

MiBACT: A Practical Guide to Rediscovering Common Sense!

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Abstract Art. 12(2) of the 2004 *Code of Cultural Heritage* stipulates that the Ministry shall dictate the general guidelines which the public offices responsible for assessing the cultural nature of a private good must adhere to. The same reference is made in art. 68(4); 4(1); 29(5); 71(4); 72(4) of the Code. Yet neither MIBAC (first) nor MiBACT (subsequently) have ever set the parameters required by the regulation. How, then, can the efficiency, equity and transparency of administrative action be ensured if it lacks that essential ‘uniformity of assessment’ placed, by the legislator, at the basis of the most significant measures related to the circulation and preservation of the cultural good?

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Keywords Cultural goods. Certificate of free circulation. Cultural interest.

1 Current Inefficiency of MiBACT. Multiple Administrative Practices

I understand, – muttered the doctor, who in truth had not understood - I understand. – [...] So saying, he rose from his seat and hunted through the chaos of papers, shovelling the lower ones uppermost with his hands, as if he were throwing corn into a measure. (Manzoni 1844)

It is 1628, as narrated by Manzoni for the purpose of describing his century, yet Agnese’s words to Renzo “Signor Doctor [...] Azzecca-Garbugli (take good care you do not to call him so!)” who thrusts his hands in the midst of proclamations, to extract his latest trick from a hat; this is the first image that comes to mind when we attempt to reach some clarity as we delve into the sea of legislative provisions that have been enacted

(especially)¹ from '75 onwards to regulate the delicate matter of managing Italy's cultural heritage. Considering that we do not wish to be unfair or inaccurate with the past, we must reluctantly point out that those calm intervals seem to thin out as we get closer to the present time. Indeed, it is enough to open any updated legal manual on the laws governing cultural heritage or, for the more daring, to browse the MIBACT website, to realise the flood of legislation that continues to affect all individuals working in the field of cultural heritage. The inevitable consequence is the creation of an increasingly slow and cumbersome bureaucratic organisation that, as with Renzo and Lucia, becomes progressively incapable of guaranteeing citizens the protection of their interests and rights, as recognised at a constitutional level today. It is not wrong, therefore, that in one of these manuals dating back to 2013, and in reference evidently to the latest legislative amendments at that time, to read that, "the passage of time, short but inexorable, marks, for the Ministry, the intensification of a sort of interventionist schizophrenia by the lawmaker that, at the rate of two years at a time, tries to solve the cultural issue of our country with yet another ministerial structure reform" (Ferretti 2013, 92; see also Barbati, Cammelli, Sciuillo 2011; Crosetti, Vaiano 2011; Volpe 2013), more than ever an exact prognosis as confirmed by recent "Ministerial Decree No. 44/2016" aimed at "reorganising the Ministry, without new or increased charges for public finance, at reorganising, also by eliminating, merging or grouping, the Ministry's executive offices, even at a general level", so replacing the previous reorganisation under the Prime Minister Ministerial Decree No. 171/2014.

Analysing the new arrangement, responsibilities and functions of each body attributed to MIBACT's organisational structure is not the purpose of this paper, not just for the obvious reason that it is intended as an article and not as the *magnum opus* of the author, but also in consideration of the fact that its author doesn't fully grasp the relevant usefulness: the regulatory texts of the numerous reforms of said Ministry seem to be linked by the common denominator whereby their respective lawmakers establish/eliminate/restore bodies; transfer and (re)define roles and responsibilities for each of them; zealously establishing the 'who' and 'what' of the administrative action on cultural heritage, without, however, necessarily assessing the 'how'. Often, in fact, during the application stage, how to

1 The MIBAC was established by Law 5 of 29 January 1975, which signed into law and amended L.D. 657 of 14 December 1974. It is worth noting that the CH law was conceived far before the establishment of the above mentioned Ministry, considering that either the *Codice Urbani*, being the Code of cultural heritage and landscape currently in force and adopted with the L.D. 42/2004, as well as the 'Melandri' Consolidated Law 490/90 previously in force, transpose the main lines of the 'Bottai' Law 1089/39, which in turn was guided by the 'Rosadi' Law 364/1909 and by the 'Pacca Edict' of 1820.

perform certain tasks is unclear, given that the system assigned *ex lege* to a certain function is actually unable to attain it (because its structure is unfit; or because the competencies between administrative bodies are duplicated, and the extent of the action of one and the start of another's are not specified; or because technical-scientific skills are required that, due to the composition of its staff, are not met; or because the timing required by law to perform a certain function is incompatible with the number of bureaucratic procedures that such type of structure requires; or because the 'declared' reform is not promptly followed by an organisational regulation; etc.).

