

Newsletter

Criminal confiscation of cultural property without conviction:
Museum ordered to return the “Victorious Youth” statue to the Italian State
(Italian Supreme Court, Criminal Section III, 30 November 2018 – 2 January 2019, no. 2779)

1. Introduction

More than half a century after the discovery of the “Victorious Youth”, the legal proceedings surrounding this historical statue have come to a turning point. The bronze statue, dating back to the 4th century B.C. and attributable to Greek sculptor Lysippos of Sicyon, was found in the summer of 1964 in the waters of the Adriatic Sea along the coast of Pedaso (Marche). Local fishermen found the statue and brought it to the Port of Fano, where it was hidden. Soon after, the statue was transferred to Gubbio, then sold to a German antiques dealer and finally purchased by an American museum, arriving in the United States in August 1977 where it is currently still exhibited.

2. The legal proceedings

On 2 January 2019 the Italian Supreme Court issued a momentous decision wherein it definitively confirmed the confiscation order of the statue – “*wherever it is located*” – issued by the Judge for Preliminary Investigations of the Court of Pesaro on 10 February 2010, order which over the years has been subject to appeals and overturns.

Initially, two distinct criminal investigations were commenced by the Italian judicial authorities with respect to the Victorious Youth, one concluding with the acquittal of the accused individuals, the other with the dismissal of the case on the ground that the perpetrators remained unknown.

In 2007 the Prosecutor’s Office of the Court of Pesaro opened a new case file against the captains of the two fishing boats that had found the statue and the antique dealers that had

first purchased it. The statute of limitations having expired, this later proceeding also resulted in a dismissal, but the Prosecutor nevertheless requested that the cultural good be confiscated.

Generally, with respect to confiscation, the Italian Criminal Code provides among others that *"confiscation is always ordered [...] of the things [...] the possession or alienation of which constitutes an offence, even if no conviction has been handed down"* (art. 240, para 2, no. 2). When it comes to cultural property, art. 174 of Italian Legislative Decree no. 42 of 2004 (the so-called Cultural Heritage Code), in penalising the illicit export abroad of goods of artistic, historic or other value, provides at para. 3 that *"the judge shall order confiscation of the goods, unless these belong to a person extraneous to the offence"*.

3. Confiscation under the Cultural Heritage Code: nature and underlying public interest

In its recent decision, the Supreme Court first and foremost clarified that the mandatory confiscation provided for in art. 174, para 3 of the Cultural Heritage Code does not have a repressive and punitive purpose, but rather consists of a recovery measure, aimed at ensuring the substantive respect of the presumed public nature of the cultural good and, therefore, the protection of the interest in its safekeeping, conservation and general enjoyment.

Other types of confiscation (such as that provided for in the Italian Criminal Code) are intended to eliminate or reduce the risk of further damage to the community, given the intrinsic dangerousness of the good confiscated. Differently, the confiscation provision contained in the Cultural Heritage Code is primarily aimed at recovery, geared at *"materially restoring the dominion which, ex lege, the State bears over the goods in question"*.

This framework finds its justification in the prevalence of the underlying public interest, which consists of the protection of archeological goods. Indeed, the legislation safeguarding cultural heritage enshrines the general principle of the State's ownership over archeological goods.

According to the Supreme Court, the statue belongs to the Italian heritage not only for having been discovered by an Italian fishing vessel, hereby entering within the national territory, but also on the basis of *"the cultural continuity which has, from the origins of its development, tied the first Italic and then Roman civilization to the Greek cultural experience"*, with traces of Lisippo of Sicyon having been found in Taranto, Italy.

From a civil law point of view, where a juxtaposition arises between the presumption of good faith of the possessor and the presumption of original State ownership of archeological goods as belonging to the cultural heritage of the State, *"prevalence must be given to the presumption of State ownership over the good, since such presumption gives preference to the national public interest in the safekeeping, conservation, valorization and enjoyment of the cultural good"*.

The Supreme Court finally recalled the widely accepted interpretation according to which a presumption of public property exists with respect to archeological goods unless the private citizen proves that one of the private property exceptions applies. These exceptions are: 1) the goods were given to him or her as reward for their discovery; 2) the goods were ceded to him or her by the State; 3) the goods were purchased prior to the entry into force of Law no. 364 of 1909, which first enshrined the public property nature of such goods. In the same vein, archeological goods must be considered *extra commercium*, not subject to acquisitive prescription. Moreover, confiscation of such goods – as a recovery measure – is not subject to temporal limitations.

4. “Extraneous to the offense” for confiscation purposes: restrictive interpretation

In the decision at hand, the Supreme Court enunciated several other considerations stemming from the recognition of the confiscation measure as constituting a recovery measure.

Among these, the Court pointed out that this form of confiscation can be applied even where the criminal proceeding results in an acquittal on grounds that do not concern the materiality of the facts. It also held that this measure does not violate the fundamental principle of proportionality, given that confiscation cannot be calibrated without renouncing the protection of the underlying public interest.

Further, the concept of person “extraneous to the offense”, with respect to whom confiscation cannot be applied under art. 174, para. 3 of the Cultural Heritage Code, is to be given a strict interpretation.

In the latter regard, the judges clarified that the individual who was aware of or complicit in the illicit export offense cannot be considered extraneous. Yet neither can the individual who through his or her behavior, even if only by negligence, contributed to causing the fact constituting the criminal offense or, in any event, consciously benefited from its commission. Such benefit consists of “*any favourable condition gained by the individual from his or her non-extraneousness to the facts*”.

On the basis of this reasoning, the Supreme Court confirmed the position taken by the Court of Pesaro, hereby ordering the statue be definitively confiscated.

The legal dispute, even considering some debatable issues arising from the decision, may not yet have reached its final destination: the Italian authorities will have to activate international cooperation mechanisms to implement the confiscation order and obtain restitution of the statue. At the same time, the Museum could consider whether to appeal to the European Court of Human Rights for a violation of the rights enshrined in the Convention.

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