdf.

17. The required documentation to export an artistic object from England.

England, if compared with Italy and France, has been the last country to elaborate the documentation needed to submit an export authorisation request, since it has been the last country to develop a regulatory framework on this matter.

We had the chance to mention the preeminent position assumed by the art market in the English legislation concerning the control on the export of cultural property. Similarly, the administration entrusted to implement the regulatory framework in place is designed to maximize efficiency, with the aim to reduce as much as possible any conflict between the public and the private sector. Finally, the same attitude, the same care in limiting the bureaucratic burden on the side of private applicants that have to deal with public authorities will be traced in the following paragraphs.

17.1 The Open General Export Licence.

The just-mentioned attitude is quite evident in the nature and structure of the open licences.

According to the 'Statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export licence presented to Parliament pursuant to section 9(6) of the export control act 2002' written by the Department for Media, Culture and Sport and issued in March 2015,

"In order to reduce the burden on would-be exporters, the Secretary of State has issued a number of open licences permitting the export of certain specified objects without the need to obtain an individual export licence[329]".

[329] Department for Media, Culture and Sport, *Statutory guidance on the criteria to be taken into consideration when making a decision about whether or not to grant an export licence presented to parliament pursuant to section 9(6) of the export control act 2002*, March 2015, 3. The Guidance is available online at the website:

There is more than one type of open licence.

The Open General Export Licence (Objects of Cultural Interest)—the so-called OGEL—allows to export, on a permanent basis and to any destination (except embargoed countries), all the categories of objects falling within the criteria established by the Secretary of State[330].

This means that if an individual verifies that the good he/she wants to export is included in this list and is produced more than fifty years before the date of the request, the exportation can proceed without asking for an individual licence. In other words: this provision establishes an automatic authorisation given by the administration for specific property, avoiding an examination to be conducted case by case.

Such a mechanism has a twofold positive effect: for the applicant it represents a guarantee regarding the possibility to export certain categories of goods. The discretional scrutiny of the administration is cut out of the process, as well as the incertitude linked to acquisition of the right to permanently remove the object national territory. On the side of the administrative authority, this automatic concession results in a reduction of the daily activity, entailing a significant saving of resources.

What are the goods that can be exported under a OGEL? The Secretary of State has identified fifteen categories, but we will list here only those objects that can be considered of artistic interest or, for other reasons, relevant for the purpose of this dissertation, referring for the others to the full document.

(e) any photographic positive or negative or any assemblage of such photographs, the value of which is less than £10,000;

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https://www.artscouncil.org.uk/sites/default/files/download-file/Export_criteria_March_2015.pdf.

[330] The full description of the categories of goods that can be exported under a OGEL are reported in: https://www.artscouncil.org.uk/sites/default/files/download-file/Open_general_export_licence_March_2015.pdf. The list can be updated or modified, so that it is important to check its content constantly.

(h) any painting in an oil or tempera medium (excluding any portrait of a British historical personage, which would fall within sub-paragraph (i) below), the value of which is less than £180,000;

(i) any portrait or other article consisting of or including a representation of the likeness of any British historical personage (made otherwise than by photography and excluding a coin), the value of which is less than £10,000;

(k) any article the value of which is less than £65,000 other than one of a description specified in the Schedule hereto;

(l) any article for which a EU licence has been issued[331];

(m) any article that is in the United Kingdom following its importation solely for the purpose of transit through the United Kingdom with a view to export;

(n) any article that has been imported into the United Kingdom from a country outside the European Union and is not in free circulation within the European Union.

Therefore, the person who would like to export a property falling within these financial, temporary and qualitative thresholds can freely send it out of the country, without any preventive authorisation from the Export Licence Unit. There is no need to present to Customs any kind of documentation or self-certification. This is a notable difference with regard to Italy where, even in cases in which the Administration may not retain the good[332], the exporter must always obtain a self-certification prior to the removal.

[331] According to this point, the document further specifies: "This Licence does not permit the export of an article that requires a EU Licence unless a EU Licence is also granted".

[332] As mentioned, this is the case of objects of artistic interest considered to be 'contemporary'. This category comprises goods that have been created more than fifty years before and whose author is no longer living.

17.2 Individual licence.

In case the object of cultural interest that the individual would like to export is not included among the above-mentioned cases, there is the need to apply for an export licence. In order to mark a distinction between the cases in which a licence is 'given' (granted) by the Secretary of State, being a *fictio iuris* since there is no need to actually submit any request, the licence is called an 'individual licence'. The adjective 'individual' therefore can be seen in opposition with the adjective used in the previous case, when we talked about 'open general export licences'.

The shared elements of an individual licence are the conditions of the object under consideration: being 'at or above a specified age and financial threshold'[333]. The destination *infra* or *extra* EU territory is not a discriminant.

At this stage different scenarios are possible. The first case is that of an object to be exported outside EU: if its characteristics are equal or exceed the EU thresholds established by EU Regulation, n. 116/2009 there is the need to submit a request for an EU individual licence. In case the value of the good does not exceed the EU 'limits' but is not covered by those of the OGEL, the applicant should submit a request for a UK individual licence.

The second scenario recalls partially the former and concerns those cases in which the object should be exported within EU territory. Also in this case, in fact, depending on whether the good is covered or not by a general export licence, the individual will have to apply for a UK individual licence.

In all these cases, for a UK individual licence or an EU individual licence, the responsible office for information, for obtaining the specific

[333] ARTS COUNCIL ENGLAND, *Procedures and guidance for exporters of works of art and other cultural goods*, 5. Available at the website: https://www.artscouncil.org.uk/sites/default/files/download file/2018%20Guidance_for_exporters_issue_1_2018.pdf.

forms, or for request submission is the Export Licensing Unit within Arts Council England[334]. Any regulatory measure mentions the necessity to physically present the object subject to controls in order to be examined. The export request authorisation to obtain an individual export licence (UK or EU) has to be completed with a full description of the object, 'detailing its full provenance or history'[335].

[334] The Procedures and guidance for exporters of works of art and other cultural goods calls on applicants to contact the Licensing Unit by telephone, to obtain useful numbers and addresses of the responsible office.

[335] ARTS COUNCIL ENGLAND, *Procedures and guidance for exporters of works of art and other cultural goods*, 5.

THREE DIFFERENT ADMINISTRATIVE STRUCTURES: A PRELIMINARY COMPARISON.

Some preliminary conclusions result from an observation of the differences between the premises of the chapter and its actual content.

Have we found our initial premises to be borne out in actual practice?

The first objective of this chapter was to determine "how relevant is the organisational structure of the administrative offices in charge of controlling the export of cultural goods to the final decisions adopted?[336]". The historical and analytical research conducted should be able to confirm or deny the assumption according to which "A considerable part of the rationales underpinning the final decision regarding an export licence is strictly connected with the expertise involved, the procedures adopted and the resources available[337]".

A first element that draws our attention is the composition of the staff involved in scrutinising the export authorisation requests submitted. Both in France and England the Committees formed for this specific purpose are quite numerous, and their membership must be worked out *ad hoc* in order to include experts in different fields. This composition has a twofold positive consequence: from one side it allows for a collective discussion on whether or not to grant an export licence. The pros and cons of different aspects (artistic, economic, legal, private, public etc...) are taken into considerations and elaborated in view of the final decision. From the other side, instead, the permanent presence of experts of different domains allows for the possibility to conduce accurate analyses in almost all circumstances.

In contrast to this scenario, in Italy the composition of the committees that scrutinise the export authorisation requests in each export office is

[336] Ivi, 1.

[337] Ibidem.

not regulated by ordinary legislation or by an internal regulation. Its composition is established case by case by each export office.

This means that the experts involved change according to the staff of the Superintendency. The consequence of this attitude is, also in this case, twofold. First of all, the would-be exporter is not aware of who is going to analyse and make the decision about his/her dossier. Secondly, the Administration may not have the necessary competence to analyse a given case, thus being compelled to ask for an external consultancy.

The second major evidence that comes from the research conducted in this chapter is the conformation of the current administrative structures entrusted with the implementation of the export control to the administrative and bureaucratic history of the given country.

French centralised structure is typical of France as a State in general, and, more in particular, it is particular to the administration of fine arts in the country since its origins. While the kind of institutional organisation changed—passing from the Monarchy, to the Empire and then to the Republic—its key organisational structure remained quite stable. The decision was and still is directly enacted by the King/Emperor/State. England, for its part, since provided itself with a more organised and structured administration to implement the control on the export of goods having cultural interest, maintained its administration as independent as possible. Moreover, all the surveys and the reforms concerning the efficiency of civil servants regarded, consequently, also the administration that specifically deals with the management of cultural heritage. Italy, instead, although the country with the most ancient tradition in the administration of cultural property, is the only one that has called into question its very structure. This took place when different proposals and suggestions to establish an independent authority responsible for implementing cultural heritage legislation were put forward. This happened during the mid-XX century, when a massive reorganisation of cultural heritage administration was underway. At the end, notwithstanding these attempts, the organisational form in place since the pre-unification period was—in its main structures—maintained. In this regard, it can be affirmed that the

Italian administrative decentralisation, probably, is a direct effect of the 'late' unification of the State.

Another initial premise of the chapter concerned the comparison between the three case studies chosen. "The administrative structure managing the national cultural heritage were established in Italy, France and England in different periods of time. Despite the fact that their organisation is justified by their own legislative and governmental history, it is interesting to trace which aspects they have in common and which ones are not taken as a model to follow[338]".

Regarding this point, the analysis conducted inclines toward a negative conclusion. In other words, the impression is that the three countries are deeply-rooted in their own administrative traditions.

Even if there was a reciprocal interest in the functioning of the other systems (Italy towards France and England; France towards Italy), a true influence of one on the other is not visible in this specific domain.

The third and last macro-theme of this chapter concerned the analysis of the nature and scope of the required documentation to export a cultural asset from each of the three countries.

This qualitative investigation was needed to understand whether a merely quantitative comparison between them was possible and, if so, to which extent.

What immediately stands out is the heterogeneity of the existing certificates and licences; the expression 'different certificates for different performances' can be therefore reaffirmed and confirmed.

Italy is the case study with the greatest volume of documentation and the only one, in particular, which requires certificates even for the export of those goods that are excluded by state control by the regulation in place. The self-certification of contemporary art, therefore, is one of a kind and cannot be compared with any other documentation available

[338] Ivi, 3.

in France and England. In order to avoid this, in England Open General Export licences are granted by the Secretary of State for certain kind of goods.

Another element that could alter a hypothetical quantitative comparison is the temporal validity of export certificates. Taking into consideration the authorisation to export a good permanently from one of the countries analysed toward an *infra* UE destination, major structural differences regarding the temporal validity of the required documentation persist. In Italy, once submitted, the certificate of free circulation is valid for five years and cannot be renewed. In France, the export certificate (the so called 'passport'), instead, is valid for a duration of twenty years with regard to objects produced less than one hundred years before and after its expiration can be renewed. The same export certificate, if issued for a good produced more than one hundred years before, is valid on a permanent basis. This difference alone allows to affirm that a merely quantitative comparison between the number of Italian certificates of free circulation and the French export certificates may be rendered problematic by this major qualitative difference.

CHAPTER III: ADMINISTRATIVE DECISIONS, JUDICIAL REVIEW AND PRIVATE SECTOR

While the previous chapter was dedicated to analyse the organisation of the administration in charge to control the export of objects having a cultural interest and its way of proceeding in adopting its decisions, now it's time to investigate the substance and the effects of the decisions themselves.

In the following paragraphs a historical perspective will be applied to investigate whether the administration had and has at its disposal some established criteria on which to base the evaluation regarding the exportability of a given item. And, if that is the case, what are these criteria are and in what degree of specificity they are formulated?

One of the first elements that will be interesting to detect is when the administration in charge of protecting the national cultural heritage adopted these general guidelines. Consequently, we will trace the similarities and differences in the aforementioned criteria between Italy, France and England.

The availability of given criteria, especially when they refer to the identification of artistic features, can easily generate different kinds of interpretations. This second aspect will be particularly evident in the review of the administrative decisions, through which it will be possible to trace a sort of history of the meanings given to concepts like 'artistic relevance' or 'national treasure'.

Concerning the possibility to conduct an overview of the administrative decisions, the comparison between the three countries under consideration will reveal differences regarding the availability of their documentation and information.

Another element which deserves to be analysed is the way the Administration 'interacts' with its users. The use of the verb 'interact' here means how the administrative measures adopted are justified and how the motivations provided are accurate. In addition, the time necessary to adopt the final decision and the observance of the due date provided for by law will also be considered. All these factors influence

and determine a different kind of relationship between public and private sector.

Furthermore, there is another relationship—strictly connected to the previous one—that will be investigated in this chapter. This is the relationship between administrative decisions and judicial power, namely the eventual judicial review over the decisions adopted by the Administration. The diverse resort to this legal instrument, both in quantitative (the number of appeals) and in qualitative (the reasons justifying the appeals) terms may illuminate this administrative-judicial inter-relation.

These analyses, altogether with those conducted in the previous chapters, will help to clarify the nature of the decisions adopted by the Administration regarding the exportability of a good of cultural interest. All the steps necessary to reach the final deliberation are scrutinised so that, in view of a possible proposal to amend the proceeding for its optimization, it will be easier to detect where to intervene.

CRITERIA UNDERPINNING ADMINISTRATIVE DECISIONS

1. Administrative decisions over the exportability of an object of cultural interest in the newborn Italian Kingdom.

We saw how Italian pre-unitary states provided themselves with a regulatory framework to control the export of goods having an artistic and historic interest starting from the very beginning of the XIX century. In the short term the unification of the country did not bring radical changes with regard to the legislative provisions adopted and the organisation of the administration of cultural heritage.

What measures did the General Directorate of Fine Arts and Antiquities (GD embedded in the Ministry of Public Education) take in order to coordinate the export offices located throughout the Italian territory regarding the assessments to conduct?

Were the civil servants working in the Superintendency left free to determine the 'relevance' of the cultural asset and the detriment to the national cultural heritage that the object's removal from the country would cause?

The legislation at stake did not provide any decisive information in this respect and the archival material preserved in the State central archives confirms this assumption.

The documents that mainly validate this hypothesis are the export licences produced towards the end of the XIX century. The form of this document was quite simple and essential; it consisted of information provided both by the applicant and by the export office's civil servants in charge of the evaluation.

What is interesting to point out regarding these documents are the parts to be filled out by the civil servants containing the considerations underpinning the authorisation to grant the export licence. They are the 'reasons that induced the office to grant the export licence without first

reporting back to the Ministry so that the Ministry could exercise its right of pre-emption or refuse the export permit[339]'. These reasons had to be provided and undersigned by the 'Commisari' that examined and judged the object of cultural interest.

We can proceed by looking at some of these motivations, dividing them according to the export office which emitted them[340]. Prior to this analysis, a general consideration is needed: the reasoning given by the export office to allow export is, in almost all the cases under examination, extremely short and quite vague.

Some of the reasons provided by Bologna's export office in 1890 are: "lack of artistic value for which the export should be denied"; "artworks of very limited artistic quality[341]"; "the qualities of the artworks presented are not such as to justify their retention[342]". A minority of the forms certified that the item was a modern one or even the product of a living author, while one licence referred to a piece of furniture dated back to the XVI century stating that the "object couldn't be considered as a work of art"[343].

Most of the export licences scrutinised coming from Milan's export office did not report any reason at all, with the space set aside in the form for explanations left empty[344].

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[339] The original version in Italian is: "*Considerazioni che indussero l'ufficio a concedere l'esportazione, senza riferirne al Ministro o perché facesse uso del diritto di prelazione o ne proibisse la vendita*".

[340] The export licence was marked by the seal of the office who emitted it, so that now we can attribute the forms to the export office of a given city or another.

[341] The original Italian wording is "*opere di ben limitato pregio artistico*".

[342] The original Italian wording is "*i pregi di quest'opera non sono tali, perché se ne debba impedire la esportazione*".

[343] The mentioned export licences are stored in ACS, MPI, AA. BB. AA., b. 390, f. 26,9-3.

[344] The mentioned export licences are stored in ACS, MPI, AA. BB. AA., b. 619, f. 6229.

The same can be said for those produced by Lucca's export office in 1889.

The State Central Archive preserve also some export licences emitted in 1888 by the Naples export office, which authorised the export when the objects under consideration were modern or not considered valuable since they were broken or restored.

As illustrated, the motivations underpinning the authorisation to permanently export an object of cultural interest from Italy at the turn of the XIX century were very approximate, when existent. Their reading gives the clear impression that the authorisation to export was granted without a thorough investigation . This could be only an impression, or perhaps the export licences analysed referred predominantly to objects manifestly devoid of any artistic or historical interest.

Moreover, the examples reported provide the justifications given by the Administration only in the cases the authorisation to export was granted. We do not have any documentary evidence of the analysis conducted by the export offices towards an object whose export authorisation was denied.

Is it possible to imagine that, on such occasions, the analysis conducted before denying the export and the reasons justifying the retention were more accurate?

We can deduce some information in this regard by the archival material at disposition. A letter exchanged in 1878 between the director of the Kircheriano museum and the General Director of Museums and Archaeological Excavations of Rome helps us in this investigation[345].

The first information we have from the letter is that the General Directorate of Fine Arts and Antiquities had recently moved the Roman export office from the Superintendence in charge of excavations to the

[345] The document is stored in ACS, MPI, AA. BB. AA.

Kircheriano museum. This transfer of duties had occurred without providing any particular indication regarding its procedures.

In particular, what emerges from the letter is a disjunction between who conducted the assessment of the the object and made the evaluation regarding its exportability and the person who formally took the decision to release the export licence[346]. Besides this disjunction of tasks that could appear rather unusual, our attention is drawn to the fact that the evaluation regarding the exportability of the object was conducted in a complete subjective way. No mention is made regarding criteria taken into consideration in adopting the final decision. On the contrary, the letter testifies that the choices were made by the officer according to his/her personal opinion ('*se crede che possa essere esportato senza pregiudizio*').

To overcome such a practice, the Director of the Kircheriano museum suggested that the evaluation of the object and the decision over its exportability were the joint responsibility of the director of the museum and the civil servants working in the export office[347].

In such a way, even in the absence of any criteria or guidelines to be followed in the evaluation of the export authorisation requests, at least the margin of discretion and error of the single individual was mitigated by a decision taken by a majority.

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[346] Quoting from page 1 of the letter "*L'antico ordinamento è questo, che le istanze per l'estrazione indirizzate a questa Direzione sono trasmesse ai due adiutori, di cui uno è incaricato delle opere di pittura, l'altro di scultura. L'adiutore visitava l'oggetto sopra luogo, se crede che possa essere esportato senza pregiudizio della scienza e del decoro nazionale, ne fissa il valore secondo il quale viene applicata la tassa, e allora, dietro questa approvazione il Direttore del museo rilascia la relativa licenza (…) La S.V. intende facilmente che, da una parte, con questo procedimento mentre il Direttore ha la responsabilità per il permesso dell'esportazione, di fatto poi non ha conoscenza degli oggetti che escono da Roma*".

[347] Quoting from page 3 of the letter "*Che tutti gli oggetti da estrarsi fossero portati al Museo, dove in tutti i giorni o in alcuni della settimana, il Direttore, assistito dagli Adiutori, li visiterebbe, concedendo o negando, secondo il caso, la licenza*".

2. Assessing the exportability of an object of cultural interest in a more 'objective' way: the request for a reasoned opinion.

Just as we saw, the unification of the Italian Kingdom did not change the manner of evaluating the object and of adopting the final decision over the granting of the export licence. In the same way as in the pre-unitary States, the assessment was based on the personal opnion of the individual in charge of conducting the examination, who relied upon only his/her personal artistic-historical knowledge and tastes.

The central administration, apparently, did not deem it necessary to deliver common guidelines to all export offices in order to reach a certain degree of homogeneity in the control of export at the national level.

No changes or attempts to alter the aforementioned situation are recorded in the first half of the XX century, so that it is possible to say that, as far as this specific aspect, it was as though Italy was still divided in different regions enjoying a high degree of decision-making autonomy.

It was not until July 1972 that legislation introduced the requirement that the export offices, in assessing the detriment that the export of an object of cultural interest could cause for the national patrimony, had to comply with guidelines adopted by the General Directorate for Antiquities and Fine Arts.

The introduction of this provision falls within the framework of a bigger reform of the control on the export of movable cultural heritage, made urgent by a judgement of the European Court of Justice[348] that condemned Italy to abolish the progressive tax on the exportation provided for in article 37 of the law of June 1, 1939, n°1089.

[348] This is European Court of Justice, 7/68, *Commission of the European Communities v Italian Republic*.

Having recognised the 'extraordinary need and urgency' to modify the legislation on the export of cultural property at stake, in order to put into effect the above mentioned ruling of the European Court of Justice and to avoid a judgement of failure, the President of the Italian Republic on July 5, 1972 enacted the Law Decree (LD) n° 288[349]. Its Article 1 established that the export offices had to observe the guidelines enacted by the General Directorate for Antiquities and Fine Arts[350].

Besides expressing the need to ensure a greater consistency in the evaluations adopted throughout the territory of the Republic, the decree gives instructions regarding the agency in charge for formulating the guidelines. Moreover, the same article explicitly specified that the eventual denial of export should be justified by the export office, which must provide a reasoned opinion for the decision adopted ('*A motivato giudizio dei competenti uffici di esportazione delle soprintendenze alle antichita' e belle arti*').

It is worth underling this last passage since it is the first time that the Administration was required, by law, to provide the motivations that led to authorise or to deny the export of a given object[351]. By asking to reveal the reasoning underpinning the adoption of a given decision rather than

[349] The law decree was proposed by the Minister of Public Education, in agreement with the Ministers of Foreign Affairs, Justice, Finance, Treasury and Commerce.

[350] The original wording in Italian is "*Nella valutazione da compiere ai sensi del precedente comma i competenti uffici si attengono ad indirizzi di carattere generale stabiliti rispettivamente dalla Direzione generale delle antichità e belle arti, dalla Direzione generale delle accademie e biblioteche e per la diffusione della cultura del Ministero della pubblica istruzione e dalla Direzione generale degli archivi di Stato del Ministero dell'interno*".

[351] Art. 35 law 1089/39, whose is replaced by Article 1 of the law decree 288/72, did not require the Administration to provide any motivations. It stated: "*È vietata l'esportazione dallo Stato delle cose indicate nell'art.1 quando presentino tale interesse che la loro esportazione costituisca un ingente danno per il patrimonio nazionale tutelato dalla presente legge*."

another, the Government wanted to limit the total freedom of which the Superintendence had enjoyed so far.

Besides guaranteeing greater transparency regarding the activity of the Administration, the obligation to provide a reasoned opinion should ensure, also, that the decision-making body perform a deeper preliminary analysis before issuing its final decision.

On August 2 1972, with 343 votes in favour and 161 against the LD n° 288 was converted in law[352].

The reading of the parliamentary debates anticipating the approval of the law decree clearly demonstrate that the introduction of the duty, for the administration, to observe general guidelines and to give a reasoned opinion on the exportability of an object of cultural interest, was subsumed within other innovations of the 'reform'. Major attention was addressed to the abolition of the progressive tax on export required by EU legislation and by the ruling of the European Court of Justice.

This is to say that, notwithstanding the importance of such provision and the relevance of its introduction, apparently it was an issue that politicians were not really concerned about. During the discussion of the bill in the Chamber of Seputies—the same day the vote took place—there was only one reference—raised by Socialist deputy Moro Dino—to the introduction of the duty to give a reasoned opinion. During his statement the deputy showed considerable mistrust about the possibility for the Superintendence to provide thorough justifications for the decisions adopted. According to him, in fact, these peripheral organs of the administration of cultural heritage could be considered one of many State agencies absolutely inadequate and unsuitable to the performance of their functions. The deputay said this was mainly due to the lack of personnel and the tremendous volume of tasks they had to carry out[353].

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[352] This is the law n° 487 of August 8, 1972, published in the Official Journal of August 28, 1972 n° 223.

[353] The original version of Moro Dino's statement is "*Ma davvero, onorevoli colleghi, crediamo che i sovrintendenti alle antichità e belle arti abbiano la possibilità*

The only reply to this comment was that of deputy Berté, rapporteur on the draft law. Although acknowledging the Superintendence's lack of personnel, Berté did not share the opinion that the Superintendence would not be able, *a priori*, to provide a reasoned opinion over the exportability of an artwork.

3. General criteria to be taken into consideration by the export offices.

Despite the doubts expressed about the performance of the Superintendence, the bill was approved, so that the provisions contained therein became law. According to its Article 1, from that moment onwards the

> "Judgment aimed at assessing the detriment caused to the national patrimony by the export of an object which—considered in its own or in the context to which it belongs—has an artistic, historical or archaeological interest (…) had to be formulated according to general standards established by the general directorate of fine arts and antiquities".

The above mentioned norm, therefore, gave mandate to the General Directorate of Fine Arts and Antiquities—the branch of the Administration specialised in the sector of artifacts, artworks and archaeology—to identify those characteristics that would have been appropriate to detect the artistic interest of any cultural good requested to be exported.

(nelle condizioni di assoluta incapacità in cui si trovano le sovrintendenze, per la mancanza di personale, per l'enormità di compiti che sono chiamate a svolgere), nella loro struttura attuale, di esprimere un giudizio motivato sui beni per i quali rilasciare la licenza di esportazione? Se c'è un settore dello Stato assolutamente carente per l'incapacità di svolgere la propria funzione in cui è stato messo, questo è il settore delle Soprintendenze artistiche. (…) Noi davvero riteniamo che possano esprimere un giudizio, che sia motivato, sull'opportunità di rilasciare o meno la licenza di esportazione di un bene artistico?".

See the report of the Chamber of deputies' session of August 2nd 1972, 1264.

It is not possible to trace the path that led the General Directorate of Fine Arts and Antiquities to establish those criteria. The documentation, if any, concerning the discussions about their identification or any minutes of the meetings during which they have been approved are still not accessible[354]. Archival research aimed at looking for these information will be possible starting in 2024.

The 'General criteria to establish when the export of objects of artistic, historical, archaeological or ethnographic interest is a detriment to the historical or cultural patrimony of the nation' were published on May 13, 1974 in the form of a circular of the Ministry of Public Education. The circular reproduced the report of the meeting held on January 10, 1974 before the General Directorate of Fine Arts and Antiquities when the I and II section of the Superior Council of Antiquities and Fine Arts (*Consiglio superiore belle arti e belle arti*) held a meeting.

The presidency of the meeting was entrusted to Giulio Carlo Argan, art historian and president of the II section of the Superior Council of Antiquities and Fine Arts [355].

After having highlighted the difficulty of establishing general criteria in such a broad and varied subject, the committee proceeded to list them. The criteria are divided into two groups, with regard to the 'uniqueness of the objects' and the 'interest of the objects in connection with the cultural-historical context to which they belong'.

The first group includes:

a) outstanding artistic quality, normally referred to as artistic value;

[354] According to article 122 of the Italian Code of Cultural Heritage and Landscape, the documents stored in the national archives are accessible after 50 years from their release.

[355] Together with Giulio Carlo Argan, the Committee also included the president of the I section of the Council of Antiquities and Fine Arts prof. Massimo Pallottino; the counsellors Antonino Giuliano, Luigi Bernabò Brea, Guglielmo Maetzke, Gianfilippo Carettoni, Casare Brandi, Cesare Gnudi, Pasquale Rotondi; as secretaries Laura D'Alessandro and Rosetta Mosco.

b) rarity, generally regarding a specific artist/school/or in relation to the area from where the object comes from;
c) special significance of the representation;
d) original technical qualities;
e) example of antiquities or prototype of scientific object;
f) specific difficulty of future purchases due to legal restrictions, especially when it comes to an object originally from another country and of particular artistic, historical, or archaeological interest.

The second group qualified the interest of the objects in connection with the cultural-historical context to which they belong according to:

a) certain or probably belonging to an artistic, historical, archaeological or monumental complex;
b) features that make the object an important example of local traditions;
c) belonging to an area of civilization other than its own and testimony of relations between different civilizations or areas.

The criteria established in 1974 by the Committee chaired by Giulio Carlo Argan remained rather abstract and vague in their formulation. Their use, as will become clear in the next part of this chapter (*The judicial review over the decisions of the Administration*) led to many different interpretations from the export offices who had to apply them when assessing the exportability of an object.

But there is something else to outline, and this is the availability of the reasoned opinions formulated by the export offices applying the above mentioned general criteria.

There are two possible scenarios, depending on the circumstance for which the certificate of free circulation was granted or not and therefore whether the object could be exported or not. In the first case the Administration was not required to express any justifications regarding the lack of detriment to the national patrimony arising from the export of that specific item. If this was the case, the certificate of free circulation

was delivered and the person who had applied for it was able to transport the object beyond national borders.

In the second case, on the other hand, the export offices were required to justify the intention to retain the object by applying the general criteria provided by the central Administration. The reasoned opinions given, which contains the interpretations of the criteria, were not enacted in the form of decrees or other documents publicly accessible. On the contrary, they were delivered only to the person who requested the certificate of free circulation, as part of the motivations of the administrative measure denying the export (and the consequent initiation of the procedure for qualifying the object as a valuable cultural property).

How is it, therefore, possible to come to know the different ways the administration interpreted the general criteria applied to evaluate the 'interest' of an object?

This is possible, in essence, by reading the verdicts issued by administrative judges who were asked to rule against the measures adopted by export offices when denying the export of a given item.

4. Updating the Italian general criteria to assess the 'exportability' of an object.

Although not always satisfactory in practice, the criteria established in 1974 remained in force for forty-three years.

In 2014, in the context of the request for major changes in the Italian export control system raised by a group of professionals working in the art system, we encounter the first 'official' demands for the re-formulation of the above-analysed criteria.

As a result of the negotiations that took place in those years, this request for reform of the regulations was taken into consideration by the legislature which, at article 1 paragraph 176 of the law n. 124 of August 4, 2017, stipulated the necessity to:

"Define and update the general guidelines to which export offices must adhere in assessing whether to grant or deny the certificate of free circulation".

To follow up this legislative provision, the General Director of Fine Arts and Antiquities constituted a working group to draft proposed amendments to the 1974 general criteria. The results were published in the ministerial decree n. 537 enacted by the Ministry of Cultural Heritage, Activities and Tourism on December 6, 2017.

As specified by the premises of the decree, the amended general guidelines referred solely to assessing whether to grant or deny the certificate of free circulation for goods of artistic, historical, archaeological, anthropological interest. The evaluation of goods of bibliographical, documental or archival interest could not be conducted by using the same general guidelines.

The list of the general guidelines is preceded by some considerations regarding the elements to take into consideration for their formulation and also some advice concerning their use by export offices. The first point underlines how, according to the development of the artistic-historical disciplines, the object to evaluate must be considered both with regard to its intrinsic values and also to the more general context in which it is situated.

