

SHORT COMMENTARIES

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Illicit Trade in Cultural Objects under the Spanish Law: *The Cabeza de mujer joven Case*

Abstract: This article seeks to introduce a brief description of the rules of protection of cultural heritage goods in the Spanish Law, using the example of a mediatic case of illicit trade, where the regulations of civil law, criminal law, and administrative law were applied and where the freedoms inherent in the right of ownership collided with the rules on properties of cultural interest. First, it provides an overview of the Spanish cultural heritage law, beginning with the constitutional mandate of assuming and promoting the protection of Spanish cultural heritage, and thereafter focusing on the concept of private ownership and its limits, in accordance with the social function of all property rights under the 1978 Spanish Constitution. Second, it describes a well-known case of illicit trade, focused on a valuable painting by Pablo Picasso. The work *Cabeza de mujer joven* (*Head of a young woman*) belonged to a private owner who decided to sell it internationally, using the services of a well-known auction house. When the required permission for exportation was denied by the Spanish public administration, the owner commenced a court proceeding aimed at changing the decision, but also planned

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to send the painting abroad using a yacht on his property. Thirdly, the article's conclusion reflects on the level of severity of the Spanish legislation as applied in the case, in the context of the balance between cultural heritage protection and the freedom of disposition inherent to the right of property ownership.

Keywords: cultural heritage, civil law, criminal law, illicit trade, *Cabeza de mujer joven*

Introduction

The importance and value of cultural, historical, and artistic heritage are widely recognized under international, regional, and national laws. In fact, cultural heritage is today perceived as one of the core elements of social, economic, and cultural development, and ever more often posited to be a global common good, to which humanity is both the custodian and beneficiary.¹ Indeed, art and cultural objects form separate classes of objects that speak about the human condition and that mirror the living conditions of individuals and communities. They offer knowledge about the creative process and the identity of the group(s) responsible for their production. Cultural heritage expresses continuity between the past and the present; introduces the idea of cultural identity; and explains our fascination for antiquities.²

Cultural heritage is a telling and concrete example of how the old public law/private law dichotomy is becoming more and more diffuse.³ On one hand, there is the idea of "cultural heritage" as a "collective ownership" or "stewardship".⁴ On the other hand, and especially when cultural goods are owned by private or public persons, the question of "property rights" comes to the fore, conceived here as a private right.⁵ This article focuses on the legal balance between the collective general interest – governed by public law – and individual rights – governed by pri-

¹ See Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018), OJ L 131, 20.05.2017, p. 1. In addition, the Final Declaration of the UNESCO World Conference on Cultural Policies and Sustainable Development – MONDIACULT 2022 (28-30 September 2022, MONDIACULT-2022/CPD/6) reiterates that "the individual and collective responsibility, on behalf of future generations, to ensure the conservation, safeguarding and promotion of the entire cultural sector including cultural heritage, both tangible and intangible, is an ethical imperative".

² For instance, see C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing, Cheltenham 2015, pp. 1-5. Also, the aforementioned MONDIACULT 2022 Final Declaration expresses one nefarious consequence of this fascination, in the form of the illicit trafficking of cultural property goods.

³ For a more in-depth study on this topic, see A. Jagielska-Burduk, *Cultural Heritage as a Legal Hybrid. Between Public and Private Law*, Springer, Cham 2022.

⁴ D. Gillman, *The Idea of Cultural Heritage*, 2nd ed., Cambridge University Press, Cambridge 2010, pp. 9-40.

⁵ On the dichotomy between "heritage" and "property", see for instance V. Vadi, H. Schneider, *Art, Cultural Heritage and the Market: Legal and Ethical Issues*, in: V. Vadi, H. Schneider (eds.), *Art, Cultural Heritage and the Market: Ethical and Legal Issues*, Springer, Heidelberg 2014, pp. 2-6.

vate law – by presenting a specific case where private law rules (civil law) and public law rules (criminal and administrative law) together formed the transversal legal nature of cultural heritage law.⁶

