

‘Protecting’ the National Artistic Patrimony; An Economics Perspective

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Abstract

This paper analyses the rationale for restricting the international trade in art, namely protection of the national artistic patrimony. The meaning of national patrimony is analysed and rationales for state ownership and interventions in the art market analysed in light of the non-private benefits that this category of art produces. Distributional concerns in the international movement of art are considered along with the 'endowment effect' that can arise when dealing with potential transactions of patrimony art. Finally the paper provides a taxonomy of restrictions used to prevent art objects leaving a nation namely export restrictions, import regulations, and tax policies and incentives.

I Why Protect The National Patrimony?

Introduction: What is the National Patrimony?

The notion of the existence of a national artistic patrimony that is jeopardised if part of it is sold, especially for export abroad, is one of the most pervasive themes in debates surrounding trade in art. Virtually every state has adopted specific legislation dedicated to the purpose of protecting cultural objects in recognition of the public interest in safeguarding what is seen as part of a nation's heritage. What though belongs to the national patrimony, what is the case for the state either purchasing and/or preventing the sale of objects belonging to the national patrimony, and what are the means by which it can attempt to bring this about? These questions are the subject matter of this paper.

In attempting to answer the question of what belongs to the national artistic patrimony, it is helpful to think of the different types of arts output. For the purposes of this discussion, it is possible to categorise arts output into three broad types. Schulze (1998) talks of the live performing arts (e.g. concerts, theatre), reproducible art (e.g. films, CDs, books), and unique or non-reproducible art (e.g. paintings, sculpture and other artefacts). The three differ substantially from each other in three important respects; durability, production technology and associated degree of uniqueness. The performing arts are largely 'art services' and are therefore non-storable; their preservation therefore is not an issue in this sense. Reproducible art can be seen as a commodity in many respects like any other – once initially produced it is storable, easy and cheap to reproduce and relatively freely traded. The focus of this chapter is on unique or non-reproducible art, namely paintings, sculpture and other art/historic artefacts.

Paintings and sculpture are unique – each original work is distinctive or a 'one-off' even if it is copied or produced in the 'style' of another artist. In economic terms this means that there are no close substitutes for the goods. This uniqueness, coupled with high relative durability, makes these works 'collectors' items', for which there is a strong secondary market. Schulze (1998) points out that this is a highly distinctive feature of this form of art. Although there is a primary market where artists (producers) sell directly to 'first' consumers, the bulk of trading is on secondary markets between consumers and consumers. These features make the market for paintings and sculpture very different to those of other

commodities and hence the application of standard economic theory, and particularly trade theory, is of limited relevance.

Not all unique art of course belongs to the national patrimony. In most countries there is an 'age' requirement, say objects of 50 years standing or more (see later). Not all 'old' art belongs to the national patrimony either; only art that fulfils some important function is categorised as belonging to it (see later). Thus, what belongs to the national patrimony is subjective and varies considerably from country to country. Central to the definition though is that objects belonging to the national patrimony are of long standing and contribute in an integral way to the cultural identity/tradition of a country/region. As one author puts it (Galle, 1991, p. 9), the national artistic heritage or national patrimony consists of:

Objects and forms of artistic expression which the... state concerned designates as objects of cultural interest, which contribute or have contributed to the present identity of a people or group in any way whatsoever and which are characteristic of them.

However the national patrimony is defined, it can usefully be categorised into two types: moveable (paintings and single pieces of sculpture) and immovable art (collective sites, buildings, monuments and their attachments). While this article will concentrate on the former, there is a certain degree of overlap often caused by looting, pillaging and even 'legal' trade which involves the breaking up of collective sites/monuments and leads to a considerable blurring of the boundaries between moveable and immovable art (see Prott and O'Keefe, 1989).

One further point to keep in mind is the issue of where the national patrimony is physically located. A major part of it is in public ownership and is housed in public museums, public institutions or publicly-owned sites. Some is in private hands, such as private galleries or homes, some is in churches, and finally some cannot be classified into any of these categories (e.g. objects not yet uncovered, objects on sites where ownership is not legally clear).

A critical issue in relation to the national patrimony is the stealing and looting of part of it, especially where access is 'open' and protection is difficult to enforce. Many international agreements address this issue, but it is a problem that has existed for thousands of years. The looting of works of art by invading armies, or colonisers, has been a recurring theme and is topical today with many claims arising recently from activities during the period around the Second World War.¹ What is different perhaps now is the scale of activity of privately-organised thieves/looters. In addition to the issue ownership is that of the

preservation/conservation, as opposed to the ownership, of the national patrimony. These all raise interesting issues but are not the concern of this article.

The focus here is on: (i) who should own the national patrimony, and especially what is the role for the state in this regard; and (ii) as a corollary what restrictions can the state impose on the sale of objects listed as belonging to the national patrimony but held by private individuals?

II State Ownership/Intervention and Non-private Benefits associated with National Patrimony

A: Introduction

Much of the national patrimony that is in state ownership came from what were once the private collections of wealthy royals, especially in Europe. Many of these works of art had *de facto* been paid for by public money. Likewise in the United States, much of what is in state collections came from donations by private individuals, aided by tax expenditures by the state (see O'Hagan, 1998). These objects are thus in state ownership/museums not arising from any philosophical view and/or economic rationale, but simply one could say by historical 'accident'. As no-one has mentioned selling any of these national treasures, no matter how acquired, the issue of their sale will not be discussed until later, even though their maintenance and upkeep does involve the state in continuing expenditure.

What is of interest is why the state should purchase today, or aid the purchase of, an historical artefact that comes on the open market and/or restrict the sale of such an artefact outside the boundaries of the nation state? This is the issue to be addressed in this section. It might be said that the decision whether or not to sell objects already in public ownership is just the mirror image of this question, but as shall be seen later there is an extraordinary reluctance to sell art objects, either new or old, not only from public collections of art but also private art museums.

