Chapter I

Government authority attention to the Cultural Heritage: a brief historical-institutional outline from the Renaissance to the present day

SUMMARY: 1. At the dawn of the first protection measures. – 2. Unified Italy and its first laws. – 3. Protection in the Republican era.

1. *At the dawn of the first protection measures*

In 1728 the French philosopher Montesquieu embarked on his *Grand Tour* of Italy, an itinerary which for many French intellectuals was an indispensable rite of passage, as Italy was the cultural and educational reference point for a well-read traveller. But on his arrival in Florence Montesquieu made a dismal jotting in his diary: the English, busily rifling amongst paintings, statues and portraits, were purloining whatever came into their hands (Ainis, Fiorillo). Hardly could the baron have imagined what would be plundered later, in the nineteenth century, by Napoleon and his troops.

It thus becomes clear why the first protection measures, dating back to the pre-Unification States, which were enacted to protect the Italian cultural heritage (eg. to safeguard the remains from the Roman and Renaissance era), were characterised by an unambiguous and constant concern: that of acting against the pillaging of works of art and archaeological treasures (in particular paintings and sculpture, in other words movable artefacts), in order to prevent them from being transferred abroad.

However, in Tuscany, which – together with Latium – is perhaps the Region that holds the world's most extensive wealth of cultural treasures, measures designed for protection of the cultural heritage had been introduced as early as the first decades of the XVI century. As is well known,

the Medici were particularly aware of the need to safeguard the heritage of fine arts and were great patrons and 'sponsors'of art.

To give a historical overview, the first measures undertaken in the Grand Duchy of Tuscany were, in brief, the following. In 1571 a prohibition was issued forbidding the removal of emblems and inscriptions from historic buildings. 1602 saw the issuing of a formal prohibition on the export of paintings unless a license was granted by the lieutenant of the Academy of Design. No license could be granted for the works of deceased artists who were included on the list of eighteen names of recognised masters of painting and sculpture (such as Giotto, Michelangelo, Botticelli, Benvenuto Cellini, Giambologna). As far as other deceased artists were concerned, the lieutenant deferred to the decision of twelve living artists who proposed that a license to export a given work should or should not be granted. In 1754 a *motu proprio* was issued and adopted by the local Council of the Regency, extending the prohibition on exporting from the Grand Duchy so that it covered entire categories of cultural artefacts, characterised as rare objects.

The other pre-Unification States were less watchful in their approach to the cultural heritage. Not until as late as the XVIII century were some sporadic measures enacted.

A few of the most significant examples can be cited. In Lombardy, it was not until 1745 (the era of Maria Theresa of Austria) that an official prohibition on the exporting of works of art was passed. In the Kingdom of Naples and the Two Sicilies, it was Charles of Bourbon (known as the "enlightened monarch") who in 1755 passed the law *prammatica LVII*, with the aim of protecting the recently begun excavations of Pompei, Stabia and Herculaneum against pillaging and plunder. The Museum of Capodimonte was opened in 1759. The Monument Protection Service for Sicily was set up in 1778. In Venice, the first catalogue of public paintings was established in 1773, and an office of the General Inspectorate aimed at protection such works was created.

During the eighteenth century, in the period of absolute rulers, protectionist action was concerned above all with the movable cultural heritage. The main aim was to ensure that artworks and archaeological remains would not leave the country. Reinterpreted in the context of today's legal framework, this approach can be summarised in the statement that the only activity permitted was that of protection, although its mode of operating was highly fragmentary and repressive in nature.

Although these actions did not fully succeed in achieving the aim they

were designed to pursue (a considerable number of artefacts were in fact exported secretly), it is nevertheless important to underline that these early measures laid the groundwork for the rules that would subsequently shape the activity of protecting the national cultural heritage. What had implicitly begun to be acknowledged was the existence of an irreplaceable historical and artistic heritage, the pride of Italy and the central attraction of cultural tourism among visitors.