What good is it, then, to describe the structure of the Ministry – by comparing the statutory provisions that have been passed over time and trying to figure out what, on paper, intends to survive to what is new – if this is not sufficient to remove the uncertainty that, in their practical application, they generate with respect to the certain fields of action of the PA? A complete organisational chart of MIBACT is easily found on its website. What are lacking are concrete and clear answers on how it works. And without them, any reform, even when driven by the lawmaker's best intentions, will always be just a remix and not a real, efficient reorganisation!² This is because the PA must indeed reach set objectives, but the lawmaker must previously (during the early stages) ensure that the procedure and

2 *Ad probationem*, the facts only (the legal references referred to herein, far from being the only ones adopted, are considered the most significant for the purposes hereof): D.L. 657/1974, signed into Law 5/1975, establishes the Ministry for Cultural and Environmental Heritage. L.D. 368/1998 reforms it, by establishing the MIBACT. The most relevant, among others, are L.D. 300/1999 and D.P.R. 307/2001, which regulate the organisation of the offices directly collaborating with the MIBACT and the ancillary functions bodies. L.D. 3/2004 (organisation regulation: D.P.R. 173/2004) reorganises the MIBACT by eliminating the role of General Secretary (which was established within the previous reform) and replacing it with the Departments model. L.D. 42/2004 issues the 2004 Code currently in force. D.L. 181 of 18 May 2006, signed into the Law 233/2006, implements a new reorganisation of the Ministry, withdrawing all Ministry's functions, structures and resources in the field of sport, in exchange for (!) the structures and resources in the field of tourism: "what is staggering (as highlighted by G. Sciullo) is the failure by the lawmaker to provide for an exact match between the role carried out by the Ministry in the field of tourism and the system to which the Ministry belongs; indeed, the functions exercised in the field of tourism do not fall within those allocated to the Ministry, while it is actually for the Presidency of the Council of Ministers to hold the relevant responsibility pursuant to art. 95 of the Constitution". D.L. 262/2006, signed into the Law 286/2006, reinstates the General Secretary and abolishes Departments (!), for the purpose of decreasing public spending (!!!). To be noted: however, the provisions of the organisational regulation Presidential Decree 173/2004 remain in force, to the extent applicable and consistently with the Ministry's structure, until and through when the new organisation regulation was issued with Presidential Decree 233/2007, one year after.

D.P.R. N. 91/2009 reorganises MIBAC. By Law 71/2013 MIBAC becomes MIBACT: the *bureau* on Tourism policies is transferred from the Presidency of the Council of Ministers to the Ministry of Cultural Heritage and Tourism. Decree of the Presidency of the Council of Ministers 171/2014 reorganises the MIBACT.

structure with which it is provided are able to do so. What else, otherwise, is meant by *effectiveness* to be pursued under art. 97 of the Constitution and art. 1(1) of Law 241/1990?

Otherwise, failing the above assessment by the lawmaker, the consequence is quite obvious: since the PA *must* provide answers (by adopting an administrative measure), with respect to each steps of a procedure, it is for the PA only to take the required decisions upon each failure by the lawmaker to provide the necessary clarifications on how to implement any such steps. This is why, contrary to any common-sense logic or efficiency, it may essentially happen that in the single branching structures under the entire bureaucratic apparatus, different *practices* are created to arrive at issuing an identical (as indeed prescribed, uniformly by law) administrative measure. And that is why, in practice, we cannot assume that the same question, addressed to territorially different administration offices, albeit equivalent, will get the same answer!

Given the above, on the other hand, could the PA act otherwise? And the single private subject, what else should he/she do except hope for the Administration's common sense?