The main rationale provided by economists for state ownership of things such as historical works of art is that the benefits from the existence of such objects are not just private but also non-private in nature. The essence of this argument is that objects identified as belonging to the national patrimony create a benefit not just for those who view these objects, for which they can be charged, but also a benefit that accrues to everyone, both those who do and those who do not view. This benefit, the non-private benefit, cannot be charged individually to people but must be paid for, and in this particular case, the objects owned by the state and funded out of general taxation.²

This in principle is a powerful argument for public ownership of the national patrimony, based as it is on strict economic reasoning rather than on some rhetorical special pleading. It

is stating that there are objects the very existence of which does create a benefit, be it psychic or whatever, for most of the population. It would be almost impossible to charge people according to the benefit they derive, and as such the object should be paid for collectively by the state using the device of compulsory taxation. What though are these non-private benefits associated with the existence of certain historical artefacts? And, even if they exist, what is their magnitude, in other words how much public money should be allocated to the purchase and/or protection of these artefacts? The latter question is almost impossible to answer and must remain a matter for conjecture or be determined in the political market place (as is most often the case). What the non-private benefits might be is an easier question altogether to answer. A wide variety of such benefits has been identified and inevitably there is more substance to some claims than to others. For the purposes of this article, though, two groupings will be considered: (i) development of national/regional identity and social cohesion and (ii) an assortment of other less important non-private benefits.

B: National/regional Identity and Social Cohesion

One of the arguments used most frequently in relation to the protection of the national art heritage relates to national identity, i.e. the extent to which this heritage can define 'those elements of national life which characterise a country and distinguish its attitudes, institutions, behaviour, way of life from those of other countries' (Throsby and Withers, 1979, p. 177). Like the physical well-being of its people and lands, the cultural identity of a nation must be cherished and protected, according to this argument. The protection both of the physical and cultural well-being, that is the physical and cultural capital, of a country, region or city creates benefits for all and these are best paid for collectively and usually owned by the state.

This argument though has been subjected to rather searching analysis by Globerman (1983). What is national identity and how does the culture of a country contribute to the establishment of such an identity? As Globerman states:

In the absence of a specification of how culture produces national identity and a more defensible nation, it is quite plausible to argue that there may be much less costly ways to accomplish the objective... Indeed, it is possible to argue that virtually no effective relationship exists between indigenous culture and national identity. For example, some critics suggest that art, by its very nature, is international in character, or that art should be judged for its own sake and not for the sake of cultural, social or economic purposes (pp. 41-42).

Indeed, some argue that art assists in eliminating parochialism and ignorance if it is allowed to circulate freely and not be in state ownership in the country in which it originated. 'If parochialism is a sickness, a free trade in artistic and cultural treasures is part of the cure' (Merryman, 1974, p. 238).

The above raises the issue of why art belonging to the national patrimony should even be kept in the country in question. In a similar vein, Bator (1989) points out that as nations become more internally homogeneous, trading artefacts is a mean by which immigrant populations and ethnic groups can maintain contact with the art and culture of their mother country. A somewhat different point is that foreign buyers may appreciate a work of art long before it is given any recognition at home and that this often acts as an external stimulus in the revaluation of a nation's own art and culture (see Prott and O'Keefe, 1989). What better advertisement for those who want to protect and conserve some national monuments/sculptures than to see part of these exhibited in say the Metropolitan Museum in New York to huge public acclaim?

The national identity argument though is used pervasively, nowhere more than in relation to restricting the export of historical works of art. But, as Zolberg (1996) argues in connection with this debate, in the late twentieth century the very notion of national identity is suspect.

In the context of large, heterogeneous nation-states should we speak of multiple identities or a single one? Is it valid to speak of "national" identity as if all nations were the same? Is national identity a fixed entity or a changing one? These questions recall debates about the concept of "national character", long discredited, in part because of its ingrained stereotypical assumptions (pp. 166-167).

In the past, national identity has usually been ascribed to a population co-extensive with the geographic boundaries of a nation, and most European countries would consider themselves to have a distinct national identity, with the national patrimony making a significant contribution to this. Many European countries are not monocultural, though, but, with immigration over the last century, multicultural, France and Britain being good examples. The real danger of an emphasis on national identity and a common cultural heritage could be the exclusion of these 'foreigners' from the national cultural debate, as well as a resistance to change over time. The United States of course is the quintessential nation of immigrants. As such, people there have had to face for a long time the issue of what 'American identity' means. The issue has never been resolved, and as such one hears far less emphasis on this

argument for cultural support in the United States than would be the case in most European countries. In fact, some people would see an emphasis on national identity as divisive.

The national identity, and related national prestige (see later), argument though holds tremendous appeal for most people, even for Americans; witness the reactions of the population there to US participation in for example the Olympic Games or the Ryder Cup in golf. Even if it is accepted that national or regional identity is desired by the body politic, there still remains the question of the link between the national patrimony and national identity. Drawing on the work of sociologists, Globerman suggests that the benefit of national identity is synonymous with social cohesion and harmony (which benefits everyone), that this cohesion in turn depends on the intensity of social communications within and among groups, and that members of the same nation communicate more effectively with each other and over a wider range of subjects than with outsiders. Thus it is argued that national cohesion depends on the degree of communication intensity, and the latter in turns depends in part on the extent of government protection of the national patrimony. If preserving the national patrimony helps us to understand who we are and to understand the ways of living and the problems of our fellow citizens then the benefits are public in nature and the assets should be protected by, and probably owned by, the state. This is captured neatly in the following:

The art of a society is both a manifestation and mirror of its culture and the existence and awareness of a common culture is intimately tied to the existence and awareness of a sense of community. (Bator, 1981, p.117)

Thus national identity and social cohesion are linked and this connection is argued also by Weil (1991). He asserts in fact that one of the primary functions of the arts is to act as an agent of social cohesion and continuity.

Like language, the arts are one of the principal means by which a society binds itself together and transmits its beliefs and standards from one generation to another. The arts perform this function when they embody, reinforce, and celebrate the values of their society, when they confirm and exemplify the lessons simultaneously taught by the family, by the formal structures of education, and by the various mass media in all their variety. In this function, the arts play a critically important role. Not only do they provide a kind of social “glue”, but they also furnish a means by which society can identify and distinguish itself from others. (Weil, 1991, p. 156)

This is indeed a very strong assertion; it may apply with special force to less well-off nations. Removing antiquities from the culture in which it is embedded (e.g. Mayan art) may deprive communities from enjoying its benefits and may threaten their sense of identity, alienate them from traditional sources of authority and weaken their institutional frameworks. The loss of such traditional art may happen insidiously and gradually over many years or in extreme cases, for example in war time or colonial exploitation, there may be sudden and excessive movement. Prott and O’Keefe (1989) also point out the problem especially with tribal and traditional communities, that western collectors through buying and reselling certain art works transform objects that may have been intended for religious worship or even some functional use into materialistic consumer goods.³ A related problem with the movement of certain works of art is that it may destroy important records of history or even civilisations, as seen in excessive depletion, be it through looting or whatever means, of the Mayan sites. If an antiquity is left within its intended site or culture, historians and scholars can often learn much more about the artists, their techniques and generally about the culture and tradition that followed, whereas once moved there may be much less chance to acquire such information when researched out of context.

