PUBLIC ADMINISTRATION AND CULTURAL HERITAGE IN ITALY

1. Preamble

The field of cultural heritage in Italy is now regulated in Italy by the Code of Cultural and Landscape Property (Legislative Decree no. 42/ 2004). Article 2, paragraph 1, of the Code, includes in the definition of cultural heritage both the cultural and the landscape goods. This is because art. 9 of the Italian Constitution equalizes landscape protection and preservation of historic and artistic heritage (second paragraph) in the common goal of promotion and development of culture (first paragraph).

Therefore this article will proceed on examining the notions of cultural and landscape goods, then shall describe the system of protection provided by the Italian law.

2. The notion of cultural good

The notion of cultural good is currently gathered from art. 2, paragraph 2, and Articles 10 and 11 of the Legislative Decree no. 42, 2004. For the first provision are "cultural goods, personal and immovable property all the things that, according to Articles. 10 and 11, arise artistic, historical, archaeological, ethno-anthropological, archival and bibliographic interest and other things identified by law or under the law as evidence having the value of civilization." In turn, the other two provisions consider cultural goods the categories of things, personal and immovable, they list.

According to the provisions just mentioned, can be drawn the conclusion that, in current law, the notion of cultural property, presents the following features *typicality, plurality and materiality*.

Typicality: cultural goods are only the ones considered as such by the legislator. Hence cultural goods are created by the legislator, responding precisely to the character of typicality.

Plurality: the legislative notion of cultural goods has no character of generality, but provides different types and categories of cultural goods.

Materiality: the qualified entities by the legislator in terms of cultural property are all physical or tangible entities, always dealing with "personal or immovable" goods.

3. Identification and typology of cultural goods

The different categories of cultural goods are listed in Articles 10 and 11 of the Code. There can be distinguished general categories and special categories.

Are **general**, (Art. 10) categories of cultural goods to which apply all the protective rules provided by the Code of the cultural goods; for example:

a) collections of museums;

b) picture-galleries;

c) galleries;

d) archives;

e) book collections contained in the libraries;

f) in general, all things of artistic, historical, archaeological or ethno-anthropological interest, such things of numismatic interest, manuscripts, books, prints, maps, musical scores, photographs, films with features like rarity and value.

Are **special**, (Art. 11) the ones to which apply only some particular norms of protection; for example:

a) frescoes, armorial bearings, tombstones and inscriptions exposed or not to public view, which cannot be removed without administrative authorization;

b) public areas of historical interest, archaeological, artistic, landscape, where trade can be prohibited or restricted;

c) works of painting or sculpture or any work of art belonging to a living author, whose sale must issue a certificate of authenticity and can be transported abroad in accordance with certain procedures.

General categories are distinguished according to their public or private affiliation,.

As a rule, so that a good of private property can be qualified as cultural property, the cultural interest (historical, artistic, archaeological, etc. ...) must be of "particular importance".

One thing may be classified as cultural good - and therefore be subject to the rules provided by the Code - thanks to the objective features presented but sometimes it may not be sufficient (suffice) to trace it back to one of the categories specified by the Code itself.

In fact, in many cases, is required the intervention of the administrative authority which, at the end of the procedures of "identification of cultural goods", evaluates the existence of such features. The evaluation is done through an administrative provision (measure), whose effects are binding even against the owners's will. As a result of the identification proceeding, the good is formally considered of cultural relevance and therefore subject to the rules of the code.

The competence to take measures for the identification of cultural goods and those relating to the protection regime, is upon the Ministry for Cultural Heritage and Activities, which has its offices in Rome, but operates through peripheral organs located in each region.

Against the decision of the administrative authority that recognizes something as a cultural good, one may appeal before the bodies of administrative justice (Regional Administrative Courts of First Instance and the Council of State in instance of appeal).

The qualification as a cultural good of one thing determines its submission to the publicist discipline contained in the Code, which confers to the Ministry for Cultural Heritage organs the power to introduce restrictions in the enjoyment and in the circulation of cultural goods, in order to ensure the preservation and the usability by the community.

The administrative procedure for the identification of the cultural property varies on whether it refers to the good as public or private property.

