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THE RETURN OF THE *BENEV. VI 29* MISSAL TO THE CHAPTER LIBRARY OF
BENEVENTO FROM THE BRITISH LIBRARY

1. The Discovery of the vanished missal; 2. The United Kingdom Spoliation Advisory Panel; 3. The *Benev. VI 29* missal before the Panel (2005); 4. The Holocaust Act 2009; 5. The *Benev. VI 29* missal before the Panel (2010); 6. The return; 7. Some conclusive remarks.

1. The Discovery of the Vanished Missal

The 2005 report by the the United Kingdom Spoliation Advisory Panel¹ for the House of Commons describes the *Benev. VI 29* missal as follows:

“The missal was written in the early part of the 12th Century at the Scriptorium of the Monastery of Santa Sophia at Benevento, which is an ancient cathedral city some 60 kms north east of Naples. It was compiled for the nuns of the Benedictine nunnery of St. Peter Intra Muros nearby. It is a very large volume comprising 290 folios and consisting of a missal and calendar written in what is known as Beneventan script. Some of the folios include musical notations of Beneventan chant. The missal is a work of considerable importance to scholars of palaeography and of early music linked to the Benedictine order, for which Benevento was an important centre”².

The missal, which was acquired by the Chapter of Benevento in 1688, was kept in the Chapter Library under the shelf marked VI 29. On 14 September 1943, during World War II, the air bombing of Benevento by the Allied Powers destroyed the Romanesque cathedral of the city and damaged the Chapter Library. The most precious books and manuscripts were transferred in another building that, after the retreat of the German troops, was used by the Allied forces as a military hospital. The missal disappeared in this period.

In 1946 Capt. D.G. Ash of the British Army took the missal to the British Museum for an expert opinion. Capt. Ash reported that he had bought it in April 1944 from a second-hand bookseller in Naples. On 13 November 1946, after having examined the missal, the deputy keeper of manuscripts of the British Museum, Mr. Collins, wrote a letter to Capt. Ash in which he told him the importance of the property and expressed the suspicion that it might have been illegally removed:

¹ Hereinafter: the Panel.

² Spoliation Advisory Panel, *Report Concerning a Claim in Respect of a 12th Century Manuscript Now in the Possession of the British Library*, 23 March 2005, p. 1. See also Iadanza, *Il messale Benev. 29 della Biblioteca Capitolare di Benevento*, in *Conferimento della cittadinanza onoraria all'avvocato Jeremy W. LeM. Scott*, Benevento, 2011, p. 18.

“As you are doubtless aware it is an offence to possess ‘looted’ property; (...) If the manuscript is not ‘loot’ you have been fortunate enough to obtain a manuscript which, on account of its liturgical interest, an institution such as this would be happy to possess”³.

On 24 June 1947 the missal was put on auction in London by Sotheby’s. It was listed in the catalogue under the heading “the property of Capt. D G Ash” and described as follows:

“Missal of the Abbey of San Pietro, illuminated manuscript of the 12th Century, on vellum (...) probably for the Benedictine Abbey of San Pietro (no longer in existence) in Southern Italy which possessed, in the Middle Ages, a fine library. (...) While the top of some leaves are stained, the manuscript is on the whole in excellent condition throughout, and an unusually good specimen of a missal of such early date”⁴. The Panel Report did not doubt Capt. Ash’s good faith:

“He came of his own volition to the British Museum bearing the missal, and openly disclosed his name, rank and address in London (...). Thereafter he went openly to Sotheby’s, and again gave his name and rank, which were published in the sale catalogue. This is not typical of the behaviour of a thief or a culpable handler of stolen goods. Had he wished to conceal his identity he would have had no difficulty in doing so: the next entry in the sale catalogue, for example, is simply referred to as ‘Property of a Gentleman’”⁵.

The missal was bought at the auction for 420 £ by an intermediary on behalf of the British Museum and was inventoried there under the shelf mark *Eagerton 3511*.