Characteristics of Spanish Cultural Heritage Law

Every historical/artistic good is defined by its value in the spatial-temporal perspective and in the cultural dimension. Heritage is a concept to which most people assign a positive value, and the preservation of material and intangible culture are generally regarded as a shared common good by which everyone benefits.⁷ These conditions form the bases of a special regulatory scheme under the general expression of “cultural heritage law”. This is because of the objectives of conservation and spreading of culture. Beyond individual rights lies a general interest: there could not be liberty, equality, or real democracy without one culture solidly established in society. In Spanish Law, Article 46 of the 1978 Spanish Constitution (hereafter, “CE”) requires public powers to watch over, promote, and protect the Spanish cultural heritage, granting them wide powers to undertake that mission.⁸ The protection of cultural property does not differentiate between its public or private ownership, and accordingly we can affirm that cultural heritage goods are not actually public, but rather that the constitutional rule is the basis for setting certain limits on private ownership.⁹ The historical-artistic dimension of some goods does not presuppose their assignment to the public domain, nor the establishment of a new type of “public property” as a new category of the rights of ownership.¹⁰ While archaeological heritage is indeed regulated as part of the public domain,¹¹ with re-

⁶ For an analysis of the legal balance between the collective general interest – ruled by public law – and individual rights – ruled by private law – in Spanish historical heritage legislation, see L.J. Capote Pérez, *Cultural Heritage and Spanish Private Law*, “Santander Art and Culture Law Review” 2017, Vol. 2(3).

⁷ H. Silverman, D.F. Ruggles, *Cultural Heritage and Human Rights*, in: H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007, p. 3.

⁸ Article 46 CE: “The public authorities shall guarantee the preservation and promote the enrichment of the historic, cultural and artistic heritage of the peoples of Spain and of the property of which it consists, regardless of its legal status and its ownership. Offences committed against this heritage shall be punished under criminal law”. *Constitución Española* [Spanish Constitution], 29 December 1978, Boletín Oficial del Estado, 1978, No. 311, Ref. BOE-A-1978-31229; for English translation consult: https://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf. This constitutional precept has its origin in 1931 Spanish Second Republic Constitution, which under Article 45 introduced the first rule in Spanish Law to fight against the pillaging and plundering of Spanish heritage. A. Pérez de Armiñán y de la Serna, *Las competencias del Estado sobre el Patrimonio Histórico Español en la Constitución de 1978*, Cuadernos Civitas, Madrid 1997, p. 37.

⁹ C. Cambor de Echanove, *Mercado y régimen de los bienes culturales en el Reino Unido*, “Cuadernos de Derecho de la Cultura” 2013, Vol. 4, p. 8.

¹⁰ J. Barcelona Llop, *El dominio público arqueológico*, “Revista de administración pública” 2000, Vol. 151, pp. 133-166.

¹¹ J.F. Gabaldón de la Banda, *La regulación del Patrimonio Arqueológico como dominio público a raíz de la promulgación de la ley de 191: un antecedente de la Ley 16 / 1985*, “Anuario Jurídico y Económico Escurialense” 2014, Vol. 47, pp. 263-284.

spect to privately owned properties, the nature of such property as a cultural good rather implies a limitation in certain faculties or freedoms inherent in its ownership.

Furthermore, the consequences of the disappearance of fiscal and commercial frontiers with the introduction of the European Internal Market have given rise to great concerns about historical heritage in the face of the fear of a massive outflow of cultural property from poorer countries to those with greater economic potential, which has produced a wide-ranging debate on possible restrictions on free movement, which in turn has become one of the most controversial aspects of European cultural integration.¹²

In this respect it is worth noting that culture was not part of the European Community's competences before 1992, but with the entry into force of the single market in 1993 serious problems arose which forced the European Union to intervene in cultural matters. Prior to the Maastricht Treaty, the only existing reference to culture was contained in Article 36 of the Treaty establishing the European Community (now Article 36 of the Treaty on the Functioning of the European Union¹³), which excluded artistic, historical, and archaeological heritage from the freedom of movement. This article provided for an exception to compulsory measures for the establishment of the internal market, leaving cultural goods outside the scope of freedom of movement. The restrictions that such a measure imposed on intra-Community trade in cultural goods were an attempt to protect them from the harmful consequences that could result from their free circulation.¹⁴