For the properties of individuals and those of commercial companies should be formally notified, by the public authority, a certificate (a formal statement) of cultural interest (Art. 13). The notification, always required, not only includes the goods in the

discipline of cultural heritage, but it confers in itself the requirement of cultural relevance, so that it has namely a constitutive value.

For the cultural goods belonging to public property or belonging to a nonprofit legal entity, the code regulates a special verification process of the cultural interest (Art. 12).

4. The verification of the cultural interest

The pattern of the administrative procedure concerning the verification of cultural interest can be summarized as follows: the Ministry of Cultural Heritage organs, ex officio or at the request of the public shareholders (State, regions, provinces, municipalities), ascertain the existence of the cultural interest (artistic, historical, archaeological, ethno-anthropological) of the goods on their property that are the work of authors no longer alive and the execution of which dates back more than fifty years ago.

However, while the case is pending, the goods are brought under the general protection provided by the Code (art. 12, paragraph 1) and, in particular, are inalienable (Article 54, paragraph 2, letter. a)); where the outcome is positive, the provisional rules of protection under which were placed, become permanent (Article 12, paragraph 7) and thus final; if, however, the result is negative, the goods will be excluded from the Code (paragraph 4) and, as all common goods, will be freely alienable - after losing the status of public good if belonging to a local authority (paragraph 6) - unless precluded by reasons of public interest (paragraph 5).

The new system is based on a legal assumption, but only relative, of the existence of cultural interest in all "personal and immovable goods" belonging to the State, any other entity or public institution and private nonprofit legal persons, "which are the work of authors no longer alive and the execution of which dates back more than fifty years ago."

However, the new standard, while encoding the statutory assumption of cultural relevance in anything of public property or private nonprofit institutions, theoretically susceptible of protection (in the presence of the necessary time requirement), on the other hand, attaches no absolute value to such assumption, always allowing the contrary to be proved, through the method of verification.

In essence, for the goods of public property and private non-profit institutions, the administrative investigation by the Ministry is necessarily required by law, not as a prerequisite for the submission of such goods to protection (as happens with private goods protectable only upon a declaration, pursuant to art. 10, paragraph 3, of the Code), but as a condition to eventually exclude them from the protection (in case of a negative result).

Verification process is thus configured, by the rules of the Code, as a duty to which the applicant must submit to exclude the goods belonging to him, from the protection rules provided by the code. As long as he does not comply, the goods remain under the full protection of the code.

Article 12, paragraph 10 of the Code, recognizes that the verification process (started on demand) of cultural interest for the immovable property in public ownership can be completed, in a negative sense, even on a tacit meaningful assumption of silence: the failure to pronounce of the Ministerial organ, on the verification of cultural interest by the deadline is tantamount to failure and this constitutes a condition for the expropriation of

the good (in the case of property owned by the State) and its free alienability (so-called silence-assent).

5. The declaration of cultural interest

In the case of private property goods, the nature of cultural property is obtained following an administrative procedure which is done *inter partes* with the owners of the good.

The procedure begins at the initiative of the Ministry of Cultural Heritage organs, which perform the investigation on the existence of cultural interest. The owners can participate in the procedure by submitting pleadings and documents. In the event of a positive finding of the cultural interest, the Ministry adopts the Certificate of cultural interest which is notified to the owner and recorded in the land registry so that it has efficacy even in relation to future purchasers of that good.

While the administrative procedure is pending precautionary measures to protect the good shall be applied.

Against the measure for the declaration of cultural interest is granted an administrative appeal to the Ministry which may annul or reform the contested measure.

In any case, the Italian law grants the appeal before judicial organs of first and second istance, both against the declaration of cultural interest and the decision by which the Ministry rejects the administrative appeal.

As noted so that a private property good can be classified as cultural property is necessary to ascertain the presence of a cultural interest of "particular importance" (Art. 13 and 10, paragraph 3).