Secondly, stress is placed on the balance which should guide controls over the export of cultural assets, meaning that between the protection of the Italian cultural patrimony and safeguarding property rights. Both of these rights are, indeed, recognised and guaranteed by the Constitution. In issuing these guidelines, the Ministry of Cultural Heritage, Activities and Landscape emphasises that:

"It is extremely important to be careful in enacting a restrictive measure (such as the retention of an object of artistic interest), by avoiding judgement not clearly supported by reasonable critical and historical reasoning. Consequently, the reasoned opinions justifying the denial to grant a certificate of free circulation have to be formulated in a comprehensive way, with precise and detailed supporting motivations, updated bibliographical references and, possibly, by combining more than one criterion contained in the general guidelines".

The novelty of the updated general guidelines enacted in December 2017 lies not in the criteria to be taken into consideration by the export offices (that did not change much from 1974) but in their formulation. In fact, this time the Administration provided comprehensive background information for each criterion in order to restrict the possibility to provide different interpretations depending on the export office applying them.

The criteria are the following:

1. Artistic quality.

   Even if a fundamental characteristic of the artwork, artistic quality cannot be the only reason supporting a denial to grant a certificate of free circulation. Moreover, this criterion should be illustrated with the tools proper to art history, archaeology and anthropology. The artistic quality, finally, should be evaluated according to the object's technical qualities; the expressive ability of the artist, and the work's originality.

2. Rarity, qualitatively and/or quantitatively.

   Concerning the quality, the rarity should refer to the intrinsic features of an artwork (its content and realisation); the quantity, instead, concerns the availability of artworks of the same author or similar samples. Due to its difficult definition, using rarity as a criterion to justify the retention of an artwork requires a particularly detailed reasoned opinion.

3. Special significance of the representation.

   By special significance of the representation it is understood that the artwork should offer an uncommon standard of quality or cultural relevance. The latter is evaluated in relation to its iconographical features and the existence of a related significant documentation or historical testimony.

4. Belonging to an historical, artistic, archaeological or monumental complex or contest, even if no longer existing or not physically rebuildable.

The belonging has to be evaluated according to elements of knowledge such as to allow its existence with certainty. If the denial to export is justified by belonging to a particular context rather than for the intrinsic qualities of the artwork, the relevance of the context should also be illustrated.

5. Particularly significant testimony for the history of collecting.

This criterion allows for the appreciation of the importance of a relevant private collection, whether historical or contemporary, or of a peculiar aspect of local traditions.

6. Relevant testimony of important relations between different cultural areas, even if from foreign provenance or production.

The reference in this case is to those goods—including artefacts made by a foreign author or by Italian authors for a foreign client—that represent a relevant testimony of the cultural exchanges between Italy and the rest of the world.

There is obviously a much greater degree of detail in the amended general guidelines with respect to those enacted forty years before. The aim of the comprehensive background information provided for each criterion is to guarantee more uniformity among the export offices spread throughout the Italian regions.

5. Assessing interest in the history and art of France.

In the previous chapter we have seen the main differences between Italian and French administrative organisation implementing controls on the export of cultural property. If the former is characterised by a decentralised organisational structure, the latter was distinguished from the beginning by a high degree of centralisation.

It will be now possible to determine whether these different organigrams are reflected in different approaches to evaluating the exportability of a good of cultural interest. The disappearance of the need to coordinate many export offices throughout the territory and to

harmonise their activities could lead, for example, to prefer other measures to evaluate the interest of an object and the linked interest of the nation for its retention.

5.1 The opinion delivered by an expert.

A review of the legislative texts at stake before 1992 reveals that French administration was not asked to provide a reasoned opinion when deciding to deny the export of an object having an 'interest for the history or the art of the nation' (*objets présentant un intérét national d'histoire ou d'art*).

Moreover, besides stating that the decision to subject the good to the administrative measure of the *classement* was taken by an order of the Minister in charge of cultural affairs, there was no other information on how the decision was adopted[356].

Who, then, was in charge of establishing whether the cultural object was to be considered important to the artistic tradition or history of the nation? And according to what criteria?

Also in this case archival material proves to be fundamental in order to understand who were the actors involved and how they acted. Most of the documents that will be analysed are letters exchanged between the *Secrétariat des Beux-Arts* and the Director of the *Musées Nationaux* and of the *Ecole du Louvre*.

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[356] Article 15 of the *Loi du 31 décembre 1913 sur les monuments historiques* stated as follow: « *Le classement des objets mobiliers est prononcé par un arrêté du ministre d'Etat, chargé des affaires culturelles* ». The impossibilty to export cultural property was provided by article 21('*L'exportation hors de France des objets classés est interdite*').

The subsequent law regarding more specifically the control on the export of cultural property - *Loi 23 Juin 1941 sur l'exportation des œuvres d'art* –established, in its Article 1 « *Les objet présentant un intérêt national d'histoire ou d'art ne pourront être exportés sans une autorisation du secrétaire d'Etat à l'éducation national et à la jeunesse (…)* ».

The former was the person in charge of fine arts administration within the Ministry of Public Education—so the one who formally had to make the decision to allow the export or not. The latter, instead, was the person contacted as expert for evaluating the quality of the object.

The procedure adopted was that, once the export authorisation request was received, the Administration urged the Director of National Museums to send one of the curators—as expert—to assess the condition and the interest of the artwork. At that point the curator sent a report to his/her director that delivered the opinion to the Administration.

The reading of these letters provides an overview of the reasons taken into account in judging artworks subject to an export request.

We will proceed now with the overview of some of them. On December 10, 1942 the *Secrétariat des Beux-Arts* wrote to the Director of the *Musées Nationaux* regarding the measures to adopt regarding a request to export five artworks—respectively by Renoir, Sisley, Pisarro, Corot and Boudin[357]--made by Werner Herold. Earlier, the Director of the *Musées Nationaux* had raised objections to granting an export certificate for those paintings and now he was asked whether the *Reunion des Musées de France* was available to purchase the artworks. This information was necessary to decide whether or not to exercise the right of pre-emption at the disposal of the State according to article 2 of the law of June 23, 1941.

The kind of reasons expressed in the reply provided are relevant not only because they demonstrate the attentiveness of the investigations conducted in examining the paintings, but also because they reveal the balance between multiple interests at stake.

In this respect, on December 23, 1942 the Director of the *Musées Nationaux* received the results of the analysis conducted by his delegate, the *Conservateur au département des peintures*, on the above-mentioned

[357] The letter, together with the following replies, are stored in NA, b. 20144657/7.

artworks. The indications would be entirely forwarded to the *Secrétariat des Beux-Arts* in reply to his initial request.

Regarding the analysis conducted: first of all, we observe that all the paintings, with the exception of the Renoir's, are datable before 1900, which makes the legislative provisions of the law of June 23 1941 applicable to them. It was then suggested to the State to exercise its right of pre-emption regarding the paintings of Corot and Boudin. The *Conservateu* stated that the Corot, being a masterwork of the painter and since it was exhibited with great success in a number of exhibitions, should not leave the country and should be acquired for the collection of a national museum. The Boudin work, because of its artistic and technical quality, was described as a relevant example of the artist's production.

More precisely, the expert's opinion reported :

« *La 'Plage de Trouville' est d'une qualité exceptionnelle ; elle a été exécutée avec un grand soin, que l'on ne rencontre pas toujours dans les œuvres de Boudin. Le Musée du Louvre ne possède aucun tableau de Boudin dans cette manière, ayant cette qualité ; son acquisition pour nous galeries serait donc tout à fait désignée* ».

As mentioned, besides testifying to the precision of the investigations conducted in examining the paintings, the opinion delivered by the expert revealed also the priority accorded to balancing the different interests at stake. In confirmation of this, the letter ended with the suggestion to exercise the right of pre-emption only for the Corot and the Boudin' and to grant the export certificate for the remaining paintings, as a compensation for the detriment suffered by the applicant[358].

The aim to implement an export control that takes into considerations not only the State's interests and necessities but also the individuals' right of property is evident and a fair balance seemed to be reached.

[358] Quoting from the letter « *Si l'exercice du droit de préemption était retenu pour ces deux tableaux, je propose que M. Werner Herold soit autorisé à laisser sortir les autres, en compensation du préjudice qu'il subirait* ».

Another letter stored in the national archives testifies to the reasons supporting the proposal to refuse an export certificate because of the relevance that the painting under consideration had for the history of the nation. After the analysis of the artwork which M. Raphael Gerard wanted to export, the expert of the Louvre's painting department reported his opinion to the Director of the *Musées Nationaux*[359].

The advice given to the Administration of fine arts was to deny the export certificate, given that:

"The painting represents an episode of the war between France and Germany that took place in 1870. The subject of the artwork is therefore a direct memory of our history, which potentially might interest those who want to preserve French documentary and historical heritage. (…) Even in the absence of artistic interest, this painting has an indisputable historical and national value".

Within the correspondence under consideration it is possible to find also some requests to retain within national borders artworks with a foreign origin. This is the case of an artwork by Goya for which M. Grosshenning requested an export certificate. The opinion over its 'exportability' was delivered by Michel Martini, *chargé de mission au département des Peintures du Louvre*, according to whom the painting, belonging to the Spanish artistic tradition, was of primary importance. Its purchase by the Louvre's department of paintings would be more than desirable, considering also its good state of preservation. For all these reasons, Martini suggested denying the export certificate request ("*je vous propose de formuler un avis netttament défavorable à la demande d'exportation*").

There is evidences that the implementation of the regulatory framework aimed at controlling the export of goods having an artistic and historic interest in France at the mid-XX century took into

[359] Letter sent by M. Michel Martini, chargé de mission au département des Peintures to Monsieur le Directeur des Musées Nationaux et de l'Ecole du Louvre on April 3, 1943, NA, b. 20144657/7.

consideration not only the individuals' right of property, but also the cultural relations with foreign institutions.

In 1953, M. Darmon submitted an authorisation request to export a painting by Watteau entitled '*Le Lorgneur*' and sell it to the National Gallery of Art in Washington DC. M. Martini, who had executed the assessment of the artwork, on November 28, 1953 reported his opinion to the Director of the *Musées de France*[360].

He recommended granting an export licence for the artworks under consideration mainly for two reasons, because the Louvre already had in its collection four paintings by Watteau of the same style and because the estimated price was too high. Moreover, his advice for granting the export certificate was motivated especially because the final destination would have been an important international museum. In such a context French art would be valued and appreciated.

Martini, in his letter, notified that both the Metropolitan Museum of New York and the National Gallery in Washington had in the past asked him to report to them about relevant French artworks that the Louvre did not intend to purchase and that were going to be leave the country. In light of this 'agreement' Martini notified the two American museums about the Watteaus. The one more interested in the purchase was the National Gallery, which was therefore put in contact with Darmon so that they could reach an agreement on the sale.

What kind of information can be drawn from these letters as a whole? The question that opened this paragraph was: 'who made the decision concerning the export of cultural property in France before 1992, and what criteria were applied?'

It is now possible to provide answers for both questions, and respectively: the curators of the Louvre, who had no formal criteria to apply in assessing the interest of the object for the history and art of the nation. The only parameter or criteria upon which they could rely was

[360] The mentioned letters are stored in NA, b. 20144657/6.

their knowledge and professionalism, being among the most competent art historians in the country.

5.2 Towards the adoption of a collective reasoned opinion.

Until the beginning of the '60s the administrative system to control the export of cultural goods in France continued to operate in the way so described. The opinion was delivered by a single expert who did not receive any formal requirements to guide his/her evaluation.

By the end of 1961, the Minister for Cultural Affairs sent a letter to the Director of the French Museums and to all the curators of the national museums who were asked to deliver their opinion on the exportability of artworks[361]. The purpose of the missive was to give instructions regarding the decisions to be adopted with respect to the most important export authorisations.

As stated by the Minister for Cultural Affairs: « *Il m'est apparu nécessaire en effet que les autorisations d'exportation les plus importantes soient entourées de précautions et soumises à une procédure spéciale* ».

Whenever the curators considered the interest of an artwork for the history or art of the nation to be of major importance, they had to consult the *Conseil artistique de la Réunion des musées nationaux*. The latter body, in addition to the cases just mentioned, had to be consulted also in case the curator had doubts regarding the assessment of the artwork and wanted to have some advice.

Finally, we should point out the introduction of the administration's duty to release a reasoned opinion when denying an individual the possibility to export a cultural asset and when the property was purchased by the State by the right of pre-emption.

[361] The letter sent on October 3, 1961 by the Ministre d'Etat chargé des affaires culturelles to Messieurs les conservateurs en chef, et conservateurs des musées nationaux assurant les examens en douane s/couverture du Directeur général des Arts et des Lettres et du Directeur des Musées de France is stored in NA, b. 19940399/7.

These instructions were communicated during a meeting called by the Ministry of Culture at the *Direction des Musées de France* on-February 19, 1988[362]. The reason for this additional duty was the entry into force of the law of July 11, 1979 that obliged the French Administration to provide a reasoned opinion when issuing an unfavourable decision.

In order to clarify the scope of the law, the prime minister sent a circular letter, on September 28, 1979, specifying the measures that each Ministry had to adopt.

With regards to the Ministry of Culture, the cases in which the reasoned opinion had to be released were the adoption of a:

1) *Refus d'autorisation d'exportation d'une œuvre d'art (article 1ere de la loi de 1941)*[363] ;
2) *Exercice du droit de retenue sur une œuvre d'art mise à l'exportation (article 2 de la loi de 1941)*[364].

6. Les avis de la Commission Consultative des Trésors Nationaux (CCTN).

On December 31, 1992, French Parliament approved a new law that amended the regulatory framework controlling the export of cultural

[362] The report of that meeting is in NA, b. 19920638/5.

[363] It is furthermore specified that « *Les décision d'interdiction d'exportation non assorties d'achat doivent être motives en droit par référence explicite à l'article 1er de la loi de 1941 et, en fait, par des considérations liées à l'importance intrinsèque de l'œuvre pour le patrimoine national, indépendamment de son intérêt pour les collections publiques* ».

[364] « *Doivent être motivés en droit et en fait l'arrêté ministériel d'acquisition aussi bien que la lettre notifiant cette décision à l'exportation. La motivation de droit doit citer l'article 2 de la loi de 1941 ; la motivation de fait doit, à partir des éléments fournis par les conservateurs, préciser les raisons essentielles de la décision (sous-représentation de l'artiste ou du type d'œuvre en question par exemple). Eviter d'employer des arguments susceptibles d'entacher la décision de détournement de pouvoir (exemple la valeur de l'œuvre très inférieure au prix du marché*) ».

property[365]. The two major changes regarded the definition of the 'interest' that could justify the denial of the request to permit the export of an object of cultural interest and the subject responsible for adopting this decision.

Article 7 of the law 92-1477 specified, inparagraph 1, that the 'export certificate could not be denied but for goods having the characteristics of national treasure'. Paragraph 4 specified that 'the denial of the export certificate could be delivered only upon submission of a reasoned opinion delivered by a commission chaired by a member of the Council of State, composed of representatives of the State and qualified persons. The Council of State, by decree, will lay down the detailed arrangements regarding the appointment of its members and the manner of publications of its decisions'.

These same legislative provisions have been reproduced in the current *Code du Patrimoine*, at its article L111-4.

We have already analysed the composition of the CCTN in the first part of the previous chapter (see paragraph 10.3); now it is time to analyse the decisions delivered by this body and their accessibility.

Regarding the last point, it is possible to trace a first difference between Italy and the France. In fact, the recommendations of the CCTN are publicly accessible since they are published in the Official Journal of the French Republic. On the substance of the recommendations, changes regarding the way of adopting the decisions—besides the collegiate nature of the deliberation—are not recorded: no criteria necessary to define the qualities that constitute a 'national treasure' are elaborated.

An overview of the recommendations delivered by the CCTN in the last fifteen years allow us to identify some general features, without prejudice to the specificity of every one of them.

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[365] This is law n° 92-1477 of December 31, 1992 '*Relative aux produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie et de douane*'.

First of all, with the exception of a number of recommendatins issued in 2002 which have a reduced length, almost all of them are quite detailed and specific[366].

Depending on the object under consideration, the recommendation to deny the export certificate is justified by the presence of extrinsic values such as the artistic quality (most recently concerning an oil painting by Rembrandt, titled 'Le Porte-drapeau' or 'Le Porte-étendard')[367] or the prestige of its technical workmanship (in 2017 this aspect was highlighted for the painting by Salvador Dali entitled 'la Pêche au thon')[368].

In other cases, the reason underpinning the decision to retain the item in France was explained by the circumstance that, prior to the export request, the object (already known by the experts because of its importance) had disappeared[369].

Other recommendations issued by the CCTN highlight the importance of the object on the ground that its retention could provide deeper knowledge of certain topics (i.e, the retention of a book published in 1494 would enrich research on the French language spoken in the XVI

[366] Claire Chastanier - Adjointe au sous-directeur des collections, Direction générale des patrimoines, Service des musées de France- interviewed by the author on July 2018, confirmed this perception. Here part of her witness "*Les avis de la Commission (…) c'est à chaque fois une justification cas par cas. Cela demande beaucoup de travail car il faut peser tous les mots de la motivation. Il faut que cela soit suffisant pour dire que c'est un trésor national, quelque chose que doit être rare voir unique, exceptionnel (…). J'essaye de peser toutes les mots et de vraiment expliquer pourquoi la commission a décidé qu'il s'agit d'un trésor national. Evidemment il y a des cas très différents, des œuvres du 18eme siècle à une Alfa Romeo de 1932. Il y a une motivation spécifique pour chaque refus*".

[367] Avis n° 2019-02 de la Commission consultative des trésors nationaux, published in the JORF n°0093 of April 19, 2019, text n° 123.

[368] Avis n° 2017-09 de la Commission consultative des trésors nationaux, published in the JORF n°0177 of July 30, 2017, text n° 60.

[369] In this regard, see the Avis n° 2018-02 de la Commission consultative des trésors nationaux, published in the JORF n° 0094 of April 22, 2018, text n° 83.

century)[370]; the discovery of unknown aspects of an artist's production (such as Toulouse-Lautrec's sketchbook with skteches of his paintings)[371] and perhaps because the only other exemplar of the same kind was in private hands.

Finally, other items were considered national treasures because considered important testimony of technological progress or local traditions (in this regard retention was recommended of a 1930s Alfa Romeo[372] and a musical instrument dated 1572[373]).

To conclude, whatever may be the reason, the opinion delivered by the CCTN had to demonstrate that the object under consideration was of particular interest for the national patrimony from an historical and artistic point of view, and thus must be considered a national treasure.

7. The English Waverly criteria.

Having analysed the criteria taken into consideration by the Italian and French Administrations when assessing whether or not to grant an

[370] The book in question is '*Le Livre de la chasse du grant seneschal de Normendie. Les Ditz du bon chien Souillard qui fut au roy de France, XIe de ce nom de Jacques de Brézé*'. See Avis n° 2003-04 of February 19, 2003 de la Commission consultative des trésors nationaux, published in the JORF n°57 of March8, 2003, page 4123, text n° 101.

[371] Avis n° n° 2005-02 de la Commission consultative des trésors nationaux, published in the JORF n°58 of March 10, 2005, page 4179, text n° 98.

[372] This is the case of an Alfa Romeo 8C 2300 châssis court 2211 079, carrosserie Figoni, produced in 1932. See the Avis n° 2017-11 de la Commission consultative des trésors nationaux published in the JORF n°0238 of October 11, 2017, text n° 125.

[373] This is a musical instrument manufactured by Andrea Amati, described as follow « *Basse de violon recoupée en violoncelle, différenctes essences de bois, décor polychrome, notamment aux armes de Charles IX, Crémone, 1572* ». See the Avis n° 2016-04 de la Commission consultative des trésors nationaux published in the JORF n°0139 of June 16, 2016, text n° 90.

export licence, we shall now investigate how such decisions are made in England.

From the previous chapter we know that the body in charge of evaluating the export authorisation requests is the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA). Its constitution, evolution and membership have been analysed.

Do members of the RCEWA have some criteria at their disposal in order to decide whether or not to grant permission to export an object? How can we discover the reasoning underpinning an eventual denial?

As concens the legislation at stake, the Export Control Act 2002 provides, at its Section 9, some useful indications on this matter. Point 3 of the 'Guidance about the exercise of functions under control orders' concerns the role of the Secretary of State, stating that the latter "must give guidance about the general principles to be followed when exercising licensing powers to which this section applies".

As a direct consequence of this statement, point 4 of the same section specifies how "Any person exercising a licensing power or other function to which this section applies shall have regard to any guidance which relates to that power or other function".

The reading of these two provisions makes clear, indeed, that the RCEWA is obliged to comply with a number of criteria in fulfilling its functions, and that these criteria are established by the Secretary of State[374].

The content and the extent of those criteria will be analysed in sequence.

With regard to the accessibility of information regarding the assessments made by the RCEWA, it is again the Export Control Act 2002 that—in Section 10, entitled 'Annual Report'—that provides some

[374] In this case this is the Secretary of State for Digital, Culture, Media & Sport.

indications. The whole section consists of two points, which are the following:

"(1) The Secretary of State shall lay before Parliament in respect of each year—

a) a report on the operation during the year of any order under section 1 so far as relating to the export of objects of cultural interest; and
b) a report on other matters relating to the operation of this Act (and any order made under it) during the year.

(2) A report required by subsection (1) shall be laid as soon as practicable after the end of the year to which it relates".

Coming back to the criteria, the general principles that the RCEWA has to follow were established in 1952, when a licensing system controlling the export of cultural goods was introduced in England.

They were published for the first time in the 'Report of the Waverly Committee on the Export of Works of Art'[375]. For this reason, they have always been referred to as the 'Waverly criteria'.

The so-called 'Waverly Report' is rather long and comprehensive of all legislative and regulatory aspects of export control. The criteria to be used in order to assess the 'national importance' of an object are listed starting from paragraph 187.

This section of the Report is called 'Principles of Control—General' and contains the 'questions that the responsible should ask themselves in seeking to determine whether an object is f such national importance that its export ought if necessary be prevented'. Then follows the enumeration of the three criteria, each of which is described in detail.

[375] *Report of the Committee on the Export of Works of Art*, 1952, a reproduction of the Report is stored in TNA, b. FO 371 98998.

1) *Is the object so closely associated with our history and national life that its departure would be a misfortune?*

The description that follows is of a deductive type. In fact, the criterion specifies 'outstanding examples of that category in possession of national institution'. Apart from that, the other clarifications on the subject are that the category includes 'foreign as well as British works' and also 'object(s) closely associated with the history of British colonisation abroad, and the development of Commonwealth'.

2) *Is the object of outstanding aesthetic importance?*

The extent of this category is illustrated providing as example some masterpieces collected in the English national collections, such as the 'Assyrian relief and the Elgin Marbles in the British Museum or the Bernini in the Victoria and Albert Museum'.

The fact of mentioning objects of foreign origin is probably aimed at defining the difference of the second criterion with respect to the first. The object's aesthetic importance, in fact, should be evaluated *per sé*, without taking into consideration any kind of relation with the nation or its history. It is a pure extrinsic quality.

3) *Is the object of outstanding significance for the study of some particular branch or art, learning or history?*

Given the difficulty of providing a unitary description of this criterion, the Report indicates: "This category includes a wide variety of objects".

Regarding the application of the Waverly criteria, it is specified that the exportability of an object doesn't have to depend only and exclusively on 'how high the object stands in one or more of these categories', but also 'on whether a reasonable offer to purchase can be assured'. This clarification reflects the importance that the economic value of the item plays in the implementation of export control in England. In fact, since the purchase by a national institution or individual would be compulsory in order to prevent the removal of a given item, any

justification on the grounds of one of the Waverly criteria would collapse in the absence of the necessary funds to acquire the object[376].

Moreover, in case an object falls under more than one category, special efforts to retain it within national borders should be made.

Since 1952 the Waverly Criteria have never been revised, nor have any political parties, experts or professional associations asked for any revision[377]. The only adjustment made concerns the wording of the Waverly criterion number 1, which since 2015 has the following formula: '*Is it closely connected with our history and national life?*'. The phrase 'that its departure would be a misfortune' has been removed.

8. The Reviewing Committee annual report on the export of objects of cultural interest.

As required by article 1 of the Export Control Act 2002, each year the Secretary of State for Digital, Culture, Media & Sport releases an Annual Report regarding the export of objects of cultural interest.

[376] In this respect, it is possible to underline a similarity between the English and the French administrative approach. In fact, as stated by Claire Chastanier, Adjointe au sous-directeur des collections, Direction générale des patrimoines, Service des musées de France (interviewed by the author on July 2018) « *Notre plus gros problème n'est pas de prendre la décision de faire les refus de certificat, ma on essaye de prendre la décision de le faire si on a des chances raisonnables d'arriver à acquérir derrière, sinon cela veut dire que pour la forme c'est pas bien perçu par le marché ni par les propriétaires. Et ça n'a pas vraiment de sens (…) Normalement la discussion des membres de la commission, va porter vraiment sur l'intérêt patrimonial majeur de l'œuvre, le prix est une considération secondaire. C'est vrai que si arrive une œuvre qui vaut 50 millions, le prix va rentrer dans les considératiosn. Mais l'essentiel de la discussion et ce sur quoi elle doit se concentrer c'est « est-elle un trésor national ou pas », en faisant abstraction du prix* ».

[377] This information was confirmed by Frances Wilson, Manager of the Export Licensing Unit within the Arts Council England during an interview with the author.

The release of these annual reports is an extremely useful source of information, containing not only all the recent developments in the regulatory framework that governs the control on the export of cultural property, but also statistics on the number of export demands received and the results thereof.

In this respect, the cases in which, during the year under consideration, export licences were denied are reported one by one, with the corresponding explanation of the reasons justifying the retention.

The section of the Annual Report entitled 'individual export cases' offers a complete overview of what happened to objects that were determined to meet at least one of the Waverly criteria. It contains a list of all the cases referred to the Secretary of State because one of the Waverly criteria was met. A second list mentions the items acquired by institutions or individuals in England and, finally, a third column lists the national treasures that were 'not saved'.

In 2019, for example, of fifteen objects that met at least one of the Waverly criteria, three were later withdrawn; seven were acquired by English institutions or individuals; and five were 'not saved' and received an export licence.

It is possible to identify some features in common in the description of the individual export cases recorded in the annual report.

They are:

- an initial indication of the reason why the applicant applied to export and the economic value indicated in the export licence (plus the specification of how that price was reached, e.g. in an auction or private sale…);
- the name of the person called to act as expert adviser and of the Waverly criterion/a the object met;
- a detailed analysis of the characteristics of the object and an explanation of its national importance (both provided by the expert adviser);

- information and judgements about the object provided by the applicant. This particular data has the function of cross-examination with respect to the assessment conducted by the expert adviser;
- the date in which the RCEWA heard the case and analysed the object plus the opinion of the Committee;
- the indication of the initial and subsequent deferral periods established by the RCEWA and the name of the institution interested in purchasing the item;
- some pictures of the object under consideration.

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

9. Who watches the watchmen?

With the first part of this chapter the investigation regarding the shaping of the decisions adopted by the Administration has come to a conclusion. We have attempted to analyse every step of the process that can influence and alter the assessments regarding whether or not to authorise the export of an object of cultural interest.

It has been possible to observe how the criteria that affect the administrative measures issued differ from one national system to the other. The regulatory framework determines whether the final administrative decisions are driven only by the evaluation of historical-artistic factors (as happens in Italy), or also by economic considerations (which is the case, albeit in different ways, in France and England).

Having illustrated the overall picture of the legislative and regulatory elements that control the Italian, French and English definitions of cultural property, it is time to understand the 'limits', if any, on this public power.

If the State has the authority to stop a citizen from freely disposing of his/her property by restricting a right considered to be inviolable, who is responsible for monitoring compliance with the legitimate exercise of this power?

This ancient dilemma can be summed up in the newly-relevant phrase 'Who watches the watchmen?[378]'.

The judicial review of the administrative measures adopted with respect to cultural heritage proves to be particularly tricky, especially for

[378] For a comparative overview of the evolution of the judicial review doctrine see D. DE PRETIS, *Il sindacato sulla discrezionalità*, in G. NAPOLITANO (edited by), *Diritto amministrativo comparato*, Giuffré, Milano, 2007, 306 f.

the role that 'soft sciences' (such as the artistic and historical ones) play in these cases.

In addition, it is important to stress also the complexity of determining the advisability of permitting the export of cultural assets. This decision, indeed, is the result of a complex procedure involving multiple activities and that runs along the razor's edge of the separation of powers[379].

Finally, the attempt of this section is that to understand what has been, and what is now, the role of judicial power in circumscribing the legal definition of cultural property.

Throughout the investigation of the case-law on the control of the export of goods having an artistic and historic interest, the relationship between cultural heritage, administrative measures, and judicial power will become apparent. We will understand how it is precisely the relation between these three factors that is able to define the national cultural heritage. Quoting a statement of Noé Wagener:

« *Le patrimoine n'est pas seulement une question d'histoire, d'historie de l'art ou d'histoire de l'architecture, pas plus qu'il n'est seulement une affaire d'identité collective. Il est aussi un fait administratif, qui a presque toujours partie liée avec le droit*[380] ».

10. Italy: judicial review of the certificate of free circulation in light of certain categories of administrative law.

In analysing the review operated by the administrative courts over the restrictive measures implemented when denying the permission to export an object of cultural interest (the refusal to deliver the certificate of free circulation and the declaration of the artistic restriction over the

[379] For scome scholarly references concerning the separation of powers see, among others, F. MERUSI, *Sentieri interrotti della legalità. La decostruzione del diritto amministrativo*, Il Mulino, Bologna, 2007; F. CORTESE, *Amministrazione e giurisdizione. Poteri diversi o poteri concorrenti?*, in P.A. Persona e Amministrazione, n. 2, 2018, 99 ff.

[380] Exposition, *Juger le patrimoine*.

good), we must make reference to some 'classical' categories of administrative law.

These are administrative discretion—one of the central issues of the debate over public administration, according to Massimo Severo Giannini[381]- and the so-called technical discretion. The former is characterised by a degree of freedom that the Administration (being in every case bound to defend the public interest) has when, having to make a choice in complex situations, it compares different interests at stake[382]. The technical discretion, instead, although 'not easy to define in its characteristics' since it is 'quite slippery and historically variable'[383] is defined as "a peculiar kind of discretion that distinguishes itself for relying on non-legal standards, rather technical, and on standards not universally demonstrable, and therefore questionable[384]".

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[381] M.S. GIANNINI, *Istituzioni di diritto amministrativo*, Giuffré, Milano, 1981, 265.

[382] The definition of 'administrative discretion' is provided by M.S. GIANNINI in *Il potere discrezionale della pubblica amministrazione. Concetti e problemi*, Giuffré, Milano, 1939.

Conscious of the huge doctrinal debate regarding the characteristics of administrative discretion, for further analysis—without any claims of being complete—see: A. PIRAS, *Discrezionalità amministrativa*, in Enciclopedia del diritto, vol. XIII, Milano, 1964, 64 ss.; C. MORTATI, *Note sul potere discrezionale*, in *Scritti giuridici*, III volume, Giuffrè Milano, 1972 e *Discrezionalità*, in Novissimo digesto italiano, vol. V, Torino, 1968,1108 ss; V. CERULLI IRELLI, *Note in tema di discrezionalità amministrativa e sindacato di legittimità*, in Diritto processuale amministrativo, 1984, 1, 463; B. MATTARELLA, *Discrezionalità amministrativa*, in Dizionario di diritto pubblico diretto da S. CASSESE, III, Milano, 2006, 1993.