Another common element to the lawmaker's various interventions is the purpose that moves it, namely to *streamline* the organisational structure, in order to make its work more efficient, especially in terms of containing public expenditure. Translated in concrete terms, this means creating a bureaucratic structure that costs less to the State, in relation to the durability of its action over time, without causing - at the same time - that "new or increased charges for public finance" (for example art. 1 of the Stability Law 208/2016, as rightly cited in the last M.D. 44/2016) arise from the implementation of its reorganisation (today, and in 2014, 2013, 2009, etc.: specific term): otherwise, indeed, fulfilling the first condition without the second (or *vice versa*), would deny its very reason for existing; and without wanting to disturb Aristotelian metaphysics, one wonders how such reforms could otherwise be in line with spending review principles so much invoked to the point of their adoption.

Now, although not being economists or lawyers, comparing numbers and dates from the list of measures (not even exhaustive) referred to (in footnote 2), the question spontaneously arises: is it humanly possible to salvage financial resources by implementing, for the umpteenth time, a ministerial restructuring, when the former one is still in progress? To attain, in this way, a genuine simplification and promptness of administrative action? To make it *economical* and *effective*? If the same actions in the past have had no beneficial consequences, we can't only consider the fact

Law 125/2015 transfers the functions for the protection of bibliographical heritage from the Regions (as formerly provided with D.P.R. 3/1972) to the State. M.D. 44 of 23 January 2016 reorganises MiBACT.

that this does not depend on the inability of its predecessors, but rather from the regulatory and structural saturation that (by now) any reform of MIBACT will magnify?

Perhaps we need to change the starting point and, perhaps, we should take a step back.

2 Pursue Efficiency through Reasonableness Preliminary Identification of Good Administrative Practices

Aside from the fundamental criteria mentioned in Law 241/1990, which drives the administrative action and on which, therefore, any relevant legislative provision must be shaped, there is one, probably highly regarded by anyone who loves the law, while not explicitly codified in any constitutional rule, that permeates the entire legal system and supervises its consistency: it is the *principle of reasonableness*.³ On the basis of such principle, the CC reminds us that the strength of the law does not derive only from the authority of the person who promulgates it, but from the ‘adequacy’ of what it provides.

Verifying the reasonableness of a law (in fact) requires investigating its factual assumptions, evaluating the congruence between means and ends, detecting the same ends; to such purpose, the preparatory works of the law, the ministerial explanatory circulars, and the historical precedents of the relevant legal scheme are often looked to (Paladin 1997).

And what places the reasonableness at the apex of the system is its eminently *practical* character, which sets it apart from the *abstract* rationality around which, on the contrary, the analogic and systematic guiding principle orbits, and which requires a factual assessment in terms of results and consequences produced by the law.⁴

Therefore, if a practical control over the provision will ultimately sanction its lawfulness, why does the lawmaker not take such a similar practical approach *ex ante* when drafting any legislative proposal?

Why isn’t a *preliminary*, comprehensive and general survey carried out,

3 Bin, Pitruzzella 2003, 468: “The consistency rule, implicit in the principle of equality, may be expressed as follows: when issuing rules, the lawmaker remains free to choose the purposes, program, principle to be developed (to the extent that they do not conflict with any ‘substantial’ constitutional provisions, such as those sanctioning rights, freedoms etc.); but once the ‘principle’ has been chosen, it must be developed accordingly”.

4 See Cartabia 2013 with reference to the ruling of the CC 130/1988: “The assessment of reasonableness, while it does not require the application of absolute and pre-definite evaluation criteria, proceeds through proportionality weighting of the measures taken by the lawmaker, in its absolute discretion with regard to the objective purposes to be achieved, taking into account any existing circumstances and limitations”.

for example, on all national territory concerning *good practices* (as referred to above) already implemented in regional and central administrations, in order to identify which of them actually ‘work’, by evaluating on the basis of reliable data? Failing their acquisition, how can the lawmaker, from the top of the pyramid, decide what is best to lay at the foundation of those implementation rules that the relevant doctrine and operators, both required to comply with them, currently report as being full of gaps or absent?