The first public announcement of the acquisition was made in 1952 in the *British Museum Quarterly*. It was listed under the heading “manuscripts acquired during the years 1941 to 1950” and described as a late 12th century missal from the abbey of San Pietro in Benevento written in characteristic Beneventan script. Under the *British Library Act 1972*, the British Library succeeded to the British Museum in title over the missal.

Only in 1948 did the Chapter Library discover that the missal had disappeared. Four years later another volume was erroneously listed under VI 29. In 1976 Ms. Virginia Brown, professor of Latin palaeography at the Pontifical Institute of Medieval Studies of Toronto, informed the Chapter Library librarian that the item inventoried under VI 29 was a devotional book written in a much later non-Beneventan script⁶ and that the true *Benev. VI 29* missal was at the British Library in London.

³ Advisory Panel, *Report cit.*, p. 5.

⁴ *Ibidem*, p. 5.

⁵ *Ibidem*, p. 6.

⁶ Ms. Brown was the leading authority in Beneventan script. The account of the visit she made on 20 April 1976 to the Chapter Library of Benevento and of her meeting with Mons. Ferrara, the librarian, is the following: “Immediately upon entering the Library, I checked the so-called MS 29 and discovered that it was a devotional book (not a missal) written in a much later, non-Beneventan script. (...) I turned to Mons. Ferrara and said ‘Monsignore, look at the script; this codex is not in Beneventan and so could not be the MS cited by Loew. Do you know where the Beneventan manuscript now is?’ His reply was negative. I continued ‘Well I will tell you where it is; it’s now in London at the British Museum and the shelf mark is Eagerton 3511. What did you do with the manuscript? Why did it leave the Chapter Library?’ (...) It is my very clear and very vivid recollection that Mons. Ferrara was quite flustered and surprised at this turn of events. He said he knew nothing about all this and disclaimed any responsibility” (*ibidem*, p. 7). Loew is the author of the book *The Beneventan Script*, Oxford, 1914, where the missal is described as “a product of the culture’s greatest excellence and finish at its period of maturity”.

On 7 April 1978, the Archbishop of Benevento asked the British Library to return the missal. The Director General of the library replied that the return was not possible because, under English law, title over objects is prescribed six years after their loss and because the missal came within the category of objects whose alienation is precluded by law⁷.

2. The United Kingdom Spoliation Advisory Panel

The Spoliation Advisory Panel was established in 2000 by the British government as a result of the Principles with respect to Nazi-Confiscated Art, adopted by the Conference on Holocaust-Era Assets (Washington, 1998)⁸. Under its constitution and terms of reference, the mandate of the Panel, whose members are appointed by the Secretary of State, is the following:

“The task of the Panel is to consider claims from anyone (or from any one or more of his heirs), who lost possession of a cultural object (‘the object’) during the Nazi era (1933-1945), where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit (‘the institution’). The Panel should advise the claimant and the institution on what would be appropriate action to take in response to such a claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner” (Art. 3).

The Panel exercises only advisory functions. It does not have the power “to determine legal rights, for example as to title” (Art. 5, para. *a*). The Panel’s recommendations are “not intended to be legally binding on the claimant, the institution or the Secretary of State” (Art. 5, para. *c*). As its proceedings “are an alternative to litigation”, the Panel takes into account “non-legal obligations, such as the moral strength of the claimant’s case (...) and whether any moral obligation rests on the institution” (Art. 5, para. *b*).

The Panel’s purpose is “to achieve a solution which is fair and just both to the claimant and to the institution” (Art. 6). In doing so, the Panel takes into account a broad range of factors, listed in Art. 7 under twelve entries. It can, *inter alia*, accomplish the following activities:

“(...) *c*) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;

d) evaluate, on the balance of probability, the validity of the claimant’s original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;

e) give due weight to the moral strength of the claimant’s case;

f) evaluate, on the balance of probability, the validity of the institution’s title to the object;

⁷ Passages of the reply of 18 January 1979 by the Director General to the Archbishop can be read in Bailey, *Benevento Cathedral Claims Missal in British Library*, in *The Art Newspaper*, No. 105, July-August 2000, p. 5.

