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Italia-USA: two legal systems in comparison

1. Introduction

In bringing my personal greetings and those of the Florentine *Soprintendenza archeologia belle arti e paesaggio*[1] that I have the honor to lead, to all the participants in this international conference, first I would like to say a few words regarding the reasons that prompted my office to accept with great pleasure the invitation of Department of Law of the University of Florence to co-organize this first meeting dedicated to a comparison between the Italian and US legislations on the protection of cultural heritage in our two countries.

Florence is in this sense the ideal place for such a debate not only for its historical and artistic heritage universally recognized as of world importance, but because in this city there has always been a large Anglo-American community that elected it as its second homeland attracted by its landscape and its history.

It is a community that often with great generosity contributes with its own resources to the preservation of Florentine monuments and masterpieces, as in the case of the Friends of Florence Foundation, to which our city owes a huge debt.

To this one must add the many thousands of students who come from the USA every year to stay in Tuscany as guests of the American universities that have their own headquarters here.

And these already particularly close ties have been further strengthened in recent years with the arrival of colleagues with significant experiences at American museum institutions to direct the main Florentine museums.

But despite these increasingly strong cultural connections between our two countries, the Italian norms of protection of its cultural heritage and the reasons behind them remain at times difficult for the Anglo-Saxon world to fully understand, as well as for the more liberal countries towards the art market (so-called 'market nations').

1. Literally the *Soprintendenza* is a local supervisory administration of the Ministry of Culture that ensures compliance of the Italian Law of Cultural Heritage in the fields of archeological heritage (*archeologia*), the fine arts, i.e., artworks and architectural heritage (*belle arti*) and landscape or natural heritage (*paesaggio*) according to territorial subdivisions. The *Soprintendenza* of Florence, for example, also has jurisdiction over the cities of Pistoia and Prato and their respective provinces. See Celani in this volume for the main daily tasks conducted by a *Soprintendenza*.

The time therefore seems ripe for starting a comparison that is useful for all, since although Italy has a centuries-old experience and an undisputed primacy in the traditional fields of the protection of national historical-artistic-archaeological heritage, we can and must also learn from the experiences of other countries.

I am thinking, for example, of forms of protection to be implemented in other fields, such as copyright on intellectual works and ingenuity, intangible heritage, NFTs, the recent forms of contemporary artistic expression, such as video or performance art.

2. The Cultural Heritage and Landscape Code/Rules

The starting point must necessarily be the Italian law for the protection of cultural heritage – the Legislative Decree no. 42 of 22 January 2004 with its subsequent additions, or simply 'the Code' – which is the concluding point of a process that began with Law n. 1089 of 1 June 1939 and experienced an important intermediate stage with the Consolidated Text[2].

In the course of this process, the more traditional categories of historical-artistic-archaeological heritage were joined by those of landscape and demo-ethno-anthropological heritage and the attention of the legislator has widened towards the field of management and valorization of such heritage, including finally to recognize intangible culture now protected by art. 7-*bis* of the Code, in implementation of the UNESCO Conventions for the Protection of Intangible Cultural Heritage and for the Protection and Promotion of Cultural Diversity, adopted in Paris on 3 November 2003 and 20 October 2005, respectively.

The original approach of the Protection Act in 1939, at a time when the role of the State was clearly pre-eminent, is still evident today and the Italian system of protection of its cultural heritage has remained until today extremely strong. It has been often used as a paradigm for legislation later adopted by other countries in Europe (especially in the Mediterranean area) and in the Latin American world.

2. Legislative Decree no. 490 of 29 October 1999.

But it would be wrong to simplistically see in the Fascist regime the terrain in which such a strong idea of the protection of cultural heritage was born. Indeed, in the pre-unification Italian States of the eighteenth and nineteenth centuries we find the gestation of what would be the modern legislation of protection. Some fundamental concepts are already historically found much earlier[3].

The Code constitutes a very firm system and it is often used as a paradigm for other countries, as I mentioned before. We are proud of this system but it is hard work for us. And we know that the Italian Code for cultural heritage is not easily understood by the Italian people, too. And at times when reading some judgements of the Administrative Courts we have the feeling that it is not clear even for the judge.

Specific competences are requested and cultural awareness to understand how wide our idea of heritage could be and that this category could change and increase day by day.

Massimo Severo Giannini had already observed how the concept of cultural heritage is an open notion, the content of which is given by other disciplines[4].

And in addition to this, the world is changing fast. We must face globalization and the appearance of digital objects in the art market (NFTs, Non-Fungible Tokens, for one), that only a few years ago were completely unknown, and to reconcile the application of the protection rules with the problem of the reuse of ancient buildings, the theme of the abandonment of churches and consequently the problem of the extremely rich artistic heritage they contain.

3. Cultural Heritage

For convenience and brevity, I would first like to refer to an excellent article by Salvatore Settis in a volume[5] that remains today, even after time, of incredible topicality on the precarious situation of the protection of cultural heritage in Italy.

In the article «Il futuro del patrimonio culturale in Italia» the scholar lists the questions that usually a foreigner asks about our cultural heritage. They are: definition, use (or uses), ownership and costs/duties.