This last argument is suggestive of the fact that the collective benefits involved may apply to a much wider group than the indigenous population. Sites containing immovable art may throw light on the origins of mankind in general and thus in a fundamental way contribute to the world population’s identity. There is though no corresponding ‘world government’ to fund the purchase/upkeep of such sites, but there are international bodies that can be used for the transfer of relatively small sums of international money to such projects. Besides, it may strengthen the resolve of some countries to assist the originating country in protecting its national patrimony against unlawful removal (see later) if all countries benefit from so doing.

National/regional identity then is a persuasive and indeed pervasive argument in favour of state ownership/regulation of objects deemed to belong to the national artistic patrimony. It is an argument in itself and it also has a bearing on almost all other arguments for such ownership/regulation.

C : Other Non-private Benefits

National Prestige

International recognition and prestige are often posited as a benefit of protecting the national artistic patrimony that is related to social cohesion and national identity, and like these is public in nature. Few people, it is argued, would be happy if their country ‘became known

abroad as a cultural wasteland, a nation in which Mammon had put beauty and art to rout' (Baumol and Bowen, 1966, p. 383). Baumol and Bowen went on to cite the billions of dollars that the United States government had spent on getting first to the moon, much of which expenditure was justified solely in terms of national feeling of achievement. Bator (1981) argues that art is a 'good ambassador' in that the trade and movement of art between nations helps to stimulate interest, understanding and admiration of the originating nation. As such, there is a national interest in having a collection of valuable historical art as it ensures the country a place in the international art and culture arena as well as being perhaps a major 'magnet' for attracting tourists (see later).

National prestige though is a very dubious grounds on which to base a public ownership/regulation argument. First, many more people might be concerned about the international standing of their football team or their golf players or film or car industry than that of their arts sector. It could be, though, that professional football or tennis will exist perfectly well without any subsidy, and therefore generate a positive benefit for others anyway, whereas the art-historical sector may not be able to sustain itself (at levels that generate national prestige) commercially without subsidy, and hence, in the absence of subsidy, no positive non-private benefit will be forthcoming. Besides, as will be seen later, many people do not think it appropriate to equate golf or basketball stars with historical art objects; the existence of both creates a sense of national pride, but basketball teams can be resurrected if let 'die' and golf stars come and go. Antiquities are unique, irreplaceable and perhaps relate much more to the 'spirit' and essence of a nation than do other factors. This brings the discussion back to national identity; there is not simply international prestige in having art objects on show for visitors, but in this case these objects also provide these visitors with a sense of the origin and identity of the nation in question and therefore a basis for better mutual understanding between nations.

Economic Spillover Benefits

Related to the international prestige argument is the fact that a country's historical artistic patrimony may act as the 'magnet' that attracts tourists to a country. Examples of this abound, such as the Louvre in Paris, the Pyramids in Egypt, the Book of Kells in Trinity College Dublin, the Zwinger in Dresden, and so on. Tourists spend money and create major employment. Thus by protecting these national cultural assets everyone in the country, it is argued, benefits.

It must be recognised of course that many other enterprises – such as golf or tennis clubs, shopping facilities, commercial theatre or amusement parks – may have similar tourist and

employment effects. It could for example be claimed that good golfing facilities are a key factor in attracting entrepreneurs to an area, with consequential benefits for museums. As such, it could be argued that the state should perhaps subsidise/own the golf clubs rather than museums. This example, while extreme, does illustrate the dangers of the economic spillover argument. Many people though probably believe that the Louvre for example creates benefits for shops/restaurants in Paris and that the direction of causation is not the other way, and that as such economic spillover effects do exist in relation to national cultural monuments. The primary rationale for public ownership of the Louvre though may never be related to such a non-specific (to the arts) benefit, but these extra benefits may be important to an overall assessment of public ownership of, and increased expenditure on, specific national cultural monuments/artefacts.

Option Demand: for Future and Present Generations

The essence of the option-demand argument is that there is a benefit for present generations involved in the consumption of the arts by future generations: present generations may derive benefits from knowing that the historic cultural assets can be enjoyed by future generations. In other words they are prepared to pay in taxes for these assets to be preserved even though they derive no benefit themselves from the existence of such objects.. This argument is put forcefully by Baumol and Bowen as follows.

We have all met people who admit they have never themselves learned to enjoy a particular art form, but felt it important that such an opportunity be available to other members of their families. The same phenomenon has a significant extension to the posterity of the community as a whole...

... A program to preserve the arts for the nation's posterity is a case of indiscriminate benefits *par excellence*. No one can say whose descendants will profit one hundred years hence from resources now devoted to that purpose. Neither can these benefits be priced and their cost covered by an admission charge. (Baumol and Bowen, 1966, pp. 384-385)

.At first glance this is a convincing argument, but is it likely that people who put no direct benefit whatsoever on the existence of such historical artefacts would be prepared to spend money on such objects just in case their offspring might? Put differently, is it likely that someone who places no value on the contribution of historical art objects to the sense of national belonging/identity would expect their offspring to do so? It seems much more convincing that if they place a high value themselves on national/regional identity they will

pass on these values to their offspring and in this case would be very anxious to spend a little more to make absolutely sure they continue to exist not just for their own lifetime but for their offspring.

The cultural preservation case is related to another option demand argument. People derive benefit from knowing that the cultural facility exists, thereby allowing them the option at some future date of attending it themselves, either on their own or with visitors. It is important to keep this argument separate from the other arguments. People may want an art treasure to 'exist', even though they never wish to see it, for reasons other than option demand: thus option-demand value is simply a small subset of the existence-value argument. The national identity argument is another, and again a much more important part of the argument; few Germans for example may pay to see a Dürer painting but many want it to be kept because of its contribution to national identity. Option demand arguments apply to almost all goods and services: we all like to know there is a quality restaurant or specialist shop or tennis club in our area, if only to know that one day we, or our children or our visitors, might like to use them. But is this an argument for providing public subsidy to a restaurant, or specialist shop, or a tennis club?