Cultural Heritage and Ownership Rights

The relationship between cultural heritage and property rights requires a brief explanation of the actual concept of right of ownership under Spanish Law. The traditional notion of ownership is enshrined in Article 348 of the 1889 Spanish Common Civil Code (hereafter, "CC"): "Ownership is the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws. The owner shall have an action against the holder and the possessor of the property to claim it".¹⁵ This notion was, however, modified and complemented by the constitutional regulation set out in Article 33 CE:

The right to private property and inheritance is recognized. The social function of these rights shall determine the limits of their content in accordance with the law. No one

¹² J. Verdugo Santos, *Libre circulación de bienes culturales en Europa: un debate entre salvaguardia y liberación*, "PH: Boletín del Instituto Andaluz del Patrimonio Histórico" 1994, Vol. 2(7), pp. 20-21.

¹³ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 115, 9.05.2008, p. 47.

¹⁴ J.I. Álvarez Jiménez, *La protección del patrimonio cultural europeo frente a la exportación ilegal*, "Revista de Derecho UNED" 2010, Vol. 6, pp. 13-40.

¹⁵ *Código Civil* [Civil Code], 25 July 1889, Boletín Oficial del Estado, 1889, No. 206, Ref. BOE-A-1889-4763; for the English translation, consult: http://www.wipo.int/wipolex/en/text.jsp?file_id=221319.

may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law.

Hence, the classic definition of ownership as the right to use and dispose of one's property with no limits other than legal ones includes the limitations set out in Article 33, i.e. limitations based on the "public utility or social interest" in such property. This adds a new dimension to the concept of private domain, adapted to its elastic condition but excluding other classic aspects of the absolute right *par excellence*. The constitutional recognition of the right to private property does not introduce a new definition of ownership different from that contained in the CC, but does provide for new limits based on the concepts of social function – a general but variable limit, depending on the kind of ownership – and social interest – a concrete justification for interference in specific ownership rights.¹⁶

The social function of property rights is a concept with many concrete definitions. Firstly, and most generally, it can be defined as an intrinsic limit on private property rights, established by CE but carried out by law, under the premise that there are collective interests which are above individual ownership. Under that assumption, the freedoms traditionally inherent to private property can be adjusted, depending on the concrete object of each ownership right.¹⁷ Therefore, the concretization of this social function depends on either the good or the object, and establishes a different content in each property right. Depending on the nature of the good, the legal framework is different, and as a result the property right thereto may restrict, or not, certain freedoms for its holder. In Spanish Law there are many examples of these kinds of rules; i.e. in Urban Law (urban property); the 2003 Forests Act (estates adjacent to common forests);¹⁸ the 1988 Coasts Act (estates adjacent to maritime-terrestrial public domains);¹⁹ or natural heritage.

Hence the question arises: What is the social function of property rights in relation to the protection of cultural heritage? Cultural or historic-artistic heritage²⁰ is defined, according to the 1985 Spanish Historical Heritage Act (hereafter,

¹⁶ The evolution of the right to property occurs parallel to other institutions (like unjust enrichment) under a more solidary and socially enriching perspective. G. Orozco Pardo, E. Pérez Alonso, *La tutela civil y penal del patrimonio histórico, cultural y artístico*, McGraw-Hill, Madrid 1996, pp. 7, 21.

¹⁷ Concrete variations of the adjustment have given rise to the idea that there is not one and only one concept of ownership, but many definitions of various types of ownership, depending on each legal framework.

¹⁸ *Ley 43/2003 de Montes* [Forests Act], 21 November 2003, Boletín Oficial del Estado, 2003, No. 280, Ref. BOE-A-2003-21339.

¹⁹ *Ley 22/1988 de Costas* [Coasts Act], 28 July 1988, Boletín Oficial del Estado, 1988, No. 181, Ref. BOE-A-1988-18762.

