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Francesca Benetti*, Clemente Pio Santacroce**

In the public interest? Archaeological research, permits and public participation in Italy

This paper aims to examine the Italian legislation on archaeological research, which requires a special permit (called "concession" – "concessione" in Italian) by the Ministry of Cultural Heritage and Activities. We will explore the history of the legislation on this permit and the current policy for issuing it, showing how the State policy led to a progressive exclusion of amateurs from this field. We will finally highlight the lack of evidence-based policy making in Italy, and call for a multi-stakeholder perspective in research design.
Keywords: cultural heritage law, permit, policy-making, public participation, Italy

Questo articolo esamina la legislazione italiana riguardante le ricerche archeologiche, che richiedono un permesso chiamato "concessione" rilasciato dal Ministero dei Beni e delle Attività Culturali. Si illustrerà la storia della legislazione riguardante questo permesso e l'attuale procedura di rilascio, dimostrando come la politica statale abbia portato a una progressiva esclusione dei "non professionisti" da questo campo. Infine si evidenzierà la mancanza in Italia di una costruzione delle politiche basata sulle evidenze e l'esigenza di una prospettiva che coinvolga tutti gli attori interessati nella costruzione delle politiche e nella pianificazione della ricerca.
Parole chiave: *legislazione per il patrimonio culturale, concessione,* policy-making, *partecipazione pubblica, Italia*

1. Introduction

In all modern States, the protection of archaeological heritage is a matter of concern and a source of contention between public and private interests, primarily because it is linked with property. Therefore, archaeological heritage was frequently subject of early heritage-related laws, which restricted some of the private property rights in favour of the public interest associated with the ancient remains. This was for example the case in Italy, with the law 12 June 1902, n. 185 ("Nasi law")[1].

Since those early days, when "public interest" meant assuring the protection of the material remains for their intrinsic value, much has

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[1] For previous legislation in the Italian peninsula see Giulio Volpe, Garzillo 1996.

changed. After the Second World War it became apparent that the significance of heritage can't be reduced to aesthetic or tangible value, but other kinds of value came to the fore, including social values (Mason, Avrami 2002). In Italy this was recognised during the 1960s, when the Franceschini Committee (named after the Chair of the group in charge of reviewing cultural heritage law) defined cultural heritage as «material testimony holding value of civilization»[2].

The meaning of "public interest" has also shifted, from the mere protection to a more nuanced interpretation, which includes allowing and fostering a meaningful significance of heritage in people's lives. In the Italian system, that is the aim of the "enhancement" (*valorizzazione*) of cultural heritage, which is defined by article 6.1 of the Code for Cultural Heritage and Landscape (from now on "the Code") as assuring the best conditions in enjoying cultural heritage[3], while respecting its conservation.

A constitutional reform in 2001 (L.Cost. n. 3/2001) defined the current distribution of legislative power within the public bodies. Heritage protection is under the jurisdiction of the State, which runs it through the Ministry of Cultural Heritage and Activities (MiBAC) and its peripheral bodies, the *Soprintendenze*. Heritage enhancement instead is assigned to the Regions, which can for example allocate funds or develop their own local policies and schemes (e.g. Tuscany in relation to the enhancement of intangible cultural heritage). Article 6.3 of the Code also explicitly states that private subjects are welcome to join the public bodies and participate in the enhancement of cultural heritage. To this aim, public participation in enhancement is shaped in manifold activities by the law, from the use of publicly owned cultural heritage for different purposes (articles 106-110) to the sponsorship of restoration and conservation activities[4], to the stipulation of agreements between the State and private subjects regarding the management of enhancement-related activities (art. 115). These are, arguably, the hottest topics of contention between the State and the private bodies in the field of the enhancement, considering that the general management and protection of cultural heritage is in the competence of the State.

[2] «Testimonianza materiale avente valore di civiltà». For a discussion on the notion of cultural heritage proposed by the Franceschini Committee, see Montella 2015.

[3] Article 6.1 (modified by D.Lgs. n. 156/2006, D.Lgs. n. 157/2006, D.Lgs. n. 62/2008 and D.Lgs. n. 63/2008): «Enhancement is exercising functions and activities devoted to the promotion of knowledge about cultural heritage and to assuring the best conditions of public use of cultural heritage, also by disabled people, with the aim of fostering the development of culture. It includes also the promotion and support (i.e. financial support) of conservation activities on cultural heritage. With regards to landscape, the enhancement includes also the regeneration of protected buildings and areas, damaged and decayed, or the realisation of new landscape values coherent and integrated».

[4] Art. 120 of the Code. It is well known the case of Tod's, which offered to pay for the restoration of the Colosseum in return of the possibility to use the Colosseum in his advertisement and branding.

Public participation in Italy seems therefore clearly limited, however further considerations can be made especially on archaeological heritage[5], considering the international movement towards its improvement.

Italy has indeed committed to several international legal obligations. Public participation in heritage management has been fostered by the European Union, with the Council conclusions on participatory governance of cultural heritage (2014/C 463/01), as well as by other bodies, such as UNESCO (in particular since the beginning of the 21st century: Díaz-Andreu 2016) and Council of Europe (CoE), especially since 2005 (Odendahl 2017). It is worth noting that Italy signed the CoE European Framework Convention on the Value of Cultural Heritage for Society (also known as Faro Convention, 2005) in 2013 but hasn't ratified it yet[6]. This Convention emphasises the instrumental value of cultural heritage to achieve human development, democracy, and sustainable economy. Heritage is understood as a resource for the communities, which can benefit from it but also have a responsibility towards it (Meyer-Bisch 2009; Carmosino 2013; Vícha 2014; see also Olivier in this volume).

Moreover, both practitioners and scholars in recent decades have underlined the importance of community involvement in archaeology. The benefits of public participation are manifold and range from the regeneration of the sense of place, to the reinforcement of community, to happiness and wellbeing, as underlined by many other papers in this volume.

It is therefore worth investigating the legislative limits that Italian archaeologists have to face when dealing with public participation. A comprehensive view exceeds the length of this paper, so we will focus on one of the burdens to public participation in archaeology in Italy, the excavation permits. The limits recently imposed by the State caused Italian public archaeology develop in original directions (e.g. Brogiolo, Chavarría Arnau in this volume), in contrast with other countries, such as the UK, where archaeological excavations were seen as the principal activities in community archaeology (Simpson, Williams 2008) and the Portable Antiquities Scheme can be seen as one of the most successful public participation projects (see e.g. Bland 2004).

This paper will start by summarising archaeological heritage legislation in Italy. Focussing then on the archaeological research permits, it will explore the history of legislation on excavation permits and the current policy for issuing them. This will highlight how State policy led to a progressive exclusion of amateurs from this field, culminating with the

[5] This is the subject of the doctoral research of one of the authors of this paper (F. Benetti), held at the University of Padua under the supervision of A. Chavarría Arnau and C.P. Santacroce.

[6] The ratification is currently under Parliamentary discussion (law proposition A.S. n. 702, XVIII legislatura).

strict interpretation of art. 3 of the Valletta Convention, ratified by Italy with the law 57/2015. It will finally explore the lack of evidence-based policy making in Italy, and will call for a multi-stakeholder perspective in research design.