III Fair Prices and Distributional Considerations

It is possible that large collective benefits are associated with the existence in the country of certain historical art objects but which the country still cannot afford to buy, at least not in relation to what some person/institution in another country is prepared to pay. Concern over the need to restrict the movement of art has mainly come about, in some people's opinion, not because of an anti-trade mentality but rather due to such distributional concerns. With the tendency for art to move from rich to poor countries there are fears that all art will end up within a few wealthy nations and the rest of the world may be left culturally impoverished. This though is part of a more general concern with the distribution of wealth both within and between countries. Most material wealth such as real estate and automobiles is concentrated in the hands of the top 10 per cent of the world's earners, largely in America, Europe and Japan, so what is different if this is also the case with historical artefacts? As argued already, historical artefacts may be very different to automobiles, houses, TV and other material goods. A country cannot sell some parts of its wealth as a result if its very 'being' is threatened. Thus access to air and water, access to one's children, and so on are qualitatively different to most material goods and are not for 'sale'. Likewise many people will not renounce their religion regardless of the material cost and history is replete with examples of this. Historical artefacts many people argue belong much closer to the 'religion' category

than to the 'cars/TV' grouping and as such do not have a price in the normal sense of the word: in other words certain things some people argue should not be for sale, no matter what the price.⁴

Bator (1981) describes art as a form of national capital as it generates income (for example through tourism as seen) and also as it produces psychological and social benefits for a country's citizens. Using this perspective however he argues does not imply that in preserving the national patrimony that no national art should be sold and/or exported. If the price obtainable for sale/export exceeds the 'fair' value of a work (including its non-monetary value) then the nation's wealth is intact or enhanced and there is no loss in selling it. Surely, cultural capital is just like any other capital; if someone wants to buy it at fair price let them do so.

This of course must apply to that part of the cultural capital that is not collectively owned, such as paintings in private hands, churches or private art museums. In this case, a fair price must be paid, or else there is interference with the private property rights of an individual. Indeed, it might be asked how an artefact is part of the national patrimony anyway if it is in private hands. It could be if it once belonged in a public place or public ownership or people are otherwise familiar with or attached to it. If it is, then the issue really is that the state/some collective domestic source should have right of 'first refusal' should it come up for sale. There may though be a feeling that since these historic artefacts are owned by wealthy people perhaps they 'should' pay back the country that made such wealth creation possible by donating, at a lower price, the artefact in question. In a sense this situation applies in the United States where there is an expectation that wealthy individuals, aided by tax concessions, will donate to worthy causes, including the donation of their works of art, in recognition of the fact that it was the market economic system of that country that made such wealth collection possible in the first place (see Useem and xxx).

If the artefact is in collective ownership the issue then arises as to when if ever it should be sold. Klammer (1996) discusses the hypothetical case of the Chinese wishing to buy Rembrandt's *Nightwatch* from the Rijksmuseum in Amsterdam for say \$1 billion. Would it be sold for this extraordinary price and if not is there any price at which it would be sold? Klammer (p. 46) argues:

Because of the identification of the Dutch with the painting, it cannot be sold. Time is involved as well as bonding. Some 'products' need time; people have invested in them, and once they begin to bear fruit – in the form of feelings of love, pride, awe even – giving them up is inconceivable; selling our friendship would be a betrayal of all we stand

for. Another factor is uncertainty. We can never be sure of the value of those special products. How much is your child worth to you? How much do you want for your wedding ring? Is a *Nightwatch* worth 100 million dollars, or 1 billion? If we have to exchange what is precious to us, we may prefer to do so in a deal involving some form of reciprocity. So we might lend out the *Nightwatch* – but only if the Chinese were to return the favour somehow, royally, at a later date. That way we may discover value in the deal itself, that is, in the quality of the reciprocal exchange.

This quotation captures a number of things pertinent to the discussion. First, there is the point that all goods/services as mentioned earlier are not the same, and that certain things quite literally do not have a price for most people. The example of one's child is a good illustration of this. Historical artefacts for many people may belong to this group. Second, it is clear that many of the important things to a person in their daily lives are not bought in the market place but received through reciprocal exchange between family members, work colleagues and friends. Third, the point about ascertaining the value, or price at which one would be willing to sell at, takes considerable time for some objects, especially say family heirlooms or national historical artefacts. Last, the quotation raises the concept that over time the utility derived from some objects can change, because of 'bonding'. This brings the discussion back to the national identity argument discussed already; a feeling of national/regional identity generated by art objects results in fact from such bonding.

The concept of bonding is related to the wider, so-called endowment effect (see Frey and Pommerehne, 1989, and Thaler 1994); it relates to the phenomenon that people often demand much more to give up an object than they would be willing to pay to acquire it. The reason is that in the case of artefacts such as paintings the nature of the service derived from the good changes with possession. For example, a thing which you or a nation enjoyed as your own for a long time, such as a painting, takes 'root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it' (Supreme Court Justice, quoted in Thaler, 1994, p. 76). Thus there is not only the pleasure of looking at the painting but the psychic benefits associated with past 'consumption' of the painting. These psychic benefits do not exist at the point of purchase but build up over time, implying that what you would therefore be prepared to sell the painting for would be considerably higher than what you originally paid for (even adjusting fully for inflation and other factors). This has important implications for the market in historical artefacts. It implies that in relation to these goods there is a status quo bias, that is a preference for the current state which biases the person/nation against selling. This would suggest then that not enough such

objects will enter the market, be it the domestic or international market. As such, there should be no need to put restrictions on the sale of these in the market place.

But, according to the earlier argument, some goods do not have a price. This is simply stating that the psychic benefits that result from the 'bonding' associated with some historical artefacts have a value that approaches infinity. But who is to be the judge of this? There are two distinctly different cases here.

If the artefact is in private hands, then whether or not the artefact is sold, and at what price, is up to the individual in question. It may be that a nation has identified with this artefact but it does not belong to the nation and the only way it can be obtained is by paying the full market price. It would run contrary to the principle of private property and individual freedom to suggest otherwise. The issue here then is how the nation is to obtain the object in question, finance as always being a major factor. Other devices are used and these will be examined later in the paper.