²⁰ Cultural heritage history, its concept, and its deciding characteristics are defined by the applicable legal doctrine. For example, see R. Parada, *Derecho administrativo*, Vol. III: *Bienes públicos. Derecho urbanístico*, Marcial Pons, Madrid 1983, p. 274; C. Barrero Rodríguez, *La ordenación jurídica del patrimonio histórico*, Instituto García Oviedo, Universidad de Sevilla, Ed. Civitas, Madrid 1990, p. 120; J. Rams Albesa, R. Moreno Flórez (eds.), *Comentarios al Código Civil*, Vol. III: *Libro segundo (Títulos I a VIII)*, J.M. Bosch, Barcelona 2001,

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“LPHE”)²¹ as the group of movable and immovable goods with artistic, historical, paleontological, archaeological, ethnographical, scientific, or technical interest or value. This definition also includes documentary and bibliographical heritage, archaeological sites, natural sites, gardens, and parks with artistic, historic, or anthropological value. All those goods are defined by the characteristic of historicity, because the LPHE establishes a special status in accordance with the notions of time and space. The notion of time under the LPHE includes different possibilities of application. On the one hand, there is the general idea of time as the expression of an historical dimension: is not time as the accumulation of years, but as an expression of historical value. On the other hand, there are special rules for goods where the time factor is defined by the number of years of its existence, for instance in the cases of documentary and bibliographical heritage goods. According to Article 49 LPHE, documentary heritage goods encompass documents from public and private entities older than a concrete number of years. Under Article 50 LPHE, bibliographical heritage goods are composed of manuscripts and printed works with three or less existent copies. Cultural value is the last determinant element to define historical-artistic heritage. But at the same time there is always a cultural aspect in every human activity. The presence of one person implies the existence of culture. Yet the actual “heritagization” requires an assessment of the value of a given cultural manifestation in a specific historical or artistic context. There are some theoretical constructions designed to establish a common concept or denominator for all categories of cultural heritage. One of them refers to the notion of cultural goods, where the adjective “cultural” is used to establish its belonging to the history of civilization. This historical dimension concretizes the ambiguous definition of culture; making a particular cultural good a testimony to the past. Thus the concept of “heritage” is defined by two aspects: culture and history.²²

In considering the social value of cultural heritage, this article will attempt to analyse how the idea of cultural heritage as a collective stewardship and legacy of the past for the present and future generations affects concrete private property rights and restricts the freedoms of their owners when a specific good is consid-

pp. 78-80; J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, pp. 1-6; M. Vecco, *A Definition of Cultural Heritage: From the Tangible to the Intangible*, “Journal of Cultural Heritage” 2010, Vol. 11, pp. 321-324.

²¹ *Ley 16/1985 del Patrimonio Histórico Español* [Spanish Historical Heritage Act], 25 June 1985, Boletín Oficial del Estado, 1985, No. 155, Ref. BOE-A-1985-12534. It has to be noted that, according to the distribution of competences established in CE, there are also regional acts in almost every Spanish autonomous region. For a brief description of the relationships between national and regional historical heritage laws, see M.J. Aznar-Gómez, *Spain*, in: S. Dromgoole (ed.), *The Protection of the Underwater Cultural Heritage*, 2nd ed., Martinus Nijhoff Publishers, Leiden-Boston 2006, pp. 275-282.

²² C. Barrero Rodríguez, *op. cit.*, pp. 119-121 and 171; L. Díaz Vilela, *¿Qué es esa cosa llamada cultura?*, part of the university extension course “Ciencia y pseudociencias 2006”, Universidad de La Laguna, March-May 2006; C. Barrère, *Cultural Heritages: From Official to Informal*, “City, Culture and Society” 2016, Vol. 7, pp. 87-94.

ered as part of Spanish historical heritage. To this end, the application of the social function of a private property right in its concrete cultural dimensions is determined by referring to regulatory regimes and selected judicial practice.