2. Archaeological heritage management in current Italian legislation, with reference to the excavation permit

We could summarise the philosophy of current Italian heritage management with one sentence: the State is reckoned as the best champion for cultural heritage. This is a recurrent theme in all legislative levels, starting from the Constitution. Article 9 of the Constitution says: «The Republic promotes the development of culture and the scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation». It is worth noting firstly its position: the article is one of the fundamental principles of the Constitution, witnessing the importance of the topic in the Italian State (Settis 2012, p. 143). Secondly, the commentators note the instrumental value of protection of cultural heritage towards the development of culture, which aims at the personal development of the citizens (Sandulli 1967, pp. 69-70; Marini 1999, p. 637; Severini 2013, pp. 11-12). This was extremely forward looking, considering that the Italian Constitution dates back to 1948, and the instrumental value of culture for implementing other policies has been coherently used only later (e.g. by the EU and its policies related to European identity-making: Sassatelli 2009; Niklasson 2017). It can also be linked to the importance of public participation, since to reach full personal development through culture, it is necessary to have an active involvement within it. Thirdly, the mention of «the Republic» means that all the elements of the State have to make a collective effort for the protection and development of culture, within the limits imposed by the law (Merusi 1975, pp. 438-440).

Recognising public interest in heritage is a necessary premise to restrict some individual rights typical of the private property. As a general rule, in order to avoid unnecessary conflicts with property rights, private items need to be particularly important to be "declared" cultural heritage, according to articles 10 and 13[7] of the Code. This means that an

[7] Publicly owned items instead do not have to be particularly important: they are automatically recognised cultural heritage if they are 50 years old and their author is dead. If any public body wants to do something against the Code (e.g. alienating an item older than 50 years and whose author is dead), it must first ask *Soprintendenze* for a verification of the cultural interest; if the item has no cultural interest, the public body can proceed.

administrative measure is normally needed impose upon private owners the protection of cultural heritage. However, this is true for everything but archaeology. As archaeological heritage automatically holds public interest, the State guarantees that the best protection is given. According to article 91.1 of the Code, the "things" with cultural and archaeological interest[8] «found by anyone in any way under the ground or in the seabed, are State property[9]». This applies to all archaeological remains found after 1909, the date of the first law which stated this principle (L. 364/1909, art. 15.3).

F.B.

2.1. Archaeological research

Considering the public property of the archaeological remains found, article 88 of the Code states that «archaeological research and, in general, works aimed at finding things listed by article 10 in any part of the national territory are reserved to the Ministry». This article is crucial. First of all, what does "archaeological research" mean in this context? According to many of the commentators, the word "research" should be interpreted only as those works that imply the physical modification of places. This would also be confirmed by the following statement "works aimed at finding cultural things". Even though we could argue that the idea of excavating to "find things" is quite a backward one, in their interpretation "works" would indicate an action that modifies the place (Marzuoli 2000, pp. 291-292; Lubrano 2012, pp. 715-716).

[8] The notion of "archaeological interest" is at present rather undefined in the Italian legislative system. Born in the 19th century when it was linked essentially with the concept of antiquity, the meaning has substantially changed in the scientific literature, ranging from the prehistoric time to the contemporary world (see e.g. Harrison, Schofield 2010). A discussion on the shift of this meaning and its consequences on the application of the law is beyond the scope of this paper, but see Benetti forthcoming. On the legal definition of archaeology and its consequences on excavation permits see also Karl in this volume.

[9] Art. 91.1 of the Code states that these are part of the "demanio" (State property) or of the "non-disposable patrimony of the State", concepts which refer to articles 822 and 826 of the Civil Code (for these notions see Santacroce 2018). The interpretation of «under the ground and in the seabed» is also a problem still open, but important as it carries consequences with the reward of the finds (see below), as well as with the sanctions. Art. 176 of the Code in fact states that taking possession of archaeological heritage is a criminal offence, punished with detention (up to three years) and a 31-516.50 euro penalty (this amount is clearly not updated with inflation). A strict and literal interpretation, also sustained by the Ministry in 2005 (legal advice 23 August 2005, cited in Mannu 2006), would exclude finds above the ground (e.g. numismatic finds in spaces between walls) or in wells from State ownership. For such finds, the State should not pay a reward. This could be seen as an attempt by the Ministry to save money, as its budget is always less than necessary. An extensive interpretation would instead include all the finds under State property (Giannini 1962; Mannu 2006). Even though article 91.1 indicates a kind of "automatism" in recognising archaeological remains as State property, we could argue that a formal act is needed to recognise a "thing" as an "archaeological" remain. Otherwise, the "treasure law" would apply, i.e. the landowner owns the thing found, or he/she shares it with the finder if the finder found it by chance (art. 932 of the Civil Code) (Pistorio 2012).

Considering archaeological discipline, the correct and up-to-date interpretation of the concept of "archaeological research" would include non-invasive research, such as geophysics, field surveys, aerial photographs analysis, LiDAR. However, applying this interpretation of the word "research" to the law would heavily clash with the freedom of research, protected by art. 33 of the Constitution, and indeed the primary laws could not be interpreted against the Constitution[10].

According to many of the commentators, this "reservation" of archaeological research to the Ministry comes from two considerations: first, as we already said, the State property of the archaeological remains, and, second, the fact that the State is in charge for the assessment of the "archaeological interest" of the things found (Mansi 2016; Lubrano 2012, pp. 717-718). When the *intention* of the digger is "finding archaeological things"[11] there is such a reservation, which instead does not apply to all other excavations[12], including digging for treasures (see footnote 9) (Cortese 2002).

This "reservation" does not consider the role of Universities in the research process and it has been widely critiqued (Marzuoli 2000; Aprea 2005), but it was never brought in front of the Constitutional Court to check its legitimacy. It was also said that this article clashes with the freedom of economic initiative (protected by art. 41 of the Constitution). This case ended up in court but the final decision reinforced the legitimacy of this article: the Constitutional Court stated in fact that it would have been legitimate even if a law precluded any private initiative in this field. This would in fact be motivated by social reasons, i.e. the importance of reclaiming the things founds for the public interest (*C. Cost.* 23 June 1964, no. 54).

Following this "reservation", the State can also order the temporary occupation of private land to carry out research (art. 88.2). However, in exercising this power the Ministry has to consider the private property right and balance it with the public interest (Lubrano 2012, pp. 722-725). The landowner will, in return, receive compensation for the occupation. The compensation can be paid by money or by giving him some of the things found, if the State is not interested in adding them to public collections.

[10] A similar problem of interpretation is in the Austrian law (Karl 2016).

[11] Since the legislation does not define what archaeology is, this is also subject to interpretation (see footnote 8). This creates a grey area, especially for recent times: for example in some cases Second World Was heritage is considered archaeology, in some other cases it is not (see Benetti forthcoming).

[12] The cultural things occasionally found during other types of excavations (or in any other case) have to be reported within 24 hours from the discovery, leaving the remains in their original position unless it is necessary to remove them because of threats to their conservation (article 90). The policy for occasional finds is not included in this paper.

Even though archaeological research is reserved, article 89 states that the Ministry can grant someone else – both public and private bodies, including the landowner – the right to conduct "archaeological research", by issuing a permit called a "concession". The permit can also include conditions, which must be met by the beneficiary, together with any other condition that the Ministry intends to apply even after having issued the permit. Consequently if the beneficiary breaches the conditions, the permit can be "revoked" as a sanction[13]. The concession can be revoked also if the Ministry wants to substitute itself for the beneficiary. Compensation will be paid for the expenses of the beneficiary[14]. Even though this revocation has to be motivated, this is a huge power that does not take into account the scientific interest of the beneficiary in carrying out the excavation for research purposes[15]. It also considers the beneficiaries as subordinates, not as peers in the archaeological research. For this reason, some commentators have argued that this permit does not shift the right to excavate from the Ministry to someone else, but it transfers only the opportunity to exercise a function, while the Ministry continues to hold the right (Alibrandi, Ferri 1995, p. 548).

The Ministry can give its consent to leave all or part of the artefacts found to the Regions or other territorial bodies with the aim of exhibiting them, once it has been ensured that they have a site suitable for their conservation.