If, then, the sporadic eighteenth-century measures represented the origin of protection of the cultural heritage, the *edict of Cardinal Pacca*, promulgated in Rome during the papacy of Pius VII on 7 April 1820, marked the first organic measure designed to safeguard historical objects and works of art, although the measure was, naturally, valid only within the Pontifical State. While reasserting some of the typologies of protection set up in the pre-Unification States, it also introduced measures to restrict the plundering of the Capitoline art collections; furthermore, it initiated the cataloguing of the works of art held in churches and assimilated buildings, establishing the requirement that church art works should be officially listed in the records of the fine arts commission. The edict also introduced several rules that were quite innovative at that time, such as the conservation and restoration of the cultural heritage and a survey of the property constituting the various types of cultural heritage.

Cardinal Pacca's decree was taken as the model in many other "small States", for instance in the Kingdom of Naples and the Two Sicilies in 1822. But it was in this same Kingdom that the right of pre-emption [1] was introduced for the first time, in 1827, in favour of the State, and it could apply to all artefacts belonging to the cultural heritage.

The Kingdom of Sardinia and Piedmont, lagging notably behind the other States, set up the Council of Antiquities and Fine Arts in 1832, entrusting it with the task of assuring the conservation of works of art and ancient objects (Ainis, Fiorillo).

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[1] Today, the legal institute is regulated by Legisl. Decr. No. 42/2004 (the Urbani Code), which states, in Art. 60, that "*The Ministry ... or the Region or another interested territorial body, shall have the power to purchase by pre-emption cultural properties alienated for a money consideration or transferred to a private company, at the price established in the deed of alienation or at the value attributed in the deed of transfer, respectively*".

2. *Unified Italy and its first laws*

The Unification of Italy in 1861 by no means represented an improvement in the forms of protection of the cultural heritage. On the contrary, a worrying inversion of the tendencies that had characterised the early nineteenth century measures began to creep in. Dispersal of the cultural heritage and its artefacts (through alienations or donations) was accentuated, favoured partly by the liberal ideology that was predominant in the nineteenth century. This approach was embodied totally by Art. 29 of the Albertine Statute, which proclaimed that

"private property was inviolable, without any exception whatsoever".

This rule took for granted that the total freedom to dispose of and exchange property was subject to no limits, even in the case of artefacts belonging to the cultural heritage. The value of such artefacts was to be determined by the market only. The power exercised by the State extended no further than a concern for the attractive appearance of the city, in the sense of a prohibition against the transformation or demolition of town buildings (and therefore of immovable property) if these were considered to be of great artistic value. There was a clear attempt to expunge from the law-books any legal institute that would impose a limitation on private property, despite the fact that such a limitation would represent the one and only guarantee of preservation of the cultural heritage. For example, trusteeship[2]. Arts. 899-900 of the Italian Civil Code declared this institute to be prohibited. It was regarded as a feudal residue contrary not only to the circulation of property, but also to the public economy and even to morals, as it created unjustified discrimination within a given family group.

[2] This is a legal institute that can be traced back to Roman law (*fideicommissum* – trusteeship), designed with the aim of allowing persons incapable of receiving nevertheless to benefit from certain assets. The testator bequeathed the assets to an heir or to a legatee who was entrusted with transmitting them wholly or in part to a third party – the trustee. Carried out in favour of relatives or freed men, it was used above all to maintain certain assets within the sphere of the family. Today this institute is referred to more frequently as the care home trusteeship, in the sense that the testator, who expects subsequently to come into the inheritance, in the meantime entrusts a care home with looking after the incapacitated relative (who is not in a position to avail of the inherited assets). The aim of the legal institute, both at that time and in the present, is to avoid the dismemberment of the assets. An example that comes to mind, in particular, is that of art collections.

The Italian *Liberale* approach towards the cultural heritage reached its nadir with the annexing of Rome in 1870 (through the so-called breach of Porta Pia). The city of Rome thus became part of Italy, bringing with it a rich dowry of inestimable cultural treasures.

