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ЮНЕСКО И ПРАВОВАЯ ОХРАНА НЕМАТЕРИАЛЬНОГО КУЛЬТУРНОГО НАСЛЕДИЯ

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Guest editor's note: Culture, sustainable development and UNESCO*

Sustainable development was defined by the Brundtland Report (1987) as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”¹. Historically, the notion of sustainability was driven by economic goals and measured primarily by GDP (Gross Domestic Product) growth. However, by the mid-1990s, the “human development” approach was introduced, adopting non-economic (i. e. social, cultural and political) goals as measures and linking development to human rights.

Around the same time, the role of culture was growing in the international development agenda. For example, UNESCO's World Commission on Culture and Development published a report in 1996, which identified culture as a constituent element in the development process. The 1990s Action Plan on Cultural Policies for Development further emphasised that “[s]ustainable development and the flourishing of culture are interdependent” (Principle 1), and called on Member States “[t]o make cultural policy one of the key components of development strategy” (Objective 1); and to strengthen their policies and practices “to safeguard and enhance the cultural heritage, tangible and intangible” (Objective 3)². Despite this, the Millennium Development Goals (MDGs) adopted by the United Nations (UN) in 2000, which set out the global development agenda from the year 2000 to 2015, do not include any explicit reference to culture, intangible or otherwise³. Culture, however, was explicitly indicated as a key component of sustainable development in the UNESCO Culture and Development Thematic Window of the Millennium Development Goals Achievement Fund (MDG-F) initiative, and in the Rio Declaration (1992)⁴. The Rio Declaration set out three “pillars” — economic, environmental and socio-cultural — collectively understood to constitute sustainable development.

In 2012, direct reference to culture was made in the final report of the Rio+20 meeting (2012)⁵. This report recommended that the UN programming for sustainability should

* I would like to thank William Long (Independent Researcher) for his support and contribution in preparing this Editorial.

¹ Report of the World Commission on Environment and Development: Our Common Future, Annex to UN doc A/42/427 (4 August 1987) (Brundtland Report).

² Action Plan on Cultural Policies for Development, adopted by the Intergovernmental Conference on Cultural Policies for Development (Stockholm, Sweden, 2 April 2018).

³ 55th session of the UN General Assembly, New York, 2000, “United Nations Millennium Declaration”, A/RES/55/2.

⁴ Rio Declaration on Environment and Development (concluded 13 June 1992) 31 ILM 874 (1992) (Rio Declaration). For more on the Rio Declaration, see: *The Rio Declaration on Environment and Development: A Commentary* / ed. by Jorge Viñuales. Oxford: Oxford University Press, 2015.

⁵ 6th plenary meeting of the UN Conference on Sustainable Development, Rio de Janeiro, 2012 “Report of the United Nations Conference on Sustainable Development”, A/CONF. 216/16.

have mentioned the three dimensions of sustainable development. In response, the International Congress on Culture “Key to Sustainable Development” was organised in 2013 under the auspices of UNESCO. The Hangzhou Declaration (2013), agreed at the International Congress on Culture, called for a specific international development goal focused on culture to be included in the post-2015 UN development agenda, “based on heritage, diversity, creativity and the transmission of knowledge and [include] clear targets and indicators that relate culture to all dimensions of sustainable development”⁶.

On 25 September 2015 the United Nations adopted the 2030 Agenda for Sustainable Development (2030 Agenda)⁷. The 2030 Agenda “is a plan of action for people, planet and prosperity”⁸ for the period 2015–2030. The Agenda sets out 17 Sustainable Development Goals (SDGs) and 169 targets, which seek to build on the MDGs and “shift the world onto a sustainable and resilient path”⁹. The 2030 Agenda for Sustainable Development, like the Rio Declaration, conceives sustainable development as composed of three dimensions — economic, social and environmental, and related to the need of peace and security. These dimensions correspond to spheres of interdependent action; focused on respect for human rights including cultural rights and cultural diversity; and they also link culture to sustainable development.

The 2030 Agenda marks an essential milestone with respect to economic development in the recognition of the contributions of culture both in terms of income generation and protecting the environment and in terms of enhancing the individuals’ abilities and combatting poverty. For example, Target 4.7 is “By 2030, [to] ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others... promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture’s contribution to sustainable development”¹⁰ and Target 11.4 is to “strengthen efforts to protect and safeguard the world’s cultural and natural heritage”¹¹.

A further milestone was the Resolution on Culture and sustainable development adopted by the United Nations General Assembly (UNGA) on 19 December 2019¹². The Resolution “reaffirms the role of culture as an enabler of sustainable development”¹³, “recognizes the power of culture as a driver of sustainable development”¹⁴ and “emphasizes the important contribution of culture to the three dimensions of sustainable development and to the achievement of national development objectives, the 2030 Agenda for Sustainable Development and its Sustainable Development Goals, as well as other internationally agreed development goals”¹⁵. The Resolution also “reaffirms that sustainable development cannot be realized without peace and security and that peace and security will be at risk without sustainable development, and acknowledges that

⁶ The Hangzhou Declaration Placing Culture at the Heart of Sustainable Development Policies. Adopted in Hangzhou, People’s Republic of China, on 17 May 2013. P. 6. Available at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/FinalHangzhouDeclaration20130517.pdf> (accessed: 16.04.2021).

⁷ 2030 Agenda for Sustainable Development (Doc. A/RES/70/1) 2015 // UN General Assembly. 2015. Available at: <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (accessed: 20.06.2020).

⁸ Ibid. Preamble.

⁹ Ibid.

¹⁰ Ibid. Target 4.7.

¹¹ Ibid. Target 11.4.

¹² Resolution on Culture and Sustainable Development (Doc. A/RES/74/230) // UN General Assembly. 2019. Available at: <https://digitallibrary.un.org/record/3847705?ln=en> (accessed: 13.04.2020).

¹³ Ibid. Art. 2.

¹⁴ Ibid. Art. 3.

¹⁵ Ibid. Art. 4.

culture can contribute to sustainable development by constituting a valuable resource for enabling communities to participate fully in social and cultural life, facilitating inclusive governance and dialogue at the national, regional and international levels and contributing to conflict prevention and resolution, as well as to reconciliation, recovery and resilience”¹⁶.

UNESCO is the only UN specialized agency with a mandate on culture. As an agency, UNESCO’s mission is to contribute to the building of peace, eradication of poverty, sustainable development and intercultural dialogue through international cooperation in the fields of Education, the Sciences, Culture and Communication and Information¹⁷. In the field of Culture, UNESCO works to promote cultural diversity and ensure that the role of culture is integrated in efforts to achieve the SDGs. One particular focus for UNESCO’s work is SDG 11 focusing on sustainable cities, and Target 11.4.

UNESCO’s work in the field of culture is mainly grounded in standard-setting instruments: declarations, recommendations and conventions. And the agency’s contribution to the achievement of sustainable development can be viewed through its Culture Conventions’ system and the relevant policy and operational documents that complement it.

This system has developed incrementally. UNESCO’s Culture Conventions do not regulate every aspect of the cultural domain, but together with the other standard-setting instruments, they do cover a great part of it, and they provide the most accepted international legal system in the field of culture. UNESCO has adopted seven Conventions on culture: the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) (2005 Convention)¹⁸; the Convention for the Safeguarding of the Intangible Cultural Heritage (2003) (ICHC)¹⁹; the Convention on the Protection of the Underwater Cultural Heritage (2001) (UCHC)²⁰; the Convention concerning the Protection of the World Cultural and Natural Heritage (1972) (WHC)²¹; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) (1970 Convention)²²; the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) (1954 Hague Convention)²³ and the Universal Copyright Convention (UCC)²⁴. All seven of these Conventions are relevant to this journal issue, but this introduction will focus on the three Conventions that constitute the key pillars of the world’s cultural diversity.

¹⁶ Ibid. Art. 5.

¹⁷ Introducing UNESCO: what we are // UNESCO. Available at: <http://www.unesco.org/new/en/units/united-nations-educational-scientific-and-cultural-organization/about-us/who-we-are/introducing-unesco> (accessed: 16.04.2021).

¹⁸ Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS (2005 Convention).

¹⁹ Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (2003 Convention).

²⁰ Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS (2001 Underwater Heritage Convention).

²¹ Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (1972 World Heritage Convention).

²² Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 Convention).

²³ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 Hague Convention).

²⁴ Universal Copyright Convention (opened for signature 24 July 1971, entered into force 10 July 1974) 943 UNTS 178.

Adopted in 1972, the WH Convention²⁵ lacks an explicit reference to sustainable development as it was adopted 15 years before the Brundtland Report²⁶. Nevertheless, the spirit of sustainable development can be read into the text. For example, the first duty imposed on State Parties, is the adoption of a general policy “to give heritage a function in the life of the community”. Furthermore, with the adoption of the “Policy on the integration of a sustainable development perspective into the processes of the WH Convention” in 2015, the Convention was explicitly linked to sustainable development. The underlying principle of such Policy was to achieve consistency with Agenda 2030 and recognize that the WH Convention is an integral part of UNESCO’s mandate to foster sustainable development.

Unlike the WH Convention, when the ICH Convention was adopted in 2003, sustainable development was already a key issue for international cooperation. Accordingly, this Convention recognizes in its preamble that ICH is “a mainspring of cultural diversity” and “a guarantee of sustainable development”²⁷. This strong statement enshrines the relevance of ICH for sustainable development. Furthermore, in 2016 as part of efforts to strengthen the links between ICH and sustainable development, a new Chapter VI, “safeguarding intangible cultural heritage and sustainable development at the national level”, was added to the Operational Directives of the ICH Convention²⁸. Chapter VI is entirely dedicated to providing guidance on how to strengthen the role of ICH as a driver and enabler of sustainable development, and how to integrate it into development plans, policies and programmes through participatory approaches. Like the 2030 Agenda for Sustainable Development and the Rio Declaration, Chapter VI of the Operational Directives conceives sustainable development as composed of three dimensions — social (OD VI. 1 Inclusive social development), economic (OD VI. 2 Inclusive economic development) and environmental (OD VI. 3 Environmental sustainability) and related to the need of peace and security (OD VI. 4 Intangible cultural heritage and peace).

Sustainable Development is also a major concern for the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. With this instrument, the global community formally acknowledged the dual nature — both cultural and economic — of contemporary cultural goods and services. The Convention provides guidance to design policies and measures that foster the creation, production, distribution of and access to cultural goods and services. Sustainable development is amongst the foundational principles of the 2005 Convention²⁹ and Article 13 of the 2005 Convention explicitly addresses the integration of culture in sustainable development.

Comparing periodic reporting mechanisms under the 2005 Convention and the ICH Convention facilitates an insight into how effectively the 2005 Convention links to sustainable development. Periodic reporting is a mechanism under both Conventions that allows States Parties to assess their implementation of the relevant Convention. Periodic reports for the 2005 Convention are divided into 5 sections. Section 2 of such reports, “Policies and Measures” is structured according to the Monitoring Framework

²⁵ Convention concerning the Protection of the World Cultural and Natural Heritage. Adopted in 1972 and entered into force in 1975 // UNESCO General Conference. Available at: <https://whc.unesco.org/en/conventiontext> (accessed: 20.06.2020).

²⁶ *Brundtland G. H.* Report of the World Commission on Environment and Development: Our Common Future // United Nations General Assembly (Doc. A/42/427). 1987. Available at: <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (accessed: 20.06.2020).

²⁷ 2003 Convention. Preamble.

²⁸ See: Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the General Assembly of the States Parties to the Convention at its second session (UNESCO Headquarters, Paris, 16 to 19 June 2008), as amended at its sixth session (UNESCO Headquarters, Paris, 30 May to 1 June 2016).

²⁹ 2005 Convention. Art. 2 (6).

of the 2005 Convention. The Monitoring Framework is structured around the 4 Goals of the 2005 Convention. In the Monitoring Framework, these Goals are directly related to specific SDGs.

Since 2018, the structure of periodic reporting for the ICH Convention has been aligned on the Overall Results Framework³⁰. The Overall Results Framework is composed of 26 Core Indicators. Each Indicator has several assessment factors, which are linked to specific provisions from the ICH Convention and its Operational Directives. The Guidance note for each Indicator also includes a section entitled “Relation with SDGs and other indicators”. This Section sets out the links between the Indicator and specific SDG Targets³¹. Unlike the Monitoring Framework for the 2005 Convention, therefore, the Overall Results Framework of the ICH Convention is not structured around “Goals” that are directly connected to the SDGs. Thus, it is easier to visualize and understand the connections between the SDGs and the Monitoring Framework of the 2005 Convention than it is to understand the connections between the SDGs and the Overall Results Framework of the ICH Convention. However, both the Monitoring Framework for the 2005 Convention and the Overall Results Framework for the ICH Convention link back to the SDGs, reflecting the importance of the connection between sustainable development and culture.

While the role of culture in building a more sustainable world is increasingly recognized and reflected in the international agenda, there nonetheless remains a weak link in the chain: the lack of coherent evidence of the multiple ways in which culture contributes to the economic, social and environmental dimensions of development. One example of the lack of coherent evidence of the contribution of culture to sustainable development is ICH in urban contexts. “ICH plays a complex role in the urban cultural ecosystem, providing ‘creative capital’ for innovation and fostering the historical development and continued viability of creative industries in cities by maintaining networks of creators who are brought together in meaningful ways in specific places. It also in many cases generates income for practitioners, as long as over-commercialisation and misappropriation can be avoided. ICH can thus encourage both social cohesion and sustainable development in Creative Cities, with the involvement and consent of the communities, groups and individuals who practice that ICH”³². Despite this, ICH has generally been neglected in cultural mapping for creative industries, and in monitoring and evaluation for city planning. This is particularly regrettable in the context of UNESCO creative cities. Thus, a recent study proposes that further work on ICH mapping and monitoring processes in Creative Cities is needed, and independent verification of the data from the Periodic Reporting under the 2003 Convention may be needed³³. ICH plays a complex role in the urban cultural ecosystem. Apart from providing “creative capital” for innovation, it fosters the historical development and continued viability of creative industries in cities by maintaining networks of creators who educate those who follow them. ICH also

³⁰ Periodic reporting of the Convention for the Safeguarding of the Intangible Cultural Heritage // UNESCO. Available at: <https://ich.unesco.org/en/periodic-reporting-00460> (accessed: 16.04.2021).

³¹ For example, in this section the guidance note for core indicator 1 states: This indicator responds as a whole to SDG Target 11.4, “strengthen efforts to protect and safeguard the world’s cultural and natural heritage”. By encouraging formal bodies or mechanisms to coordinate broad public participation in safeguarding, Assessment Factor 1.3 also complements SDG Target 16.6, which aims to “Develop effective, accountable and transparent institutions at all levels”, as well as Target 16.7, which aims to “ensure responsive, inclusive, participatory and representative decision-making at all levels”.

³² *Deacon H., Rinaldo D., Taboroff J., Ubertazzi B., Waelde Ch.* Understanding and measuring the role of intangible cultural heritage in the Creative City. Paper prepared for the World Bank Technical Deep Dive, Creative Cities: Culture and Creativity for Jobs and Inclusive Growth, January 27 — January 31, 2020, Tokyo and Kyoto. P. 1.

³³ *Ibid.* P. 7.

in many cases generates income for practitioners, as long as over-commercialisation and misappropriation can be avoided. ICH brings people together in meaningful ways in specific places, and can thus encourage both social cohesion and sustainable development in Creative Cities³⁴.

To tackle the issue of the lack of coherent evidence of the ways in which culture contributes to sustainable development, UNESCO has developed a specific framework of thematic indicators (the Culture|2030 Indicators³⁵, launched in June 2020), whose purpose is to measure and monitor the progress of culture's contribution to the national and local implementation of the SDGs and Targets. The framework aims to assess both the role of culture as a sector of activity, as well as the transversal contribution of culture across different SDGs and policy areas. The intended purpose of the framework is to bring data together and highlight linkages and intersections between culture and other policy areas. By strengthening the transversal visibility of culture in the 2030 Agenda, the Culture|2030 Indicators seek to help build a coherent and strong narrative on culture and development that is evidence-based and can inspire informed decision-making. These indicators are not a silver bullet that solve all challenges. They have been critiqued for reporting on the existence of policies, institutions, and other instruments without assessing their performance or effectiveness and it has been highlighted that very few indicators in the Culture 2030 suite directly explore the relationship between ICH and cultural industries in cities³⁶. Nonetheless, the Culture|2030 Indicators are another step towards the integration of culture and sustainable development.

In this context, this special issue of *Pravovedenie* gathers articles that were presented at the Federal State Budgetary Educational Institution of Higher Education "Saint-Petersburg State University" online conference of 18 May 2020 on the subject of "UNESCO and Cultural Heritage". The conference saw the participation of 22 speakers coming from all over the world. The conference was introduced by Sergey Belov, Dean of the Law Faculty at Saint-Petersburg State University. Belov was followed by Matteo Rosati³⁷ who spoke on the topic of "UNESCO's role and action in fostering culture for sustainable development". Conclusions were given by Pier Luigi Petrillo³⁸. This conference was scientifically organised by Benedetta Ubertazzi³⁹ with Anton Rudokvas⁴⁰ and Darya Rytova⁴¹ also contributing to the organisation of the event. Particular thanks also go to Sergey Belov, Anton Rudokvas, Valeria Romanovskaya⁴² and William Long⁴³, without whom the publication of this special issue of *Pravovedenie* would not have been possible.

³⁴ Ibid. P. 3.

³⁵ Culture|2030 Indicators // UNESCO. 2019. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000371562> (accessed: 16.04.2021).

³⁶ Deacon H. *et al.* Understanding and measuring the role... P. 7.

³⁷ Programme Specialist at the Culture Unit UNESCO Regional Bureau for Science and Culture in Europe.

³⁸ UNESCO Chair Professor on Intangible Cultural Heritage and Comparative Law; Member of the UNESCO Evaluation Body of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage; Full Professor of Comparative Public Law Department of Law and Economic University of Rome Unitelma Sapienza.

³⁹ Full Tenured Aggregate Professor and Researcher of European Law University of Milan-Bicocca; Contracted Associate Professor of International Intellectual Property Law and UNESCO Intangible Cultural Heritage Law School of Law Saint Petersburg State University; UNESCO Facilitator, Global Capacity-building Programme for the effective implementation of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.

⁴⁰ Professor, Civil Law Department, Saint Petersburg State University.

⁴¹ PhD Candidate, Saint Petersburg State University.

⁴² *Pravovedenie* Editorial Board Secretary.

⁴³ Independent Researcher.

In 2020, the COVID-19 pandemic brought the world to a standstill. This has had profound implications for culture and sustainable development. Among UNESCO's responses to the pandemic were the launch of the web platform on "Living Heritage experiences and the COVID — 19 pandemic": Living heritage as a source of resilience and recovery during crisis⁴⁴ and UNESCO — COVID 19 Culture response⁴⁵. Analysing the trends that emerged as a result of the pandemic, Saša Srećković asserts that there may be increased attention given to environmental studies and related heritage expressions, as well as traditional/alternative medicine⁴⁶. Srećković also highlights the strong communitarian and social impacts of traditional medicine and argues that strengthened intersectoral cooperation, with traditional medicine integrated into public policies, can demonstrate that heritage really matters for economic and social development. Like Srećković, Valentina Zingari views ICH as a source of resilience during the pandemic and focuses on the importance of community participation and cooperation. Zingari also suggests that the pandemic may have made the global framework of international culture Conventions more pertinent than ever in a context of global awareness-raising of ecological, economic, social and cultural challenges.

COVID-19 has shown the importance of intangible cultural heritage for physical spaces and for the achievement of sustainable development. An example of this importance can be seen in the case of the ICH element "Knowledge, skills and rituals related to the annual renewal of the Q'eswachaka bridge"⁴⁷. This bridge has been woven by hand with vegetable fibres by peasant communities every year for 600 years. Every June, for over six centuries, local communities rebuilt the bridge using traditional knowledge and techniques and the Q'eswachaka is considered a sacred symbol of the bond of the communities with nature, history and traditions⁴⁸. However, in 2020, due to the impacts of the COVID-19 pandemic the communities were not able to maintain the bridge in the customary way. This led to a deterioration in the fibres from which the bridge is constructed and consequently the Q'eswachaka collapsed. The example of Q'eswachaka thus highlights the close relationship between intangible cultural heritage and the physical world, and the importance of an integrated understanding of such heritage to achieve sustainability. Without communities being able to practice their intangible cultural heritage, the tangible bridge deteriorated and collapsed.

The example of Q'eswachaka therefore highlights the importance of cultural spaces associated with living heritage and how lockdowns and restrictions designed to protect populations from COVID-19 have impacted upon the capacity of communities, groups and individuals to access such spaces. Saša Srećković notes this consequence of the pandemic and suggests that the policies of some institutions will increasingly seek to integrate (intangible) cultural heritage, through measures including territorial functional

⁴⁴ See: UNESCO Launches Platform on Living Heritage and the Covid-19 Pandemic // UNESCO. Available at: <https://ich.unesco.org/en/news/unesco-launches-platform-on-living-heritage-and-the-covid-19-pandemic-13263> (accessed: 18.12.2020).

⁴⁵ See: Culture Response // UNESCO. Available at: <https://en.unesco.org/covid19/cultureresponse> (accessed: 18.12.2020).

⁴⁶ See: *Riordan A., Schofield J.* Beyond medicine: Traditional medicine as cultural heritage // *International Journal of Heritage Studies*. 2015. Vol. 21. P. 280–299.

⁴⁷ "Knowledge, skills and rituals related to the annual renewal of the Q'eswachaka bridge" (Peru) Inscribed in 2013 (8.COM) on the Representative List of the Intangible Cultural Heritage of Humanity.

⁴⁸ *Lombardo C.* Crolla l'ultimo ponte inca del Perù: la pandemia di Covid ne ha fermato la manutenzione // *Corriere della Sera*. 2021. Available at: https://www.corriere.it/cronache/21_marzo_28/crolla-l-ultimo-ponte-inca-peru-pandemia-ne-ha-fermato-manutenzione-65fe1592-8f95-11eb-bb16-68ed0eb2a8f6.shtml (accessed: 16.04.2021)

planning⁴⁹ for both urban and rural settlements, the creation of smart cities and cultural routes. Neel Kamal Chapagain also addresses the spatial impacts of the pandemic. He notes that since COVID-19 has forced people to stay in their own homes, it may have brought an extended moment to experience and reflect on architecture and urban planning at a very personal scale — from a room, to an apartment or a house, to a neighbourhood, then perhaps even to a city in limited ways. He suggests this moment of reflection may lead to (re)thinking architecture and urban planning and that the notion of intangible cultural heritage (ICH) as espoused by the 2003 UNESCO convention could offer useful insights in better results in our contemporary architecture and urban planning thinking and practice. Chapagain argues that unless the heritage custodians, practitioners and professionals reflect on their own practices and rethink the frameworks for heritage practice in a critical manner, it will not be possible to position cultural heritage as a pillar for sustainable development.

Elena Sinibaldi and Antonio Parente take a more holistic approach in analysing the importance of integrating tangible and intangible cultural heritage to achieve sustainable development. Through their evaluation of the WH Convention, ICH Convention and Italian regulatory context, Sinibaldi and Parente derive an analysis of the concept of living heritage in relation to the anthropological definition of organic landscape, representation of collective identities (community-based heritage), inclusive places and sociability (public policy), communicative restitution (universal ethical values), participatory management (participative brand-making), and integrated sustainability. They suggest that the strategic value of “integrated living sustainability” underlines three-dimensional sustainable integration (social, economic and environmental) and the urban-rural linkages and also expressly introduces both natural and cultural heritage, as well as tangible and intangible heritage, as components of a potentially transformative process of development. Sinibaldi and Parente also highlight how marketing and legal perspectives can be successfully combined to safeguard intangible cultural heritage in accordance with ICH Operational Directive 173(b).

Regarding marketing perspectives, Diego Rinallo explores promotion measures for (intangible) cultural heritage that facilitate sustainable development. Rinallo’s contribution focuses on raising awareness of intangible cultural heritage by providing step-by-step guidelines for promotional digital storytelling interventions as well as offering some emerging considerations on how marketing and legal perspectives can be successfully combined to safeguard intangible cultural heritage. Rinallo’s analysis builds on project work he has conducted. One such project is the British Academy for Sustainability project “Celebrating local stewardship in a global market: community heritage, intellectual property protection and sustainable development in India”, which engages with three cases in West Bengal to investigate how developing Heritage-sensitive Intellectual Property and Marketing Strategies (HIPAMS) can give ICH bearer communities greater control over the commercialisation of their heritage to strengthen competitiveness while contributing to its safeguarding and ongoing viability⁵⁰. A second project is the “AlpFoodway Alpine Space Project”. Rinallo describes how, for this project, an anthropological video inquiry aiming to investigate the cultural and social values expressed in the Alpine food heritage was created “to raise awareness in the general public about the need to defend the Alpine food heritage before it is lost forever, to favor an understanding of the common values behind such heritage across Alpine countries, and to mobilize communities and policy makers at

⁴⁹ The subject is well represented within the policies of European Union. See: *Bold J., Pickard R. An Integrated approach to cultural heritage // The Council of Europe’s technical co-operation and consultancy program / eds J. Bold, R. Pickard. Strasbourg: Council of Europe, 2018. P. 67–79. See also: Territorial heritage and development / ed. by J. M. Feria. CRC Press Taylor & Francis group, 2012.*

⁵⁰ HIPAMS India. Available at: www.hipamsindia.org (accessed: 17.12.2020).

the local, regional, national and EU levels to safeguard and valorize the Alpine food heritage". Agostina Lavagnino's contribution complements Rinallo's. Lavagnino addresses raising awareness of intangible cultural heritage and focuses on participatory inventory processes at the international UNESCO level, as well as examining the approach to inventory processes in Italy's Lombardy region. Like Rinallo, Lavagnino also engages with the "AlpFoodway Alpine Space Project". Lavagnino analyses the Project's inventory process, reporting that all partners started a bottom-up process involving local communities to identify and inventory Intangible Alpine Food Heritage, including more than 150 elements about food production, agricultural knowledge, rituals, traditions in a spirit of recognition of a common cultural heritage.

Like Rinallo, Chiara Bortolotto engage with the interactions between ICH and the market and thus focuses on culture and economic sustainable development. Bortolotto highlights the complexities of these interactions. She explains that the words "trauma" and "scandal" are used by international heritage experts in connection to the use of the ICH Convention as a marketing tool to promote popular commodities and there is caution surrounding the Convention being used as a "brand for capitalistic practices". However, Bortolotto reports, this caution is balanced with the recognition that "communities have to eat" and that economic uses of ICH must therefore not be prohibited. Bortolotto's contribution explores how these differing perspectives have led to the idea of "commercialization without over-commercialization" to allow flexibility on the matter of whether the commercialization of ICH is to be regarded as a form of "sustainable development" and "creative economy" or as a threat to cultural processes. Harriet Deacon's contribution, like Bortolotto's, addresses commercialisation. However, Deacon's paper focuses on the case study of a trademark registration of a Sámi symbol in Norway and engages with the capacity of intellectual property protection to address some kinds of cultural misappropriation and mediate some of the tension between heritage safeguarding and its commercialization.

Regarding legal perspectives, Francisco Humberto Cunha analyses the legal frameworks for ICH, investigating the impacts of UNESCO's ICH Convention on Brazilian law. Cunha focuses on two aspects: a juridical-normative, which seeks to know whether the international norms innovated Brazilian law; and the other, of a political nature, which examines whether Brazil fulfils the state obligations defined for the countries by the ICH Convention. Among the legal measures that can be adopted to safeguard ICH stand Intellectual Property rights. The connections between intellectual property rights, (intangible) cultural heritage and sustainable development are themes that are shared by the contributions of Harriet Deacon and Benedetta Ubertazzi. Ubertazzi engages with intellectual property rights and environmental sustainability of ICH. Ubertazzi suggests that intellectual property rights can recognise communities as bearers of knowledge about nature and as essential actors in sustaining the environment. Thus, in Ubertazzi's view, although if not carefully drafted intellectual property rights can pose risks for environmental sustainability, when correctly adopted they have the capacity to empower communities.

Deacon, like Ubertazzi, engages with the utility of intellectual property law for heritage-bearing communities to sustainably safeguard their cultural heritage. Deacon suggests that strategies including the registration of community trademarks may be positive for communities, although she acknowledges that challenges remain in extracting maximum value from this approach. Additionally, Deacon explains that intellectual property protection is often seen as a cause of cultural misappropriation (as it offers commercial enterprises the opportunity to register monopoly rights such as trademarks over signs that may be of cultural significance to communities), but that the public policy exception, which excludes registration of signs "contrary to morality or public policy", can take

account of public opinion, the public interest and human rights. This exception, Deacon suggests, may offer communities a means of preventing cultural misappropriation. It is not a perfect means of preventing such misappropriation however. One problem that Deacon identifies is that simply protecting the public domain by enabling free use of cultural symbols by all does not always help indigenous peoples safeguard their heritage. A second is that religious symbols have received disproportionate attention in case law, with a focus on preventing “blasphemous” or “banalizing” commercialization. It is not clear, Deacon argues, how this can protect the more general category of important cultural symbols which may be sacralised as “cultural heritage” by minority groups or indigenous peoples. Furthermore, Deacon notes, some groups may not be eager to represent their cultural symbols as “religious”, especially in a context of historical oppression and discrimination of religion and religious identities.

Religion, cultural heritage and human rights are themes that Deacon’s contribution shares with Lixinski’s. Lixinski suggests that cultural heritage law, religion, and human rights are part of a complicated equation about the shaping of national identity and the promotion of intercultural dialogue and just societies, themes that are integral to social sustainable development. Lixinski argues that a focus on religious heritage as living heritage, enabled by treaties like the ICH Convention, allow for heritage and religion to contribute to a broader conversation about humanity and the values we wish to espouse.

The relationships between “just societies”, sustainable development and culture resonate beyond the sphere of ICH. Addressing the restitution of cultural properties, Tullio Scovazzi asserts that the question of restitution of removed cultural properties to which the treaties in force do not apply for chronological or other reasons is far from being settled under customary international law. In Scovazzi’s opinion, an evolutionary trend is developing in present customary international law according to which claims relating to movements of cultural properties should be addressed in order to achieve an equitable solution, taking into account all the relevant circumstances. To achieve such solutions, Scovazzi argues, non-adversarial procedures, such as negotiation, mediation or conciliation, should be put in place. Like Scovazzi, Gyooho Lee addresses the question of restitution. Lee’s article focuses on the context of Korea and the restitution of stolen cultural property though the application of foreign domestic public law or of private international law. Lee identifies four challenges for the Korean legal community to address in order to achieve the successful restitution of stolen cultural property.

Addressing tangible heritage like Lee, Maria Alexandrova focuses on the challenges of identifying objects as cultural heritage. Within the framework of the WH Convention, Alexandrova highlights the differences between UNESCO practice in adding temporally recent sites to the WH List and the Russian legislative framework, under which objects must reach a specific age before they can become a cultural heritage object. Alexandrova’s analysis seeks to evaluate the optimal balance of public and private interests, as well the impacts of Russian legislation on the protection of late Soviet and early new Russian period objects and urban development.

Finally, addressing tangible heritage, like Lee and Alexandrova, Tarasco develops on the relationship between the UNESCO world heritage sites owned by the Italian state and the profiles of their profitability and sustainability. Tarasco argues that if it is true that the award of UNESCO site status to a cultural monument is independent, as it should be, of its economic capabilities, then it is also true that increasing its economic profitability contributes to the achievement of the objectives of the UNESCO Conventions: the protection and valorization of the cultural heritage object. Hence the need to include in legislation an obligation to maintain autonomous financial reporting of UNESCO sites, which today is absent in many State-owned UNESCO sites, which currently do not have their own accounting and financial autonomy.

The articles collected in this issue engage with UNESCO's Culture Conventions and demonstrate some of the diverse relationships between culture and sustainable development. This issue hopes to contribute to the construction of a coherent and strong narrative on culture and development and highlight the transversal contribution of culture across different SDGs and policy areas.

Sincerely,
Guest editor of the issue,
Post. PhD, Tenured Aggregate Professor, University Milan-Bicocca; Contracted
Associate Professor at the Saint-Petersburg State University; UNESCO Facilitator, global capacity-building programme for the effective implementation of the
2003 Convention on Safeguarding Intangible Cultural Heritage

Benedetta Ubertazzi

СТАТЬИ

UDC 340.147

Heritage: How to remain relevant following the virus crisis?

Saša Srećković

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The article states that despite the creation of the UNESCO fund aimed at International assistance by means of which State parties to the Convention for Safeguarding of Intangible Cultural Heritage, inter alia, can address problems arising from catastrophes and emergencies. However, the devastating effects of the pandemic on heritage are yet to be expected. Due to the known recent circumstances, without mobility of people and their mutual contacts, and without physical access to the built heritage and museums, there will be no income for local people living in their surroundings. Another problem is related to the intangible expressions of heritage due to inevitable economic turbulences subsequent to the pandemic, and even due to the recent political turmoil caused by various related factors, such as the behavior demonstrated by different governments while facing the crisis and consequent revolts in many communities worldwide. While clear solutions for affected heritage following the crisis are still not on the horizon, we may assume that in the near future there will be an increase of interest in environmental studies. Many will reflect upon the sustainable use of resources and their relevance for heritage (such as agrarian heritage, particularly in regard to food security; traditional medicine or cultural rights and intellectual property in the same context). While there is no doubt that digital tools for reviewing (tangible) heritage will only progress over time, the question is to what extent will living experiences of heritage be affordable to people, at least in the forthcoming period. An adequate response to a global disaster will certainly integrate heritage into policies such as territorial urban/rural planning and various intersectoral activities, and examples already exist in projects funded and supported by the European Union. Despite the weakening of available resources as a result of the pandemic, heritage institutions should also increasingly allow for more democratic inclusion of communities into the issues of inventorying and safeguarding heritage, through mechanisms such as participatory mapping and the like.