Finally, according to article 92, the Ministry gives a reward corresponding to one fourth of the value of the things found to the landowner and the beneficiary of the excavation permit[16], but only if archaeological activity and/or the protection of culture is not included in its institutional or statutory aims[17]. The reward can be paid by money, by tax credit or by part of the things found, even though in the daily ministerial practice this last option is discarded (Malnati *et al.* 2015). This is not a purchase or a compensation: it's only an incentive for finders and landowners to "do the right thing" and give all the artefacts to the State. As there's no

[13] Breaching the conditions is a criminal offence. Article 175.1.a) states that whoever does archaeological research without permit or breaches the conditions of the permit can be punished with detention up to one year and with a 310-3,099 euro penalty.

[14] The amount of money will be decided by the Ministry. If the beneficiary doesn't agree with the amount, this will be decided by a third part nominated by the Court, however the expenses for the third part are anticipated by the beneficiary.

[15] This article was probably never been applied until now (Ardovino 2013, p. 294).

[16] The reward is also given to the occasional finders who reported their finds and behaved according to article 90 (see footnote 12).

[17] A recent judgement (Consiglio di Stato, sez. VI, n. 2302/2015) stated that civic councils are not entitled to the reward, since it is not a compensation but an incentive to "do the right thing". The civic councils can not avoid to "do the right thing" as protecting culture is a statutory duty, following the Constitution and other articles in the Code.

(clean) market for archaeological antiquities in Italy to calculate the value, the amount of the reward is determined by the Ministry. If the beneficiaries do not agree with the amount, it will be decided by a third part chosen by agreement between the Ministry and the beneficiary. If they do not agree on the third part, then it will chosen by the court (art. 93.3 of the Code).

The Ministry holds therefore a central role at any stage: it decides whether to grant someone else the right to carry out archaeological research, it applies the conditions which can also change in progress, it can revoke the permit already granted, it decides whether the artefacts are given to other public bodies or not, if a certain site is suitable for exposing the artefacts or not, whether to give a reward[18] and, if so, how much it will be.

It goes without saying that this imbalance between the Ministry and the beneficiaries of the excavation permits (mostly Universities) causes discontent and animosity, and is often subject to critiques.

C.P.S.

2.2. Commercial archaeology

In order to safeguard archaeological remains, the *Soprintendenza* can stop works threatening archaeological remains, both in public and private works (art. 28.4 and 28.2 of the Code).

However, for public works also the Code of Public Contracts applies (D.Lgs. 50/2016), whose article 25 is devoted to "preventive archaeology"[19] (as it is called in Italy). The procedure for preventive archaeology includes different stages:

- A report with an evaluation of the archaeological risk assessment, based on archival research, field surveys, previous archaeological works, aerial photographs, etc. This can only be written by "qualified" people, i.e. PhDs in archaeology or "specialised" archaeologists[20].
- If the *Soprintendenza* thinks that the work will likely affect archaeology, it can ask for coring, geophysical surveys, field surveys and excavations.
- The final archaeological report is then approved by the *Soprintendenza*, which can also apply conditions to the work, to ensure the conservation of the remains (*in situ* or somewhere else).

[18] Even though the law says «The Ministry *gives* a reward…» (my emphasis), the court interpreted it by stating that the Ministry has the discretional power of "*an debeatur*" ("if" granting the reward or not) (TAR Lazio II n. 1965/2000).

[19] The Code of Public Contracts has been approved in 2016. However, a similar article was part of the previous version of the same decree, no. 163/2006.

[20] This title refers to the two-year course *Scuola di specializzazione* ("Specialisation school"), an Italian level of education to be completed after the MA.

Agreements between the *Soprintendenze* and the civil servants responsible for the works can decide the means of publication and communication of the result, also for the general public.

Similar conditions can apply to private works if required by the city councils within the urban planning system. However there's a lack of standardised legislation at the national level (Guermandi 2016).

This is not the place to examine further the characteristics of preventive / commercial archaeology in Italy and its problems, as this is already discussed by other authors (e.g. Guermandi, Rossenbach 2013; Güll 2015; Knobloch 2019). For the purpose of this paper, however, it is important to note that obviously no "concession" is needed for archaeological excavations in commercial archaeology, since the scientific directors of the excavations are civil servants of the *Soprintendenza*. The workers in the excavation can be hired by an archaeological company or by the builder. Following the principle of the "developer pays", the archaeological companies will be paid by the builder. In this case, however, since the scientific directors are civil servants, the knowledge coming from the excavations is owned by the Ministry, which retains a sort of copyright. No formal law recognises the right of the excavators to publish the results of the excavation, even though the personal relationships between the civil servants and the excavators often result in collaboration in the publications. Again, the excavators are not peers in the research by law, but subordinates.

3. The excavation / archaeological research permit: a synthesis

The excavation permit has a long history. The "Nasi law" introduced it in 1902. «Whoever» wanted to carry out an archaeological excavation («in search of antiquities», as article 14 states) had to ask the Ministry of Education (at that time in charge of Cultural Heritage) for a permit to do it. The aim of this request was permitting the Ministry to send its civil servants to monitor the excavation and survey it. As archaeology as a profession was yet to be formalised, this measure was arguably introduced to assure quality standards of the archaeological excavations. Searching for antiquities could in fact be a lucrative activity, as only one fourth of the things found were due to the State[21]. This could be seen almost as compensation for the investment of the researcher. In fact, the ratio was reversed (one fourth of the things found were due to the

[21] Except for foreign citizens and institutes, that had to donate all the antiquities found to one of the national collections (article 14).

landowner and the rest to the State) if the State itself wanted to excavate «for scientific purposes» on private land (article 16). In that case, the private owner was also entitled to compensation. Compared to the current system, this law witnesses a first tentative balance between private and public interest (Giulio Volpe 2013, pp. 72-78). However, the primary aim of this and the following laws was defining the property of the things found, by discriminating between treasures and archaeological finds (defined by the intention of the excavator). The treasures were in fact due to the landowner who possibly shared it with the finder[22].

Only a few years later, the "Rosadi-Rava" law (364/1909) modified the rules. «The Government» could excavate «for archaeological purposes», if the Ministry of Education reckoned it necessary. However, the Ministry of Education could give "licence" to excavate to public and private bodies and people, but they had to be monitored by the civil servants of the Ministry and to meet the conditions set by the Ministry «in the interest of science». The things found were owned by the State, except for half of the things found (or their equivalent value) left to the beneficiary of the licence. This could also be seen as a sort of compensation for the investment of the beneficiary, since the rule stated that only one fourth of the things found were due to the landowner if the Government decided to carry out an excavation on private land. This law also introduces the chance for the Government to revoke the licence, whenever it wants to substitute itself for the beneficiary.

A general reform of cultural heritage law took place with the "Bottai law" (1089/1939) which introduced some new measures regarding the excavation permit. Article 43 stated that the Ministry of Education could carry out archaeological research and «works aimed at finding things», but could also let public and private bodies and people excavate, under the release of the "concession" (article 45; the landowner instead needed an "authorisation", article 47). The beneficiary of the "concession" had to meet the conditions applied to the concession, as well as «all the other conditions that the public administration intends to apply». Again, the Ministry could revoke the concession if the beneficiary breached the conditions or if the Ministry wanted to substitute himself to the beneficiary, reimbursing him/her the expenses. Article 46 affirmed the State ownership of the things found, but both to the landowner and the beneficiary of the concession was due one fourth of the things found or the

[22] The 1865 Civil Code stated that the treasures are due to the landowner, who shares it with the finder if he/she found it by chance (Ardovino 2013, p. 292). A similar article is in the 1942 Civil Code, which however specifies that cultural heritage is subject to a cultural heritage law (art. 839 of the Civil Code), that states the public property of the things found (art. 822.2 and 826.2 of the Civil Code). See also footnote 12.

equivalent value. However at that time no "archaeological research" other than the excavations existed.