6. Protection measures with particular reference to the system of circulation of cultural goods

Where the procedures of verification and declaration of cultural interest reach their conclusion positively, with the ascertainment of cultural interest, public e private goods will be submitted to the protection measures provided by the Code: in particular:

a) the code provides wide powers of supervision and inspection of the goods to the Ministry of Cultural Heritage organs , for control purposes (Articles 18 and 19).
b) Cultural goods, even if of private property, cannot be destroyed, damaged or even used for purposes which may bring prejudice to their conservation (Art. 20).
c) A series of activities are subject to the provisional issue of an administrative authorization, and this with particular reference to the execution of building works (e.g. maintenance or renovation of an immovable property having cultural interest) that, however, must be done under the control of an organ of the Ministry of Cultural Heritage that can dictate regulations (Articles 21, 22, 24).

Alongside with the security measures, are provided **conservation** measures (e.g. restoration or renovation of a building) that can be done either at the initiative of the owners

or at the imposition of ministerial organs, with the possibility to benefit of state contributions also in the form of tax cuts.

As regards **the regime of circulation** (with particular reference to the sale) the Code of cultural heritage reaffirms, as mentioned, the division of cultural goods depending on the affiliation: a) cultural goods belonging to public or nonprofit legal bodies, b) cultural goods belonging to an individual or commercial company.

In the first case (case *sub a*) the circulation of the cultural goods, requires a prior authorization to the sale and the pre-emption procedure in the event of an onerous transfer.

In the second case (case *sub b*) is not required prior authorization, but it is necessary to observe exclusively the rules on pre-emption, maintaining, however, the prior mandatory notification .

So we have:

• the authorization: required only for the cultural goods belonging to public or nonprofit legal bodies;

• the notification and pre-emption procedure: required for all cultural goods, without any distinction between the different categories of the subjects owners of the property.

6.1. Authorization

The purpose of the authorization is to allow the Ministry of Cultural Heritage to assess whether the change of ownership of the good may affect its conservation and use.

Competence to grant permission is upon the Ministry for Cultural Heritage. The request must be addressed by the individual owner and shall be supported by a report describing the intended use and the conservation program to be implemented.

One of the most problematic aspects of the authorization is the type of acts that fall in: the Code mentions the documents of alienation, the memorandum of mortgage or the lien, the act of exchange, and uses an all-embracing formula “legal transactions that can lead to alienation of cultural property”, concerning certainly the transfer acts deriving from the executive procedure.

It goes without saying that the concept of "alienation" includes both transfers for a valuable consideration and transfers without charge.

6.2. Notification

The notification shall be made in case of alienation of a public or private cultural good.. The notification is compulsory on the one hand in order to inform about the goods circulation vicissitudes and, on the other hand, to ask the public authority enabled, to exercise the right of pre-emption recognized by the law, namely the right to be preferred, on equal terms, to a third in the purchase of the cultural good.

According to art. 59 of the Code prior notification is required for "acts that transfer, in whole or in part, in any capacity, the ownership or the possession" of the cultural good.

The notification requirement applies both to acts transfering the ownership, both for the acts suitable to convey the possession of the good (and therefore for the lease contracts, bailment, deposit, transfer to a third term of a custodial and maintenance administration commission).

The acts of transfer, subject to prior notification, unlike those subject to pre-emption, also cover the acts *inter vivos* free of charge and the acts upon death (*mortis causa*).

Art. 59 of the Code, specifies that the notification should be submitted to the Superintendent (local organ of the Ministry) of the place where the cultural goods are located and should include essential information identifying the good.

In case of unsuccessful or late notification is believed that the sale effects remain suspended from the date of signing until it is given the opportunity to the State to exercise its right of pre-emption, namely the right to be preferred in the purchase on equal terms. Once the notification is done and the term expires, but the State hasn't exercised that right, the contract regains full retroactive effect, both between the parties, both towards third parties, including the State.

6.3. The pre-emption right

The artistic pre-emption right represents, in the issue of cultural goods circulation, the most critical moment, because it affects the sale of the cultural good, influencing the contract effects that remain suspended until the expiration of the period of 60 days granted to the State to exercise its right to be preferred in the purchase at the same price.

As to the nature of artistic pre-emption, the question is whether it should be traced to the common assumptions of statutory pre-emption, or if, as seems preferable, must abide by its own rules, characterized by the supremacy power of the state, to pursue the public interest for the preservation and enjoyment of cultural heritage.