Keywords: cultural heritage, Intangible Cultural Heritage, emergencies, pandemic, consequences, economic turbulences, response, agrarian heritage, community participation.

Introduction

In these rather monothematic times any deliberation on outcomes of the actual crisis is often at risk of discovering “hot water” and many reflections around the pandemic of COVID-19 may appear annoying and all but original. However, I took that risk and

Saša Srećković — Ba. Sci. in Ethnology/Anthropology, Museum counselor, Ethnographic Museum in Belgrade, 13, Studentski, Beograd, 11000, Serbia; sasasrec@gmail.com

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challenge to say something obvious, and if possible a little bit beyond that while keeping in mind the need to prepare myself for some more bad news, if need be.

Anyway, by introducing this approach to anticipate occurrences we could only deal with assumptions about trends that are likely to shape the reality around heritage in the period immediately following the global crisis caused by the corona-virus. Those trends have not demonstrated quite measurable parameters so far in the disciplines such as cultural heritage, but by reading some global and local economic figures that have been already available it is possible to anticipate, at least in rough terms, and draw conclusions based on common sense of how the heritage domain is affected¹ and how is yet probably going to be affected.

Now, only a few months since its beginning the devastating effects of the actual pandemic on heritage are probably yet to be expected. Logically so, due to the known recent circumstances; without mobility of people and their mutual contacts, and without physical access to built heritage and museums there are neither revenues for professionals in charge of their maintenance and presentation, nor for local people living in their surroundings who so far enjoyed earnings from economical activities within heritage clusters. This is but not some novelty and the already existing adverse effects on economies certainly affect heritage to some degree, such as losses of jobs, global recession, grave losses for travel industry worldwide etc. A number of businesses around heritage sites are certainly not going to be able to start over, at least not that soon. Heritage institutions will not be able to attract masses of visitors, organize events and draw money from programs, probably as long as the vaccine for Covid-19 disease is not in wide public use.

1. UNESCO and disasters

And it is important to note that the UNESCO have treated this kind of problems well ahead. Numerous local disasters worldwide (armed conflicts, natural catastrophes) that in turn had affected heritage over many years fed into the pool of experiences that served for drafting various legal documents, publications, plans for response and subsequent actions in the field. As I have been mostly involved with the programs dedicated to intangible cultural heritage I shall recall the most noteworthy recent activities in this field. One of the latest respective events occurred in 2019 as the UNESCO secretariat for intangible cultural heritage launched the expert meeting that concluded in drafting the summary report on principles and operational modalities of dealing with intangible cultural heritage in emergencies². Dual role of intangible cultural heritage is there considered, as heritage possibly affected by emergencies, but also heritage as a tool to help relief of communities during and after emergency situations. In the document there is by no means an exhaustive list of actions, but rather the core principles that can be adapted to local contexts. The term “emergencies” is to be understood to include both conflict situations and disasters caused by natural and human-induced hazards. The report also emphasizes the clear links between tangible and intangible heritage “insomuch as attack on one is often associated with the attack on the other”³.

¹ We can follow the links indicating some organized efforts internationally to estimate possible damages, such as: <https://www.europanostra.org/europa-nostra-launches-wide-consultation-on-the-impact-of-covid-19-on-the-heritage-world>, or <https://www.canada.ca/en/conservation-institute/services/conservation-preservation-publications/canadian-conservation-institute-notes/caring-heritage-collections-covid19.html> (accessed: 18.12.2020) and <https://www.iccrom.org/heritage-crisis-covid-adverse-economic-impacts> (accessed: 18.12.2020).

² See: <https://ich.unesco.org/en/news/what-to-do-for-intangible-cultural-heritage-in-emergencies-13214>; <https://ich.unesco.org/en/Decisions/14.COM/13> (both accessed: 18.12.2020).

³ Ibid.

Another UNESCO instrument related to intangible cultural heritage and available for cases of emergencies has been taking effect through the mechanism of International Assistance⁴. The related fund is available to state parties to the *Convention for safeguarding of intangible cultural heritage*. It can, *inter alia*, tackle problems arising by various catastrophes and disasters. My strong impression is that this mechanism has been rarely utilized if we take in account possible benefits it can bring to the member countries.

Among the most recent and relevant UNESCO responses to disasters affecting heritage is the web survey among its colleagues that resulted in the web platform on “Living Heritage experiences and the COVID — 19 pandemic”: Living heritage as a source of resilience and recovery during crisis⁵. There are cases of online activities and use of digital tools to enhance safeguarding heritage in the period of pandemic in many countries. But there are also interesting experiences from the cases by engaging audiences, such as the fascinating account on living heritage in Flanders, Belgium⁶ and how communities adapt to the situation thereby developing new living heritage forms. And the most recent action *UNESCO – COVID 19 Culture response*⁷ in four key areas: Sharing culture, Assessing the impact, Support for artists & cultural professionals and Building capacity.

2. A shortlist of damages

The outbreak of pandemic in the first months of 2020 is an unfortunate opportunity to test the guidelines set out in “Intangible cultural heritage in emergencies”. The actual global disaster is but a new test for heritage in general. Moreover, it added new elements on a global scale, whereas the former emergencies mostly affected heritage locally. As a result, the total reduction of living human contacts brings along in turn absence of living experiences of heritage, and threatens in turn the livelihood of respective heritage communities. In the meantime many would rely on enjoyment of heritage by means of digital tools and virtual communication. That is surely not enough, since we are aware of the role the heritage play in human lives; these technical tools and appliances are rather suitable to trigger perception and only in part appreciation of heritage.

The particular challenge is facing the heritage institutions. The considerable budget trimmings subsequent to this crisis will affect their operations, in particular in countries where governments do not understand long term effects of investing in the sphere of culture and heritage⁸. Needless to say what kind of consequences we can expect as we recently learned that the Ethnographic Museum in Belgrade, being the focal point for intangible cultural heritage and ethnographic fieldwork in Serbia, would receive exactly zero dinars (0) for the field research in 2020.

And that is not all. Beyond healthcare concerns and immediate economic and social effects the actual crisis unleashed numerous political tensions around the world. I dare say, hand in hand with the virus pandemic the world experiences another pandemic of *mistrust in official versions* ranging from health care requirements (e. g. vaccination, lockdown) across many other aspects of public service management of the emergency situa-

⁴ See: <https://ich.unesco.org/en/requesting-assistance-00039> (accessed: 18.12.2020).

⁵ See: <https://ich.unesco.org/en/news/unesco-launches-platform-on-living-heritage-and-the-covid-19-pandemic-13263> (accessed: 18.12.2020).

⁶ See: <https://ich.unesco.org/en/living-heritage-experience-and-covid-19-pandemic-01124?id=00084> (accessed: 18.12.2020).

⁷ See: <https://en.unesco.org/covid19/cultureresponse> (accessed: 18.12.2020).

⁸ The case from Serbia shows that the Ministry of culture was deprived from the previously allocated budget amount due to the outbreak of the pandemic of Covid-19: <http://www.seecult.org/vest/o-pomoci-za-umetnike-u-narednoj-rundi-budzet-za-kulturu-smanjen> (accessed: 18.12.2020).

tion (such as fear of overall surveillance); mistrust of various intensity depending on level of faith the people place in their respective country governments.

What does it have to do with heritage? Perhaps not an immediate reference; however, let us think twice: decisions on (primarily tangible) heritage have been always up to the authorities⁹. How shall various communities of the near future respect heritage interpretations delivered by authorities if they tend to believe lesser and lesser in official interpretations in general? Maybe this is an issue and trouble already brought about with development of civil society. Indeed it appears to be easier with material or tangible heritage in this regard: there are no big disputes over who erected a fortress in some distant past and to whose warring sides the builders belonged back then: the monument testifies of universal human creation regardless of conflicting parties once upon a time. However, closer to the present time the heritage (and primarily intangible heritage) is subject to different interpretations and estimates of its value. The discipline *culture of memory* adds nowadays a lot to multiple voices that contribute to interpretations of heritage¹⁰. Truth for the will, reservations and criticisms caused by different attitudes in this field have been constantly airing long before the pandemic. And now it is taking effect more than ever.

Another issue, the prior unprecedented expansion of digital tools and social media certainly contributed immensely to this polyphony and plurality of (theoretically, possibly equally valued) interpretations. That is undoubtedly going to leave a mark on interpretations of cultural heritage¹¹ and respective identities. Authorities do not avail of exclusive access to media any more, though they still control the most influential ones.

And what about virtual pieces of digital culture (messages or posts) that have been overflowing our apps daily — will they be considered elements of intangible cultural heritage soon? As we know the communities in Finland and Germany already initiated Demoscene — the art of digital coding to be nominated to the UNESCO international lists lately¹². Among the outcomes of the current pandemic — albeit not a novelty in form — is a series of postings from various social media and networks, this time with the topic of the pandemic. Some of them distinguish themselves by a comic content, such as funny *coronisms*¹³, some of them however being quite subversive in nature, thereby reaching beyond the pandemic only and revealing political agendas¹⁴. Since the latest technology is taking over a great deal of human communication nowadays it is not oddly to expect that digital contents are going to enter the realm of (intangible) heritage at some point — sooner or later.

⁹ Blake J. On defining the cultural heritage // *The International and Comparative Law Quarterly*. 2000. vol. 49, no. 1. P.68.

¹⁰ There are numerous works that endeavor to unravel complex interplay between heritage and memory, such as: *Critical perspectives on cultural memory and heritage: construction, transformation and destruction* / ed. by V. Apaydin. London: UCL Press, 2020. The following papers, too: *Whitehead C., Bozoglou G.* Heritage and Memory in Europe: a review of key concepts and frameworks for CoHERE // *Critical heritages (Co-HERE)*. Newcastle University, 2017. P.2–23; *Viejo-Rose D.* Cultural heritage and memory: Untangling the ties that bind // *Culture & History Digital Journal*. 2015. Vol. 4, no. 2. P. 1–13.

¹¹ The topic is well elaborated in the case studies in the book: *Giaccardi E.* Heritage and social media: Understanding heritage in a participatory culture. London: Routledge, 2012. See the respective considerations in the chapter dedicated to Social Practice.

¹² See: <http://demoscene-the-art-of-coding.net> (accessed: 18.12.2020).

¹³ A colloquial name for such postings as used in Serbia, and probably elsewhere, too. The relevant text is published in the Serbian magazine *Politika*: <http://www.politika.rs/sr/clanak/453398/Smeh-pod-maskama> (accessed: 18.12.2020). Even some museological activities on collecting relevant items related to Corona-virus are reported to take place. See: <https://theconversation.com/us/topics/museums-1517> (accessed: 18.12.2020).

¹⁴ See: https://www.cidob.org/en/publications/publication_series/opinion/seguridad_y_politica_mundial/coronavirus_infodemics_and_disinformation (accessed: 18.12.2020).

3. Other responses

There are certainly way more questions than answers while facing realities post COVID-19 and its impacts. If we take in consideration these complex realities and circumstances that in various ways concern heritage it is clear that there are (yet) no prescriptions or even guidelines as to how to act for the benefit of heritage following the pandemic. The UNESCO does advocate the significance of this approach, but it is the question of how far it can balance between not only cultural but political agendas of particular countries. While being funded by these state parties, i am afraid one day the UNESCO might end up in the crossfire while pursuing its mission the way the World Health Organization is exposed to now¹⁵.

We certainly need to follow some global trends that will likely recognize multiple benefits of heritage.

As regards intangible cultural heritage i think there is going to be an increased attention to environmental studies and related heritage expressions. For example, *agrarian heritage*¹⁶ may gain on significance, while economies will have to adapt and diversify agricultural production following the global recession caused by the pandemic of COVID-19, but also given the previous devastations caused by some adverse effects of the *green revolution* and similar trends. The principle of food and nutrition security underlies another actual argument, involving actions aimed at eradication of poverty and hunger, as already envisaged by the 2030 Sustainable Development agenda¹⁷.

I guess the voices are going to be in turn louder as to the topic of traditional/alternative medicine¹⁸, too. At the first place we should welcome any inventorying and mapping efforts as regards traditional and indigenous methods. The reason is more than obvious over these days, especially in view of the mentioned global mistrust in institutions. Therefore healthcare institutions are expected to include and allow for multidisciplinary views and more flexible approach beyond interests of particular pharmaceutical companies, just to name one of the globally most neuralgic points¹⁹.

It is important to emphasize a strong communitarian and social impacts of traditional medicine. One integral approach to healthcare includes the issues such as legal protection of rights of patients to choose not only safe and efficient methods, but also culturally acceptable and economically affordable way of self-healing. Though widely practiced (among the poor and rural population, for example) the traditional medicine is rarely integrated in public policies.

Indeed, a strengthened intersectoral cooperation can demonstrate that heritage really matters for economic and social development.

¹⁵ See: <https://www.who.int/news-room/detail/23-04-2020-who-reports-fivefold-increase-in-cyber-attacks-urges-vigilance> (accessed: 18.12.2020).

¹⁶ See the example of the concept as elaborated by the governmental agencies in Holland: <https://english.cultureelerfgoed.nl/publications/publications/2015/01/01/heritage-as-an-aspect-of-the-common-agricultural-policy> (accessed: 18.12.2020). Another contribution within the framework of Sustainable Development is available in the book: *Koohafkan P., Altieri M. A. Forgotten Agricultural Heritage: Reconnecting food systems and sustainable development*. London: Routledge, 2017. The paramount public document: *Howard P., Puri R., Smith L. J., Altieri M. Globally Important Agricultural Heritage Systems: A Scientific Conceptual Framework and Strategic Principles*. Available at: <http://www.fao.org/3/ap025e/ap025e.pdf> (accessed: 18.12.2020).

¹⁷ See: <https://sustainabledevelopment.un.org/?menu=1300> (accessed: 18.12.2020).

¹⁸ See: *Riordan A., Schofield J. Beyond medicine: Traditional medicine as cultural heritage // International Journal of Heritage Studies*. 2015. Vol. 21. P. 280–299.

¹⁹ Among the numerous case studies see: *Russet L. B. Who steals indigenous knowledge? // Proceedings of the Annual Meeting*. Cambridge University press (on behalf of American Society of International Law). 2001. Vol. 95. P. 153–161.

In the wake of expected consequences and responses there is probably going to occur some higher degree of democratization of cultural heritage²⁰ in general. It is because institutions only will not be able to cover all aspects of heritage identification and research, in particular in the immediate period upon the actual pandemic. They will be forced to include communities in their activities more than ever²¹. So among the methods there will be a stronger emphasis on actions such as participatory mapping²², inclusion of volunteers etc. The local communitarian interests will be further promoted through social media outreach and digital networks.

The role of legal expertise in all those activities will only rise in time. For one, the many of UNESCO legal documents (treaties, conventions, recommendations etc.) deal exactly with responses to disasters and emergency situations. The same stands for intellectual property issues, the topic that has been otherwise very “hot” all over the world in the recent period. And what i consider we need to integrate more is the issue of cultural rights²³ and how to give voice to marginal, indigenous communities and various minorities²⁴ so as to reduce their pressure on institutions on one hand, but also to mitigate their frustrations of being underrepresented and ignored.

During times of disruptive changes as we are currently experiencing we certainly need increased moral re-considerations and new procedures. Even beyond strictly legal statements we shall desperately need ethical codes of various kinds (regulating behavior betw. experts and communities) where legal expertise is essential or even crucial.

Of course, among the policies that will come to the forefront the investments in education occupy the critical importance. At least we know well in Serbia how it feels like to have a good educational system destroyed, thereby transforming many communities into ready-made consumers of “reality” programs. How to identify and recognize (a socially desirable) heritage is yet going to be our big common concern.

I may also assume that some actual policies of EU will further integrate (intangible) cultural heritage increasingly, such as *territorial functional planning*²⁵ for both urban and rural settlements, creation of smart cities, cultural routes, etc. And, of course the same stands for opportunities enacted by heritage tourism, creative industries etc.

Conclusions

I addressed some of the most significant short-term outcomes and impacts of the pandemic COVID-19 on heritage, in particular on intangible cultural heritage. The effects may be more or less immediate, some global impacts may not refer to the field of heritage directly, but the various factors together still affect heritage in medium and longer term. As we can see the UNESCO has prepared some adequate responses in its own domain.

²⁰ See for example: The ICOMOS Declaration. Available at: <https://whc.unesco.org/en/news/1767> (accessed: 18.12.2020).

²¹ The statement primarily refers to intangible cultural heritage; among the relevant papers i would recommend: *Proschan F.* Community involvement in valuing and safeguarding intangible cultural heritage // *Reflections on cultural heritage theories and practices* / eds K. Van Balen, A. Vandesande. A series by the Raymond Lemaire International Centre for conservation, KU Leuven, 2015. P. 15–21.

²² *La Frenierre J.* Mapping heritage: A participatory technique for identifying tangible and intangible cultural heritage // *International Journal of the Inclusive Museum*. 2008. Vol. 1, no. 1. P.97–104.

²³ See: <https://unesdoc.unesco.org/ark:/48223/pf0000001194> (accessed: 18.12.2020).

²⁴ See: *Stamatopoulou E.* Cultural rights in international law. Article 27 of the Universal declaration of human rights and beyond. Leiden; Boston: Martinus Nijhoff, 2007. P.41, 70, 163–170.

²⁵ The subject is well represented within the policies of European Union. See: *Bold J., Pickard R.* (eds) *An Integrated approach to cultural heritage* // *The Council of Europe’s technical co-operation and consultancy program*. Strasbourg: Council of Europe. P.67–79. See also: *Territorial heritage and development* / ed. by J.M. Feria. CRC Press Taylor & Francis group, 2012.

Few people could know at the moment about the wider economic and social consequences of the global standstill caused by the pandemic. Certainly that the heritage systems are yet going to get affected and it is not likely to expect a considerable funding of cultural operations in near future unless relevant activities be carried out in the context of response to the crisis or development projects.

However, with a proactive attitude it is possible to mitigate the trends that are otherwise inevitable. I started from the assumption that almost any problem, however overwhelming it be, may in turn reveal some new opportunity.

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Наследие: как остаться релевантным после вирусного кризиса?

С. Сречкович

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В статье отмечается, что, несмотря создание в рамках ЮНЕСКО фонда, предназначенного для оказания международной помощи, благодаря которой государства — участники

Конвенции об охране нематериального культурного наследия, в частности, могут решать проблемы, возникающие в результате катастроф и чрезвычайных ситуаций, стоит ожидать разрушительных фактических последствий пандемии для культурного наследия. В силу известных в последнее время обстоятельств — без мобильности людей и их взаимных контактов, а также без физического доступа к материальному наследию и музеям — у местных жителей, живущих в окрестностях подобных объектов, не будет никаких доходов. Другая проблема связана с нематериальным выражением наследия из-за неизбежных экономических потрясений, последовавших за пандемией, и даже из-за недавних политических потрясений, вызванных различными связанными с ней факторами, такими как поведение, продемонстрированное различными правительствами в условиях кризиса, и последовавшие за этим бунты, вспыхнувшие по всему миру. Хотя четких решений проблем пострадавшего после кризиса наследия все еще не выработано, автор статьи предполагает, что в ближайшем будущем возрастет интерес к экологическим исследованиям, многие будут размышлять об устойчивом использовании ресурсов и их значимости для наследия (например, аграрное наследие, особенно с точки зрения продовольственной безопасности; традиционная медицина или культурные права и интеллектуальная собственность в том же контексте). Несомненно, цифровые инструменты для ознакомления с наследием со временем станут лишь прогрессировать. Вопрос заключается в том, насколько живой опыт культурного наследия окажется доступен людям, по крайней мере в предстоящий период. Адекватное реагирование на глобальное бедствие, безусловно, должно включать культурное наследие в такие стратегии, как территориальное городское/сельское планирование и различные межсекторальные мероприятия, и подобные примеры уже имеются в проектах, финансируемых и поддерживаемых Европейским союзом. Несмотря на ослабление имеющихся ресурсов в результате пандемии, институты культурного наследия должны также все чаще допускать более демократическое включение местных общин в вопросы инвентаризации и охраны этого наследия с помощью таких механизмов, как совместное картографирование и т. п.

Ключевые слова: культурное наследие, нематериальное культурное наследие, чрезвычайные ситуации, пандемия, последствия, экономические потрясения, реагирование, аграрное наследие, участие общин.

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Сречкович Саша — бакалавр наук в области этнологии и антропологии, музейный советник, Этнографический музей, Сербия, 11000, Белград, Студенческий пр., 13; sasasrec@gmail.com

Community participation in Intangible Cultural Heritage safeguarding

Valentina L. Zingari

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According to the Convention for the Safeguarding of Intangible Cultural Heritage (ICH), social actors are at the core of the ICH. Article 2 proposes a subjective, creative and dynamic definition of heritage based on community, groups and individuals (CGIs), highlighting a spiritual connection: ICH safeguarding must respect the “sense of identity and continuity” of CGIs — the main actors in the process of heritage transmission. This community-based vision of heritage is developed in the text of the Convention, the Operational Directives, and reinforced since 2016 by the Twelve Ethical principles introduced in the Basic Texts. A Convention is much more than a text: it determines political, social and cultural contexts, as well as processes of change. A normative tool conceived as guidelines for governments, permeates social life, becoming a framework for the actions and evolution of civil society. This article reflects on the following case study: the “Tocati Programme for the Safeguarding of Traditional Games and Sports” (TGS). The programme started in Verona, Italy in 2003, connecting a network of communities and building relationships through the organization of an international event: The “Tocati Festival of Games in the Streets”. From the beginning, this social movement has strengthened the support of institutions at different levels, connecting people, communities and living traditions with representatives of institutions, researchers, artists and policymakers. The cultural association coordinating Tocati, Associazione Giochi Antichi (AGA) met the UNESCO ICH Convention in 2007. The author examines what has changed in the framework of the Convention in regard to the history of a community-based process and how the Tocati experience contributes to the effective implementation of the Convention today. An attempt is made to identify the key factors, actors and steps of the Tocati cultural, social and political process. This is a story that improves our understanding of the role of civil society in the complex, often conflictual and powerful dynamic of heritage-making.

Keywords: community, civil society, traditional games and sports, Intangible Cultural Heritage, safeguarding, community participation, UNESCO.

1. Need of community and civil society creativity

These journeys in the foreign lands of which a society is made up... indeed, culture can be compared to this art, conditioned by places, rules and data; it is a proliferation of inventions in confined spaces.

Michel de Certeau. Avant-propos à La culture au pluriel (1980)¹

In the particular time we are living, during the Covid 19 pandemic, taking the time to question the “need of community”² in our society is more pertinent than ever. In this

Valentina Lapicciarella Zingari — PhD Cultural Anthropologist, UNESCO Intangible Cultural Heritage Accredited Facilitator, 16, Strada di Palazzavelli, Siena, Sovicille, 53018, Italy; vzingari@gmail.com

¹ *De Certeau M.* La culture au pluriel. Paris: Union Générale d'Éditions, 1974. P. 13.

² See: *Bauman Z.* Community, seeking safety in an insecure world. Polity Press, Cambridge 2001. In the introduction, *An Ouverture*, Bauman affirm: “Words have meanings. Some words, however, also have a feel. The word ‘community’ is one of them” (Ibid. P. 1).

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time of disruption, with museums, theatres and other “places of culture” closed, we are missing, and, therefore, looking for, a new imaginary of cultural heritage, focussed on the creativity of everyday life and civil society experiences. We need to be surprised by this creativity.

Around us in many sociopolitical exchanges, the word “community” is everywhere in several forms: loss of community, need of community, sense of community and individual responsibility in the community, are all common key-words. During the lockdown, confined in our individual spaces, we are also taking time for new reflections on the values of social life. Moreover, to respect the Covid 19 norms, following the recommendations of the scientific community for human health, generates common behaviors. In a time of emergency, norms show their necessity, limits and potential. This process has disclosed with surprising clarity how crucial it is to think and act in terms of cooperation and interconnection at the scale of the planet. Is the global framework of international Conventions getting more pertinent than ever in a context of global awareness-raising of ecological, economic, social and cultural challenges?

Several centuries ago, William Shakespeare told us: “There are more things in Heaven and Earth, Horatio, than are dreamt of in your philosophy” (Hamlet, Act 1, Scene 5). In the 1970s, Michel De Certeau, evoked “these journeys in the foreign lands of which a society is made up... indeed, culture can be compared to this art, conditioned by places, rules and data; it is a proliferation of inventions in confined spaces”. Inviting us to turn toward an anthropology of everyday life, stating that “Everyday life is dotted with wonders”: an extraordinary repertoire of unpredictable answers.

The civil society living projects and realisations has been, for me as a researcher in Human Sciences, a source of surprises and permanent challenges. Communities need our time and care. We need their experiences, struggles and wisdom: the living heritage of Humanity they embody and will to transmit to future generations.

In a recent letter, accompanying the UNESCO survey on Intangible Cultural Heritage (ICH) during the pandemic we find the word *disruption*. The letter ends recalling that: “at the same time we are seeing how *living heritage can be a source of resilience* in such difficult circumstances, as people continue to draw *inspiration, joy and solidarity* from practising their living heritage”³.

In this complex and difficult global context, we are discovering how ICH — embodied in gestures, language and oral traditions, traditional games and food heritage, social practices and rituals — sustains people and communities in everyday life, as a source of resilience. This helps us to a new understanding of the meaning of ICH as Heritage that “communities, groups and individuals” constantly produce, connecting memory and creativity across the world.

2. Time of communities: Intangible Cultural Heritage and community participation

Everyday life is dotted with wonders.
Michel de Certeau. L'invention du quotidien (1994)

Starting this reflection on the relation between social life and norms, I wish to give visibility to some key concepts emerging from the text of the UNESCO Convention for the safeguarding of Intangible Cultural Heritage (2003 Convention) and the literature on community participation in the process of heritage-making. I will adopt the vision of Heritage

³ See: Living heritage experiences and the COVID-19 pandemic. Available at: <https://ich.unesco.org/en/living-heritage-experiences-and-the-covid-19-pandemic-01123> (accessed: 20.09.2020).

as a cultural process, in which historical and cultural narratives and meanings are created and recreated⁴: a space of negotiation and compromise between different powers⁵, and a question of human rights.

The 2003 Convention is a normative tool, and legally-binding. Beyond the text, inspired by its words, its social meaning speaks the diverse and universal language of dreams, at work in human actions, transforming ideals in socio-political tools. What is the place/position of “communities, groups and individuals”, the human beings, in this inspiring text? The question of community engagement in heritage identification and definition is central in the Convention and the 12 Ethical principles, today integrated in the Basic Texts of the Convention⁶. It is the core of the ICH definition, where “community sense of identity and continuity” is the key-factor legitimating the process of heritage-making.

Article 2 – Definitions

For the purposes of this Convention

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

It is the main reference for any safeguarding activities, first of all the inventories of ICH.

Article 11 – Role of States Parties

Each State Party shall:

- a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;
- b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non- governmental organizations.

Article 15 of the 2003 Convention, is fully devoted to this crucial question.

Article 15 – Participation of communities, groups and individuals

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavor to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

Taking into account the Operational Directives (O. D.) of the 2003 Convention⁷, a living text evolving over time at the rhythm of the UNESCO ICH Convention statutory meet-

⁴ See: *Smith L.* Heritage and its Intangibility // Skounti A., Tebbaa O. On the Intangibility of Cultural Heritage. Rabat, Marrakech: UNESCO Office, 2011. P. 11–21.

⁵ In reference to the presentation of Riecks Smeets, in the framework of the First Forum of ICH researchers, Paris 2012. Available at: <https://www.culture.gouv.fr/Sites-thematiques/Patrimoine-ethnologique/Soutien-a-la-recherche/Colloques-seminaires-et-journees-d-etude/2012/9e-Journee-du-Patrimoine-Culturel-Immateriel-Premier-Forum-de-chercheurs-du-PCI-a-la-Maison-des-Cultures-du-Monde> (accessed: 20.09.2020).

⁶ See: Text of the Convention for the Safeguarding of the Intangible Cultural Heritage. Available at: <https://ich.unesco.org/en/convention> (accessed: 20.09.2020).

⁷ See: Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage. Available at: <https://ich.unesco.org/en/directives> (accessed: 20.09.2020).

ings, we find the concept of community participation substantiated by concrete indications, aiming to translate into practice the ICH concepts. O. D. 79 and 80 recommend the establishment of cooperation and coordination mechanisms, assuring the *widest and effective participation* of communities, groups and individuals

79. Recalling Article 11 (b) of the Convention and in the spirit of Article 15 of the Convention, the Committee encourages States Parties to establish functional and complementary cooperation among communities, groups and, where applicable, individuals who create, maintain and transmit intangible cultural heritage, as well as experts, centres of expertise and research institutes.

80. States Parties are encouraged to create a consultative body or a coordination mechanism to facilitate the participation of communities, groups and, where applicable, individuals, as well as experts, centres of expertise and research institutes, in particular in:

- a) the identification and definition of the different elements of intangible cultural heritage present on their territories;
- b) the drawing up of inventories;
- c) the elaboration and implementation of programmes, projects and activities;
- d) the preparation of nomination files for inscription on the Lists, in conformity with the relevant paragraphs of Chapter 1 of the present Operational Directives;
- e) the removal of an element of intangible cultural heritage from one List or its transfer to the other, as referred to in paragraphs 38–40 of the present Operational Directives.

O. D. 81 and 82 recommend capacity building of communities and measures to raise the awareness on the values of ICH.

81. In conformity with the provisions of Articles 11–15 of the Convention, States Parties shall undertake appropriate measures to ensure capacity-building of communities, groups and, where applicable, individuals.

82. States Parties shall take necessary measures to raise the awareness of communities, groups and, where applicable, individuals regarding the importance and value of their intangible cultural heritage, as well as of the Convention, so that the bearers of this heritage may fully benefit from this standard-setting instrument.

O. D. 86 encourages the development of networks composed by communities, experts, centres of expertise as well as joint and interdisciplinary approaches, in relation to “elements of ICH they have in common”.

86. States Parties are encouraged to develop together, at the subregional and regional levels, networks of communities, experts, centres of expertise and research institutes to develop joint approaches, particularly concerning the elements of intangible cultural heritage they have in common, as well as interdisciplinary approaches.

Integrating this “community, groups and individual” level, the Non-Governmental Organisations (NGO) accreditation system is an important framework proposed by the Convention for an effective involvement of civil society in the fabric of heritage. It directly and openly connects NGO worldwide with the ICH Secretariat, without any filter by State-parties, involved in a later stage in the accreditation procedure via the Evaluation Body recommendations and the Intergovernmental Committee decisions.

90. In conformity with Article 11 (b) of the Convention, States Parties shall involve the relevant non-governmental organizations in the implementation of the Convention, *inter alia* in identifying and defining intangible cultural heritage and in other appropriate safeguarding measures, in cooperation and coordination with other actors involved in the implementation of the Convention.

The NGO mediation role is analysed in some scientific publications as crucial for the empowerment of the community to achieve effective participation in the ICH safeguarding process⁸. Civil society organisations play an essential role, as often the same communities, composed by practitioners and bearers of ICH, can organise themselves under associative forms. A multiplicity of different modalities is possible, also in the framework of the crucial mechanism of NGOs-ICH accreditation system. Operational Directive 108 affirms that Community centres and associations that are “created and managed by communities themselves” can play a vital role in supporting the transmission of ICH.

Community centres and associations that are created and managed by communities themselves can play a vital role in supporting the transmission of intangible cultural heritage and informing the general public about its importance for those communities. In order to contribute to raising awareness about intangible cultural heritage and its importance, they are encouraged to:

- a) be used by communities as cultural spaces in which their intangible cultural heritage is safeguarded through non-formal means;
- b) be used as places for transmitting traditional knowledge and skills and thus contribute to intergenerational dialogue;
- c) serve as information centres about a community’s intangible cultural heritage.

In chapter VI of the Operational Directives, devoted to the safeguarding of ICH and Sustainable Development at the national level, a large set of key words are used as concrete tools for collaborative actions. O. D. 170 and 172 underlines the value of research made by “communities and groups themselves”, recommending, at the same time, to facilitate cooperation with relevant experts, cultural brokers and mediators through a participatory approach, to sustain safeguarding efforts.

Let us take a rapid overview of the scientific literature related to ICH and the roles of heritage professionals and NGOs in the process of heritage-making.

The effective synthesis of Chiara Bortolotto in the book “Le patrimoine culturel immatériel. Enjeux d’une nouvelle catégorie”⁹, started with an overview on the “participation of communities” evocating the “desire for community”, identified by Zygmunt Baumann as main expression of a widespread need of cultural belonging in the contemporary “liquid society”. Reflecting on the origin and development of the ICH paradigm, this overview recognises a possible role of experts and researchers as “cultural broker”. In this same book, Valdimar Hafstein reflects on the social and political uses of the ICH paradigm, focussing on the process where “references to ICH contribute to a cultural claim that structures the social field”, affirming that “the Intangible cultural heritage is the community”¹⁰. Frédéric Maguet analyses the different conception of Democracy, between French universalism and the Anglo-Saxon “right to the differences”, evocating the Axel Honneth analysis of political philosophy, defining democracy as a “community of communities”¹¹.

Mediation, “pragmatic posture”, engagement, sharing authority, advocacy, are the key-words of an unfolding vision of heritage, which aims to facilitate the understanding of the “logics of social actors” by listening to their narratives, translating languages and putting in dialogue different levels of social action: between civil society actors, policy-makers and representatives of Institutions. In the UNESCO documents, we find an interesting definition proposed by some experts in 2006:

⁸ See in particular: *Jacobs M., Neyrink J., Van Der Zeijden A.* UNESCO, Brokers and Critical Success (F)Actors in safeguarding Intangible Cultural Heritage. Gent: Volkskunde, 2014. P. 432.