In the end of the 1990s the Italian State wanted to empower the Regions as a consequence both of requests by the Regions and of a general thrust towards decentralisation as a mean to improve State efficiency, and this ended up in 2001 with the Constitutional reform cited in paragraph 1. Before the reform however, in 1998, a decree – within the so-called "Bassanini reform" – tried to redistribute powers between the State and the Regions. Notwithstanding the powerful wind of change, the decree stated that concessions and authorisations for archaeological purposes were in the competences of the "State" (article 149.3.d).

The Bottai law remained valid almost until the new Millennium, even though several scholars and practitioners criticised it (Giannini 1962; *Per la salvezza dei beni culturali in Italia* 1967, I, p. 181; Merusi 1975, p. 443; Brogiolo 1997; De Caro 2008). Only in 1997 the Parliament delegated the Government to gather in a single text all the previous laws for cultural heritage (L. 352/1997), imposing however as a condition to apply minimal modifications aimed at coordinating the laws and simplifying the procedures. The result of this reorganisation was Decree 490/1999, whose article 85 stated that «the State» was entitled to carry out archaeological research. This was a significant opening, as the State means not only the Ministry of Cultural Heritage. However a proposal, not implemented, from the National Council for Cultural and Environmental Heritage suggested to add that the excavations should be carried out in the framework of research plans done by the *Soprintendenze* or the Universities (Marzuoli 2000, p. 290).

In the 1999 decree, rules equal to the Bottai law applied for the release of the concession.

Although the reorganisation was useful, only five years later, after the constitutional reform it was necessary to write a new law, the Code, to introduce new measures. However, the conditions applied by the "delegation law" (L. 137/2002, art. 10) limited severely the opportunities for significant changes. The Code, first published in 2004, again assigned the power of carrying out archaeological research only to the Ministry (Lubrano 2012). This is in line with the principles stated in the press release on 22 November 2002, which announced the opening works of the Trotta Committee, in charge of revising the legislation. One of the pillars of the law-to-be was in fact redistributing the functions between the central State and the Regions, keeping however "protection" firmly in the hands of the central State. Furthermore, the Committee was formed only by experts in cultural heritage legislation. A look at the

drafts of the Code[23] reveals an initial adherence to the 1999 decree[24], with the specification of the reservation to the State to carry out archaeological research also on the seabed within 12 miles from the coast. However, the final draft submitted to the Parliament and the Regions mentioned the Ministry as entitled to carry out archaeological research. The reading of the minutes of the parliamentary meetings related to the approval of the Code shows concern about the lack of involvement of all the stakeholders[25].

It is worth noting some elements emerging from this synthesis. (1) Since its beginning, the legislation about the excavation permit has hardly ever changed. What has substantially changed is instead the archaeological context, both scientific and professional. The initial aim of the excavation permit was regulating the excavations of foreign research institutes and, above all, the property of the finds, i.e. distinguishing treasure hunting from archaeological research (Marzuoli 2000, p. 286; Ardovino 2013, pp. 291-292). Treasures (valuable things without owners found by chance) belong to the landowner who shares them with the finder[26], instead archaeological remains belong to the State because of their public interest. Today the situation has completely changed. If at the beginning of the 20th century the reservation to the Ministry was arguably justified by the lack of professional knowledge outside the public administration and by the necessity of guaranteeing quality management, this is not valid anymore since the majority of archaeologists works outside the public administration. And furthermore, it is not so easy to distinguish today, with the expansion of the concept of archaeology, "treasures" from "archaeological finds". How can ordinary people distinguish them? Do metal detectorists have to require an excavation permit? Metal detecting is formally legal in Italy as long as the finder reports the discovery of archaeological finds, and it does not require a concession[27]. But isn't it an activity aimed at "finding things"? With the expansion of the concept of archaeology up to the contemporary period, how can we distinguish activities aimed at "finding treasures" from those aimed at "finding archaeological heritage"? (2) Carrying out archaeological research (i.e. excavation) has always been a heavily centralised activity, culminating in

[23] These are available in a non-official website: http://www.patrimoniosos.it/rsol.php?op=getsection&id=12 (last accessed 26/12/2018).

[24] http://www.patrimoniosos.it/rsol.php?op=getartcod&id=2 (last accessed 26/12/2018).

[25] VII Senate Committee (Education and Culture), Meeting minutes, 13 and 14 January 2004. Similar considerations – and particularly the lack of the consultation with Universities – were done in the process of writing the 1999 decree (Marzuoli 2000, pp. 288-289).

[26] Art. 932 of the Civil Code.

[27] It requires however a sort of "licence" released by the Regions (e.g. Veneto, Lombardy).

2004 with the Code. The 1999 decree, which reserved archaeological research to «the State», was probably more in line with the Constitution. A chance to include Universities in the research plan was unfortunately set aside, even though this would have required more coordination between the different public bodies[28]. (3) Rules related to the reward for the finds have been progressively restricted since the beginning of the 20th century. Initially set to the value of three quarters of the value of the things found, it ended up with nothing due to the beneficiary if the beneficiary carries out archaeological excavations as part of his/her/its statutory duty. This could be probably explained by the refusal of the Ministry to pay the reward by ceding part of the "things" found (Malnati *et al.* 2015) and the following need to pay for it with the ministerial funding, progressively cut through the years.

F.B.

4. How does it work? Issuing the permit and the limits to public participation

In practice, the administrative procedures for issuing the permit start with the peripheral bodies. The applicant submits his/her request to the local *Soprintendenza*. The civil servants write a report to the central General Directorate for Archaeology, Arts and Landscape, and in the process of examining the application they can require other documents. The final decision is taken by the General Directorate, which finally decides whether issuing the permit[29]. In order to ensure a unified approach to all the applications, the General Directorate issues almost annually the guidelines to evaluate the applications and instruct the civil servants on how to write the report for the General Directorate. These guidelines take the form of circulars.

Since 2012 these circulars have introduced significant changes and added burdens to public participation in archaeology, jeopardising the participation of the local communities in archaeological research (Brogiolo 2018).

Circular no. 24 issued on 4 December 2012 highlights the financial problems of the Ministry. Firstly, the Circular recalls previous rules: even though the Code states that the Ministry can order the temporary occupation of private land on behalf of the beneficiary of the concession, previous circulars obliged the beneficiary to pay for the compensation.

[28] For a recent agreement between the MiBAC and the Ministry of Education see paragraph 7.

[29] This procedure has been applied since 2016, when the organisational structure of the Ministry was reformed (D.M. 23 January 2016). Before that time the permits were issued by the General Directorate for Archaeology.

Secondly, the circular says that, notwithstanding this obligation which saved ministerial funding, the Ministry could not afford to pay the reward for the finds to the landowners anymore. Indeed, the Director General stated that the Ministry accumulated a significant debt (Malnati 2013, p. 285; Giuliano Volpe 2013, p. 301). Since the reward is due by law, the Director General decided to deny any application for excavations on private land to be carried out in 2013. This triggered huge protests especially from Universities (see Brogiolo 2013), which led the Director General to rectify the circular. As a result, circular no. 8 issued on 14 March 2013 stated that in order to obtain the concession, the landowner and the beneficiary of the concession have to formally renounce the reward for the finds. However, circular 24/2012 also highlights some faults of the beneficiaries: it recalls the necessity to include in the plan a sum for filling the excavation in, and to deliver only clean and restored artefacts to the local *Soprintendenza*. It is evident in fact that the beneficiary, in exercising a right granted by a special permit, has to behave irreproachably. Finally, the duration of the excavation permit is three years, in order to let the *Soprintendenza* verify its research and economic plan, and the Director of the excavation can not apply for more than three permits per year. This measure, which also limits the freedom of research, highlights once again the difficult relationships between Universities (most of the applicants) and the Ministry: on one side the faults of the beneficiaries in carrying out an excavation in an exemplary way, on the other the difficulty of the Ministry of imposing the necessary conditions and sanctions. However, it would have been good to make the data related to the excavation permits public[30]: how many permits were issued? How many of these excavations were left unfilled or badly filled? How many sanctions were applied?