[383] F. CINTOLI, *Discrezionalità tecnica (diritto amministrativo)*, in Enciclopedia del Diritto, Annali II, volume 2, Giuffré, Milano, 2008.

[384] Ibidem.

For further doctrinal analysis regarding the technical discretion see: E PRESUTTI, *Discrezionalità pura e discrezionalità tecnica*, in Giurisprudenza italiana, vol. 4, 1910, 16; P. VIRGA, *Appunti sulla c.d. discrezionalità tecnica*, in *Jus*, vol.1, 1957, 95; V. BACHELET, *L'attività tecnica della pubblica amministrazione*, Giuffrè, Milano, 1967; C. MARZUOLI, *Potere amministrativo e valutazioni tecniche*, Giuffré, Milano, 1985; F. SALVIA, *Attività amministrativa e discrezionalità tecnica*,

To conclude this preface, it seems useful to mention also the category of the 'technical assessment' (*accertamento tecnico*). This is always an evaluation made by the administration, but this time "by applying standards derived from 'hard-sciences' (…). This leads to a result that is verifiable in absolute terms; the decision adopted by the Administration is therefore demonstrable or falsifiable in a definite way[385]".

The necessary lack of deeper information regarding the conceptual evolution and the contents of the above-mentioned categories (not being our purpose to analyse these notions *per sé*, but rather to observe their application in a very specific context), helps, however, to compare them and grasp their main differences.

Starting from the two typologies of discretion, while the administrative one consists both of the moments of the assessment and of the choice when different interests at stake are compared; the technical one includes only the element of the assessment but not the choice[386].

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in Diritto Processuale Amministrativo, 1992, vol. 4, 685; D. DE PRETIS, *Valutazione amministrativa e discrezionalità tecnica*, CEDAM, Padova, 1995.

On the subject of the technical discretion concerning artistic and landscape assessments, see: A. ROTA, *Tutela dei beni culturali tra tecnica e discrezionalità*, CEDAM, Padova, 2002; A. GIGLI, *La funzione di tutela del paesaggio tra discrezionalità tecnica e compresenza di interessi primari*, Rivista quadrimestrale di diritto dell'ambiente, 2015, 2; G. SEVERINI, *Tutela del patrimonio culturale, discrezionalità tecnica e principio di proporzionalità*, in *Aedon*, 3, 2016; P. CARPENTIERI, *Semplificazione e tutela*, in *Aedon*, 3, 2016; G. SIGISMONDI, *Valutazione paesaggistica e discrezionalità tecnica: il Consiglio di Stato pone alcuni punti fermi*, in *Aedon*, 3, 2016; G. C. DI SAN LUCA, *Il sindacato giurisdizionale sulle valutazioni tecniche in materia ambientale*, Giustamm- Rivista di diritto pubblico, 7, 2016; A. CIOFFI, *Giudice amministrativo e valore dell'opera d'arte*, in *Corriere del Merito*, 2011, 8-9.

[385] F. CINTOLI, *Discrezionalità tecnica (diritto amministrativo)*, op. cit.

[386] See F. CARINGELLA, *Manuale di diritto amministrativo*, III ed., Giuffré, Milano, 2008. Specifically 962: "*Mentre la discrezionalità amministrativa consta sia del momento del giudizio nel quale si acquisiscono e si esaminano i fatti che del momento della volontà e della scelta, nel quale si compie una sintesi degli interessi in gioco; quella*

The distinction between the two concepts of technical discretion and technical assessment, on the other hand, is more straightforward and evokes the disciplines to which the administration makes reference. These are the so-called humanistic sciences, in the former case, and the 'hard-sciences' in the latter[387].

In the evaluations conducted by the administration responsible for cultural heritage and activities when scrutinising the *dossier* of artworks proposed for exportation, it is possible to detect both the typologies of discretion mentioned. If on the one hand, in fact, technical and scientific assessments can support the definition of an object as important for its historical and artistic interest etc., on the other hand discretionary and opportunity-related assessments are the basis of the decision to permanently retain the object within national borders.

Evidence of the balancing of interests between the legislative, executive, and jurisdictional powers in the field of cultural heritage emerge from the study of the rulings of the administrative judge who evaluates the refusal to grant a certificate of free circulation issued by the responsible offices.

Besides allowing the investigation about how the categories of discretion are implemented in this specific matter, the analysis of the relevant case-law also enables us to highlight the dynamics of the relationships among the different state powers and those between the private and the public sector.

The heterogeneity of the interests at stake, as well as the necessarily different interpretations of the general criteria to assess the exportability of an object, are a reflection of the intrinsic complexity of the very

tecnica si risolve solo in analisi di fatto (…) ma non di interessi. Contiene il profilo del giudizio ma non della scelta".

[387] Regarding the validity of such a distinction between soft and hard sciences, see F. SALVIA, *Attività amministrativa e discrezionalità tecnica*, op. cit., in particular 704.

definition of cultural property[388]. Add to this the fact that the decision-making phase on the exportability of an object of historical/artistic interest is a moment of particular importance both for the definition of the national cultural heritage[389] and for the development and maintenance of an art market that is active and reliable.

11. Judicial review of the so called 'technical discretion' with regard to the export of cultural property.

How do the judicial reviews of the denial to grant the certificate of free circulation fit into the debates regarding the power of the administrative judge over the discretional decisions adopted by the Administration?

In 2006, for example, the Regional Administrative Court (RAC) of Sicily issued a ruling in line with the traditional interpretation of the technical discretion of the administration regarding the so-called soft sciences. Anchored in a vision of the irreplaceability of the technical choices made by the Administration if coherently expressed and developed according to criteria of reasonableness, the judge declared his incompetence to express an alternative choice. Thus the maxim:

"When the judgment of the administration is anchored to technical and scientific assessments related to one of the so-called inexact sciences, the natural plurality of solutions, all equally plausible and consistent in terms of logic and reasonableness, does not allow, in the presence of compliance with the reported *standards* of logic and consistency of the decision, a mere substitution of subjective evaluations, all in theory responding to the same criteria, which would lead not to the substitution of an illegitimate choice with a legitimate choice, but to the simple preference granted in the jurisdictional seat to one of several

[388] See, among others, the seminal essay by M.S. GIANNINI, *I beni culturali*, in Rivista trimestrale di diritto pubblico, vol. 3, 1976, 20.

[389] In 2015 the Regional Administrative Court of Veneto (Venezia) -Sez. II, May, 19, n. 531- ruled as follow: "Protection of the national cultural heritage is also achievable through limitations on the export of artworks, not only allowed, but required by the Constitution and the Community legislation".

possible solutions—all abstractly legitimate—allowed by the respect of the scientific laws of the sector[390]".

In 2011, the RAC of Lazio[391] proposing this interpretation, introduced, albeit *incidenter tantum*, a reasoning about the 'just cause' that can motivate the detention of an object[392] and the conditions for its optimal valorization. The reasoning of the Court council highlights the need to reconcile the possibility of intervention available to the juridical body and its assessments regarding the subject of the dispute:

"With regard to the substance of the decision regarding the exportability of a good of cultural interest, evidently the Court cannot make any review, given the impossibility of substituting the technical evaluations made by the expert authority with its own assessments. We only consider, *incidenter tantum*, that there is no identifiable any reason to justify the retention of the *Commode* within national borders. (…) The export of the object under consideration does not entail any detriment to the national public interest[393]".

In this excerpt it is possible to detect how the impossibility of expressing an opinion regarding the technical assessments conducted by the administration impedes the the judicial body's evaluation of the appropriateness of the administration's decision regarding the retention of the good. It seems possible to detect an attempt made by the Court to 'interfere' in the choices made by the Administration within the limits of its administrative discretion. Such a stance, thus, looks bizarre considering that the evolution of both the jurisprudence and the doctrine will admit the review of the technical discretion while the category of administrative discretion has always remained unappealable.

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[390] RAC Sicilia (Palermo), sez. II, March 7, 2006, n. 525. In a simil way also RAC Umbria (Perugia), sez. I, September 1, 2017, n. 556.

[391] RAC Lazio (Roma), sez. II-*quater*, March 24, 2011, n. 2659.

[392] In the case under consideration the reference is to a *Commode* of Louis XV that received a denial to the export by the Roman export office that, contextually, launched the procedure to issue an artistic restriction over the object.

[393] TAR (Roma), sez. II-*quater*, 24 marzo 2011, n. 2659.

A different orientation regarding the review of technical discretion is expressed in the judgment of the Lombardy RAC called to rule in 2011 on the correctness of the notification of a painting by *Frans Floris de Vriendt* entitled 'Allegory of Immortality of Virtue'[394]. The Milanese Court underlines how the:

"Substantial unquestionability of technical discretion must be considered, by now, an orientation abandoned in virtue of the possibility of verifying the technical assessments carried out by the Administration in two distinct profiles: the correctness and reliability of the technical scientific analyses as well as the correctness of the proceedings".

The judges recognize the 'physiological margin of questionability' typical of the cultural heritage sector, believing that this is due not so much (or not only) to the technical and specialist character of the rules necessary to ascertain the historical and cultural value of an object, as much as by the changeability of the same over time[395].

The possibility to judicially review the technical assessments made by the Administration was introduced for the very first time in 1999 by the Council of State with the ruling n° 601[396]. This decision recognised how:

"The judicial review over the administrative technical assessments may concern not only a scrutiny of the formal conduct of the Administration, but can also entail a deeper analysis of the technical assessments made – regarding both their accuracy and their implementation".

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[394] RAC Lombardia (Milano), sez. II, December 19, 2011, n. 3239.

[395] Quoting from RAC Lombardia, II sez., n. 3239, 2011,3: "*Tale margine discende dalla inevitabile considerazione che il valore culturale e storico di un'opera è correlato alle concezioni culturali della società e dell'opinione pubblica in un determinato momento storico*".

[396] Council of State, sez. IV, 9th April 1999, n° 601, *Spirito c. Min. giust. e altri*, in Rivista Amministrativa della Repubblica Italiana, 1999, 482. For a comment of that judgement see M. DELSIGNORE, *Il sindacato del giudice amministrativo sulle valutazioni tecniche: nuovi orientamenti dal Consiglio di Stato*, *Dir. Proc. Amm.*, 2000, 185; C. VIDETTA, *Il Sindacato sulla discrezionalità tecnica della pubblica amministrazione nella giurisprudenza successiva alla decisione 9 aprile 1999 n. 601 della quarta sezione del Consiglio di Stato*, in Foro amministrativo –Tar, 2003, 1185.

While the doctrine, already at the beginning of the XX century, recognised the extent and innovative importance of the new Council of State's attitude[397], it cannot be said that in jurisprudence such an approach has been followed in all sectors of the public administration.

In confirmation of this observation, it is enough to take as examples the two rulings analysed earlier in this section (RAC Sicilia 525/2006 and RAC Lazio 2659/2011[398]). Both of them are subsequent to the Council of State's 'change of direction', and besides this, each adopts a different approach.

11.1 The 'crux' of the relationship between citizens and public administration.

As mentioned, from the case-law on the subject it is possible to deduce typical characteristics of the dialectic between the public and private sectors.

A point of reference for this analysis can be the reasoning expressed by the RAC of Lazio in a ruling[399] concerning the artwork *Le verre* by Pablo Picasso, for which a certificate of free circulation had been requested from the Milan export office.

This illustrative sentence will help us understand not only the responsibilities of the Administration towards individuals, but also the legal guarantees to be observed when exercising a public authority.

With regard to the first point, the Court recognises the importance to guarantee the right to be heard of the individual in the different phases of the administrative process. This process, in fact, is the moment when the legal relationship between the citizens and the administration is

[397] See M. DELSIGNORE, *Il sindacato del giudice amministrativo sulle valutazioni tecniche: nuovi orientamenti dal Consiglio di Stato*, op. cit.

[398] Also the most recent administrative jurisprudence endorces the same interpretation of technical discretion when cultural property are concerned. See Consiglio di Stato sez. VI, 25 giugno 2019, n° 4356.

[399] RAC Lazio (Roma), sez. II-*quater*, 30 luglio 2006, n. 7757.

built. While this holds true for any kind of intervention by the public administration, it is even more important in situations of unencumbered assets. Suh situations indicate conditions when the norm does not specifically bind the administrative actions regarding the *quid* or the *an* of its behaviour[400].

On this occasion, the Court –acknowledging the flaw reported by the claimant regarding the missed notification of the denial to release the certificate of free circulation- emphasizes how:

"In the matter under consideration, the procedural guarantees must be considered (...) from a broader perspective, which sees an Administration that dialogued 'from the beginning of the relationship, presenting itself to the private party as 'institutional mediator' between articulated requests and interests, which only at the end of an in-depth, complete and effective mutual exchange, will eventually be summarized in the final provision of the proceeding".

With respect to the legal guarantees to protect the parties in question, in the case under consideration—as in other cases[401]- the judges clarified that when the administration exceeds the deadline provided for at article 68 of the Code for cultural heritage and landscape, it does not represent a violation[402]. The possibility for the administration to deliver its final

[400] Specifically, with regard to the ('delicate') topic of cultural heritage, the case under consideration states "*Il superamento del mero rispetto delle prescrizioni formali imposte dalla normativa in materia (…) richiede una visione unitaria del rapporto amministrativo (…). Ciò anche, o meglio, ancor più, nel settore della tutela e della valorizzazione dei beni culturali in cui, secondo i recenti orientamenti del legislatore, la collaborazione tra parte pubblica e privata assume un valore emblematico dell'esercizio del potere o solo in senso autoritativo, di imposizione di limiti e vincoli a beni di proprietà dei privati*".

[401] The flaw of adopting the administrative measure beyond the due date provided for by article 68 paragraph 3 of the Code for Cultural Heritage and Landscape has been raised by the claimant also in RAC Lazio (Roma), sez. II *quater*, sent. 10272/2016; RAC Lazio (Roma), sez. II *quater*, sent. 4395/2017; Consiglio di Stato sez. VI, 29 luglio 2019, n° 5316.

[402] In accordance with article 68 paragraph 3 of the Italian Code for Cultural Heritage and Landscape the export office has to issue or deny, releasing a

decision on the exportability of a good of cultural interest after the strict deadline derives from the non-peremptory essence of this provision. The regional administrative court of Lazio specifies that the time limit provided for in article 68 paragraph 3 of the Italian Code for Cultural Heritage and Landscape:

"Is a merely approximate deadline since the purpose of the export offices, in performing their tasks, is that of safeguarding a constitutional interest, that is avoiding the dispersion of the cultural national heritage".

It is therefore possible to understand how, in such cases, the balance between the interests of the individuals to know the outcome of the administrative procedure in a timely manner and the 'fundamental interest to protect the cultural patrimony[403]' turns in favour of the latter.

The last reference to the 'crux' of the relationship between citizens and public administration concerns the obligation for the administration to state reasons justifying their rulings. In the matter under consideration this is translated into the obligation to deliver a reasoned opinion when denying the certificate of free circulation. This has to contain both the results of the artistic-historical assessments made with respect to the object and also the reasons regarding the propensity for its retention.

The completeness of the reasoned opinion, just as much as its availability, is fundamental because in this way the reasons that led the administration to adopt a specific decision is made public. Besides this, it is fundamental also in preparation of a potential appeal, in order to allow the claimant to reply to the specific motivations adopted by the administration.

reasoned opinion, the certificate of free circulation notifying the interested party of its decision within 40 days starting from the submission of the object.

[403] RAC Lazio (Roma), sez. II-quater, July 30, 2006, n. 7757.

11.2 Assessments regarding the 'artistic quality' of the artwork.

An additional topic analysed by administrative courts in judging the appeals against the denial to release the certificate of free circulation concerns the 'artistic quality' of the artwork.

The judicial review over this criterion is particularly problematic in how it arrives at different outcomes according to the typology of the object under consideration.

For example, while judging the appeal against the retention of Picasso's artwork *Le Verre* (RAC Lazio sez. II *quater*, n. 7757/2008), the administrative court sets a limit regarding its ability to judicially review the assessments made by the Administration when addressed to artworks realised by 'avant-garde artists'.

Their artworks, in fact, according to the Court, are:

"Characterized by extreme relativity and irreducible questionability, such that they cannot be analysed, in the jurisdictional context, not even by resorting to the consultation of experts. In fact, while the review of assessments in which the so-called "technical discretion" is generally expressed can be conducted by applying the rules of the discipline concerned with a certain degree of objectivity and agreeability (...), the judgment on the relevant historical-artistic quality in a contemporary artwork, on the other hand, is irreducibly characterized by a high degree of mutability not only in different historical periods, but in the same period, by virtue of the extreme subjectivity of the same. All this is attested by the dramatic 'detachment' of the evaluations expressed by the critics and by the 'appreciation' of the works by the citizens that gave rise to the lively debate among the same scholars on the very possibility of qualifying certain 'artistic products' as artworks".

According to the regional administrative court of Lazio, in such cases the ordinary authority of the administrative judge to make 'a check of the reliability of the technical assessments made by the administration[404]' is significantly reduced since the subject is a source of extensive debates even among scholars called to give a professional opinion.

[404] Council of State, sez. IV, 9th April 1999, n. 601.

These conclusions do not appear to be acceptable, since the application of technical parameters do not always leads to 'results' provable in a clear and unambiguous manner. The same concept of 'technical discretion' raises the problem of implementating questionable evaluations, thus distinguishing 'technical discretion' from 'technical assessment' (*accertamento tecnico*). The evaluation of the 'artistic quality' of an artwork can be very complicated not only with regard to contemporary artworks, but also for 'more traditional artifacts'. And even in cases when it is impossible to reach a unanimous consensus regarding the 'quality' of a certain artwork, this *per sé* should not justify the impossibility of conducting a judicial review, as this would lead to a 'jurisdictional gap' with regard to specific artworks, considered to be 'too awkward' to be evaluated.

The unreasonableness of the just mentioned case is even more understandable if opposed to another judgement the regional administrative court of Lazio was called to express about the annulment of the imposition of the historical and artistic restriction on a painting attributed to *Gaspar Van Wittel* (known as Vanvitelli) entitled *View of the Tiber from Castel Sant'Angelo*[405].

After reiterating the importance of the formal and procedural guarantees necessary to formulate a correct evaluative judgment on the historical-artistic importance of the object, the administrative court affirmed:

"It appears evident that the obligation for the Administration to state reasons regarding the relevance and significance of the artwork in the history of art or of its artistic quality (…) can only find attenuation in front of recognized masterpieces that, for intrinsic character and nature, are susceptible to immediate appreciation".

[405] RAC Lazio (Roma), sez. II-*quater*, 1st March 2011, n. 1901.

Consequently, the Court ruled the claimant's grievance concerning the lack of motivation of the decision issued by the public administration unfounded:

"In light of the above and the very special framework of the elements of evaluation considered (the reputation of the artwork and its author, its significance and the popularity of the artwork, even with a non-specialist public, unchanged over the centuries)".

In conclusion, the assessment regarding the artistic quality of a XVIII century artwork seems to be not complicated enough to justify the attenuation of the obligation of the administration to state reasons.

11.3 Assessments regarding the 'rarity' of the artwork.

As regards the evaluation of the 'rarity' of the work, the jurisprudential judgments about its administrative interpretation, as they emerge from the case-law under consideration, appear to be coherent with one another.20

In 2011, the RAC of Lazio, with sentence n. 5318[406], cancelled the artistic restriction on a painting attributed to A.B. representing "Saint Bishop, Saint Bartholomew and Prophet" due to lack of motivation to justify the retention of the artwork. In particular, the export office was asked to examine the profile of the rarity of the artwork "with reference to the frequency and availability of similar works". The case under consideration specifies how:

"The judgment about the evaluation of the rarity profile of the artwork is based on a concept of marginal utility, having to compare the value of an additional good with the works of the same author already owned within the national territory. Furthermore, this judgment necessarily has a mutable character over time, which varies according to the need for cultural education and the cultural policies of which it is an expression."

A further example is the case in which the same regional tribunal in 2015 ruled on the possibility of cancelling the decision rejecting the

[406] RAC Lazio (Roma), sez. II *quater*, 15th June 2011, n. 5318.

proposed hierarchical appeal against the declaration of cultural interest of a painting attributed to Cennino Cennini, entitled 'Madonna and Child with Saints and Angels'[407].

Specifically, the availability of other artworks by the artist in the national territory (even in places accessible to the public) were not considered a reason justifying a defect in the contested provision as:

"The concept of the rarity of the artwork, in terms of evaluations of its historical and artistic relevance and the reconstruction of the historical and artistic framework of an era, cannot be considered in strictly numerical terms or in terms of the uniqueness of the artifact."

The analysis of these rulings highlights not only the prevailing jurisprudential interpretation of the criterion of rarity, but also the *favor* accorded a nationalistic orientation in terms of cultural heritage: for the purpose of the decision only the artworks present within the national territory are taken into consideration[408].

Ultimately it seems useful to cite the ruling expressed by the RAC of Lazio concerning the artwork by Salvador Dalì entitled *Pensée*[409]. The insistent defence, among other complaints, disputed the refusal of the export license, because there are other works by the artist in Italy. The administrative court reiterated the need to consider the criterion of rarity not in strictly quantitative terms, but in qualitative terms, to then specify:

"The Administration has based the judgment (...) also with respect to the artistic expression of Dalì, considering the artwork under consideration as a "unique" example in Italy of his formative period."

In this decision, administrative jurisprudence thus provided a further possible interpretation of the criterion of rarity, ascribable not only to the

[407] RAC Lazio (Roma), sez. II *quater*, January 30, 2015, n. 1786.

[408] See, within all, J.H. MERRYMAN, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*, Wolters Kluver, 2009, in particular the essays: *The nation and the objects* and *The retention of cultural property*.

[409] TAR Lazio, sez. II quater, n. 4395, 2017.

entire production of the author, but also with reference to the evolution of the artist's production itself.

11.4 Assessments regarding the criteria of the 'representativeness of the artwork' and that of 'testimony of relations between different cultural areas'.

With regard to the jurisprudential interpretation and application of the two criteria concerning the 'representativeness of the artwork' and being 'an important testimony of significant relationships between different cultural areas', it is sufficient to mention the case concerning a *Commode* of Louis XV[410].

In 2010, the regional administrative court of Lazio was asked to rule on the possibility of cancelling the denial of the certificate of free circulation and the procedure for declaring the item of French origin to be of cultural interest. Specifically, "it is precisely in the interpretation and application of the relevance of the characteristic of 'Italianness' that the controversy under consideration is centred".

"That the Italian character of the object constitutes an essential condition in order to impose its forced detention within the national territory". To then add "it seems obvious that although an African mask may be part of universal culture and must be represented in Italian public collections, it is not necessary to have as many examples as there are African tribes".

With regard to the case in question, no circumstances were found that could justify the retention within the national territory, either because of

"An inexistence of a significant bond with our country such as to consider the *Commode* as a component of our cultural heritage both by virtue of a historicized acquisition, and from the point of view of the recurrence of similar objects both in private and in public collections."

Ultimately, the analysis of the case-law regarding the judicial review of the administrative measures denying the possibility to export an object of cultural interest reveals the case-law to be extremely diversified. The

[410] TAR Lazio, sez. II-*quater*, n. 2659, 2011.

outcomes of the courts' scrutiny over the very same topic can differ from each other in a significant way.

In light of the above-described situation, what is certain is that in Italy the administrative judges played and still play a fundamental role in the definition of cultural heritage law, as well as in its evolution[411].

12. The role of the French Council of State in reviewing the administrative decisions on the export of cultural property.

The analysis over the discretional power of the administration has also been widely debated by scholars in France as one of the main themes of administrative law. Just as have done in the preceding paragraphs, also in the following ones the investigation of the judicial review will be focused on the measures adopted regarding the permission to export an object of cultural interest.

In such cases it is possible to detect how the primary role of the French Council of State is to counter-balance the prejudice to the right of property of those receiving a restrictive administrative measure[412]. This objective, overall, proves to be preeminent as compared to the purpose of reviewing the assessments made by the administration in evaluating classifications of historical or artistic national interest.

Specific researches reveal how the case-law regarding claims seeking to obtain the cancellation of decrees that deny permission to export a given object, or by which the State exercises its right of pre-emption on

[411] See L. CASINI, *Jeux avec les frontières : le rôle de la jurisprudence administrative dans la construction du droit italien du patrimoine culturel*, in *Droit public et patrimoine, le rôle du Conseil d'Etat*, Comité d'histoire du ministère de la Culture, Paris, 2019, 199.

[412] See M. CORNU, *Le jugement de l'esthétique et l'interet d'art ou d'histoire devant le Conseil d'Etat*, in *Droit public et patrimoine, le rôle du Conseil d'Etat*, Comité d'histoire du ministère de la Culture, Paris, 2019, 112.

the occasion of an export authorisation request, is not overabundant[413]. Quantitatively it is less copious with respect to the Italian judgements on the same subject but, unlike the latter, qualitatively more consistent.

The analysis conducted allow us to circumscribe the main issues faced by the highest administrative jurisdictional authority to the following themes: the extent of the judicial review over the decisions adopted by the Ministry of Culture; the validity of administrative decisions adopted beyond the deadline provided by the law; the possibility to retain objects of cultural interest having a foreign origin; the adequacy of the justifications provided by the administration to deny the export of a cultural property.

12.1 The extent of judicial review over the decisions adopted by the Ministry of Culture.

We underlined earlier how French judicial review regarding the measures adopted by the administration in charge of the protection of the national cultural heritage is more consistent with respect to the same judgements enacted by Italian courts.

This is especially true with respect to the extent of the 'interference' of the administrative judge over the decisions adopted by the administration in this specific context. In the Italian examples it was possible to notice a heterogeneity of stances implemented in this regard by administrative judges. The declarations of the impossibility to reconsider the technical assessments conducted by the administration contradict others of opposite sign, in a balancing act between technical and administrative discretion that struggles to settle on an overriding approach.

The highest French administrative court, on the contrary (limited to the very specific cases under consideration) seems to comply with the same approach in use since the very beginning of the XX century.

[413] No official data on the number of appeals against the refusal of export licences are available.

The ruling case is the so called *Affaire Gomel*, enacted by the Council of State on April 4, 1914. This is one of the few judgements related to cultural heritage issues which falls within *Les grandes decisions du Conseil d'Etat*[414].

In this case, for the first time, the Council of State agreed to a judicial review over the validity of the legal classification of the facts made by the administration. This approach represented quite an extension of the scope of judicial review, since up to that moment it had been limited to verifying the formal correctness of the legal reasoning conducted by the administration[415].

Following in the footsteps of this case, two years later the Council of State introduced an even more in-depth 'kind' of judicial review. Since 1916, in fact, the administrative judge had been asked to review also the technical assessments conducted by the administration (*l'exactitude matérielle des faits*)[416].

To conclude this introduction, we can say that in France the scope of judicial review over the measures adopted by the administration is now equivalent to that of Italy. In both countries, in fact, only the

[414] In the present case Mr Gomel submitted the request to obtain a building permit in order to conduct restoration work on a building he owned. The Prefect of the Seine refused to issue such a permission on the grounds that *Place Beauvau* in Paris, where the building was located, constituted a monumental prospect in the sense of article 118 of the law of July 31, 1911. This law provided that the Administration could refuse to issue a building permit in the event that a monumental prospect would have been under threat.

[415] In *Gomel* the legal reasoning of the Administration was correct: it could refuse to issue the requested permit on the grounds that the planned restoration work would have undermined a monumental prospect. On the other hand, the accuracy of the legal qualification of the facts conducted by the administration was much more questionable. The preliminary question to be answered was: 'is *Place Beauvau* a monumental prospect within the meaning of section 118 of the 1911 law?' The Council of State replied in the negative and cancelled the refusal of Mr. Gomel's building permit request.

[416] Conseil d'Etat, January 14, 1916, *Camino*, n° 59619.

administrative discretion (*l'opportunité*) eludes the review of the administrative judge.

If comparable on a theoretical level, the differences concern mainly the implementation of such an approach. First of all, as just seen the latter has been adopted in France since the very beginning of the XX century, while in Italy the Council of State admitted judicial review over the so-called 'technical discretion' of the administration only in 1961. In the second place, the differences concern the consistency of the case-law examined. All the judgements reviewing administrative measures denying the issuance of the export licence for an object of cultural interest delivered by the French Council of State after 1914 agree in recognising such authorityon the part of the administrative judge.

This approach appears to have been confirmed for the first time in 1969, in the conclusion of the case *Sieur Henri de Talleyrand Périgord* delivered by M. Kahn. Quoting from this statement:

« *L'appréciation est soumise au contrôle du juge : c'est ce que vous avez expressément admis par la décision Biekens, et la solution, du reste, est dans la ligne d'une jurisprudence plus que cinquantenaire, puisque c'est dans un domaine assez voisin qu'avec l'arrêt Gomel vous avez, pour la première fois, contrôlé la qualification juridique des faits.* »

Similar opinions were expressed in 1987 by Sylvie Hubac, *commissaire du gouvernement*, who delivered the conclusions for the case *Heugel*[417]:

« *Ainsi que vous l'avez jugé par vos décisions Biekens (CE 18 février 1966) et Sieur Henri de Talleyrand Périgord (CE 12 décembre 1969), le litige né des conditions dans lesquelles l'Etat acquiert sur le fondement de la loi du 23 juin 1941 et par une décision individuelle et unilatérale un objet d'art destiné à l'exportation ressort de la compétence de la juridiction administrative.* »

Albeit in the absence of direct references, the other case-law under consideration also does not call into question this aspect and sticks to the established extent of the judicial review.

[417] Conseil d'Etat, April 3, 1987, n° 54140, Affaire *Crts. Heugel*.

12.2 The validity of administrative decisions adopted beyond the due date provided by the law.

The Council of State delivered its opinion regarding the validity of the administrative measure enacted beyond the due date provided by the regulatory framework on the control of the export of cultural property on more than one occasion.

Until 2013, with no exception, the Council of State affirmed the principle according to which the administration could deliver its decisions also after the deadline established by the law. The deadline provided by the law, just as in Italy, was not considered as a peremptory provision since the public interest to protect the cultural national heritage took precedence over individual interests.

The first occasion in which this issue was raised is in the *Affaire Sieur Henri de Talleyrand Périgord,* discussed by the Council of State on December 12, 1969. The conclusions presented in this case, delivered by the *Commissaire du Gouvernement* M. Kahn, are one of the most relevant references when it comes to the study of the control on the export of cultural goods in France.

In its conclusion, M. Kahn made explicit its opinion welcomed by the court—according to which the export licence must not implicitly be delivered by the expiry of the period established in article 1 of the law of June 23, 1941. The latter provides that the administration has at its disposal one month to adopt a decision over the exportability of an object. As a consequence, it follows that the denial to issue the licence in question can also be enacted beyond this due date[418].