The second case is where the object is already owned by the state but the question of selling it to pay for other worthy projects such as hospitals arises. There is an extraordinary reluctance to sell works of art held in public collections/ownership. As one author put it in relation to the debate on international trade in art: 'Paradoxically, it is easier for art works that have been sold to leave the country altogether than for a work in a museum to be sold and sent out of a state or city to another place within the United States' (Zolberg, 1996, p. 171). Even more paradoxically, it could be the reluctance to sell any art object, let alone those belonging to the national patrimony, from national collections that is the greatest barrier to others selling.⁵ Once the object is sold to such a collection it can in effect never be bought back; once sold it is truly gone for ever. Thus, it does not make sense to exhort a country/person to sell an artefact now and buy it back if times get better; such a choice may not exist. In this sense it is much better if the objects are sold to private collectors, since it is much more likely that they will come on the market again than if they are purchased by a museum. On the other hand though, if an object is sold out of public ownership in one country to public ownership in another at least residents of the selling country can have access to the object if they should visit the buying country. For many people this is poor compensation, as the location in which the object is placed may be vital to the overall psychic benefits that flow from the artefact; there is also of course the cost of getting to the other country. Long-term loans or in some cases 'permanent loans' may be a way of overcoming this problem, but it is not evident why this should be the case if the loan is truly permanent.

IV Restricting Objects In The National Patrimony Leaving A Country

A : Introduction

Almost all of the policy discussion in relation to the national patrimony relates not so much to what it is and why it needs protection, nor to how the state might purchase relevant objects once they are identified as belonging to the national patrimony, but to how objects held in private hands but deemed as belonging to the national patrimony can be kept within the boundaries of the nation state in question. It does not matter whether such an object should be sold to another private individual within that country. Nor is there concern that the part of the national patrimony held in public collections be sold as this will almost certainly not arise, for reasons mentioned earlier. Rather, the emphasis is almost exclusively on preventing works from being exported.

It is true that most governments use various devices, such as tax breaks, to entice individuals to leave works of art to art museums and thereby keep the works of art in question in the country. These tax breaks however apply not only to works of art but all donations to non-profit organisations, including those to churches, schools, hospitals, and other art forms such as concert halls, opera, theatre, and so on. Besides, in relation to works of art they are not restricted usually to works of art belonging to the national patrimony; they apply to all works of art, be they new or old, 'good' or 'bad'. There are reasons for the state to subsidise in this way donations of works of art not belonging to the national patrimony (see O'Hagan, 1998) but these are not of direct relevance to this discussion. Some governments though do use the tax system to entice people to keep objects belonging to the national patrimony (mainly the UK) but these are relatively unimportant devices when compared with export regulations and direct purchase by the state. It is also the case that some art work purchased today will at some later stage, because of the bonding discussed earlier, become part of the national patrimony; thus, unless there is state purchase of more recent art there will be no part of the future national patrimony relating to more recent times.

This section will consider three devices by which states attempt to keep objects belonging to the national patrimony within national boundaries: export restrictions and pre-emptive rights, import regulations/restrictions, and tax breaks specific to the national patrimony.⁶

B: Export Restrictions and Pre-emptive Rights

The most common form of regulation in art markets, in place in over 140 countries, with the notable exception of the US, is restrictions on exports of art objects belonging to the national patrimony. Legislation in this area concerns limiting, controlling or prohibiting the export of

works of art through subjecting them to approval or notification systems prior to export. Most countries try to limit the number of items subject to restrictions by criteria of age and/or value to ensure they are practical to enforce (this list may be different to what is listed in the national patrimony or may act as a proxy for what is in the national patrimony where no such list exists), but there is a wide variety in degree of controls between nations. The main methods of export regulation that are in use or that have been proposed are the following:

1. Embargo or Prohibition. The prohibition on export may refer either to an entire class of items such as all antiquities or some precisely defined list of works. The effect of embargo is to eliminate all legal trade in listed items and as such is often applied only to a limited number of art works. Also countries using embargo will generally allow certain exceptions. For example China prohibits the export of all works of art except for the purpose of exhibition subject to the issuance of a special licence.⁷ Countries such as Columbia and Turkey also enforce prohibition of exports unless for temporary exchange or exhibition. Prohibition can only be useful for countries with strict border controls and low international trade as export bans raise the value of art on illegal markets encouraging smuggling and illicit export (see later).
2. Export Quotas. This system sets export quotas by reference to the volume of imports. It was suggested by the UK Waverly Committee to try to keep a balance between the gains to the national patrimony from imports with losses through exports but was rejected and is not currently in use in any state.⁸
3. Export Licensing. This is the most flexible and widely-used instrument for export control with a variety of systems in place ranging from genuine screening devices to effective embargo in that licences are rarely granted (‘administratively enforced embargo’ (see Bator 1981)). Liberal systems include that of Japan in which the list of items requiring a licence is very narrowly defined or the UK which maintains high age and value criteria. Strict systems are found in countries such as Italy and Greece in which any item deemed of subjective interest by the state requires licence authorisation.
4. Pre-emptive Rights. These are associated with export licensing. They give the state, public museums or other institutions the right to purchase the work of art to be exported at either a competitive market price or one set or agreed through negotiation. Licence application is needed to defer export and allows time for potential domestic purchasers to mobilise the necessary funds; this is important also as seen earlier as it can often take considerable time and reflection to ascertain the extent of the ‘bonding’ and therefore psychic collective benefit that may attach to a historical artefact. National systems vary

as to whether the price offered by the exporter has to be matched, or a new price negotiated or settled by the courts. Some states such as Italy and Greece retain the right to withhold the licence even when the delay period is due and no offer is forthcoming; this is equivalent to export prohibition. Others such as France retain this right but offer compensation to the owner. In states such as the UK and Canada however export licences must be granted if the state or domestic institution does not exercise their rights of acquisition.

5. Export Taxes. Some states also impose taxes once an export licence is granted to act as a further disincentive to export. Taxes are based on the value of the object to be exported and vary from 5 to 30 per cent in Italy and Spain and in the 15-25 per cent range in Saudi Arabia. Internally in the EU taxes are not permitted as they were found to be contrary to Article 16 of the Treaty of Rome concerning the abolition of customs duties.⁹

It is obvious that nations differ significantly in the intentions and practices of their export regulation systems. Thus, the fact that one country has a particularly strict regime on its statute books does not mean that *de facto* such a system applies. Nonetheless, the table below does give an indication of how a sample of countries rank against each other, probably both *de jure* and *de facto*, in severity of restrictions.