A hurried preventive remedy had to be found by passing a series of measures designed to thwart the dispersal of artworks and objects. Such measures included the following: Law No. 2359, dated 25 June 1865, which authorized the administration to enforce expropriation of historic buildings and monuments if they had been allowed to become dilapidated due to neglect by the owners; Royal Decr. No. 6030, dated 27 November 1879, which, exclusively in reference to the city of Rome, suspended the force of the rules that had abolished trusteeship; Law No. 286, dated 28 June 1871, which established the indivisibility of art collections among heirs. However, the most significant overall outcome was that the dis-homogeneous legislation of the pre-Unification States was restored to full effect. As a result, in the former pontifical State the prohibition against exporting works from the capital to the former pontifical State continued to be in force, while the former Savoy Kingdom allowed total freedom of trade; Law No. 1461, dated 8 July 1883, which allowed the alienation of works of art and antiquities on condition that they be sold to transferred the State or to national agencies.

It was not until Law No. 431, dated 17 July 1904, that the first organic body of rules on heritage conservation was drawn up. Among its noteworthy achievements, mention should be made of the institution of the national cultural heritage catalogue and a prohibition against exporting the works listed in the catalogue, if they were characterised by particularly elevated value. However, since the export prohibition was dependent on whether or not the element in question was listed in the national catalogue, the prohibition could very easily be bypassed, so that art works continued to be transferred abroad: all that was necessary was for the works not to be placed on the list, or to be deleted from the catalogue.

In 1909, following on from the resolutions made by a specific committee, an important law was passed, Law No. 364, dated 20 June 1909, which was the direct forerunner of the 1939 legislation. The 1909 Law extended the scope of the cultural heritage to include codexes, manuscripts, prints, incunabula, and so on; furthermore, it established that works forming part of the cultural heritage could not be alienated if they belonged to the State or to public and private bodies; it introduced the obligatory notification of any transfer of cultural property belonging to

private individuals and the right of pre-emption in favour of the State; it declared a prohibition against demolition, removal, modification or restoration unless authorised by the Minister; it established proper rules governing archaeological excavations. The law was accompanied by a list of regulations approved by Royal Decree No. 363, dated 30 January 1913, which remained in force even after Law No. 1089/1939. Other laws were also passed subsequently, with the aim of seeking to relaunch policies for cultural heritage protection (Ainis, Fiorillo).

During the twenty-year period of the authoritarian regime two important laws were approved, at the behest of the Minister of National Education Giuseppe Bottai: Law No. 1089, dated 1 June 1939, entitled Protection of Things of Artistic or Historical Interest, and Law No. 1497, dated 29 June 1939, entitled Protection of Things of Natural Beauty, to which should be added Law No. 2006, dated 22 December 1939, entitled New Rules and Organisation of the Archives of the Kingdom.

In particular, the first of these two laws represented a major reference point in the framework of the Italian cultural heritage for no less than the following 65 years, right up to the passing of the nowadays Urbani Code – named after the Minister who proposed it – in which the above-mentioned laws were repealed.

Focusing now on Law No. 1089/1939, and postponing reference to Law 1497/1939 until Chapter III, it can be noted straightaway that considering the era in which it was passed, the legislation aiming to protect things of artistic and historical interest presented a number of strikingly modern features, designed as it was to build up a body of rules that would be as organically structured as possible. That is to say, its basic aim was to balance two opposing interests: the public interest in protecting the cultural heritage and the rights of private individuals over the artefacts themselves (Greco). It should not be forgotten that the Albertine Statute was still in force, with its rule, as mentioned earlier, on the inviolability of property rights. The balance achieved by Law No. 1089/1939 was reached by a compromise between the imperative need to protect artefacts of historic-artistic significance versus the question of property rights pertaining to such artefacts. In the case of elements of the cultural heritage consisting of privately owned property, the protectionist rules were applied mainly if the property in question had been declared and stated to be of notable public interest on account of its great historical-artistic value. On the other hand, cultural heritage artefacts that were in the pub-

lic domain were viewed as necessarily of interest, even if their historic-artistic value was merely generic, as it was assumed that public objects were of public interest by definition.