[418] Quoting from the conclusions of M. Kahn « *En droit on sait qu'il n'est pas d'accord implicite se cet accord m'est prévu par un texte et que les textes qui le prévoient sont interprétés restrictivement. Or, l'article 1ere dit, non pas que le ministre dispose d'un délai d'un mois pour refuser l'autorisation (comme l'article dit qu'il dispose de six mois pour exercer son droit de rétention), mais qu'il doit 'se prononcer' dans le délai d'n mois, c'est-à-dire qu'il doit, dans ce délai, soit autoriser, soit refuser l'exportation. Il n'est donc pas possible de soutenir que l'autorisation d'exporter est implicitement accordée à*

The regulatory framework established by the law of June 23, 1941 provides also that the administration has at its disposal six months to exercise its right of pre-emption (Article 2). With respect to this eventuality, M. Kahn specified that the terms established at article 1 and 2 of the law of June 23, 1941 constitute two different and autonomous due dates.

The expiration of the first one does not affect the validity of the second (which instead has a peremptory character). Thus the State can legitimately exercise its right of pre-emption within six months from the date of the export authorisation request even when the denial to the exportation was not delivered within the first month.

Besides the considerations regarding the non-peremptory essence of that provision, the *commissaire du Gouvernement* added that the denial of the export authorisation request had to be considered implicitly delivered when the exercise of the right of pre-emption by the State occurs[419].

If, on the one hand, such regulatory system could seem to biased towards the public interest, on the other hand the person who submitted the export authorisation request is allowed to withdraw the latter until the adoption of a decision. Considering that, as mentioned, a mechanism of tacit approval was not expected, the applicant could withdraw the export authorisation request until an explicit decision of the administration was adopted.

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l'expiration d'un délai d'un mois, ni d'ailleurs que le demande ne peut plus être légalement rejetée après l'expiration de ce délai ».

[419] Ibidem « *Il n'est pas douteux qu'au-delà du délai de six mois de l'article 2, alinéa 2, le ministre ne peut plus exercer légalement le droit de rétention. (…) A s'en tenir à la loi elle-même, les deux procédures sont entièrement distinctes et la décision sur l'exportation n'est pas le préalable obligatoire de la décision dur la rétention : certes, (…) la délivrance de l'autorisation implique nécessairement la non-rétention des objets proposés à l'exportation. Mis, de ce qu'il n'a pas refusé cette autorisation, il ne résulte pas que le ministre l'ait accordée* ».

This interpretation of the law of June 23, 1941 was subsequently adopted by the Council of State when ruling on similar claims regarding restrictive measures adopted by the administration after the supposed deadlines. References of this kind can be found in the following cases: *Affaire Schlumpf* (CE March, 27, 1981); *Affaire Crts. Heugel* (Ce April 2, 1987); *Ville d'Orléans et ministre de la Culture, de la Communication, des Grands Travaux et du Bicentenaire c. Woodner* (CE November 30, 1990).

This was the situation until 2013, time when French Government introduced the principle according to which silence on the part of the administration is deemed to constitute assent[420].

Although the deadlines required by the law became more stringent, the four months at the disposal of the Minister of Culture for delivering a final decision over the exportability of an object often are not respected. These delays are due to the great amount of requests to scrutinise court rulings, as well as to the time needed to conduct accurate research on the object.

Furthermore, this legislative change caused a shift in the claims supporting the appeals proposed against the refusal of an export licence. From that moment on, applicants appealed the administrative tribunal to obtain a cancellation of the denial issued by the administration on the grounds that a delay in the deadline for a decision must be interpreted as an approval of the export authorisation request[421].

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[420] The principle of the tacit approval was introduced by the law of November 12, 2013 '*Habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens*' and it is now codified by article L. 231-1 of the *Code des relations entre le public et l'administration*.

[421] C. CHASTANIER - *Adjointe au sous-directeur des collections, direction générale des patrimoines, service des musées de France-*, interviewed by the author in July 2018, confirmed this: « *Maintenant il y a une nouvelle vague de contentieux qui sont sur des aspects de procédures lié à la question silence égale acceptation. (…) Alors nous avons de contestations sur le délai dans lequel la décision a été prise, quand elle a été prise. Ils essaient tout pour annuler la décision parce que ça a été pas prise dans le bon moment. Jusqu'à maintenant le juge administratif nous a donné raison, mais beaucoup*

12.3 The possibility to retain objects of cultural interest of foreign origin.

As seen, French administration can deny the authorisation to export an object of cultural interest if, as a first condition, it represents an object of historical or artistic national interest. This legislative provision leaves the administration in charge of protecting the national cultural heritage with the responsibility to evaluate what kind of objects fulfill such a classification.

Given that the norm makes reference to the concept of 'nationality', the authorities in charge of implementing it, and those with the duty to verifying the correctness of their action, have wondered whether items produced in another country or manufactured by a foreign artist could fall within this category.

The already mentioned *Affaire Sieur Henri de Talleyrand Périgord* provides clarifications also on this issue.

The export authorisation request under consideration, in fact, concerned a collection of Venetian drawings dating to the XIX century. At the time of their legal importation in France, which occurred in 1938, the collection of Italian drawings already enjoyed a certain fame among art historians.

In 1963, twenty-five years after his arrival in France, Henri de Talleyrand Périgord submitted an export authorisation request for the same collection and one year later the State communicated its intention to exercise the right of pre-emption over the drawings. This was the beginning of the legal battle that would end in 1969 with the judgement of the Council of State.

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sont passés seulement en première instance et on attend encore l'appelle. On a quatre mois seulement pour donner une réponse et pour que la ministre signe ; les avocats au but de quatre mois disent qu'il y a une acceptation qui nait. Donc il faut qu'on a un contradictoire et on a des discussions ponctuelles sur les aspects règlementaires ».

Apprised of the French State's intention to purchase the drawings, Henri de Talleyrand Périgord objected to the judgment that his collection could be considered a national treasure. In particular, he denied that the drawings could be of national interest since their presence in the country dated back only to twenty-five years ago.

Is that length of time too short for an object to become a national treasure, or is time not a factor in such a qualification?

The conclusions reached by M. Kahn and adopted by the Council of State lean towards the position that brevity of time is not a decisive factor. The Venetian drawings, in fact, were considered to be of national artistic interest since France is keen to have in the collection of its museums artworks that are under-represented.

The Council of State should explicitly admit, the *commissaire du gouvernement* continued, that there is nothing to prevent artworks of foreign origin from being listed as items having a national interest.

Finally, it is evident from this case that the national interest is not necessarily linked to the nationality of the author, but rather to the interest represented by the property for the nation[422].

12.4 The adequacy of the justifications provided by the Administration to deny the export of a cultural property.

In the first part of this chapter we analysed the importance of the motivations provided by the administration when an export authorisation request is denied. The extent of the obligation to deliver a reasoned opinion when enacting unfavourable individual measures changed over time, accordingly to the regulatory framework in force.

We saw that in France, since 1979, the administration has been obliged to produce a reasoned opinion both when the authorisation to export an

[422] See J.F. POLI, *La protection des biens culturels meubles*, Librairie générale de droit et de jurisprudence, Paris, 1996.

object of cultural interest is denied and also when the State exercised its right of pre-emption over an object proposed for export.

The overview of the case-law under consideration proves that there have not been many appeals against the lack or scarcity of justifications. We saw, moreover, that the *avis de la CCTN* are generally very tailored and specific.

An exception to such a scenario is the case Dauberville[423], with regard to which the Council of State was called to rule precisely on the adequacy of the justifications provided by the administration.

In this case M. Dauberville appealed the decision of the Parisian administrative tribunal (July 6, 1983) that refused to cancel the Director of the French Museums' decision (February 12, 1981) to deny the export of a painting by Cezanne requested by M. Dauberville. The latter complained that the Parisian administrative tribunal delivered its decision exercising an abuse of discretion since the judgement was not supported by adequate motivations.

The Council of State, in 1985, considered M. Dauberville's appeal legitimate and cancelled the decision of the administrative tribunal on the grounds that the decision by the Director General of Customs did not mention the relevant legal provisions nor the motivations justifying of the denial. Moreover, this lack of motivation was not legalised by the subsequent compliant decision by the Director of French Museums that merely stated the impossibility to authorise the export of an 'evidently important artwork' ('*Le ministre de la culture ne pouvait pas autoriser la sortie de France de cette oeuvre évidemment capitale*').

The great importance of an artwork, as well as its fame and unanimous appreciation, according to the French administrative judges, are not, *per sé*, sufficient to justify an export denial. Each opinion delivered by the Administration must contain both the legal reasoning supporting the restrictive measure and also the explanation of the circumstances and

[423] CE June 17, 1985, *Dauberville*, n° 54172.

characteristics that make that specific object a national treasure important for the history and the art of the nation.

The availability of the justifications supporting the decisions of the administration plays an essential role not only in the 'relations' between the administrative authorities and the interested party who submits an export authorisation request, but also between the administration and society as a whole.

The necessity of transparency with regard to the system controlling the export of cultural property has been the object of two rulings, respectively of the Parisian administrative tribunal and by the Council of State.

These judgements, which we now analyze, were issued throughout 2018.

Herewith the premise of the case law under consideration. The edition of the journal '*La tribune de l'Art*' of April 2, 2017[424] complained of the unwillingness of the Ministry of Culture to share the minutes of the CCTN meetings and the export licences delivered by the same administration. The journal had requested to know the reasons that led the CCTN to grant an export licence for certain objects (which the journal considered to be of national importance). According to the *Tribune de l'Art* the Ministry replied negatively to the journal's request. Quoting from the reply of the Ministry:

« *Contrairement aux avis de la commission consultative des trésors nationaux - de même que les arrêtés ministériels de refus de certificat qui en sont la conséquence – qui sont publiés au Journal officiel, les compte rendus des séances qui retranscrivent les débats de la commission ne peuvent être communiqués à un tiers sans violer le principe de confidentialité qui s'applique aux membres de la commission établit par l'article D.111-25 du code du patrimoine ('les membres de la commission et toute personne appelée à assister aux séances sont tenus d'observer le secret des délibérations').* »

[424] The title of the article under consideration is '*Trésors nationaux: le ministère cache les documents!*'

As consequence of this reply, the journal appealed the *Commission d'Accès aux Documents Administratifs* (CADA), which has the duty of delivering opinions over the administration denials to share certain documents. The opinion of the CADA approved the request of *La tribune de l'Art*[425] but the Ministry, notified of the CADA decision, never replied, implicitly denying the request within the one month required to obey with this decision.

This implicit refusal of the Ministry of Culture was appealed to the Parisian administrative tribunal not only by *La tribune de l'Art*, but also by the *Societé pour la protection du paysage et l'esthétique de la France* (SPPEF) which, simultaneously, had submitted the request to access the same documentation, and obtained the same denial from the Ministry.

The Administrative tribunal of Paris delivered the judgement on the appeal of the SPPEF on February 21, 2018. According to the ruling the implicit decision of the Ministry of Culture not to share the required documentation was cancelled and the Ministry had two months starting from the notification of the judgement to comply with it[426]. Specifically, the Ministry was told to share with the applicant the export licenses issued from 2007 to 2016[427] along with the data or statistics about the latter as well as the minutes of CCTN meetings produced since 1993. According to the Parisian administrative tribunal this request would not prejudice the good progress of the administration, thus did not have any

[425] The opinion delivered by the CADA was the following : « *Les comptes-rendus de la commission consultative des trésors nationaux sont communicables, dès lors qu'ils ne présentent plus un caractère préparatoire, et les certificats d'exportation sont également communicables, sauf si les propriétaires des œuvres sont de notoriété publique et en occultant les éléments permettant l'identification du titulaire de l'autorisation, tels que son nom et ses coordonnées* »

[426] See Tribunal Administratif de Paris, 21 février 2018, *Société pour la Protection des Paysages et l'Esthétique de la France*, n. 1713758/5-3.

[427] Quoting from the judgment « *Sous réserve de l'occultation préalable, le cas échéant, des données personnelles dont la communication aux tiers porterait atteinte à la vie privée* ».

'abusive' character (as supported by the defendant to justify the denial)[428].

The Minister of Culture appealed this judgement to the Council of State, adducing the same issues raised in its prior defence. The ruling of this court was delivered on November 14, 2018[429].

First of all, the sentence reports that, with a letter sent on September 25, 2018, the *Directeur général des patrimoines* provided the SPPEF with the required statistics about the number of export licences issued. For this reason, the appeal of the Ministry of Culture on this specific issue lost its relevance and it would not be taken into consideration by the court.

Regarding the 'abusive character' of the request claimed by the Ministry for justifying its denial, the Council of State judged that the administrative tribunal committed an error of law in its analysis of article L. 311-1 of the C*ode des relations entre le public et l'administration*. The tribunal of first instance, in fact, considered only that the request made by the SPPEF was not directly intended to prejudice the good progress of the administration, without appreciating its effects on the latter. On this grounds, the Council of State ordered the administrative tribunal to renew its judgement, taking into account this correct interpretation of article L. 311-1 of the *Code des relations entre le public et l'administration*.

In light of these conclusions, the Ministry of Culture was entitled to seek the cancellation of the judgment delivered by the administrative tribunal on February 21, 2018.

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[428] Ibidem « *La ministre de la culture fait valoir que cette demande de communication présenterait un caractère abusif du fait du nombre de documents demandés. (…) La ministre de la culture fait valoir que les certificats de sorties du territoire sollicités, délivrés au titre de la période considérée, représentent plus de 35.000 dossiers, non numérisés pour la plupart, et que le volume de ces documents ne lui permet pas d'en délivrer copie (…)* ».

[429] Conseil d'Etat, 10ème - 9ème chambres réunies, 14 novembre 2018, n. 420055.

13. England: is anyone watcing the watchmen?

"It is not impossible—as some of us In England think—for executive power to be subjugated to the jurisdictional control: France has succeeded! Instead, allowing the growing strength of the Executive to exercise itself freely and arbitrarily towards private individuals (only obeying its own will) means moving exactly in the opposite direction to our deepest aspirations. In England, as the authority of the executive power gradually increased, so has its autonomy grown until it no longer recognizes any other law than its own. Judges in England do not have the authority to know the content of the decisions adopted by the executive power; they do not investigate whether the decision has a legal basis since the ministry believes that the public interest has been satisfied[430]".

In this manner, the British jurist Charles John Joseph Hamson expressed his astonishment when observing, during the '50s, the functioning of the French Council of State. Despite the interest of the work in its entirety, the passages that highlight the differences between the continental system of judicial review and the British are particularly valuable. The reported excerpt is an example of this.

Although with some differences between them, we have seen that both in Italy and in France administrative courts are entitled to oversee the conduct of the administration and, if needed, to reconsider it.

Furthermore, the right of citizens to appeal an administrative judge's ruling is, according to a former president of the French Council of State, 'warranty of a balance between compliance with the law and individual freedom[431]'.

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[430] C.J. HAMSON, *Pouvoir discrétionnaire et control juridictionnel de l'administration. Considérations sur le Conseil d'Etat statuant au contentieux*, Librairie générale de droit et de jurisprudence, 1958, 18.

[431] M. R. CASSIN, *Etudes et Documents du Conseil d'Etat*, La documentation française, Paris, 1948, 15 « *Le Conseil d'Etat n'est pas seulement la pièce régulatrice de la bonne marche des affaires publiques, mais sa seule présence maintient (en outre) dans l'administration la perspective d'un contrôle possible et, parmi les citoyens, la confiance dans le droit et la liberté* ».

Historically, common law systems, instead, do not have the same familiarity with the concepts of administrative law and judicial review[432].

As this is not the moment for an extensive comparison of civil and common law systems, nor for a historical analysis of English administrative law, we will focus our analysis on the role of judicial review over the administrative decisions on the export of cultural assets[433].

13.1 British export license system put to the test of judicial review.

The research on case law on the subject has not produced many results, in fact, hardly any at all.

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[432] The major turning points that have occurred in English administrative law –in two different periods of time- have been illustrated by A.V. DICEY, *The Development of Administrative Law in England*, Law Quarterly Review, issue 31, 1915, 148 and by T. POOLE, *The reformation of English administrative law*, Cambridge Law Journal, 68 (1), 2009, 142–168.

Since judicial review in the '60s, however, this situation has started to change, as confirmed by DE SMITH, WOOLF & JOWELL, *Judicial review of administrative action*, 5th Edition, London Sweet & Maxwell, 1995, 3: "In the last thirty-six years the circumstances in which the courts have been prepared to intervene to provide relief for unlawful administrative action have expanded in spectacular fashion".

With regard to administrative discretion see: J. L. JOWELL, *Law and bureaucracy. Administrative discretion and limits of legal action*, 1975, Dunellen Publishing Company; K. HAWKINS, *The uses of discretion*, Clarendon Press-Oxford, 1992; DE SMITH, WOOLF & JOWELL, J*udicial review of administrative action*, quoted above; C. HARLOW & R. RAWLINGS, *Law and administration*, 3rd Edition, Cambridge university press, 2009, esp. 'Transforming judicial review', 95 and 'Rules and discretion', 190.

[433] On the role of the jurisdictional power over the protection of the cultural patrimony in English law see R. REDMOND-COOPER, *Le rôle des juridictions dans la protection du patrimoine en droit Britannique*, in *Droit et patrimoine. Le rôle du Conseil d'Etat*, Comité d'histoire du ministère de la Culture, 2019, 189.

The only example is the tormented case concerning Antonio Canova's sculpture, *The Three Graces*[434].

The marble statue was commissioned in 1814 by the Sixth Duke of Bedford for his sculpture gallery at Woburn Abbey. In 1989 the J. Paul Getty Museum of California contracted to purchase the statue for 7.6 million dollars, conditional upon the grant of an export licence. In March of the same year an export licence application was submitted on behalf of the seller but the Reviewing Committee objected to the proposed export on the ground that the statue fulfilled all three of the Waverley criteria.

A decision on the export licence application was deferred, initially for six months and then—since no English institution was able to raise money to reach the price offered by the Getty—for a further three months. In March 1990 the Secretary of State for Trade and Industry, in contrast with the current relevant practice and with the aim of retaining the artwork, announced that purchase offers from private individuals would also be taken into account. The objective was achieved, so on May 1990 the Minister could legitimately refuse to issue an export licence but this effort would do little to avoid the exit of the Canova' from England. Three years later, in fact, the Getty Museum entered into a fresh agreement to purchase *The Three Graces*, offering once again the initial purchase price. After the Reviewing Committee agreed that the *Te Three Graces* satisfied all the Waverly criteria, the decision on the export licence application was postponed several times, for more than one year. By September 1994 the amount of money needed to match the Getty Museum's offer of 7.6 million had been reached. The Minister took account of the resulting offer to purchase and refused to grant the export

[434] The case is reported in the Report of the Reviewing Committee 1988-1989, case 23; Report of the Reviewing Committee 1989-1990 par. 53-57 and Report of the Reviewing Committee 1993-1994 case 11. It is also cited in M. WANTUCH-THOLE, *Cultural property in Cross-Border Litigations. Turning rights into claims*, De Gruyter, Leck, 2015, 70; J.A.R. NAFZIGER, R. KIRKWOOD PATERSON (Edited by), *Handbook of the law of cultural heritage and international trade*, Edward Elgar, Northampton, 2014, 480.

licence. On December 12, 1994 the *Three Graces* went on display at the Victoria and Albert Museum, the sale having by then been completed.

Given the outcome of the affair, the Getty museum appealed the Divisional Court and the Court of Appeal (*Regina v Secretary of State for National Heritage and another, ex parte Paul Getty Trust*)[435]. The reasons supporting the appeal were the following: violation of Getty's legitimate expectations; Wednesbury unreasonableness; infringement of the Treaty of Rome (unauthorised state aid). Although the Court acknowledged that the appeal was formally correct, the Getty appeal was rejected. In particular, the Secretary of State's decision to no longer defer the decision on the export licence application was not such as to create 'legitimate expectations'. And secondly, the High Court ruled that the Secretary of State provided sufficient reasons for extending the deferral period, so that the decision was not affected by Wednesbury unreasonableness.

In response, the Getty museum's director John Walsh said in a press statement: "Evidently the faith we have had in the fairness of the British export license system has been misplaced. (…) On two occasions that we have endeavoured to purchase the statue, our efforts have been blatantly frustrated by manipulations of the export license system"[436].

WHAT REALLY CHANGES

The purpose of this part is twofold: to draw preliminary conclusions regarding the factors analysed in parts I and II and, finally, to

[435] Since the judgment has been handed down by the Court, the decision is an 'unreported judgment', it has not been published entirely. For an analysis of the Court of Appeal's decision see N. BAMFORTH, *Protecting the National Heritage? Judicial Review and the Three Graces*, in Art Antiquity and Law Journal, 1, 1996, 147.

[436] John Walsh's statement is reported by the Los Angeles Times in an article published on August 10, 1994 titled "Three Graces' Saga: Getty Purchase Delayed Again".

understand how the national export control system influences the activities of its users.

In order to draw some conclusions, it seems useful to recall our initial questions. Concerning the criteria employed by the administration to decide whether or not to allow the export of a given item, major questions arose about the moment of their adoption (were they been introduced since the very beginning of the implementation of an export control or in a second stage?) and the degree of similarity between the three countries.

With respect to the judicial review over the administrative decisions, instead, the main question to be answered regards the capacity of the authorities to guarantee and maintain a sense of fairness between administrators and administered[437].

This part will investigate the above-mentioned issues by comparing the three countries under examination.

[437] On this regard proves to be particularly interesting a judgement of the Regional Administrative Court of Lazio delivered in 2019 in which the claimant challenges the whole Italian legislative system concerning the export control of cultural goods. More specifically, the owner of an artifacat attributed to Caravaggio (a shield depicting a '*Testa di Medusa*') criticises the fact that there are no compensatory measures to offset the financial loss consequent to the non 'exportability' of the cultural asset. See T.A.R. Roma, (Lazio) sez. II, 29 maggio 2019, n.6783.

In a judgement delivered in 2018, the Italian Council of State gives a comprehensive overview of the domestic export control system, putting in comparison the reasons underpinning a more protectionist approach (typical of the so-called 'Source nations') and a more liberal one (typical of the so-called 'Market nations'). See Consiglio di Stato sez. II, 05 marzo 2018, n° 548.

14. Comparing the Italian general guidelines on export, the French concept of historical and national interest, and the English Waverly criteria.

We have analysed in detail the criteria that national administrative offices in charge with the evaluation of export authorisation requests have to take into consideration when conducting their assessments of the object. Their adoption meets different needs depending on the system in which they are incorporated.

14.1 The reason whether to adopt general criteria or not is structural.

In Italy the adoption of general guidelines to which export offices must adhere is necessary in order to guarantee a minimum degree of uniformity within the national export system.

As seen, the Italian administrative structure in charge of implementing control over the export of goods having a cultural interest is characterised by its decentralisation. The export authorisation requests are addressed to one of the eighteen export offices present in the national territory.

In what way, therefore, is it possible to guarantee consistency in the implementation of the national export system from north to south? The drafting of the general guidelines serves exactly this purpose.

However, we have also seen that the Italian export control system is one of the oldest worldwide, if not the oldest. Cultural property was subject to restrictions on their circulation already before the unification of the Italian Kingdom, such that the administration in charge of protecting the national cultural heritage has always been designed with a decentralised model. Nevertheless, it is only since the second half of the XX century that a centralized administration has provided its peripheral offices with general guidelines aimed at ensuring uniformity in the whole system.

How can we explain such a discrepancy? How was the unity of the export control ensured before centralization? The legislation at stake at the time required denial of the export authorisation request when the exit of the object would have caused serious detriment to the national cultural heritage. It was then the task of the civil servants working in the export offices to determine the effective meaning of 'serious detriment', and each of them worked it out according to his/her own expertise and knowledge. It is not difficult to imagine that those capabilities could vary from one individual to the other.

The turning point in this scenario occurred at the beginning of the 1970s. A single piece of legislation[438] declared both the need for the export office to provide a reasoned opinion when delivering a refusal to the export authorisation request and established the requirement to adhere to some general guidelines enacted by the central administration in conducting their assessments.

The concurrent introduction of these two novelties in the export control system is striking. When a reasoned opinion starts to be required, the need emerges to have guidelines to refer to.

In this manner the Italian mechanism to monitor the circulation of cultural goods outside national borders attempted to reach a greater level of objectivity and national uniformity at the same time.

Has this objective been reached? According to the art market players operating in Italy, the export control system for the last forty years has been characterised by a high degree of discretion.

The general guidelines at disposition of export offices were considered too vague, leaving the civil servants using them a great margin of free interpretation. Such a discrepancy in the employment of the criteria apparently resulted in a 'forum shopping', the practice of

[438] Law Decree n° 288 enacted on July 5, 1972 proposed by the Minister of Public Education, in agreement with the Ministers of Foreign Affairs, Justice, Finance, Treasury and Commerce.

submitting the export authorisation request to the export office most likely to provide the most favourable outcome.

Our analysis of the judicial review against the refusal of the certificate of free circulation has provided a general picture the dissatisfaction concerning the application of the general guidelines. Their interpretation has often been called into question by applicants for an export authorisation.

The updating of the general guidelines at disposal of the export offices that occurred in 2017 resulted, as already mentioned, in a greater level of detail for each criterion. But it is still too early to appreciate the effects of this revision.

In what way, however could it be possible to deal with the natural tendency to inconsistent implementation of export control at the national level, when the administration implementing it is characterised by a high degree of decentralisation?

Of course it is not possible to imagine that all civil servants working in the eighteen Italian export offices have the same parameters of judgement so as to ensure a uniform interpretation of the guidelines at their disposal. What is possible to imagine, however, is the involvement, within export offices, of civil servants with the same background and kinds of expertise. A qualitative homogeneity of this sort would ensure that the assessments of all the export authorisation requests were analysed taking into account the same 'interests'.

Keeping more or less the same composition within the membership of the committee in charge of evaluating the export authorisation requests is what happens in France ever since the establishment of the *Commission Consultative des Trésors Nationaux*. In the absence of criteria to take into account when evaluating the interest of an object for the history or the art of the nation, French administration can rely upon the stability of the professional profiles involved.

Since in France the export authorisation requests have to be addressed to the central administration, homogeneity among the assessments to conducted at national level is less of a problem.

Homogeneity in adopting the decisions, instead, should be ensured in terms of time, namely over the years. This imperative is granted mainly by three factors. The first is the presence within the CCTN of the same professional disciplines over time. The second is the permanence in the CCTN of the same members over a long period, whch reinforces confidence in the export system and its rulings. Finally, a certain standard of compliance within the decisions of the CCTN could result from the fact that all its members are chosen among the maximum experts in their field.

Being the only committee to be set up, it can obtain the participation of the most talented historians, curators, administrators, dealers etc.

Probably it is this very last point, coupled with the centralised characteristic of the French administration, that explains the lack of need to establish specific criteria regulating the assessments of the objects submitted for export authorization.

The English export system, in turn, stands between the Italian and French ones, having characteristics proper to both.

In fact, notwithstanding the centralised structure of the administration in charge of implementing controls on the export of cultural goods across the Channel, it is provided with some criteria to be taken into consideration in conducting its activity.

The Waverly criteria were formulated in 1952, at the same time in which English the export control system was taking shape and assuming the features it still has today. This means that the need to have at disposal some indications to refer to in order to qualify an object as national treasure was perceived as one of the pillars of the whole system. As mentioned in the previous paragraphs, this structure has never been changed, nor has any request in this regard has been proposed.

On closer inspection, we notice that the wording of the Waverly criteria could appear rather vague, as well as the first general guidelines enacted in Italy in 1974. The realization of this similarity generates an even bigger surprise when we highlight the absence in England of appeals against their implementation or of discontent regarding their formulation.

How can we explain the difference between these two countries? How is it possible that what is grounds for complaint in one (Italy) it is not in the other (England)?

There is where a characteristic proper to the administration with a centralised structure comes into play: the possibility to turn to the maximum experts in the field. As seen in the previous chapter when analysing the functioning of the English administrative system, both the members of the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest and the expert advisers involved are professionals working in the most important institutions of the art system. Their opinion is apparently considered to be reliable, in addition to be adequately provided with documentary evidence.

14.2 The criteria are almost the same; their implementation is not.

- Is this object important for the history and the art of the nation?
- Is it closely connected with our history and national life?
- Is it of outstanding aesthetic importance?
- Is it of outstanding significance for the study of some particular branch of art, learning or history?
- Is it possible to detect in the object subject to export control one or more of the following characteristics? Artistic quality; rarity in qualitative or quantitative terms; special significance of the representation; belonging to an historical, artistic, archaeological or monumental complex or contest; particularly significant testimony for the history of collecting; relevant testimony of important relations between different cultural areas?

The juxtaposition of the parameters that guide Italian, French and English civil servants in deciding whether to advise the retention of a given item or not reveals no major differences among them.

We can say with reasonable confidence that they express, though in a different phrasing, the same concept. They are all meant to discover—taking into account the same 'values'—what is the bond between the object and the country in which it is located. They all highlight that special relationship for which the object represents an added value for a specific country, so that it cannot be permanently removed[439].

In light of these considerations it is possible to argue that the criteria are the same, but what differs is their implementation.

Their implementation is affected, first of all, by the professional figures responsible for their interpretation and, secondly, by the overall regulatory framework to which they belong.

While we have already discussed the former consideration, regarding the latter it suffices to recall the fact that in France and England considering an object as a national cultural treasure is not enough to retain it if there are no funds available for its purchase.

We could imagine that without this normative difference, and still adopting the same criteria, the number of cultural properties retained in Italy, France and England would be more or less the same[440].

[439] See J.H. MERRYMAN, *The nation and the object*, International Journal of Cultural Property, volume 3, issue 1, 1994, 61.

[440] Regarding this point, see the difference between the items considered as being national cultural treasures in France and England but to which an export licence was finally granted (in the absence of funds) and those that have been retained. The lists of both categories are reported in the first part of this chapter.

15. Is this system fair? The balance between public and private interests.

To what extent do the three States takes into consideration private interests when shaping and implementing the regulatory framework to control the export of cultural property? In what way is the public interest to constitute and maintain a national cultural heritage balanced to protect the right of property of those who own objects of cultural interest?

The approach of Italy, France and England with regard to this is rather different.

The differences are particularly evident when reading the recommendations made in the 1952 Waverly Report on the Export of Works of Art, the document on which English export control is founded. Paragraph 125 of the Report established the principle 'No prohibition without an offer to buy'.

Quoting from the Report:

"As a corollary of these recommendations we recommend that in every case in which export is prevented the owner must be assured of an offer to purchase at a fair price. This is a principle to which we attach the utmost importance (…). We think that the State has a clear right to forbid the export of objects which it regards as of national importance. But we think that it has the equally clear duty to see that particular individuals are not unfairly treated as a result".

This premise has ensured that the "system control in England has been designed to strike a balance between the protection of the national heritage, the interests of sellers, and the need to safeguard the UK's reputation in the international art market".

We cannot say the same for the Italian of the French control system, although among them some differences can be traced.

In France, for example, the relationship between the administration in charge of the protection of the national cultural heritage and the art market sector has been quite stable.

In 1990, the Ministry of Culture created a body made up of professionals working in the sector of the art market and civil servants dealing with cultural heritage. This was the *Observatoire des mouvements internationaux d'oeuvres d'art*[441].

Its purpose was twofold: analysing the international circulation of artworks and considering how to adapt the French legal framework on the protection of national cultural heritage in view of the European single market.