⁹ *Le patrimoine culturel immatériel. Enjeux d’une nouvelle catégorie / ed. C. Bortolotto.* Paris: Editions de la Maison des sciences de l’Homme, 2011. P. 251.

¹⁰ *Hafstein V.* Célébrer les différences, renforcer la conformité // *Ibid.* P. 86.

¹¹ *Maguet F.* L’image des communautés dans l’espace public // *Ibid.* P. 55.

Communities are networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their ICH¹².

This notion of network is even more pertinent in the contemporary evolutions of social and political life, particularly in the democratic experience of European countries, evolving in a globalized world. If the UNESCO 2003 Convention opens the way to change, to a new “time of communities” in the language/practices of cultural policies, the *Council of Europe Framework Convention on the value of Heritage for Society*, propose an interesting and complex definition of “heritage community”.

Article 2 — Definitions

For the purposes of this Convention,

a) cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time;

b) a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.

In a recent publication, Marc Jacobs observes that “the underlying idea is that of a network of different actors, both (groups of) living human beings and institutions”¹³.

3. “Tocati, a shared programme for the safeguarding of Traditional Games and Sports”: A relevant case-study to question the social life/uses of normative tool

There are more things in Heaven and Earth, Horatio, than are dreamt of in your philosophy.

William Shakespeare, Hamlet, Act 1, Scene 5

A concrete community-based project, “Tocati, a shared programme for the safeguarding of Traditional Games and Sports”, allows us to reflect on the norm as a tool for living process and social uses, observing how a community project involves policy-makers, institutions and other stakeholders at different levels. From the text to the field we can see, and in this case state, the pertinence of the Convention *at work*. The Tocati case-study helps us to reflect on the role of communities, groups and individuals together with NGOs, experts, mediators and Institutions in the co-creation process of heritage-making, between the willingness to safeguard ICH in the dynamic and creative sense of heritage as a common good, as proposed by the 2003 Convention, and the communities claims of a recognition as cultural actors in the public space. In order to “see the connections”, we propose looking at the history of Tocati: a civil society process of heritage-making, taking inspiration in the 2003 Convention as a framework for community-empowerment and a shared tool supporting a complex networking and safeguarding process.

In the following description we show, in a chronological order, some of the main moments of the Tocati evolution, keeping in mind the coherence between this experience and the Operational Directive key-concept and references, which we analysed in section

¹² UNESCO-ACCU 2006. Available at: <https://ich.unesco.org/doc/src/00034-EN.pdf> (accessed: 20.09.2020).

¹³ *Jacobs M.* CGIs and Intangible Heritage Communities, Museum engaged // Museums and Intangible Cultural Heritage. Towards a Third Space in the Heritage Sector. Bruges: Werkplaats Immaterieel Erfgoed, 2020. P.39.

II. This evolution shows, at the same time, the factors and actors progressively involved in the ongoing safeguarding process.

In 2002 an informal group of practitioners “*born to save a Traditional game (S-cianco-Lippa)*”¹⁴, claiming its right to use the public space to practice their traditional game, in the centre of the Italian historical town of Verona. The first public event, at the local level, has an unexpected success with an important public participating to this first “Torneo di S-cianco Città di Verona”¹⁵.

In 2003 a newly-born cultural association — Associazione Giochi Antichi (AGA) organised the first edition of “Tocati (in local language, ‘it is your turn’, a popular expression used during the game), Festival dei Giochi in strada” a national event including a lot of different traditional games from the surrounding regions and the whole of Italy¹⁶. The festival decides to pay attention not only to the games in itself, but to the communities of players, practitioners and bearers as cultural actors, considering the traditional game as an element of local cultures. In this sense, Tocati insists on cultural diversity as a value and on traditional games as expressions connected with other elements of community’s living heritage. Traditional games with their diversity connect communities across geographical distance, building creative cultural bridges¹⁷.

In 2004, AGA organised the first “Tocati, Festival internazionale dei Giochi in strada — international festival of games in the streets”. Inviting *ludic communities* from other context of Italy and Europe to join Verona, sharing diverse living traditions in an open, interconnected, creative and innovative vision of heritage as a *sociocultural ecosystem* based on a fabric of relationships: the first international network of Tocati is on the road¹⁸. The event has been an unexpected success, returning the city to its inhabitants while opening it to the world. AGA, with some relevant efforts, obtained the support of its municipality and of the Veneto Region for the Festival organisation¹⁹. Since the very beginning, with the “Host of Honour” format, AGA invites a country or region of the world to join Verona bringing together some main groups practicing traditional games, as well as other ICH practitioners of this same region: traditional dances, music, crafts and foods transform the Verona centre in a colourful landscape devoted to the host traditions, highlighting the values of traditional games and sports as elements of ICH. In this way, Tocati avoids specialization and professionalisation, with a strong care for the “real” and “authentic” community-dimension of the invited groups. This same attention is devoted to avoiding any form of commercialisation of heritage, ensuring the free access of everybody to public spaces. The sponsors of the Festival cannot impose their brand around the spaces de-

¹⁴ This sentence is a citation of the AGA president, Giorgio Paolo Avigo, in several interviews, conserved in the AGA archives.

¹⁵ See the AGA web site and past editions of this local event. Available at: <https://www.associazionegiochiantichi.it/s-cianco/trofeo-citta-di-verona> (accessed: 20.09.2020).

¹⁶ See: Tocati Festival Internazionale dei Giochi in Strada. Available at: <https://tocati.it/edizioni/edizione-2003/> (accessed: 20.09.2020).

¹⁷ For general literature on traditional games and sports, see: *Jeux traditionnels, sports et patrimoine culturel* / ed. by P. Parlebas. Culture et Education. Paris: L’Harmattan 2016. In this same book, see the article: *Joauen G. Jeux traditionnels d’adultes et environnement institutionnel*. P.39–59. On the Tocati network case study: *Berti F., Zingari V. L. Between similarities and cultural diversities: Intangible Cultural Heritage meets intercultural education. The example of Traditional Sports and Games* // *Proceeding of the first International Conference of the Journal Scuola Democratica*. 2009. Vol. III: Governance, Values, Work and Future. P.70–76. Available at: <https://www.scuolademocratica-conference.net/wp-content/uploads/2019/11/1st-SD-Conf.-Proceedings-Vol.-3.pdf> (accessed: 20.09.2020).

¹⁸ See: Operational Directives 79–81.

¹⁹ See: Operational Directives 105.b and c “promoting policies for public recognition of bearers and practitioners of Intangible Cultural Heritage”. See also: <https://www.associazionegiochiantichi.it/s-cianco/trofeo-citta-di-verona> (accessed: 20.09.2020) and the Tocati website, <https://tocati.it/> (accessed: 20.09.2020).

voted to ludic performance: streets and squares are totally free, as in the every-day life of Italian villages where the communities come from.

In 2006 AGA negotiated the possibility of opening, in a public park of the historical centre of Verona, which has been a UNESCO World Heritage site since the year 2000, the “community centre” of the Casa Colombare. From this moment on, AGA has developed different permanent safeguarding activities, involving a local network of stakeholders together with schools, universities, museums and policy-makers, while connecting it with the world, via the international activities of the Festival²⁰. In the Casa Colombare, a growing diversity of safeguarding activities is permanently in project and in process.

In 2007, the meeting with the European Traditional Games and Sports Association (AEJEST/ETSGA)²¹ opened the vision/activity of AGA to a stronger international commitment, and to an “infinity of relationships”. ETSGA is an international network and a platform of exchange, improving the possibilities to develop joint approaches to safeguarding TGS, while encouraging the meeting between critical and interdisciplinary reflections developed at the regional level and crossing different level of actions²². In this same period, ETSGA is applying for accreditation as an ICH NGO at UNESCO²³. The European organisation has been involved since the beginning in the UNESCO working groups, contributing to the process of recognition of Traditional Games and Sports since 1999, the year of the important declaration of Punta del Est²⁴. In the framework of the ETSGA meetings, AGA realizes the contact-points between its vision and the values expressed by the UNESCO Convention on the safeguarding of Intangible Cultural Heritage. These international exchanges raise awareness of the importance and originality of the Tocati project, reinforcing the identity of its community-based vision on safeguarding TGS as part of living heritage.

In 2008 a first network of ten Italian groups of players met and wrote a “Manifesto”²⁵, proposing the criteria defining a “traditional ludic community”, distinguishing these social-cultural local actors from sportive federations and others actors of the dominant sportive and professionalized environment. It was the starting moment of a community-based identification and documentation activity across Italy. This approach precedes the most recent concerns of the Evaluation Body established by the Convention²⁶, opening a rich

²⁰ See: Operational Directives 108 and 172.

²¹ For AEJEST/ETSGA. Available at: <https://jugaje.com/?lang=en> (accessed: 20.09.2020).

²² See: Operational Directives 86.

²³ For the 2003 Convention NGO accreditation system. Available at: <https://ich.unesco.org/en/accreditation-of-ngos-00192> (accessed: 20.09.2020).

²⁴ With the Declaration of Punta Del Este, n 1999, UNESCO recognize for the first time Traditional games and sports as part of cultural heritage of our societies. In 2009, a second Collective Consultation held in Tehran aims to establish a UNESCO Advisory Committee and to propose a definition, or rather a definitional framework: “Traditional sport and games are motor activities of leisure and recreation which can have a ritual character. They are part of the universal heritage diversity. They are practiced in an individual or collective manner, deriving from regional or local identity; they are based on rules accepted by a group that organizes competitive or non-competitive activities. Traditional sport and games dispose of a popular character in their practice and in their organization, yet if turned into sport tend to be uniform and institutionalized. The practice of traditional and games promotes global health”. Available at: <https://unesdoc.unesco.org/ark:/48223/pf00000252837> (accessed: 20.09.2020). In the 2003 Convention frame, the document available at: <https://ich.unesco.org/en/social-pracAces-rituals-and-00055> (accessed: 20.09.2020) states that “Traditional sports and games are part of our intangible heritage and a symbol of cultural diversity of our societies”.

²⁵ See: <https://www.associazionegiocchiantichi.it/associazione/filosofia/manifesto> (accessed: 20.09.2020).

²⁶ See in particular: the Report of the Evaluation Body on its work in 2018 and 2019. Available at: <https://ich.unesco.org/en/13com> (accessed: 20.09.2020), ITH/18/13.COM/1016 (accessed: 20.09.2020). Intangible Cultural Heritage and Sports. Considering the recent trend with an increasing number of nomina-

season of participatory experiences of auto-documentation, community-based research and non-formal capacity-building experiences²⁷. This nascent community-network is the object of an original publication, made by AGA in collaboration with its network, devoted to a trip across Italy and its ludic cultures: "Italian Traditional games. Trip across Italy in play"²⁸. This community-based research was a powerful tool to open, in Italy, a season of study and research in the framework of Institutional inventories of Intangible cultural heritage²⁹.

The shared claim of TGS as cultural activities finds in the ICH Convention a powerful tool and in the statutory meetings of the Convention a pertinent framework for network-building activities, empowering the community in its safeguarding efforts. AGA develops a strong dialogue with the European Traditional Games and Sport Association (ETSGA), accredited NGO by the Intergovernmental Committee for ICH in 2010. In 2014, taking into account the cultural approach to the safeguarding of TGS as a living and community-based element of ICH, ETSGA propose to the AGA President to represent the European NGO in the UNESCO frame. This decision opens a new age in the relationship between AGA and other accredited NGO, as, inter alia, some Italian NGOs participating on a regular basis in the Intergovernmental Committees of the ICH UNESCO Convention³⁰. The ICH NGO Forum³¹, in particular, works like an empowerment platform, bringing together communities, civil society organisations and different experts active in the ICH safeguarding perspective, in dialogue with the UNESCO ICH Secretariat and States parties.

In the context of the 2014 Intergovernmental Committee and ICH NGO Forum, a dialogue born between AGA, other NGOs and some ICH experts, on the pertinence of the ongoing project of Tocati as a good safeguarding practice³². In this same period, the under-use of the Register of Good safeguarding practices was evocated in international discussions, as a challenge to be faced by States parties of the Convention for the years to come. Since the first discussions devoted to Tocati, several communities and experts decided to engage and support the Tocati programme and Festival nomination process as a good practice for the safeguarding of ICH. The nomination process reinforces the

tions related to sports, the Evaluation Body discussed the boundary between traditional sports and games and their professional forms. When describing sports in their files, States Parties often focus on explaining their rules and system of organisation instead of concentrating on their value as cultural practices and the community roles. Concerns were raised as to whether sports and games are in conformity with Article 2 of the Convention and with the Ethical Principles for Safeguarding Intangible Cultural Heritage (Principles 1 and 6). The Body concluded that sports and games can be expressions of intangible cultural heritage when they are community-based practices with a clear cultural meaning and are constantly recreated and transmitted across generations and when the file focuses on their practice within a local community in a non-professional environment. The professionalization of traditional sports could undermine their status as intangible cultural heritage.

²⁷ See: Operational Directives 81, 82, 86.

²⁸ Giochi Tradizionali. Viaggio attraverso l'Italia che gioca. Associazione Giochi Antichi. Available at: <https://www.ediciclo.it/libri/dettaglio/giochi-tradizionali-ditalia/> (accessed: 20.09.2020).

²⁹ See, in particular: the Lombardy regional inventory. Available at: www.intangiblesearch.eu (accessed: 20.09.2020). Since 2018 AGA was in charge of a participatory documentation process, together with 12 ludic communities actives at the regional level.

³⁰ The SiMBDEA Italian Association is an UNESCO accredited NGO since 2010. Available at: <https://ich.unesco.org/en/accredited-ngos-00331> (accessed: 20.09.2020).

³¹ See the page of the UNESCO ICH website devoted to the ICH NGO Forum. Available at: <https://ich.unesco.org/en/ngo-forums-00422> (accessed: 20.09.2020).

³² See art. 18 of the 2003 UNESCO Convention. Available at: <https://ich.unesco.org/en/convention> (accessed: 20.09.2020).

network-building, highlighting the connections between ICH and the sustainable development perspectives³³.

Since 2016 an international symposium “Tocati, a shared heritage” has taken place in the framework of the Festival every year, bringing together communities, experts and Institutions from several countries in shared critical reflections, developing and reinforcing the awareness raising process, while strengthening at the same time the motivations to work in the perspective designed by the criteria of the Register³⁴. This central and regular moment devoted to the Tocati international network, reinforce the communities and Institution’s dialogues: the pillar for the effective implementation of the Convention safeguarding perspectives.

Since 2017 the Tocati network promotes, with the support of the Central Institute for Intangible Heritage (ICPI) of the Italian Ministry of Cultural Goods and Activities (MiBACT) and the Cultural Sector of the Veneto Region, a capacity-building process at the national level: the “days of Intangible” brings together communities of practices, NGOs, experts and facilitators as part of the UNESCO global network of capacity building, as well as Institutions at all levels. This national process is strengthening the Italian community network, together with Institutions at the local, regional and national level³⁵.

In 2018 an experimental inventory process was launched in cooperation with Lombardy Region³⁶.

In 2019, in the process of preparation of the nomination file, the European partnership coordinated by the UNESCO Office of the MiBACT, identifies Tocati as a shared cooperation programme, living through a permanent network of communities promoting a wide range of initiatives at all levels: from the local to the international one, reflecting the criteria of article 18. The nomination file has been sent to UNESCO in March 2020, during the Covid19 lock-down, by five States parties of the Convention: Italy (leader partner), Belgium, Cyprus, Croatia and France.

In 2020, a resilient Tocati Festival, supported by new technologies, connected the Italian communities in a widespread event, in which groups from 17 Italian countries played simultaneously and live, via streaming, in an extraordinary dialogue with the groups in presence in Verona. New technologies and social channels have allowed communities from all over the world to follow and experience the festival together.

This broad international “heritage community” of Tocati is an example of “traditional ludic communities” connecting with one another and with Institutions, in a growing process of awareness raising and empowerment. The Tocati example reveals to what extent the UNESCO Convention can be a powerful tool to reinforce and improve a community-based safeguarding strategy, strengthening the capacity of communities to connect with experts in order to demonstrate the coherence of their approach/story with the “spirit of the Convention”³⁷, while reinforcing the institutional trust in this community-based process. At the same time, the Convention is a tool for awareness raising of the communities, who progressively discover the many dimensions of the heritage values of traditional

³³ Chapter VI of the Operational Directive is devoted to ICH and Sustainable Development. Available at: <https://ich.unesco.org/en/directives> (accessed: 20.09.2020).

³⁴ See: Operational Directives 79–81.

³⁵ See: Operational Directives 81–82, and <https://tocati.it/?s=le+giornate+dell%27imateriale> (accessed: 20.09.2020).

³⁶ See: 2003 Convention, art. 12–15 and Operational Directives 80 and 86.

³⁷ The “spirit of the Convention” is a term widely used by both government representatives and representatives of communities, NGOs and experts during the meetings of the Intergovernmental Committees and General Assemblies of the 2003 Convention. See: *Jacobs M.* The spirit of the Convention. Interlocking principles and Ethics for safeguarding ICH // *International Journal on Intangible Cultural Heritage*. 2016. Vol. 11. P. 71–87.

games and other social practices, engaging in the transmission, at the local as well at the global level, of their ICH to the new generations.

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Участие общин в охране нематериального культурного наследия

В. Л. Дзингари

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В соответствии с Конвенцией об охране нематериального культурного наследия (Intangible Cultural Heritage, ICH) социальные субъекты являются отправной точкой для определения ICH. Статья 2 Конвенции предлагает субъективное, творческое и динамичное определение этого наследия, основанное на сообществе, группах и индивидах (community, groups and individuals, CGIs) и подчеркивающее их духовную связь: охрана ICH должна уважать «чувство идентичности и преемственности» основных участников процесса передачи наследия. Это общинное видение наследия развито в тексте Конвенции, Оперативных директивах и с 2016 г. подкреплено Двенадцатью этическими принципами, введенными в основные тексты. Конвенция — это гораздо больше, чем текст: она определяет политические, социальные и культурные контексты, а также процессы изменений. Нормативный инструмент, задуманный как руководящие принципы для правительств, проникает в социальную жизнь, становясь основой для действий и эволюции гражданского общества. Автор статьи размышляет над тематическим исследованием

«Программа Токати по охране традиционных игр и видов спорта» (Tocati Programme for the Safeguarding of Traditional Games and Sports, TGS). Эта программа стартовала в Вероне (Италия) в 2003 г., объединив сеть сообществ и построив отношения через организацию международного мероприятия «Фестиваль уличных игр Токати». С самого начала это общественное движение усиливало свою институциональную поддержку на разных уровнях, связывая людей, общины и живые традиции с представителями институтов, исследователями, художниками и политиками. Культурная ассоциация, координирующая фестиваль Токати, а именно Associazione Giochi Antichi (AGA), испытала воздействие Конвенции ЮНЕСКО ICH в 2007 г. Автор поставил перед собой вопрос о том, что Конвенция изменила в истории общинного процесса и как опыт Токати способствует эффективному осуществлению Конвенции сегодня. В статье идентифицируются ключевые факторы, акторы и этапы культурного, социального и политического процесса Токати. По мнению автора, эта история улучшает понимание роли гражданского общества в сложной, часто конфликтной и мощной динамике создания нематериального культурного наследия.

Ключевые слова: сообщество, гражданское общество, традиционные игры и спорт, нематериальное культурное наследие, участие общин, охрана, ЮНЕСКО.

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Дзингари Валентина Лапичирелла — PhD культурологии, аккредитованный координатор ЮНЕСКО по нематериальному культурному наследию (ICH), Италия, 53018, Совичилле, Сиена, Страда-ди-Палаццавелли, 16; vzingari@gmail.com

Intangible Cultural Heritage in architecture and urban planning

Neel Kamal Chapagain

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This article reflects several observations of our cities during the COVID-19 pandemic — particularly the initial lockdown that most parts of the world experienced since March 2020. One of the impacts of COVID-19 has been the forced closeness of people with their homes wherever they were. In the present age, perhaps, many of us have rarely experienced our own homes or shelters or architecture so closely. The pandemic may have brought us an extended moment to experience and reflect on architecture and urban planning on a very personal scale — from a room, to an apartment or a house, a neighbourhood, and then perhaps a city on a limited scale. This is an interesting moment in history to reflect on architecture and space, and how they are designed and planned. COVID-19 has exposed the limitations of many of our thoughts and practices. Apart from the author's own self-reflections at "home", observations include the context of South Asian cities where the globally accepted measure of lockdown to prevent the spread of COVID-19 triggered the plight of millions of migrants on the momentarily empty roads and highways for a long-march towards rural and semi-urban segments of countries. This led to the author's re-thinking of architecture and planning in urban contexts. In (re)thinking architecture and urban planning, the article uses the notion of intangible cultural heritage (ICH) as espoused by the 2003 UNESCO Convention, and discusses whether ICH could offer useful insights to achieve better results in our contemporary architecture and urban planning thinking and practice. Can the ICH perspective help us to understand these bitter realities of the 21st century? The author attempts to reflect on some of the questions.

Keywords: COVID-19, intangible cultural heritage, Kathmandu Valley, world heritage, architecture and urban planning, UNESCO.

One of the impacts of COVID-19 has been the forced closeness of people with their homes wherever they are. In the current era, perhaps many of us have rarely experienced our own homes or shelters or architecture that closely. So, the pandemic may have brought us an extended moment to experience and reflect on architecture and urban planning at a very personal scale — from a room, to an apartment or a house, to a neighbourhood, then perhaps a city in limited ways. This is an interesting moment in history to reflect on the architecture and space, and how they are designed and planned. It is within the world of this close architecture and urban planning that we might have been traversing between the real and virtual, tangible and intangible, natural and cultural, and so on. Though this is (was) momentary until the lockdown and other COVID-19 restrictions are in place, personally I find it a unique historical moment to reflect on our personal space, family space, the home and the neighbourhood. This is the experience of the privileged group. But there are also other groups — not so privileged or less privileged, unprivileged or those for whom any situation seem the same.

Neel Kamal Chapagain — PhD, Independent Architect and Heritage Professional, Nepal, Associate Professor & Director, Centre for Heritage Management, Ahmedabad University, Commerce Six Roads, Ahmedabad, Navrangpura, Gujarat, 380009, India; neel.kamal@ahduni.edu.in

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Unfortunately, there has also been a very painful experience (for other who do not fit into what I termed privileged in the last paragraph) in many cities in South Asia, where the consequences of urban response to COVID-19 has resulted in a struggle between “home” and “work” for millions of migrants. As the pandemic forced governments to announce stay home orders, this unprivileged group was perplexed by the notion of “home” and the act of “staying”. “Home” can be defined in multiple ways, in connection with the basic rights of being human, feeling close to where one belongs, a place or refuge where one can feel safe and comfortable, and as the popular saying goes “home is where heart is”. In other words, a home is a concept, a space, a structure that gives solace to people. Our cities are called “home” by many people — residents, non-residents alike. Differing classes of working people call the same city as home, within which they would have found a range of spaces that they would call home. There would be infrastructures laid around to ensure that all kinds of workers are secured in the city where they work, as their home. Of course, people would have multiple homes, which are free for them to navigate between. However, these all came to a completely different interpretation as the pandemic began to take its toll and the governments in South Asia took proactive measures to declare a complete lockdown in March 2020. As I followed strictly the “stay home” orders in the comfort of place and structure I call home, I realised it was very timely for us to reflect on the idea of architecture and urban planning, and reflect into their deeper meaning beyond the physical buildings and infrastructures. This is where perhaps the idea of intangible cultural heritage helps to examine the unseen features of our architecture and urban planning.

1. Observations during the COVID-19 lockdown in Nepal and India

As the world came to a standstill in a relatively shorter span of time in the first quarter of 2020, we experienced a different world through our windows — sounds of birds, sometimes noticing different species of birds and other species, seeing clearer skies, and so on. People of Kathmandu valley in Nepal witnessed a historic unprecedented scene — to be able to see extensively beautiful and clear panorama of the Himalayan mountain range, including a published picture by a journalist where he could even point out the Mt Everest¹. This was beyond the imagination of many generations in Kathmandu I think. Staying at home, I was able to observe for myself the cycles of flowering and fruiting in some of the plants in the kitchen garden, slow motion video recordings of insects’ movements and so on. Our son celebrated his tenth birthday away from us but creatively termed it as a digital birthday celebration and did manage well to integrate digital technologies not only to connect but also cheer up his own “locked down” situation by integrating online games to party with his friends and cousins. These all, however, are memorable experiences of the “privileged”.

Unfortunately, the lockdown and stay home literally compelled many working people in our societies to come out of their temporary homes in the cities to make a move towards their “real” home. There were thousands of people taking to the streets and to the highways travelling out of the Kathmandu valley on foot because the lockdown closed down all forms of transports. This was the same and even worse scenario across India where perhaps the biggest mass migration in recent history was observed by many of us via our television sets. Though it was not officially authorised to walk on the roads, but it was the desperate choice made between the virus threat and the virtue of survival.

¹ *Gautam A.* When the air is clean // Nepali Times. 2020. Available at: <https://www.nepalitimes.com/banner/when-the-air-is-clean> (accessed: 16.05.2020).

In Kathmandu valley, perhaps the previous panic the city had experienced was during the 2015 earthquakes. At that time, most of the physical monuments were destroyed, and subsequently were given good attention from both the national and international agencies. Such attention was possible because the Kathmandu valley has the privilege of hosting seven heritage zones listed in the World Heritage Sites list of UNESCO since the 1978. But this pandemic did not impact these heritage sites except that their visitation by tourists were interrupted — which was recognised by the government and authorities sometime later when the economic impacts of the lockdown were felt. However, the people who were impacted by the pandemic did not seem to be like any concern for the government which was so concerned about the rebuilding of physical monuments. Even when the traditional festivals (locally called *jatras*) had to be postponed due to the pandemic, the government in Nepal did not feel it necessary to consult the traditional practitioners and followers. They could simply impose restrictions since it would violate the “distancing” norms prescribed for the pandemic situation. Yet, the same “distancing” norm would not be referred when there would be a need of a political gathering or a meeting of the affluent. One may interpret these incidences as a matter of national politics, but I interpret these as lack of sensitivity towards the cultural heritage. What is more bothering as a dilemma for me is related to the heritage thinking that we have carried largely. On the one hand, heritage professionals keep arguing that heritage offers resilience (though not much demonstrated in practice), and on the other hand, the rest of the society seem to ignore the heritage that makes a city or home — they ignore the intangible mostly whereas the tangibles seem to receive some attention due to their physical existence. This dilemma is what I would like to reflect upon in this article.

As I focus on the intangible cultural heritage, let us remember a fundamental ground of intangible cultural heritage, that it exists in the minds and practices of people, hence it is also called living heritage. Intangibles are also not as separate to the tangibles as these are the intangibles which give meaning to the tangibles² like cities and our homes. Therefore, the negligence of intangible heritage cannot be done without neglecting people — the carrier, bearer, practitioners and beneficiaries of such intangible legacies. Evidently, the problem of separation of tangible and intangible heritage in heritage practice seems to have a much higher toll during the health related pandemic as it does not hurt the tangibles but the intangibles — hence, the people become victims in multiple ways. In countries like Nepal, where the basic rights of citizens are largely not fulfilled due to still existing socio-political injustices, it was evident that the people with less economic power are the bigger victims of the pandemic as they resorted to mass-migration out from the cities because their economic utility during a complete lockdown was very low. This inhumane scenario that I observed during the pandemic lockdown made me question — what good are our heritage sites or heritage legacies are for, if they have no relevance to people? It may sound like an extreme argument but what I would like to highlight is what we have largely missed in our heritage interpretation so far.

As a heritage educator, I wondered what good are those world heritage sites for the citizens. Well, heritage sites do not come to rescue at such crisis — one may think. That is because our interpretation of the heritage of Kathmandu valley has only been limited to the bricks and mortars, the tiered roofs and the squares, the sacred temples and some rituals. Even when we recognised the rituals and practices as being integral part of the heritage discourse, we somehow do that detached from the built space and made them an island of intangible cultural heritage. It is where we have missed to understand these heritage sites which formed our cities. It was our mistake to develop a perception of tangible

² *Smith L. Uses of heritage. London: Routledge, 2006.*

and intangible as distinct worlds of heritage, which have been decried³. Hence, I would not put the entire blame just on the politicians or the government for such an indifference adopted for its own citizens during the pandemic, but I would suggest that the heritage professionals dealing with such rich heritage sites are also partially to be blamed for missing out on deeper interpretation of the heritage of these cities.

As I discover through an article⁴ (written not by a heritage professional but a journalist) that appears in a newspaper soon after, that the Kathmandu valley had imagined and practiced the process of quarantine at least two centuries before 2020 pandemic. There were public rest houses where merchants returning home from business trip would spend a week, purify themselves following certain rituals, and come home only after ensuring that everything and everyone is well quarantined. All this would take place at the few entry points to the valley. Yet, this all was treated like a ceremony or ritual that one would go through voluntarily. Within the cities, there would be public rest houses for the street walkers and travellers to take rest, and occasionally they would also be fed and offered drinks at places. These all became a things of ancient past in the twenty first century when the fellow citizens walked days and days without anyone offering them food or shelter. Rather, there have been incidents where neighbours did not allow anyone coming from outside to enter the neighbourhood for the fear of the coronavirus. Anyone being diagnosed positively with coronavirus were treated as if they were no longer humans or as if they committed crime.

In this paper, I would like to reflect what relevance the idea of heritage has in such situations. More specifically, I argue that the discourses of heritage — particularly that of the Intangible Cultural Heritage (ICH)⁵ may be a useful concept within our understanding and practice of architecture and urban planning.

2. Response to COVID-19 and missing out on heritage aspects

The very first response to the COVID-19 crisis in many countries was some variant of “stay home” order, with a widespread slogan of “stay home, stay safe”. I would like to list here a few simple questions which require deeper reflection and retrospection of some of these basic concepts and terminologies. In doing this, I begin to explore some relationships between the idea of home and the intangible cultural heritage, and the same can be expanded to a neighbourhood and to a city.

- What is “home”?
- Does everyone have “home”?
- What is people’s relationship with “home”? Why staying home has become a mental issue? (There has been reports of psychological issues and mental health issues that different age groups are facing during this crisis, particularly since people are confined at home for a longer stretch. There may be multiple areas of inquiry, i.e. whether the “home” is a contemporary space and function has missed out on individual’s personal needs or aspirations, or whether the ability to move around freely is a primary factor that contemporary society is concerned with? In

³ *Chapagain N. K.* Blurring boundaries and moving beyond the tangible/intangible and the natural/cultural classifications of heritage: Cases from Nepal // Cultural landscapes of South Asia: Studies in heritage conservation and management / eds Amita Sinha, Kapila D. Silva: 24–38. London, New York: Routledge, 2016. P.24–38.

⁴ वसन्त महर्जन थप सामग्री. महामारीमा नेवार समाज: उहलियै पन्क्वारेन्टनि’ र ‘आइसोलेसन’ मा बस्थे ! थप सामग्री [Maharjan B. Newar Society during the Pandemics: They used to maintain quarantine and isolation way back in past too] // Himal Khabar. 2020. Available at: <https://www.himalkhabar.com/news/113918> (accessed: 12.05.2020).

⁵ Convention for the safeguarding of intangible cultural heritage // UNESCO.2003. Available at: <https://ich.unesco.org/en/convention> (accessed: 12.05.2020).

both aspects, can these be negotiated in terms of architecture and planning at multiple scales?)

— Is home defined by just “four walls and roof”? Are there invisible subtle relations between people and home? What are they?

— Does ICH capture those relationships between people and home?

— Does ICH explain principles of urban planning of our heritage cities?

— Can ICH be a guidance for a better city planning?

We can begin to reflect on these questions from an individual scale, and then move onto communal scale as a city or country. At individual level, perhaps the pandemic made us realise about our own self, but also about our “home”. Perhaps many of us may not have spent such an extended time at home. To me, this has been a revealing moment to understand the techniques, the space, some problems and some opportunities that are at my own home — the physical structure and space called home. How far was I engaged with it — even though it is my heritage and I teach about heritage? Does the material makes it “home” or is it the space or is it my attachment that makes it home? Once I answer these set of questions, then I can ask a question to my architectural education, and perhaps the practice of architecture. Do we — as architects, design home as a detached space or do we allow it to have some emotions? Of course, architects alone cannot make a building as a home, it is the users who make it home. Then, how far have we gone to the users (once they occupy the home) and get feedback on our design or design process?

Similarly, if we change the scale to the city, then the question should be “what do the residents think of their cities”? Aren’t the migrant labours who occupied different parts of the city for so long have a say on this? Why — in the face of pandemics, none of the migrants were able to feel connected to the city? As I bothered about this from heritage perspective, I wonder whether some of the questions should bother our planners and policy makers and politicians. Today, South Asia is facing another pandemic in the making due to the irresponsiveness of our politicians and policy makers towards these users of the city. Perhaps such is a lesson that this pandemic has brought to professions like architecture and planning, as well as players like politicians and policy makers. How can then heritage offer any insights into such problems? I will briefly touch upon this next.

Other stakeholders of the city aside, it should be the roles of heritage enthusiasts and practitioners and institutions to interpret the heritage in a holistic manner. So far, we only interpret the bricks and the mortar and form and the shape, with less concern about the legacies of who built them. The workers were there when these monuments of the Kathmandu valley were built. The patrons had ensured them of their livelihoods but also necessary social security so that the artisans and artists could perform their best. While we create a thriller by offering anecdotal stories that so and so artist was chopped off of his hands after creating a masterpiece, we conveniently ignore the general practice that the artists and artisans were respected for their skills. Do our cities have similar respect for the millions of workers (mostly the migrant workers in today’s societies) who actually built our cities? This may sound an irrelevant argument in today’s capitalist society but any serious heritage thinker — who is equally bothered about process as much as she is bothered about a product that exists today as heritage, whether tangible or intangible, shall be able to see the connection I am trying to make here. Heritage is and should be such deep thinking exploring the roots and the recipes of creating such legacies, and NOT just scattered compositions of bricks and mortars and spaces in our cities. Missing that in Kathmandu valley rendered us today devoid of any pre-existing places which would have played the role of a quarantine space (as I mention previously that there used to be quarantine spaces built at main entry points to the valley). What happened to such a wisdom? Though some communities may still follow the rituals associated with such practices, would not it be the role of a heritage thinker and practitioners to connect such rituals with some designated spaces in the fringes of the city, but more importantly to curate such a beautiful

architectural and planning theory and practice that were in place centuries before today's pandemics?