Table 1 shows the US has one of the most liberal systems with no legislation barring or limiting the export of art, except very specific laws protecting Indian sacred sites. This lack of restrictions could be due both to the predominance of a free market ideology in the US economic system and the fact that they are and always have been predominantly buyers rather than sellers of art. It is also worth noting that all of the major international art markets lie towards the top of the table (London for old masters, New York for contemporary art, Switzerland for jewellery and antiques, and so on.). Further, it is clear that a country not rich in national patrimony will resist efforts to impose any system of uniform export restrictions. Besides, there may be economic, and as well cultural, factors that explain a particular country's attitude to export restrictions. This will also apply in relation to how a country will assist in enforcing an export regulation applicable in another country.

C : Import Regulations

The use of export regulations is, as seen, only one of a range of instruments used to protect the national patrimony by keeping it within the boundaries of the country in question. For a system of control to function properly, import regulations are perhaps a necessary corollary

which implies that states have to rely on the co-operation of other nations – the ultimate consumers of exported art. Import regulations in other cultural goods often relate to protective measures¹⁰, but in the case of art are in place to try to reduce illicit trade by making those who provide a potential market agree not to purchase works they believe are stolen or in breach of some export regulation. Generally this implies that all imports must be accompanied by some form of pedigree such as proof of origin, ownership, or legal export.

Again there are a variety of systems in place. The US is the most significant importing state as well as the largest market for stolen and illegally exported art. Its policy on imports is as liberal as that of exports with no restrictions on imports apart from some pre-Columbian sculptures and murals. The UK, another important collecting and exporting nation, also does not impose controls on imports or recognise and enforce the export controls of other states claiming it would work against their status as a major international market. These and other wealthy art markets such as Japan are all major importers and, to maximise the range of acquisitions available, generally are against import controls. While they can be forced to deal legally with issues of stolen property, illegal export does not often in itself constitute an offence. Other states have a variety of measures in place which can be categorised as follows:

1. Blank Check Control. This refers to systems which bar the import of all art whose export has not been legally authorised. Proponents of this system claim that the US and other big importers are major markets for illegally-exported art and, as they are economically superior to art rich states, there is a strong incentive to sell to them even if in violation of export laws. As a result, the blank check control system was proposed in the original draft of the UNESCO Convention Document¹¹ which called for all signatories to prohibit import of works of art unless accompanied by appropriate export documentation from their country of origin. The US rejected and defeated this draft stating that they could not adopt a rule banning imports simply because their export was in violation of another state's law.¹²

2. Selective Controls or Import Limitations. While few nations prohibit the import of art, many apply selective restraints. Types of art imports subject to restraint are:

- a) Stolen works of art (stolen from their state of origin and therefore not declared as part of their exports);
- b) Illegally exported objects (exported in violation of the state-of-origin laws);
- c) Objects from clandestinely excavated sites (the most difficult to prove as theft unless initially classified and protected under the state's law).

In the case of stolen art most states, including the US, provide remedies in the form of judicial action giving the owner rights to sue for recovery in the courts of the importing nation provided they can furnish sufficient proof of ownership and theft. The second type, (b), is not as clear-cut as the complaining party for this case is the state whose export laws have been violated, rather than the original owner seeking return. As a general rule exporting states will have no standing in the importing state to recover the stolen object or sue for its value and must seek remedy directly against those who violated its laws. A problem that arises in legal cases in this area, and that of the third category, is the difficulty in distinguishing between stolen and illegally exported goods.¹³ For example in the famous US v McClain (1977) case (see McAlee?) where Mexican artefacts were being looted from sites and illegally exported to the US, the necessity of establishing ownership was emphasised. Many pieces involved were not known or registered with the Mexican government and so the courts ruled that while it was illegal to deal in stolen goods, theft could not be established unless there was a bona fide declaration of ownership. Illegal export in itself does not constitute theft and as such it is not a violation to import an item of art or anything else into the US just because it has been illegally exported from another state.¹⁴

3. Self Restraining Acquisition Policies. Rather than resorting to judicial action this system involves those supplying the market for illegally exported goods to voluntarily decline purchase. Works of art of national importance will often end up in museums, and, through international pressure and self interest in preserving art, most of these institutions have developed 'ethical acquisition' policies. Most large museums have explicit policy statements regarding acquisitions which generally include that works will not be accepted into collections if illegal export is suspected or until some valid title can be proven. International organisations such as ICOM and UNESCO have been instrumental in developing ethical acquisition codes and policies that they expect their members to comply with. ICOM, founded in Paris in 1946 and now with around 15,000 members in 147 countries, also has a code of professional ethics, respect for which is regarded as a minimum requirement to practice as a member of the museum profession. It states explicitly that:

Illicit trade in objects destined for public and private collections encourages the destruction of historic sites...theft at both national and international levels... and contravenes the spirit of national and international patrimony...A museum should not acquire, whether by purchase, gift, bequest or exchange, any object unless the governing body and responsible officer are satisfied that the museum can acquire a valid title to the specimen or object in question and that in particular it has not been acquired in, or

exported from its country of origin and or any intermediate country in which it may have been legally owned in violation of that country's laws... (ICOM, 1986, p.)¹⁵

Although not all museums enforce such policies (and there is no way to control the acquisitions of private/individual collectors),¹⁶ media attention concerning acquisition controversies and substantial public interest especially from potential donors has exerted considerable pressure on large institutions to refrain from dealing in unlawfully traded material. However Hamilton (1975) describes the problems of these self regulating policies in an analogy to a strike:

Self denying ordinances are a tactic similar to a working man's strike: unless a sizeable majority join in the tactic, it will fail and the striker will be out of work, the museum poorer in collections. On the other hand, if the evil is perceived by large enough numbers of the public, government regulation could be imposed – if museums fail to stem the tide of criticisms by their own acts, legislators may take the initiative away from them... (Hamilton, 1975, p. 361)

Many regulators feel legal restrictions on what museums obtain is overly rigid and puts acquisition policies in the hands of public officials rather than the museums themselves. Most nations use some form of indirect regulation via tax and other financial incentives. Museums often receive favourable tax treatment due either to their status as charities (e.g. US) or as public storehouses of the nation's wealth in art. These tax incentives could be the entry point for regulating museum acquisitions with favourable treatment made conditional on the adoption of suitable policies.¹⁷

There is substantial international agreement in imposing import controls if the art is stolen, or its illicit export is damaging an important category of art or a nation's legitimate national patrimony. However many feel that unless there is a multilateral system operating, illegal flows of art will continue in the direction towards the countries with the least controls.