⁸ “Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues” (Princ. XI).

g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance; (...)"

The Panel may recommend various alternative solutions, namely:

- "a) the return of the object to the claimant, or
- b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, or
- c) an ex gratia payment to the claimant, and
- d) in the case of b) or c) above, the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and
- e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible" (Art. 8).

The Panel may also direct the attention of the Secretary of State "to the need for legislation to alter the powers and duties of any institution" (Art. 9).

3. The *Benev. VI 29 Missal* before the Panel (2005)

The Metropolitan Chapter of Benevento brought the case of the missal before the Panel in November 2002.

After having considered the parties arguments⁹, in particular the fact that the British Library opposed the restitution for a number of reasons, and having taken into account the difficulties of proof, the Panel held that

"the circumstantial evidence relied upon by the claimants is sufficiently robust to vindicate their submission, for the reasons they give, that the missal was spoliated between the time of the bombing in 1943 and the acquisition by Captain Ash in 1944. It follows that they have made good their case on the circumstances of their loss, and consequently that the case falls within our jurisdiction"¹⁰.

As regards the modalities of the acquisition, the Panel made the following remarks:

"We do not find that the British Library defence of the British Museum's conduct convincing. It is manifest from his letter that Mr Collins suspected that the missal might have been looted, and advised Captain Ash accordingly. When the missal came on the market 9 months later the potential purchase was handled not by Mr Collins, but Mr Miller, Head of Manuscripts at the British Museum; however, as already noted, Dr Wright, the current Head of Manuscripts, accepted in evidence that they must have communicated with each other.

We do not think that the terms of the Sotheby's catalogue, and in particular the identification of Captain Ash as the vendor, were sufficient justifiably to allay the previously harboured suspicion as to the missal's provenance, judged by the standard of a reasonable Head of Department in a national collection.

Doubtless the standards of the time were less rigorous than today's, but the possibility that the missal had been

⁹ The respondents' position was that there was "no evidence to support a theory that the missal was confiscated by occupying forces, or that its sale, or sale at an undervalue, was coerced, or that it disappeared in an act of pillage by troops or civilians" (Advisory Panel, *Report* cit., p. 13).

¹⁰ *Ibidem*, p. 14.

looted was so manifest that its provenance should have been further investigated. Despite the absence of identifying marks, Mr Collins had correctly pinpointed the missal's origin in Benevento, and the appropriate course would have been to direct enquiries to Benevento, or to other well-known repositories of such manuscripts such as Monte Cassino to investigate the missal's ownership prior to acquisition. This Mr Collins and Mr Miller did not do at the time, nor did their successors in 1961 even when the claimants were positively identified as the missal's original owners"¹¹.

The British Library argued before the Panel that it should take into account the good stewardship of the missal since the British institutions had acquired it. It also argued that there was a public interest in keeping the missal in an internationally renowned centre where meticulous care could be taken of it and where it was accessible to scholars and researchers for study. The Panel did not find these arguments convincing:

“While the high quality of the British Library's conservation and the accessibility of their collection is not in doubt, the Panel does not think that this is by any means a decisive factor (...). Indeed, if it were decisive, the same consideration would almost certainly defeat any claim for restitution against any of the national collections within our remit, and thus frustrate the Panel's primary role as laid down in our terms of reference. Moreover, no evidence has been advanced by the respondents to show that the claimants' present regime of conservation and accessibility of the Chapter library is defective”¹².

The Panel concluded that the Metropolitan Chapter of Benevento had on balance made good its moral claim. It recommended the Secretary of State to introduce legislation amending the *British Museum Act 1963*, the *British Library Act 1972* and the *Museum and Gallery Act 1992*, so as to permit the restitution of the missal.