Following this circular, one of the most frequent critiques from both the major sides involved (Ministry and Universities) was the lack of joint strategic programming of the research (Ardovino 2013, pp. 297-298; Volpe 2013). That's why a new circular, no. 18 issued on 19 September 2013, asked the *Soprintendenze* to take an active role in the research, by designing research programmes related to their territory to serve as support to the statutory protection. Regarding the content, the circular says that «The project can also include studies [...], enhancement projects of archaeological areas and monuments, exhibitions and museum setting. These projects will be designed by the *Soprintendenze* hopefully with the possible support of scholars of the related stakeholders». The

[30] As we will see, the Ministry has only recently made available some information through the Central Institute for Archaeology (see paragraph 6).

research projects, approved by the Directorate General, should then be published on the website of the Directorate. The Circular specifies that the projects should include all the excavation permits. However, the lack of strategic programming can not be fulfilled by the Ministry only, but should require the compulsory, rather than voluntary, involvement of other stakeholders. It would also require careful stakeholder mapping to be made public to let other interested stakeholders join, prior to the design of the research. Moreover, these "research programmes" have not yet been published and it would be reasonable to wonder whether they really exist, as most of the work carried out by the *Soprintendenza* is at present necessarily reactive, and not proactive, due to a lack of financial and staff resources.

Rules remained unchanged in 2014, until circular no. 3 issued on 9 February 2015. The circular tackles the issue of programming, however it does so by further centralising the powers of the *Soprintendenza*. It asks the *Soprintendenza* to evaluate if «the activity proposed by the applicants […] meets […] the necessity of safeguarding archaeological heritage and is […] fully coherent with the research programmes designed or launched by the *Soprintendenze*. We therefore ask the *Soprintendenze* […] to clearly highlight [i.e. evaluate] the usefulness [of excavations and researches], pointing out the value and importance of these excavations within the general research programme of the *Soprintendenze* and to evaluate their impact on the management of the territory, above all related to the conservation problems of the remains […] and the artefacts». However, if the research is free and this right is protected by the Constitution, the applications should not be subject to an evaluation of *usefulness* and *importance* to the Ministerial programming. If this criterion can be valid for the research excavations carried out by the *Soprintendenza* itself, it can not be valid for deciding whether granting an excavation permit or not. This also can constitute an obstacle to designing independent research projects that meet the social needs of the local communities, or are built together with or by the local communities. The last part of the sentence shows instead the faults of the beneficiary of the concessions (and/or the failure of the Ministry to apply the sanctions for breaching the concession and/or to apply the necessary conditions to the permit): restoration / conservation works undone, backfilling done badly (causing safety hazards), incomplete documentation delivered to the *Soprintendenza*. The circular then recalls that the Ministry can not afford the payment of the reward for the finds, so either the landowners renounce the money, or the beneficiaries of the concessions have to pay for it out of their own pocket. Finally, it recalls that every applicant can ask for no more than three concessions a year.

On 29 April 2015, Italy ratified the Valletta Convention (L. 57/2015) after the persistent lobbying activity of professional associations. By the time of the ratification, Italy had already in place, as we've seen, laws related to preventive archaeology, one of the main aims of the Convention. However, following this ratification other burdens to public participation were added to the process of issuing the permit. Circular no. 6 issued on 15 February 2016 considers article 3 of the Valletta Convention and its consequences in the Italian context. Since art. 3(1) says that «[each Party undertakes] to apply procedures for the authorisation and supervision of excavation and other archaeological activities», the circular underlines that it is necessary to ask for a permit and it excludes any other different agreement which comprises excavations between the *Soprintendenze* and other stakeholders. These agreements, previously encouraged by the decree (DPR) 441/ 2000 then abrogated, should however be legal under the law 241/1990 concerning the administrative process. Article 11 and 15 of this law states in fact that public administrations can arrange agreements with private and public bodies to carry out activities of common interest. We could also argue that agreements should be encouraged in the context of better research programming by the *Soprintendenze*, fostered only a couple of years before. Applications for concessions are in fact characterised by the fact that they come from a unilateral initiative, instead agreements could include different stakeholders. Moreover, the structure put in place by agreements, where usually civil servants cooperate with the applicants as scientific directors, recalls what happens in preventive archaeology. In preventive archaeology there's no need to ask for the permit, as civil servants are scientific directors.

The circular recalls again the duty for the beneficiary of the permit to deliver to the *Soprintendenza* the excavation reports and to conserve the remains and artefacts found, as stated by art. 3(1)(b) of the Valletta Convention. It also recalls, as usual, the need to obtain from the landowner the renouncement of the entitlement to any reward for the finds[31].

Another significant change was introduced by this circular. The Director General interpreted art. 3(2) of the Valletta Convention («[each Party undertakes] to ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially autho-

[31] The following "Operational explanations" released with a communication dated 27 February 2015 (prot. 905) from the Director General to the *Soprintendenze* extend the need to have a signed declaration of renounce to the reward also by the director of the excavation and the other workers (except for the students).

rised persons») as a duty to exclude amateurs from the excavations. To be fair, the Explanatory Report of the Valletta Convention recognises the importance of amateurs in the development of archaeological research and it specifies that this article should not forbid the participation of the public but should instead imply the participation of archaeologists to monitor the excavation (Council of Europe 1992, p. 5). But the Explanatory Reports do not give authoritative interpretations of the Conventions, so the text of the Conventions remains somewhat open to national interpretations. And the Italian General Directorate interpreted it restrictively, burdening significantly public participation in archaeological excavation. The circular allows amateur participation only in support activities. Archaeological excavation is instead reserved to «archaeologists with a degree or university students in archaeology and related disciplines». Both the categories are unclear. What degree, apart from "archaeology", does someone need to have to be considered an archaeologist? For example, are Geology and History included? And what are the "related disciplines" of the latter category? Potentially almost everyone, with the expansion of the concept of archaeology. Moreover, it is worth noting that the same criterion does not apply to excavations in commercial archaeology, where civil servants are the scientific directors of the excavation.

In relation to the exclusion of amateurs, the circular also states that the fees of the "summer schools" / excavations with paying participants should only be used to cover board, lodging, insurance and other expenses. Fees can not be a profit for the beneficiary, as «archaeological excavation is an activity aimed at increasing knowledge» (but the law states «aimed at finding things»).

Following article 3(3) of the Valletta Convention («[each Party undertakes] to subject to specific prior authorisation, whenever foreseen by the domestic law of the State, […] any other detection equipment or process for archaeological investigation»), the circular also states that field surveys and other non-invasive research has to be authorised. However, this measure can not be enforced: since the law does not require it, a missing authorisation can not be sanctioned.

Most of these requirements were confirmed by circular no. 21 issued on 25 October 2016, for the excavation permits to be released in 2017. Especially, regarding the role of volunteers and amateurs (limited to support activities), it states that only «graduates and undergraduates in archaeology and related disciplines, such as […] physical anthropology, geology, geoarchaeology, archaeozoology, palaeobotany» can participate to the excavation, but this sentence is still somewhat vague.