D: Tax Policies and Incentives

Tax incentives are used by most governments as a means to support the arts. In relation to the national patrimony, financial incentives are used as a form of indirect aid, channelling funds and donations towards art institutions and thus encouraging the domestic retention of works of art and reducing trade. Incentives may be designed to discourage exports of heritage art through encouraging donations to domestic museums in cash or kind¹⁸ or through

making it more financially attractive to hold the object rather than sell it abroad. Finally, tax breaks may also be offered in return for public access and ownership by domestic institutions. Tax incentives are generally applied to receipt of income or transfer of works of art by sale, gift or death (see Christies, 1998, for details on the various tax measures available in different countries).

These tax measures though are not, as mentioned already, specific to the national patrimony and only aid the retention of art-historical objects indirectly. Nonetheless, there are a few tax measures which specifically apply to the national patrimony and two of these will be discussed briefly.

Exemptions from inheritance and capital taxes. Works of art may be exempt from these taxes once certain conditions concerning public access or exhibition and retention within the state are met. There are 100 per cent exemptions from inheritance, estate and capital gains tax for donations of art to national museums and galleries in countries such as the UK and Japan.

If the object is kept in private hands, then in the UK tax concessions also apply and the scheme is known as a 'conditional exemption' because, to avail of the tax break, certain conditions must be fulfilled, namely: the work must be considered by the state to be of national artistic, historic or scientific interest;¹⁹ it must be deemed of sufficiently high quality to be displayed in a public collection or be 'museum worthy'; the owner must agree to keep the object permanently in the UK (a change in 1998?); plus agree to take steps to preserve and maintain the object and ensure reasonable public access either through allowing access in situ in private homes or through loan to a public institution for exhibition for at least 28 days per year. Other countries attach value limits such as in Germany where exemptions are granted up to amounts of 40,000 DM for direct inheritants or 10,000 DM for others. In all schemes these tax incentives promote the dual objectives of discouraging export and increasing public access.

Acceptance in lieu is an incentive that allows individuals to discharge a tax debt on asset and estate taxes by donating works of art to the state and public institutions. This mechanism acts as a tax deduction and there are usually stipulations attached in terms of acceptability of items and if remaining in situ, public loan and exhibition conditions. For example, in the UK, to be considered items must be both museum worthy and 'pre-eminent' in their own right or as an addition to a collection, or in Germany the work must be 'exceptional' and represent the public interest.²⁰ Governments are often strict as to which items are acceptable in lieu of taxes as this tax incentive is more costly than others in that the tax usually paid on transfer is lost plus the tax deduction from estate or other taxes owed. Again

like the previous incentive, acceptance in lieu is in place to discourage exports and increase public access.

V Conclusions

It is clear that for most states there are objects which form a special part of the country's cultural/historical legacy, some works of art very much falling into this category. A corollary of this appears to be that the objects in question should remain within the geographic boundaries of the state/region concerned, for reasons mentioned earlier; the fact that the object would be maintained and conserved somewhere abroad appears not to be relevant to this debate. It was argued that if this is the case the most appropriate avenue to ensure the maintenance of such objects in the country is through state purchase; if they belong in some sense to 'all' then they should be paid for and owned by all, through the state purchasing and maintaining them. This is indeed the case for most such objects and in most countries what would be considered as part of the national patrimony is largely on display in public museums. The argument for such public ownership has been examined carefully in this article; the principle of the argument is not really challenged, but the extent to which it applies is a matter of considerable debate. How many objects 'belong to all', in the sense that they confer a benefit on a wide section of the population, and how much society should pay to obtain these objects are all matters of heated debate.

There are objects though which many consider to be part of the national patrimony but which are not in state ownership. Examples of these include private collections of historical artefacts, objects kept in churches, and objects the ownership of which is unclear, such as yet undiscovered art treasures. Once these objects remain in the state there does not appear to be an issue, even though there may be no public access to many of these objects. Why though should this be the case and why does it only become an issue when the objects come up for sale? It would presumably be difficult to raise the issue otherwise as compulsory purchase by the state is not an option when they are not for sale. Besides, once they are declared for sale there is a very real possibility they will be sold abroad, given that the market for art is very much global in nature and as such any individual country would normally form only a small part of the purchasing power within that market. The question then is why can the state or some public institution not simply compete on this global market and buy the objects on the open market? The alternative is to prevent in some way the sale abroad of these objects.

Export licences in many cases simply ‘provide time’ for a public institution to compete on the open market. The object could for example otherwise be sold without their knowledge. Besides, it usually takes much more time for a public institution to raise the money for such a purchase than would be the case for example for some foreign private institution. This would be especially the case if the public institution requires both private and public contributions to raise the necessary funding. The provision of this ‘time’ therefore seems reasonable provided that the time period is not excessive and once elapsed the individual is free to sell to the highest bidder.

If this is not the case and the individual is not allowed to sell abroad, even after the elapse of a year say, then for some this is acceptable. The cost for the individual is of course a considerably lower price received; if sold on the much smaller domestic market then a lower price is almost inevitable. The alternative for the individual is to sell it illegally abroad; because of the potentially large differential between domestic and global price there will be plenty of economic incentive to do so. But which is more inappropriate, the sale abroad with the full permission of the owner but not that of the state or the sale on the domestic market with the state’s consent but with the owner constrained to do so and receiving probably a much lower price? This is the central issue in placing any constraint on the sale of works of art other than that of a ‘delaying’ export licence. For many people it may be an acceptable constraint on private ownership/sale. Such restrictions exist in all societies; for example individuals cannot legally sell hard drugs in most western societies, exchange and capital controls have operated in many developed countries and in times of crisis restrictions on private actions can be far-reaching. As mentioned previously, some people see works of historical art as belonging outside the normal range of trade/commerce, no matter who owns it. Besides, reinforcing this is the fact that most works of historical artefacts are probably owned by wealthy people, people who as mentioned may have made their wealth in that country and who many believe should make an appropriate return to the nation by either retaining historical art objects within the country or by donating them to the state, with or without state assistance. For others though the strong belief persists that such philanthropic gestures should be voluntary and not enforced through some state regulation/action; the next step could be enforced ‘appropriation’ of all art objects held by wealthy individuals without any compensation whatsoever. For those who believe that the existence of private property and its protection under the law is a *sine qua non* of an economically strong and civilised society this would be intolerable.