In fact Sect. 3, sub-sect. 5, of the *British Library Act 1972* prevented the return of the missal. It provides that properties transferred to the British Library are subject to the same conditions that were previously applicable. In the case of the missal, this is a reference to Sect. 5, sub-sect. 1, of the *British Museum Act 1963*, which provides as follows regarding the disposal of objects:

“The Trustees of the British Museum may sell, exchange, give away or otherwise dispose of any object vested in them and comprised in their collection if

a) the object is duplicate of another object, or

b) the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography or a process akin to photography is held by the Trustees; or

c) in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students :

provided that where an object has become vested in the Trustees by virtue of a gift or bequest the powers conferred by this subsection shall not be exercisable as respects that object in a manner inconsistent with any condition attached to the gift or bequest”.

¹¹ *Ibidem*, p. 22.

¹² *Ibidem*, p. 23.

4. The Holocaust Act 2009

The stalemate situation was overcome by the *Holocaust (Return of Cultural Objects) Act 2009* which provided a legal basis to the return of the missal. The act was adopted by the Parliament of the United Kingdom “to confer power to return certain cultural objects on grounds relating to events occurring during the Nazi era”. It provides that seventeen cultural institutions, including the British Library Board and the Trustees of the British Museum, may transfer an object from their collections if an advisory panel has recommended the transfer and if the Secretary of State has approved such recommendation. Claims must relate to events occurring during the period between 1 January 1933 and 31 December 1945. The Act expires ten years after it was passed (12 November 2009).

5. The *Benev. VI 29* Missal before the Panel (2010)

After the adoption of the Act, the Metropolitan Chapter of Benevento renewed its claim to the Panel for the return of the missal. Again the Panel, which was appointed as the advisory panel for the purposes of the Holocaust Act, recommended the return of the missal to the claimant¹³.

The Panel did not consider appropriate to stipulate some conditions for the transfer that the British Library had requested:

“The British Library Board has intimated that, while reserving its absolute discretion, the Board would not oppose in principle the restitution of the Missal to the claimants. However, the Board is anxious that its curatorial concern for the highest standards of stewardship and for accessibility for researchers should be recognised, and that an acknowledgement should be given of the British Library’s loss, should transfer be recommended.

The Panel considers that such recognition and acknowledgement are due but do not consider it would be appropriate for the Panel to stipulate any conditions for transfer”¹⁴.

The *Benev. VI 29* missal was the first object returned by a British institution following the adoption of the Holocaust Act.

6. The Return

At the opening of the VI Conference of the International Committee for Medieval Latin, on 11 November 2010, an official ceremony was held at the Municipal Theater of Benevento to celebrate the delivery of the missal to the Archbishop of Benevento. Mr. Jeremy W. LeM. Scott, the

¹³ See *Report of the Spoliation Advisory Panel in Respect of a Renewed Claim by the Metropolitan Chapter of Benevento for the Return of the Beneventan Missal Now in the Possession of the British Library*, 15 September 2010.

¹⁴ *Ibidem*, paras. 6 and 7.

British lawyer who assisted the claimant before the Panel, made a speech that emphasized the morality implied by the restitution:

“Questi oggetti (...) sono diventati altamente simbolici. Non è facile individuare di cosa siano divenuti simbolo; ma i simboli spesso rifuggono da analisi precise.

L’importanza, l’enorme importanza emotiva che oggetti del genere possono acquisire – associati come sono all’identità e alla storia di un luogo – e il modo in cui il loro destino può così profondamente colorare la percezione di una città intera e di un intero paese non è così poco comune, ma è comunque straordinario e meraviglioso: come lo è – più in generale – un semplice atto di restituzione che può trasformare il risentimento, la diffidenza, perfino l’odio, in gioioso piacere e generosità di spirito”¹⁵.

7. Some Conclusive Remarks

It is somewhat surprising that the British *Holocaust (Return of Cultural Objects) Act* has been applied for the first time to ensure the return of an object that has little to do with the Holocaust. The missal was not property owned by Jews who were the victims of persecution. The fact that its disappearance occurred during a war against Germany has no direct connection with the Holocaust. While there is no evidence that it was looted by German authorities or troops, it could have likewise been illegally appropriated by a British, American or Italian thief.