3. City it was

It seems the settlement evolution in the Kathmandu valley had in past put in provisions for the needs like quarantine and isolation (not these words but equivalent words in Newari language), which are still reflected in some of the rituals and traditions that the Newar community follows still today. Perhaps today the rituals are objectified and only symbolic gestures are carried out, hence losing out on the essence of the rituals and practices or perhaps confining the practices in limited sense only to the community and not to the city dwellers as a whole. In past, there seems to have been space and structures allocated for a businessman to quarantine himself while returning from a business trip to Tibet or elsewhere. Maharjan mentions of accounts of missionaries who had noticed that the roads would be blocked whenever there would be fear of any contamination being spread in the then cities⁶.

4. City as heritage site

However, the above accounts rarely feature in the narrative of a world heritage that Kathmandu valley proudly boasts of having in its several historic and religious sites. Even the intangible practices of purification and precautions today are considered as unscientific and blind faith, and hence increasingly being not followed. Of course, one can choose to follow a more contemporary processes, but the essence could have been kept alive in spirit so that dealing with pandemics would not be a matter of following government imposed lockdown but something that communities could anticipate and enforce voluntarily. Perhaps the necessary lockdowns could have been a celebratory communal declaration rather than an imposition from the authorities.

5. City during the COVID-19 crisis

Today, the reality of these cities are starkly different. Kathmandu valley — a growing urban area today has its history and foundation to multiple layers of built and unbuilt heritage in which taking care of nature and people through rituals and practices that were closely associated with schemas of place, streets and the natural features. An interesting crossroad of the ideals of Hinduism and Buddhism, the valley's heritage is applauded for demonstrating the tenets of compassion and care. The city residents — despite having the heritage of compassion and carefulness, have mostly turned blind to fellow citizens. Take for example — different kinds of guthis (a social institution and practice) in the Kathmandu valley.

Guthis are community institutions which have multiple functions — like a local cooperative group to something like a neighbourhood block group, and better as a public trust that is responsible for building and maintaining public infrastructure including buildings and spaces, as well as maintaining them by using the land trust and other resources associated with the guthis. The guthis concept could have very well offered a huge refuge in the crisis induced by the pandemic as well, but officially the practice of guthi has largely been truncated to only some small family and community guthis, while the bigger ones being integrated into the modern governance system. The ecosystem of land and other resourc-

⁶ *Maharjan B. Newar Society during the Pandemics...*

es that were weaved together through these guthis have long been disrupted, hence the traditional water supply and other water networks, the culture of community-connections, culture of precautionary measures like the cultural process of quarantining oneself if coming from foreign trade and so on, were long lost. Perhaps what drew attention of peoples like Eduard Sekler and Carl Pruscha in the 1970s were the people, culture and their manifestations through the monuments and landscapes of the Kathmandu valley. Such a global attention to Kathmandu valley eventually led to the listing of selected monument zones of Kathmandu valley as the first nomination from South Asia in the UNESCO's world heritage sites list in 1978. However, the limited vision of the nomination dossier or document has never been critically examined or expanded. Instead, it became further narrower as was the boundaries of the world heritage properties in the valley. Any serious heritage professional must profess such a shortcoming in her heritage thinking and practice.

6. Perspectives from the ICH discourse: ICH as a source of resilience and recovery

As a solace to the above concern, it is heartening to note that the agencies and individuals related to the heritage sector have been optimistic about the role of heritage in times of crisis and disasters. This was evident during the COVID-19 pandemic as well through initiatives undertaken by UNESCO, ICCROM, ICOMOS and others. It can generally be inferred that many community groups may find their cultural practices as a refuge during times of crisis. However, many of our cultural practices require a larger gathering, which is not advisable in such situations. It is for such situations that the understanding and safeguarding of ICH should be updated to fit the changing needs including those of the pandemic response.

In Kathmandu valley, some of the traditional festivals came into dispute in 2020 when the government restricted such practices in view of the pandemic situation. Had there been open-mindedness from both sides and a timely discussion were made feasible, perhaps we could have not disrupted the cultural beliefs while maintaining the health advisories and practices. Perhaps negotiations and revisions to the process could be done to allow important cultural traditions to continue even during the lockdown. In absence of any anticipation of such crisis, there was not enough time and preparation for such timely negotiations and modifications of practices. However, I would also argue that it was also a matter of lack of cultural sensitivity on the part of the government while at the same time lack of a proactive adaptation on the part of community of practitioners. This situation either left traditions halted historically, or led to violent conflict between the practitioners' community and the law-enforcement authorities. But perhaps the law enforcement processes and governance structures should have allowed some space for consideration and opportunities of negotiation with various stakeholders within a city of living heritage to find out appropriate ways to maintain physical distance while pursuing crucial social and cultural functions. Yet, while saying so I am not suggesting to put anyone at risk of infection and health risk. I think the missing component here is our heritage theorization which have largely been busy objectifying and glorifying certain aspects, and not paying enough attention to various everyday aspects and deeper meanings. The agencies sponsoring or promoting various safeguarding measures may consider promoting such alternative practices and frameworks extensively at all times, for example — UNESCO's platform on living heritage and the COVID-19 pandemic⁷.

⁷ UNESCO launches platform on living heritage and the COVID-19 pandemic // UNESCO. Available at: <https://ich.unesco.org/en/news/unesco-launches-platform-on-living-heritage-and-the-covid-19-pandemic-13263> (accessed: 10.05.2020).

7. Reflections on broader practices on heritage, architecture and planning

COVID-19 has exposed the limitations of many of our thinking and practices, at least this is what I observed in the context of South Asian cities where the globally accepted measure of lockdown to prevent the spread of COVID-19 triggered the plight of millions of migrants on the momentarily empty roads and highways for a long-march towards rural and semi-urban segments of countries — not a great example of urban planning, where their “homes” would not be seen as any great example of architecture. Have we missed something in these scenarios? Can a perspective of ICH help us understand these bitter realities of 21st century? This is where perhaps there is a possibility of examining our built environment through a lens of intangible cultural heritage. In addition, I believe there is a strong need of self-reflection and perhaps a corrective measure in our general heritage practice. Heritage professionals must recognise the pitfall of objectifying the notion of intangible cultural heritage — this may be unintended consequences too. In relation to architecture and building context, intangible cultural heritage are largely perceived as either an add-on to an architectural process (like a building craft or aesthetic and symbolic decorations) or as a performance in a space (as cultural practices that fill up a space). Instead, I argue that the intangible aspects could very well be part of any design intervention or exercise in a given context. Similarly, in urban design or planning processes, intangible cultural heritage could have been a useful reference to conceptualise design and use of spaces, their hierarchies and more importantly bringing in resilience in our urban design.

So, rethinking cities through ICH requires a few key principles to be born in our mind while we research, design, build and live in a city that is founded on the historic and cultural legacies, but is aiming to be competently comfortable, safe and future-oriented cities. Elaborating on these would be a scope of another paper, but I conclude by highlighting key points to move into that direction:

Layers of Heritage, Knowledge Systems as ICH: Enhanced understanding of Architecture & Urban Planning, Regional Development. It appears that ICH discourse has also been trapped into an objective discourse, and moving towards monumentalizing of the intangibles and knowledges and practices by adopting a listing process which has the potential to objectify the ICH like that of the World Heritage list. Instead of a unique or romantic or monumental gesture, ICH needs to be understood as layers of heritage — particularly displayed through the knowledge systems and visible practices and performances (both with physical products or non-physical experience and expressions). If such layers are integrated into the education of architects and urban planners, then perhaps the practices around built environment would have also facilitated the continuation of such ICH elements in our cities. However, this is not an entirely new argument. Like some thought-processes in the heritage sector itself, the practice of architecture has also embraced similar concepts through socially responsive architecture, culturally sensitive architecture and urban design, environment-behavior design approach, among others. On this, the global proliferation of heritage discourse and set of practice mechanisms should have supplemented for creating synergies for better and livable cities, but the outcomes have not been successful everywhere. It is ironic that the culturally rich contexts are today desperate to ditch their legacies to embrace a universalized design language, thus missing opportunities of creating good architecture and cities anchored on cultural identity and sustainable practices — both in cultural and environmental sense as well as in economic development perspectives. It is where I think perhaps a ready reference to ICH as a part of culture-sensitive design philosophy may be helpful in nurturing the potential synergy between the design practice and heritage practice.

ICH is not an “intangible”, “invisible” or an “add-on” to the built heritage. In my opinion, one of the sheer flaw in our understanding is to think of ICH as an “invisible”, hence at times easy to avoid or ignore. Therefore, we should articulate ICH for being inseparable part of the tangibles and everyday life emphasizing on inclusivity than invisibility or intangibility. ICH are

integral characteristics and elements of many aspects that our cities are built with. ICH is a way of understanding, designing, and functioning of built environment, that interconnects both the “cultural” and “natural” as well as “tangible” and “intangible”. ICH is the soul, which architecture and urban planning need to enshrine in design and function.

ICH as an expression of people's relationship with their homes, neighbourhoods and cities. In continuation of the above arguments, I would like to conclude by pointing out my attempt of answering some of the questions that were raised earlier in this paper, i. e. Does ICH capture those relationships between people and home? Does ICH explain principles of urban planning of our heritage cities? Can ICH be a guidance for a better city planning?

Let me begin to reflect on these questions by considering a few anecdotal and personal experiences. During this pandemic, as I “stay home” at my family home in Nepal, I realise a few aspects of this home that is missing in other houses that I have considered as home elsewhere. In terms of the spaces, a traditional home in Nepal⁸ would have a semi-private space that creates a buffer between the public space and private space. Somewhere close to this space would be a water source (either a tap or just some vessels with water) so that family members returning home or visitors could wash their hands and feet before entering the home. The segregation of kitchen and hierarchy of dining spaces as well as some rituals and everyday practice in using these spaces have some protocols that would have made much sense during the health pandemic. These traditional homes, however, lacked a comparable toilet and bath facilities as compared to today's lifestyle — a major aspect of improvement in traditional houses in Nepal. There have been decent additions of these facilities in wherever the traditional houses are adapted into contemporary urban living as well. These generic designs would have regional variations relating to specific climate and landscape as well as cultural nuances.

Today, on the other hand, a typical family home being built across Nepal mostly follow universal standards and logic in space and structure. They do not have any traces of these traditional space design concepts. These are mere mimicry of a modern apartment living concept though the services and everyday culture in Nepal at large is yet to be like that of apartment living culture. This is a simple illustration of where a potential reference to intangible cultural heritage could inform architects of space requirement and cultural contexts for a Nepali house. This should not mean to go back into the traditions blindly and freeze the culture and lifestyle. Instead, this approach informed by genuine understanding of ICH could respond to the needs of people in realistic manner by fusing the familiar with the desirable, and integrating the traditional knowledges into the contemporary aspirations. Similar analogy can be drawn to town planning aspects, that can contribute to a balanced urban design and planning strategies.

In rural areas, houses built in synchronisation with agricultural practices not only ensures proper lighting and ventilation for each individual houses, but these became natural way of maintaining distance and “stay home” was not a big issue for rural population during the pandemic. The crowded urban areas in Nepal, had different set of experience where the life style was meant to be an urban one without decent urban services. Hence, what has happened in the built environment in Nepal, is we have left the traditional ways but have not yet learned the essence of modern living that is being blindly copied everywhere. Instead, if we (architects and planners) had attempted for gradual transition by latching onto the traditional ways but slowly and necessarily adapting and improving upon, I am sure the experience of these spaces would have been much more meaningful and timely. Again, the broader definition and everyday perspectives on ICH could have been a good start in such design thinking.

⁸ I recognise that I am generalising diverse cultures found within Nepal, but this experience is not unique to me, hence I decide to call it as a “Nepali family” in generic sense.

As per its definition, ICH can be understood in multiple but overlapping ways as connected to homes and neighbourhoods as well as cities. Not only it captures the meaning of spaces, value and hierarchies of the use of spaces and importance given to them, but ICH is also about the processes of creating such spaces including built structures and natural landscapes. Further, ICH includes traditions and practices which are weaved intricately around the built environment that is designed with certain anchoring concepts (which is what the previous sentence captured). The safeguarding of ICH is about documenting and continuing these elements of ICH, hence it clearly makes sense for us to agree that there is a great potential of integrating ICH as a concept and practice tool in design thinking and practice — particularly related to our built environment. Let me elaborate this by referring back to the example of Kathmandu valley that I used in this paper.

There are myths about how the valley was founded as a way of making it a habitable land out of a pond in the ancient times. Archaeologically proven ancient settlement patterns attest the planning concept adopted by which the agricultural land were preserved while setting up settlements at higher lands. Similarly the water resources and forest resources as well as key entry points were designated and integrated into the then planning process by way of introducing varieties of sacred spots and shrines which were connected to people through numerous festivals and rituals, and so on. These are all well documented, and many of them are still practiced today. Had the planners and developers paid attention to any of these, we would not have seen drying of water resources, disruption of water supply through traditional water canal systems, and maintaining of various other aspects of natural and cultural resources management. I would not like to end my critique just with reference to the development professionals, planners and governments. In fact, the communities themselves have ditched their ICH for the want of a rapid modernisation. It is where the professionals input should have come handy. But what have heritage professionals and institutions done?

Kathmandu valley was one of the first listed world heritage sites from the region, but objectifying the notion of heritage (both in the national policy via the Ancient Monuments Protection Act and the jurisdiction of the Department of Archaeology) and internationally through the World Heritage listing, the achievement of the last six decades of modernisation has uprooted the desire of progress from the bedrock of cultural heritage. The streets that were meant for pedestrians and cultural processions almost every other day have been universally widened to make them “car-friendly” but ignoring the traditional hierarchy of spaces. Agricultural lands have been blindly approved for “land pooling” schemes without much consideration for open spaces — let alone agricultural purpose. In the name of modernisation, traditional community institutions like *guthi* are largely made dysfunctional by bringing them under the act with the same name. I have demonstrated elsewhere that the mandate of preserving heritage legacies in Kathmandu valley could have been achieved by integrating the *guthi* system into modern heritage laws and frameworks⁹. However, these mega-flaws are as much to be blamed on the politicians as much to the heritage fraternity. If the very idea of heritage would not have been limited just to the monumental and the things of the past, we would have perhaps seen the relevance of living heritage that exists in the everyday life. This could have given useful glimpse into what contemporary architecture and urban design should aim for. We can only hope and pledge now that the pandemic — in its truly historic experience, has awakened us up to rethink heritage, and re-orient our practices. Unless the heritage custodians, practitioners and

⁹ *Chapagain N. K.* Towards a framework for applicability and adaptability of traditional knowledge systems and modern knowledge systems: case studies from Nepal // *Traditional Knowledge Systems and the conservation and management of Asia's heritage* / eds Gamini Wijesuriya, Sarah Court. ICCROM, 2020. P. 211–223.

professionals reflect on their own practices and rethink the frameworks for heritage practice in a critical manner, we will not be able to position the cultural heritage as a pillar for sustainable development. This is more so important in the context of ongoing discussion on achieving the sustainable development goals¹⁰ by 2030 — particularly the goal number 11 and target 11.4 which uses the term heritage — both natural and cultural (assuming that the cultural does mean the broader intangible cultural heritage as well).

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Нематериальное культурное наследие в архитектуре и градостроительстве

Н. К. Чапагэйн

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Статья отражает некоторые наблюдения за городами во время пандемии COVID-19 — особенно во время их первоначального полного блокирования, которое большинство стран испытали с марта 2020 г. Одним из последствий COVID-19 стала вынужденная привязка людей к своим домам, где бы они ни находились. До этого многие редко задумывались о собственном жилище, постоянном или временном, и его архитектуре. Пандемия дала возможность осмыслить архитектуру и городское планирование в очень личном масштабе — от комнаты, квартиры или дома до района, а затем в некоторой степени и города. Наступил интересный исторический момент, позволивший задуматься об архитектуре и пространстве, а также о том, как они проектируются и планируются. COVID-19 выявил ограниченность многих мыслей и практик. Автор статьи размышляет о собственном опыте пребывания в доме, а также осмысляет наблюдения за окраинами южноазиатских городов, где общепринятые меры изоляции для предотвращения распространения COVID-19 вызвали тяжелое положение миллионов мигрантов, вынужденных перемещаться на большие расстояния по временно пустым дорогам и магистралям, ведущим в сельские и полугородские сегменты стран. Автор пересматривает свое

¹⁰ Sustainable Development Goals // United Nations. Available at: <https://sdgs.un.org/goals> (accessed: 10.05.2020).

понимание архитектуры и планирования в городском контексте, используя понятие нематериального культурного наследия (Intangible Cultural Heritage, ICH), поддержанное Конвенцией ЮНЕСКО 2003 г., выясняет, может ли концепция ICH предложить полезные идеи для достижения лучших результатов в современном архитектурном и градостроительном мышлении и практике, а также размышляет, способна ли перспектива ICH помочь понять горькие реалии XXI в.

Ключевые слова: COVID-19, нематериальное культурное наследие, Долина Катманду, Всемирное наследие, Архитектура и городское планирование, ЮНЕСКО.

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Чапагэйн Нил Камал — доктор философии, независимый архитектор и специалист по наследию, Непал, адъюнкт-профессор, директор, Центр управления наследием Ахмедабадского университета, Университет Ахмедабад, Индия, 380009, Гуджарат, Наврангпуры, Ахмедабад, Центр Шесть Дорог; neel.kamal@ahduni.edu.in

UNESCO's tangible and intangible cultural heritage: Sustainable development perspectives

Elena Sinibaldi, Antonio Parente

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The United Nations Educational, Scientific and Cultural Organization (UNESCO) 2003 Convention for the Safeguarding of the Intangible Cultural Heritage has not only introduced a conceptual and applicative expansion of the interdisciplinary subjects applied to cultural heritage, but it has also increasingly encouraged an integrated planning of sustainable development policies for territories and communities that convey and shape their relative cultural and anthropomorphic identity, along with the re-thinking of the collective dimension of heritage in terms of rights to creation and fruition as well as the related cultural management. This article presents a reflection on the opportunity to identify and develop the relationship between tangible and intangible heritage as resources that are essential to one another. To this purpose, two illustrative UNESCO application paths are examined. The first relates to the recognition of *The Vineyard Landscape of Piedmont: Langhe-Roero and Monferrato* as a Cultural Landscape of World Heritage, pursuant to the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, while the second concerns the inscription of the intangible element *The Celebration of Celestinian Forgiveness* in the Representative List of the Intangible Cultural Heritage of Humanity of the UNESCO 2003 Convention. Due to differences in paradigms and application criteria under the two UNESCO Conventions, which are also detectable in the Italian regulatory context, these case studies offer the opportunity to advance an interdisciplinary reflection aimed at rethinking safeguarding contexts, as well as enhancement and increasing accessibility of cultural heritage. As a result of the reflection, an analysis of the concept of *living* in relation to the anthropological definition of organic landscape, representation of collective identities (community-based heritage), inclusive places and sociability (public policy), communicative restitution (universal ethical values), participatory management (participative brand making), and integrated sustainability is derived.

Keywords: UNESCO, tangible cultural heritage, intangible cultural heritage, sustainable development, cultural collective rights, benefit sharing.

The concept of intangible cultural heritage (ICH) emerges in relation to the sense of identity, memory and continuity of communities, groups and individuals, since the owners of ICH values are dynamic actors, transmitting and renewing the values throughout time. As declared in article 1 of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, the safeguarding of ICH is among the main purposes of the Convention¹. The first part of this paper will address the basic concepts of UNESCO's

Elena Sinibaldi — PhD, Ministry for Cultural Heritage and Activities and for Tourism, 27, Via del Collegio Romano, Rome, 00186, Italy; elena.sinibaldi@beniculturali.it

Antonio Parente — Dr. Sci. in Law, Lawyer, Ministry for Cultural Heritage and Activities and for Tourism, 27, Via del Collegio Romano, Rome, 00186, Italy; antonio.parente@beniculturali.it

¹ Official text is available on the UNESCO website. Available at: <https://ich.unesco.org/en/convention> (accessed: 21.08.2020).

2003 Convention (such as safeguarding, tradition, creativity and ICH itself) in terms of integrated sustainability (social, economic, environmental, cultural); the second part, indeed, is dedicated mostly to two key studies (from Italy) as well as a theoretical approach regarding the relationship between tangible and intangible heritage.

Safeguarding is part of a complex cultural process that involves different stakeholders and institutions. The largest participatory system includes communities, non-governmental organizations (NGOs), institutions, media, and civil society. Safeguarding, indeed, is based on community involvement, and is linked with different processes that start from the identification and definition of ICH, documentation, formal and non-formal transmission, revitalization, promotion and management². Safeguarding without freezing cultural heritage, as recommended by the United Nations Educational, Scientific and Cultural Organization (UNESCO), merges two apical aspects of the cultural expression: tradition and creativity. Of course, tradition is connected to the past and crosses generations while also being varied and partly recreated over time and maintaining its viability in the present day. Creativity, in turn, is one of the bases of cultural diversity, and it provides a direct tool for involving young people, new generations and civil society, at large, in the safeguarding process. Moreover, it permits the development of intergenerational and intercultural dialogue.

ICH is intrinsically dynamic and multifaceted, dense with a variety of customary practices that have specific aspects, so that there cannot be a single standard way of managing it. The complexity of a safeguarding system cannot neglect the gist of the social value of ICH, which is essentially cultural, and which cannot be directly translated into a commercial value. In fact, the direct economic value resulting from the consumption and trade of ICH products is only one aspect, and it is not the most relevant one, since the most significant value of ICH, as clearly remarked in the UNESCO documents³, resides in community identity and continuity, which are aimed at social cohesion and without which development would be impossible.

The United Nations (UN) 2030 Sustainable Development Agenda (already accepted into the decision 10.COM 14.a of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage and the resolution 6.GA 7 of the General Assembly for the UNESCO 2003 Convention) remarks on the socially-inclusive approach that looks at the society-of-the-future and specifies the balance of the three integrated dimensions of sustainable development: economic, social and environmental⁴. This approach to future economic growth pays due attention to people-centric approaches for sustainability, without discriminating against any groups such as vulnerable or disabled people, children, women, young people, indigenous people, refugees, internally displaced persons and migrants. The view set out in the 2030 Sustainable Development Agenda requires intensive cooperation and solidarity at all levels, and an innovative integrated system for the management of cultural, natural and environmental resources.

The culturally-focused safeguarding policy dictated by international law is therefore renewed in the light of guidelines (UNESCO 1972 and 2003 Conventions) which on the one hand intend to create agency sectors and themes, including, for example, those of

² Moreover, safeguarding involves some systematic measures, such as: legislative framework and general policy, financial measures, implementation of local policies; fostering of interdisciplinary studies; awareness raising (at local, national and international levels, through media, seminars, and workshops), promotion and accessibility (projects, activities, educational and information programmes and capacity-building).

³ See: Ethical Principles of the UNESCO 2003 Convention (Decision 10.COM 15.a). Available at: <https://ich.unesco.org/en/ethics-and-ich-00866> (accessed: 12.12.2020).

⁴ UNO 2030 Agenda for Sustainable Development. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (accessed: 21.08.2020).

cultural heritage, creativity and urban re-development, which are increasingly online and taken as catalysts of interaction and enhancement processes⁵; on the other, they rethink public policy as the right to free expression and fruition, also diversifying in this sense the relationship between cultural offerings through the multiplication of cultural contents and their consumption.

This last area brings out an even more widespread reflection that has been one of the fundamental principles of the UN mission since its origins, that is, the respect and achievement of what are defined as fundamental human rights, to which there are recurring references in the preambles of the UNESCO Conventions involved in the field of culture.

Pursuant to article 22 of the Universal Declaration of Human Rights, in fact, each individual, as a member of society, has the right to social security, as well as to realization through national effort and international cooperation and in relationship with the organization and the resources of each State, of the economic, social and cultural rights that are indispensable to its dignity and to the free development of its personality⁶.

In turn, the International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on December 26, 1965 and the International Covenant on Civil and Political Rights of 1966 recognize the cultural rights of individuals and protect cultural diversity. Among the approximately thirty treaties approved by the Organization in over half a century, the following can be mentioned: the two Conventions on Copyright of 6 September 1952 and 24 July 1971; the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, with the Additional Protocols of 1954 and 1999; the Convention on the Illicit Trafficking of Cultural Property of November 14, 1970; the Convention for the Protection of World Heritage of November 16, 1972, shared and applied universally; the Convention for the Safeguarding of Intangible Cultural Heritage (April 20, 2003), whose preamble explicitly refers to the Universal Declaration of Human Rights and the Pacts, and finally the Convention for the Protection and Promotion of the diversity of cultural expressions of 20 October 2005.

Almost all of the international Conventions mentioned so far have been ratified by Italy, which is a Party, having shared its statutes and purposes, both of the UN's mandate and UNESCO's mission. It is therefore a matter of being able to advance in the legal and administrative discipline by questioning the inter-relationships of the cultural heritage sectors and their collective social dimension in generating values, social meanings and at the same time users⁷. In this regard, in fact, the complexity of the interconnections between legal instruments and the "cultural dimension" has increasingly emerged within international debate and in the work of the World Intellectual Property Organization (WIPO), which has, since 2001, been exploring the possible conditions for protecting "Traditional Knowledge (TK), Traditional Cultural Expressions (TCEs) and Genetic Resources (GRs)", which are generally defined as a whole as "a living body of knowledge passed from gen-

⁵ See Cultural heritage: a cross-cutting theme to Horizon 2020: Horizon 2020 Work Programme 2018–2020. P. 70. Available at: https://ec.europa.eu/research/participants/data/ref/h2020/wp/2018-2020/main/h2020-wp1820-cc-activities_en.pdf (accessed: 13.07.2021).

⁶ In Italian legislation, for example, cultural freedoms are reconnected to the right to education, freedom of teaching, the protection of historical and artistic heritage and the landscape and the promotion of culture as well as the protection of language, freedom of religion, of opinion and expression, are recognized as intangible and inalienable and have received, in Italy with the Republican Constitution of 1948 dignity and constitutional importance, with the relative system of guarantees. For a reflection on the evolution of the concept of "Cultural Rights" in the Italian legal system see: *Carcione M.* From the recognition of cultural rights in the Italian legal system to the enjoyment of cultural heritage as a fundamental right // Aedon. 2013. No. 2. Available at: <http://www.aedon.mulino.it/archivio/2013/2/carcione.htm>.

⁷ In relation to this, it seems relevant to note the works of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Available at: <https://www.wipo.int/tk/en/igc> (accessed: 21.08.2020).

eration to generation within a community... often form[ing] part of a people's cultural and spiritual identity"⁸.

Starting from the 40th session of the "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)" (2019), a possible connection with the "access and benefit-sharing systems" and the analysis of some domains of the "Traditional Cultural Expressions" has emerged as a focus for reflection and analysis. The related discussion paper⁹ identified the four key areas for further reflection as:

- *traditional cultural expressions in action* (encompassing dances, plays, ceremonies, rituals, games and traditional sports, as well as other performances);
- *material traditional cultural expressions* (including such items as expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, and architecture);
- *music and sound traditional cultural expressions* (before the 20th century, most of folk songs and other genres were transmitted orally, but nowadays they are also embodied in recordings);
- *verbal and written traditional cultural expressions* (which may take the form of epics, legends, poetry, riddles and other narratives).

On the basis of the "Proposal for a study by the WIPO Secretariat on existing sui generis systems for the protection of traditional knowledge in WIPO Member States"¹⁰, WIPO has created the "Compilation of Information on National and Regional Sui Generis Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions"¹¹, in which the term "Sui generis Regimes"¹² is defined "as existing legal mechanisms which provide indigenous peoples and local communities (IPLCs) and other beneficiaries with intellectual property (IP) or IP-similar protection against misuse and/or misappropriation of their traditional knowledge (TK) and/or traditional cultural expressions (TCEs), and/or distorting or culturally offensive uses"¹³.

⁸ Compilation of Information on National and Regional Sui Generis Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions // WIPO. 07.05.2020. Available at: https://www.wipo.int/export/sites/www/tk/en/resources/pdf/compilation_sui_generis_regimes.pdf (accessed: 21.08.2020).

⁹ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Traditional Cultural Expressions: A Discussion Paper. WIPO/GRTKF/IC/40/13. Fortieth Session 17–21.06.2019.

¹⁰ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Proposal for a Study by the WIPO Secretariat on Existing Sui Generis Systems for the Protection of Traditional Knowledge in WIPO Member States. WIPO/GRTKF/IC/40/14. Fortieth Session 17–21.06.2019.

¹¹ Compilation of Information on National and Regional Sui Generis Regimes...

¹² The category of "sui generis" law is widely debated — and applied — in Italy since 1996 according to the European Directive 96/9/CE.

¹³ It is possible to read in the informative compilation that "The sound working methods under the mandate are to include an evidence-based approach mentioned in paragraph (c) of the mandate, with particular reference to conducting and updating studies covering domestic legislation in paragraph (d). These tasks facing the IGC involve balancing a complex set of issues that include responding to indigenous people(s)' and local communities' concerns over the unauthorized use of TK, especially in a commercial context, while allowing active exploitation of the TK by the originating community itself and also safeguarding the interests of industry, museums, archives, libraries and other stakeholders. Over the past twenty years, a number of WIPO Members have introduced provisions into their national laws to protect TK. The IGC would benefit from a better understanding of the scope of these laws, the nature and effectiveness of their implementation, and their quantifiable impacts. This proposal aims to build upon the body of work developed in the IGC and gather further information that will provide the IGC with a better understanding of sui generis systems for protecting TK. The proposal includes questions relating to the nature of these systems, the extent to which countries have implemented and enforced such laws and regulations, examples of how

These last themes reconnect even more insistently in the planning of global cultural policies and programs, which aim at transversal impacts of development in the territories, in the communities and in the knowledge and exchange between cultures.

As recommended in the 2030 UNO Agenda, inclusivity and sustainability are directly reflected in the economic sectors, which should work so as to reduce the inequality generated from production and consumption processes. The inequality gap arising from these processes could be reduced by increasing inclusivity and empowerment.

Based on the aforementioned observations, the process of “cultural patrimonialization”¹⁴ proceeds through a holistic approach, which, by means of several methodologies and indicators, link the various components (social life, historical background, etc.) that build “heritage configuration” (an expression used by the author to refer to the dynamic and flexible nature of the heritage in the contemporary) from a socio-cultural perspective. The dynamic concept of patrimonialization organically advances both tangible and intangible aspects. The evidence of material culture, as a component of humanity responding to history and environment, is already contemplated in article 2 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, which defines ICH. Furthermore, the more generic concept of “cultural and natural spaces” (art. 2 of the UNESCO 2003 Convention) offers a glimpse of the wider potentialities of the promotion of “sustainable integrated safeguarding plans”, which could involve ecosystems and cultural-natural landscapes.

Nevertheless, the assumption that territory (in the morphological sense) and cultural landscapes¹⁵ are not separate from the results of human activities was also recognized by the UNESCO Convention for the Protection of World Heritage (1972)¹⁶. Indeed, that Convention pointed at the Outstanding Universal Value of “living cultural tradition, traditional human settlement, land/sea-use, human interaction with the environment, up to events or living traditions, ideas, beliefs, and artistic and literary works of outstanding universal significance”¹⁷ as well as stating clearly that the “properties may be understood to meet the conditions of authenticity if their cultural values (as recognized in the nomination criteria proposed) are truthfully and credibly expressed through a variety of attributes including: form and design; materials and substance; use and function; traditions, techniques and management systems; location and setting; language, and other forms of intangible heritage; spirit and feeling; and other internal and external factors”¹⁸.

A concrete example of the correspondence between tangible and intangible heritage can be seen in two different UNESCO nomination cases: one concerned with an inscrip-

such laws and regulations have been applied, any quantifiable or other benefits that have been derived from these laws, whether these laws would apply to subject matter used by the public, and any exceptions and limitations that may apply” (the results of consultation are available at: https://www.wipo.int/export/sites/www/tk/en/resources/pdf/compilation_sui_generis_regimes.pdf).

¹⁴ “The term patrimonialization, primarily used in francophone studies, refers to the way that places, popular traditions and artefacts are transform into heritage. Processes involved in a complex global/local context — the cultural, historical, social, economic, juridical and political system” (*Sousa F.* Intangible Cultural Heritage. MEMORIAMEDIA e-Museum, methods, techniques and practices // *Memória Imaterial*. 2015. CRL. P.6. Available at: https://www.researchgate.net/publication/333193967_INTANGIBLE_CULTURAL_HERITAGE_MEMORIAMEDIA_e-Museum (accessed: 21.08.2020).

¹⁵ The meaning of “cultural landscape” included in the UNESCO Convention for the Protection of World Heritage (1972) dates back to the 1990s. “Cultural landscapes” are defined at Section II. A “Definition of World Heritage”, article 47 of the Operational Guidelines for the Implementation of the World Heritage Convention (2019).

¹⁶ Official text is available on the UNESCO website at: <https://whc.unesco.org/en/conventiontext> (accessed: 21.08.2020).

¹⁷ Operational Guidelines for the Implementation of the World Heritage Convention. 2019. No. 77 criteria V and VI // UNESCO. Available at: <https://whc.unesco.org/en/guidelines> (accessed: 21.08.2020).