The PA is essentially a ‘local’ administration (Bin, Pitruzzella 2003) in that it assumes that the bureaucratic structure immediately closest to its citizens is the one that best and more promptly fits their needs. This is the axiom enshrined in the Constitutional Reform under Title V pursuant to Law N. 3/2001 and from the principle of subsidiarity and decentralisation, through which the competencies of administrative functions among the various local and state agencies – having inspired many legislative interventions (even) on the matter of cultural heritage – are shared. Therefore, if, to close the loop and achieve the system’s efficiency, I must influence and intervene at a local level, it will mean that any change taken from above should be evaluated, in the first place, fully knowing the concrete *modus operandi* adopted locally and, based on such, to then rationalise ‘in reverse’ up to the central system, to understand what changes are needed. Conversely, reverse reasoning, from the central to the local, will likely continue to cause new reshuffling of structures, but without achieving any actual streamlining of the steps and letting practical answers to problems coming from implementing regulations, if and when enacted, and from individual local PAs, if and how best they will consider to proceed.

So would have been so irrelevant to consider, for the purposes of enacting Law 125/2015, that in 2015 only the Veneto Region’s Office for Bibliographical Heritage (Ufficio Sovrintendenza Beni Librari Regione Veneto) had actually succeeded in concluding (and timely) 3,689⁵ final exportations? Wouldn’t it have been more useful to request this information before, and not after, the promulgation of such law and to understand why the corresponding offices of other Regions recorded vastly inferior numbers? Failing such general and preventive framework, how could it be determined whether the regain by the State, as early as 1972, of the competence for the protection of bibliographical heritage was actually the most suitable choice, as compared, for instance, to tampering with and redefining (instead!) policies, guidelines and procedural protocols that have not been systematically addressed for almost half a century?⁶

5 Conference *Tutela, conservazione e restauro. Quale futuro per il patrimonio librario e archivistico*, Auditorium Santa Margherita, Ca’ Foscari University, Venice, 6 May 2016 (in particular Dal Poz, “La costruzione delle competenze regionali nella tutela del patrimonio librario”).

6 More precisely, with regard to bibliographical heritage, reference should be made to the Implementation Regulation of the ‘Rosadi’ Law 364/1909, approved with R.D. No. 363/1913.

3 Uniformity of Evaluations (Procedural Plan)

Along with bibliographical heritage, in fact, the entire system to preserve cultural heritage under the 2004 Code generally stands on the notion of *cultural interest*: simple (pursuant to art. 10(1)), as for property owned by the State or any other public entity; particularly/exceptionally important (pursuant to art. 10(3)) for privately-owned property. The Code provides that where the competent public offices assess/verify the presence of such interest in the property, the relevant provisions of the Code shall apply and in order to prevent any differences in treatment within the national territory (i.e. “to remove at the mere arbitrariness of the authorities”⁷ a decision involving, as it is well known, extreme restraints to the full and absolute exercise over private property, when it concerns a *res privata*), the Ministry is responsible for dictating the *general guidelines*, with which said offices must comply in order to ensure “uniformity of assessment” (pursuant to art. 12(2)). Also art. 68(4) (a source of innumerable legal disputes and attacks on export offices) when regulating the procedure for granting or refusing to issue the “certificate of free circulation”, envisages that “export offices shall comply with the general guidelines established by the Ministry, after consulting the competent advisory body”. The same reference is included in arts. 4(1); 29(5); 71(4); 72(4) of the 2004 Code.

Therefore, within the lawmaker’s intent the desire for a uniform administrative action constitutes a guarantee for efficiency, equity and transparency; consequently, such uniformity is placed at the basis of the most significant measures related to the circulation and preservation of the cultural good. Yet, in the whole deluge of reforms adopted since its inception, neither MIBAC nor MIBACT have ever set the parameters required by the above-mentioned provision. The only positive fact to which case law,⁸ doctrine and various operators refer is an out-dated ministerial circular of 13 May 1974 issued by the Ministry of public education.

Compared with Duchamp’s *Fontaine*, with Beuys’ *Felt Suit*, with Klein’s immaterial work, with the serial nature of the work produced by Warhol’s Factory and, remaining in Italy, with Manzoni’s *Merda d’Artista*, with Merz’s neon, with Fontana’s *Concetti Spaziali* (etcetera, etcetera, etcetera!), we will acknowledge, however, that reference to their “unique superior artistic ‘quality’, ‘rarity’, singular technical quality” mentioned

7 Lemme 2006, with specific reference to the Export offices as to the free circulation certificate, but applicable to all “competent Minister’s bodies” entrusted with the cultural interest assessment for the purposes of art. 12(2) of the 2004 Code.