Between 2018 and 2019, the General Directorate designed an online form for the applications[32] and released on 18 January 2019 another Circular (no. 4) with new, even stricter, guidelines (already discussed by Brogiolo 2019). In particular, a significant new item regards non invasive research, that now explicitly needs a permit (a concession) to be carried out. Drawing from an extensive interpretation of the formula "archaeological research", it affirms in fact the need of a "concession" also for non-invasive research. However, as we have already highlighted, this interpretation of articles 88 and 89 of the Code clashes heavily with article 33 of the Constitution (about the freedom of research)[33] (see paragraph 2.1 and 3). It limits a fundamental freedom without any good reason to do so, since there's no physical contact with archaeological heritage. Even though this measure maybe can be explained by the need to limit the reward for the finds, arguably stopping non-invasive research is not aimed at "protecting archaeology". If anything, the very contrary is true: if we do not know where archaeological heritage is, how can we protect it? And since the Ministry has no sufficient staff and resources to do extensive research on all the Italian territory, it needs the collaboration of other stakeholders.

It is worth noting that, with a later circulars aimed at clarifying some concepts (n. 7 issued on 21 January 2019), the General Directorate tried to partially revise and attenuate the all-comprehensive interpretation of "archaeological researches" (i.e. which includes all non-invasive research methods). It split in fact the remote sensing research and geophysics, subject to concession, from the field surveys, which should be authorised by the *Soprintendenza*. However it must be underlined that the power of releasing this authorisation does not seem to be legitimated by the primary law (i.e. the Code). As if to say: either field surveys are "archaeological research" and then they should be reserved to the State (with compatibility issues with the Constitution, as we have said), or otherwise they must be free.

Even practically the strict implementation of this measure (i.e. a permit for every single research within Italian territory) would add significant bureaucratic work and this is in contrast with what is declared in the beginning of the circular, i.e. that it meets the need to ensure a better efficiency and quickness of the procedures[34]. With mention of the other

[32] Circular no. 37 issued on 19 September 2018.

[33] Doubts raise about the compatibility with the Constitution when we note that the Circular, following the previous ones (since 2015), states that when assessing the "research proposal", the *Soprintendenza* has to verify (among other things) if the archaeological research of the applicant is «coherent with the research programmes developed or launched by the *Soprintendenza*».

[34] The Circular also list between its aims the "de-materialisation" of documents of the procedure. This aim was met through the use of digital documents made available by the Ministry at the webpage

rules (participation of amateurs, use of the summer schools, etc.), it strongly confirms the previous circulars. It adds, however, that civil servants have to specify in their report to the Director General, how the excavation will impact on the *Soprintendenza* (i.e. economically or organisationally), where the finds will be stored[35] and any fault (e.g. delivery of incomplete documentation or of dirty artefacts, backfilling done badly) of the beneficiary body (not the Director of the excavation!) in the past also in other parts of Italian territory[36].

Finally, also from a strictly legal-administrative point of view, some of the statements of the circulars nn. 4 and 7/2019 raise doubts. For example (even though this is not the place to delve into this topic), contrarily to what is affirmed in circular n. 4/2019 (p. 3), the concession could be replaced by an agreement between the State and the (public or private) body that wants to carry out the archaeological research. This is in fact stated by the law 241/1990, which regulates the administrative procedure. This same law also states that if the public administrations (in this case the *Soprintendenze*) receive incomplete applications they should ask the applicant to provide the missing documents (L. 241/1990, art. 6.b). Instead the circular affirms that incomplete applications should be rejected.

It is also worth noting that the number of the documents the applicants must deliver has grown exponentially: in 2013 the documents were nine[37], in 2019 eighteen[38]. This clearly adds bureaucratic work from both sides.

http://www.ic_archeo.beniculturali.it/it/240/istruzioni-e-modulistica-per-i-richiedenti-la-concessione [last accessed 08/04/2019]. The circular also forbids again any agreement between *Soprintendenze* and other bodies for excavations and also for non-invasive research, stating that it is only in the General Directorate's competence to allow these researches.

35 Even though it is almost impossible to estimate how many finds will be found.

36 This will require an intense bureaucratic work, which also could involve a coordination by all the *Soprintendenze*.

37 Economic plan, [report of the previous year's excavation], project design, [declaration of delivery to the local *Soprintendenza* of the list of the finds], [declaration related to the procedure of payment of the compensation for temporary occupation], excavation plan, cv of the director of the excavation, signed renounce to the reward of the landowner, declaration of publication of a synthetic report on Fastionline.it with a printed copy.

38 Application with the name of the excavation director and the list of all the excavators involved, economic plan (with the guarantee – if necessary by surety – that the Ministry will not be responsible of any injurious event occurred during excavation), project design, cadastral map of the area, georeferenced plan of the excavation, cv of the director of the excavation, organisational chart of the staff involved, renounce to the reward signed by the applicant body, renounce to the reward signed by the director of the excavation with ID document, renounce to the reward signed by the excavators involved with ID documents, renounce to the reward signed by the landowner or declaration of payment by the beneficiary, [declaration related to the procedure of payment of the compensation for temporary occupation], declaration of insurance of all excavators involved and copy of insurance papers, [general excavation plan], [detailed excavation maps], [4-8 photographs of previous excavation], [declaration of delivery to the local *Soprintendenza* of the scientific report, the list of finds].

Circular	n. 24, 2012	n. 8, 2013	n. 3, 2015	n. 6, 2016	n. 21, 2016	n. 4,7, 2019
Forbids excavations on private land	X					
Concessions for no more than 3 years & no more than 3 excavations for every Director	X		X	X	X	X
Mandatory backfill of the excavation and preliminary restoration of the artefacts	X		X	X	X	X
Landowners have to voluntarily renounce the reward or beneficiaries have to pay for it		X	X	X	X	X
Excavations have to be coherent with the research programme of the *Soprintendenze*			X	X	X	X
Evaluation of the risks for future conservation			X	X	X	X
No amateurs				X	Partly	X
No summer schools (especially no profit!)				X	Partly	X
No public contracts between *Soprintendenze* and excavators				X	X	X
Surveys have to be authorized				X	X	X
Remote sensing needs a permit						X
Documents to deliver	9	-	5	14	14	18

Tab. 1. Summary of the measures listed in the Circulars from 2012 to 2019.

Taken together, these rules limit significantly public participation in archaeological research subject to a permit. The legislation, originally aimed at regulating the property of the things found and the reward for the finds, was not designed to take into account the research interest of other bodies than the Ministry. In this context, the Valletta Convention was interpreted strictly, in evident contrast with what happens in other countries, particularly in Northern Europe, such as the United Kingdom and Sweden[39]. The ratification of the Valletta Convention, wanted by professionals, did not introduce significant changes in commercial archaeology, but was used to restrict non-professionals access to research archaeology. And professional archaeologists have no inter-

[39] See also in this volume Karl, Möller and Rizner for other interpretations and implementations of the Valletta Convention in Austria, Germany and Croatia.

est in filling possible vacancies left empty by amateurs, since these projects are obviously funded significantly less than commercial archaeology.

What seems to emerge by reading these circulars between the lines is a conflict between the Ministry and the Universities, but the unintended casualties are the volunteers, and with them also part of the educational potential of archaeology, as well as the social benefits of community archaeology (for the benefits see Brogiolo, Chavarría in this volume). This however burdens community involvement in research programmes, which are arguably the most suitable places for public participation in field of archaeology. The circulars however also highlight several faults and malpractices of the beneficiaries of the concessions, whose financial consequences were apparently undertaken by the Ministry.