The kind of collaboration between this institution and the Administration is testified to in the first *Rapport d'Activité* published by the *Observatoire des mouvements interationaux d'art* in 1991[442].

The data elaborated in the *Rapport d'Activité* provide extremely useful information, such as the trends in the international art market, the turnover of artworks sold abroad and in France, or statistics regarding the number of export licences requested, granted or refused.

The *Observatoire des mouvements interationaux* has continued to carry out its activities up to today[443], although starting from 2006 it is located

[441] For more details regarding its origin, evolution and composition see: file:///C:/Users/Utente/Downloads/Observatoire+du+march%C3%A9+de+l'art+et+du+mouvement+des+biens+culturels.pdf.

[442] The document is in NA, b. 19990209/2.

Also the minutes of the meetings held during the very first years of the '90s are stored in the same folder. The statistics of the changes registered in the international circulation of artworks from 1993 until 2004 are reported in an aggregated form, in a study conducted by the Minister of Culture in the person of François Rouet, *Les Mouvement internationaux d'œuvres et objets d'art. Analyse statistique des évolutions 1993-2004*. Septembre 2005, Ministère de la Culture et de la Communication, Département des études, de la prospective et des statistiques. The document is available at the website : file:///C:/Users/Utente/Downloads/Note+statistique_12.pdf.

[443] Unfortunately, due to a scarcity of resources, in the last years no minutes of the meetings nor annual reports have been drafted.

within the Minister of Culture and the *Service des musées de Frances* acts as General Secretariat of the former.

In France the State, through the Ministry of Culture, keeps track of the evolution of the art market and proves to be aware of its necessities. In England the need to safeguard the reputation of the national art market is recognised as a priority by the same law and guaranteed by the functioning of the whole regulatory framework at stake.

In Italy, instead, it is not possible to trace any formal interconnection between the public authority and the private sector, in particular with art collectors or dealers.

While it is indisputable that occasional exchanges may have occurred and still occur, probably with the involvement of expert art dealers in technical committees advising on a legislative intervention, no stable or formal relationship exists.

The distance between public and private sector turns to the disadvantage of the latter, which tends to perceive the system that regulates control on the export of cultural property as unfair[444]. In confirmation of this are the grievances of a group of operators comprising a large part of the professionals of the art market[445] that led to the change of the legislation that occurred in 2017.

[444] M. STERPI in an interview with N. MAGGI in *Arte e diritto: Italia maglia nera del mercato internazionale*, Collezione da Tiffany, June 10, 2014 highlighted the difficulties of purchasing a work of art in Italy, "where the times for the release of export permits are very long and the results of the procedures completely unpredictable".

[445]In particular, the group is made up by: Associazione Nazionale Case d'Asta; da Christie's, Sotheby's e Artcurial; dalle case d'asta italiane Il Ponte, Bolaffi, Minerva e Finarte; dall'Associazione Nazionale delle Gallerie d'Arte Moderna e Contemporanea; dall'Associazione Antiquari Italiani; dall'Associazione Librai Antiquari d'Italia; da Art Defender e Arterìa.

Finally, if in Italy the system that monitors the movement of cultural assets is not perceived as a fair one, virtually the same can be said for the role played by the guardians of this system.

As analysed, the outcomes of the judicial reviews against export authorisation requests are mainly in favour of the Administration. But what is perceived as more disturbing for the peaceful enjoyment of the property rights of collectors is the unpredictability of the system, including its supervision by the jurisdictional powers.

In the second part of this chapter we analysed how, on a doctrinal and theoretical jurisprudential level, the 'intensity' of the review conducted by the administrative judge is equivalent in France and Italy. What differs is the tendency in Italy to produce judgements that do not adhere to the pratical guidelines and that result in contradictory decisions.

All this results in a sense of unfairness and uncertainty that does not facilitate, *inter alia*, public confidence and the development of the art market sector.

CHAPTER IV: THE INTERNATIONAL CIRCULATION OF CULTURAL PROPERTY: A GLOBAL CHALLENGE

When talking about 'controls on the export of goods having cultural interest' we are referring to a trans-border circulation of assets; a circulation that is international *per definitionem*[446].

The domestic regulatory frameworks analysed under different aspects in the previous chapters are, as seen, apparently meant to regulate the exit of cultural property beyond national borders to another country. The modalities and procedures by which objects of cultural interest circulate and are exchanged within national borders are not explored, other than marginally, in this dissertation.

This being cleared up, we could wonder how the present chapter deals once again with the international circulation of objects having artistic or historic interest. The purpose of the following paragraphs is to analyse the measures adopted at a supranational level to regulate the export of cultural property[447].

With reference to the supranational level there are some distinctions we can make, concerning both the geographical areas and the actors involved. In relation to the former, the difference made is that between the European zone[448] (Part I) from one side, and the world as a whole from the other (Part II).

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[446] For an extensive analysis of the legal consequences attached to the international circulation of artworks and other cultural goods see K. SIEHR, *Interational art trade and the law*, Leiden, Nijhoff, 1993.

[447] Regarding the supranational export controls of cultural property, see, amoong others: A. LANCIOTTI, *La circolazione dei beni culturali nel diritto internazionale privato e comunitario*, Edizioni Scientifiche italiane, Napoli, 1996; M. FRIGO, *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*, Giuffré, Milano, 2007; C. SOTIS, C. B. D'ARGENTINE, *Circolazione dei beni culturali mobili e tutela penale: un'analisi di diritto interno, comparato ed internazionale*, Giuffrè, Milano, 2015; F. FIORENTINI, *New challanges for the global art market: the enforcement of cultural property law in international trade*, in A. APPERS (edited by), *Property law perspectives* III, Intersentia, 2015.

[448] For bibliographical references on the Community export controls see, among others: J. E. PUTNAM, *Common markets and cultural identity: cultural*

Regarding the actors involved, the differentiation proposed concerns the nature of the body responsible for the enactment and implementation of the policies under examination. In this scenario we find both institutional actors such as European Union institutions (Part I) and international organisations like UNESCO and UNIDROIT (Part II). Domestic legislations are more or less directly affected by these supranational norms depending on the degree of compliance of the national legislature, and also by the adherence of the State to international treaties and conventions.

The autonomy of an ensemble of supranational norms with respect to domestic legislation has become evident by the use of the expression 'international cultural heritage law', adopted by scholars since the first decade of the XXI century[449]. National cultural heritage legislations and

property export restrictions in the European Economic Community, The University of Chicago legal forum, 1992; M.P. CHITI, *Beni culturali e comunità europea*, Giuffré, Milano, 1994; D. VOUDOURI, *Circulation et protection des biens culturels dans l'Europe sans frontieres*, Revue du Droit Public et de la Science Politique en France et à l'etranger, vol. 2, 1994; P. PAONE (edited by), *La protezione internazionale e la circolazione comunitaria dei beni culturali mobili*, Editoriale Scientifica, Napoli, 1998; M. COSTANZA (edited by), *Commercio e circolazione delle opere d'arte*, CEDAM, Padova, 1999; M.A. SCHWARZENBERG, *Tutela e circolazione infra-comunitaria del patrimonio culturale*, Maggioli editore, Santarcangelo di Romagna, 2000; L.V. PROTT, *The international movement of cultural objects*, International Journal of Cultural Property, vol. 12, n° 2, 2005; A. BIONDI, *The Merchant, the Thief & the Citizen: The Circulation of Works of Art Within the European Union*, Common Market Law Review, vol. 34, 1997; G. MAGRI, *La circolazione dei beni culturali nel diritto europeo: limiti e obblighi di restituzione*, Edizioni Scientifiche Italiane, Napoli, 2011; M. CORNU, *L'Europe des biens culturels et le marché*, Journal du droit international, 2002; M. GRAZIADEI and B. PASA, *The single European market and cultural heritage: the protection of national treasures in Europe*, in A. JAKUBOWSI, K. HAUSLER, F. FIORENTINI (edited by), *Cultural heritage in the European Union. A critical inquiry into law and policy*, Brill Nijhoff, 2019.

[449] See, just to mention the major contributions dealing with international cultural heritage law: C. FORREST, *International law and the protection of cultural heritage*, Routledge, London, 2010; F. FRANCIONI and J. GORDLEY (edited by), *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford,

international cultural heritage law stand on different levels not only for their subject matter (see for example the distinction between 'cultural heritage of mankind' and 'national treasures') and the typology of intervention, but also for their 'seniority'. In this regard Janet Blake wrote in 2015 that 'cultural heritage treaty-making on the international (global) level is of relatively recent date and the field is still a young and evolving[450]'. The same cannot be said with respect to national cultural heritage legislation that, even if not homogeneously worldwide, has a long lasting tradition.

Ultimately, the aim of this chapter is to contribute to understanding how national cultural heritage legislation influences the supranational regulatory level and vice versa.

Finally, the following analysis would like to contribute to the reflection on whether we are on the way to envisage a global cultural heritage law[451].

2013; J. BLAKE, *International cultural heritage law*, Oxford University Press, Oxford, 2015.

[450] J. BLAKE, *International cultural heritage law*, op. cit., 5.

[451] See L. CASINI, *'Italian hours': The globalization of cultural property law*, International Journal of constitutional law, vol. 9, 2011; of the same author *The Future of (International) Cultural Heritage Law*, editorial, International Journal of constitutional law, vol. 16, 2018.

SHAPING THE EUROPEAN UNION'S CONTROL OVER THE EXPORT OF CULTURAL PROPERTY

1. The EU and third countries: reasons underpinning the necessity of a Community border.

"Under article 9 of the Treaty, the Community is based on a customs union which should cover all trade in goods. By goods, within the meaning of that provision, must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions (…)[452]".

This extract, taken from a judgment of the European Court of Justice, provides two essential pieces of information: a description of what can be considered as a 'good' and the knowledge that the Community is a free trade area, meaning that member States cannot impose customs duties on commercial exchanges between each other. As regards the first point, the Court established that to be considered a 'good', the product should be liable to evaluation in monetary terms and be subject of a commercial transaction.

Does such a description of goods coincide with that of a cultural property? The European Court of Justice provided a clarification on this point, by stating that "the articles (…) whatever may be the characteristics which distinguish them from other types of merchandise, nevertheless resemble the latter, inasmuch as they can be valued in money and so be the subject of commercial transactions[453]".

Once having understood that cultural objects in certain aspects are comparable to other kinds of commodities, we can move to the second aspect highlighted at the very beginning: their possibility to circulate.

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[452] *Commission of the European Communities v Italian Republic*, case 7/68 of the European Court of Justice, Grounds of Judgment Paragraph B.1.

[453] Ibidem.

As highlighted in previous chapters, if we take into consideration only the domestic legislative level, governments are, to a certain extent, free to enforce different kinds of restrictions on the exportation of goods of cultural interest. Cultural heritage law could establish an absolute ban on export or rather to organise a licensing system of authorisation, including even the imposition of a tax to be paid in order to permanently remove an artwork from national territory.

Does this freedom of decision still stand when nations are cooperating on a supranational framework and affected by other legislative levels (e.g. the European or the international one)? Nowadays, it is very difficult to imagine any area of intervention which is not influenced by at least two different regulatory levels, and this also applies to the international trade.

In confirmation of this, EU member States are expected to adjust their domestic legislation according to the EU regulatory framework, and cultural heritage law is not an exception.

Coming back to the aforementioned judgement of the European Court of Justice, after having delineated the key features of what can be considered as a good, the ruling clarifies:

"Article 16 of the Treaty prohibits the collection in dealings between member States of any customs duty on exports and of any charge having an equivalent effect (…) This provision makes no distinction based on the purpose of the duties and charges the abolition of which it requires[454]".

Following this reasoning, the European Court of Justice in 1968 ruled that the Italian Republic had to abolish its progressive tax on the export of articles of cultural interest to other member States of the Union. This didn't imply that member States had to abolish any other provisions aimed at preserving objects of cultural interest within their national borders. In fact, article 36 of the Treaty on the Functioning of the European Union allows for 'restrictions or prohibitions on exports

[454] Ibidem, Grounds of Judgment Paragraph B.2.

justified on grounds of the protection of national treasures possessing artistic, historic, or archaeological value[455]'.

The exception laid down in Article 36 of the TFEU therefore appears to provide enough degree of autonomy to member States for preserving their national cultural heritage.

But notwithstanding this provision, with the expansion of EU intervention in many different areas, member States started feeling worried of losing their autonomy in establishing what kind of objects they could consider as national treasures, prohibiting the free circulation.

Moreover, it is worth mentioning that Europe, taking into account international statistics monitoring the performance of the art market, is considered as an aggregated sum of the different member States' performances[456]. This is to say that globally the European Union in this sector is considered as a single actor[457] and is evaluated as such with respect to other countries.

These economic indicators can be taken into account to understand the role the EU plays in in the art market and, consequently, the

[455] For an overview of the Community and international regulatory framework concerning the circulation of cultural property in place before the achievement of the European single market see: P.L. FRIER, *La libre circulation des biens culturels dans l'Europe de 1993*, in BYRNE, SUTTON, RENOLD (edited by), *La libre circulation des collections d'objets d'art*, Genève, Centre du droit de l'art, 1993; D. VOUDOURI, *Circulation et protection des biens culturels dans l'Europe sans frontieres*, Revue du droit public et de la science politique en France et a l'étranger. 1994, p. 480.

[456] This is true with the exception of the UK art market share, given its preeminent individual role in the global art market sales.

[457] An evidence of this can be found in the following passage "A look at the art world in 2016 reveals shifting markets and changing tastes: the European market grew, the Americas declined, and the Asian market was stable", 2017 TEFAF Art Market Report, 7. Available online at the website http://1uyxqn3lzdsa2ytyzj1asxmmmpt.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/TEFAF-Art-Market-Report-20173.pdf.

amplitude of the issue at stake. According to the 2017 TEFAF Report "Europe is the largest global exporter of Art & Antiques", and that "total exports continue to exceed total imports in Europe, having resulted in a continual outflow of art, collectors' pieces and antiques over almost every consecutive year over the past 30 years, in particular to the Americas and to Asia[458]".

What are the conclusions to be drawn from this data? Why is this relevant? Such evidence reveals massive 'outgoing traffic' of goods having an artistic interest from European borders towards different destinations.

Given this situation, the first question to be asked from a legal perspective is: what is the necessity to regulate this specific sector of the international trade? And if this is the case, how should it be regulated?

Like the majority of features covered by cultural heritage law, the reason to regulate a given situation is the result of a twofold necessity: an economic and a cultural one[459]. It could be argued that the EU control over the export of cultural goods has been shaped by these two main factors.

The way of proceeding (from a bottom up to a top down investigation) that will be adopted in the following analysis is aimed also at highlighting the mutual influences arising from national legislation to the supranational legislative level, and *viceversa*.

Regarding the temporal framework, we will observe that the beginning of the '90s of the 20th century are crucial years for the shape of an European regulatory framework on export control. In fact, January 1, 1993 was the date set by the Single European Act for completing the realisation of the European single market. The latter refers to the EU as

[458] 2017 TEFAF Report, 73.

[459] In this regard see point B of the 2001 'European Parliament resolution on the application of the Convention Concerning the Protection of the World Cultural and Natural Heritage in the Member States of the European Union': "Having regard to the importance of cultural and natural heritage both as an economic factor and as a factor in social integration and citizenship".

"one territory without any internal borders or other regulatory obstacles to the free movement of goods and services[460]". This is the first time in which the control on the export of objects having a cultural interest, until then a sole responsibility of national governments, is addressed at the Community level.

1.1 Some terms of reference.

The specification of some terms of reference is necessary to frame the following reasoning and the resultant analysis.

The 'cultural question' in the context of the construction of the EU venture has been addressed from the very beginning so as to provide a support to member States in acknowledging, protecting and enhancing their own cultural heritage[461]. Article 3 point 1 q) of the Treaty Establishing the European Community lists, within the activities that the Community shall include, "a contribution to education and training of quality and to the flowering of the cultures of the member States[462]".

[460] https://ec.europa.eu/growth/single-market_en.

[461] From the beginning of the '70s, the European Communities started to reflect upon cultural issues and to implement some actions in this direction. Before this, as has been remarked by E. PSYCHOGIOPOULOU, *The integration of cultural consideration in EU law and policies*, Introduction, Martinus Nijhoff publisher, 2008. In particular: "The launch of the European project in the 1950's was not intended to lead to a cultural unification; national cultural spheres were to remain strictly unaffected. The original Treaty of Rome establishing the European Economic Community (EEC) did not shape a Community cultural policy nor did it empower Community institutions to take action in cultural matters".

For an overview of the European activities in the cultural sector both on a theoretical and a practical level, see Commission of the European communities, *1st Report on the consideration of cultural aspects in European community action*, Bruxelles, 17.04.1996, COM (96) 160 final.

[462] The consolidated version of the Treaty establishing the European Community is available online on the website https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT.

Another reference to keep in mind is art. 151 of the Treaty Establishing the European Community[463] (TEC). Its paragraph 1 states, in fact, that "The Community shall contribute to the flowering of the cultures of the member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore".

In 2004 Alessandro Chechi proposed an interesting interpretation of this article, focusing on what could be the extent of this common European cultural heritage. He states: "Article 151 is aimed at 'bringing the common cultural heritage to the fore', that is, at making the people of Europe aware of their shared history, common heritage and common destiny'. However, it should be noted that none of these objectives can autonomously be developed by the Community. It can simply encourage co-operation between member States and 'if necessary' it can support and supplement their actions in this sector[464]".

By accepting this reading of article 151 TEC, it becomes evident that the role of the EU Community is mainly that of coordinating and gathering together the actions of member States in the cultural sector, allowing for the pre-eminence of national meanings and contents in the concept of 'culture'. In fact, even the mention of bringing to the fore a (European) 'common cultural heritage' can be interpreted more as a union of multiple individual sensibilities than as a complete convergence of the latter or the proposition of a third concept.

From a doctrinal perspective it is possible to trace other prior compliant interpretations of the European cultural heritage as a 'union of differences'. In 1991, Pietro Pietraroia affirmed that the core value of

[463] Article 151 of the Treaty establishing the European Community falls within the Part dedicated to European policies and, more specifically, under Title XI named 'Culture'. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E151

[464] A. CHECHI, *Cultural Matters in the Case Law of the European Court of Justice*, Art Antiquity and Law Journal, n. 9, 2004, p. 284.

European culture is reflected in its being determined by differences rather than by homogeneity[465].

An understanding of what concept of culture results from the European treaties is needed in order to further investigate the object of Community export control of cultural property, shaped in consequence of this very preliminary and essential step.

The need to identify and define the key features of the European identity came to be perceived, with the passage of time, as something to put into practice by EU leaders[466]. Actually, the purpose of identifying the characteristics of a common identity was to improve the social and economic relations of the EU community with external partners. A shared identity was considered essential to be identified as a single entity to interact with on a global level.

In 1973, the Heads of State or Government of the nine member States signed a 'Declaration on European Identity' that, in its preamble, reports the aims and efforts just mentioned:

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[465] P. PIETRAROIA, in M. COMPAGNA and P. PIETRAROIA (edited by), *Beni culturali e mercato europeo. Norme sull'esportazione nei paesi della comunità*, Istituto poligrafico e Zecca dello Stato, Roma, 1991. See, in particular, p. 40: "*In verità un valore essenziale della cultura europea è proprio nel suo qualificarsi per differenze piuttosto che per omologazione. La sua ricchezza dipende proprio dalla contiguità di identità culturali estremamente varie, dal loro continuo confrontarsi e contaminarsi senza confondersi dal loro mutare e magari rinnegarsi. Per questo è difficile cercare e tollerare un'idea di unificazione culturale europea che implichi un'artificiosa omologazione dei valori e dei contenuti*".

[466] The caption of the Declaration on European Identity signed at Copenhagen on December 14, 1973 reports "At the Copenhagen European Summit of 14 and 15 December 1973, the Heads of State or Government of the nine Member States of the enlarged European Community affirm their determination to introduce the concept of European identity into their common foreign relations".

The full text of the Declaration is available online at the website https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf .

"The Nine Member Countries of the European Communities have decided that the time has come to draw up a document on the European Identity. This will enable them to achieve a better definition of their relations with other countries and of their responsibilities and the place which they occupy in world affairs. They have decided to define European Identity with the dynamic nature of the Community in mind".

The reference to the 'dynamic nature of the Community', again, shows not only the impossibility of examining an European identity without taking into consideration the national histories and the rooted cultural identity of each member State, but also the willingness not to disregard this very particular aspect[467].

2. Member States and the EU: towards a harmonisation between national legislation?

So far we have argued that the construction of a European cultural identity, at least as it appears from the reading of the founding treaties and further official documentation, was based on the acknowledgment of national diversities. But evidently, with the approach of 1993, these official statements were not enough to reassure member States worried about the process of (economic) integration, because "it threatens to water down national differences and bring about cultural homogeneity[468]".

2.1 Genesis and content of the Regulation on the export of cultural goods: the EU's perspective.

EU institutions started reflecting on mechanisms to control the export of cultural goods when it came to implementing the single European market, at the turn of the '90s of the 20th century. The program to remove barriers within the internal borders of the Union has resulted in a

[467] Paragraph I point 1 of the Declaration specifies that: "The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures".

[468] A. CHECHI, *Cultural Matters in the Case Law of the European Court of Justice*, op. cit., p. 286.

twofold consequence: on one side the need to establish an internal free trade of objects having an artistic interest that respected the national prerogatives in the area while, on the other, the need to regulate the passage of these goods from a newly created border, that is, of the EU.

In 1989 a series of considerations were subject of an official "Communication from the Commission of the European Communities to the Council regarding the protection of the artistic, historical and archaeological national patrimony in view of the abolition of internal borders to be implemented in 1992[469]". Point 2 of the Communication summarises the needs put forward: while there was the awareness that, in the long term, the ideal would be the identification of a common European cultural heritage, at the same time there was the legitimate demand of member States to protect their own cultural identity. Given the above, the Commission (point 3) aimed to start a dialogue with all member States in order to face these issues, and to prevent the adoption of a 'pre-constituted solution'.

One of the first clarifications made by the Commission in the process of finding a common solution was:

"It would be inconceivable to apply unrestrictedly the logic of the internal market and the principle of the free movement of goods in respect of objects that constitute national treasures; account must be taken of the special nature of cultural items, which cannot be treated as mere goods[470]".

By a procedural point of view, there has be an attempt to involve, in the process of putting forward practical proposals, all the actors who could provide political and technical suggestions. That is why, on the basis of the Commission's Communication of 1989, the Council and the

[469] This is the COM (89) 594 Final version enacted in Brussel on November 22, 1989.

[470] Ibidem, 2.

Ministers for Culture of member States (meeting within the Council) adopted further conclusions[471], stressing three aspects in particular:

1) member States must foster cooperation both amongst themselves and with the Commission;
2) there is a need to reach a harmonization of checks on cultural objects being exported to non-member countries;
3) to complement the regulation of the internal market, it is essential to organise a system for the return of cultural objects unlawfully removed from the territory of a member State.

Having identified these programmatic points, resulting from political necessities, the Commission was invited to study practical solutions together with experts from member States[472]. The end of 1990 and all of 1991 were therefore dedicated to the study of possible practical implementations.

On January 17, 1992 the Commission was ready to present their conclusions to the Council and Parliament. The conclusions were embedded in two legislative proposals that would enable the Council to continue discussing on the basis of specific texts[473].

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[471] The conclusions were adopted during the session of November 19, 1990 in Brussels. The document containing the report of the meeting is stored in NA, b. 19990209/1.

[472] In doing that and to thoroughly examine the questions at stake three seminars were held, each organised by a different member State and dedicated to a different topic. The first was meant to study the harmonisation of export controls, held in Magalia, November 27-29, 1990 and organised by the Spanish authorities. Portugal sponsored a seminar on questions relating to the return of objects on March 21-22, 1991 in Sintra. The last one, on the movement of cultural objects in the Community, was organised by French authorities in Marly-le-Roi, June 26-28, 1991.

[473] This way of proceeding is in line with what is called the ordinary legislative procedure. According to Article 289 paragraph 1 of Treaty on the Functioning of the European Union, "The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission".

These two proposals were:

1) a Council Directive on the approximation of the laws, regulations and administrative provisions of the member States relating to the return of cultural objects unlawfully removed from the territory of a member State;

2) a Council Regulation on the export of cultural goods.

One of the main challenges that emerged from discussions was a provision of measures ensuring uniform controls on the export of cultural objects at the Community's external borders. In fact, it was necessary to implement a system that would not result in deviations in the art trade, meaning to avoid situations in which objects considered part of the national cultural heritage of one member State could leave the Community through another member State which did not provide the same degree of control.

At the same time, it was not conceivable to consider imposing a reciprocal knowledge of all national legislation in order to allow export to an *extra* EU destination taking into account the regulatory framework of the member State from which the object originated. One of the Commission's main concerns, in fact, was that the introduction of uniform controls could create a 'disproportionate administrative burden in terms of the objective pursued[474]'.

This is the reason why all member States agreed on the necessity to establish common categories of cultural objects subject to export control *extra* EU. Aided by independent experts and in cooperation with experts from the member States, the Commission undertook to establish the features of the cultural objects that would be protected by the Regulation[475]. Temporal and financial thresholds, besides taking into

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The detailed procedure of the ordinary legislative procedure is then explained at Article 294 of the TFEU.

[474] COM (91) 447 – SYM 382, cit., 6.

[475] The Directive on the return of cultural objects takes into account the same category of objects.

consideration the nature of the objects, were used in order to identify the cultural goods to subject to export controls. These characteristics and thresholds were all listed in an Annex attached to the Regulation.

The main categories of cultural objects listed in the Annex are the following:

1) Archaeological objects more than 100 years old which are the products of excavation and finds on land or under water; archaeological sites and collections.
2) Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years.
3) Pictures and paintings executed entirely by hand, in any medium and on any material, which are more than 50 years old and do not belong to their originators.
4) Original engravings, prints, serigraphs and lithographs with their respective plates and original posters, which are more than 50 years old and do not belong to their originators.
5) Original sculptures or statuary and copies produced by the same process as the original, which are more than 50 years old and do not belong to their originators.
6) Photographs, films and negatives thereof, which are more than 50 years old and do not belong to their originators.
7) Books more than 100 years old, singly or in collections.
8) Archives, and any elements thereof, of any kind or any medium which are more than 50 years old.

Regarding the financial threshold, this was expressed in ecus[476] and referred to the economic value of the good declared at the moment of export. Therefore, the Regulation covered the abovementioned object when their economic value corresponded to or exceeded: 0 for archaeological objects, dissembled monuments, and archives; 15 000 for

[476] ECUS stands for 'European Currency'.

drawings, engravings and photographs; 50 000 for statuary, books and 150 000 for pictures.

Once the thresholds were established, the Commission clarified that 'Any objects falling within these categories must be accompanied by an export licence[477]'. This sentence is immediately followed by the consideration that such a licensing scheme would have covered, in certain cases, even objects not considered to be part of the national cultural heritage of a given country, but,

"This, however, is an inevitable consequence of the fact that customs officials cannot judge whether or not an object belonging to these categories and intended for export has the status of a national treasure[478]".

This last clarification is particularly important for two reasons:

1) it formally established that, starting from 1993, some member States that previously had a less restrictive legislation on the protection of their national cultural heritage were obliged to adopt a minimum level of control when cultural goods are shipped to an *extra* EU destination. This kind of uniformity is, indeed, necessary since the Community has to take into consideration the necessities, needs and requests of all member States, both of those that are commonly known as 'source nations' and the 'market nations'. The imperative of this compromise is, finally, justified by administrative and bureaucratic needs linked to customs' checks. It is evident that member States adopting less restrictive legislation are free to maintain that legislation as long as the export of cultural goods had, as its final destination, another European country.

2) it made clear that member States would be prepared to adopt more restrictive controls on the export of cultural goods outside the EU borders. Those established at the Community level had to be considered the reigning thresholds.

[477] COM (91) 447 – SYM 382, cit., 10.
[478] Ibidem.

We can easily imagine how complicated has been for the Commission to reach these compromises and compel their acceptance by member States since the Regulation truly strikes at the heart of decisions that affect sensitive areas of national policy.

Once the Commission issued the two provisional proposals, the debate, following ordinary legislative procedure, moved to the Council where the discussions tend to be more political than technical[479].

2.2 Genesis and content of the Regulation on the export of cultural goods: the member States' perspective.

In the last paragraph we saw that the Commission's Regulation and Directive proposals were drafted after frank and intense discussions with member States' representatives and experts. It is now necessary to go into more detail regarding their different positions and requests.

The general reactions to the Regulation and the Directive proposed by the Commission in January 1992 are found in a report—signed by the French Director-General of the European Affairs Mission— of a meeting of the cultural goods working group held on February 13 and 14[480].

The first observation is that the individual stances of member States are still very far apart and, in such a scenario, the Commission's position is almost always intermediary. Apparently, at the time the reactions were so extreme that the rapporteur states "*Il sera difficile de les modifier*".

Southern nations and Northern nations also seemed to be divided in two groups, as suggested by the description of the French approach to the issues at stake that "*Selon les questions soulevées, (la France) est plus*

[479] NA stores a document dated the 29th April 1992 drafted by the Presidency of the European Council and addressed to the Council that reveals which were the main political issues under discussion. This is a document of the Council of the European Communities, from the Presidency to the Council, n° 5582/92 CULTURE 22 UD 37. See NA, b. 19990209/1.

[480] This is the 'Compte rendu de la réunion du groupe ad hoc « biens culturels », signed by Anne Magnat. The document is stored in NA, b. 19990209/1.

proche des pays du sud ou proche de la Grande Bretagne et des Pays Bas[481]". Germany found itself quite isolated on one side for its very severe and liberal opinions ("*Les rapprochements ne sont pas possibles à ce stade*"), being on the same page with the United Kingdom in certain cases. Both, for example, were convinced that the enactment of the Directive might lead to excessive insecurity in the art market. On the other side, southern States strongly stressed the necessity to consider the Regulation and the Directive as strictly connected, requesting their contemporary enactment[482]. Other countries that apparently were not firmly rooted in an 'extreme position' were Belgium, Ireland and Denmark, since very often they seemed to be in line with France.

The separation within EU countries was clear even with regard to the categories of objects the Regulation and the Directive would affect (meaning the categories of objects of cultural interest designated by the Commission and their related thresholds). Italy, Netherlands, Belgium, Ireland and France preferred that the legislative texts should relate to goods already considered cultural property or those that fell under the categories indicated by the Commission. In this way, member States could maintain their own categories of objects of cultural interest (very restrictive in the case of Italy, for example, and not existing at all for Belgium)[483]. Another isolated group was formed by Greece and Portugal

[481] Ibidem, 1.

[482] This information is confirmed also by another document reporting the outcome of proceedings conducted by the cultural goods working group which met on March 4, 1992, n° 4327/92 CULTURE 6 UD 7, stored in NA, b. 19990209/1.

« *Il a d'une manière générale été reconnu qu'un parallélisme devait être maintenu entre les travaux à mener concernant la directive et ceux relatif au règlement. Les deux instruments juridiques doivent en effet, selon la majorité des délégations, entrer en vigueur simultanément, compte tenu des liens multiples qui existent entre leurs dispositions* ».