8 RAC (TAR) Lazio, Rome, II *quater*, 24 March 2011, 2659; RAC (TAR) Liguria, 14 June 2005, 906.

in the 1974 circular is quite generic and vague;⁹ *id est*, useless for the officer called to make a decision, as well as misleading for the purposes of the “uniformity of evaluations” on the national territory.

Considering, therefore, that art has had time to become immaterial, Italy to join the European Union, Great Britain to exit it, shouldn't it be a priority to update the 1974 circular?

4 Weak Supervision of the Administrative Court and the Court-Appointed Expert (at the Trial Level)

Secondly, we realise how the lack of uniformity of assessment contributed to creating a sort of ‘free zone’ at a trial level¹⁰ where, under the auspices of “technical discretion” (and thus protected from the inherent supervision of the administrative judge (Marzuoli 1985; Ferri 1987; Cavallo 1993; Marini 2002), it is considered, in terms of protection, the sole cultural interest contemplated under art. 9 of the Constitution, without any form of *heterogeneous* comparison. Accordingly, the inevitable consequence is that the position of the individual owner of the work of art is reduced from full entitlement to a mere vested interest to the legitimacy of the administrative action (Catelani, Cattaneo 2002).

With specific consideration to the adoption of measures for the identification of cultural goods, the *pro tempore* MIBAC, with memorandum registered under nr. 24516 of 28 September 2005 (recalled even in the more recent MIBACT circular 19 of 30 July 2015), expressly excluded that the offices, entrusted with the rendering of the *technical* assessment in

9 The absolute indefiniteness of the notion of *rarity* can be fully understood in the interpretation of the administrative courts case law, maintaining that the rarity of a work of art cannot be assessed only on the basis of numerical criteria or on the grounds of the uniqueness of the work (RAC (TAR) Lazio, Rome, II *quater*, N. 1786 of 2015; and 5318 of 2011, the assessment as to the rarity of a work of art shall be based on the concept of “marginal usefulness”, i.e. such additional value of a work of art – as compared to any values already possessed – and adjustable from time to time to the needs of the relevant cultural education and policies of which such value constitutes the relevant expression and which may justify the inclusion of such work of art into the national cultural heritage even to yet another picture of a Master already included in public collections, once the relevant advisory authority will have assessed its particular uniqueness).

10 It is also worth noting that the sole instrument available to a private party to obtain a review of the judgment is to appeal against it before a higher authority (*ricorso gerarchico*). However, it can prove being a difficult path, given the usual procedure of the head authorities (to note: belonging to the same governmental entity that issued the concerned ruling), to fail to answer to such party claim within the ninety-day period provided by art. 6 of D.P.R. 1199/1971, **silently rejecting** the claim (decision which may be also challenged before the RAC (TAR) or by submitting an extraordinary appeal to the President of the Republic).

respect of the existence of a cultural interest in the *res* being appraised, may linger in applying administrative discretion, involving the weighting among public interests or between public and private interests, in order to decide which of them should prevail in the actual case. This is because – as made out in the cited circular – “the choice of priority of the cultural interest has already been made once and for all *in apicibus* by art. 9, para. 2, of the Constitution and by the relevant implementing provisions of law (from the Consolidated Act of 1999 to the 2004 Code, both fundamentally confirmatory, under such profiles, of the approach taken by the historical ‘Bottai’ Law 1089 of 1939)”.¹¹

This approach meant that, as a consequence of the substantial un-censurability of the administrative actions on cultural constraints,¹² authentic masterpieces of Italian art obtain the certificate of free circulation, possibly ending up in important foreign museums; works of dubious quality, of acknowledged repetitiveness, made modestly and amateurishly, are vice versa constrained, possibly with the indivisibility constraint (the most stringent existing in Italy), thus totally inconsistently with the unusual liberalism that inspired the Office in the assessment of real cornerstones of Italian art (Lemme 2015).