An essential characteristic of the ordinary statutory pre-emption (e.g. provided by law and not by agreement of the parties) is that the favorite subject by law, takes over as part of the contract and the purchase finds its basis on the contract, id est on the exchange of wills between the transferor and the preferred transferee; in contrast, in the artistic pre-emption the transfer does not occur as a result of the agreement of the parties but as a unilateral act of the public authority.

The purchase on pre-emption is divided into two instances: a) the adoption of the administrative measure; b) its notification to stakeholders.

The decision to exercise the pre-emption right has overruling effects and modifies the contract between the original contracting parties, which consequently is being invalidated by it.

7. The landscape

Cultural goods are to be kept distinct from the landscape goods which are similar to the first ones for reasons that inspire the protection (the cultural value they own) and therefore also brought back to the concept of cultural heritage, but are separately considered by the code under a different definition (Article 2, paragraph 3) and under the legal regime of protection. Article. 9, paragraph 2, of the Italian Constitution, states that the protection of the landscape, and historical and artistic heritage of the nation, is a fundamental and qualifying task of the Republic.

Initially, the Italian Constitutional Court has interpreted the notion of landscape extensively to encompass the entire human habitat. This interpretative direction was given by the need to overcome the absence in the Constitution of a reference to the concept of

environment. Once reached the goal of recognizing a constitutional protection for the environment through a broad interpretation of the notion of landscape, the two concepts have been gradually separated.

According to the Constitutional Court, the concept of landscape indicates, first of all, the morphology of the territory, regards namely the environment in its visual appearance (Constitutional Court, n. 367, November 7th 2007).

The enhancement of the landscape has found new impetus in the European Landscape Convention signed in Florence on the October 20th, 2000 and subsequently ratified by the Law n. 14, on January 9th, 2006.

The Convention aims to promote the protection, management and planning of landscapes and to organize the European cooperation in this field and introduces a new idea of the the member states territory landscape dimension, setting the principle of uniqueness of the landscape, the protection of which must be exercised no more on individual portions of the territory, but overall in an all-encompassing perspective.

The Convention defines the landscape as "... a certain portion of territory, as perceived by population, whose character derives from the action of natural and/ or human factors and their interrelations ..." and affirms the centrality of the protection as essential part of the strategies for land management.

Under the influence of the European Convention, the Code of Cultural Heritage and Landscape (Legislative Decree n. 42, January 22nd, 2004, as amended by Legislative Decree n. 157, March 24th, 2006 and by the Legislative Decree no. 63, March 26th, 2008), has (re)allocated to the landscape an autonomous dimension, and in this sense, it is significant that in the code has been abandoned the terminology "environmental goods", used by the consolidated text of 1999 (Art. 138 Legislative Decree no. 490/1999) and now replaced with the category of "landscape goods" (Articles 2 and 134 of the Code).

This confirms what was supported by the most authoritative doctrine, according to which it is appropriate to distinguish the concept of environment from the landscape, especially considering that, compared to the original concept of landscape - coinciding with the aesthetic notion of “natural beauty and natural pictures " - the later meaning established a broader concept, no longer limited to "natural beauty" to preserve, but including the form and appearance of the territory in its identity values. The notion of landscape, therefore, does not cover only the "natural beauty" or the physical changes of the territory, expression of human wit and creativity, but the shape of the territory and the surrounding environment as a whole, expression of traditions, spiritual and cultural values, as a result of the interaction between the human community there settled and the surrounding environment of which preserves the historical memory.

On the contrary, the notion of environment should more properly be referred to all the elements that make up the biosphere (air, water, soil) and to the plant and animal species which should be protected as values in themselves and as constitutive elements of the human habitat in order to ensure optimal conditions of healthiness for the protection of the fundamental right to health.

The protection of landscape heritage is pursued through the tools of the **landscape plan** and the **landscape approval**: with the first one, each region carries out the reconnaissance of portion of territory with landscape importance and establishes the

conditions of use, necessary to preserve them; with the second one, each region controls if a certain intervention required by a private or other public body and involving a physical change of the property constrained (e.g. building a construction - a house, a road, a bridge -) is compatible with the conservation requirements contained in the plan.