¹⁸ *Ibid.* No. 82.

tion in the World Heritage List, and the other regarding the Representative List of intangible cultural heritage.

*The Vineyard Landscape of Piedmont: Langhe-Roero and Monferrato*¹⁹, is an Italian property which has already been inscribed in the World Heritage List, under the category of “cultural landscapes” in adherence with the following criteria:

— The vineyard landscape of Langhe-Roero and Monferrato is the extraordinary result of a “wine tradition” that has evolved and has been passed down from ancient times until today and constitutes the basis for the area’s social and economic structure. This cultural tradition is evident in a consolidated heritage of cultivation and winemaking expertise and techniques that are based on a thorough understanding of the grape varieties cultivated there over many years and their ability to adapt to particular environmental conditions. This wealth of knowledge has continued to evolve through constant efforts to improve the production cycle while maintaining traditional methods and has led to the production of high quality wines of international prestige. The thousand-year tradition of winemaking is visible in the layout of the landscape, a palimpsest of places where grape growing and winemaking take place, places featuring vineyards, divided up into small plots created in the Middle Ages by feudal land division <...>.

— Furthermore, the vineyard landscape of Langhe-Roero and Monferrato is an extraordinary example of the interaction between society and the environment, a constant relationship that has gone on for two thousand years. Over the centuries, vineyards, settlements and social forms of life learned to integrate, creating a living landscape where every transformation is the result of Man’s determination to make the most of form, content and function for the purposes of grape growing and winemaking <...>²⁰.

From a living heritage perspective, an emblematic element is the *Celebration of Celestinian Forgiveness*, which was recognized under the UNESCO 2003 Convention. This element is defined as: “a traditional celebration inspired by Pope Celestine V, who issued a historical ‘Bull’ as an act of partnership among local populations. It is an intangible cultural heritage, a set of rituals and celebrations passed down uninterruptedly since 1294 conveying a strong sense of continuity and cultural identity for the whole community”²¹.

During 2009 L’Aquila City was hit by a severe earthquake that destroyed the old city, a large part of which is still inaccessible, and caused the death of some 300 people. Significantly, the community decided not to stop the annual celebration, thus leveraging ICH values to compensate for the partial loss/lack of tangible heritage (a vast part of the Basilica of Collemaggio was damaged as well). This social resilience within civil society allowed a group of bearers and practitioners (Associazione Comitato Perdonanza Celestiniana) to

¹⁹ Vineyard Landscape of Piedmont: Langhe-Roero and Monferrato // UNESCO. Available at: <https://whc.unesco.org/en/list/1390> (accessed: 21.08.2020).

²⁰ The Vineyard Landscape of Piedmont: Langhe-Roero and Monferrato: Executive Summary. 2014. P. 10 // UNESCO. Available at: <https://whc.unesco.org/uploads/nominations/1390rev.pdf> (accessed: 21.08.2020).

²¹ “The lighting of the ‘Fire of Morrone’ and its descent from the Hermitage of Celestine V near Sulmona accompanied by a candlelight procession open the ‘Forgiveness Walk’ along a traditional itinerary marked by the lighting of tripods in each of the 23 villages involved and the signature by each mayor of a parchment recalling the Bull’s symbolic values. The community gathering ends up on August 23rd in L’Aquila with the lighting of the last tripod, which keeps burning until August 29th. Anticipated by 1000 people of the civil society, drums, clarions and flag bearers enliven and mark the rhythm of the ‘Parade’, made up of 1000 citizens wearing traditional costumes, walking along with the three main characters, the ‘Lady of the Bull’, the ‘Young Lord’ and the ‘Lady of the Cross’, symbolizing the Celebration traditional values: hospitality, solidarity and peace. The city Mayor reading of the historical Bull anticipates the opening of the Basilica of Collemaggio Holy Door and its ritual crossing (first historical Jubilee event). The Celebration ends on August 29th: the Holy Door is closed, the Parade walks the Bull back to the Municipal Hall, the tripod flame is extinguished” (Celestinian forgiveness celebration // UNESCO. Available at: <https://ich.unesco.org/en/RL/celestinian-forgiveness-celebration-01276> (accessed: 21.08.2020)).

work towards the UNESCO nomination process for the ICH Representative List, resulting in the inscription of this cultural heritage on that list in 2019. Moreover, the Basilica of Collemaggio was restored in a timely manner (in 2017) thanks to the leading interdisciplinary coordination of the “Superintendency for Archaeological, Artistic and Architectural Heritage and Landscape for L’Aquila and its Seismic Crater” (acting under the Italian Ministry for Cultural Heritage and Activities and for Tourism²². Such a timely and effective intervention provides an exemplary evidence, and a model of a post-disaster restoration and conservation, underlined by *Europa Nostra* as follows: “This intervention truly represents the rebirth of a city, the strong sense of spirituality and the participation of the community in this project must be considered as an integral piece of the whole <...>”²³.

The aforementioned two examples well express, from different perspectives, the relationship between the tangible and intangible in terms of safeguarding, promotion, and accessibility. Indeed, living practices shape anthropomorphic territories and spaces, and the inherited knowledge and manifestations dynamically become part of the “habitus”²⁴ of people, of their sites, their public areas, the urban/rural-shaping and fruition they enact.

Beyond the above examples, it is worth distinguishing some heritage paradigms and criteria, both at national and international levels, in light of the UNESCO Conventions (1972 and 2003) in the field of Culture²⁵. While the concept of “World Heritage Property” (under the 1972 Convention) is based on the principles of integrity and authenticity as additional requirements to the Outstanding Universal Value, the Intangible Cultural Heritage (ICH) of the 2003 Convention stands out for being inclusive, traditional, living, and community-based. If the identification of “World Heritage Property” implies the definition of its geographical coordinates, as well as of their boundaries and buffer-zones, ICH refers to a wider localization context, according to criteria of community-inclusivity and “cultural affinities” among elements as a UNESCO publication clarifies: “We may share expressions of intangible cultural heritage that are similar to those practised by others. Whether they are from the neighbouring village, from a city on the opposite side of the world, or have been adapted by peoples who have migrated and settled in a different region, they all are intangible cultural heritage: they have been passed from one generation to another, have evolved in response to their environments and they contribute to giving us a sense of identity and continuity, providing a link from our past, through the present, and into our future. Intangible cultural heritage does not give rise to questions of whether or not certain practices are specific to a culture. It contributes to social cohesion, encouraging a sense of identity and responsibility which helps individuals to feel part of one or different communities and to feel part of society at large”²⁶.

Moreover, whilst the main purpose of the 1972 Convention is aimed at preserving the Outstanding Universal Value and ensuring the protection of the nominated property, the fundamental prerogative of the safeguarding of ICH addresses both formal and non-formal transmission to future generations, as a guarantee for vitality, promotion and, in some cases, revitalization.

²² Progetto Collemaggio // Ministero per i beni e le attività culturali e del turismo. 2020. Available at: <http://su-aq.beniculturali.it/index.php?it/319/progetto-collemaggio> (accessed 21.08.2020).

²³ Available at: <http://www.europeanheritageawards.eu/winners/basilica-santa-maria-di-collemaggio> (accessed: 21.08.2020).

²⁴ Bourdieu P. Il senso pratico. Armando: Rome, 2005. P. 84.

²⁵ It is however significant to note that within the framework of the 2003 UNESCO Convention, the thematic investigation criteria of the elements have been set up on the official website of reference, including the one that coincides with the World Heritage Sites.

²⁶ What Is Intangible Cultural Heritage? // UNESCO. Available at: <https://ich.unesco.org/en/what-is-intangible-heritage-00003> (accessed: 12.12.2020).

In line with the Italian regulatory tradition founded on the protection of tangible cultural heritage, the *“Italian Code of Cultural Heritage and Landscape”* (Legislative Decree 42 of 2004) recognizes intangible cultural interests²⁷, but has not yet clearly introduced any statement about the involvement of local communities. At the same time, however, it is not negligible that the same Italian code still includes direct references to the “protection”, “management” and “promotion” of cultural heritage through the recognition of the “reproduction rights”²⁸ related to that heritage. The application of this normative framework is found in the Civil Code (Administrative Code), industrial and intellectual property rights (Industrial Property Code) and Copyright Law²⁹.

The conservation and protection of cultural material and landscape heritage entails the adoption of technical and disciplinary tools and specific rules, distinguished from those that require that the intangible elements should be centered on bearers and practitioners. Under the latter tools and rules, bearers and practitioners are addressed as the primary beneficiaries, materially and morally, under an ethical approach in line with the widest supranational code of the Organizations of the United Nations which have tended, since the origins of the UN, to develop a universal code of values and communication that can be shared by all, regardless of cultural diversity: in that sense, one of the main ongoing debates is around “individual and collective rights” corresponding to practices, manifestations and expressions of heritage-communities.

Specifically, the UNESCO 2003 Convention mentions “the diversity of issues linked to protection of various rights of the communities, groups and individuals, connected to the safeguarding of the ICH”³⁰ and the “application of intellectual property rights, privacy rights and any other appropriate forms of legal protection, to ensure the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage are duly protected when raising awareness about their heritage or engaging in commercial activities”³¹. In the meantime, the Operational Directives of the 2003 Convention require the States Parties to take care to ensure that awareness-raising activities will not de-contextualize or denaturalize ICH. Furthermore, under the Operational Directives, States Parties must seek to prevent the misappropriation or abuse of the knowledge and skills of bearers and practitioners, by avoiding the risks of over commercialization and unsustainable tourism³².

The strategic value of “integrated living sustainability” (an expression used by the author to mean that every heritage, both as tangible or intangible, to be sustainable needed to be living in terms of polyhedric and interfaced way. It is heritage in a socially responsive sense) is thus fully supported by the importance of ICH restitution and representation, including its ethical brand-making, at different levels (local national, and international). In fact, the plan and adoption of interconnected actions, which encompass all forms of social and cultural expressions — tangibility and intangibility — are still recommended as an integral part of global public policies. Even the latest re-thinking of urban measures³³ not only underlines three-dimensional sustainable integration (social, economic and environ-

²⁷ Art. 7-bis of the *“Italian Code of Cultural Heritage and Landscape”* (Legislative Decree 42 of 2004 and ss. m. i) introduced the direct mention at the application of UNESCO 2003 and 2005 Conventions.

²⁸ Art. 108 of the Italian Code the *“Italian Code of Cultural Heritage and Landscape”* (Legislative Decree 42 of 2004 and ss. m. i).

²⁹ In Italy the copyright jurisdiction mainly refers to the Law of 22 April 1941, No. 633.

³⁰ Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage. 2018. No. 173.a // UNESCO. Available at: https://ich.unesco.org/doc/src/ICH-Operational_Directives-7.GA-PDF-EN.pdf (accessed: 21.08.2020).

³¹ Ibid. No. 173.b. On the same issue, see Operational Directive No. 104.

³² Ibid. No. 102.

³³ UNO New Urban Agenda. 2016. Available at: <http://habitat3.org/wp-content/uploads/NUA-English.pdf> (accessed: 21.08.2020).

mental) and the urban-rural linkages, but also expressly introduces both natural and cultural heritage, as well as tangible and intangible heritage, as components of a potentially transformative process of development, also accounting for age- and gender-responsive approaches.

In the current framework, the paradigm of a “collaborative commons”³⁴ increasingly takes on consistency, also characterized by the progressive affirmation of a more empathic and sustainable economy, involving different stakeholders and individuals. Through global networks and the theme of “innovation” based on social and relational contexts³⁵ it would be possible to rethink the system of values of the cultural chain — also by strengthening the reflection on the application of benefit-sharing — that integrates tangible and intangible heritage, tradition and creativity, centers and suburbs, and balances individual and/or collective rights with those connected to the public domain, as well as promoting constant dialogue between local and international levels.

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Материальное и нематериальное культурное наследие ЮНЕСКО: перспективы устойчивого развития

Е. Синибальди, А. Паренте

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Конвенция ЮНЕСКО об охране нематериального культурного наследия 2003 г. не только расширила на концептуальном и прикладном уровнях количество междисциплинарных тем, относимых к проблематике культурного наследия, но и еще больше поощрила комплексное планирование политики устойчивого развития территорий и общин. Эти

³⁴ *Rifkin J.* The Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism. New York: St. Martins Press, 2014.

³⁵ *Schumpeter J.* Theory of economic development. Milan: ETAS, 2002. Translation of the sixth German edition (1964), also on the basis of the English edition of 1934, of *Theorie der wirtschaftlichen Entwicklung*, 1911. According to J. Schumpeter the concept of growth is to be understood as a gradual phenomenon, made up of continuous adjustments; the concept of development, on the other hand, is to be understood as a discontinuous phenomenon and is characterized by the introduction of new combinations, which may concern five dimensions: creation of products; introduction of production methods; opening of markets; discovery of sources of supply of raw or semi-finished products; reorganization of an industry.

субъекты формируют и транслируют их относительную культурную и антропоморфную идентичность, наряду с переосмыслением упомянутого наследия с точки зрения прав на его созидание и на его плоды и связанного с таким переосмыслением управления культурой. Авторы настаивают на возможности выявления и развития взаимосвязи между материальным и нематериальным наследием как однопорядковыми ресурсами, существенными друг для друга. В качестве иллюстрации рассматриваются два пути применения Конвенции ЮНЕСКО. Первый касается признания «Виноградного ландшафта Пьемонта: Ланге, Рокко и Монферрато» культурным ландшафтом Всемирного наследия в соответствии с Конвенцией ЮНЕСКО об охране всемирного культурного и природного наследия 1972 г., а второй — включения нематериального элемента «Празднование Целестинского прощения» в репрезентативный список Нематериального культурного наследия человечества Конвенции ЮНЕСКО 2003 г. Из-за различий в тех парадигмах и критериях применения тематических исследований в рамках двух конвенций ЮНЕСКО, которые также обнаруживаются в итальянском нормативном контексте, указанные исследования дают возможность продолжить междисциплинарный диалог, направленный на переосмысление контекстов охраны различных видов культурного наследия, а также расширение и повышение его доступности. На основе такой рефлексии авторы формулируют концепцию жизни, связанную с антропологическим определением понятий органического ландшафта, репрезентации коллективной идентичности (общинное наследие), инклюзивных мест и социальности (государственная политика), коммуникативной реституции (универсальные этические ценности), партисипативного управления (партисипативное создание бренда) и интегрированной устойчивости.

Ключевые слова: ЮНЕСКО, материальное культурное наследие, нематериальное культурное наследие, устойчивое развитие, культурные коллективные права, совместное использование выгод.

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Синибальди Елена — PhD, Министерство культурного наследия, культурной деятельности и туризма Италии, Италия, 00186, Рим, ул. дель Колледжио Романо, 27; elena.sinibaldi@beniculturali.it

Паренте Антонио — д-р юрид. наук, юрист, Министерство культурного наследия, культурной деятельности и туризма Италии, 00186, Рим, ул. дель Колледжио Романо, 27; antonio.parente@beniculturali.it

Heritage storytelling, community empowerment and sustainable development

Diego Rinallo

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In many disciplines, storytelling has gained recognition as a powerful tool for sharing wisdom, stimulating empathy, transmitting knowledge and persuading audiences about promotional messages. With the emergence of the worldwide web first, and social media more recently, much attention has been focused on the potential of digital storytelling. Storytelling is also considered by some as a means to safeguard and provide access to Intangible Cultural Heritage (ICH), for example through documentation and inventorying practices built on narration or through the development of websites and applications. Public availability and marketing of ICH may however expose heritage bearers to risks of misappropriation, decontextualization or misrepresentation, as has been recognized by the UNESCO's 2008 Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage. How is it possible for heritage bearers to benefit from ICH storytelling while mitigating these risks? This article builds on work carried out in the context of two research projects that dealt with digital storytelling in very different manners: AlpFoodway, a EU Interreg Alpine Space project (2017–2019), which aimed to create a sustainable development model for peripheral mountain areas based on the preservation and valorization of the traditional Alpine food heritage; and the ongoing British Academy for Sustainability project “*Celebrating local stewardship in a global market: community heritage, intellectual property protection and sustainable development in India*”. Thanks to the lessons learned in the context of these two projects, this article shares some considerations on how approaches to storytelling developed in the field of marketing can assist with community empowerment and sustainable development. As a result, it contributes to a better understanding of the understudied and little understood conditions under which ICH entanglement with the market can be carried out in heritage sensitive and legally savvy manners that empowers individuals, groups and communities that are ICH bearers and ensures that they are the prime beneficiaries of the economic benefits of commercialization.

Keywords: Intangible Cultural Heritage, marketing, sustainable development, digital storytelling, community empowerment.

Introduction

In many disciplines, storytelling has gained recognition as a powerful tool for sharing wisdom, stimulating empathy, transmit knowledge and persuade audiences about promotional messages¹. With the emergence of the worldwide web first, and social media more recently, much attention has been focused on the potentials of digital storytelling².

Diego Rinallo — Associate Professor of Marketing, Emlyon Business School, 23, Avenue Guy de Colongue, Écully, 69130, France; diego.rinallo@kedgebs.com

¹ Sobol J., Qentile J., Sunwolf. Once Upon a Time: An introduction to the Inaugural Issue // *Storytelling, Self, Society: An Interdisciplinary Journal of Storytelling Studies*. 2004. Vol. 1 (1). P. 1–7.

² See: De Jager A. et al. Digital Storytelling in Research: A Systematic Review // *The Qualitative Report*. 2017. Vol. 10 (22). P. 2548–2582; Lambert J. *Digital Storytelling: Capturing Lives, Creating Community*. Berkeley: Digital Diner Press, 2006; Robin B. R., McNeal S. G. *Digital Storytelling* // *The International Encyclopedia of Media Literacy*. 2019. Wiley Online Library. <https://doi.org/10.1002/9781118978238.ieml0056>.

Storytelling is also considered by some as a means to safeguard and provide access to Intangible Cultural Heritage (ICH), for example through documentation and inventorying practices built on narration, through the development of websites and applications³ and by engaging the younger generation in safeguarding initiatives⁴. In the field of marketing, storytelling is considered a very effective approach to digital promotion⁵ as it generates narrative transportation in consumers⁶. Public availability and marketing of ICH may however expose heritage bearers to risks of misappropriation, decontextualization or misrepresentation, as has been recognized by the UNESCO's 2008 Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage⁷. How is it possible for heritage bearers to benefit from ICH storytelling while mitigating these risks?

This paper builds on work the author carried out in the context of two research projects that dealt with digital storytelling in very different manners. A contrast of these two experiences can provide a useful introduction to the varieties of approaches in this respect. AlpFoodway, a EU Interreg Alpine Space project (2017–2019), aimed to create a sustainable development model for peripheral mountain areas based on the preservation and valorization of the traditional Alpine food heritage⁸. One important part of the AlpFoodway activities consisted in an anthropological video inquiry aiming to investigate the cultural and social values expressed in the Alpine food heritage. The work resulted in a collection of 17 video interviews involving 23 informants, who were selected based on the fieldwork conducted in their respective areas⁹. All videos were produced by AESS, Lombardy Region's Archive of Ethnography and Social History, and professionally realized by Lab80, a professional video maker cooperative. They were part of broader documentation and inventorying activities that resulted in approximately 150 entries on a participatory online

³ See among others: *Selmanovic E. et al.* VR Video Storytelling for Intangible Cultural Heritage Preservation. Eurographics Workshop on Graphics and Cultural Heritage, Vienna, Austria, 12 to 15 November 2018. P. 57–66; *Silva W.* Animating Traditional Amazonian Storytelling: New Methods and Lessons from the Field // *Language Documentation and Conservation*. 2010. Vol. 10. P. 480–496; *Wachowich N., Scobie W.* Uploading Selves: Inuit Digital Storytelling on YouTube // *Études/Inuit/Studies*. 2010. Vol. 2 (34). P. 81–105; *Wilson K., Desha C.* Engaging in Design Activism and Communicating Cultural Significance through Contemporary Heritage Storytelling: A case study in Brisbane, Australia // *Journal of Cultural Heritage Management and Sustainable Development*. 2016. Vol. 6 (3). P. 271–286.

⁴ UNESCO, too, has promoted storytelling initiatives, such as the 2019 Asia-Pacific Youth ICH Storytelling Contest, launched by ICHCAP, a UNESCO Category II Institute for International Information and Networking Center for ICH in the Asia-Pacific region, to strengthen young practitioner networks and raise awareness of safeguarding intangible cultural heritage among the younger generation. Available at: <http://www.ichngoforum.org/2019-asia-pacific-youth-ich-storytelling-contest-online-exhibition> (accessed: 06.12.2020).

⁵ See for example: *Chiu H.-C., Hsieh Y.-C., Kuo Y.-C.* How to Align Your Brand Stories with your Products // *Journal of Retailing*. 2012. Vol. 88 (2). P. 262–275; *Megehee C. M., Woodside A. G.* Creating Visual Narrative Art for Decoding Stories that Consumers and Brands Tell // *Psychology & Marketing*. 2010. Vol. 27 (6). P. 603–622; *Woodside A. G., Sood S., Miller K. E.* When Consumers and Brands Talk: Storytelling Theory and Research // *Psychology & Marketing*. 2008. Vol. 25 (2). P. 97–145.

⁶ *Van Laer T. et al.* The Extended Transportation-Imagery Model: A Meta-Analysis of the Antecedents and Consequences of Consumers' Narrative Transportation // *Journal of Consumer Research*. 2014. Vol. 40 (5). P. 797–817.

⁷ In particular, article 102 of the *Operational Directives* mandates that particular care should be exerted to ensure that awareness raising activities will not de-contextualize or denaturalize the ICH manifestations or expressions concerned; mark the communities, groups or individuals concerned as not participating in contemporary life, or harm in any way their image; facilitate the misappropriation or abuse of the knowledge and skills of the communities, groups or individuals concerned; lead to over-commercialization or to unsustainable tourism that may put at risk the ICH concerned.

⁸ Alpfoodway. Available at: <https://www.alpine-space.eu/projects/alpfoodway> (accessed: 17.12.2020).

⁹ Alpfoodway. Available at: <http://intangiblesearch.eu/alpfoodway-webdoc/#HOME> (accessed: 17.12.2020).

inventory¹⁰. The video inquiry did not have the goal of promoting specific heritage bearers or their products and services. Rather, it was realized with the intention to raise awareness in the general public about the need to defend the Alpine food heritage before it is lost forever, to favor an understanding of the common values behind such heritage across Alpine countries, and to mobilize communities and policy makers at the local, regional, national and EU levels to safeguard and valorize the Alpine food heritage.

The ongoing British Academy for Sustainability project “*Celebrating local stewardship in a global market: community heritage, intellectual property protection and sustainable development in India*” is instead adopting a remarkably different approach to storytelling. The project engages with three cases in West Bengal to investigate how developing Heritage-sensitive Intellectual Property and Marketing Strategies (HIPAMS) can give ICH bearer communities greater control over the commercialisation of their heritage to strengthen competitiveness while contributing to its safeguarding and ongoing viability¹¹. One of the project partners, the Indian social enterprise Banglanatak dot com¹², has the mission to foster inclusive and sustainable development through culture. Since its foundation, Banglanatak dot com has documented traditional knowledge of ICH bearer communities across India with safeguarding, awareness-raising, and educational goals, which has resulted in extensive video documentation¹³. Thanks to the project, the bearer communities desire to better promote their know-how and product has led to the development of more market-oriented forms of storytelling, including the development of narrative packaging and labels for heritage products, heritage-sensitive promotional websites¹⁴. Part of the intervention has consisted in capacity building interventions to assist bearer communities, the organizations representing them, and individual artists to build a promotional and legally savvy digital storytelling presence on the social media platforms Facebook, Instagram, and YouTube.

Thanks to the lessons learned in the context of these two projects, this paper shares some considerations on how approaches to storytelling developed in the field of marketing can contribute to community empowerment and sustainable development. The paper is organized as follows. In the next section, marketing approaches to storytelling are positioned in the broader field of storytelling practices. This is followed by step-by-step guidelines for promotional digital storytelling interventions coherent with the HIPAMS framework. The concluding remarks offer some emerging consideration on how legal and marketing perspectives can be successfully combined to safeguard intangible cultural heritage.

1. Varieties of heritage storytelling practices and goals

Individuals, groups and communities tell stories for a variety of purposes. Story is a central category of analysis in many disciplines, reflecting a human tendency to make sense of the world, of specific events, and of personal identity and history in a narrative format¹⁵. To

¹⁰ Intangible Search. Available at: www.intangiblesearch.eu (accessed: 17.12.2020).

¹¹ HIPAMS India. Available at: www.hipamsindia.org (accessed: 17.12.2020).

¹² Banglanatak Dot Com. Available at: <https://www.banglanatak.com/home> (accessed: 17.12.2020).

¹³ See for example: Banglanatak Dot Com. Available at: <https://www.youtube.com/user/banglanatak/videos> (accessed: 17.12.2020).

¹⁴ See: Bengal Patachitra. Available at: <https://www.bengalpatachitra.com> (accessed: 17.12.2020); Baul Fakiri. Available at: <https://www.baulfakiri.com> (accessed: 17.12.2020); Purulia Chau. Available at: <https://puruliachau.com> (accessed: 17.12.2020).

¹⁵ See again: *Sobol J., Qentile J., Sunwolf*. Once Upon a Time...

make a few selected examples, according to some both lawyers¹⁶ and leaders¹⁷ should be effective storytellers. In organization studies, work on the storytelling organization¹⁸ highlights that shared stories permit to create internal cohesion and a strong organizational culture, as well as coherence in the image that is communicated to clients and other external stakeholders. In the field of marketing, storytelling is considered of the utmost importance to create resonant brands and marketing communications, particularly through the use of social media¹⁹ as, compared to traditional advertising, it generates narrative transportation and more favorable consumer responses. As this brief review shows, the term storytelling is employed in different disciplines with heterogeneous premises and goals.

This section discusses similarities and differences in possible approaches to heritage storytelling. Stories can be told by different authors, through different media (e. g., texts, pictures, videos), for different goals, with different level of expertise, and based on different contents. With respect to authors, we can distinguish stories that are:

Community-generated: an individual member or a group/organization representing (part of) the community is the author of the story. Individuals and groups inside the same heritage bearer community can tell different stories based on their age, gender, socio-economic status, geographical location, and reputation. Inclusive approaches to storytelling work to help stories from the more marginal or vulnerable individuals and groups to be developed and heard.

Consumer-generated: clients and audiences, too, can tell heritage stories about people and communities, products, experiences, and places. At the time of social media, consumer stories can stay online forever. Consumer-generated stories can assume various forms, including product/performance reviews and social media posts. Dissatisfied consumers tend to share their experiences much more frequently than satisfied consumers²⁰. Consumer-generated narratives can be judged more persuasive than community-generated ones (unlike heritage practitioners themselves, consumers have no vested interest in representing products or performances in a positive manner).

Media-generated stories come from journalists and the media (TV, press, etc.). Professional bloggers/social media influencers are part of this category. Media-generated

¹⁶ See for example: *McKenzie S. C.* Storytelling: A Different Voice for Legal Education // *The University of Kansas Law Review*. 1992. Vol. 41 (251). P. 251–269.

¹⁷ *Mladkova L.* Leadership and Storytelling // *Procedia — Social and Behavioral Sciences*. 2013. Vol. 75. P. 83–90; *Ready D. A.* How Storytelling Builds Next-Generation Leaders // *Sloan Management Review*. 2002. Vol. 43 (4). P. 63–69.

¹⁸ *Boje D. M.*: 1) The Storytelling Organization: A Study of Story Performance in an Office-Supply Firm // *Administrative Science Quarterly*. 1991. Vol. 36 (1). P. 106–126; 2) Stories of the Storytelling Organization: A Postmodern Analysis of Disney as “Tamara-land” // *Academy of Management Journal*. 1995. Vol. 38. P. 997–1035; *Boyce M. E.* Collective Centring and Collective Sense-making in the Stories and Storytelling of One Organization // *Organization Studies*. 1995. Vol. 16 (1). P. 107–137.

¹⁹ *Coker K. K., Flight R. L., Baima D. M.* Skip It or View It: The Role of Video Storytelling in Social Media Marketing // *Marketing Management Journal*. 2017. Vol. 27 (2). P. 75–87; *Ferrari S.* Storytelling and Narrative Marketing in the Era of Social Media // *Social Media Marketing: Breakthroughs in Research and Practice* / eds I. Deliyannis, P. Kostagiolas, Ch. Banou. Information Resources Management Association, 2016. P. 206–220; *Fog K., Budtz C., Yakaboylu B.* Storytelling: Branding in Practice. Berlin: Springer, 2005; *Herskovitz S., Crystal M.* The Essential Brand Persona: Storytelling and Branding // *Journal of Business Strategy*. 2010. Vol. 3 (31). P. 21–28; *Lundqvist A., Liljander V., Gummerus J., and Riel A. van.* The Impact of Storytelling on the Consumer Brand Experience: The Case of a Firm-originated Story // *Journal of Brand Management*. 2013. Vol. 20. P. 283–297; *Patterson A., Brown S.* No Tale, No Sale: A Novel Approach to Marketing Communications // *Marketing Review*. 2005. Vol. 5. P. 1–14; *Vera R., Viglia G.* Exploring How Video Digital Storytelling Builds Relationship Experiences // *Psychology and Marketing*. 2016. Vol. 33 (12). P. 1142–1150; *Pulizzi J.* The Rise of Storytelling as the New Marketing // *Publishing Research Quarterly*. 2012. Vol. 28. P. 116–123.

²⁰ *Moore S. G.* Some Things Are Better Left Unsaid: How Word of Mouth Influences the Storyteller // *Journal of Consumer Research*. 2012. Vol. 38. P. 1140–1154.

stories can contribute to raise awareness about ICH and specific individuals, groups and communities practicing it. Media reports can however contribute to misrepresentation due to lack of in-depth research, the reiteration of clichés, and the privileging of some sources (e. g., academic experts, government officials, high status bearers).

Expert-generated. This includes professional critics and professional experts working for governments, cultural institutions, NGOs, universities and research institutions. Some of these experts can act as gatekeepers (e. g., museum/exhibition curators; governments for financial aid or official events). Their reviews, reports and studies can be influential as they can legitimize and raise awareness about ICH elements and bearer communities.

Motivations to create and diffuse stories include those that follow:

Expressive. Expressive stories are authored by individuals (typically consumers) to express themselves: to share an emotional moment (e. g., posting a picture or video of a performance they are attending) or preserve it in memory, and sometimes to show-off/increase their social status by showing refined and discerning tastes. With the advent of social media, individuals are increasingly “self-branding” themselves, posting content that reflects their ideal selves²¹.

Promotional. Commercial storytelling can be carried out by individual heritage bearers; by organizations representing (parts of) bearer communities; by commercial intermediaries (e. g., art galleries, middle-men, shopkeepers) and, sometimes, by cultural institutions, tourism management organizations, and NGOs. Promotional stories should have clear goals, target groups, and messages. Their content tends to cast a positive light on the promoted ICH. Typical marketing objectives include generating awareness, strengthening reputation, stimulating trial/first purchase, informing/generating a positive consumer attitude; generating customer loyalty.

Documenting/safeguarding. Communities’ stories can be documented to safeguard traditional knowledge. This can result in material or digital archives in various forms (online, DVDs, CDs, books, etc.). The World Intellectual Property Organization has developed a toolkit to assist in the documentation of traditional knowledge, which discusses the intellectual property right issues generated by the documentation process²².

Academic/scientific. Experts from different disciplines carry out research that can affect heritage communities in different manners. Academic studies are peer-reviewed and written according to academic standards that re-interpret community points of view in terms of discipline-based abstract categories. On the positive, academic experts can help bearer communities to better understand their own history, retrieve lost knowledge, and contribute to legitimize ICH. This can result in promotional storytelling grounded in academic sources. On the negative, academic experts can misrepresent communities and their heritage and diffuse stories that contradict long-held beliefs. This include the diffusion of knowledge that communities would rather keep secret.

Stories can be developed based on different levels of expertise. Effective storytelling requires a mix of competences, including aesthetics, copy writing, photography, video making, knowledge of digital platforms, content creation, management of online communities, persuasive communication and marketing.

²¹ See: *Schau H. J., Gilly M. C.* We Are What We Post? Self-presentation in Personal Web Space // *Journal of Consumer Research*. 2003. Vol. 30 (3). P. 385–404; *Sung Y., Lee J.-A., Kim E., Choi S. M.* Why We Post Selfies: Understanding Motivations for Posting Pictures of Oneself // *Personality and Individual Differences*. 2016. Vol. 97. P. 260–265; *Oh S., Syn S. Y.* Motivations for Sharing Information and Social Support in Social Media: A Comparative Analysis of Facebook, Twitter, Delicious, YouTube, and Flickr // *Journal of the Association for Information Science and Technology*. 2015. Vol. 66 (10). P. 2045–2060.

²² See: *Documenting Traditional Knowledge: A Toolkit*. Geneva: World Intellectual Property Organization, 2017.

Amateur stories are created by non-professional storytellers. Unlike older generations who learn to use digital systems and social media as adults, “digital natives” already possess some of the competence required for effective storytelling. Also in these cases, however, professional storytelling requires complementary skills.

Professional stories are created by experts with high levels of technical and scripting skills — for example, media workers, professional video makers, advertising agencies.

Professionally assisted. Capacity building interventions can be designed to assist individuals, groups and organizations tell their stories. Interventions of this kind are sometimes developed to empower and give voices to marginalized people in various contexts²³.

The content of stories is heterogeneous. Building more or less explicitly on structural analyses of fairy tales and mythology²⁴ and/or Jungian psychology²⁵, applied work has attempted to identify “universal” story archetypes for artists, leaders, brands, and social media storytellers²⁶. In the context of ICH promotion, such work can provide a blueprint to develop content in various areas, including the following:

Foundation myths — Stories about the beginning of specific practices, art forms, rituals, etc., in a specific area.

Cultural heroes — Stories about founders or other key protagonists.