Of course, through the centuries, the Italian notion of cultural heritage has been enlarged and improved[6]. Today it would perhaps be more correct to speak about 'heritages' to indicate a conceptual multiplication that embraces – albeit with difficulty – the intangible/immaterial.

Now cultural heritage in Italy also consists of landscape (what we call '*beni paesaggistici*') in addition to archaeology, historical sites and buildings, masterpieces of art, oral traditions, immaterial goods, fossils, photos and negatives, cars, scientific instruments and so on, everything that is seventy years older and could be considered useful for the reconstruction of the national history or for the cultural identity not only of the Nation but also of local communities. It is its peculiarity to be a 'widespread heritage' and characterized by a high level of conservation.

And our idea of cultural heritage consists not only of things but also of relations between objects (for example, a group of objects without any relevance become important as a collection) or also relationships between objects and places. Fundamental for us are the significance of the original context and the importance of the strong ties that generated over the ages between the objects and their places, that is, territories and local communities, but also with the arts and literature.

And about this last point, we are creating new legal duties as for example what we call '*vincolo pertinenziale*' – a very strong protective restriction that ties some objects to a place or to a territory from where they cannot be separated or removed.

It is a category/concept accepted now from recent case law[7], but there is no mention of this type of duty in the Code!

In the United States 'cultural heritage' is still mainly conceived as 'art objects' or 'true masterpieces'. It is characterized by an exclusively economic definition, which considers it as other goods on the market for financial investments.

In Italy, on the contrary, thanks to art. 9 of the Constitution, regardless of its ownership – public or private – cultural heritage has an eminently civil and social function and by vocation is public in the broad sense of the term.

In addition, in Italy 'art object' is only one of the different categories that constitute 'cultural heritage'. This difference is truly important: beauty and economical value are not the unique parameters. What it is important for us is the 'historical' value as a document of civilization and an element of identity.

3. See for example the Constitution of the Municipality of Siena of 1309-1310 and the resolution of the Senate of Rome of 25 March 1162 on the Trajan Column.
4. See Giannini M.S., *I beni culturali*, Riv. trim. dir. pubbl., 1976, p. 8.
5. Settis S., *Battaglie senza eroi. I beni culturali tra istituzioni e profitto*, Milano: Mondadori Electa, 2005.
6. De Santis V., *L'evoluzione del concetto di bene culturale*, Aedon, available at www.aedon.mulino.it/risorse/dib_tu/desantis.htm (last accessed 20 Sept 2023).
7. See the favorable judgment in *TAR Toscana, sez. Firenze* n. 1345/2020 – Banca Popolare di Vicenza vs. Ministero della Cultura, recently confirmed by the Consiglio di Stato, sec. VI, n. 1135 del 01/02/2023. Another favorable judgment, *TAR Toscana, sez. Firenze* n. 288/2021 Fondazione Marino Marini vs. Ministero della Cultura, was overruled by the Consiglio di Stato, sec. VI, n. 5281 of 30 May 2023 (stating that the works, although extremely important, could not be tied to the city of Pistoia alone).

This is the reason why everyday objects or objects without high artistic value are considered important for our national cultural heritage.
One simple example will help to understand: a potsherd or a simple coin of the Roman period has no economic value, but if I found it during an archaeological excavation in the USA, I can suppose that the Romans arrived in America many centuries before Columbus.
This is the importance of the context where we have found the objects, this one of the reasons why all archaeological objects are protected by the Italian law.
The differences between the American and the Italian viewpoints still exist and are useful to understand why in the Memorandum on the limit of importation of archaeological objects from Italy to the USA, signed between our Countries for the first time in 2001 and recently renewed in 2020, the archaeological objects under protection are only those dating from the 9th century before Christ to the 4th century after Christ, so excluding Prehistory, Bronze age and, of course, Paleontology.

4. The problem of circulation

We are now part of the European Union and of a larger international community and market and we also must face the heavy circulation of people and goods. Another new problem, previously unknown because of the size it has taken on, is the illicit trafficking of stolen objects. For a long time, it was essentially an Italian problem. During the peak of illegal exportation, Italy lost twelve thousand artifacts per year in the early 1980's. It is the equivalent of losing a museum full of artifacts and antiquities per year. Now this number decreased, less than one thousand. But due to the recent wars (ex-Yugoslavia, Iraq, Libya, Afghanistan, Syria) and the use of this trafficking from the terroristic groups and the mafia to find economic resources, this phenomenon is now impressive.
To know the market value of looted artifacts is impossible, but at the end of the last century it was between six and ten billion dollars. This statistic puts the illegal antiquities market in third place, behind narcotics and illegal arms trading, for the most profit to be made on the black market.

5. Conclusion

Finally, for these and other reasons we think that a dialogue between our countries and specialists for a better understanding of the Italian law is important, in order to explain the historical formation of the Italian code of cultural heritage and the role we ascribe to such heritage for the development of the Nation (and not only as economic value).
A round table and three panels will be devoted to these topics.
We know that the time allotted will be not sufficient to fully address these issues, but we hope that this conference will be only the first of a long series.
In thanking you for your participation, I am sure that you will make important contributions to the planned work.