The “historical value” of a good implies the application of a special status to protect it. Accordingly, the formal designation of a good as cultural property includes an ensemble of obligations and charges. Their imposition is a direct consequence of the axiological and policy objectives enshrined in the 1978 Constitution and LPHE, i.e. that more and more people should be able to benefit from the cultural value of the good. Since cultural heritage includes goods in private hands, then cultural stewardship should merge with ownership rights. In this way private property rights over cultural goods are demarcated by the general limitations arising from their social function. These limitations include the protection of culture as being in the collective interest of everyone,²³ which particularly affects the freedoms of disposal. In this context, “everyone” includes the present and future generations, not only of Spaniards, because *voluntas legis* conceives of culture as a universal good (a “universal universality”).²⁴ The discussion concerning the universal, national, or local nature of cultural heritage is very interesting and transcends national law rules.²⁵ The constitutional duty of protecting and encouraging culture introduces a limit defined by the principle “pro-monument” – the cultural value of every good declared as part of historical-artistic heritage is imposed by “pro-culture” rights, which supersede private rights to it, meaning that the preservation of cultural heritage goods is more important than private interests. In private property rights over these kinds of goods, the ancient *ius abutendi* or “right to abuse” is forbidden and marks the frontier between the possibilities of a private owner to freely dispose of his or her ownership rights in cultural goods, and the interdictions which may be imposed on such a private owner by the State. The social function of ownership acts here in a concrete form, i.e. the objective of preservation of historical-artistic goods in the name of their cultural value. The collective benefit derived from such conservation justifies the limitations placed on ownership rights.

The establishment of a special set of rules for some goods belonging to private owners presupposes new limits added to the general ones that define contemporary property rights. In this way some of the freedoms or rights normally held by owners may be restricted. In this scenario, activities ordinarily valid for goods not

²³ Article 1 LPHE declares that the purposes of historical heritage regulation are “the protection, promotion and transmission to future generations of Spanish Historical Heritage”, in accordance with the duties imposed by Article 46 CE.

²⁴ The definition of culture as a right of everyone (*droit sujetif de tous*) in Spanish Law can be found in M. Cornu, J. Fromageau, C. Wallaert (eds.), *Dictionnaire comparé du droit du patrimoine culturel*, CNRS Éditions, Paris 2012, p. 63.

²⁵ Compare J. Blake, *op. cit.*, p. 12. Also, and linked with the return of cultural artifacts debate, see A. Taşdelen, *The Return of Cultural Artefacts: Hard and Soft Law Approaches*, Springer International Publishing, Cham 2016, pp. 1-6.

defined as cultural heritage could be restricted or even declared illicit for goods included in the definition of “cultural heritage”. In this way specific public rules regarding cultural goods affect the nature and efficacy of private contracts signed with the aim of transferring the ownership of historical-artistic goods. In this article we examine the application of one of those rules – the limitation of the right of disposal and exportation – using a paradigmatic example: The *Cabeza de mujer joven* case.

The *Cabeza de mujer joven* Case

The painting *Cabeza de mujer joven* (*Head of a young woman; or Buste de jeune femme*) is a creation by Pablo Ruiz Picasso.²⁶ This work is representative of a little-known period in the author’s life – his days in the Spanish town of Gósol.²⁷ His pictorial oeuvre of those times is defined as part of a period of transition between the so-called “pink” and “blue” phases and cubism.

The oeuvre was acquired by its last private owner in 1977, and in 2012 he decided to sell it in an auction, scheduled by the Christie’s auction house for 6 February 2013. The Spanish section of this popular auction house informed the customer of the possibility that the work might be part of the Spanish cultural heritage.²⁸ Consequently, the owner authorized Christie’s Ibérica S.L. to manage the exportation of the painting outside of Spain.²⁹

On 5 December 2012 Christie’s Ibérica S.L. filed a request for authorization for its export with the Spanish Ministry competent in culture,³⁰ but the committee

²⁶ Pablo Ruiz Picasso (Málaga, 25 October 1881 – Mougins, 8 April 1973) was a painter, sculptor, illustrator, ceramist, poet, creator of mural and graphic work, author of theatrical pieces, and designer of stage designs for theater. His biography can be found in the *Electronic Biographical Dictionary* of the Spanish Royal Academy of History: <https://dbe.rah.es/biografias/9357/pablo-ruiz-picasso> [accessed: 30.11.2022].

²⁷ Picasso visited Gósol, in the Lleida Pyrenees, for one week – 22-29 May 1906 – and discovered the Romanesque images and the primitivism of the Iberian statuary.