7.1. The division of legislative powers

As regards the division of legislative powers, the Constitutional Court, with the already cited above sentence n. 367, 2007, stated that on the territory weigh more public interests: those concerning the conservation and protection of environment and landscape, whose care is solely responsible the State, and those concerning the territorial government (town planning and construction) and the enhancement of cultural and environmental goods (land use), which are assigned to the concurrent legislative competence of the State and Regions. The environmental and landscape protection, pressuring a complex and homogeneous good, considered by the Constitutional law as a primary and absolute value, and falling within the exclusive legislative competence of the State pursuant to art. 117, second paragraph, letter s (for environmental, ecosystem and cultural heritage protection), precedes and constitutes a limit to the protection of the other public interests assigned to the concurrent legislative power of the Regions concerning territorial government and the enhancement of the cultural heritage and environment (principles reaffirmed by subsequent n. 180, Constitutional Court May 30th, 2008), although still does not affect the right of the Regions "to adopt higher standards of environmental protection in the exercise of powers provided by the Constitution, which come into contact with that of the environment" (Constitutional Court n. 272, October 29th, 2009).

7.2. The administrative functions relating to landscape matters

In terms of the division of administrative responsibilities between center and periphery, the reform of Title V of the Italian Constitution approved in 2001 (Art. 118) introduced the principle of subsidiarity, which requires to distribute these functions to the administrative bodies that are closer to the citizens (Municipalities), unless to ensure an uniform practice is necessary to provide for the competence of a different, more centralized entity (e.g. provinces, regions or the state).

In fact, in this very matter of the landscape had long begun a process of decentralization of the administrative functions, assigned or delegated in large part to the regions and from these, to the local authorities (provinces and municipalities).

Already with the Legislative Decree n. 616 of 1977 had been delegated to the regions various administrative functions, such as those exercised by central and peripheral state organs for the protection of natural beauty with regard to their identification, to their protection and the sanctions applied to them.

The co-management of landscape heritage was enacted by assigning administrative functions to the regional and local authorities but mantaining State penetrating powers of control, review and intervention.

For example, landscape planning was attributed to the Regions, but in case of breaching the deadline set for that purpose by Law. n. 431 of 1985, the state could exercise substitutive powers adopting directly landscape plans; the vexed question of the effects of

the expiry of the term assigned to the Regions for the approval of landscape plans arises again presently, as a result of changes brought in Legislative Decree n. 42/2004, first in the Leg. D. n. 157, March 24th, 2006 and then by Leg. D. n. 63, March 26, 2008, the deadline for the adjustment of landscape plans has been fixed for December 31st 2009, by a procedure deeply inspired by the principle of sincere cooperation between the State and the Regions, with the expectation that at the end, in case of default of the Regions, the Ministry can provide in its stead.

And again, landscape authorization, which is compulsory for any physical change of the property constrained in terms of landscape, had been delegated to the regions and often sub-delegated to the municipalities, but Ministry of Cultural Heritage local organs retained substitutive powers, through which could also cancel the authorizations granted unlawfully locally.

State and Regions, and potentially, local authorities, were so called to co-manage the landscape heritage, but through a system that allowed segregation to peripheral organs and central bodies, often unable to communicate with each other.

Recently, the legislator has changed the system, setting up co-management more like a loyal co-operation between center and periphery, than as a delineation of reserved areas of competence.

With Legislative Decree n. 42, 2004, the state powers in the field of landscape planning, have been redesigned, enhancing the ability to reach agreements for the development of the landscape plans.

For landscape authorizations, as well, except the transitional regime, the state administration is no longer involved in the control on authorizations issued by the local regions or municipalities, but cooperates through an opinion (mandatory in some cases) in the only administrative procedure left to the responsibility of the Regions.

The system of separated powers, in which state authority could intervene through substitutive or control powers, in relation to administrative measures adopted by regional or local authorities, is replaced by a new model based on the principle of sincere cooperation, often enhanced by the Constitutional Court, although, as mentioned above for landscape plans, remain substitutive state powers in case of non compliance of the Regions.

Finally, for matters within their competence, the regions can distribute (and regulate) the administrative functions between the regional and local levels, except for those matters reserved to a higher level of competence.

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