We could argue that the regulatory power of the ministerial circulars is not equal to that of the primary legislation (the Code). But since the circulars instruct the administrative process aimed at issuing the permit, they can have a heavy impact on the day-to-day management of archaeology in the State context.

F.B., C.P.S.

5. A clumsy attempt of institutional support to the promotion of cultural heritage

The Code works essentially with two kinds of provisions: those which sacrifice private property for a public interest (e.g. forbid you to do something), and those which permit on an exceptional basis something that normally is not allowed (such as in the case of the excavation permit). Regarding the excavation permits, Italy has not produced until now any proactive form of institutional support. This is due to the fact that excavations are reserved for the Ministry, and the Ministry itself has the statutory duty to promote culture.

In the 2018 budget proposal, however, we see an attempt to offer institutional support by allocating funds. During the discussions on the budget law 2018 (i.e. the State budget for 2019 and the preventive budget until 2021), Hon. Lorenzo Viviani[40] proposed an amendment which was immediately refused and not even presented officially for discussion in Parliament. However, for the purpose of this paper it is worth mentioning it.

The proposal was aimed at promoting tourism and was formed of a single article with two paragraphs[41] and it was contained in the budget

[40] Member of Parliament (right wing), graduate in biological sciences with an interest in agricultural and fisheries policies.

[41] As already said, the proposal was never presented officially. The only available source of the text

as it would have allocated €1.5 m over three years to cover public administration expenses.

Here we focus on the second paragraph, which proposed that owners of farm vacation houses could ask for the excavation permit and offer their guests (i.e. tourists) the participation, «not for profit» to some archaeological excavations in their land, under the control of the director of the excavation. This proposal was probably aimed at fostering the economic initiative of the tourist sector in archaeology, and at the same time boosting tourism by offering new and exciting "experiences", one of the trends in the tourism industry (Melotti 2008). However, the proposal had several pitfalls. It seemed to ignore the fact that the current law already gives the landowner the chance to apply for an excavation permit and it introduced an unclear discrimination: why the paragraph should apply only to the owners of the farm vacation houses? This was probably the consequence of the recent transfer of the competence on tourism to the Ministry of Agriculture. Also, it ignored the current policy for issuing the permit (see above, paragraph 5), which excludes any amateur from excavations – including tourists. Most importantly, the proposal did not require any research aim. Even though the law mentions only the activity of "finding things", from a scholarly point of view we could argue that it is the knowledge associated with excavation that makes these artefact worthy of "public interest". This would also be in line with the aims of article 9 of the Constitution.

The proposal triggered the protests of the professional associations, which argued that it did not mention a role for professional archaeologists (probably other than the scientific director, otherwise the permit would certainly not be given!). They appealed to the ratification of the Valletta Convention and to article 9-bis of the Code, introduced in 2014[42], which states that all works on cultural heritage have to be undertaken by professionals «with appropriate training and experience». However, the law does not specify what "appropriate training and experience" means. This was intended to be the subject of a decree due in late 2014 or early 2015, which is now under Parliamentary discussion.

is the online journal AgCult at https://agcult.it/2018/11/19/manovra-emendamento-lega-ospiti-di-agriturismo-potranno-partecipare-a-scavi-archeologici/ (last accessed 03/01/2019). The first paragraph highlighted that a large proportion of Italian cultural heritage lies unused, an usual complaint in the discourse about cultural heritage policies in Italy. The proposal then encouraged «the hotels, the historic houses and wineries which offer touristic products» to arrange agreements with museums and other institutions to exhibit in their spaces some cultural items «important for the territory where the firm is located» currently catalogued but hosted in storages. This would add a patina of prestige, as it happens with the Park Hyatt Hotel in Milan, which exhibits (fake?) Greek vases in the hall (Melotti 2008, pp. 76-79). These kinds of agreement are already allowed by the Code, between public bodies (article 89), or between public and private bodies (article 106).

[42] By article 1 of the law 110/2014.

The huge protests triggered by this proposal, coming also from the Ministry itself, prevented it from being presented officially.

6. Is it really a matter of concern? The importance of evidence-based policy making

As we have seen above, the circulars significantly inhibit public participation in archaeological excavations. But is it worth restricting public participation in archaeology to avoid inadvertent damage by amateurs? What is the extent of the problems of quality management associated with the participation of amateurs in excavations in Italy? And what is the impact of excavations carried out under the excavation permits?

Hard data to answer these questions is not easy to find. Unfortunately, it is impossible to find data about inadvertent damage to archaeological heritage in excavations, both carried out by amateurs and by professionals. However, it is worth trying to understand the impact of excavations carried out by excavation permits. In 2011-2012, before the circulars cited above, there were between 400 and 500 excavations under permit and some 7,000 excavations in commercial archaeology[43] (Malnati 2011, p. 8; Malnati 2013, p. 287). No detailed figures were made public at that time.

Today, some data about excavation permits is made available by the Central Institute for Archaeology (ICA), a ministerial office of the General Directorate for Archaeology, Art and Landscape founded in 2016 and whose functions were defined in 2017[44]. In 2018, 384 excavations permits were issued, 7 applications were denied. Most of them were issued to Universities and other research institutes (77%) (fig. 1). It is impossible to know how many commercial archaeology excavations were carried out in 2018, but arguably the figure is still between 6,000-7,000[45]. Also, it would be important to consider the surface area explored by excavation. Most of the excavations under excavation permits are small-scale, since the economic resources are limited. In commercial archaeology instead, beside some small-scale excavations, there are also a number or large-scale excavations. Unfortunately, the published data

[43] This number is an underestimation as it does not include Sicily, Val d'Aosta and Trentino Alto Adige, which have regional and independent *Soprintendenze*.

[44] Foundation by Ministerial Decree 245/2016; organisation and function by Ministerial Decree 169/2017.

[45] Although point 6.1 of Circular no. 1 issued on 20 January 2016 requires the *Soprintendenze* to send the General Directorate three times a year a report which include, between other information, the number of the commercial archaeology excavations in their territory, these numbers are not publicly available.

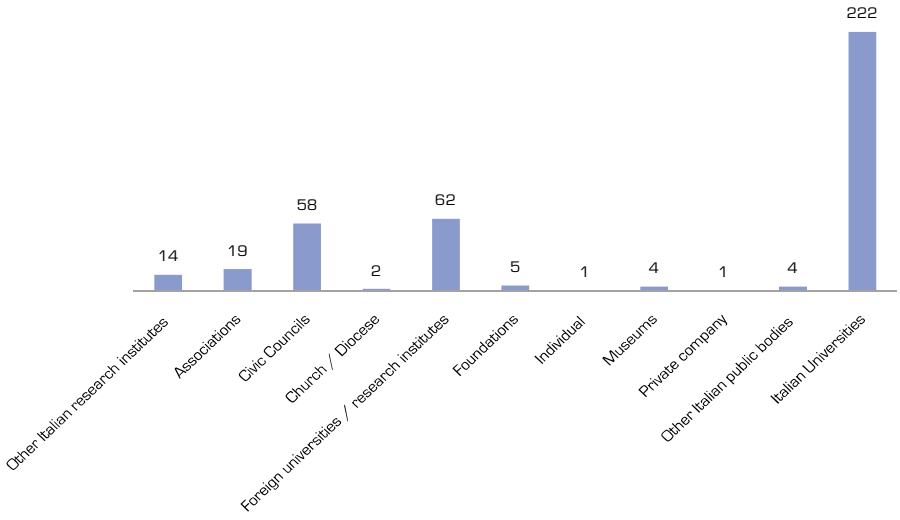

Fig. 1. Applicants for excavation permits in 2018 (source: ICA).

about excavation permits does not show the surface explored[46], since they make public: location, site and (sometimes) rough chronology, applicant, excavation director, excavation starting year, duration of the permit (from 1 to 3 years), civil servant in charge of the application, entry protocol and authorisation number, country of the applicant, property of the land. Some two thirds of the excavations are now on private land (fig. 2), but we can not know if the number of excavation on private land decreased after the requirement to renounce the reward for the finds.