²⁸ According to the Judgment of the Madrid Court of Appeal No. 398/2020 of 1 September 2020, ECLI:ES:APM:2020:9138.

²⁹ According to the Judgement of the Spanish Supreme Court No. 755/2021 of 4 March 2021, ECLI:ES:TS:2021:755, these are facts established in the records contained in the administrative file that the plaintiff, on 5 December 2012, through the representation of Christie’s Ibérica S.L. presented through the Electronic Register of the Secretariat of State for Culture (Secretaría de Estado de Cultura), application for a definitive export permit, with the customs office, with a departure in Madrid and destination to London (United Kingdom), of the painting of Picasso.

³⁰ According to Article 5 LPHE: “1. For the purpose of this Law, export shall be understood as the departure from Spanish territory of any of the property forming part of the Spanish Historical Heritage. 2. The owners or possessors of such property that is more than one hundred years old and, in all circumstances, of property registered in the General Inventory described in article 26 of this Law, shall require express authorization in advance from the State Administration for export by the method and under the conditions laid down in regulations. 3. In spite of the provisions of the above section and without prejudice to the terms of Articles 31 and 34 of this Law, it shall be prohibited to export property declared to be of cultural interest and any other property which, because it belongs to the Spanish Historical Heritage, the State Administration declares expressly to be unexportable as a measure of precaution until proceedings are taken to include the property in one of the categories for special protection covered by this Law”.

responsible for authorizing such an export – Junta de Calificación, Valoración y Exportación de Bienes del Patrimonio Histórico Español – unanimously denied the petition on 13 December 2012. Furthermore, the committee proposed a declaration of the painting’s non-exportability, based on cultural heritage reasons. At this time the painting was presumably in Madrid.³¹ The reasons given by the committee to justify its decision were the absence of such a work in Spain, and the fact that the painting was one of the few works created by its author within the so-called “Gósol period”, i.e. the stage in which Picasso was clearly influenced by the plastic of Iberian art, and this creative phase would decisively influence not only cubism, but also the subsequent evolution of painting.³²

In accordance with the committee’s decision, on 19 December 2012 the Spanish Ministry of Culture denied the petition and provisionally declared the non-exportability of the painting, pending its formal declaration as part of the movable cultural heritage properties of Spain.³³ This decision was confirmed on 28 December 2012 and notified to Christie’s Ibérica S.L. and the work’s owner on 15 January 2013.³⁴

The oeuvre was then carried to a yacht located on the property of the painting’s owner and moored in the harbor of Valencia, with orders to the boat’s captain to hide the picture from public inquiries.³⁵ In July 2015, the yacht arrived at the French seaport of Calvi, in the island of Corsica. Meanwhile, the owner agreed with a transport company for the transfer of the good from the Corsican harbour to the city of Geneva, but the French custom services inspected the ship and found the painting.³⁶

³¹ Again, according to the Judgment of the Spanish Supreme Court No. 755/2021 of 4 March 2021, the application states that the painting is in Madrid. The work is valued in this application at €26,200,000. Accompanied to the request for exportation is a copy of a document by which the full owner of the referenced work authorizes Christie’s Ibérica S.L. to request, on his behalf, before the Ministry (Ministerio de Educación, Cultura y Deportes) the corresponding export permit for the work in question.

³² Again, the Judgment of the Spanish Supreme Court No. 755/2021 of 4 March 2021 and the Judgment of the Madrid Court of Appeal No. 398/2020 of 1 September 2020.

³³ According to the Judgment of the Spanish Supreme Court No. 755/2021 of 4 March 2021, the resolution agreed to request the competent Autonomous Community to begin the proceedings to declare the work as a cultural heritage good.

³⁴ The proprietor tried to convince the Ministry that the painting was not in the Spanish territory and that he was not the direct owner of it, but a limited company.

³⁵ According to the Judgment of the Madrid Court of Appeal No. 398/2020 of 1 September 2020, the Guardia Civil Tax Service carried out an inspection of the vessel on 10 June 2015, requiring the master of the gullet to make a declaration of the goods on board, and the master, following the oeuvre owner’s instructions, did not list this work of art.