In hindsight, however, the legislative evolution over the last 40 years would require us to rethink the nature and scope of the MIBACT’s powers of protection. The distant 1974 circular was followed by, in chronological order, Law 241/1990 as subsequently reinstated and amended, which depicts the administrative procedure as the privileged moment to assess, weight and evaluate all facts and points of law as well as the various (public and private) interests involved in the administrative action; the Consolidated Act 490/99 and the 2004 Code. In particular, arts. 14, 19, 22, 28, 33, 46, 68, 70 and 71 of L.D. 42/2004 follow the general discipline on administrative procedure, providing for the duty to notify to those concerned the commencement of the procedure aimed at assessing the existence of the cultural character of a property, as well as any grounds

¹¹ In 2004, the lawmaker does not actually diverge from the original framework of the s.c. Bottai Law, thereby delaying the harmonisation with EU law and rendering the declaration of cultural interest subject to a high degree of discretion. Thus, the operators of the art market complain about an assessment being substantially conditioned by the arbitrariness of the competent office. This would be the reason why – according to certain authoritative literature – foreign collectors adversely look at our shows and exhibitions, while Italian collectors are worried about the disgrace of the “embargo on exports” (cf. Morabito 2012): upon a good has been declared as a cultural good, the privately-owned property enters into the black hole of administrative proceedings and may, in accordance with applicable laws, be subtracted from the freedom of contract for an indefinite period of time.

¹² See, *among others*, ST, Section VI, 22 April 2014, 2019; Section VI, 3 July 2014, 3360; RAC Lazio - Rome, Section II quater, 5 October 2015, 11477; accordingly, RAC- Piedmont, Section II, 9 May 2014, 821; RAC Abruzzo- Pescara, Section I, 8 March 2012, 121.

for refusing the motion (to issue the certificate of free circulation), for the obvious convenience, also in terms of budgeting, to anticipate in the procedural phase the comparison, usually commonplace at the time of the trial, between the Administration's evaluations and the considerations of the concerned persons as for the property's characteristics.¹³

Unlike the existing regime under the Bottai Law, today the private owner of the cultural work of art has the opportunity to speak *as equals* with the PA, by submitting briefs and/or documents within the proceedings.

How can we, then, in this renewed legislative framework, postulate on the absolute irrelevance, *a priori*, of any interest other than the primary one? Would it not, on the contrary, be more correct (and consistently with applicable law) to acknowledge that, in the matter in question, to the traditional *technical appraisal* criteria were added, as a result of the known participatory principles provided by Law 241/90, also the unavoidable – and no less meaningful – moments of *administrative discretion*, aimed at balancing public and private interests involved in the proceedings for a declaration, provided by the *lex specialis*?¹⁴

From such changed perspective, the circulation of a cultural good, as well as the declared submission of such good to the cultural goods statutory scheme, are revealed to be the result of a complex process in which the technical discretion (applied on the good in order to detect the relevant artistic, historical, archaeological, ethnographic, bibliographic, etc. interest) is inextricably linked to the *administrative discretion* (concurrent with the weighing of interests), since it involves, necessarily, a decision on the work of art's worthiness for protection, and therefore a substantial "cultural policy choice" (Ainis 1991).

If it is true, indeed, that the second paragraph of art. 9 of the *Constitution* ("The Republic protects the landscape and the historical and artistic heritage of the Nation") should not be interpreted separately from the first (for which, the purpose of protection and a fundamental task of the Republic is "the development of culture"), but naturally and necessarily in relation to it, it is equally true that the administration for cultural heritage, when exercising its power to constraint, should take into account not only the cultural interest identified in the good, but also the interest of the private owner of such good and those remaining public interests, in potential contrast with the primary interest held by MIBACT (all adequately represented in the proceedings). From this perspective, the principle of

13 SC, Section VI, 3 January 2000, 29, *Giornale di Diritto Amministrativo*, 6582 ff., with note by Sandulli.

14 Reference is to art. 42 of the *Italian Constitution*, art. 17 of the Nice Charter, art. 1 of CEDU AP n. 1 and to the heavy limitations that the status of CH entails on the property right; thus identifying a 'conformed' ownership title, adjusted to the existence of the public interested protected in compliance with art. 9 of the Italian Constitution, cf. Salvia 2002, 603 ff.

proportionality, enlightened and enriched by the specialized disciplines applicable to the individual case, would represent the fundamental *limit* to the discretion to which the PA is entitled to when decreeing the cultural merit of the *res*, thereby allowing to adapt the administrative measure to the peculiarities of the case, with the least possible sacrifice of any other conflicting interests, whether public or private.¹⁵