Endnotes

¹ According to US government sources, around 220,000 works were seized, or forcibly sold, to the Nazis. An indication of the vast scale of this is that these paintings represent about a fifth of the world's total stock of western art, equivalent to around \$25 billion at today's prices. Half of these works of art are still missing or the subject of dispute. (See, 'On the Track of Art with a Troubled History', *Financial Times*, November 21, 1999.

² A related issue is that the viewing of an artifact such as a painting can provide a service to more than its owner and at no extra cost. Thus many people can view a painting and derive pleasure from this without reducing anyone else's pleasure. This is also a situation where state ownership would be justified, especially if the numbers wanting to see/visit the artifact was large.

³ 'They Loot Graves Don't They?', *Economist*, January 16 1999.

⁴ A typical example of such a view would be the following. 'To attempt an estimate of the money value of the artistic content of our museums would be an intellectual vulgarism... (art) is a service to society as free from the rules of demand and supply as the service of law' (Adams, 1937, p. 47).

⁵ A further factor of course is the high cost of selling works of art, with commissions for selling averaging around 10 per cent or more of the selling price.

⁶ A particular problem in looking at this issue is that many measures put in place are designed to guard against trade in stolen art historical objects; this is a rather different form of illegality to art that is traded with the knowledge and support of its owner but which is in violation of some export restriction. There is fairly widespread agreement across countries that some form of international treaty is needed to deal with art objects which are stolen, but even here there is considerable difficulty as very often the question of ownership is in dispute or unclear. Related to this is the question of art historical objects which had been stolen/looted some time in the past (e.g. such as during the Second World War) by invading/occupying armies and whose ownership is now very much in dispute. The concern here is exclusively with the measures put in place to deal with trade in art historical objects which is in breach of the laws restricting such trade; the problem as shall be seen is that in many cases such measures are designed to deal with both issues, i.e. stolen and illegally-exported objects. This though does not apply to measures to restrict exports and these will form the main focus of the remainder of this paper.

⁷ Although nothing has been given exception since 1950.

⁸ Prott and O'Keefe's (1989) explanation for its rejection was that as most movement involved outward flows, a balanced quota was little different to a prohibition of exports.

⁹ The case of EC Commission v. Italy (1968) is detailed in Prott and O'Keefe (1989) in which Italy's progressive tax on art exports of 8-30% was found to be contrary to the principles of the Treaty Of Rome. Italy had argued that the tax did not unduly hamper trade and helped to compensate the nation for the loss of its national patrimony by providing funds to use for preservation and restoration but were defeated and Italian law was changed in 1972 to remove the tax.

¹⁰ It is argued that import restrictions are needed in certain cultural industries to prevent indigenous cultures from being bombarded with some dominant external culture. For example content restrictions on TV programming in France or content quotas in Canada's radio stations to prevent US domination (see Kesten, 1992). It should also be noted that certain nations may actively encourage imports (e.g. exemptions from tariffs and customs duties) to foster cultural awareness and education or simply to allow for more trade on their national markets.

¹¹ See section 2.4

¹² Bator (1981) argues on the side of the US regarding the undesirability of such a rule. He claims that it removes the decision as to what art enters a country and the decision of what scope of enforcement regime it may be practical and desirable to operate. Blank Check Systems imply that you must enforce other states export laws whatever their content even if highly restrictive and coercive which must always work in the direction of restricting the international trade in art despite the wishes of the international community. It would also involve a very complex, expensive and intrusive regime to be effectively enforced especially in the EU where all other interests have moved towards dismantling border controls.

¹³ For details on the substantial numbers of legal cases tried in this area see Merryman and Elsen (1979) and Prott and O'Keefe (1989).

¹⁴ For a more in depth discussion of the case see McAlee (1981) and Bator (1981).The case stirred debate over the need for blanket state ownership of sites as the courts ruling held that an antiquity could be regarded as stolen property under the National Stolen Property act if it was taken from a foreign state that had explicitly declared ownership. However Bator’s discussion of the case makes the point that this might encourage a regulatory regime that is over inclusive and unduly rigid. He states that many illegally exported antiques were unearthed years ago and often are substantially unwanted at home and unnecessary to preserve the national patrimony. He claims that nominal state ownership should not prevent their free export and the stolen property category should be reserved for clear and egregious cases .

¹⁵See Article 3.2 in ICOM Code of Professional Ethics at [http:// www.icom.org/](http://www.icom.org/)

¹⁶ According to O’Keefe (1997) there is only one association of private collectors – the Swiss Association of Collectors and it has no code of conduct

¹⁷ In the EU the 7th directive did not affect the exemption from VAT for museum imports . Exemptions such as these provide an example of such an ‘entry point’ to regulate acquisitions, for example if imports are not accompanied by suitable pedigree or proof of ownership/legal export.

¹⁸ Again, encouraging museum ownership is analogous to discouraging exports especially in European institutions who rarely if ever sell any works that become part of their collections

¹⁹ Specifically objects eligible for conditional exemption are : any pictures, prints, books, manuscripts, works of art, scientific collections or other things not yielding income which appear to the commissioner of the Inland Revenue to be of national, scientific or artistic interest (British Inland Revenue,1986)

²⁰ In certain states such as Belgium whilst acceptance in lieu is possible in theory, conditions for approval are so strict- needing international recognition and depending on the successor- that the mechanism is rarely used in practice.

Table 1: Ranking of Countries in Terms of Severity of Export Restrictions

| <i>Minimal or no restrictions</i> | <i>Low level</i> | <i>High level</i> | <i>Export embargo</i> |
|-----------------------------------|------------------|-------------------|-----------------------|
| Barbados | Japan | France | China |
| United States | Switzerland | Italy | Columbia |
| UK | Spain | Turkey | |

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