However the scope of the *Holocaust (Return of Cultural Objects) Act* is not limited to looting related to the Holocaust. It may well also cover cultural objects claimed as a consequence of events that occurred during the “Nazi era”, as chronologically defined in the act. Within this period, it may be applied to cases where the weakness of another subject was exploited for cultural gain. Such a broad scope of application is one of the merits of this British act. It is only regrettable that Italy who took advantage of the British legislation in order to have the missal returned, has not yet adopted a similar act.

There is no doubt that the “massive and unprecedented looting and confiscation of art and other cultural property owned by Jewish individuals, communities and others”, as stated in the Declaration adopted in 2000 at the Vilnius International Forum on Holocaust Era Looted Cultural Assets, is the most evident and the worst instance of exploiting the weakness of another subject for cultural gain. It is directly connected to the sinister crime of genocide¹⁶. Nevertheless, there may be other instances where the acquisition of cultural properties, however legal on its face, does not comply with fundamental moral requirements.

¹⁵ LeM. Scott, *Il ritorno di un messale*, in *Conferimento* cit., p. 16.

¹⁶ See the tragic stories recalled in the thought-provoking book by Müller & Tatzkow (eds.), *Lost Lives, Lost Art*, London, 2010.

As regards the restitution of cultural properties¹⁷, compelling moral grounds are today influencing the development of more appropriate legislation, as the *Holocaust (Return of Cultural Objects) Act*. The retention of the missal was legal under English law, as a consequence of the six year statute of limitations. However the Panel concluded that the Metropolitan Chapter of Benevento had successfully pleaded its moral argument and recommended the return of the manuscript.

In the last years an evolutionary trend has developed towards the return of removed cultural properties to their countries of origin¹⁸. The trend is based on a number of principles that are located somewhere between morality and law and that can be instrumental in addressing shortcomings of multilateral treaties in force regarding the return of cultural properties¹⁹, in particular their non-retroactive character and the fact that they can create rights and obligations only for the States parties.

The principles in question include the principle of non-exploitation of the weakness of another for cultural gain, which applies to situations of persecution, war, colonial domination, foreign occupation or to situations involving indigenous peoples. Also included is the principle of preserving the integrity of cultural contexts, which is deeply rooted in the nature of cultural heritage. Other principles, having a procedural nature, relate to international co-operation against illegal movements of cultural properties and to international co-operation in settling disputes regarding the return of cultural properties, taking into account all the relevant circumstances. In order to reach an equitable solution for each particular case, these principles, which play in favour of the State of origin of cultural properties, should be balanced against other considerations, which may play in favour of the State of destination.

The story of the *Benev. VI 29* missal is another instance of the present evolutionary trend towards the return of cultural properties to the countries of origin. Moral principles that dictate the return are being progressively transformed into legal rules.

¹⁷ See in general Prott & O'Keefe, *National Legal Control of Illicit Traffic in Cultural Property*, Paris, 1983; Carducci, *La restitution internationale des biens culturels et des objets d'art*, Paris, 1997; O'Keefe, *Trade in Antiquities: Reducing Destruction and Theft*, London, 1997; Palmer (ed.), *The Recovery of Stolen Art: A Collection of Essays*, London, 1998; Hoffman (ed.), *Art and Cultural Heritage - Law, Policy and Practice*, New York, 2006; Frigo, *La circolazione dei beni culturali*, Milano, 2007; Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge, 2008; Nafziger & Nicgorski, *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, Leiden, 2009.

¹⁸ For more elaboration see Scovazzi, *Diviser c'est détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties*, in *Rivista di Diritto Internazionale*, issue No. 2, 2011 (forthcoming).

¹⁹ Namely, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Properties (Paris, 1970) and the UNIDROIT (International Institute for the Unification of Private Law) Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995).