



CULTURAL PROPERTY LAW

WHAT HAPPENS WHEN CULTURAL HERITAGE IS UNLAWFULLY REMOVED FROM YOUR COUNTRY?

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I - INTRODUCTION

The unlawful removal of cultural heritage from a country – either because of a lack of awareness or because of a real intention to illegally traffic the assets – is a real problem that international cooperation between the Member States of the European Union has proved insufficient to resolve. Besides any criminal or other liability on the part of those engaging in this type of unlawful conduct the question of recovery of the objects that have been removed unlawfully and not returned always remains.

Law no. 30/2016, published on 23 August 2016 (“Law 30/2016”) came into force on 24 August and implements Directive 2014/60/EU of the European Parliament and of the Council (“2014 Directive”). This Directive addresses the return of cultural heritage that have been unlawfully removed from the territory of one Member State of the European Union to another Member State.

Law 30/2016 introduces mechanisms to safeguard and protect national cultural heritage possessing artistic, historic or archaeological value, as provided for in article 36 of the Treaty on the Functioning of the European Union.

The 2014 Directive revoked Directive 93/7/CEE of the Council, which was the first step in setting up cooperation between the Member States in the area of the unlawful circulation of cultural heritage. One important feature of the 2014 Directive is its recognition of the fact that the periods previously in force to resolve certain situations were too short. In light of this, it establishes longer periods and a narrower definition of what are considered to be cultural heritage for the purposes of this regimen under analysis.

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Until the entry into force of Law 30/2016, there was only one provision in Portuguese law on this issue: article 69 of Law 107/2001 of 8 September (Base Law of Policy and Rules of Protection and Valuing of Cultural Heritage). Article 69 establishes rules that refer to European Union and international law, a principle of reciprocity and requirements to bring actions in the Portuguese courts for the recovery of unlawfully cultural heritage.

In terms of international law, it is crucial to mention the relevant Conventions ratified by Portugal:

- i) The UNESCO Convention of 17 November 1970 (ratified by Decree no. 26/85 of 26 July), on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and
- ii) The UNIDROIT (International Institute for the Unification of Private Law) Convention of 24 June 1995 (Ratified by Decision of the Assembly of the Republic no. 34/2000 of 4 April) on Stolen or Illegally Exported Cultural Heritage. This Convention remedied some of the weaknesses in the UNESCO Convention, including those relating to third parties who may have acquired cultural heritage in good faith.

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II - THE REGIMEN

Law 30/2016 has been introduced against this background of Portuguese, European and international law, and below are summarized its main provisions:

- i) Terms and territorial limits to be considered in determining the applicability of Law 30/2016:
 - a) The Law applies to cultural heritage that have been unlawfully removed from Portugal since 31 December 1992 (in line with the date of Directive 93/7/EEC);

In cases of reciprocity between States, Law 30/2016 may apply to situations that predate 1 January 1993; and
 - b) The Law applies only to cultural heritage moved between Portugal and another Member State of the European Union.
- ii) The definition of a cultural heritage: The asset in question must be classified as a cultural heritage under the national legislation of the “dispossessed” State, and removed from the territory of that State in breach of its rules on protection and valorisation of such kind of assets. In the case of Portugal, the law applies to cultural heritage regardless of whether or not they are registered (or in the process of being registered) in the national heritage classification and inventory register. This means an unregistered cultural object can be subject to these rules. Furthermore, under the Portuguese legal system, as a general rule, cultural objects are classified on a case-by-case basis. Essentially, this requires the existence of a background in civilisation or culture and a relevant cultural interest – as provided for in the above-mentioned Base Law of Policy and Rules of Protection and Valuing of Cultural Heritage. Furthermore, the definition of movable cultural heritage is foreseen in Article 55 of the Base Law of Policy and Rules of Protection and Valuing of Cultural Heritage

- iii) Cooperation between States and Central Authorities: Under Law 30/2016, the so-called Central Authorities of the Member States are required to locate cultural heritage that have been moved unlawfully and to identify those holding them. The Law also established duties of cooperation and exchange of information between Central Authorities of other Member States.

In this context, the Central Authorities are required to use the Internal Market Information System – IMI – created by Regulation no. 1024/2012 of the European Parliament and of the Council of 25 October. The aim of this system is to improve the functioning of the exchange of information on various matters relating to the internal market, and this system now includes data relating to unlawfully removed cultural heritage.

- iv) Safeguard Measures: The Central Authorities must take the measures necessary to preserve unlawfully removed cultural objects found in their territory. They must also ensure cooperation with the Central Authorities of the “dispossessed” Member State, with a view to recovering the object in question. Nevertheless, Law 30/2016 establishes a six-month period for the “dispossessed” Member State to decide, under the applicable legal system, whether the asset in question is of value or not for the purposes of this recovery mechanism. At the end of this period, if the “dispossessed” Member State does not decide to attribute value to the cultural heritage, the obligation to protect it is lifted.

v) Arbitration and Restitution Proceedings:

In line with the role of intermediary that the Central Authorities can assume, Law 30/2016 provides for recourse to arbitration. Arbitration proceedings can be brought by the Central Authorities if the possessor of the cultural heritage and the “dispossessed” Member State in question formally indicate that they agree to this. However, law 30/2016 does not establish rules for this type of dispute resolution. Besides this solution, the “dispossessed” Member State may also bring legal proceedings against the possessor for the return of the unlawfully removed cultural heritage. These legal proceedings must be brought in the Member State where the asset in question is located.

In the case of Portugal, the district courts will have jurisdiction to judge these return proceedings. Any legal proceedings must be brought within three years of the date on which the Central Authorities of the “dispossessed” Member State become aware of the location of the cultural heritage and the identity of its possessor. The ability to bring legal proceedings is subject to a limitation period of 30 years from the date on which the cultural heritage was unlawfully removed from the territory of the Member State bringing the action. Law 30/2016 extends this period to 75 years in the case of assets that are part of public collections or belong to the inventories of ecclesiastical or other religious institutions.

vi) Third-party possessors and compensation:

In cases where the courts order the return of the cultural object, law 30/2016 provides for compensation for third-party possessors who have acted in good faith (with “due diligence”). The law states that fair compensation will be due to a third-party possessor in good faith who is deprived of the unlawfully exported object. It makes no provision on how this should be calculated, but seems to indicate that the rules of equity should be followed.

One important feature of the 2014 Directive is its recognition of the fact that the periods previously in force to resolve certain situations were too short. In light of this, it establishes longer periods and a narrower definition of what are considered to be cultural heritage for the purposes of this regimen under analysis.

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 Iberian Law Firm of the Year
The Lawyer European Awards, 2015-2012

 Portuguese Law Firm of the Year
Who's Who Legal, 2016, 2015, 2011-2006
Chambers European Excellence Awards, 2014, 2012, 2009

 Top 5 - Game Changers of the last 10 years
Top 50 - Most Innovative Law Firm in Continental Europe
Financial Times - Innovative Lawyers Awards, 2014-2011