Heritage revitalization — Stories about how the heritage was saved from extinction and revitalized.

ICH bearers — Stories can show the human side of various individuals: masters and apprentices, men and women, young and old, and from different social groups including those from discriminated or marginal background. Like the stories of cultural heroes, these stories can be dramatized with elements of conflict opposing their protagonists to villains and populated with helpers, mentors, and supporters.

Know how, skills, production methods. These stories can be used to highlight differences between heritage products and cheaper counterparts/competing products. This include for example the use of natural raw ingredients instead of synthetic ones; artisanal methods instead of industrial productions; how the ICH was passed down through the generations and how it evolved to keep up with times and changes in living conditions.

Specific manifestations of ICH. There are ample opportunities — for both documentation and promotional purposes — for stories about specific products, performances, ritual objects, etc.

²³ See: *Moutafidou A., Bratitsis T.* Digital Storytelling: Giving Voice to Socially Excluded People in a Variety of Contexts // DSAI: Proceedings of the 8th International Conference on Software Development and Technologies for Enhancing Accessibility and Fighting Info-exclusion. 2018. P. 219–226; *Opel D., Stevenson P.* Do Women Win? Transnational Development NGOs, Discourses of Empowerment, and Cross-technology Initiatives in the Global South // *Connexions*. 2015. Vol. 4 (1). P. 131–157.

²⁴ See: *Campbell J.* The Hero with a Thousand Faces. Princeton: Bollingen Foundation, 1949; *Lévi-Strauss C.* The Structural Study of Myth // *Journal of American Folklore*. 1955. Vol. 68 (270). P. 428–444; *Propp V.* Morphology of the Folk Tale. Austin: University of Texas Press, 1968.

²⁵ *Jung C. G.* The Archetypes and the Collective Unconscious. Princeton: Princeton University Press, 1968.

²⁶ See, among others: *Bassil-Morozov H.* Jungian Theory for Storytellers. A Toolkit. New York: Routledge, 2018; *Delgado-Ballester E., and Fernandez-Sabiote E.* Once Upon a Brand: Storytelling Practices by Spanish Brands // *Spanish Journal of Marketing*. 2016. Vol. 20 (2). P. 115–131; *Olsson S.* Acknowledging the Female Archetype: Women Managers’ Narratives of Gender // *Women in Management Review*. 2000. Vol. 15 (5–6). P. 296–302; *Schedlitzki D., Jarvis C., and MacInnes J.* Leadership Development: A Place for Storytelling and Greek Mythology? // *Management Learning*. 2015. Vol. 46 (4). P. 412–426; *Shadraconis S.* Leaders and Heroes: Modern Day Archetypes // *LUX*. 2013. Vol. 3 (1). P. 1–13.

2. Making storytelling heritage-sensitive and marketing and legally savvy

Market-oriented organizations, both profit and not-for-profit, have learned to use storytelling to raise brand awareness, improve brand image, and generate consumer loyalty. Promotional material realized in this context (e. g., TV commercials, social media posts) follows the rules of persuasive marketing communications, including establishing clear goals, messages, target audiences based on market research and a clear branding strategy. With the rise of social media, these organizations have been able to harness the power of consumer-generated storytelling that results in even more credible stories — albeit this brings in the risk of diffusing discordant or negative messages. Once a budget is defined, these organizations often work with advertising or social media agencies that develop creative ideas which, once approved, are implemented. At the end of promotional campaigns, results are measured to verify to what extent results were where achieved — sometimes with the help of additional market research.

Special caution is required to adapt these approaches to ICH promotion. As also the UNESCO Convention on ICH's *Operational Directive* recognized, public disclosure of ICH for promotional reasons may expose heritage bearers to risks of misappropriation, decontextualization and misrepresentation. Still, under-commercialization can be as detrimental to the continuing viability of ICH as over-commercialization²⁷. How is it possible for heritage bearers to benefit from ICH storytelling while mitigating these risks? Building on the HIPAMS framework that is being developed in the context of India, this section proposes step-by-step guidelines for interventions aimed at exploiting the power of storytelling for community empowerment and sustainable development in a heritage-sensitive and marketing and legally savvy manner.

Research to understand awareness and knowledge of ICH elements and possible misappropriation and misrepresentation. In the theory and practice of marketing, the first step to develop any strategy is the conduct of market research²⁸, which can be carried out through a variety of quantitative or qualitative research methods. The emergence of social media has made it simpler to carry out market research²⁹. Even in case of limited skills or funding available to carry out formalized market or audience research, a simple google, Facebook or Instagram search can provide useful elements to assess the level of awareness and the image of specific ICH elements or bearers among potential consumers or audiences. This will permit to better understand knowledge gaps and reasons for appreciating the elements and help to identify instances of misrepresentation and misappropriation.

Capacity building with ICH bearer communities. In many cases, ICH bearers lack the aesthetic, technical and promotional skills required to promote themselves effectively. Effective storytelling-based promotion can take place through social media marketing, which require less substantial investments than traditional media³⁰. Heritage-bearer individuals, groups and communities should therefore be empowered through capacity building interventions on social media use, persuasive communication, and storytelling tech-

²⁷ AlpFoodway. Map of ICH Food Commercial Valorisation Practices Across the Alpine Space. Available at: https://www.alpine-space.eu/projects/alpfoodway/project-results/wp2_map_ich_commercial_valorisation_practices.pdf (accessed: 6.12.2020); AlpFoodway. Guidance Paper on the Successful Valorization of the Alpine Food Heritage. Available at: https://www.alpine-space.eu/projects/alpfoodway/project-results/wp2_o.t2.1_guidancepapertosuccessfullycommercializealpinefoodheritage.pdf (accessed: 6.12.2020).

²⁸ McGivern Y. *The Practice of Market Research*. Harlow: Pearson, 2009.

²⁹ Poynter R. *The Handbook of Online and Social Media Research: Tools and Techniques for Market Researchers*. Chichester: Wiley, 2010.

³⁰ McDonald J. *Social Media Marketing Workbook*. CreateSpace, 2020.

niques, to be able to create and diffuse their own promotional stories. Such interventions would benefit from covering both the collective promotion of the ICH element as a whole and the complementary individual promotion of heritage practitioners, so that these two levels build on each other in a synergic manner. Capacity building should also cover legal aspects, for example in making sure that the images, sounds and video employed for digital storytelling do not infringe the copyrights of third parties, as well as legal remedies to instances of misappropriation and misrepresentation.

Encouragement of user-generated stories. Heritage bearers should use all possible moments of interactions with audiences and consumers, both real (e. g., participation to events and festivals, client visits, etc.) and digital (e. g., social media posts) to encourage the production of user-generated digital stories. Such user-generated stories can raise awareness about the ICH element and its practitioners to new publics, generating additional interest and promotional opportunities. This is however not without risks. User-generated stories can not only support/amplify community-generated stories but also introduce new elements (both positive and negative) or even contradict community- or bearer-generated narratives. Capacity building interventions should teach ICH bearers to mitigate these risks and respond to the possible fake news and misrepresentation issues, and ensure that user-generated posts are respectful of their intellectual property rights and referring back to the bearers' official social media accounts.

Encouragement of both individual and collective promotion and legal protection of the ICH element. Marketing needs to include both the collective promotion of the ICH element as a whole and the individual promotion of heritage practitioners, so that these two levels build on each other in a complementary, synergistic manner. An example of this approach is the website³¹ co-developed with artists from Naya village, a cultural hub of the Bengal Patachitra art form. Through the site, audiences can learn the history and know-how behind this traditional art form. Additionally, artists have a promotional window of their own that can be personalized with their artist statement, pictures of their choice, and contact information. Also legal protection should adopt a similar logic, by ensuring through appropriate governance systems a good balance between individual and collective forms of intellectual property rights protection and enforcement.

Conclusions

At first sight, marketing and ICH safeguarding look like strange bedfellows. According to the UNESCO's *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, ICH-related commercial activities can be a mixed blessing since, on the positive, they can raise awareness about heritage importance and generate income for its practitioners, but on the negative they can end up in distortions in the ICH meaning and purpose, commercial misappropriation, and unsustainable tourism (art. 116–117). While over-commercialization is an undeniable threat to ICH ongoing viability, under-commercialization can, too, compromise the survival of ICH elements. This paper takes as a point of departure the fact that the intergenerational transmission of ICH is often market-mediated. It aims to contribute to a better understanding of the under-studied and little understood conditions under which ICH entanglement with the market can be carried out in a heritage-sensitive and legally savvy manners that empowers individuals, groups and communities that are ICH bearers and ensures that they are the prime beneficiaries of the economic benefits of commercialization.

³¹ Bengal Patachitra. Available at: www.bengalpatachitra.com (accessed: 17.12.2020).

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Повествование о наследии, расширение прав и возможностей общин и устойчивое развитие

Д. Риналло

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Во многих дисциплинах устная традиция получила признание как мощный инструмент для обмена мудростью, стимулирования эмпатии, передачи знаний и убеждения аудитории в рекламных сообщениях. С появлением всемирной паутины и социальных сетей в последнее время большое внимание было сосредоточено на потенциале цифрового

повествования. Устная традиция также рассматривается некоторыми как средство защиты и обеспечения доступа к нематериальному культурному наследию (Intangible Cultural Heritage, ICH), например посредством документирования и инвентаризации практики, построенной на повествовании, или посредством разработки веб-сайтов и приложений. Однако публичная доступность и маркетинг ICH могут подвергнуть носителей наследия риску его незаконного присвоения, деконтекстуализации или искажения информации, как это было признано в Оперативных директивах ЮНЕСКО 2008 г. по имплементации Конвенции об охране нематериального культурного наследия. Каким образом носители наследия могут извлечь выгоду из рассказывания историй, охраняемого ICH, одновременно снижая эти риски? Предлагаемая статья основана на работе, проведенной в контексте двух исследовательских проектов, касавшихся цифровизации устной традиции различными способами: 1) AlpFoodway, Межрегиональный проект альпийского пространства ЕС (EU Interreg Alpine Space project, 2017–2019), направленный на создание модели устойчивого развития периферийных горных районов, основанной на сохранении и валоризации традиционного альпийского пищевого наследия; 2) продолжающийся проект Британской академии устойчивого развития «Навстречу местному самоуправлению на глобальном рынке: общинное наследие, защита интеллектуальной собственности и устойчивое развитие в Индии». Благодаря урокам, извлеченным в ходе реализации этих двух проектов, автор статьи делится мыслями о том, как подходы к рассказыванию историй, разработанные в области маркетинга, могут способствовать расширению прав и возможностей местного сообщества и устойчивому развитию. Проведенное исследование способствует лучшему пониманию недостаточно изученных условий, в которых взаимодействие ICH с рынком может осуществляться юридически грамотно и с вниманием к культурному наследию. Такое понимание даст новые возможности отдельным лицам, группам и сообществам, являющимся носителями охраняемых ICH практик, и гарантирует, что они являются основными бенефициарами экономических выгод коммерциализации.

Ключевые слова: нематериальное культурное наследие, маркетинг, устойчивое развитие, цифровизация устной традиции, расширение прав и возможностей местных сообществ.

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Риналло Диего — адъюнкт-профессор маркетинга и потребительской культуры, Бизнес-школа Emlyon, Франция, 69130, Экюлли, ул. Гю де Колоньо, 23; diego.rinaldo@kedgebs.com

Intangible Cultural Heritage and inventory process of the Lombardy region

Maria A. Lavagnino

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The article presents the experience of a regional state institution involved in the process of compiling the Regional Intangible Cultural Heritage (ICH) Register in the spirit of the 2003 Convention. The Lombardy Region Ethnography and Social History Archive (Archivio di Etnografia e Storia Sociale, AESS) has been operating since the 1970s within the regional institution for the enhancement of the Lombardy Region's traditional heritage. The Archive has since been used to promote fieldwork and ethnographic research projects and it has been supplemented with documents, photographs and audio-visual documentation. The Italian ratification of the 2003 UNESCO Convention was an opportunity to give continuity and consistency to the cultural activities that the Lombardy Region Ethnography and Social History Archive has been conducting since the 1970s. Regional Law no. 27 of 23 October 2008, "Enhancement of the intangible cultural heritage", and the new Regional Law of Lombardy no. 25 of 7 October 2016 on "Regional policies on cultural matters — Regulatory reorganization" allowed a participatory inventory process and shaped the formation of pioneering legislative action in Italy. As a result of this new regional cultural policy, the Intangible Search Inventory was established, overseen by the AESS, which coordinates safeguarding measures, actions and projects. The Intangible Search Inventory is a community based inventory that adopts the 2003 Convention principles for the safeguarding of ICH and works to apply the key ideas of the Convention itself, including participation and communities in the identification and description of the ICH elements. The Archive is also in charge of the production, collection and enhancement of multimedia documentation on ICH. This extends to multimedia collections regarding rituals, social habits, traditional technical knowledge, oral expressions and traditional music. Some of this thematic fieldwork and multimedia materials can be further explored on www.intangiblesearch.eu.

Keywords: regional law, living heritage, identifying, inventorying, communities, safeguarding, participative processes.

Introduction: the regional context

The General Directorate Autonomy and Culture of the Lombardy Region operates in the field of the Intangible Cultural Heritage (ICH) through the Regional Law no. 25 of October 7, 2016 on "Regional policies on cultural matters — Regulatory reorganization" which recognizes ICH as a strategic tool at institutional level, to enhance it in its various domains and expressions through the Ethnography and Social History Archive (Archivio di Etnografia e Storia Sociale, AESS), following different lines of action (Article 13 and Article 22)¹.

Maria Agostina Lavagnino — Lombardy Region Ethnography and Social History Archive, 1, Piazza Città di Lombardia, Milan, 20124, Italy; maria_agostina_lavagnino@regione.lombardia.it

¹ The Lombardy Region Ethnography and Social History Archive (Archivio di Etnografia e Storia Sociale, AESS) has been operating since the 1970s within the regional Institution for the enhancement of the Lombardy Region's traditional heritage. Available at: www.aess.regione.lombardia.it (accessed: 14.03.2020).

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The purpose of writing about the Lombardy Region Ethnography and Social History Archive experience is to light the context in which the activity of the Regional Archive operates, discussing and reflecting about the issues concerning ICH, the development of tools and methods in this fieldwork researches area as a strategic issue of changing process in cultural approaches and policies.

The Lombardy Region Ethnography and Social History Archive has been operating since the 1970s within the regional Institution for the enhancement of the Lombardy Region's traditional heritage. The Archive has since been used to promote fieldwork and ethnographic research projects and has been increased with documents, photos and audio-visual documentation. It promotes knowledge, conservation, enhancement and public use of the audio-visual documentary heritage, as related to social life, popular traditions, socio-economic and landscape transformations, as well as to work, literature and oral history, singing and traditional music of the Lombardy Region, with particular attention to ethno-anthropological assets and intangible cultural heritage.

The fifty years activities of this Public Cultural Institute testify the constant attention to those creative actions continuously carried out by local communities, within the framework of their traditional practices, which are recognized by the 2003 UNESCO Convention and later by our national and regional legislation. The Archive developed an important work of collection, documentation, cataloguing, dissemination (editorial series, records, films, multimedia products, public consultation services) of the cultural heritage of the Lombardy Region territorial communities². Since the beginning, these activities has been carried out in cooperation with Local Authorities, Research Institutions, Universities, Non-profit sector Bodies, Public and Private Foundations committed to the preservation and enhancement of the cultural heritage, experimenting cultural mediation strategies.

As mentioned before, the Archive has always paid attention to the traditional cultural assets, the living practices of the Lombard communities, following the methodology of the anthropological fieldwork. In all the fieldwork researches there has always been the intuition of the existence of distinguishable cultural characters and specificities local cultural values.

In this perspective, traditional cultural heritage has always been considered a potential resource for local development, first in terms of safeguarding and governance, and then as an attractive factor for local and sustainable development.

Archive's strategy has been defined in the introduction to the "Quaderni di Documentazione Regionale" in 1972³. The document contains important principles about strategic planning actions and innovative governance policy. The notion of giving a "global cultural meaning to political actions" means paying attention to all the cultural phenomena that constitute the components of the Lombardy reality, not only historical, but also the contemporary components which are in close connection with the communities. It means giving a voice to the bearers of living heritage: they are the "men of today, alive and active", "they are the Lombardy citizens of the Seventies"; they are the communities, groups and individuals of today, they are the social actors of the Intangible Cultural Heritage who, in line with the UNESCO principles, are the bearers and, at the same, time the "curators" of the safeguarding and viability processes of Intangible Cultural Heritage.

The conducting of research based on fieldwork, the cultural planning activities, the know-how of the regional territory creates an opportunity for the Archive, with the 2003 Convention and its national ratification, to shape the fulfilment of a pioneering legislative action in Italy.

² See editorial projects, records and multimedia collections on www.aess.regione.lombardia.it and fieldwork researches on www.aess.regione.lombardia.it/ricerca (accessed: 14.03.2020). The Institution collections has a huge collections of digital records, mostly available online.

³ *Leydi R. Le trasformazioni socio-economiche e la cultura tradizionale in Lombardia // Cultura tradizionale in Lombardia / ed. by R. Leydi. Milan: Department of Culture, 1972. P.7–11.*

1. The international and national legal framework: the community and civil society participation

The Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 17 October 2003 and ratified by Italy in 2007 with law no. 167 of 27 September 2007, introduced new governance and cultural policy strategies at an international level⁴. The concept of cultural heritage encompasses the practices, representations, expression, knowledge and skills that communities, groups or individuals identify and recognize as their own. Above all, the Convention recognized and established a new heritage category. Furthermore, UNESCO insists that the patrimonialization process depends on the participation of those who practice and transmit these cultural assets.

The text of the Convention shifts the attention from the “experts” to the actors of the ICH, who are not only identified as the bearers, but also ensure its vitality and transmission and must therefore concretely participate in the development of governance strategies that ensure its safeguarding in a “bottom up” process.

The safeguarding concept, very different from the “tutela” one, traceable in the Italian national law texts⁵, includes the dynamic nature of the intangible heritage: a concept that totally transforms the institutional and scientific approach to intangible assets. Their living nature is aimed at accepting changes and new demands in the transmission process. Safeguarding means measures aimed at “ensuring the viability of the intangible cultural heritage” and, naturally, social actors have a fundamental role in the participatory management of their heritage. As stated in Article 2 of the Convention, intangible cultural heritage “is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity”. Among the measures that ensure the viability of ICH, and its transmission from generation to generation, stand identification and inventory.

UNESCO’s attention of communities and individuals participation is reflected in other international documents, starting from the 2005 Council of Europe Framework Convention, the Faro Convention⁶, ratified by Italy on 23 September 2020, which in fact promotes participation as an essential factor for the cultural heritage management and refers, in its definition, to the communities to which it belongs, introducing the idea of “heritage community”, taking up some of the principles set out in the 2003 Convention for the Safeguarding of Intangible Cultural Heritage.

The Faro Convention defines “cultural heritage” and “heritage community” in Article 2:

Article 2 — Definitions

For the purposes of this Convention,

a) cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values,

⁴ The ratification law is published in: Gazzetta Ufficiale. 2007. 12 October. No. 238.

⁵ The Legislative Decree No. 42 of January 22, 2004 “Code of Cultural Properties” contains only an Article, added in 2008, dedicated to intangible cultural heritage, Article 7-bis “Expressions of collective cultural identity” in which the legislator introduced only the commitments undertaken by Italy with the national laws that ratified the 2003 and the 2005 UNESCO Conventions, that are “subject to the provision of this Code if they are represented by material testimony and if the prerequisites and the conditions for the applicability of article 10 exist”. Article 10 includes the list of cultural properties under the Code protection: according with this article, the intangible heritage is “protected” only in its tangible dimension.

⁶ Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No. 199), Faro, 27 October 2005.

beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time;

b) a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.

According to the Faro Convention, “heritage community” means a human group that wants to support with public actions a cultural heritage considered worthy of being transmitted to future generations. The Faro Convention, unlike other international legal instruments, shifts the focus from the cultural heritage itself, to the relationship of communities “with the surrounding environment and their active participation in the process of recognition of cultural values, placing heritage as a resource at the centre of a vision of sustainable development and promotion of cultural diversity for the construction of a peaceful and democratic society”⁷.

Cultural heritage is recognized as part of the right to participate in cultural life, in the Universal Declaration of Human Rights of 1948, which in Article 27 proclaims: “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.

Even before the Faro Convention, UNESCO adopted the Convention for the Protection and Promotion of the Diversity of Cultural Expressions on 20 October 2005, ratified by Italy on 30 January 2007. The Convention “celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and other universally recognized instruments”, not only emphasizing the fundamental right of individuals and peoples to participate in culture (Article 2 and Article 5), but in particular recalling the theme of participation in a specific article:

Article 11 — Participation of civil society

Parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention.

In the international documents, the participatory approach prevails as part of the right of communities and individuals and as a possible tool for States to develop new strategies in the implementation of cultural policies. The theme is complex and highly contemporary, involving, in this global change of scenarios, the anthropological disciplines, international and cultural heritage laws.

In the 2003 Convention, participation is one of the key concepts of safeguarding, as recurrently stressed in various reports of the intergovernmental committee debates. Among the measures that can guarantee the viability of ICH, the Convention calls for the implementation of inventories.

The analysis of the language Convention’s text, which uses non-prescriptive language in most of its articles, makes it possible to understand the importance given to certain strategic points, in particular those concerning the way in which safeguarding measures are implemented, and the importance given to inventories in this direction. According to Article 11 of the Convention, each State Party, is required to take the necessary measures to ensure the safeguarding of ICH including communities, groups and relevant NGOs in the identification of elements.

⁷ *Carmosino C.* Il valore del patrimonio culturale fra Italia e Europa. La Convenzione quadro del Consiglio d’Europa sul valore del patrimonio culturale per la società // Aedon. 2013. No. 1. Available at: <http://www.aedon.mulino.it/archivio/2013/1/carmosino.htm> (accessed: 14.03.2020).

Article 11 — Role of States Parties

Each State Party shall:

- a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;
- b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant nongovernmental organizations.

Article 11 is more prescriptive than other ones (“take the necessary measures”, “identify and define”). Each State, ratifying the Convention, is obliged to implement safeguarding plans to ensure that ICH can be transmitted from one generation to another. Transmission and participation processes are emphasized in the Convention: as indicated, only intangible elements that are recognized by communities as “theirs own ICH” are to be safeguarded.

Inventories are strictly connected to the safeguarding measures because they can raise awareness, can encourage creativity and “self-respect in the communities and individuals”.

Article 12 — Inventories

1. To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.

2. When each State Party periodically submits its report to the Committee, in accordance with Article 29, it shall provide relevant information on such inventories.

Indeed, the inventories process should not be static, the updating of them should ensure the recording of changes in identifying elements: communities are the bearers and the ones who create their ICH and keep it alive. Inventorying is an ongoing process and it cannot happen without the community involvement in identifying and safeguarding ICH.

Article 15 — Participation of communities, groups and individuals

Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

From a democratic perspective and in participatory governance, a focus on civil society gives a voice to the communities, social groups, individuals who represent themselves through the diversity of their own ICH. In accordance with this perspective, institutions do not have an autonomous and centralizing role, but instead become the subjects of a cultural mediation, facilitating cultural participation. Indeed, institutions continue to play an important role in the selection processes of the cultural heritage, but this function no longer falls exclusively on the shoulders of institutions. As a result of the new international regulatory context, there now exists a recognition of the need to understand the ICH elements through the transmission processes, in terms of viability and enhancement, and through the “living signs” that are constantly recreated, in an ever-new production of culture.

The new paradigms introduced by the Convention lead institutions to a new reflection on cultural heritage and force the scientific community, experts, ethnographic and anthropological disciplines to carefully analyse fieldwork research approaches and methodologies, bringing new principles into the process of identification and inventory of ICH. Inventories are an integral part of safeguarding because they raise awareness about ICH and its importance for individual and collective identity.

The new international regulatory context, involving the study, comparison, experimentation, and within the context of European Programmes⁸, has led the Lombardy Region Ethnography and Social History Archive to draw up an international inventory, shared on the inter-regional level of the European cross-border area. As such, to understand these developments and perspectives, we must first begin with an analysis of the activity of the Regional Archive operates.

2. Regional policies on Intangible Cultural Heritage

The Italian ratification of the 2003 UNESCO Convention was an opportunity to give continuity and consistency to a cultural action that the Lombardy Region Ethnography and Social History Archive has been operating since 1970s.

In the spirit of the 2003 Convention, the qualification of the intangible heritage as a “cultural asset” finds regulatory fulfilment in the Regional Law no. 27 of 23 October 2008, “Enhancement of the intangible cultural heritage”, which recognizes this heritage and attests the willingness, at the institutional level, to enhance it in its various forms and expressions through the Regional Archive, following different lines of action, as reflected in Articles 1 and 2. The new Regional Law of Lombardy no. 25 of 7 October 2016 on “Regional policies on cultural matters — Regulatory reorganization” takes up the contents of former law no. 27, in particular in Articles 13 and 22:

Article 13 — Ethno-anthropological heritage and Intangible Cultural Heritage

1. The Region promotes and supports the knowledge, identification, safeguarding and enhancement of ethno-anthropological heritage and intangible cultural heritage in its territory or in communities of Lombard citizens residing abroad, in its various forms and expressions.

2. For the purposes of this law, intangible cultural heritage means, in accordance with the definition contained in the Convention for the Safeguarding of the Intangible Heritage, ratified by Italy with law no. 167, 2007, practices, representations, expressions, knowledge, as well as the tools, objects, artefacts and cultural spaces associated with them, which communities, groups and in some cases individuals recognize as part of their heritage, their history and their identity with particular regard to: a) traditions and oral expressions, including oral history, narrative and toponymy; b) music and traditional performing arts, represented in a stable or itinerant form, as well as street artistic expression; c) social customs, ritual and festive events, historical events; d) knowledge, practices, beliefs related to the cycle of the year and of life, to nature and to the universe; e) traditional knowledge and techniques related to productive, craft, commercial and artistic activities.

3. The Region promotes, furthermore, the creation of inventories of intangible cultural heritage and fosters its inclusion in the lists prepared by UNESCO, carrying out a consultancy and support function for the national and international institute in charge.

Article 22 — Ethnography and Social History Archive (AESS)

1. The Region, through the Ethnography and Social History Archive (AESS), promotes the knowledge, conservation, enhancement and public use of the audio-visual documentary heritage, as related to social life, popular traditions, socio-economic and landscape transformations, as well as to work, literature and oral history, singing and traditional music of the Lombardy region, with particular attention to ethno-anthropological assets, intangible cultural heritage, the Lombard language and its variants.

2. In particular, AESS:

- a) guarantees the public use of funds, collections and collections owned by the region or by other affiliated subjects, consisting of texts, photographs, audio-visual media, sound documents also through the digitization and management of databases;

⁸ E. CH. I. — Italo-Swiss ethnographies for the enhancement of the intangible heritage project (Interreg Italy-Swiss Cooperation Programme 2007–2013) and AlpFoodway project (Interreg Alpine Space Programme 2014–2020).

- b) promotes knowledge of the ethno-anthropological heritage through the acquisition of historical and contemporary documentary funds, the study and research in the field with every available technical support and the creation of communication products;
- c) promotes the safeguarding of the intangible cultural heritage also through the creation of regional inventories that favour the transmission between generations;
- d) promotes knowledge of the Lombard language in its variants;
- e) it also promotes knowledge of the documentary heritage relating to the First World War also through the general info-teleomatic archive of historical and documentary findings in conjunction with the territorial competent bodies, which provide for its constant updating.

In 2008, to promote the new Regional Law and spread the principles of the 2003 UNESCO Convention, was developed the travelling exhibition project “Culture in Movimento”. The project has been carried out in cooperation with Local Authorities, Ethnographic and Local Museums, Ecomuseums, Mountain Communities, Provinces, Research Institutes, Foundations and Cultural Associations. The 2008 Regional Law “Enhancement of the intangible cultural heritage” introduced a new regional political strategy to identify, safeguard and enhance ICH. And this was the first important instrument to start the process of implementing a Regional Register about Lombardy ICH. The travelling exhibition was the first action to implement this idea, drawing the Inventory up with ICH communities and Local Associations, Cultural Operators, Local Authorities and spread the new cultural policies all around the regional territories.

In the context of the enhancement of intangible heritage, the recognition of the ICH in the regional legislative framework, sparked a new “season” in the two-year period 2010–2011, through the first call of the Lombardy Region, “Public call for the participating process for the implementation of the Lombardy Intangible Heritage Register (REIL)”.

The REIL implementation, an identification and safeguarding tool introduces, in accordance with the 2003 Convention, a bottom-up procedure, directly involving heritage communities in the identification process of intangible assets. The model starts from the assumption that shared responsibility between institutions and civil society serves as an “aggregating force” in the application of participatory and shared enhancement models.

This new approach has allowed the Archive to experiment with models that involve diversified and heterogeneous professional skills (encouraging and facilitating dialogue between social actors), combining the knowledge of anthropologists as well as the knowledge of those who locally recognize intangible assets as part of their contemporary heritage. Through this first public call, the Archive included the Traditional Violin Craftsmanship in Cremona and the Lombardy Region Alpine Transhumance elements in its Register (2011)⁹, which will be later included in the Representative List of Humanity.

We have to underline that not all the projects that had a financial support were included inside the Regional Register. We included elements, not submitting them for a Nomination process or filling Nominations for the Convention Lists: this is a National evaluation process. The Register is intended as a tool to map the regional ICH “with a view to safeguarding”, involving communities in this complex process of identifying and inventorying, having them a privileged place in safeguarding it.

Since 2011, and up to 2019, the Regional Law has allowed for the publishing of Public Calls to support communities, Institutions, Associations and Local actors carrying out projects for the identification, fieldwork researches, and participatory safeguarding actions.

⁹ The forms are available with the video-documentation at the web address of the Intangible Search Inventory: www.intangiblesearch.eu (Lombardy Section).

As a result of the listed assumptions and through mediating the needs of the “R. E. I. L. community”, a first draft inventory was tested, directly involving the communities in its definition processes. This draft inventory form has developed, and has found fulfillment and wider sharing, in the context of European Programming, with the creation of an inventory that is open to the territory of the Alpine Macroregion Strategy¹⁰.

The inventory form was developed taking into account different documents including, the UNESCO layouts of the Application Dossiers, the UNESCO “Identifying and Inventorying Intangible Cultural Heritage Guidelines”, ten cases of European and international inventories analysed by the Association for the Protection of Cultural Heritage Intangible (ASPACI), research carried out in 2010 for the Regional Archive¹¹, and the Ministerial form BDI — Intangible Demo-ethnoanthropological Heritage, created by the Central Institute for Catalogue and Documentation and used at National level for the presentation of the proposals for the Nomination of the elements.

The UNESCO kit contains a proposal for a structure that identifies, through its six sections, the information considered essential by UNESCO for the element “storytelling” through an inventory form: the data for its identification, its characteristics, the persons and institutions associated with the element, the state of the practice, the conditions of its transmission and viability, the methodology of its identification and the documentation produced and/or available.

It is a model which introduces important innovations¹². In particular, the model draws attention to the descriptive aspects that refer to the role of the communities, groups and organizations linked to the element, involved in the transmission and viability processes. Relevant to this process is the information relating to the transmission methodology and the safeguarding measures in place, as well as the possible threats to viability. In the development of the layout, the comparisons and analysis of inventories and forms developed by other institutions at the European and international level were also significant.

The Archive contains new information introduced by the Convention, which are relevant because in relation to the descriptive requests of the Application Dossier-ICH 02 a number of key questions arise. Who are the bearers and practitioners of the element? What are the specific roles of communities and groups or other categories for the practice? What are their responsibilities? What are the ways in which communities participate? How are these elements transmitted? How is safeguarding applied?

These are some of the indispensable features of the Inventory that are defined as “narrative” and which explain, within the obvious limits of a cataloguing form, the cultural geog-

¹⁰ In the spirit of the Convention, and thanks to the work shared with partners from other Regions and international ones, the international inventory for the enhancement of the intangible cultural heritage of the Alpine cross-border regions between Italy and Switzerland has been published online (www.intangiblesearch.eu). This is one of the results of the project E. CH. I. — Italo-Swiss ethnographies for the enhancement of the intangible heritage (Interreg Italy-Swiss Cooperation Programme 2007–2013). Lombardy Region, project leader, collaborated for its development with Piedmont Region, Valle d’Aosta Autonomous Region, Bolzano Autonomous Province, Valais Canton, Ticino Canton and Grigioni Canton, different administrations territories, but linked by common cultures values. Through the AlpFoodway project (Interreg Alpine Space Programme 2014–2020) the Inventory, in its dynamic and participative approaches, has been open up to the communities of other Alpine Regions (Trentino Alto Adige, France, Slovenia, Austria and Germany).

¹¹ In addition to the work by ASPACI, Participatory Identification of Intangible Cultural Heritage (Identificazione partecipativa del patrimonio culturale immateriale), in 2012 a new research was developed: ASPACI. Participation in Intangible Cultural Heritage Safeguarding: Ethnographic, Economic and Technological Aspects. Milan: Ethnography and Social History Archive, 2013.

¹² Kit of the Convention for the Safeguarding of the Intangible Cultural Heritage. P. 15 // UNESCO. Available at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00451> (accessed: 14.03.2020). See also the analysis edited by ASPACI. Identificazione partecipativa del patrimonio culturale immateriale. 2011. P. 6–37 (Ibid.).

raphy of a territory, through constantly evolving living practices, which, as demonstrated, continue to be the centre of the communities and establish links between tradition and contemporary values. This is a rather complex process and, in fact, the new role of communities and the concept of participation triggered significant changes in the fieldwork approaches, identification and inventorying, enhancement and restitution methods, and forced institutions to deeply reflect on and rethink governance strategies with a renewed attention. The work is complex and continues to progress and, in light of ongoing and foreseeable future developments, requires continuous collaboration with institutions and civil society.