Law No. 1089/1939 was, however, marred by several flaws. Firstly, it lacked certain administrative procedures. For instance, we may note that according to Art. 52

> *"the public was admitted to visits of the things … that are the property of the State or of some other body or Institute that is legally recognised according to the rules that shall be established in the regulations"*

and Art. 53 then provided that:

> *"The Minister of Education can make it compulsory for private owners of immovable things having exceptional interest, if they have been declared on the list, and of collections or declared series … to allow visits to the things, the collections and the series themselves for cultural purposes, according to the purposes that shall be established cases by case, in agreement with the owner"*.

One can hardly fail to realise that this *visiting right* granted to the general community, which allowed people to view publicly or privately owned elements of the cultural heritage, foreshadowed the public access that was later enshrined in Italian law – albeit not until 1998 – by Legisl. Decr No. 112. Now, this legal institute, strikingly innovative in that it favoured the effort to respond to the cultural interests of the community, never genuinely got off the ground: one need only reflect that the regulations provided for in the wording of the law were never issued, and no administrative penalty was set up for any private owners who might seek to avoid compliance with the new measure.

Law No. 1089/1939 was also flawed by inconsistencies and gaps affecting the definition of things of historic and artistic interest. Consider the question of archives, which are of greater historical than artistic interest. This difference was sufficient to separate out the archive sector from the general Law, No. 1089, and to set up another Law, No. 2006/1939, to govern this sector, and a rather different body of laws was established to safeguard this type of property. The area of the archives involving political affairs was placed under the care of the Ministry of the Interior, while things of historical and artistic interest were to be governed by the Ministry of Education. This implied that archives did not fall under the scope of the regime's ambitious cultural project, in contrast to the other two

1939 laws. Rather, the archive law arose merely in response to a need to guarantee State Secrets, or to allow utilisation of documents for purposes of legal certainty rather than to determine historical truth.

Law No. 1089/1939 provided for no suitable cataloguing and inventory tools, nor did it demand a robust organisation that would be entrusted with the task of protecting the heritage. In other words, the rules embodied in Law No. 1089/1939 expressed a specific conception of things of historical and artistic interest, grounded on an aestheticising interpretation, suffused with a vein of populism as was typical of the era. It was important to make use of these 'things' as a means of conveying certain values cherished by the regime. Besides, the privately held things that benefited from protection were characterised by their precious nature and rarity, and their distinguishing feature was their uncommon beauty. In general, these 'things' were considered as static and inert objects, for contemplation only, and any public intervention was limited to mere preservation (likewise as restricted as possible), carried out by a system of administrative policing, namely the Superintendencies, totally disregarding any concern for incentivising an interaction between this form of law enforcement and civil society. Basically, this corresponded to the liberal ideology that did not conceive of any action in favour of society, because all individuals were assumed to act according to their particular capability, opportunity and interest.

3. *Protection in the Republican era*

The dangers threatening the new phase of the development of civil society in Italy were no longer represented only by dispersal of the heritage, but also by uncontrolled urban and building development (especially during the economic boom years) and by inadequate conservation of the public collections.

With the Republican Constitution of 1948 a new phase in cultural policy was ushered in by the Law dated 26 April 1964, No. 319, which set up the investigation commission for things of historical, archaeological, artistic and landscape interest (the *Franceschini Commission*). The outcome of its inquiry was a dramatic indictment of the ruinous state of the Italian cultural heritage: from the devastation affecting the archaeological sites to the inadequate cataloguing of works of art and objects of

historical interest; from the impossibility of engaging in restoration of art treasures to the lack of security and poor custody in museums, etc. The commission issued eighty-four declarations that covered the entire subject-matter. Of particular relevance is the I declaration, which for the first time gave a unitary definition of the elements composing the cultural heritage:

> *"any object that constitutes a material testimony having the value of civilisation"*

and of the cultural heritage:

> *"all types of property having reference to the history of civilisation"* belong to the cultural heritage of the Nation.