[483] Ronchey, the Italian ministry for cultural heritage and activities, during a hearing before the 7th permanent commission at the Senate held on July 15, 1992 stated "*Sto lavorando assiduamente nella CEE affinché l'articolo 36 sia interpretato nella forma più ampia, sostenendo che i beni previsti da tale articolo dovrebbero costituire una categoria giuridicamente a sè stante*".

who did not favour the establishment of general categories valid in all European territory.

As is evident, member States were divided in two distant camps, each strident in its own position, based on different conceptions of the meaning to give to cultural heritage and the art market.

Another difference seemed to be the strong sense of unity among the northern countries in comparison to their southern counterparts[484]. Archival material confirms that:

"*Les pays du sud sont loin de former un groupe homogène qu'unirait la priorité d'aboutir à un texte, fut-il imparfait, et qu'aiguillonnerait la perspective de la présidence britannique, pendant laquelle tout ne peut guère qu'évoluer dans le sens d'une plus grande prise en compte des intérêts marchands*[485]".

It was felt that Greece had an unrealistic attitude, Spain was interested only in its own priorities (namely the protection of ecclesiastic properties), and Italy clung to the non-application of statutory limitations in respect to inalienable cultural property[486].

Another remark charged that the negotiations were conducted more on the form than on the substance of the legislative acts, especially

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The report of the hearing follows with the indication that the Italian delegation urged the adoption of a direct referral to each member State's national legislation for the identification of what should be considered cultural property.

[484] This is affirmed also by Ronchey, ibidem, that affirmed "*Nel corso delle trattative in sede comunitaria occorrerà tenere conto del contesto complessivo in cui sono inserite, che vede l'Italia in una posizione di oggettiva debolezza ed il pericolo che un eccessivo irrigidimento possa compromettere quanto ottenuto finora. Attualmente solo la Grecia è allineata sulle posizioni italiane, mentre la Spagna, il Portogallo, l'Irlanda e anche la Francia temono che nel semestre di presidenza inglese possano essere approvate proposte ancora meno condivisibili*".

[485] Note from the French ministry of foreign affairs, Direction of economic and financial affairs, Department of the economic cooperation written in Paris on April 12, 1992 by Philippe Jeantaud. The document is stored in NA, b. Répertoire 19990209/1.

[486] Ibidem, 2.

concerning the composition of the delegations representing each member State. Some of them, in fact, were only composed of civil servants from each respective Ministry of Culture, who appeared mainly interested in theoretical disquisitions[487]. These risked turning the proceedings into sterile debates, since the legal and the economic reasons underpinning the Regulation and the Directive tended to be overwhelmed by purely cultural discussion.

The need not to focus exclusively on aspects driven by a cultural approach, since there were many other issues to resolve, was shared by scholars, who agreed that:

"Such enactments (the Regulation and the Directive) were not intended as cultural policy instruments; they formed part of the drive to complete the common market and ensure proper functioning of its internal and external facets[488]".

The economic reasons justifying the adoption of the two legislative texts was also confirmed by the legal department of the European Council that, when questioned about clarification of the legal basis taken into consideration, affirmed:

"According to the jurisprudence of the Court, article 113[489] forms the legal basis for all matters concerning the regulation of the exchanges between the Community and third countries".

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[487] « (…) Délègues des seuls ministères de la culture, disposés à faire bonne figure dans des débats qui se prêtent à la durée et aux considération théoriques » Ibidem, 3.

[488] E. PSYCHOGIOPOULOU, *The integration of cultural consideration in EU law and policies*, op. cit., p. 21.

[489] Article 113 of the Treaty establishing the European Community Part Three falls under the 'Community policies' and, more specifically, under the 'Common commercial policy'. Its paragraph 1 states that "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade".

The Regulation on the export of cultural goods was finally adopted on December 9, 1992[490], while the Directive on the return of cultural objects unlawfully removed from the territory of a member State was enacted in March 1993[491]. This temporal gap between the adoption of the Regulation and the Directive, as expected, worried those States in the 'southern camp' who pushed for the transposition of the Directive a deadline of nine months beginning from December 3, 1992. This was established as such for all member States with the exception of Germany, Belgium and Netherlands, who obtained a period of twelve months for the transposition of the EU Directive into their national legislation. In this regard, the Italian Minister for Cultural Heritage and Activities, Ronchey, affirmed "*Il nostro interesse che sia approvata quanto prima la legge di ricezione (della Direttiva) è evidente, perché altrimenti saremmo esposti alla circolazione prevista dal regolamento, senza difesa per quanto riguarda le azioni di restituzione*[492]".

3. From supranational to national legislation.

The previous paragraphs were meant to observe and report the individual approaches and viewpoints put forward by member States as regards the adoption of the legislative texts on the circulation of cultural goods after the implementation of the single European market. This was what we called 'the bottom-up part' of the analysis.

In order to offer a 'complete' overview of the issue under scrutiny, we will proceed now in examining member States' legislative

[490] The full text of the Regulation is available online on the website https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992R3911.

[491] The full text of the Directive is available online on the website https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0007&from=IT.

[492] Ronchey, hearing of the 7th permanent commission at the Senate held on December 14, 1992, '*Indagine conoscitiva sull'attuazione del diritto comunitario nelle materie dell'istruzione pubblica, dei beni culturali, della ricerca scientifica, dello spettacolo e dello sport- profili amministrativi e organizzativi*', 4.

implementations of the abovementioned Regulation and Directive, following a 'top-down' approach.

The situation in 1993, in fact, was quite diversified with respect to the licensing systems adopted nationally, the maintenance or not of a double authorisation depending on the destination of the export (*infra* or *extra* EU), and the training provided to the authorities in charge of implementing the control.

In 1992 the EU Commission approved a programme, called 'Matthaeus', with the aim of 'helping member States' customs departments make the change to the new working arrangements introduced following the abolition of the Community's internal frontiers on 1 January this year[493]'. Within this framework, from April 5-7, 1993 member States held a seminar in Delphi specifically dedicated to the exportation of cultural goods. The reports of this meeting provide useful information regarding the progress reached at a domestic level in implementing the Regulation and the Directive[494].

The meeting in Delphi was attended by all member States except for Germany and its agenda included four main points: 1) a presentation, by the Commission of the mechanisms for mutual administrative assistance; 2) the progress regarding the entry into force of the two legislative texts into domestic legislation; 3) the problems arising from their application; and 4) the training of customs authorities in this regard.

First of all, the Commission urged member States to exchange information and to refer to the Commission for any doubts regarding the implementation of the Regulation and the Directive. Regarding the second point in agenda, each domestic situation will be briefly discussed.

[493] http://europa.eu/rapid/press-release_IP-93-621_en.htm.

[494] This is the 'Compte rendu du séminaire sur l'exportation des biens culturales' made by the French Committee on the Affairs of the European Union. The document is stored in NA, b. 19990209/1.

British administrative authorities implemented two different licensing systems: the first for the exportation *infra* EU and a second for shipments of cultural goods *extra* EU. Since the European scheme of control over the export of cultural goods was more restrictive than the one in place before, it was calculated that in one year the export requests would have gone up, passing from 6 000 to 30 000. More generally, the British delegation reported that the entry into force of the new licensing system had taken place smoothly.

The Netherlands maintained its previous regulation for the export of cultural property consisting of a list of 800 classed objects. In this way, for the export to an *extra* EU destination applicants had to request both the national and the European export licence. The situation was the same in Denmark where the implementation of the EU system struggled to be enforced since it was faced with a number of practical problems. Belgium, for its part, was in an even more difficult situation for two main reasons: there were no previous controls on the export of cultural property in place and, moreover, movable cultural goods were under the administration of three different local authorities. Luxemburg, on the other hand, facilitated by its geographical conformation, did not find difficulties: there were not many exit points from the country and the customs authority was always available to receive additional training.

Moving on to southern States, Greece and Spain declared that they would maintai their own domestic regulatory framework, adding to this another kind of export licence for the shipments towards a third country.

As mentioned in Chapter I, Italian delegation announced that its domestic legislation was going to be subject to modifications even if, at the end, not all the proposals put forward for a better management of the export offices were implemented. In 1998 Italian Parliament adopted law n° 88 that introduced the EU Regulation and Directive without upsetting the national core of the domestic export control system.

In France, the approval of the EU Regulation gave the impulse to adopt new domestic legislation containing modifications of the controls on the export of cultural property. This is law n° 92-1477 '*Relative aux*

produits soumis à certaines restrictions de circulation et à la complémentarité entre les services de police, de gendarmerie et de douane' enacted on December 31, 1992. The third Title of the law contained norms dedicated to goods of cultural interest and, more specifically, shortly after it was adopted, a decree concerning the new rules to be adopted for the permanent removal of cultural objects[495]. What is remarkable is the Annex to the decree, containing the description of the objects requiring an export licence prior to export. The age and financial thresholds, indeed, reflected the Community ones almost completely.

This way, France granted a quasi-total homologation of its domestic legislation to the newly adopted European one.

Beyond the communication of the changes introduced or under development in their own domestic legislation, the delegations present in Delphi took advantage of the meeting to share amongst themselves some of the difficulties encountered in implementing the EU legislation.

The first concern shared by member States regarded the difficulty to determine the State of origin of the cultural good. There was any established method to determine such provenance. This situation was in part due to the fact that some countries used different documentation than others, so that goods could circulate accompanied by certain certificates or not depending on the State they were located in.

A second problem, strictly connected to the previous one, regarded the amount of time necessary for a good to be subject to the legislation of a given country.

A first solution to resolve these kinds of issues was put forward by the Italian delegation, which proposed the composition of a handbook

[495] This is the Décret n° 93-124 '*Relatif aux biens culturels soumis à certaines restrictions de circulation*' enacted January 29, 1993. The full text of the decree is available online at the website https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006080990.

containing the legislation concerning export controls adopted by all member States. This proposal received broad approval.

Finally, all member States agreed on the necessity to implement specific training on the Community legislation for customs authorities.

4. The 'winners' lost and 'losers' won.

A residual doubt we could have after analysing the extent of EU legislation with regard to the control of the export of cultural objects after the abolition of the Community's internal frontiers, is: has the enactment of the Regulation managed to delineate the features of an European cultural heritage? Did member States benefit from the adoption of a common control over the export of cultural property beyond the Community's borders? Or, instead, has their power to protect and control what they considered their own national treasures been weakened? And finally, did they take advantage of this occasion to reflect on the appropriateness of their domestic regulatory framework and the administrative system responsible to implement it?

Regarding the first question, the analysis conducted seems to prove first of all that this was not the purpose of the Regulation. Its major scope was to introduce common principles on the commercial policy of the European Community, such that the cultural considerations—even if certainly significant—came in second place. From the beginning of the negotiations, in fact, Article 36 of Treaty was put forward in order to make clear that national definitions of what objects should be considered as cultural property would have prevailed. This proves that the key features of the European cultural identity are to be found in the pre-eminence of national diversities rather than in their homologation.

With respect to the advantages or disadvantages of adopting the two EU legislative texts into the domestic regulatory framework controlling the export of cultural assets, it seems that the new Community regime affected mainly those member States which previously lacked any kind of control. In fact, all the countries that had already adopted more restrictive legislation could continue to implement it, keeping in mind

that the EU regulation provides only a minimum level of control, and not a maximum. The situation is different for States such as Belgium which, starting from nothing, had to organise and implement a licensing system and regular checks at their borders.

An additional consideration can be made for Italy, a country that with regard to its specific historical moment can be considered at the same time a winner and a loser. In fact, on the supranational level it can be observed that the introduction of the EU Regulation did not weaken its control over national cultural heritage. On the 'domestic' level, on the contrary, we argued how the implementation of the EU legislation provided opportunities for the Administration in charge of implementing export control to equip itself with more efficient mechanisms. Italian politicians, in fact, recognised that the functioning of export offices in Italy was not satisfactory, because of the excessive discretionary power the offices had in deciding whether or not to grant the export authorisation and because of their inadequacy on an administrative level. Because the proposed amendments and improvements were not put in place, we could claim that, for this specific aspect, Italy lost an opportunity.

That is why, to recall the title of this paragraph, it could be argued that it appears the 'winners' lost and the 'losers' won.

5. Shaping EU control over the export of cultural property: mission accomplished?

Can we state that with the enactment of the 1992 Regulation and the 1993 Directive, the shaping of EU control over the export of cultural property has been completed? The answer would be rather negative.

The particular interest for this historical and political moment is due to the fact that this has been one of the first occasions in Europe in which, in a field so important for the definition of the national identity, the autonomy of member States has been limited, even if only to a certain extent.

After 1993, EU institutions kept on working to regulate the control on the export of cultural property. In 2009, after that Council Regulation (EEC) No 3911/92 was amended several times, a new Regulation was enacted . This is the Council Regulation (EC) No 116/2009 of December 18, 2008 on the export of cultural goods, entered into force March 2, 2009[496]. By a formal point of view this Regulation repealed Council Regulation (EEC) No 3911/92[497].

Its main objectives -likewise the 1992 Council Regulation- were to protect cultural goods in trade with third countries (in order also to maintain the internal market) and to subject the export of cultural goods to uniform controls at the Community's external borders[498]. Moreover, the preservation of member States' definition of their own national cultural heritage was reaffirmed, as clearly established at the last point of the Regulation preamble:

"Annex I to this Regulation is aimed at making clear the categories of cultural goods which should be given particular protection in trade with third countries, but is not intended to prejudice the definition, by Member States, of national treasures within the meaning of Article 30 of the Treaty"

On the substance, EU Regulation 116/2009 confirmed the necessity to present an export licence when exporting cultural goods[499] outside the customs territory of the Community. Under Article 2.2. such a licence shall be issued, alternatively:

(a) by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993;

[496] The full text of the Council Regulation (EC) No 116/2009 of 18 December 2008 on the Export of Cultural Goods is reported in the OJ L 39 of February 10, 2009.

[497] See Art. 11 of the EU Regulation 116/2009.

[498] See points 2 and 3 of the EU Regulation's preamble.

[499] Article 1 of EU Regulation 116/2009 specifies that "the term cultural goods shall refer (…) to the items listed in Annex I".

(b) or, thereafter, by a competent authority of the Member State in whose territory it is located following either lawful and definitive dispatch from another Member State, or importation from a third country, or re-importation from a third country after lawful dispatch from a Member State to that country.

An overall analysis of the international circulation of cultural goods should take into account not only the permanent removal of such objects from a national territory, but also their importation.

The regulation of the import of cultural property at the Community level didn't go together with the implementation of common export controls.

As reported by the European Parliament, until 2018 "The EU applies common rules subjecting the export of EU cultural goods to prior authorisation, as well as common rules on the return of cultural objects unlawfully removed from the territory of a Member State. However, until now there has been no EU legislation on the import of cultural goods into the EU's customs territory from third countries, apart from two specific measures for Iraq and Syria[500]".

This lack of legislation was healed by the approval of the Regulation (EU) 2019/880 of the European Parliament and the Council of 17 April 2019 on the introduction and the import of cultural goods[501]. The enactment of this Regulation follows a Commission's legislative proposal put forward in July 2017.

As clarified by art. 1, the scope of the EU Regulation under consideration is to"set out the conditions for the introduction of cultural goods and the conditions and procedures for the import of cultural goods for the purpose of safeguarding humanity's cultural heritage and

[500] See http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-import-of-cultural-goods .

[501] The official text of the Regulation is available on line at the website https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0880.

preventing the illicit trade in cultural goods, in particular where such illicit trade could contribute to terrorist financing".

Therefore, the introduction of a cultural good that falls within the categories listed in the Annex of the Regulation requires an import licence issued by the competent authority of the Member State in which the cultural good is placed for the first time[502].

Witouth going further with the analysis of the Community import controls, we could conclude the investigation on the European regulatory framework by saying that the 1992 legislative intervention represents only the first step of a broader operation completed almost 30 years later, and perhaps still not definitively.

Even if at the time there were 'losers' and 'winners', it is certainly true that the discussions, the questions, and the frictions put forward in that occasion contributed to establishing a basis for the construction of a 'European cultural identity' that is still in the process of formation.

[502] See art. 4 of EU Regulation 2019/880.

THE INTERNATIONAL REGULATORY FRAMEWORK: CONVENTIONS AND SOFT LAW MECHANISMS.

In 1995 John Henry Merryman noticed that "since promulgation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the typical contribution to the growing international cultural heritage dialogue has focused on the illicit trade and on measures to control or eliminate it[503]".

This statement turns out to be still relevant today, and it seems partially confirmed by the international legislation enacted since 1970. Actually, some differences between national cultural heritage legislation and international cultural heritage law can be traced. While for the former the control on the export of cultural property—meaning the regulation of the licit circulation of such goods—is a major subject, it is less so for the latter.

For what concerns the circulation of cultural objects, international treaties are far more focused on the prevention of phenomena of smuggling or on the return of cultural assets unlawfully removed from its country of origin[504]. Restricting the references only to the international conventions dealing directly with the circulation of cultural property, we can quote the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects and the 2017 Council of Europe Convention on offences relating to cultural goods.

The reason for this difference in substance between public policies adopted at the domestic and international levels is to be sought in the

[503] See J.H. MERRYMAN, *A licit international trade in cultural objects*, International Journal of Cultural Property, vol. 4, 1995, 13; republished in J.H. MERRYMAN, *Thinking about the Elgin marbles. Critical essays on cultural property, art and law*, Wolters Kluwer, 2009, 244.

[504] See A. CATELANI and S. CATTANEO, *I beni e le attività culturali*, XXXIII volume of the Trattato di diritto amministrativo directed by G. SANTANIELLO, CEDAM, Padova, 2002, 201.

responsibilities incumbent upon each legislator. At a national level the issues to be faced are more related to the building and preservation of a national cultural identity and to the regulation of a national trade and economic system linked to the artistic production. We analysed in the first part of this chapter the tight interconnections and influences between the domestic and the European regulatory frameworks in this specific sector. We saw, in fact, that Community institutions provide for a regulatory framework to control the export of cultural objects within and beyond European borders.

Moving on to the international scenario, on the contrary, we do not find any treaties or conventions dealing with the licit circulation of cultural property.

Besides these differences, something that the three legislative levels (national, European and international) have in common is the existence of a trigger for intervening in regulating the circulation of cultural objects. This is in fact due in any circumstances to certain historical factors.

For what concerns the Italian, French and British domestic legislation, the historical reasons underpinning the adoption of export controls have been reviewed in chapter II. Regarding the European Union, instead, the approach of 1992 and the accomplishment of the internal market was the reason to establish common rules that regulated the trade in antiquities and objects of cultural interest and, at the same time, ensured member States the possibility to preserve their own national treasures.

Also for the international context historical events such as the outbreak of terroristic phenomena in the Middle East have been decisive for the adoption of supranational rules. Following this specific historical example we could think about the enactment of the 2017 Council of Europe Convention on offences relating to cultural property.

6. Dealing with the licit while regulating the illicit circulation of cultural property.

So far we argued that when dealing with international treaties and conventions in the area under examination, the primary concern is to confront the illicit or unlawful phenomena that could arise in the movement of cultural objects.

While this is not the place to examine in detail the supranational legislative framework preventing and fighting the illicit export of cultural property, we can continue the analysis by looking at the repercussions that international treaties enacted to face such events have on the control of the export of cultural objects[505].

6.1 Juridical and practical measures suggested by UNESCO to prevent illicit trafficking.

International organisations (first and foremost UNESCO[506]), in pursuing their mission, put in place instruments and adopted recommendations aimed at fostering the prevention of illicit traffic in antiquities and objects of cultural interest. In doing so, the main juridical

[505] Among the consolidated bibliography concerning the illicit trafficking of cultural property, see: N. BRODIE, J. DOOLE, P. WATSON, *Stealing history: the illicit trade in cultural material*, McDonald Institute, Cambridge, 2000; L.V., PROTT, *Biens culturels volés ou illicitement exportés: commentaire relatif à la Convention d'UNIDROIT 1995*, UNESCO, Paris, 2000; N. BRODIE, K.W. TUBB, *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*, Taylor & Francis, 2003; F. DESMARAIS (edited by), *Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage*, ICOM, Paris, 2015;

J. ULPH, I. SMITH, T*he Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability*, Hart Publishing, 2012.

[506] UNESCO is the acronym for 'United Nations Educational, Scientific and Cultural Organization'. It is a specialized agency of the United Nations and its major aim is to contribute to the promotion of international collaboration in education, sciences, and culture.

measures that UNESCO suggests to nations and other interested parties to adopt are the following[507]:

1. Update and/or strengthen national legislation;
2. Ratify international conventions;
3. Utilisation of practical instruments made available by supranational institutions.

The first suggestion highlights the importance for each State to establish national cultural heritage legislation and to enforce it. Nowadays almost every country in the world is provided with a regulatory framework for the protection of the national cultural heritage, but not all of them foresee the same degree of safeguards or the same typologies of intervention. This heterogeneity, as noticed, is due to many different factors—among which we can list historical, political, economic and social reasons— and it is partially overcome by international conventions able to provide a certain degree of homologation.

Notwitstanding the unavoidable heterogeneity within the different domestic regulatory frameworks, UNESCO advises member States to constantly update their domestic norms. In particular, the latter should be provided with the following characteristics:

3) a clear definition of the cultural heritage falling within the scope of the legislation;
4) a defined legal regime for cultural property establishing what categories of goods cannot be object of trade and what can be permanently exported (and under what conditions);
5) a system of listing and/or identification in order to monitor cultural objects requiring special care or administrative control, both in public and private hands.

Concerning specifically the private sector, UNESCO recommends national governments to ensure that dealers of antiquities and cultural

[507] See *Mesures juridiques et pratiques contre le trafic illicite des biens culturels*, handbook published by UNESCO, Section des normes internationales, Division du patrimoine culturel, 2006.

assets keep a register containing all the transactions they make. This register should contain a clear description of the object, its provenance, price, and the names of the buyer and seller. Such information might prove to be essential to confront the illicit traffic in cultural property and, moreover, in this specific sector the collaboration between public and private actors should be encouraged in every possible way.

The last recommendation stresses on the primary importance of the information: States have to foster awareness on the importance of the national cultural heritage and, in doing so, they should make available as clearly as possible the baseline legislative framework to control the trade and export of objects of cultural interest.

If these first suggestions are mostly theoretical, on a more practical level UNESCO recommendations focus on three aspects regarding, respectively, the budget available, the efficacy of the administrative action, and access to information.

Member States are invited to allocate adequate financial and human resources to the different actors operatin at a regional, national and international level for the protection of national cultural heritage. Taking into account the bureaucratic point of view, the administrative structure in charge of controlling the circulation of cultural objects should be organised in a way to ensure the efficiency of its performance. Finally, those willing to be purchasers, sellers or exporters of cultural property should be put in the condition to obtain information easily. They should have a direct access to the norms and the documentation they need in order to legally conclude their transactions. This is possible by making the legislation in force available on official websites and also by sharing all the useful information in the UNESCO database of national cultural heritage laws[508].

[508] UNESCO Database of National Cultural Heritage Laws 'was launched in 2005 (…) is the unique tool which allows a free and easy access to cultural heritage laws currently in force as well as a rapid consultation of other relevant national cultural rules and regulations'. It is available at the following link:

The second point mentioned in the juridical measures suggested by UNESCO ('ratification of international conventions'), highlights the importance to adhere to these supranational pieces of legislation. There are several reasons underpinning this emphasis. First of all, international conventions provide for a number of practical suggestions as well as a series of general principals that have been agreed upon by many different actors. By ratifying an international convention, State parties commit themselves to adopt a regulatory framework that will be the same for all of them. As UNESCO emphasizes :

« *L'avantage de ce régime uniforme est qu'il règlement directement ce qui fait l'objet de la convention au sein de tous les Etas parties- chacun suivant les mêmes règles de sorte qu'il n'y a ni désaccord ni surprise lorsqu'une action est engagée conformément à une disposition de la convention, contrairement à ce qui pourrait se passer en l'absence de conventions*[509] ».

Moreover, once a State decides to ratify an international convention, it must be embedded in the national legislation, and this can happen by revising already existing norms or by the adoption of a new law. Whatever the case, the reception of an international treaty is often a good occasion to revise the domestic legislation in the area concerned and to implement the general principles established at the supranational level.

From a practical point of view, the process of ratification of an international convention is generally made up of two main phases, the first put forward at the national level and the second at the international one. In the former, the ministers who are concerned (regarding the circulation of cultural property, this could be the Ministry of Cultural Heritage and the Ministry of Foreign Affairs) analyse the content of the convention and deliberate upon the pluses and minuses of its ratification. They then proceed to adopt the provisions of the convention into the domestic legislative framework.

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https://en.unesco.org/news/unesco-database-national-cultural-heritage-laws-updated/.

[509] See *Mesures juridiques et pratiques contre le trafic illicite des biens culturels*, op. cit., 8.

Once this national phase is over, the State must file the binding document of adherence to the convention to the international body that enacted it in the first place. At this stage, the convention enters into force between three and six months after the beginning of the entire process[510].

Lastly, the third juridical measure suggested by UNESCO to prevent the illicit trafficking of cultural property concerns the utilisation of practical instruments made available by supranational institutions. More specifically, the practical instrument in question for what concern the international circulation of objects having cultural interest, is a model certificate of export developed by UNESCO and the World Customs Organization (WCO).

UNESCO and WCO elaborated the export certificate in 2005 and since then have been encouraging each member State to adopt it. Its creation was justified by the necessity to provide a model certificate specifically suited to the export cultural objects, since many States used the same form for the export of ordinary commodities ('normal merchandise') and cultural property.

If on the one side it is true that in 2005 there were already many countries provided with a national export certificate specifically suited for cultural objects, on the other this 'supranational' model met the needs of those countries without any certificate of this kind.

Lastly, the supranational form helped to standardize the documentation already adopted at the national level. Such standardization could facilitate the drafting of all the bureaucratic forms associated with customs operations between one country and the other.

[510] The main international conventions that come into play to prevent illicit traffic in cultural property are: the 1954 *Hague Convention for the protection of cultural property in the event of armed conflicts*; the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property* and the 1995 *UNIDROIT on stolen or illegally exported cultural objects*.

The UNESCO and WCO model certificate of export, together with its explanatory notes, is available online in different languages, which member States are free to download and adapt to their specific necessities[511].

Concerning the content of the form, it is rather self-explanatory. The main information to be provided is the indication of the cultural object's owner; the beneficiary applicant requesting the export and his/her representative (if any). Regarding the typology of export, it has to be specified whether it is permanent or temporary, the country of destination and of departure, including the specification of the issuing authority. Besides this, a picture of the cultural object to be exported is needed together with the indication of its identifying characteristics, such as the dimensions, the inventory number, or any other classification such as type, author, origin, date of production, title and material/technique. Finally, the UNESCO and WCO export certificate requires a declaration of the economic value of the object and its legal status (sold, loaned, exchanged….).

The combination of all this data allows for the precise identification of the cultural object that will cross the borders of one or more countries and, furthermore, its registration and filing in customs offices permits to keep track of its passage. This activity of monitoring is surely a fundamental tool of prevention against the illicit circulation of cultural property and, moreover, this chain of information facilitates the identification of the object's country of origin.

After looking at the purpose for its enactment and the structure of its content, we shall proceed by looking at the extent this international form of export certificate has been used. The only details regarding this aspect

[511] The model certificate is available at the following website: http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/.

are obtainable by a report made in 2009 by UNESCO offices. No more updated information are available[512].

After its elaboration in 2005, both UNESCO and WCO sent the model certificate for exportation to their States parties, recommending its adoption. Two years later (on 25 September 2007) the same countries received a request to evaluate the use and the effectiveness of the model certificate. The answers received were needed so that the two organizations could enhance the use of the export certificate and modify it according to the necessities put forward.

Secretaries of UNESCO and WCO received forty-three answers[513]. These replies reveal that the majority of the States already had a certificate or a licence specifically suited for the export of cultural objects. On the other hand, there were countries where the export of cultural property was completely prohibited, so that they did not need any kind of export certificate. Moreover, twenty-eight answers out of a total of thirty-nine reported that the export certificate actually in use was the one elaborated by national authorities, which was hardly ever inspired by the UNESCO-WCO model.

Regarding the pro and cons of the international export certificate, some States found the application a bit too long and complicated: on this point Costa Rica and Burkina Faso mentioned the lengthy procedures that

[512] Thanks to Edouard Planche, head of Culture Unit at UNESCO, for providing the '*Rapport sur l'utilisation du modele de certificate d'exportation UNESCO-OMD*' produced in May 2009. The information regarding the lack of any further official data regarding the utilisation of the export certificate has been provided by the same Edouard Planche in an interview conducted by the author in July 2018.

[513] The answers received came from the following States: Andorra; Angola; Argentina; Australia; Azerbaijan; Bhutan; Brunei Darussalam; Burkina Faso; Chile; Colombia; Costa Rica; Croatia; Cyprus; Cuba; El Salvador; Ethiopia; Finland; Gabon; Ghana; Israel; Italy; Japan; Jordan; Kenya; Kuwait; Malesia; Mexico; Monaco; Mongolia; Montenegro; Mozambique; New Zeeland; Norway; Papua New Guinea; Serbia; Swiss; Thailand; European Union; Macedonia; Tunisia; Turkey; Zambia.

ensued when a single physical or juridical person wanted to export many cultural objects at the same time. This was not possible by using a single form, so that the same information had to be repeated in many different documents. Notwithstanding this, a lot of state parties acknowledged the importance of such a tool, especially for its international vocation. They recognised as well that, if adopted globally, it would be a very useful instrument in combating the illicit trafficking of cultural property.

Finally, while half of the States reported that they were not using the UNESCO-WCO model and that they were not going to do so since a national export certificate was already in place, the other half proved to be open to its adoption in the future. Among some of this second category, however, the model certificate had to be simplified and adjusted case by case according to the national legislation.

6.2 Codes of ethics.

Within the regulatory framework adopted to prevent the illicit trafficking of cultural property (that directly or indirectly affects also the licit circulation of these properties) we have to mention also the codes of ethics adopted by different bodies.

It is important to recall that codes of ethics do not provide legally binding provisions, but only commit state parties to be morally engaged in respect to certain behaviours and actions. In such a context, and since the illicit circulation of cultural objects has started to be an increasingly worrying phenomenon, some of the actors involved in the trade of cultural objects chose to bind themselves to specific ethical and professional principles[514].

[514] For an overview of such soft law mechanisms implemented by museums see: PJ O'KEEFE, *Codes of ethics: form and function in cultural heritage management*, International Journal of Cultural Property, vol. 7, issue 1, 1998, 32-51; M. FRIGO, *Ethical Rules and Codes of Honour Related to Museum Activities: a Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property*, International Journal of Cultural Property Law, vol. 16, issue 1, 2009, 49-66.

Generally, the distinction between cultural objects that can be legally traded and those that cannot, with the aim of keeping them away from the market, is emphasized.

In 1999, the UNESCO intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation adopted the 'UNESCO International Code of Ethics for Dealers in Cultural Property[515]'. This international code of ethics consists of eight articles, among which the first enunciates the founding principle, that is:

"Professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported".

After its adoption, UNESCO encouraged its States parties to share the document with the national associations of dealers in antiquities and cultural objects so that they might acknowledge its content and adopt it.