³⁶ According to the Judgment of the Madrid Court of Appeal No. 398/2020 of 1 September 2020, the owner contacted an air transport company to make a reservation on a flight scheduled for 31 July 2015. The French customs services, upon learning that the accused was processing the transport of the oeuvre from France to the United Kingdom, ordered an inspection of the gullet, which they carried out on 30 July 2015, locating the painting in a box packed in the cabin of the captain, and having knowledge of the lack of the mandatory administrative authorization for its departure from Spanish territory, proceeded to intervene.

According to the 1995 Suppression of Smuggling Act,³⁷ the owner's activities constituted a smuggling offence, based on the following facts: The owner desired to sell the painting at an auction outside of Spain and tried to export the painting outside of Spain, in violation of the prohibition of the Spanish Ministry of Culture. The ban on its exportation was based on the cultural heritage nature of the oeuvre, which was not officially declared but met the conditions described in the Spanish Cultural Heritage Law to be considered as part of that category. Nonetheless, the owner ordered the transportation of the picture from Valencia to Calvi in Corsica (France). He was found guilty of smuggling and sentenced to eighteen months in prison and was ordered to pay a fine of €52,400,000 (double the painting's value). Moreover, the painting was confiscated and expropriated to the Spanish state. Later, the sentence was amended, and the Court issued a clarifying decision, increasing the punishment to three years in prison and ordering the payment of a fine of €91,700,000 (almost four times the value of the work); while the original orders for confiscation of the painting and its expropriation on behalf of the State Treasury were maintained.

The owner of the painting then commenced an action based on a two-pronged strategy. First, he challenged in court the decision to impose a criminal penalty; and second he appealed the Spanish Ministry of Culture's declaration of non-exportability. Both appellations were refused in the judgments of the Madrid Court of Appeal No. 398/2020 of 1 September 2020 and of the Spanish Supreme Court No. 755/2021 of 4 March 2021. With respect to the first prong, i.e. the criminal penalty, both the conviction and the punishment were maintained; and with respect to the second prong, under the contentious-administrative one, the declaration of non-exportability was upheld.

Conclusions

The Spanish cultural heritage legislation has traditionally been characterized as being strongly, perhaps even extremely, protective. The constitutional mandate has been translated into civil, administrative, and criminal regulations. The *Cabeza de mujer joven* case is an expression of the application of the rules contained in those distinct legal orders. First, the administrative law rules introduce public control over cultural heritage goods, establishing limitations to their exportation and penalizing the violation of such rules. Secondly, this public control and the consequent limitations on exports abroad presuppose restrictions on the freedom of disposition, traditionally inherent to ownership rights. In this context, the traditional definition of the civil law of private property as *ius utendi, fruendi et abutendi* is mod-

³⁷ *Ley Orgánica 12/1995, de 12 de diciembre, de Represión del Contrabando* [Suppression of Smuggling Act], Boletín Oficial del Estado, 1995, No. 297, Ref. BOE-A-1995-26836. For more on the regulation of the crime of smuggling in Spanish Law, see F. Renart García, *Aspectos sustantivos del delito de contrabando de bienes culturales (I)*, "Diario La Ley (Madrid)" 2001, Vol. 22(5427), pp. 1-35.

ulated by the intrinsic limits arising from their social function, defined in the case of cultural heritage goods by and as their cultural value. Thirdly, the criminal law rules sanction and punish the violation of the administrative law rules in particularly serious cases.

In the *Cabeza de mujer joven* case the severity of the punishment imposed on the owner was based on the appraised value of the painting and justified by the nature of the work as a cultural heritage good, which established the aforementioned limitations to the ownership right over the painting. The appraisal, established by the proprietor himself, is the yardstick for the economic part of the sanction, but it may be questioned whether the cumulation of prison sentences, a fine, and confiscation of the work was not excessive, especially when the increased penalty was established by means of a clarifying decision. This is a procedural law matter, but the substance of the case reflects, once again, the complexity of the balance between the public interest – defined by the cultural nature of the good – and private ownership – defined by its freedoms.

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