After all, to consider the technical rule able to provide unequivocal results (and therefore fully binding an activity) does not constitute an assumption that is acceptable in principle, given that any decision on the *cultural nature* of the good still lacks that dose of certainty that should characterise technical and scientific disciplines, by implying, in fact, an unavoidable rate of subjectivity (cf. Giaccardi 1996).¹⁶ Indeed, technical and scientific investigations relating to cultural heritage, by reason of the continuous evolution of the relevant disciplines and in the light of the physiological relativity that characterises them, can provide solutions that are not ‘certain’, but that are, at the most, ‘reliable’. Consequently, to protect the private owner affected by the *naturaliter* uncertain cultural circumstance, they should not be considered exempted from the inherent ‘weak’ control of the administrative court (Rota 2002).

With this, we don’t want to argue that the court, by bypassing the basic principle of segregation of duties, may duplicate the value judgment made by the Administration (with substitute powers being inadmissible in the light of the exclusive jurisdiction of legitimacy). More simply, it may confirm the actual existence of the cultural legacy, being the requirement for the contested measure, and together with it, the diligence employed, by using the techniques applicable to the investigation activity. It may, in other words, ensure compliance with the technical rule used, by going as far as to the annulment of its evaluative outcome, if it appears that the result reached by the Administration, regardless of its physiological questionability, departs from the limits of natural flexibility underlying the indeterminate legal concept, which the Administration is required to apply, and is unreliable – in whole or in part – owing to the misapplication of the objective appraisal and evaluation criteria, or because of the application

15 See Parisio 2008, for whom “the preservation of cultural heritage always assumes the simultaneous settlement between the public interest in the protection with the private interest in the full enjoyment of the good” (177); on such assumption, the principle of proportionality is “the means which most allows the evaluation of the exercise by the Administration of its discretionary power, with the perspective of considering the interests involved” (187).

16 Needless to say (in terms of procedure), MIBACT should be equipped with uniform evaluation parameters, certain and determined to the highest possible extent, as well as stringent and objective assessment techniques aimed at ascertaining the existence of a cultural interest, to minimise the disputability of evaluations.

of erroneous criteria.¹⁷

On the other hand, the adhesion to the administrative court's weak forms of supervision is supported *a fortiori* by the admittance, in the administrative trial, of the technical appraisal as part of the investigative instruments aimed at acquiring elements that are useful to forming the decision (art. 67 of the *Administrative Procedure Code*).

It would be desirable, therefore, that the administrative courts, instead of following the easier path of recalling (incorrectly) the technical discretion (that cannot be challenged other than within the narrow spaces of some symptomatic figure of "abuse of power"), should resort more frequently to the appointment of a court-designated expert, so exercising a direct control (based on internal and technical parameters, and not only external ones) of the debatable fact, at the foundation of the challenged restricting resolutions. Furthermore, given the subjectivity inherent also in the opinion of the most leading expert, it would probably be good practice to consult more than one and, based on what (once again!) takes place in practice, try to single out criteria that the expert must apply in the implementation of the appraisal, in order to facilitate, within the trial, the discussion relating to the merits of the different opinions expressed.¹⁸

5 Set Priorities and Acquire Concrete Information Practical Examples

'Art', 'historic and artistic heritage', CH are elastic concepts, as well as all others that are the subject matter of provisions of law. This is physiological in order for such concepts to not become immediately obsolete. More than others, they likely have a large percentage of semantic flexibility with respect to their firm core meaning: defining them as a "one off" term would be impossible and even more counter productive for legal certainty. But, what we require from the lawmaker and the Administration concerned is

17 In such terms SC, Section VI, 11 March 2015, 1257; accordingly, SC, Section VI, 23 April 2002, 2199, with note by Scarselli and Fracchia; SC, Section IV, 6 October 2001, 5827, in *Foro italiano*, 2002, III, 414, with note by E. Giardino; SC, Section VI, 14 March 2000, 1348, *Giustizia civile*, 2000, I, 2169.