Among such soft law mechanisms, we can also mention the 'Red Lists of Cultural Objects at Risk: practical tools to curb the illegal traffic of cultural objects' promulgated by the International Council of Museums (ICOM). The Red List "presents the categories of cultural objects that can be subject to theft and traffic", and its purpose is to "help individuals, organisations and authorities, such as police or customs officials, identify objects at risk and prevent them from being illegally sold or exported[516]". ICOM began working on the content of the list in 2000 and it has been helped by the experts who nationally monitor the circulation of cultural items inside and outside domestic borders.

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[515] The full text of the 'UNESCO International Code of Ethics for Dealers in Cultural Property' is available online at the website: http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-international-code-of-ethics-for-dealers-in-cultural-property/.

[516] See the official statement of ICOM available at the website: https://icom.museum/en/activities/heritage-protection/red-lists/.

This list can be seen as an instrument that assists the licit trade in cultural objects since it does not contain property that has already been stolen or illegally exported. On the contrary, "the cultural goods depicted on the lists are inventoried objects within the collections of recognised institutions. They serve to illustrate the categories of cultural goods most vulnerable to illicit traffic[517]". We can see how this is an example of 'dealing with the licit while regulating the illicit circulation of cultural property'.

[517] Ibidem.

CONCLUSIONS

1. Recap of the theme.

The main question around which the whole dissertation revolves is: how does a State regulate the permanent removal of artworks and other objects of cultural interest beyond its national borders?

We have explored this topic with a twofold focus, approaching it looking both at cultural policy issues and at administrative law aspects more generally. If, on the one hand, investigating the way a State exercises the control on the export of cultural property has allowed us to detect the different reasons underpinning the implementation of a more or less restrictive regulatory framework (and its repercussions). On the other hand, the analysis of such a complex system allowed us to understand the interconnections between some fundamental principles of administrative law.

As mentioned, the regulatory framework conceived to eventually retain an object of cultural interest within the national soil of a given country is a complex one. It implies the balancing between different actors (States, supranational institutions, private individuals and art dealers' associations) and different interests (the retention of the artwork in its place of origin for the benefits of the nation; the maintenance of an active art market; the fruition of cultural objects as patrimony of mankind). In order to deeply understand the topic under consideration, it has therefore seemed appropriate to split up the investigation over the export control system into the different 'steps' of which it is composed.

Among the macro-areas characterising the regulatory framework of the export control we can mention the legislative basis that shapes the whole system; its administrative implementation; and the eventual judicial review of the acts issued by the Administration to those who have submitted an export authorisation request.

All these different factors are so connected with each other that we couldn't neglect one of them if we wanted to understand the functioning

and the reasons underpinning the whole export control system, and its effects.

Before proceeding with an overview of the above mentioned passages, it is worth mentioning other two main features that characterised the investigation; these are the historical approach and the comparative perspective.

Historical events and facts have been pieced together after extensive archival researches carried out with the aim of understanding, among other things, what were the reasons underpinning certain regulatory measures; what kind of compromise between different values and parties were made; whether there were legislative proposals made and then discarded; and, finally, what reactions provoked the enactment of a new legislation.

This archival research involved the consultation of the State archives belonging to the three countries examined[518] in addition to the private archive of the first Italian Minister of Cultural Heritage, Giovanni Spadolini[519]. The research has been focused on both official (draft legislation; minutes of meetings; reports of the activities carried out by the Administration) and non-official materials (notes; letters; memoranda) produced and stored by the Administration in charge of the protection and management of cultural heritage in Italy, France and England[520]. The reading of documents testifying the backstory of official legislation has been fundamental not only from an historical point of view, but also for a better comprehension of the regulatory frameworks currently in place.

[518] These are: *Archivio Centrale dello Stato* in Rome; *Archives Nationales* of French State, *site de Pierrefitte-sur-Seine* (Paris); and The National Archives, based in Kew (London).

[519] Archivio Giovanni Spadolini, Fondazione Spadolini. Nuova Antologia, Florence.

[520] References detailing the archival sources consulted are listed in the section titled 'Selected Bibliographical and Archival references', which follows this one.

Lastly, we should mention that while there are scholars who investigated the history of the legislation concerning the control of the export of cultural objects (especially in Italy and in France), a thorough historical reconstructions of the administrative structure and procedures implementing these policies has not yet been conducted.

Concerning the comparative perspective, the research of the legislative framework, administrative organisation and judicial review have been addressed with respect to three different countries: Italy, France and England. Their choice is due to the affinities and differences that have historically distinguished the attitudes of the Italian, French and English legislatures when regulating the permanent removal of good having a cultural interest outside national borders.

Moreover, the three countries analysed represent, each in a different manner, a specific and different model of 'way of thinking about cultural property[521]'. Resuming the seminal distinction outlined by John Henry Merryman in the '80s, we have furnished examples of source nations' policies by looking at the Italian regulatory framework, and an example of a market-oriented nation with regards to England. France, in its turn, has proved to have typical features of both, depending on the period taken into consideration. Currently, we could say that the regulatory framework adopted beyond the Alps lies in between Italian protectionism and English liberalism.

In the light of the above, how and why was this comparison conducted throughout this dissertation?

The main objective was to put into relief the existence of different declinations and legislative options to reach the same purpose, namely the preservation of the national cultural heritage through the control of the export of cultural property. We have observed how the very same legislative priority can be pursued starting from different assumptions and adopting different regulatory systems.

[521] See J. H. MERRYMAN, *Two ways of thinking about cultural property*, The American Journal of International Law, vol. 80, n. 4., 1986.

The identification of these differences has thus led us to reflect on the possibility of 'exporting' from one country to the other some of the aspects that, in each model, seem to work best. But on this point, we had to consider the profound discrepancies existing in the administrative systems of the three countries, and thus the difficulty of transposing certain solutions in another social-legal context. This seems even more complicated if we think that Italy and France are based on a tradition of civil law, while England belongs to the common law system. Furthermore, notwithstanding the shared common origin of the Italian and the French administrative systems, the two—on account of the decentralisation characteristic of one and the centralisation typical of the latter—differ from each other in a substantial way.

With respect to the way in which this comparison has been carried out, the choice was for a 'thematic and step-by-step approach', which is evident also by just looking at the Table of Contents that opens the dissertation. The titles of the chapters, 'parts' and paragraphs reveal how the whole investigation has been structured in macro-themes, each of which includes a comparison of the three different systems.

One option was to divide the dissertation in three parts—one for each country—, reiterating the same kind of analysis sequentially, following a scheme rendered in simplified form as:

1. Italy: legislation; administrative organisation; judicial review.
2. France: legislation; administrative organisation; judicial review.
3. England: legislation; administrative organisation; judicial review.

This approach, however, was discarded essentially for two reasons: it would ultimately have been ponderous to follow and, more than anything else, it would not have allowed a step-by-step comparison.

The chosen option, on the contrary, allows (hopefully) the reader to focus on the subject addressed (e.g. administrative organisation) from different perspectives (the Italian, French and English solutions are illustrated one next to the other). This way, it has been possible to

highlight the similarities and differences between the three systems alongside our analysis.

To conclude this general summary of the distinguishing features of this dissertation and of the approaches adopted in analysing the topic under consideration, we would emphasise once again the great importance of recognizing the close connection between the different macro-areas that contribute to form the whole regulatory framework under consideration.

We have repeatedly described the control of the export of cultural objects as a 'complex system', and this complexity has been demonstrated in the analysis conducted throughout the four chapters that precede these conclusions.

The interconnections between the different steps -from the submission of an export authorisation request by the applicant to the release of the final decision over the exportability of the cultural object by the responsible administrative office and, finally, when called for, its amendment by the judicial authority- have been highlighed. Investigation into each of these steps was needed precisely to 'follow' the whole process piece by piece and to detect what aspects proved to be efficient and what, on the contrary, were unsuitable.

This segmentation (together with the subsequent restitching of the different sections) seemed to be the only way possible to avoid misleading judgements over the three different systems under consideration.

It is not unusual, indeed, to read opinions regarding the export control system of certain country based only on a legislative analysis. The assessment of legislation could be insufficient or incomplete because, especially in this field, the effectiveness of a given norm is revealed mostly in the course of its implementation and the interpretation given of it by the competent Administration (and eventually by the subsequent intervention of the administrative judge). When this complementary analysis is lacking, the whole opinion risks distortion.

2. The policy-making process underpinning controls over the export of cultural property.

We could not analyse the export control system without first deeply examining the legislative basis on which it is based. This is why the first chapter of the dissertation is devoted to investigating the legislative framework regulating the permanent removal of objects having a cultural interest from the country where it is located.

The legislative analysis focused (for the three countries under consideration) on the historical origin of the legislation regulating the export of cultural objects; its evolution over the years and its current status. The main documentary sources consulted for writing this part were -in addition to official texts published in the States' legislative records- reports of parliamentary debates; draft legislations not ultimately passed; and archival material documenting the legislative framework adopted in the past.

This investigation, aside from the individual specificity of each national history, highlighted some common features that can be summed up under three headings:

1. the reasons underpinning the adoption of a regulatory framework to control the export of cultural property;
2. the actors involved and the preliminary analysis conducted in the policy-making process;
3. the existence of a Community and supranational legislative framework.

2.1 The reasons underpinning the adoption of a regulatory framework to control the export of cultural property.

Bibliographical, archival, and legislative sources consulted have shown how, even though adopted in different historical periods, the pieces of legislation enacted in Italy, France and England to regulate the export of cultural objects were dictated by similar underlying reasons.

Particularly clear is the emergency character that distinguish the policies meant to control the permanent removal of cultural objects outside national borders. This emergency character is revealed by the close relation between the enactment of new pieces of legislation and a period of social, political, or economic instability which endangered the physical survival of cultural property or the maintenance of their status (and not least their economic value).

The introduction, or the periodic updates, of the three legislative frameworks analysed was adopted in response to the uncontrolled exodus of artworks and other objects of cultural interest from national borders, or as a preventive measure to avoid that happening. This exodus could occur for different reasons, among which we can mention wars, internal uprisings or political instability that complicated strict controls on incoming and outgoing goods.

Other historical reasons underpinning the adoption of an export control system reveal the risk of massive removal of artworks or other cultural objects by foreign dealers and institutions. This happened particularly during periods of supremacy of a given country in the art market sector. In this respect, we can recall the situation at the end of the first half of the XX century, when the U.S.A. became leaders in the purchase of modern and contemporary artworks coming especially from Europe. Some countries (France and England above all), worried by the power of this foreign capital and concerned for the impoverishment of national collections, decided to tighten up the legislation in force in order to 'save' their national treasures from being exported and maintain their national cultural heritage.

This last passage provides us an additional element typical of the 'emergency' character mentioned above, namely the great sensibility of the population towards the destiny of their national cultural heritage. The peril of losing artworks and other cultural objects perceived as being part of our own national identity is something that typically alarms large segments of the populations, and that has an immediate echo in the daily press.

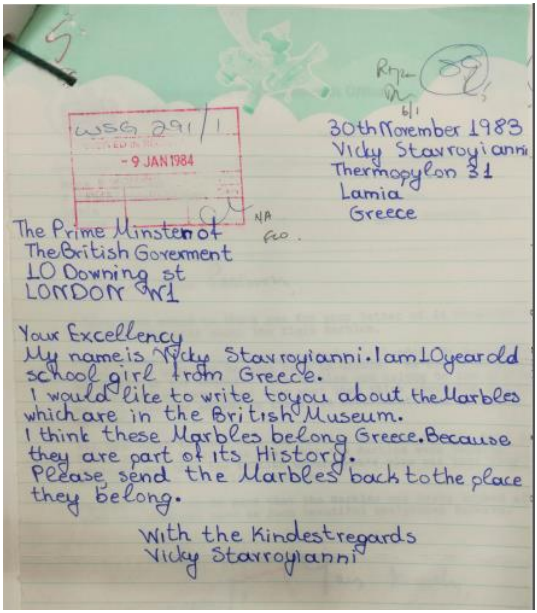
It goes without saying that the pressure media could exert, combined often with a real emergency situation, put politicians in the position of taking swift action. This is the reason why sometimes cultural policies do not reveal a broadminded approach, which mean the need to constantly revise the norms implemented or to substitute them before long.

As a last remark, we would like just to stress once again the degree to which cultural heritage policies are perceived as fundamental for the maintenance of a sense of national belonging and national identity by the population living in the country adopting them. In this context the norms regulating permission to permanently export cultural property are no small matter but, on the contrary, one of the political concerns most deeply felt by citizens worldwide.

The connection between cultural objects and the nation to which they belong is considered as a strategic one, if not necessary; the interest of the states to preserve those artworks that most represent the country has been deeply studied by scholars worldwide[522]. A clear example of this feeling of belonging (that is at the base of legal constrains to the free circulation of artworks and other objcets of cultural interest) is the letter below stored in the National Archives of England. The letter was sent by a Greek girl to the prime minister of British Parliament on November 30, 1983. This document[523] is, to our mind, the most fitting testimony - among all the different kinds of material consulted for writing this dissertation- of 'attachment' to the national cultural heritage.

[522] See, among the other references quoted in the footnotes and bibliographical references of this dissertation: J.H. MERRYMAN, *The nation and the object*, cit.; E. JAYME, *Globalization in art law: clash of interests and international tendencies*, cit.; L. CASINI, *International regulation of historic buildings and nationalism*, cit.

[523] The letter is stored in TNA, FCO 9 4090.



2.2 Actors involved and preliminary analysis conducted in the policy-making process.

Another important element taken into consideration while analysing the different legislative frameworks was the involvement of the different actors implicated in the whole process of export control. Among them we can mention, besides the politicians in charge of formally adopting any given legislation, the representatives of the art market (dealers, auction houses, gallerists), the world of art collectors, and those in charge of preserving and increasing national art collections.

As has been observed, their involvement in the decision-making process is not consistent among the three countries analysed; they are consulted and recognized as stakeholders in some cases while almost completely neglected in others.

Our investigation highlighted the importance of including people of different backgrounds representing the different values and interests that revolve around cultural heritage when discussing legislative

measures concerning it. In this way, the 'complexity' we have referenced in regard to export control should be reflected in the multidisciplinary approach adopted in its regulation.

Moreover, it is important to stress the importance of maintaining the stability of such a multidisciplinary approach rather than resorting to irregular and sporadic consultancy from 'external experts'. The establishment of ongoing communication among the different actors would create a condition of reciprocal trust and confidence that could only work in favour of the primary interest pursued: the best protection of the national cultural heritage.

This way of proceeding, finally, would help bring the public and private interests together in collaboration rather than in conflict, as too often happens.

With regard to the assessments conducted prior to the enactment of an export control system, what is important to underline is the need to adopt, in this field also, evidence-based policies.

In general, we could say that the evidence on which to base the adoption of a regulatory framework for regulating the permanent export of cultural property should be reliable and of different kinds. As for reliability, we want to emphasize the fact that, without compromising ideological principles, a commitment to monitoring and evaluation must be foremost. On the other hand, monitoring programs must recognize the necessity of involving diverse typologies of knowledge to identify how to optimally deal with the issue under discussion.

In order to do so, legislators should be able to combine evaluations and assessments concerning economic, legal, historical and artistic factors.

While there is no to denying the existence of such an approach in some legislative interventions on cultural heritage, we should ask whether this kind of impact assessment is conducted prior to the adoption of a regulatory framework concerning the control of the export of cultural objects.

A legislative intervention of one kind rather than another may lead to important consequences for the country which has issued it, and such consequences can be appreciated in economic, social and artistic terms. The impression we have is that, in some countries more than others, the legislative frameworks concerning controls over the export of objects having artistic or historic interest are based mostly on ideological assumptions rather than technical evidences.

2.3 The existence of a Community and supranational legislative framework.

We have certainly been compelled to recognize how much domestic legislation has been influenced by the adoption of a supranational regulatory framework on this subject.

After having conducted an analysis of the content of this legislative framework and the different purposes for their enactment (see especially chapter IV), however, a question remains: when it comes to the supranational level, is it enough to provide State parties with a common legislation or they should be provided, also, with a common administrative structure? And if this is the case, what kind of authority should organise and run it?

Since cultural objects today are ever more subject to international and trans-borders trade and movements, we would probably need a sort of supranational authority to manage and control these international exchanges. At the same time, in this field there are so many factors that come into play that a decentralised approach seems to be the only one possible. We are talking about subjective and highly interpretable factors such as national importance; rarity; artistic relevance; and historical significance. The appreciation and evaluation of such features are susceptible to many different interpretations, which can vary depending on the context in which the evaluation is conducted.

It is for all these reasons that the establishment of a 'global' authority in charge of controlling the circulation of cultural property doesn't currently seem possible or practicable.

To corroborate this assumption, we observed how export control systems, despite some aspects in common, to a great extent rely upon rules and principles established at the national level[524].

This perceived regulatory fragmentation is such that nowadays the State is still the first and foremost actor responsible for the definition of its own national cultural heritage and, consequently, for preservation of national treasures inside domestic borders.

International conventions and treaties undertake fundamental tasks, especially as far as legislative harmonisation, multilateral collaboration and dissemination of basic legal protection are concerned. Having said that, at this stage it does not seem possible to envisage a sort of global administrative authority or a global set of norms that could replace national institutions and administrations in the implementation of an export control system.

The regulatory fragmentation when dealing with the definition of a national cultural heritage and preservation of national treasures inside domestic borders occurs even in the the context of European Union, where the legislative homologation should be greater. We saw to what extent the EU Regulation 116/2009, although it provides for a minimum level of uniformal controls at the Community's external borders, allows member States to tighten border controls for cultural objects so to create differentiated regimes.

It cannot be denied that this international regulatory fragmentation causes some difficulties, especially if we think at the number of displacements that artworks face worldwide and at the huge extent reached by the international art trade nowadays. But it is unlikely that these issues, even if existing, will lead to a general standardisation of the norms and rules regulating the circulation of artworks and other objects

[524] Such legislative fragmentation begins to be seen as a threat to the establishment and maintenance of a licit international circulation of cultural property. In this regard, see M. PIRRELLI, *"Lavorare per una normativa uniforme per il mercato dell'arte". L'appello di Marina Schneider (UNIDROIT)*, Il Sole24 ore, April 3, 2019.

of cultural interest. A prospect of real improvement in this sector could rather come from an administrative simplification, assurance of the efficiency of the whole export control system and transparency in draft legislation. All this results in the need of reaching an adequate standard of administrative management rather than the necessity for the Legislator (at the different levels) to create new norms[525].

3. Administrative organisation.

After analysing the legislative basis on which export control is built, we proceeded with the investigation by looking at the way the regulatory framework is implemented in practice.

This research was not limited to outline what are the administrative structures in Italy, France and England that receive and assess export authorisation requests, but also included the analysis of the kinds of professions involved in performing these duties and the procedures adopted by the responsible offices.

The main sources used to conduct research in this area were legislative texts; letters stored in State archives (mostly exchanged between the central Administration and its peripheral offices or between the minister in charge of cultural heritage and her/his staff); reports on the functioning of export offices; and interviews conducted by the author with representatives of the national administrations involved.

The main aspects highlighted in this regard concern the structure of the administrative systems and the organisational solutions adopted to deal with discretionary assessments.

[525] On the strategic role played by the Public Administration see CASSESE S., *Che cosa resta dell'amministrazione pubblica?*. For a specific reference in the field of cultural heritage management see A.L. TARASCO, *Diritto e gestione del patrimonio culturale*, Laterza, Roma, 2019.

3.1 The administrative structure.

The three countries under considerations have widely differing administrative and organisational traditions. More specifically, one is characterised by a strong decentralisation, the second stands out for an accentuated centralisation, and the third relies on a structure which tends to eliminate red tape in favour of greater independence and the efficacy of its agencies.

All three models are ascribable to the administrative history of the country they belong to, and they keep with the tradition of the larger State organisation. This is to say that in none of the cases analysed the administrative structure implementig the export control differs in its bureaucratic model from other administrative branches of the same country. In Italy there was an attempt to establish an independent authority to manage, among other things, the export control of cultural property but this project was later discarded in favour of the establishment of a ministerial structure like the traditional and the current one.

It is not really possible to say if there is a model that is more efficient or better than the other ones. A greater or lesser efficiency is not entirely dependent on the administrative structure adopted; there are other elements that, together with this one, have an impact on the functioning and efficacy of the export control system.

3.2 Organisational solutions to deal with discretionary assessments.

Among the elements that contribute to the efficiency of the export control system we can mention what we could call the 'organisational solutions to deal with discretionary assessments', namely the determination of standard procedures for evaluating the exportability of an object of cultural interest.

As already mentioned several times, the evaluation of an export authorisation request is a very complex procedure. This complexity is given not only by the need to have specific expertise that allows an authority to detect the artistic and technical qualities of the good and its

importance for the history and the art of the nation. The evaluation over the exportability of an object of cultural interest should be much broader than this and should includ also a balancing between the public interest in retaining the item within national borders and the detriment to the applicant's free enjoyment of his/her property.

To conduct this kind of evaluation there is a need of multiple expertise, of a collective decision if possible, and of an established procedure or general guidelines to follow.

Why do we need these kinds of 'procedural safeguards' when it comes to the analysis of an export authorisation request? Because, first of all, we are dealing with unencumbered assets and, second, because the subject matter (the evaluation and assessment of an artwork or another object of artistic interest) is highly susceptible to various and conflicting interpretations.

Regarding the typology of administrative activity, the analysis conducted during the dissertation (see especially chapter III) has shown that we are certainly dealing with unencumbered assets. And this is the case in all three countries under consideration.

This is due to the fact that the office in charge of issuing or denying the export licence must give its opinion about the advisability that the object leaves the country on a permanent basis. This judgement is subsequent to the assessment of the artistic, historical, or technical characteristics of the object which, *per sé*, are not sufficient to justify the retention of the object. The combined request of both an evaluative moment and a decision of opportuneness based on these evaluations are at the heart of the discretionary power of the administration in this field.

If we agree that this discretionary component is innate in assessments of the exportability of a cultural object and that it couldn't be otherwise, what organisational solutions can be provided to the responsible administrative bodies for carrying out their activities?

We consider, finally, that the discretionary nature of the final administrative decision should not prejudice the fairness of the procedure, while also ensuring an equal treatment for all the users.

We have argued that to meet the needs of fairness especially when dealing with unencumbered assets and discretionary choices, the administration should be 'guided' in its activity by the provisions concerning who is entitled to adopt the final decision, and according to what procedure. Compliance with an established procedure should guarantee an equitable administrative action[526].

Our investigation has illustrated how in some jurisdictions the regulatory framework in force firmly establishes which authorities are tasked with making the definitive rulings; according to which criteria; with delineated reasoned opinions; and appropriately avenues for communicating their deliberations. In others, instead, some of these aspects are not regulated in terms either of legislation or administrative practice[527].

To conclude, the analysis conducted reveals that in presence of a discretionary power, the activity of the administration should be determined by accurate guidelines, at least as far as its mode of action.

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[526] For a general reflection about the influence of the 'way of implementing' the rules, see P. LASCOUMES & P. LE GALES (edited by), *Gli strumenti per governare*, with a preface by S. CASSESE, Mondadori, Milano, 2009. The original version, titled *Gouverner par les instruments*, was published by Presses de la Fondation Nationale des Sciences Politiques, Paris, 2004.

[527] The most striking example is provided by the composition of the Italian export offices: there is no requirement or indication as to what professional profiles should work in there. The MiBACT Decree of the 26th January 2016, n. 44 titled '*Riorganizzazione del Ministero dei beni e delle attività culturali e del turismo ai sensi dell'articolo 1, comma 327, della legge 28 dicembre 2015, n. 2018*' does not provide any guidance in this respect. Article 4.1 letter v) limits itself to mention that 'export offices are embedded in the Superintendence'.

4. The judicial review over discretionary administrative decisions.

The third major theme addressed in this dissertation, besides the policy making-process and administrative organisation, was the judicial review over the decisions adopted by the administration. In particular, the investigation has been focused on the appeals to the administrative judge against a ruling to refuse the granting of an export licence by the competent administration.

As concerns the material consulted to tackle this issue, first of all we proceeded with a survey of the case-law concerning the review of the administrative activity directed at evaluating the exportability of an item of cultural interest. The judgements pronounced by the administrative courts were then analysed and compared with the legal doctrine in the area of judicial review; administrative discretion; so-called 'technical discretion'; and technical assessments. Finally, the archival material consulted (consisting in this case largely of letters) was useful to the extent to which it allowed us to understand how decisions were adopted over time by the administration.

The first element that stands out is the heterogeneity of situations between Italy, France and England when it comes to appealing to an administrative judge to amend a decision adopted by the administration. The heterogeneity between these three countries concerns both the frequency with which it takes place and its outcomes.

4.1 Filing an appeal against an administrative decision.

When first looking at the case-law concerning the review of administrative action directed at evaluating the exportability of an item of cultural interest in the three countries, the first data we detected is their quantitative difference.

This observation generated the following question: why does one country record a higher number of judiciary appeals compared to the others?

Is this because in some jurisdictions there are more alternative dispute settlement mechanisms that avoid the recourse to an administrative judge? Or is it because the grounds for filing an appeal exist in some circumstances while they are lacking in others?

With reference to the question regarding alternative dispute settlement mechanisms, we did not detect, during the course of the analysis conducted, data and elements particularly worthy of consideration. We are inclined to conclude, then, that the availability of different typologies of appeal does not greatly influence the general request to amend decisions adopted by the administration.

The grounds for filing an appeal, instead, play a very important role in this field. The number of appeals is high where dissatisfaction in the whole export control regime is higher. Altough this conclusion might seem a tautology, it reveals important clues.

First of all, the dissatisfaction concerns the economic loss that occurs when the applicant is denied the possibility to export his/her object of cultural interest withouth receiving a compensation equivalent to the price of the good on the international art market. Where the denial does not result in a economic loss, individuals are less motivated to appeal the administrative decisions.

This is demonstrated by the case of England, where the whole export control regulatory framework has, as one of its major concerns, the non-alteration of the art market. In such a system, the individual who is denied permission to export an artwork, receives in any event its economic value according to the international art market estimations. The English licensing system is based on the assumption that the administration cannot deny the release of an export licence without offering the applicant a sum equal to the declared economic value of the object proposed for export.

When, instead, the State imposes its right of pre-emption without paying the individual for his/her financial loss, the dissatisfaction of the

applicant denied the right to freely dispose of his/her property is much greater.

This conclusion may appear obvious but it is important to underline how much the financial loss suffered by those who submit an export authorisation request plays an extremely significant role in the decision to file an appeal[528].

In addition to this there is a second reason for dissatisfaction that pushes individuals to appeal an administrative judge to amend the administrative decisions. And this is attributable to the malfunctioning of the public administration in charge of evaluating the export authorisation requests submitted[529]. Excessively long time periods; failure to comply with the due date established by the law; inadequately reasoned opinions supporting the denial to grant an export licence; or uncertainty about the ways the evaluation has been conducted. All these attitudes give cause for a number of appeals that significantly outweigh those 'attacking' the substance of the administrative decision[530]. The analysis conducted suggests that an administration considered to be efficient faces fewer appeals[531].

Lastly, among the grounds that explain the recourse to the judicial authority, we should also take into consideration the cost of filing such appeals. If this price is particularly elevated (as in England compared to

[528] This conclusion could lead us think about the public expenditure needed (in terms of money and of judicial staff) to cover the costs of this dissatisfaction.

[529] On the relation between the judicial intervention and the performance of the Administration (especially in Italy) see the contributions published in *Rivista trimestrale di diritto pubblico*, issue 1, 2019, in particular L. TORCHIA, *Il giudice amministrativo e l'amministrazione, controllo, guida, interferenza*; S. CASSESE, *Che cosa resta dell'amministrazione pubblica?*

[530] Also in this case we could think about the amount of public expenditure caused by the malfunctioning of the Administration.

[531] Up to the 'extreme example' of England where the appeals in this field are nonexistent and where individuals do not suffer any financial loss from the denial of an export licence and they are faced with an Administration considered to be efficient.

Italy and France) individuals would probably be discouraged from proceeding in this direction.

4.2 The extent of the judicial review.

While those just discussed were the different reasons supporting the filing of an appeal to amend the decisions of the administration to deny the release of an export licence, we proceed now to recall the extent of the judicial review in the countries under consideration.

First of all, we have to narrow the field of the comparison only to Italy and France, since we have not detected any judgements produced by an English court on the matter.

With regard to the two continental countries, we have demonstrated how the extent of judicial review of administrative discretion and 'so-called' technical discretion is the same.

First of all, we came to the conclusion that the assessments made by export offices in evaluating an export authorisation request belong to the so called 'mixed-discretion'. This kind of administrative decision, in fact, is the result of two different phases: a technical evaluation in which the object is analysed for its artistic and historical characteristics; and a purely discretional evaluation about the advisability of its export.

When compared with such a case, administrative judges should be able to evaluate -and amend if necessary- the technical assessments made by the administration, in addition to ruling on the lawfulness of the procedure adopted to come to the final decision. Judicial authority, instead, is not entitled to evaluate and amend those parts of the administrative decision that are attributable to administrative discretion.

While today this conclusions are shared almost unanimously by the legal doctrine in both Italy and in France, the same cannot be said overall for the court rulings rendered. In this respect we have highlighted, especially in Chapter 3, how the case-law in the matter has not been consistent among them, in particular in Italy.

Despite the establishment of the principle—both in legal doctrine and in jurisprudence—that administrative courts are entitled to evaluate the technical assessments made by the administration, there is still a certain degree of reluctance to do so. Administrative judges have the tendency to refrain from assessing the correctness or acceptability of the evaluations of the artistic and historical characteristics of the objects for which the export licence was requested.

This 'shyness' of the administrative judge can perhaps be explained by the difficulties that still persist, among the experts as well, in 'judging' an artwork, especially if the work does not fit the standards and canons of classical and modern art. But this shyness, though understandable, cannot have an adverse effect on the safeguarding of individual rights which, in these situations, are at risk of receiving a weakened judicial protection.

Lastly, a final remark on the importance of balancing all the different aspects, actors and powers that contribute to the functioning of the whole machinery of export control of cultural property is needed. Despite the relevance of each of these factors taken individually, we have shown that a fair legislative framework, an efficient Administration, or a consistent judicial review alone cannot guarantee an optimal control over the export of cultural property and, more in general, over the definition and maintenance of a national cultural hetitage.