It is worth remembering that the exclusion of "non-professionals" is valid only for research under permit. In commercial archaeology, although article 9-bis of the Code states that works on cultural heritage have to be carried out by professionals, the legal definition of "professionals" in archaeology[47] is still under discussion. In order to work on a construction site, the worker has to attend some training courses about health and safety, to pass a medical examination and to take out insurance. Again, data is missing about the number of archaeologists (at least defined like those trained in archaeology) involved in commercial archaeology, compared to other kinds of workers involved in archaeological excavations (e.g. construction workers or "experienced" archaeologists). However

[46] Data available at http://www.ic_archeo.beniculturali.it/it/218/concessioni-2019 (last accessed 05/01/2019).

[47] Apart for those in charge of the initial report in preventive archaeology, see above paragraph 2.

not all of them have graduated or are studying archaeology, as the Circulars currently require for obtaining the excavation permits. The circulars therefore create an imbalance between research and commercial archaeology, with different rules applied to different people.

The Circulars restrict public participation in order to prevent potential damage to archaeology when this kind of excavation is less than one tenth of the number of all the excavations in Italy (and probably the percentage is even less if we consider the surface area explored). Also, in terms of excavations under permit, the responsibility of the quality of the excavation lies with the Director. The civil servants of the *Soprintendenze* monitor the excavation and the delivery of the reports to guarantee a standardised minimum quality level and if the beneficiaries breach the conditions they can be sanctioned. So the potential "inadvertent damage" provoked by under-skilled excavators is very limited.

If excavations can cause "potential damage", we should be worried about the majority of excavations in commercial archaeology, which would require more clear rules (advocated also by Guermandi 2016).

We could argue that excluding volunteers and local communities from excavations under permit, considering that they pay for them in many cases through public funding, is a social damage. It is important then to monitor more effectively the extent of the issues and to build more accurate policies in archaeology.

7. Conclusion

The Italian cultural heritage legislation was born by "sedimentation", from its layout dating back to the end of the 1930s to some (few, in

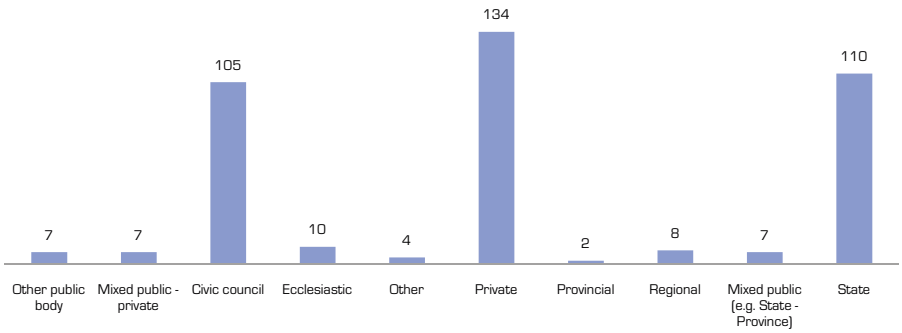

Fig. 2. Property type of the land excavated with excavation permits in 2018 (source: ICA).

	Positive	Negative
Law	Constitution Ratification of Faro Convention	Code, art. 88, 89 (reservation to the Ministry only) Code, art. 9-bis, interpreted strictly Valletta Convention, art. 3, interpreted strictly
Para-law		Circulars regulating the release of excavation permits from 2015 onwards

Tab. 2. Positive and negative elements for public participation in Italian legislation related to excavation permits.

the case of archaeological heritage management) recent additions. The legislation related to the excavations permits is aimed at defining the property of the finds and restricting some rights because of public interest in the archaeological heritage. However, often this legislation does not take into account the development of the concept of archaeology itself and of the professional and scholarly context. For example, it does not take into account the scientific interest of the universities in carrying out an excavation aimed at the development of the scientific research.

We could summarise positive and negative elements for public participation in Italian legislation related to excavation permits as in tab. 2.

Between the positive elements, the Constitution is in first place as it protects both cultural heritage (article 9) and the freedom of research (article 33). Article 9 also includes a social dimension of cultural heritage, which is the source of its public interest. The aim of protecting cultural heritage is not for the sake of protection, but for the development of the citizens[48] (see above).

The ratification of the Faro Convention[49] could also be a positive element in Italian legislation[50]. This Convention states that communities have a responsibility to heritage and can benefit from it. A collective effort is therefore needed to define, research and manage it (Fairclough 2009; Vícha 2014).

[48] Indeed until 1975 the Ministry in charge for cultural heritage was the Ministry of Education.

[49] See above, note n. 6.

[50] However the ratification of the Faro Convention is unlikely to imply massive legislative changes. According to some interpretation, the Italian law would already comply with the Convention (Sciacchitano 2011; Carpentieri 2017).

Possibly, an interpretation of article 3 of the Valletta Convention similar to the one proposed in the Explanatory Notes to the Convention itself could also be a positive element for public participation in Italian law.

The negative elements are related to the law. In particular, article 3 of the Valletta Convention and article 9-bis of the Code have been recently interpreted as a tool to ban fieldwork by non-professionals. This breaches their right to engage with independent research, but the ratification of an international convention can not be interpreted against the Constitution. Furthermore, if it is true that any excavation risks damage to archaeological remains, then the major risk lies in preventive / commercial archaeology, the field where 95% of archaeology happens and which deserves more clear rules.

The Circulars and the reactions triggered by the circulars themselves, as well as the recently proposed law, highlight conflicts in the field of archaeology in Italy. On the one hand between Universities and the Ministry, and on the other hand between professionals and amateurs. And these conflicts have worsened with the economic crisis and the following cuts.

Reading between the lines of the Circulars we can see the faults of the beneficiaries of the excavation permits, more than 60% of which are Italian Universities and other research Institutes. Indeed, the progressive restrictions of the Circulars could be read as attempts to make lives harder for these institutions. But the casualties of this conflict lie among the citizens who, even if interested, can not participate any longer in excavations but only in "support activities".

What we are calling for is not a "free for all" approach, but a wide involvement of stakeholders in the research design, already advocated several times during the process of law-making.

If at the local level, mapping the interested stakeholders certainly requires time, at the National level an agreement between the Ministry and the University could certainly help overcoming some issues[51]. Notwithstanding an initial agreement between the MiBAC and the Ministry of Education, University and Research (MIUR) on 19 March 2015, a following agreement proposed in 2018 was never signed[52].

The provisions of the Circulars were probably born with the best intention, i.e. avoiding inadvertent damage to archaeology. But we should

[51] Some agreements aided by personal relationships between civil servants and academic professors are known, but there is no National framework in place.

[52] See the final report of the Council for Cultural Heritage http://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1528903565583_Relazione_finale_CS_presidente_GV_.pdf and the final report of the commission MiBAC-Universities https://www.cun.it/uploads/6791/Relazione_CSBCP-CUN.pdf?v= (last accessed 06/01/2019).

ask ourselves what is "in the public interest"? Is it in the public interest to restrict citizens' chances to participate in the 5% of the archaeological excavations carried out for research purposes, with a more relaxed environment than commercial archaeology, under the supervision of a skilled director? In order to better protect archaeology the State needs compliance by its citizens, as well as more staff and economic resources. Restricting more rights than what is strictly necessary risks triggering illicit behaviour and therefore further damaging archaeology.

F.B.

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