18 Zagato 2015: "[by identifying such criteria], in case of dispute it will always be the judge or the arbitrator who will decide on the actual case, but in this way they will not have to grope around in the dark in order to reach a decision, nor will they have to be experts on art, as they will be able make an assessment on the basis of constant elements; they will be able to compare them with consideration of other expertise provided on the same piece of art, by requiring, if necessary, the rendering of an appraisal aimed at clarifying the same points. Finally, on the basis of such criteria, (now yes!) they will be able to establish what should be deemed most relevant, and base their decision on it".

not to provide definitions, but to give concrete answers, practical criteria, guidelines on conduct; and this implies first of all “making a choice”. Not with respect to those who must carry out a specific competence and not on how to call the body, but on what we decide to priorities today. Do we wish our beautiful artistic treasures to basically remain within our national boundaries, although this may mean storing them in depositaries or vaults?¹⁹ Or do we want to become more participative in the art market - a market necessarily international - thereby ‘re-appraising’ certain works that we possess, although accepting, for some of them, “their exit from national territory with the consequent inability to control their movements and relocations”?²⁰ Personal opinion aside, we may also act cautiously in the face of a global market where exorbitant billing indexes are growing (strangely enough!) in inverse proportion to economic crisis indicators. But in that case, the more we tighten up the mesh of our national borders, the more we need to *enhance* what is kept inside, attempting to “revalue” it otherwise. If we hold back and do not enhance, the Italian art market will cease to exist!²¹

Once the choice is made, and the guidelines are set, then yes, the lawmaker may consider a structural reform, but (again!) on the basis of concrete information acquired before intervening.

If, for example, export Office officials are asked how to make decisions/ what in fact could be useful to them/ what is useless, by comparing proposals from various local offices, maybe we would understand how to enable them to work well (moreover by removing them from the resentment of private parties!); and the citizens (and the judicial authorities) to improve control.

We might, still for instance, ask ourselves:

- Wouldn't it be useful to grant the export Office officials access to the *artprice* website (considering that: (i) art. 68/3 requires them to “ensure the fairness of the market value” of the good as indicated in the report; (ii) that the aforementioned website contains real time evaluations for individual artists in the international market; (iii) for this

19 We must remember that the decision to keep a cultural property within the country's boundaries could be based not on the need to preserve the property itself, while the possibility to ensure the availability of such property on the territory in the event the State may wish to acquire such property in the future. Which could also never happen; in addition, by following such reasoning, nothing could ever be allowed to be taken out!

20 Judgment of RAC Lombardy, 29 January 2002, 345 on the contents of the prohibition to export.

21 In addition, to encourage the appraisal as a sort of counterbalance to keeping a property on national territory would represent a ‘proportionate’ measure towards any private interests that possibly came into play.

- reason, in practice it is an essential instrument for anyone working in the art world; (iv) the annual membership cost is small)?
- Wouldn't it be useful to equip them with black lights lamps (Wood's lamp)?
 - Wouldn't it be useful to require that at least one out of the three experts sitting in the export Office's Commission, entrusted with the assessment of the property for the purpose of issuing the certificate of free circulation, actually holds the necessary expertise in relation to the specific type of art being the subject matter of such assessment? And where such a requirement is not met, mandatorily resort to the leading outside opinion of an expert on the subject?
 - Wouldn't it be useful to require that the abovementioned Commission's individual experts - who will be required to appraise during their work hours - receive suitable documentation on the property (obviously well!) in advance before the date scheduled for their personal inspection?
 - Instead of pointing a finger at the export Offices (as we have seen to be frequently useless and very expensive in practice!), wouldn't it be more constructive, and fair, to bridge the regulatory vacuum by starting with requiring what has been said above? How can we not notice that the frustration of private interest (with verifying the quality of the Offices' assessment) goes hand in hand with the development of the administrative practices that are necessary (to supplement that regulatory shortfall), although not necessarily 'good'?! Arts. 24 and 97 of the Constitution must be jointly fulfilled, and be jointly implemented as the link connecting the management system with the cultural heritage. This, however, cannot be done by the Export Office or any other individual 'parts' comprising such system. That is why leveraging their erroneous judgments in the individual concrete case cannot be the answer to the problem (but, rather, a return to its starting point!).

The author, furthermore, can only jump to the defence for qualifying *some* civil servants, considering the diligence that they show when carrying out their duties despite the many changes, resources and sometimes-meagre answers.

Along with them, who writes shares the determination and confidence that things might get better.

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