APPENDICES

List of national treasures for which an export certificate was refused by the french administration[532] [533]

(2003-2018)

7. Antoine-Robert Gaudreaus, *Bureau de pente*, merisier, bronze ciselés et argentés, époque Louis XV, 1733 (provenant du cabinet de retraite de Marie Leczinska au château de Marly)
8. Eugène Delacroix, *Paysages de montagnes et diverses études dit Album des Pyrénées*, dessins à la mine de plomb et aquarelles, 62 feuillets, 1845
9. François Ollive, *Atlas portulan de Méditerranée*, encre et gouache, 1646
10. Jacques de Breze, *Le Livre de la chasse du grant seneschal de Normendie. Les Ditz du bon chien Souillard qui fut au roy de France XIe de ce nom*, [Paris, Pierre Le Caron, vers 1494], 12 feuillets
11. Simon Vouet, *La Vierge au rameau de chêne dite Vierge Hesselin*, huile sur toile, XVIIème siècle
12. Jacques-Louis David, *Album de dessins n°5*, 82 dessins et 11 calques, 27 feuillets
13. *Fragment du Jubé de la cathédrale de Chartres*, bas-relief en pierre calcaire, vers 1230-1240
14. Antoine Vater, Clavecin, 1732
15. Camille Claudel, *La jeune fille à la gerbe*, terre cuite, vers 1886
16. Francesco Primaticcio dit Le Primatice, *Etude d'homme drapé* ou *Un Atlante*, sanguine et rehauts de gouache blanche sur papier, XVIème siècle
17. Paris Bordone, *Etude d'homme nu*, pierre noire et rehauts de craie blanche sur papier bleu, XVIème siècle
18. Jean Auguste Dominique Ingres, *Portrait de Charles Marcotte d'Argenteuil*, graphite sur papier, 1811

[532] Given their technical nature, the description of the objects is reproduced in its original wording as described by the Administration responsible for the procedure.

[533] The data were provided by the Direction Générale des Patrimoines, Service des Musées de France in July 2018.

19. *Commode à façade en arbalète*, placage d'amarante, bronzes dorés, dessus en marbre griotte, époque Régence

20. Attribué à l'entourage de Michel Bourdin, *Monument funéraire pour Charles de Fresnoy*, marbre blanc, France, XVIIème siècle

21. Nicolas Poussin, *La Fuite en Egypte (dite au voyageur couché)*, huile sur toile, 1657 ou 1658

22. Alexandre-François Desportes, *Cerf aux abois*, huile sur toile, 1729

23. Attribué à M. G. Biennais, *Meuble de toilette d'Eugène de Beauharnais*, acajou, ébène et bronzes dorés, nécessaire en cristal, nacre, porcelaine, argent et or, époque Empire, circa 1805-1810

24. *Tête de cheval*, marbre, Grèce, Attique, époque archaïque, fin du VIème siècle avant J.C.

25. *La Vie et les Miracles de Saint François d'Assise*, texte de Saint Bonaventure, manuscrit enluminé sur parchemin, 58 illustrations, 132 ff, vers 1480

26. Pierre Bersuire, Traduction française des *Décades de l'Histoire romaine* de Tite-Live, manuscrit sur parchemin, 260 ff, 1358

27. Paul Verlaine, *Cellulairement*, manuscrit autographe de 32 poèmes, 69 ff. 1873-1875, avec une lettre autographe illustrée de Verlaine à Sivry

28. Edmond de Goncourt, *La Fille Elisa*, édition originale illustrée par Henri de Toulouse-Lautrec, Paris, 1877

29. Henri de Toulouse-Lautrec, *Ensemble de 26 affiches*

30. Antoine Coysevox, *Buste du cardinal Melchior de Polignac*, marbre blanc, 1718

31. *Tour à guillocher aux armes du Comte d'Artois*, signé "Wolff Porte Saint- Martin", bronze ciselé et doré, fer, époque Louis XVI

32. Giambattista Tiepolo, *Projet de décor pour un dessus-de-porte*, huile sur toile, XVIIIème siècle

33. Attribuée à Bernard II van

34. Risenburgh (B.V.R.B.), *Commode livrée pour la Duchesse du Maine au château de Sceaux*, laque de Coromandel et bronzes dorés, époque Louis XV

35. Attribué à un atelier champenois, *Pavement de carreaux provenant du château de Polisy (Aube)*, faïence, 1545

36. Attribué à Jean-Henri Riesener, C*offre de forme rectangulaire ayant appartenu à Marie-Antoinette*, placage d'acajou, amarante, sycomore, bronzes ciselés et dorés, époque Louis XVI, vers 1785

37. *Papyrus médical*, inscription recto-verso en cursive hiératique, feuilles de papyrus issues initialement d'un rouleau d'environ 10 m, Egypte, Nouvel Empire, XVIIIème dynastie

38. Jean Cocteau, *La Belle et la Bête*, manuscrit autographe signé, 1944-1945, accompagné d'un ensemble de documents de travail relatifs au film

39. Jean Auguste Dominique Ingres, *Portrait du Comte Mathieu-Louis Molé*, huile sur toile, 1834

40. Attribué à François-Honoré-Georges

41. Jacob dit Jacob-Desmalter, *Fauteuil du Grand Cabinet de l'Empereur Napoléon Ier au Grand Trianon*, acajou, placage d'acajou et bois doré, époque Empire, 1810

42. Claude-Charles Saunier, *Console provenant du Salon de compagnie de la duchesse d'Harcourt au château de Versailles*, placage de bois, bronze doré et marbre, circa 1787

43. Attribués à l'École de Tours, *Vierge en prière et Christ bénissant*, huiles sur panneaux de bois, deuxième moitié du XVème siècle

44. Louis Delanois, *Deux chaises provenant du Salon de compagnie de la comtesse du Barry au château de Versailles*, bois sculpté et doré, circa 1769

45. Constantin Brancusi, *Le Baiser*, pierre calcaire, 1909 (provenant de la sépulture de Tania Rachevskaïa au cimetière du Montparnasse, Paris)

46. Vassily Kandinsky, *Ensemble de manuscrits autographes et de feuillets dactylographiés*, circa 1910 à 1925

47. Manufacture royale des Gobelins, Don *Quichotte reçu chez les filles de l'hôtellerie*, tapisserie appartenant à la Tenture de l'*Histoire de Don Quichotte*, tissée d'après un carton de Charles Coypel, Ateliers de Audran et Cozette, laine et soie, 1773-1776

48. Pablo Picasso, *Portrait de Berthe Weill*, crayon Conté et fusain sur papier, 1920

49. Ensemble d'ouvrages et de documentation ayant appartenu à Vassily Kandinsky

50. Abbé Jean-Antoine Nollet, *Paire de globes céleste et terrestre*, dédiés à la duchesse du Maine et au comte de Clermont, époque Louis XV, 1728-1730

51. Michelangelo Buonarroti dit Michel-Ange, *Deux études d'un homme nu pris dans un mouvement ascendant (recto)*, *Esquisses d'un homme nu et fragment d'une étude de tête d'homme (verso)*, pierre noire, sanguine, 3ème quart XVIe s.

52. Manuscrit enluminé de la *Vie de Sainte Catherine d'Alexandrie*, trad. française de Jean Mielot, copie calligraphiée et signée par David Aubert, 14 miniatures attribuées à Simon Marmion, parchemin, 54 ff, 2ème moitié du XVème siècle

53. Tapisserie avec deux anges tenant une couronne, laine et soie, France, milieu du XVème siècle

54. Archives personnelles (ensemble de manuscrits et de documents divers) de Guy Debord, vers 1950-1994

55. Trésor de Pouilly-sur-Meuse, ensemble d'orfèvrerie civile datant principalement du XVIème siècle, découvert en Lorraine

56. Charles-Joseph Natoire, *Don Quichotte déshabillé par les Demoiselles de la Duchesse*, carton de tapisserie de la 7ème scène de L'*Histoire de Don Quichotte*, huile sur toile, vers 1742

57. Fragment avec personnage provenant du tombeau de Charles V et de Jeanne de Bourbon à la basilique de Saint-Denis, marbre sculpté, vers 1376

58. Lucas Cranach, dit L'Ancien, *Les Trois Grâces*, huile sur bois, daté 1531

59. Attribué à Guido di Pietro dit Fra ANGELICO, *Saint Dominique et Saint François d'Assise recevant les stigmates*, tempera sur panneau, probablement 2ème quart du XVème siècle

60. *Grande bouteille à deux anses*, provenant de Boulogne-sur-Mer, verre, époque gallo-romaine, IVème siècle ap. J.C. (?)

61. Attribué à Jean Malouel, *Piéta avec Saint Jean et deux anges*, peinture à l'œuf sur bois, fin du XIVème-début du XVème siècle

62. Microscope optique, signé « *Le Bas aux Galleries du Louvre* », Epoque Régence, bronze doré, laiton, acier, étui en maroquin

63. *Linceul inscrit de textes funéraires en hiéroglyphes cursifs*, Égypte, fin du Moyen Empire ou début du Nouvel Empire, lin, dessin à l'encre noire, rouge et blanche

64. Johann Christian Neuber, *Table dite de Teschen ou de Breteuil*, bronze doré, pierres dures, porcelaine de Saxe, âme de bois, tablettes coulissantes en cuivre, signée au bord du plateau : « *Neuber à Dresde* », inscrite sur un médaillon de porcelaine : « *Bretevillio Legato Pacificatori Teschen d. XIII Maii MDCCLXXIX* », 1779

65. Archives de la famille Turgot, XVIIème et XVIIIème siècles, env. 14000 pages

66. *Livre d'heures à l'usage de Paris de Jeanne de France*, manuscrit enluminé sur vélin, France, milieu du XVe siècle, 336 feuillets [coll. *Marquet de Vasselot*]

67. *Feuillet de diptyque byzantin*, ivoire, Méditerranée orientale, première moitié du VIème siècle [coll. *Marquet de Vasselot*] dit *Ivoire de Trébizonde*

68. *Plaque représentant les douze tribus d'Israël de l'Ancien Testament*, ivoire, France (?), milieu du XIIème siècle [collection *Marquet de Vasselot*]

69. *Diptyque : Nativité, Crucifixion et prophètes*, ivoire, Constantinople (?), XIIIème siècle

70. *Tenue de cérémonie, composée d'un habit et d'une cape ayant appartenu au Maréchal Ney*, velours de soie, soie, broderies en fils d'argent doré, Époque Premier Empire, probablement 1804

71. Deux statuettes représentant *Saint Jean et la Synagogue provenant d'une Descente de croix*, ivoire, Ile-de-France, fin du XIIIème siècle

72. *Archives de Michel Foucault*, manuscrits et dactylogrammes, environ 3700 feuillets

73. Antonin Artaud, *Autoportrait*, 17 décembre 1946, crayon sur papier, signé et daté en bas à droite

74. Jean-Baptiste Greuze, *La Lecture de la Bible (« Un Père de famille qui lit la Bible à ses Enfans »)*, huile sur toile, vers 1755

75. César Franck, *Variations symphoniques pour piano et orchestre*, encre sur papier, 1885

76. *Insigne de Grand Aigle de la Légion d'honneur du Maréchal Ney*, étoile en or du 1er type, vers 1806-1806-1815

77. Nicolas Besnier, *Paire de pots à oille couverts du service Walpole, avec leur présentoir*, argent fondu et ciselé, Paris, 1726-1727

78. Description des douze *Cesars abregees avecques leurs figures faictes et portraictes selon le naturel*, manuscrit sur parchemin, 32 feuillets, illustré par Jean Bourdichon, Tours, vers 1520

79. Hector Berlioz, *Les Troyens*, manuscrit en partie autographe, réduction pour chant et piano des actes 1, 3, 4 et 5, 4 volumes in-4, 1858-1859

80. *Archives personnelles d'Edouard Glissant*, vers 1951-2011

81. *Bréviaire dominicain de Saint-Louis de Poissy*, manuscrit sur parchemin, 500 à 600 ff. non numérotés, Paris, vers 1310- 1315, reliure de la seconde moitié du XVIème siècle

82. Roberto Matta, *Le Poète (Un poète de notre connaissance)*, huile sur toile, 1945

83. *Épée (avec son fourreau et son baudrier) de Grand Écuyer de Lorraine*, exécutée par l'orfèvre Simon Gallien pour le prince Marc de Beauvau-Craon, c. 1728

84. *Registre de comptes des travaux du Château d'Amboise*, cahiers de parchemin, 204 feuillets, fin XVe s.

85. Philippe de Champaigne et atelier, *Portrait de Louis XIII en pied*, huile sur toile, vers 1639

86. Elisabeth-Louise Vigée-Lebrun, *Portrait de Louise Marie Adélaïde de Bourbon-Penthièvre, duchesse d'Orléans*, huile sur bois, 1789

87. *Aiguière à décor de pivoines*, porcelaine bleu et blanc, Chine, dynastie Ming, époque Yongle, 1er quart du XVème siècle

88. *Album des plans et vues de Trianon*, encre sur papier et rehauts d'aquarelle, 19 planches, reliure de maroquin rouge aux armes de Marie-Antoinette, vers 1781- 1782

89. François Gerard, dit Baron Gérard, *Portrait de Joachim Murat, Maréchal de l'Empire, en grande tenue*, huile sur toile, 1805

90. Alexandre-Jean Oppenordt et Jean Ier Berain, *bureau du roi Louis XIV*, livré en 1685 pour son Cabinet de travail à Versailles, chêne, sapin, ébène, placage en palissandre de Rio, marqueterie en contrepartie gravée de cuivre et incrustations d'écaille rouge, bronze doré

91. *Album de photographies composé par Léon Maufras*, 113 tirages sur papier albuminé réalisés par Gustave Le Gray, 1857-1860

92. Caspar David Friedrich, *Chouette (grand duc) sur un arbre*, huile sur toile, première moitié du xixe siècle

93. Ensemble de cinq albums de photographies, dits *Albums Halévy*, tirages argentiques d'époque d'après des négatifs au gélatino-bromure d'argent, constitués par la famille Halévy, 1891-1914

94. Attribué à Johannes Hültz, *Elévation de la face ouest de l'octogone et de la flèche de la cathédrale de Strasbourg*, plume et encre noire, lavis gris, brun et vert, sur trois feuilles de parchemin collées, marques de stylet et de compas, vers 1419

95. Henri Dutilleux, *Métaboles*, manuscrit autographe partition pour orchestre, 95 pages in-folio, 1964

96. Pierre-Paul Prud'hon, *L'Âme brisant les liens qui l'attachent à la terre*, huile sur toile, 1821-1823

97. Attribué à Mathieu Le Nain, *Le Christ enfant méditant sur la Crucifixion*, huile sur toile, vers 1640-1642

98. *Visière de casque romain*, bronze (?), probablement Ier siècle après JC, découverte à Conflans-en-Jarnisy en 1908 et ayant appartenu à Henry de Montherlant

99. André Breton, *Manifeste du Surréalisme*, 19 f. et 2 f., juillet-août 1924 et *Second Manifeste du Surréalisme*, 24 f. déreliés, 1929, épreuves corrigées, 40 f., avec divers autres documents joints, reliure et emboîtage contemporain de G.-H. Mergher; manuscrit autographe d'André Breton, *Poisson soluble*, 59 f., août-septembre 1924 ; manuscrits autographes préparatoires d'André Breton *pour Poisson soluble*, sept cahiers d'écolier de 97, 20, 44, 20, 20, 24 et 11 pages, mars-mai 1924

100. Alphonse François de Sade, manuscrit autographe de *Les 120 journées de Sodome, ou L'école du libertinage*, rouleau de papier, 1785, accompagné de son étui

101. François Girardon, *Buste de Guillaume de Lamoignon*, marbre blanc sculpté, Paris, 1671-1673

102. Sculpture d'*Idole anthropomorphe cycladique représentant un harpiste assis*, marbre blanc, art des Cyclades, Cycladique ancien II, circa 2 500 avant J.-C.

103. Automobile Alfa Romeo 8C 2300 châssis court 2211 079, carrosserie Figoni, 1932

104. Cinq pièces issues du *Trésor de Beaurains (dit d'Arras)*: multiple de 5 aurei de Constance Chlore, deux multiples de 5 aurei de Galère Maximien, multiple de 10 aurei de Dioclétien et multiple de 8 aurei de Constance Chlore, or, Trèves, fin du iiie siècle début du ive siècle

105. Salvador Dali, *la Pêche au thon*, huile sur toile et collage, 1966-1967

106. *Heures dessinées à l'usage de Paris*, manuscrit et dessins sur parchemin, possiblement attribués aux Frères Limbourg, 178 feuillets, début du XVe siècle

107. Jean-Honoré Fragonard, *Le jeu de la palette/La bascule*, huiles sur toile, vers 1760-1765

108. Hendrick Goltzius, *Vierge en gloire entourée de sainte Cécile et d'anges musiciens*, pierre noire, sanguines de deux couleurs différentes, lavis brun-rouge, craie jaune et rehauts de gouache blanche sur huit feuilles de papier assemblées, début du XVIIe siècle

109. *Apollon Citharède*, bronze, provenant probablement des environs de Pompéi, deuxième moitié du IIe siècle-début du Ier siècle avant J.-C.

110. Auguste Rodin, *Je suis belle*, plâtre, signé « A. Rodin » à l'arrière de la base, vers 1885

111. Léonard de Vinci, *Etude pour un saint Sébastien*, pierre noire, plume et encre brune sur papier, au verso : Expérience d'optique sur la gradation des ombres et des lumières et Quatre lignes de texte en écriture spéculaire, plume et encre brune sur papier

List of national treasures granted an export certificate by the french administration[534] [535]

(2000-2015[536])

1. Antoine ou Louis Le Nain, *Le Reniement de Saint Pierre*, huile sur toile, XVIIème siècle
2. Edgar Degas, *Au théâtre*, pastel sur papier, 1880
3. Edgar Degas, *Femme au tub*, monotype sur papier, circa 1880
4. Anonyme du cercle du sculpteur Charles Simart, Album de quarante études, vers 1856-1860
5. Giovanni Paolo Pannini, *Le Concert et Le Bal*, paire d'huiles sur toile, 1751
6. Attribué à Jean-Henri Riesener, *Bureau plat dit de Napoléon*, acajou, bronzes dorés, époque Louis XVI (provenant du château de Malmaison)
7. Henri de Toulouse-Lautrec, *Au lit, le baiser*, huile sur carton, 1892
8. *Fragment de bas-relief représentant une femme*, France, période romane, provenant de Saint-Guilhem-le-Déser
9. Eileen GRAY, *Fauteuil "Sirène"*, bois laqué, circa 1914-1920
10. Jacques François Joseph Saly, *L'Amour essayant une de ses flèches*, marbre, 1753 (piédestal en marbre sculpté de Jacques Verbeckt)
11. Giovanni Antonio Canale dit Canaletto, *Vue de Venise – Pont du Rialto*, huile sur toile, première moitié du XVIIIème siècle
12. Auguste Rodin, *Faunesse debout, variante avec tête de la Martyre, dite parfois Phryné*, œuvre conçue vers 1884, épreuve en bronze à patine brune dorée, probablement réalisée vers 1897 par la fonderie J.B. Griffoul

[534] Given their technical nature, the description of the objects is reproduced in its original wording as described by the Administration responsible for the procedure.

[535] The data reported were provided by the *Direction Générale des Patrimoines, Service des Musées de France,* in July 2018.

[536] The difference in the time period taken into consideration with respect to the previous list is due to the fact that from 2016 on the period of deferral was still in effect for many cases, so that it is not possible to know their outcome.

13. Frans Hals, *Portrait d'homme*, huile sur panneau, probablement vers 1650

14. Attrib. à Alexandre-Jean Oppenordt, *Grande commode de forme galbée dite « en sarcophage»*, d'après un modèle de Jean Bérain, décor de marqueterie en première partie de laiton sur écaille brune, enrichie d'ornements de bronze doré, vers 1690-1700

15. *Deux pleurants provenant du tombeau de Jean de France, duc de Berry, à Bourges*, albâtre (?), vers 1450-1453

16. Eustache Le Sueur et son atelier, *Ensemble de six panneaux peints provenant du Cabinet de l'Amour de l'Hôtel Lambert*, bois peint et doré, vers 1645-1647

17. Antoine Sébastien Durand, *Deux pièces de surtout de table en forme de couvre-plats (Un renard et un coq/ Une fouine et un pigeon) provenant du service d'argenterie Orléans-Penthièvre*, argent martelé, fondu et ciselé, poinçons de maître, poinçons de charge et décharge, Paris, 1756-1757

18. Caspar David Friedrich, *Chouette [Grand duc] sur un arbre*, huile sur toile, 1 ère moitié du XIXème siècle

19. Jean Dunand, *Ensemble complet de boiseries d'appartement constituant les quatre côtés d'une pièce, Les Palmiers*, vingt-sept panneaux associés, avec quatre portes pleines et deux portes coulissantes, laque arrachée grise, argent et or sur latté, applications de métal laqué noir gravées de motifs géométriques

20. Jacques Ruhlmann, *Chaise longue à skis, dite "du Maharadjah"*, bois recouvert de laque industrielle, bronze chromé et velours de soie, circa 1929

21. *Deux plaques de croix limousines*, émail champlevé et cuivre doré, fin du XIIème siècle

Items found to be national treasures
acquired by institutions or individuals in the united kingdom

(2005-2018)

1. Joseph Anton Koch, *The Schmadribach Waterfall near Lauterbrunnen, Switzerland*
2. *A Roman figurine of a man wearing a hooded cloak*
3. Alfred Gilbert, *Queen Victoria*, portrait bust,
4. Benjamin Jonson, *Workes* (1640)
5. Salvador Dalí and Edward James, *Mae West Lips Sofa*,
6. George I Palladian *baby house*
7. Salvador Dalí and Edward James, *Lobster Telephone (White Aphrodisiac)*
8. William Burges, *vase from the Summer Smoking Room at Cardiff Castle*
9. English tapestry in the Japan/Indian Manner
10. Bernardo Bellotto, *The Fortress of Königstein from the North*
11. Wedgwood 'Black Basaltes' First Day's Vase
12. Pontormo, *Portrait of a Young Man in a Red Cap*
13. Baird Phonovision disc and ephemera
14. Captain Thomas Davies, *An East View of the Great Cataract of Niagara*
15. Anglo-Saxon gilt-bronze strip brooch
16. Hans Coper, *Large bowl*
17. Dieric Bouts the Elder, *St Luke Drawing the Virgin and Child from the workshop*
18. A pair of Charles II Silver Andirons
19. A pair of Italian pietre dure mounted, inlaid ebony cabinets
20. TE Lawrence, *Arab Jambiya dagger and scabbard owned*
21. Joris Hoefnagel, *Nonsuch Palace from the South*

22. Medieval King Robert the Bruce of Scotland and Dunfermline Abbey Cokete Seal Matrix Pair
23. Giovanni da Rimini, *Left Wing of a Diptych with Episodes from the Lives of the Virgin and Other Saints*
24. Lorenzo Bartolini, *The Campbell Sisters Dancing a Waltz*
25. English translation of Erasmus's *Enchiridion militis Christiani*
26. *The Rejlander Album*
27. A gold and gem-set ring owned by Jane Austen
28. A traictise from the Mendham Collection
29. A pair of wall hangings designed by May Morris
30. Sir Anthony van Dyck, *Self-portrait*
31. Giovanni Battista Lusieri, *Panoramic View of Rome: From the Capitoline Hill to the Aventine Hill*
32. The Monson Catholicon AnglicuM
33. An Empire style medal cabinet
34. An Iron Age bronze mirror
35. An atlas of estate maps of Hampton Court, Herefordshire
36. A Regence Ormolu-mounted Chinese porcelain casket
37. Lorenzetti, *Christ between Saints Paul and Peter*
38. George Stubbs, *Kongouro from New Holland (The Kangaroo) and Portrait of a Large Dog (The Dingo)*
39. Seven silk works
40. A peridot and gold suite of jewellery
41. A pair of Italian Console Tables
42. John Nost the Elder, *The Crouching Venus*, sculpture
43. Edouard Manet, *Portrait of Mademoiselle Claus*
44. Benjamin Britten's complete draft score of The Young Person's Guide to the Orchestra
45. William Burges, *A zodiac settle*
46. The great silver wine cistern of Thomas Wentworth
47. A lacquered Imari porcelain garniture
48. William Beckford, *William IV cabinet on stand*
49. James Henry Dixon, *The Eglinton Tournament*, set of watercolours
50. William Dyce, *Landscape with Two Women Knitting*, painting
51. Collection of Thomas Hardy typescripts

52. Roger Fenton, *Pasha and Bayadere*, photograph
53. *Thomas Walker Archive*
54. Domenichino, *Saint John the Evangelist*, painting
55. Carved and marquetry bookcase supplied by Gillows of Lancaster to Mrs Hutton Rawlinson, 1772
56. A 13-bore silver-mounted flintlock gun
57. J S C Schaak, *Portrait of General Wolfe*
58. Copy of the warrant for the execution of Mary Queen of Scots by Lambeth Palace
59. A ledger kept by a 17th-century lead merchant in the Peak District
60. An early English brass astrolabe quadrant
61. *The Dering Roll*
62. John Thomas Seton, *Portrait of Alexander Dalrymple*, painting
63. *The archive of Reverend William Gunn*
64. An Anglo-Saxon gilded mount with interlace decoration
65. An Anglo-Saxon great square-headed brooch
66. J M W Turner, *The Blue Rigi, Lake of Lucerne, Sunrise*, watercolour painting, 1842
67. Collection of manuscript and printed maps cut as jigsaws and housed in a mahogany cabinet
68. An eighteenth-century mantua and petticoat
69. *A felt appliqué and patch-worked album coverlet made by Ann West* in 1820
70. *Diaries, correspondence and manuscript volumes of Mary Hamilton*
71. Neolithic 'jadeite' axe-head
72. *Guild Roll of the Guild of St Mary*
73. A fifteenth-century illuminated *manuscript of the Hours of the Passion*
74. Eighteenth-century *Union flag*
75. The starred Anglo-Saxon gold coin of King Coenwulf of Mercia
76. Seven Vikings silver pieces
77. Medieval bronze
78. The Codex Stosch

79. Giovanni Antonio Canali, il Canaletto, *View of the Grand Walk, Vauxhall Gardens* & *The Rutunda, Ranelagh*, paintings

80. A silver cup cover Solomon Hougham presented to Captain Philip Bowes Vere Broke

81. A medieval figure of a bronze equestrian knight

82. A Roman millefiori dsc

83. Antoine-François Callet, *portrait of Louis XVI*

English national treasures that were not saved
(2005-2018)

1. Francesco Guardi, *The Rialto Bridge with the Palazzo dei Camerlenghi*
2. Joseph Mallord William Turner, *Ehrenbreitstein*
3. Julia Margaret Cameron, *Images from the Life (The Norman Album)*
4. John Martin, *The Destruction of Pharaoh's Host*
5. Sir Peter Paul Rubens, *The Head of an African Man Wearing a Turban*
6. Paul Cézanne, *Vue sur L'Estaque et le Château d'If*
7. *Nobel Prize Medal and Citation awarded* to Hans Krebs
8. *Book of Hours* in enamelled gold binding
9. Balthasar Permoser, *Autumn and Winter*, ivory statuettes
10. Titian, *Study of a Kneeling Man*
11. William Hogarth, *The Christening*
12. Parmigianino, *Virgin and Child with Saint Mary Magdalen and the InfaNT Saint John the Baptist*
13. John Whitehurst George III mahogany wheel barometer
14. English gilt bronze, painted and cast iron railings
15. Meissen figure of 'Pulcinell'
16. Alberto Giacometti, *Femme*, sculpture
17. Paolo Veronese, *Venice Triumphant*, drawing
18. *A pair of pietre dure* table tops
19. *An Italian pietre dure* table top with the arms of the Grimani Family
20. The Bruce James Talbert *'Pericles Dressoir'*
21. John Flaxman RA, *The Adoration of the Magi*
22. Jan Brueghel the Elder, *The Garden of Eden with the Fall of Man*
23. A marble statue of Aphrodite
24. Claude Gellée, called Claude Lorrain, *A Mediterranean Port at Sunrise with the Embarkation of Saint Paula for Jerusalem*
25. A collection of works by Thomas Baines, North Australian Expedition,
26. The Statue of Sekhemka
27. Rembrandt van Rijn, *Rembrandt Laughing*

28. A Bentley 4.5 litre Blower
29. Letters and related documents of James Wolfe
30. Claude-Joseph Vernet, *A View of Avignon*
31. Domenico Puligo, *Portrait of a Lady, called Barbara Salutati*
32. *Death mask of Napoleon Bonaparte*
33. Giovanni Battista Lusieri, *Panoramic View of Rome: From Saint Peter's to the Chiesa Nuova to the Aventine Hill*
34. A pair of bronze sculptures by Massimiliano Soldani-Benzi
35. Benjamin West, *Devout Men Taking the Body of St Stephen*
36. Alonso Sánchez Coello, *Portrait of the Infante Don Diego, son of King Philip II of Spain*
37. A gilt-bronze centrepiece by DR Gastecloux
38. Nicolas Poussin, *The infant Moses trampling upon Pharaoh's Crown*
39. Charles Le Brun, *Portrait of Everhard Jabach and family*
40. Christian van Vianen, *A Dutch silver ewer and basin*
41. Pablo Picasso, *Child with a Dove*, painting
42. A George II silver-gilt ewer and basin, the 'Bristol ewer and basin'
43. A George II ivory-mounted padouk medal cabinet, the 'Brand cabinet'
44. A south German marquetry table top
45. Jasper Francis Cropsey, *Richmond Hill in the Summer of 1862*, painting
46. Louis de Gruuthuse's copy of the Deeds of Sir Gillion de Trazegnies in the Middle East
47. Raphael, *Head of a Young Apostle*, study
48. An amber games board attributed to Georg Schreiber
49. Niccolò di Pietro Gerini, *Four scenes from the Passion of the Christ*
50. Julia Margaret Cameron photo album, the *'Signor 1857'*
51. A three-masted topsail schooner, *Kathleen & May*
52. Jean-Antoine Watteau, *La Surprise*, painting
53. Francesco Guardi, *Venice: A View of the Rialto Bridge from the Fondamenta del Carbon*, painting
54. Luigi Manfredini, *A North Italian empire athénienne*

55. Painting said to be by Sir Peter Paul Rubens, *Portrait of a Young Woman*
56. An Edward VI *silver-gilt mounted Rhenish salt-glazed tankard*
57. Pierino da Vinci, *relief of Ugolino imprisoned with his sons and grandsons*
58. Joseph Mallord William Turner, *Modern Rome – Campo Vaccino*, painting
59. Jan de Bray, *David and the Return of the Ark of the Covenant*, painting
60. Nicolas Poussin, *Ordination*, painting
61. Frans Hals, *Family Portrait in a Landscape*, painting
62. A carved ivory oliphant
63. A rock-crystal ewer
64. Cornelis van Haarlem, *Saint Sebastian*, painting
65. Samuel Palmer, *The Shearers*, painting
66. Raphael, *Head of a Muse*, drawing
67. Bartolomé Esteban Murillo, *The Virgin and Child*, painting
68. Michiel Van Musscher, *Portrait of an Artist in his Studio*, painting
69. John Constable, *Flatford Lock from the Mill House*, painting
70. Karel van Mander the Elder, *The Crucifixion*, painting
71. Pierre Legros the Younger, *bronze statuette of Marsyas*
72. Pietro di Francesco degli Orioli, *Adoration of the Shepherds*, also known as *The Nativity*
73. An English breech-loading, magazine primed, flintlock fowling piece
74. Naval gold medal awarded to Captain Philip Bowes Vere Broke
75. A pair of brocaded ivory silk satin wall hangings, *Verdures du Vaticans*
76. Naddo Ceccarelli, *Madonna and Child*
77. Luca Carlevarijs, *View of the Molo, Venire, looking west*

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