It should be noted that in adopting the phrase *cultural property*, the Commission drew on statements forming part of international law and in particular, the Hague Convention of 14 May 1954 (Protection of Cultural Property in the Case of Armed Conflict). It was in this context of the Hague Convention that such concepts were expressed with these specific terms for the first time, alluding to things of historical and artistic interest, even though cultural property (the entire heritage), taken as a material testimony of civilisation, certainly has a historic value but its tokens do not necessarily also have artistic value.

The Commission's final report constituted a document of considerable political relevance, but it remained devoid of legal significance as it was never translated into an official body of laws. It was not until the Bassanini reform of late 1990s (specifically, Legisl. Decr. No. 112/1998, to be described further on), that the work of the Franceschini Commission finally achieved its results, when the concept of cultural property was first introduced into the Italian legal system. The concept of the cultural heritage was encoded in official legal form a few years later, with the 2004 Urbani Code.

Along the lengthy path charted by these reforms, there was no innovative political decision *funditus* corresponding to the work of the Franceschini Commission. Rather, action continued to be episodic and localised in various areas of the national territory, with the main aim of addressing emergency situations.

To cite a few examples, the following laws can be noted: Law No. 44, dated 1 March 1965, which extended the sphere of responsibility of the Superintendents, as well as restoration activities and theft prevention

measures; Law No. 1061, dated 20 November 1971, which made counterfeiting of artworks a criminal offence; Law No. 171, dated 16 April 1973, and the Decr. Pres. Rep. dated 20 September 1973, the latter two measures being passed for the protection of Venice.

It was not until the 1990s that reform of the legislation concerning cultural property began to gather speed, partly prompted by European Community law. Examples include EEC Regulation 9 December 1992, No. 3911, now replaced by EC Regulation No. 116/2009, dated 18 December 2008, concerning the exporting of cultural property beyond EU borders, and EEC Directive No. 93/7, dated 15 March 1993, concerning the restitution of cultural property in the case of illicit appropriation from a Member State, which will be addressed in greater detail in Chapter VII.

As mentioned earlier, the Bassanini reforms of the late 1990s sought to bring about far-reaching innovation in the public administration and in all government agencies. With reference to cultural property, one important reform passed in the period in question was Law No. 352, dated 8 October 1997, (rules on cultural property), which in Art. 1 provided that the Government should issue an Act under parliamentary delegation committing it to pass, within a year, a legislative decree containing a consolidated law that would group together and coordinate all the legislative measures currently in force on a given subject. Art. 9 of the aforesaid Law No. 352 also established that the Superintendence of Pompei should be given organisational, scientific, administrative and financial autonomy. On the basis of the successful outcome of the latter measure, the experiment was subsequently extended to other Superintendencies with two ministerial decrees dated 11 December 2001. In the long-drawn-out proceedings leading up to the passing of the Consolidated Law in 1999, a further two legislative decrees, of major significance for the sector, were drawn up.

The first, already cited, was Legisl. Decr. No. 112, dated 31 March 1998, (attribution of administrative functions and tasks of the State to the Regions and to the local authorities, embodying the implementation of paragraph I of Law No. 59, dated 15 March 1997). Art. 148 of this Legislative Decree defined, for the first time, the legal concept of cultural property, which can clearly be perceived to have drawn inspiration from the work of the Franceschini Commission of thirty years earlier:

> *"the property that makes up the historic or artistic heritage, the buildings and monuments, the demo-ethno-anthropological, archaeological, archi-*