3. Examples and best practices

Starting from the Lombardy Register the Intangible Search inventorying process has been extended to the Alpine Regions through different European programme and projects.

The Rye Bread Festival is a good example of a safeguarding participatory measure. Started at regional level in the Aosta Region, in Lombardy Region and in Canton Grigioni (Switzerland), the Festival has grown into a transnational one joining communities from eight Alpine regions in six countries (Aosta, Lombardy and Piemonte Regions in Italy, Upper Gorenjska Region in Slovenia, Parc de Bauges in France, Upper Bavaria in Germany, Canton Grigioni and Canton Valais in Switzerland).

Every year, at the same day of October, all the Regions open their community's ovens to make rye bread. Started in the Aosta Valley, at regional level, the Rye Bread Festival is an example that has become a transnational one, joining Alpine communities inside a ritual, make traditional rye-bread, in which the communities' know-how is still alive, and raise awareness of the common ICH across regions and countries. For the fifth-year edition, in this time of Covid emergency, we developed a new format to go inside community's homes and connect them (all over the countries) through digital instruments and streaming devices. We developed with local communities this approach, to maintain the spirit of the event, to create a new common shared experience in making bread, and for the first time, at the same time, to put in contact communities of different Regions through digital devices.

Thinking about Educational programme on ICH the Politecnico University of Milan School of Design launched a course in Exhibition Design Studio in 2017. The course is based on the Intangible Search Inventory (www.intangiblesearch.eu) to select five collections, to share information with the students and to understand the importance of ICH. The course aims at enhancing the cultural heritage of the Alpine Mountain's identity, focusing on design solutions that relate to exhibit design in terms of widespread museums and temporary exhibitions. This is only an example for integrating intangible cultural heritage in University Programmes. Similar methods could be used to raise awareness with the public schools, in different context of learning to learn more about ICH: awareness raising is a key to safeguarding ICH.

Fifty students from various countries designed two different typologies of projects to valorise some Alpine ICH practices and rituals. The first project lays itself within the regional landscape, the second one in the urban context of the square Città di Lombardia in the city centre of Milan (the Lombardy Region Institutional District). The projects presented how the cultural heritage of the Alpine mountain regions can be shared to urbans thanks to design new models of cultural experience and, hence, demonstrate the relationship between rural and urban areas.

The collections were inspired by the Lombardy Register elements:

- traditional carpet *pezzotti*: it's a rustic and coloured traditional carpet, made of waste textile from Valtellina;

- handmade footwear *pedù*: Lanzada town's (Valmalenco) footwear made of a thick fabric sole with velvet ribbed and laced upper sewn onto it;
- rye bread *pan de séghel*: it's a particular type of bread made of rye wheat which still today is consumed throughout "Valtellina" mountain area;
- carnival and wooden mask sculptors: Schignano's Carnival is part of the Alpine ones;
- bells and bell-ringers: since the middle ages the sound of bells has played a major role in the Bergamo's area celebration of religious events and in calling public gatherings.

At the end, talking about ICH Convention methodology, the AlpFoodway Alpine Space Project in which all partners started a bottom-up process involving local communities to identify and inventorying Intangible Alpine Food Heritage and including more than 150 elements about food production, agricultural knowledge, rituals, traditions in a spirit of recognition of a common cultural heritage. Alpine Food Heritage is the set of sustainable production and consumption practices, knowledge and skills, productive landscapes and locally produced traditional food in the Alpine regions. It depends on commons, shared goods and services, and on mutual assistance.

With the support of the Macroregional Strategy EUSALP¹³ Lombardy Region has been developing an Inter Directorates Task Force that link Culture, Agriculture, Environment, Local Mountains to support the dissemination of the AlpFoodway Methodology results also in the context of the UNESCO 2003 Convention¹⁴.

Conclusions

One of the tools used to develop new strategic regional policy is the Lombardy Register of the Intangible Heritage (REIL). According to the Guidelines and 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003 Convention), REIL was implemented in accordance with communities participatory processes: www.intangiblesearch.eu (Lombardy Section).

The Lombardy Region Register, in the context of European and International projects, was opened up to international heritage communities, Institutions, Cultural Organisations and Regions of the Alpine Macroregional Strategy EUSALP¹⁵.

As a result of this new regional cultural policy, the Intangible Search Inventory was established, overseen by the Archive which coordinates safeguarding measures, actions and projects. The Intangible Search Inventory is a community based inventory that adopts the 2003 Convention principles for the safeguarding of ICH, and works to apply the key ideas of the Convention itself, including participation and communities, in the identification and description of the ICH elements.

The Archive is also in charge of the production, collection and enhancement of multimedia documentation on ICH. This extends to multimedia collections regarding rituals,

¹³ "The Alpine macro-regional strategy would provide an opportunity to improve cooperation in the Alpine States as well as identifying common goals and implementing them more effectively through trans-national collaboration. EUSALP constitutes a strategic agenda that should guide relevant policy instruments at EU, national and regional level, by closely aligning and mutually reinforcing them". Available at: <http://alpine-region.eu> (accessed: 14.03.2020).

¹⁴ All the studies and results are available the Alpine Space project website: <https://www.alpine-space.eu/projects/alpfoodway/en/home> (accessed: 14.03.2020). Elements from the Alpine Regions: www.intangiblesearch.eu (accessed: 14.03.2020).

¹⁵ AlpFoodway Project — Alpine Space Programme 2014–2020. Available at: <https://www.alpine-space.eu/projects/alpfoodway> (accessed: 14.03.2020).

social habits, traditional technical knowledge, oral expressions and traditional music. Some of this thematic fieldwork researches and multimedia materials can be further explored on www.intangiblesearch.eu.

The main objectives of Intangible Search are:

- identifying and inventorying the living ICH taking into account various domains of ICH which, according to the Unesco Convention, include e. g. oral tradition, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, traditional craftsmanship;
- spreading and increasing awareness about ICH in a very widespread manner, also holding discussions and seminars for the purpose of providing a large number of parties operating in the field of ICH.

The challenge is to implement new strategies and support communities and Local Authorities with a view to the future, allowing participation and civil society involvement to contribute spreading ICH values and benefit, enlarging the actors and the education about ICH.

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Нематериальное культурное наследие и процесс инвентаризации в регионе Ломбардия

М. А. Лаваньино

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В статье описывается опыт регионального государственного учреждения, участвующего в процессе составления Регионального регистра Нематериального культурного наследия (Intangible Cultural Heritage, ICH) в духе Конвенции 2003 г. Архив этнографии и социальной истории региона Ломбардия (Archivio di Etnografia e Storia Sociale, AESS) работает с 1970-х годов в рамках регионального учреждения по приумножению традиционного наследия региона Ломбардия. С того времени Архив использовался для осуществления полевых работ и этнографических исследовательских проектов и пополнялся документами, фотографиями и аудиовизуальной документацией. Ратификация Италией Конвенции ЮНЕСКО 2003 г. дала возможность сохранить преемственность культурной деятельности, осуществляемой AESS с 1970-х годов. Региональный закон от 23.10.2008 № 27 «Об укреплении нематериального культурного наследия» и новый Региональный закон Ломбардии от 07.10.2016 № 25 «Региональная политика в области культуры — регулятивная реорганизация» позволили провести инвентаризацию с участием всех заинтересованных сторон и принять в Италии новаторское законодательство. В результате осуществления новой региональной культурной политики была создана опись выявленного нематериального наследия, курируемая AESS, который координирует охранные меры, действия и проекты. Опись выявленного нематериального наследия — это сформиро-

ванный благодаря деятельности местных сообществ реестр, основанный на принципах Конвенции 2003 г. об охране ИСН и применении ключевых идей самой Конвенции, включая участие местных сообществ в идентификации и описании элементов ИСН. Архив также отвечает за производство, сбор и расширение мультимедийной документации по ИСН, в том числе мультимедийных коллекций, касающихся ритуалов, социальных привычек, традиционных технических знаний, устного творчества и традиционной музыки. Некоторые из тематических полевых исследований и мультимедийных материалов доступны на сайте www.intangiblesearch.eu.

Ключевые слова: региональное право, живое наследие, идентификация, инвентаризация, сообщества, охрана, процессы участия.

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Лаваньино Мария Агостина — Архив этнографии и социальной истории региона Ломбардия, Италия, 20124, Милан, пл. Читта ди Ломбардия, 1; maria_agostina_lavagnino@regione.it

ЮНЕСКО, нематериальное культурное наследие и рынок: споры и камни преткновения*

К. Бортолотто

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В статье рассматриваются взаимосвязи нематериального культурного наследия (Intangible Cultural Heritage, ICH) и рынка на фоне переориентации приоритетов ЮНЕСКО на устойчивое развитие. Основываясь на наблюдениях за заседаниями руководящих органов Конвенции по охране нематериального культурного наследия, автор анализирует противоречия, порожденные рисками чрезмерной коммерциализации ICH, между субъектами нормотворческой деятельности, связанной с разработкой «хорошего» управления наследием. Хотя необходимость согласования рынка и наследия официально признана, включение той или иной коммерческой практики в перечень ICH ЮНЕСКО квалифицируется многими такими субъектами как травматическое. Дискуссия, вызванная выработкой документов по этой теме в руководящих органах Конвенции, проливает свет на противоречивое восприятие взаимосвязи между рынком и ICH. При рассмотрении идеи коммерциализации без чрезмерной коммерциализации, предложенной упомянутыми субъектами для разрешения напряженности между наследием и рынком, в статье подчеркивается конститутивная двусмысленность Конвенции. Эта концепция, основанная на идеях «незаконного присвоения» и «деконтекстуализации», является частью логики понятия интеллектуальной собственности. Однако Конвенция явно была разработана в рамках альтернативной парадигмы, подчеркивающей культурный динамизм и общность культурного достояния. В то время как предприниматели, имеющие дело с таким наследием на местах, переходят от одного правового режима к другому, прагматично и стратегически используя правовые рамки, основанные на принципиально иной логике, эта непоследовательность порождает нормативные головоломки для субъектов, сопричастных официальным органам Конвенции, разрывающихся между режимом собственности и режимом наследия и обосновывающих существование данных режимов различными концепциями моральной экономики. Таким образом, в рамках Конвенции принцип коммерциализации без чрезмерной коммерциализации представляет собой хрупкий компромисс, отражающий напряженность между различными режимами внешнего регулирования отношений, существующих внутри традиционной культуры.

Ключевые слова: ЮНЕСКО, Конвенция по охране нематериального культурного наследия, коммерциализация, моральная экономика, правовой режим наследия, рынок, устойчивое развитие.

Бортолотто Кьяра — PhD антропологии, Школа высших социальных наук (EHES), Франция, 75006, Париж, Распайл, 105; chiara.bortolotto@ehess.fr

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Введение

В 2019 г. *The New York Times* опубликовала статью «Глобальный шопинг с ЮНЕСКО в качестве вашего гида», где подробно показывается, как списки нематериального культурного наследия (Intangible Cultural Heritage; далее — ИСН, наследие) могут быть использованы культурными покупателями для выбора «произведений искусства и ремесел, имеющих историческое значение». Эти списки не только повышают коммерческую привлекательность ремесел, признанных ИСН, но и, как говорится в статье, рекомендуют культурным туристам испытать «поистине нематериальные впечатления», например в венских кофейнях, предлагающих «идеальный привал, когда усталым покупателям... нужен перерыв»¹.

Даже если в рамках Конвенции об охране нематериального культурного наследия² (далее — Конвенция ИСН, Конвенция) в качестве ИСН и объекта охраны и передачи признаются только «практики, представления, выражения, знания, навыки» (ст. 2), а не их результаты и продукты, последние являются тем, что предлагается в качестве товара на мировом рынке и вызывает интерес глобальных потребителей. Как следует из статьи в *New York Times*, списки наследия ЮНЕСКО наделяют критическую символическую добавленную стоимость потенциальным глобальным экономическим воздействием и, следовательно, играют роль виртуального большого базара для культурных потребителей. Как утверждают специалисты по маркетингу, эти списки функционируют в качестве бренда, предоставляющего желанное «одобрение или печать одобрения»³, аналогично системе франчайзинга⁴, хотя иногда только с эффектом плацебо⁵.

Это особенно верно для списков ИСН⁶, поскольку коммерциализация часто выступает не внешним фактором, как это происходит с памятниками и памятными местами, а внутренним компонентом социальных и культурных практик, обозначаемых как ИСН. Действительно, некоторые из этих практик на самом деле могут быть поняты именно как коммерческая деятельность⁷, и даже когда они превращаются в наследие, сама их жизнеспособность зависит от маркетинга их продуктов. Другими словами, рынок — это один из аспектов, которые делают ИСН «живым наследием». Продажа пиццы, духов, пива или кимчи поддерживает такие практики,

¹ *Mohn T.* Global Shopping with UNESCO as Your Guide // *New York Times*. 2019. URL: <https://www.nytimes.com/2019/11/21/style/global-shopping-unesco-guide-germany-hungary.html> (дата обращения: 08.07.2019).

² *The Convention for the Safeguarding of the Intangible Cultural Heritage*. Paris: UNESCO, 2003. — Принята Генеральной конференцией ЮНЕСКО в 2003 г. По состоянию на июнь 2020 г. была ратифицирована 178 государствами-участниками.

³ *Ryan J., Silvanto S.* A Brand for All the Nations: The Development of the World Heritage Brand in Emerging Markets // *Marketing Intelligence and Planning*. 2011. No. 29 (3). P.305–318.

⁴ *Adie B. A.* Franchising Our Heritage: The UNESCO World Heritage Brand // *Tourism Management Perspectives*. 2017. No. 24. P.48–53.

⁵ *Adie B. A., Michael H. C., Prayag G.* World Heritage as a Placebo Brand: A Comparative Analysis of Three Sites and Marketing Implications // *Journal of Sustainable Tourism*. 2018. No. 26 (3). P.399–415.

⁶ Конвенция устанавливает два списка: Репрезентативный список нематериального культурного наследия Человечества (The Representative List of the Intangible Cultural Heritage of Humanity) и Список нематериального культурного наследия, нуждающегося в срочной охране (The List of Intangible Cultural Heritage in Need of Urgent Safeguarding). Первый направлен на то, чтобы проиллюстрировать разнообразие ИСН и повысить осведомленность о его важности, второй — на мобилизацию международного сотрудничества и помощи для принятия мер по охране культурных проявлений, которые, как считается, нуждаются в срочных мерах по их сохранению. Реестр надлежащей практики охраны содержит программы, проекты и мероприятия, наилучшим образом отражающие принципы и цели Конвенции.

⁷ *Broude T.* Mapping the Potential Interactions between UNESCO's Intangible Cultural Heritage Regime and World Trade Law // *International Journal of Cultural Property*. 2018. No. 25 (4). P.419–448.

как «Искусство неаполитанской пиццерии», «Навыки, связанные с парфюмерией в Pays de Grasse», «Пивная культура в Бельгии», «Кимджанг, изготовление и совместное использование кимчи в Республике Корея» и «Традиции изготовления кимчи в Корейской Народно-Демократической Республике», а ведь все перечисленное — это элементы, внесенные в списки ИСН ЮНЕСКО.

Нематериальное культурное наследие выводит на первый план запутанность отношений между рынком и наследием, поскольку коммерциализация присуща последнему, а также потому, что рост значения ИСН пересекался с мандатом ЮНЕСКО по учету приоритетов устойчивого развития ООН в течение последнего десятилетия. В рамках обозначенных целей существования категории ИСН необходимость решения проблемы коммерциализации обострилась, что привело к принятию Оперативных директив по коммерциализации № 116 и 117⁸, рассматриваемых среди очень немногих попыток ЮНЕСКО непосредственно заняться экономической наследия⁹. Несмотря на упомянутый официальный сдвиг, ЮНЕСКО, похоже, не очень комфортно воспринимает тот факт, что «рынок не является врагом наследия»¹⁰. В данной статье я исследую нежелание коммерциализации и выясняю, как оно отражает внутреннюю двусмысленность Конвенции, разрываемой между конфликтующими концепциями моральной экономики.

1. Коммерциализация как нормативная головоломка

Субъекты наследия на местах действуют как субъекты предпринимательства, наделяющие себя потенциалом посредством превращения культурного капитала в экономический капитал и повышения оценки культурно выделяющихся продуктов и услуг¹¹. Такие субъекты рассматривают свои культурные ценности не только как «новую основу для накопления капитала»¹², но и как мощные инструменты расширения прав и возможностей и повышения устойчивости. Авторы одного из исследований предполагают, что коммодификация не обязательно идет вразрез с утверждением культурной идентичности и в силах фактически обеспечить чувство свободы воли и способ самоконструирования, который вместо того, чтобы порождать отчуждение, может повысить чувство гордости у культурных производителей¹³. В таких процессах валоризация благодаря культурному признанию увеличивает экономическую ценность предметов, превращенных в наследие. Рост экономической ценности, в свою очередь, вызывает повышение значимости неэкономических аспектов этих предметов¹⁴.

⁸ Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage. 2018. URL: Available at: <https://ich.unesco.org/en/directives> (дата обращения: 08.07.2019).

⁹ Lixinski L. International Heritage Law and the Market // International Heritage Law for Communities. 2019. No. 3 (2). P. 127–167.

¹⁰ Lixinski L. Commercializing Traditional Culture: Promises and Pitfalls in the Convergence of Intellectual Property Law and Cultural Heritage Law // Annali Italiani Del Diritto d'autore, Della Cultura e Dello Spettacolo. 2020. P. 8.

¹¹ Meskell L. The Nature of Heritage: The New South Africa. Oxford: Wiley-Blackwell, 2012.

¹² Coombe R. J. The Expanding Purview of Cultural Properties and Their Politics // Annual Review of Law and Social Science. 2009. No. 5 (1). P. 402.

¹³ Comaroff J. L., Comaroff J. Ethnicity, Inc. Chicago Studies in Practices of Meaning. Chicago: University of Chicago Press, 2009.

¹⁴ Kirshenblatt-Gimblett B. Intangible Heritage as Metacultural Production // Museum International. 2014. No. 66 (1–4). P. 163–174.

Разнообразие способов использования наследия позволяет «предпринимателям наследия»¹⁵ использовать множественные и гибридные методы оценки, что дает возможность примирить наследие, понимаемое как воплощение идентичности группы, и ее отчуждаемость. Социальные субъекты, вовлеченные во взаимодействие с наследием на этой основе, прагматично используют Конвенцию ICH, основываясь на собственном ее понимании и на конкретных потребностях каждой ситуации. Они часто находят пути осмысления взаимного наложения культурных аспектов наследия и рынка, иногда стратегически используя различные правовые рамки, основанные на принципиально разных логиках. Случай рисования песком в Вануату, признанный ЮНЕСКО в 2003 г. в качестве ICH, демонстрирует, как народное понимание собственности и отчуждаемости приводит к уменьшению поляризации таких категорий, как наследие и рынок¹⁶.

Субъекты, действующие внутри официальных органов Конвенции, где определения и цели наследия устанавливаются для формирования политических принципов и выработки «правил для мира»¹⁷ в сфере политики в области наследия, не разделяют той же легкости, что и практикующие признанную наследием деятельность на местах. Ожидая обоснованных объективных оценок, которые могут быть использованы при принятии политических решений, вышеупомянутые субъекты рассматривают один и тот же вопрос с другой точки зрения. Предполагается, что их оценки согласуются с конкретными политическими рамками, в границах которых данных субъектов просят вмешаться. В этом смысле обязанность последних состоит в том, чтобы осмыслить отдельную ситуацию через призму Конвенции так, чтобы это соответствовало ее духу и принципам. Указанные субъекты несут заметную ответственность, ведь то, что они говорят, будет иметь очень конкретные последствия, поскольку «слово эксперта — это активное слово»¹⁸.

Именно эти субъекты, находящиеся в данной конкретной нормативной позиции, и являются предметом последующего анализа¹⁹. Хотя они также участвуют в довольно неформальных мероприятиях, таких как публичные дебаты или

¹⁵ Pfeilstetter R. Heritage Entrepreneurship. Agency-Driven Promotion of the Mediterranean Diet in Spain // International Journal of Heritage Studies. 2015. No. 21 (3). P. 215–231.

¹⁶ Geismar H. Treasured Possessions: Indigenous Interventions into Cultural and Intellectual Property. Durham; London: Duke University Press, 2013.

¹⁷ Barnett M., Finnemore M. Rules for the World: International Organizations in Global Politics. Ithaca; London: Cornell University Press, 2004.

¹⁸ Heinich N. Des Valeurs. Une Approche Sociologique. Paris: Gallimard, 2017. P. 54.

¹⁹ Мое исследование основано на мультисетевом, многоуровневом и «многопозиционном» (Sapignoli M. A Kaleidoscopic Institutional Form: Expertise and Transformation in the UN Permanent Forum on Indigenous Issues // Palaces of Hope: The Anthropology of Global Organization / ed. by M. Sapignoli, R. Niezen. Cambridge: Cambridge University Press, 2017. P. 80) сопричастном наблюдении за имплементацией Конвенции ICH. Я наблюдала за межправительственными переговорами по разработке Конвенции в 2003 г., а затем присутствовала на ежегодных совещаниях Межправительственного комитета по охране ICH с 2009 г. (на Бали, в Абу-Даби, Париже, Баку, Виндхук, Аддис-Абебе, на острове Чеджудо, в Порт-Луи и Боготе). Кроме того, я следила за сессией 2010 г., проходившей в Найроби, по подкасту и регулярно оказывала помощь в проведении двухгодичных сессий Генеральной Ассамблеи государств-участников в штаб-квартире ЮНЕСКО в Париже и ряда совещаний экспертов по всему миру. Помимо осуществления наблюдения со стороны руководящих органов Конвенции, я активно участвовала в ее имплементации лично. С 2007 по 2009 г. я участвовала в кампании инвентаризации ICH, начатой Министерством культуры Франции, а с 2012 г. заседаю в Комитете по этнологическому и нематериальному наследию (Comité du patrimoine ethnologique et immatériel), созданном для консультирования Министра культуры Франции по вопросам имплементации Конвенции ICH. С 2013 по 2015 г. я участвовала в подготовке номинации для включения в Репрезентативный список ICH фестиваля Luminara в Пизе (Италия). С 2011 г. я выступаю в официальном качестве фасилитатора (facilitator) в нескольких европейских странах в рамках программы ЮНЕСКО «Наращивание потенциала».

семинары по наращиванию потенциала, их нормотворческая деятельность особенно актуальна в более формализованных ситуациях, особенно в руководящих органах Конвенции ЮНЕСКО: Генеральной Ассамблее государств-участников и Межправительственном комитете по охране ЮНЕСКО (далее — Комитет)²⁰. В то время как Генеральная Ассамблея председательствует в управлении Конвенцией, Комитет определяет мягкое руководство²¹, которое формирует нормативные представления об ЮНЕСКО. Комитет, состоящий из дипломатов и правительственных экспертов в области ЮНЕСКО, отвечает за включение элементов, предложенных государствами-участниками, в международные списки. Его рассмотрение основано на рекомендациях оценочного органа (evaluation body)²², состоящего из представителей организаций гражданского общества, действующих в области наследия, и лиц, назначенных государствами, которые обычно работают в правительственных агентствах наследия. Нормативные головоломки этих субъектов особенно интересны тем, что, узаконив некоторые подходы к охране как «хорошую практику» или запретив другие как неуместные, они способствуют «хорошему» управлению наследием на глобальном уровне и тем самым адаптируют официальные представления о наследии.

В рамках упомянутых процедур включение того или иного элемента в список ЮНЕСКО рассматривается как деликатная обязанность для лиц, работающих в оценочном органе или в делегациях членов Комитета, поскольку создает прецеденты и примеры, а значит, служит определению на практике самой концепции нематериального культурного наследия. Как отметил албанский делегат на заседании Комитета, состоявшемся в Найроби в 2010 г., эта ответственность особенно чувствительна в том, что касается экономических вопросов. Он подчеркнул, что превращение Конвенции в «неопределенный документ, открывающий доступ ко всем формам коммерциализации и фольклоризации», подорвет ее будущий авторитет (ITH/11/6.COM/CONF.206/4 Rev.: 29)²³. Как я указываю в следующем разделе, этот дискомфорт, связанный с рынком, не является изолированной перспективой для субъектов ЮНЕСКО, взаимодействующих в связи с Конвенцией в нормативной перспективе.

2. Травма вторжения рыночных отношений в храм наследия

Действительно, когда дискуссия о наследии/рынке входит в нормативную сферу ЮНЕСКО, она порождает споры и переживания. В течение последних лет оценочный орган и Комитет регулярно поднимали экономические вопросы, особенно при обсуждении тех кандидатур на внесение в список наследия, которые связаны с ремеслами и продовольствием. Первые весьма спорные с этой точки

²⁰ Генеральная Ассамблея является суверенным органом Конвенции. Она формируется всеми государствами-участниками и собирается один раз в два года. Комитет состоит из представителей 24 государств-участников, избираемых Генеральной Ассамблеей на четырехлетний срок в соответствии с принципами справедливого географического представительства и ротации. Комитет собирается на очередные сессии один раз в год.

²¹ См. об этом: *Larsen P. B. The Politics of Technicality. Guidance Culture in Environmental Governance // The Gloss of Harmony: The Politics of Policymaking in Multilateral Organizations / ed. by B. Müller. London: Pluto Press, 2013. P. 75.*

²² Оценочный орган назначается Комитетом и состоит из шести экспертов, представляющих государства-участники, не являющиеся членами Комитета, и шести представителей неправительственных организаций, аккредитованных при Конвенции.

²³ Здесь и далее документы ЮНЕСКО цитируются с использованием системы ссылок Организации. Там, где нет ссылки, цитата взята из моих полевых заметок.

зрения номинации, такие как «Средиземноморская диета» (Mediterranean Diet) или «Гастрономическая трапеза французов» (Gastronomic Meal of the French), были внесены в список наследия в 2010 г. и стали объектом интенсивных дипломатических закулисных переговоров перед сессией Комитета. Даже если публичные дебаты во время заседания Комитета не допускали официальной критики, делегаты государств или представители некоммерческих организаций часто комментировали в ходе неофициальных обменов мнениями то, что они воспринимали как трудную интеграцию в сфере наследия. Например, эксперт по наследию из Юго-Восточной Европы призналась мне, насколько она противится внесению в список наследия средиземноморской диеты, которая, по ее мнению, не соответствует сфере действия Конвенции, поскольку «это (коммерческий аспект) не входит в сферу деятельности ЮНЕСКО, которое по определению вносит в список элементы ИСН на основе их культурной ценности». Несмотря на счастливый финал, внесение в список наследия упомянутой «Гастрономической трапезы французов» (Gastronomic Meal of the French) все еще квалифицируется в среде ЮНЕСКО как травматическое из-за очевидного коммерческого аспекта, лежащего в основе данного проекта²⁴.

Однако процесс такого «травмирования» только начинался. В десятилетие, последовавшее за включением в состав наследия «Гастрономической трапезы французов», подобная дезориентация возникла по поводу понятий «пивная культура» и «искусство неаполитанской пиццерии». Часто именуемые просто «пивом» и «пиццей», как будто понятия «культура» и «искусство», выделенные в их полных официальных названиях, были просто необязательны, эти элементы постоянно описываются в неофициальных беседах как самые скандальные в истории Конвенции случаи внесения в список наследия. Действительно, ходят слухи, что пицца оказалась «трудным» элементом, требовавшим большого обсуждения в оценочном органе, и итальянскому послу в ЮНЕСКО было трудно бороться за номинацию в коридорах организации, или что пиво удалось номинировать только благодаря искусному составлению заявки со стороны кого-то, кто знал «правильные слова», чтобы использовать их во избежание смущения в оценочном органе. Хотя ни один официальный голос не был явно подан против включения в состав наследия «искусства неаполитанской пиццерии», через несколько минут после провозглашения такового один из отцов-основателей Конвенции и признанный лидер в ее имплементации на международном уровне подошел ко мне и, качая в отчаянии головой, поделился своим разочарованием и горем: «Это действительно означает смерть Конвенции».

Слова «травма» и «скандал» используются экспертами международного наследия в связи с применением Конвенции в качестве маркетингового инструмента для продвижения популярных товаров, укоренившихся в коммерческом обороте, часто в интересах крупных компаний. Один из членов оценочного органа объяснил мне свою позицию не как протест против экономического использования ИСН (потому что «сообщества должны есть»), а как опасение использования Конвенции в качестве «бренда для капиталистических практик». На протяжении многих лет критика коммерческого использования ИСН также касалась предметов, которые гораздо менее известны, чем пицца или пиво. Один из примеров — белорусское шаповальство (войлочное производство), причем он упоминается в негативном

²⁴ См. подробнее: *Bortolotto C. Como Comerse Un Patrimonio: Construir Bienes Inmateriales Agroalimentarios Entre Directivas Técnicas y Empresariado Patrimonial // Revista Andaluza de Antropología. 2017. No. 12. P. 144–166. URL: <http://www.revistaandaluzadeantropologia.org/uploads/raa/n12/bortolotto.pdf> (дата обращения: 08.07.2019).*

контексте, несмотря на протесты делегации Беларуси о том, что 30 войлочников работали на семейном уровне без торговых точек и «во время рождественского фестиваля продали всего пару сотен изделий». Оценочный орган неодобрительно отнесся и к коммерческим последствиям ткачества Моси в Хансанском районе Кореи, и к аналогичным аспектам Фичи-Чамбалаалле, новогоднего праздника народа Сидама, представленного Эфиопией.

Осуждение рынка как угрозы для охраны ИСН не является бесспорным в рамках дебатов Комитета ИСН. Именно для того, чтобы поставить под сомнение эту перспективу, Сент-Люсия выступила в поддержку панамской номинации «кустарные процессы и методы производства растительных волокон для талька». Номинация подверглась нападкам за то, что склонна «слишком много внимания уделять коммерциализации шляп Пинтао путем создания новых образцов»; по мнению оценочного органа, это «может не отражать целей Конвенции» (ITH/17/12.COM/11.b: 7). Сент-Люсия подчеркнула необходимость определения «того, что называется коммерциализацией», попросив продолжить обсуждение этой концепции, пока комитет не примет «общий негативный подход к ней, как если бы она была плохой во всех отношениях».

На необходимость согласования коммерческой и охранной деятельности (а не восприятие их как противоречащих друг другу) действительно неоднократно указывалось в дебатах Комитета со времени одной из первых публичных дискуссий о взаимоотношениях между рынком и ИСН, вызванной выдвижением в 2012 г. номинации на включение в список срочной охраны «Ала-кииз» и «Шырдак» — искусства кыргызских традиционных войлочных ковров. Жизнеспособность этой практики оказалась под угрозой из-за отсутствия интереса со стороны новых поколений, слабой поддержки правительства и доминирования недорогих синтетических ковров. Таким образом, меры защиты, описанные в номинации, включали в себя действия, направленные на развитие ковровой промышленности. Однако оценка досье показала, что защитные меры оказались чрезмерно сосредоточены на экономических целях, и было предложено не включать этот элемент в состав наследия. Кроме того, некоторые члены западноафриканского комитета сочли экономические последствия тревожными, выразив обеспокоенность тем, что коммерциализация может «вытеснить культурную сущность этого элемента». Кыргызская делегация выразила решительное несогласие, объяснив, что прочные связи с рынком являются единственным шансом на выживание этого ремесла и что такие связи не подорвут его культурную ценность. После продолжительного обсуждения членов Комитета данный элемент был включен, несмотря на негативное мнение оценочного органа.

Марокко, в частности, предложило Комитету занять четкую позицию по этому вопросу, который стал таким важным и противоречивым при выдвижении кандидатур на включение в список наследия, особенно тех, которые касались ремесел. Делегат из Марокко задал вопрос: следует ли государствам соблюдать осторожность в отношении рыночных вопросов и благоразумно ли «игнорировать упоминание коммерческого аспекта ремесел», или следует «рассматривать коммерциализацию как неотъемлемую меру защиты этого элемента». Кроме того, он настаивал на том, что Комитету нужно найти баланс между охраной и коммерциализацией. Обсуждая этот проект решения, несколько членов Комитета признали важность рынка в обеспечении защиты ИСН и необходимость согласования этих двух аспектов, а не рассмотрения их как противоречащих друг другу. Другие придерживались мнения, что права интеллектуальной собственности являются основополагающим инструментом, если практикующие специалисты хотят извлечь выгоду из коммерциализации своей продукции.

3. Коммерциализация без чрезмерной коммерциализации

Преыдушие примеры показывают, что взаимодействие между наследием и рынком остается спорным вопросом для тех, кто устанавливает стандарты на международном уровне. Во время встречи, организованной на национальном уровне для обсуждения инициатив по включению коммерческой практики в список наследия, посол одной европейской страны в ЮНЕСКО выразился так: «Хорошо известно, что есть две группы: старые и новые, сторонники строгого прочтения Конвенции и сторонники ее либерального прочтения». В качестве компромисса Комитет выдвинул идею коммерциализации без чрезмерной коммерциализации. Это расплывчатое решение действительно имеет преимущество, так как обеспечивает определенную степень гибкости. На самом деле, следует ли рассматривать коммерциализацию ИСН как форму «устойчивого развития» и «креативной экономики» или как угрозу культурным процессам? На этот вопрос официальный голос ИСН ЮНЕСКО не смог ответить однозначно, тем самым препятствуя любому установлению общего правила.

Оценочный орган регулярно повторяет, что коммерциализация «не является априори дисквалифицирующим фактором» (ITH/09/4.COM/CONF.209/INF.6: 6) или «обязательно нежелательной» (ITH/18/13.COM/10: 11), поскольку она может обеспечить получение дохода для носителей, но одновременно предупреждает, что чрезмерная коммерциализация «способна нанести ущерб социальным и культурным функциям и жизнеспособности» (ITH/13/8.COM/4: 8) нематериального культурного наследия. Дебаты в Комитете настаивают на необходимости баланса между рынком и охраной, указывая, что коммерциализация «не должна быть чрезмерной», отдавая охране роль второстепенной цели. Однако превышение уровня коммерциализации рассматривается не только как вопрос степени. Это разграничение также подчеркивает, что акторы, участвующие в маркетинге, не считаются легитимными. Таким образом, ответ на вопрос о том, хороша коммерциализация или плоха, также зависит от деятельности сообществ и их роли в качестве инициаторов или жертв коммерциализации. Действительно, включение того или иного элемента в состав ИСН иногда может принести экономическую выгоду национальной туристической индустрии, а не людям, непосредственно связанным с внесением в список элементов²⁵. На семинаре авторитетный академический специалист по ИСН отметил: «Как мы можем молчать, когда крупные компании крадут традиционный дизайн и продают его в аэропорту? Если это сообщество продает свою культуру, то коммерциализация является защитной мерой, но если этим занимаются компании, частные субъекты или ученые, то это культурное присвоение».

Упомянутые опасения переключаются с тем, что Дороти Нойес описывает как «репрезентативный анекдот об угрозе традиционной культуре, который изображает многонациональную корпорацию, присваивающую созданное изолированной коренной группой»²⁶. В таких случаях, по ее словам, «сообщество/необщина... представляется четким бинарным понятием», информирующим о различии между эксплуатацией извне и использованием или развитием изнутри, которые являются частью категорий Всемирной организации интеллектуальной собственности (ВОИС)²⁷. Выделяя коммерческую деятельность, приносящую выгоды за пределами сообщества, чрезмерную коммерциализацию отождествляют с опасениями

²⁵ *Kyoim Y.* The Economic Imperative of UNESCO Recognition: A South Korean Shamanic Ritual // Journal of Folklore Research. 2015. No. 52 (2–3). P. 181–198.

²⁶ *Noyes D.* The Judgment of Solomon: Global Protections for Tradition and the Problem of Community Ownership // Cultural Analysis. 2006. No. 5. P. 31.

²⁷ *Ibid.*

незаконного присвоения и деконтекстуализации, а следовательно, и с логикой интеллектуальной собственности.

Даже если Конвенция была вызвана опасениями «разграбления», «деструктивной транскulturации» или «неправомерного присвоения»²⁸, она стала попыткой подтвердить введенный Конвенцией о всемирном наследии (World Heritage Convention) переход от режима собственности, сосредоточенного на «контроле владельца, выражающемся в его способности отчуждать, эксплуатировать и исключать других от рассматриваемого объекта или места», к режиму наследия, основанному на ответственности за заботу, передачу и бережное отношение к этим объектам или местам²⁹. Эти два режима представляют собой «различные домены», основанные на свойственных каждому из них правах и этике³⁰. Согласно Бендиксу и Хафстейну, подобный сдвиг режимов может быть понят в терминах принципов исключительности/инклюзивности, которые лежат в основе учреждения коллективных субъектов. Предполагается, что «субъект права на культурные ценности по умолчанию является исключительным, подверженным незаконному присвоению и имеет право на реституцию; субъект культурного наследия склонен быть инклюзивным субъектом, коллективным “мы”, призванным к сплочению, чтобы предотвратить деградацию и потерю, а не кражу другим»³¹.

Действительно, юридическая наука выделила фундаментальные философские различия и конкурирующие цели этих подходов³². Данные различия особенно очевидны в отношении экономических аспектов. Право интеллектуальной собственности (далее — ИС) ставит во главу угла экономику, поскольку оно базируется на индивидуализме частного права и изначально смотрит в будущее, нацеливаясь на инновации. Напротив, правовое регулирование отношений, связанных с ИСН, не имеет экономических целей, будучи основано на публичном праве и, таким образом, ориентировано на общественные (а не на индивидуальные) интересы и направлено на сохранение связи между наследием как объектом охраны и породившим его прошлым³³. Эти два правовых режима особенно расходятся по отношению к фактическому объекту их охраны: в то время как инструменты ИС направлены на защиту продуктов определенной культурной практики, Конвенция ИСН фокусируется на самих социальных и культурных процессах³⁴.

Договаривающиеся государства отбросили первоначальные аргументы в пользу охраны ИСН в рамках режима ИС, который «превратил бы ИСН не просто в товар, но в товар, являющийся собственностью»³⁵. В конце концов они пришли к согласию, что охрану ИСН нужно рассматривать в широкой перспективе с акцентом на передачу культурных процессов, а не на их правовую защиту, осно-

²⁸ Основные проблемы выражены в письме, направленном в 1973 г. Министерством иностранных дел и религии Боливии Генеральному директору ЮНЕСКО (IGC/XII/12; LA.73/CONF.005/12). В официальной историографии Конвенции это письмо рассматривается как основополагающее событие, вызвавшее интерес ЮНЕСКО к ИСН.

²⁹ См. об этом: *Pratt L. V., Keefe P. J. O.* “Cultural Heritage” or “Cultural Property”? // *International Journal of Cultural Property*. 1992. No. 1 (2). P. 310.

³⁰ См. подробнее: *Hafstein V. Tr., Skrydstrup M.* Heritage Vs. Property: Contrasting Regimes and Rationalities in the Patrimonial Field // *Routledge Companion to Cultural Property* / eds J. Anderson, H. Geismar. Oxford; New York: Routledge, 2017. P. 38–53.

³¹ *Bendix R., Hafstein V. Tr.* Culture and Property. An Introduction // *Ethnologia Europaea*. 2009. No. 39 (2). P. 9.

³² См. об этом: *Lixinski L.* Commercializing Traditional Culture. P. 9–15.

³³ *Ibid.*

³⁴ См. подробнее: *Bortolotto C.* From Objects to Processes: UNESCO's Intangible Cultural Heritage // *Journal of Museum Ethnography*. 2007. No. 19. P. 21–33.

³⁵ *Lixinski L.* Commercializing Traditional Culture. P. 5.

ванную на праве собственности и направленную на экономическое использование их конечных продуктов. В режиме наследия, сформированном такими ценностями, как неотчуждаемость, которая позволяет делиться, но не монополизировать, вышеупомянутая идея транскulturации не рассматривается как разрушительный фактор. Вместо этого она ценится как элемент обобществления наследия³⁶.

Концепция коммерциализации без чрезмерной коммерциализации привносит в Конвенцию логику понятия собственности, которая явно находилась под запретом при разработке этого нормативного документа. Введение данного понятия отражает необходимость прояснения некоторых форм маркизации ИСН для того, чтобы оно стало «живым наследием», полностью укоренившимся в потоке социальной динамики. Это понятие также делает очевидной внутреннюю двусмысленность Конвенции, в соответствии с которой, хотя ИСН явно навязывает «новый порядок ценностей», где использование, в том числе экономическое, хотя и преобладает над всеми другими³⁷, однако же остается нормативно оформленным в рамках наследия, а не режима интеллектуальной собственности. Два указанных режима основаны на противоположных экономических предпосылках и управляются различными моральными принципами. В то время как местные предприниматели, работающие с таким наследием, находят способы ориентироваться в противоречивых концепциях моральной экономики, связанных с этими двумя режимами, подобная двусмысленность сбивает с толку в нормативной перспективе, которая, видимо, согласуется с логикой концепции наследия, лежащей в основе Конвенции.

Заключение

Даже если сам термин «нематериальное культурное наследие» был придуман как негативная реакция на рынок³⁸, в практике имплементации Конвенции вопросы коммерциализации становятся все более актуальными и демонстрируют трудность формирования ИСН всецело в режиме «достояния», который «направлен на изъятие объектов из коммерческой сферы, сохранение их для целей созерцания, размышления и наслаждения»³⁹.

Необходимость согласования рынка и правового режима наследия официально признана, однако субъекты, выступающие с нормативной точки зрения, сталкиваются с травмой нарушения логики той концепции наследия, которая лежит в основе Конвенции. Эти субъекты разделяют озабоченность по поводу того, что интерес к культурным продуктам, а именно к рыночным компонентам ИСН, будет выше, чем интерес к производящим их культурным процессам, признанным в качестве того фактического наследия, которое Конвенция намерена охранять. Поэтому коммерциализацию необходимо сдерживать и регулировать. Условия регламентации последней различают «хорошую» коммерциализацию с выгодой для «сообществ» и «плохую» коммерциализацию, основанную на «незаконном присвоении» и «деконтекстуализации». Это пример того, как ««сообщество» становится

³⁶ См. об этом: *Debarbieux B., Bortolotto C., Munz H., Raziano González C.* Sharing heritage? Politics and territoriality in UNESCO's heritage Lists // *Territory, Politics, Governance*. 2021. Forthcoming.

³⁷ См. об этом: *Cominelli F.* Patrimoine Culturel Immatériel: Paradigmes Économiques, Débats et Perspectives // *Le Patrimoine Culturel Immatériel Au Seuil Des Sciences Sociales*. Paris: Éditions de la Maison des sciences de l'homme, 2020. P.6.

³⁸ См. подробнее: *Lixinski L.* Commercializing Traditional Culture.

³⁹ *Hutter M.* Economic Perspectives on Cultural Heritage: An Introduction // *Economic Perspectives on Cultural Heritage* / eds M. Hutter, I. Rizzo. Basingstoke: MacMillan Press, 1997. P.8.

волшебным словом, вокруг которого может формироваться консенсус в условиях международной напряженности по поводу использования традиции»⁴⁰.

Я утверждаю, что идея коммерциализации без чрезмерной коммерциализации демонстрирует, как имплементация Конвенции разрывается между двумя логиками, лежащими в основе регулирования традиционной культуры. Эти две логики отражают различные представления о моральной экономике, базирующиеся на исключительности режима собственности, с одной стороны, и на инклюзивности и обобщественности правового режима наследия — с другой. Таким образом, в рамках Конвенции принцип коммерциализации без чрезмерной коммерциализации воплощает собой хрупкий компромисс, отражающий трудности встречи и примирения упомянутых правовых режимов.

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UNESCO, Intangible Cultural Heritage and the market: Controversies and stumbling blocks*

Chiara Bortolotto

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This article considers the relationship between Intangible Cultural Heritage (ICH) and the market in the backdrop of the reorientation of UNESCO's priorities regarding sustainable development. Based on ethnographic observations of the meetings of the governing bodies of the Convention for the safeguarding of intangible cultural heritage, this work analyses the controversies generated by "risks of over-commercialization" of ICH among actors with normative agency for designing "good" heritage governance. While the need to reconcile market and heritage is officially acknowledged, the inclusion of a particular commercial practice on the UNESCO ICH lists is qualified by many actors as "traumatic". The debate spurred within the governing bodies of the Convention by the drafting of these documents sheds light on the controversial perception of the relationship between the market and ICH. In considering the idea of "commercialization without over-commercialization" suggested by actors to resolve the tension between heritage and market, this work highlights a constitutive ambiguity of the Convention. Based on the ideas of "misappropriation" and "decontextualization", this concept is part of the logic of intellectual property. The Convention, however, was explicitly designed within an alternative paradigm emphasizing cultural dynamisms and shared belonging. While heritage entrepreneurs on the ground shift from one regime to the other making a pragmatic and strategic use of legal frameworks based on fundamentally different logics, this inconsistency generates normative conundrums among the actors involved with the official bodies of the Convention, torn between a proprietary and a heritage regime and their different moral economies. In the framework of the Convention, the principle of "commercialization without over-commercialization" embodies therefore a fragile compromise reflecting the tension between different regimes regulating traditional culture.

Keywords: UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, commercialization, moral economies, heritage regimes, market, sustainable development.

⁴⁰ *Noyes D.* The Judgment of Solomon: Global Protections for Tradition and the Problem of Community Ownership // *Cultural Analysis*. 2006. No. 5. P.31.

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Chiara Bortolotto — PhD in Anthropology, École des hautes études en sciences sociales (EHESS), 105, Bd. Raspail, Paris, 75006, France; chiara.bortolotto@ehess.fr

Ethics, intellectual property and commercialization of cultural heritage*

Harriet J. Deacon

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The Sámi are an indigenous people residing in Sápmi, a region cutting across northern Scandinavia (Norway, Finland, Sweden) and the Kola Peninsula in Northwest Russia. This article tells the story of a Sámi sun symbol on a seventeenth century drum, originally from Swedish Sápmi, that was registered as a trademark by a jewellery company in Norway called “Tana Gull and Sølvsmie AS” in 2009. The mark was invalidated in 2020 because, according to the Norwegian Intellectual Property Office, the registration of a religious symbol was likely to infringe on the rights of the Sámi, whose access to their own cultural and religious symbols should be protected. The basis for the decision was a public policy exception, a provision within trademark law excluding the registration of signs “contrary to morality or public policy”, and allowing the law into account public opinion, public interest and human rights. Analysis of this case is used to shape the debate about the role of intellectual property law in addressing the problem of over-commercialization, for example by preventing cultural misappropriation. The authors suggest that the notion of blasphemy or religious offence through banal commercialization should be more broadly formulated in interpretation of the public policy exception in order to take account of cultural misappropriation. They also argue that protecting the public domain by preventing registration of important cultural and religious symbols is not sufficient to address the problem of cultural misappropriation in a commercial context. Positive protection through trademark registrations is just as important as their defensive protection.

Keywords: Sámi, Intangible Cultural Heritage, commercialization, cultural misappropriation, trademark, ethics, intellectual property.

Introduction

The Sámi are an indigenous people residing in Sápmi, a region cutting across northern Scandinavia (Norway, Finland, Sweden) and the Kola Peninsula in Russia¹. They have experienced significant historical discrimination and persecution, and currently face a number of forms of cultural misappropriation, particularly in the areas of tourism and craft². This paper tells the story of a Sámi sun symbol on a 1693 drum that was registered

Harriet Jane Deacon — PhD, MSc, BA (Hons), Visiting Research Fellow, Coventry University, 1, Priory st., Coventry, CV1 5FB, United Kingdom; harriet@conjunction.me.uk

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¹ *Solbakk J. T.* The Sami People. Karasjok: Sámi Institute, 1990. P. 13–14.

² *Joy F.* Sámi Shamanism, Cosmology and Art as Systems of Embedded Knowledge. Doctoral Dissertation. Acta Universitatis Lapponiensis 367. Rovaniemi: The University of Lapland, 2018. Available at: <http://lauda.ulapland.fi/handle/10024/63178> (accessed: 28.06.2020).

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as a trademark by a jewellery company in Norway called “Tana Gull and Sølvsmie AS” (hereafter Tana Gull) in 2009, and invalidated in 2020. This trademark was (inaccurately) called a “‘patent’ on the Sámi sun”³. We will use the case to demonstrate how trademark law can play a role in addressing cultural misappropriation and promoting cultural heritage practice and transmission.

In the heritage field, there has been long-standing and widespread concern about potentially adverse impacts of commercialization or marketization of intangible cultural heritage (ICH). Bortolotto has critically interrogated the implied tension between “sacred” heritage and “profane” commerce, and the “embarrassment” that results from bringing these concepts together⁴. Nevertheless, remarkably little attention has been paid to developing a better understanding of the relationship between intangible heritage and the market⁵. The Intergovernmental Committee of the 2003 UNESCO Intangible Heritage Convention, at its 2019 meeting in Bogota, Colombia, has now expressed the need to identify “safeguarding measures and good practices that address the risk of decontextualization and over-commercialization of [intangible heritage] elements”. The Committee reminded States Parties that “while recognizing the economic opportunities presented by certain elements of intangible cultural heritage, it is important to prioritize the safeguarding of their social functions and cultural meanings and to clearly distinguish these from the branding or labelling of a product”⁶.

This request comes after over a decade of concern, but very little guidance, from the Committee, or from the UNESCO Secretariat of the Convention, on the relationship between branding or intellectual property protection, (over-)commercialization and safeguarding. The issue is conceptually and politically rather difficult to resolve, and the relationship between ICH safeguarding, intellectual property protection and commercialization is likely to be complex. General methodologies for tangible heritage management planning also have to be tailored to the circumstances of each case. Case studies are thus needed to inform the design of planning methodologies to maximize the synergies and mitigate the tensions between intellectual property rights protection, ICH safeguarding and commercialization. Several projects have begun to search for new concepts and tools in this area. The Alpfoodway⁷ and HIPAMS India⁸ projects have demonstrated the importance of community-centered planning to develop heritage-sensitive marketing and intellectual property strategies in the European Alps and India respectively.

Branding or labelling of a cultural product, and the registration of marks to do this, is not necessarily incompatible with safeguarding community meanings associated with the underlying heritage practices or traditions. One example of this is the registration of the Sámi Duodji trademark and its use to indicate traditional Sámi handicraft products made by Sámi, which will be discussed below. Intellectual property law, and other legal mecha-

³ *Aslaksen E. A.* Har tatt “patent” på den Sámi ske sola // NRK Sápmi. 2018. Available at: https://www.nrk.no/Sápmi/har-tatt-_patent_-pa-den-Sámi-ske-sola-1.13902043 (accessed: 28.06.2020). Translated using Google Translate.

⁴ *Bortolotto C.* Intangible Cultural Heritage and the Market: The Embarrassment of Heritage Alienability. 2020. Unpublished paper.

⁵ *Lixinski L.* Intangible heritage economics and the law: listing, commodification, and market alienation // *Safeguarding Intangible Heritage* / eds N. Akagawa, L. Smith. London: Routledge, 2018. P. 54–67.

⁶ Decisions of the Intangible Heritage Convention’s Intergovernmental Committee, Bogota, November 2019, DECISION 14.COM 10 // UNESCO. Available at: <https://ich.unesco.org/doc/src/LHE-19-14.COM-Decisions-EN.docx> (accessed: 28.06.2020).

⁷ Alpfoodway. Available at: <https://www.alpine-space.eu/projects/alpfoodway/en/home> (accessed: 28.06.2020).

⁸ HIPAMS India. Available at: <http://hipamsindia.org/> (accessed: 28.06.2020).

nisms, can be used in a positive sense, to help communities manage and control the commercialization of their heritage and culture and ensure equitable benefit among them⁹.

Ethical and legal tensions may however arise when the rights of individuals and their communities to take part in cultural life, protected under human rights law or *sui generis* national provisions, conflicts with exclusive rights granted in the sphere of public law, such as intellectual property rights. Lixinski observes that regulation of the protection of traditional culture and its commercialisation are informed by different logics. The background norms for intellectual property law are found in private law, privileging individualism and party autonomy, whereas heritage law has its origins in public law, privileging public interest and the common good¹⁰.

From a community perspective, misappropriation of heritage by third parties, for example through the registration and enforcement of trademarks based on cultural or religious symbols, “can dilute the semantic content of cultural expressions as well as their appeal and authenticity” for community members and thus discourage or prevent them practising their culture¹¹. Commercial enterprises often use edgy and controversial brands or controversial marks deliberately, to attract consumer attention and eventually increase their market share¹². Religious symbols may be used deliberately as products or in brands to elicit strong emotional reactions, both positive and negative. For example, in reviewing the marketing success of rosaries as fashion necklaces by Dolce and Gabbana fashion house, Rinallo et al. found that

...the religious and historically established attribute of sacredness contributes a powerfully marketable quality to rosaries, which holds both in terms of their attraction and rebellious possibilities. The appropriation, manipulation, and monetization of sacred meanings by fashion brands such as D&G open our eyes to emergent new forms of material culture that embody the sometimes turbulent, sometimes-peaceful, and sometimes ecstatic coexistence of the religious and the commercial¹³.

Cultural appropriation may be used as a commercial strategy, not just to create controversy and media coverage, but also to create meaning, where a brand “piggy-backs” on existing cultural value associated with a name, symbol or design. Anemaet suggests that the low threshold for assuming acquired distinctiveness in EU trademark law in fact may create dysfunctional incentives for the registration of cultural symbols as trademarks in Europe. Religious or cultural groups often do not want to, or are unable to, register such marks themselves, or to use them commercially¹⁴. Anemaet argues that more effective

⁹ Deacon H., Smeets R. Intangible Heritage Safeguarding and Intellectual Property Protection in the context of implementing the UNESCO ICH Convention // Safeguarding Intangible Heritage / eds N. Akagawa, L. Smith. London: Routledge, 2018. P. 36–53.

¹⁰ Lixinski L. Commercializing Traditional Culture: Promises and Pitfalls in the Convergence of Intellectual Property Law and Cultural Heritage Law // *Annali italiani del diritto d'autore, della cultura e dello spettacolo (AIDA)*. 2020 (Forthcoming).

¹¹ Mattila T. Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks — especially with regard to duodji-handicrafts and the Sámi dresses. Finland: Publications of the Ministry of Education and Culture, 2018. No. 40. Available at: <http://julkaisut.valtioneuvosto.fi/handle/10024/161206> (accessed: 28.06.2020).

¹² Bonadio E. Brands, Morality and Public Policy: Some Reflections on the Ban on Registration of Controversial Marks // *Marques Intellectual Property Law Review*. 2015. No. 19. P. 43.

¹³ Rinallo et al. When sacred objects go B@a(n)d // *Consumption and spirituality*. 2012. No. 29 (41). P. 37–38.

¹⁴ Liu W. Protection of Religious Signs under Trademark Law: A Perspective of China's Practice // *Religions*. 2017. No. 8 (11). P. 246–259.

mechanisms are needed to exclude such signs from registration, thus protecting the public domain and preventing misappropriation¹⁵.

The “public policy exception” is an existing mechanism in trademark law which has not yet been widely used to address misappropriation of cultural symbols, by which we mean those symbols valued by specific communities because they are linked to their cultural heritage practice or group identity. Although, from an anthropological point of view, religious symbols are a type of cultural symbol, we distinguish in this paper between those symbols that are linked to religious worship (Christian crosses, for example), and those which may be of broader cultural significance to communities. The paper first reviews the use of the public policy exception in trademark law regarding religious or cultural symbols. Second, the case study critically analyses the two main grounds for refusal of the mark: protecting religious sensitivities and the public domain. Finally, it presents some conclusions regarding the role of trademark law in safeguarding and commercialization of cultural heritage.

1. The public policy exception and cultural misappropriation

The “public policy exception” allows for refusal of registrations of signs that are “contrary to morality” or public policy¹⁶. The Paris Convention, for example, allows for refusal of registration when a trademark is considered “contrary to morality or public order and, in particular, of such a nature as to deceive the public”¹⁷. The growing literature on the public policy exception has focused on issues such as human rights, access to the public domain, and the refusal of registration to offensive signs¹⁸. Some of the case law concerns religious symbols, but very little concerns other kinds of culturally important symbols.

Reviewing the registration of trademarks incorporating words from foreign or Indigenous languages in Australia, Richardson et al. have shown that the perspectives of Indigenous and minority communities were often not taken into account assessing the suitability of these trademarks for registration¹⁹. Indigenous peoples in various countries have experienced misappropriation of their cultural symbols through the registration trademarks. In some cases they have sought to use trademark law, including the public policy excep-

¹⁵ *Anemaet L.* The Public Domain is Under Pressure — Why We Should Not Rely on Empirical Data When Assessing Trademark Distinctiveness // *International Review of Intellectual Property and Competition Law*. 2016. P. 1–33. Available at: <https://ssrn.com/abstract=2749555> (accessed: 28.06.2020). See also: *Senftleben M.* Public Domain Preservation in EU Trademark Law — A Model for Other Regions? // *The Trademark Reporter*. 2013. No. 103 (4). P. 775–827. Available at: <https://ssrn.com/abstract=2331598> (accessed: 28.06.2020).

¹⁶ The Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U. S. T. 1538, 828 U. N. T. S. 305 [hereafter Paris Convention] art. 6^{quinquies} at B. 3 and Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27 (2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U. N. T. S. 299 [hereafter TRIPS], art. 15 (2). This was transposed into Article 7.1 (f) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark.

¹⁷ The Paris Convention art. 6^{quinquies} at B. 3.

¹⁸ *Bonadio E.* Brands, Morality and Public Policy; *Schovsbo J., Riis T.* Public Policy Limitations of Trade Mark Subject Matter — An EU Perspective. Working paper // *Social Science Research Network (SSRN)*. 2018. Available at: <https://ssrn.com/abstract=3188013> or <http://dx.doi.org/10.2139/ssrn.3188013> (accessed: 28.06.2020); *Tavares P. S., Ziemer A. A., Randazza M. J.* 2019. Morality and Trademarks: The South American Approach // *ip-iurisdiction*. 2019. Available at: <https://ip-iurisdiction.org/morality-and-trademarks-the-south-american-approach> (accessed: 28.06.2020); *Ziemer A. A., Tavares P. S., Randazza M. J.* Morality and Trademarks: The South American Approach // *Suffolk Transnational Law Review*. 2017. No. 40 (2). P. 221–278.

¹⁹ *Richardson M., Thomas J., Klein J.* From “Oomoo” to “Oro”: nostalgia labels and cultural policy on the Australian trade marks register // *The Object and Purpose of Intellectual Property* / ed. by S. Frankel. Cheltenham: Edward Elgar Publ., 2019. P. 7–29.

tion, to address the problem²⁰. In the US, after the SLANTS trademark was upheld on the basis of commercial free speech, objections to trademark registration based on offensive use (for example in the REDSKINS case) are now more likely to fail²¹. European courts, by contrast, have tended towards the view that freedom of commercial expression is not constrained by denial of trademark registration because companies can still freely use an unregistered brand or logo²². In addressing the problem of offensive trademarks such as REDSKINS, Phillips suggests that the misappropriation of cultural identity and imagery for use as a trademark can be considered a “dignity taking” proscribed under the Universal Declaration of Human Rights²³.

In this paper, we are particularly interested to understand to what extent the public policy exception in trademark law in Europe protects against inappropriate use of religious symbols as opposed to significant cultural symbols in general, and whether these protections in trademark law take minority religious or cultural views into account.

Human rights considerations have been particularly influential in European trademark law (and its public policy exception) since the entry into force of the Treaty of Lisbon “placed human rights and fundamental freedoms at the very top of the hierarchy of norms”²⁴. These include freedom of religion, freedom of expression (commercial, artistic or political) and prohibition against discrimination in the European Convention on Human Rights, which Norway has ratified²⁵. Norway also provides specific protection for Sámi cultural rights and customary law²⁶. Article 108 of the Norwegian Constitution tasks the government to assist the “Sámi people to preserve and develop its language, culture and way of life”. The International Covenant on Civil and Political Rights (ICCPR), ratified by Norway, protects the rights of minorities to “enjoy their own culture, to profess and practise their own religion, or to use their own language” (art. 27)²⁷. Norway, with the other Nordic-Baltic countries, now also strongly supports The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)²⁸. Article 31.1 of UNDRIP says:

²⁰ *Rimmer M.* Indigenous Intellectual Property: A Handbook of Contemporary Research. Research Handbooks in Intellectual Property. Cheltenham (UK), Northampton (Mass): Edward Elgar, 2017. A useful if now a bit dated review of the literature can be found in: *Pak J.* Re-imagining the Wheel: Seeking a Feasible International Regime to Protect Indigenous Cultural Expressions Through Trademark Law // Pacific McGeorge Global Business & Development Law Journal. 2011. No. 24. P.381–409.

²¹ *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E. D. Va. 2015) was obviated by *Matal v. Tam* which affirmed that the disparagement clause of 15 U. S. C. S. § 1052(a) was unconstitutional.

²² *Geiger C., Pontes L. M.* Trade mark registration, public policy, morality and fundamental rights. Centre for International Intellectual Property Studies Research Paper No. 2017-01. 2017. Available at: <https://www.ip.mpg.de/en/publications/details/trade-mark-registration-public-policy-morality-and-fundamental-rights.html> (accessed 08.07.2021).

²³ *Phillips V. F.* Beyond trademark: the Washington Redskins case and the search for dignity // *Chicago-Kent Law Review*. 2017. No. 92. P. 1061–1086.

²⁴ *Geiger C., Izyumenko E.* Shaping Intellectual Property Rights Through Human Rights Adjudication: The Example of the European Court of Human Rights. Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2020-02. P.7 // *Mitchell Hamline Law Review*. 2020. No. 46 (3). Available at: <https://ssrn.com/abstract=3613591> or <https://open.mitchellhamline.edu/mhrl/vol46/iss3/3> (accessed: 28.06.2020).

²⁵ Review the methodology used by the EUIPO to balance these considerations: *Geiger C., Pontes L. M.* Trade mark registration...

²⁶ In general, Sámi cultural and political rights are protected more strongly in the three Scandinavian countries than in Russia, where Sámi have not reached the population size required for state recognition as a minority.

²⁷ The United Nations General Assembly. 1966. “International Covenant on Civil and Political Rights”. Treaty Series 999 (December): 171. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed: 28.06.2020).

²⁸ Nordic-Baltic Statement on the Rights of Indigenous Peoples. 2017. Available at: <https://www.norway.no/en/missions/wto-un/nig/statements/hr/hrc/hrc36/nordic-baltic-statement> (accessed: 28.06.2020).

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions²⁹.

While Norway is not a member state of the European Union, Norwegian trademark legislation is harmonized to a large extent with the EU Trademark Directive. European trademark law establishes general principles that govern refusal of registration; these are interpreted in the European Union Intellectual Property Office (EUIPO) guidelines³⁰, in decisions by the European Union (EU) and European Economic Area (EEA) courts, including the EUIPO and Human Rights courts (ECtHR) and in national courts.

There is considerable diversity in the interpretation of the public policy exception at the national level: it is “unwritten law” to be interpreted and re-interpreted in each case. While the concepts of morality and public policy are different, they overlap, and in law, do not need to be distinguished as either can be the basis for rejecting a registration³¹. These concepts are acknowledged to be context-specific and subject to changes over time³². The idea of public policy (or public order) is an objective criterion. It does not invoke a narrow view of legality, but broader principles and values of government, human rights, international conventions and so on, that are relevant for the functioning of a democratic society and the rule of law³³. The concept of “accepted principles of morality” is a subjective criterion that aims to protect “the basic moral norms of society” as a whole where the public will feel “insulted, discriminated against or held up to ridicule” rather than acting simply as an arbiter of bad taste for the puritanical³⁴. The intention of registration and context of use of the sign are considered when making a decision³⁵.

European courts have been somewhat inconsistent in applying the law³⁶, although some general trends have emerged³⁷. Under the public policy exception, “contrary to morality” provisions can be used to deny registration to signs with either strongly positive or strongly negative connotations. Signs that are determined to be offensive and capable of causing outrage include those that are “pejorative, discriminatory, blasphemous or offensive, or which incite riots”, those “associated with terrorist organisations or victims of terror, with the glorification of totalitarian regimes, with criminal acts in nature, or with racial and cultural slurs”³⁸. The EUIPO guidelines explain that “the banal use of some signs with a highly positive connotation can also be offensive (e. g. *terms with a religious meaning*

²⁹ United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 // UN General Assembly. Available at: <https://www.refworld.org/docid/471355a82.html> (accessed: 28.06.2020).

³⁰ EUIPO trademark guidelines, 2020 edition. Available at: <https://guidelines.euipo.europa.eu/1803468/1788542/trade-mark-guidelines/3-accepted-principles-of-morality> (accessed: 28.06.2020).

³¹ EUIPO trademark guidelines, 2020, Chapter 7.3.

³² EUIPO trademark guidelines, 2020, Chapter 7.1. See also: *Von Bomhard V., Von Mühlendahl A.* Concise European Trade Mark Law. The Netherlands: Wolters Kluwer, Alphen aan den Rijn, 2018.

³³ EUIPO trademark guidelines, 2020, Chapter 7.2.1.

³⁴ EUIPO trademark guidelines, 2020, Chapter 7.3. see also OHIM Trademarks and Designs Cancellation Division Decisions 06/07/2015 R 1727/2014-2 “Oval shape”.

³⁵ EUIPO trademark guidelines, 2020, Chapter 7.3; *Geiger C., Pontes L. M.* Trade mark registration... P. 6.

³⁶ *Reingraber T.* Public order and morality as grounds for refusal within trademark law: European and comparative approach. Unpublished Master’s thesis. Brussel: Hogeschool-Universiteit, 2012. Available at: <https://www.duo.uio.no/bitstream/handle/10852/54532/DINESH-T---Masters-Thesis.pdf> (accessed: 28.06.2020). The same seems to be true in Canada, see: *Blaiwais L., Miller S.* Offensive Trademarks: The Canadian and American Perspectives // Intellectual Property Journal. 2018. No. 30 (2). P. 205–215.

³⁷ *Geiger C., Izyumenko E.* Shaping Intellectual Property Rights... P. 7.

³⁸ *Geiger C., Pontes L. M.* Trade mark registration... P. 11.

or national symbols with a spiritual and political value... [emphasis added]]”³⁹. Although this list of examples is non-exhaustive, it does highlight the way in which the provision has been used more often to protect against religious (rather than cultural) offensiveness, and has focused on “national culture” in the one case where cultural heritage was considered.

Case law provides some examples of decisions on religious symbols, and a few on national symbols where the sign itself is not offensive: in these cases, the thresholds for refusal are high⁴⁰. For example, registration of a symbol of the Christian Latin cross as a trademark of a religious association was denied in 2015. The decision noted that “religious symbols of very high symbolic value” — such as the cross at issue which it described as “the archetypal and ultimate symbol of Christianity” — “are becoming commonplace as a result of their commercialisation”⁴¹. The Board of Appeal of the EUIPO took the view that:

signs which severely offend the religious sensitivities of a substantial group of the population are best kept off the register... the very notion that the representation of a Christian cross used for business purposes or for “banal use” and, in particular, for use as a commercial trade mark could cause offence to a section of the relevant public of believers who, inter alia, could regard the religious value of the cross as being compromised⁴².

The Board determined that registration would not only be offensive to the religious sensitivities of Christians, but also to non-Christians whose freedom of belief and cultural diversity would be constrained by the mass commercial distribution or omnipresence of commercial religious signs. Granting the registration would have infringed the freedom of other religious groups to use the sign, which is more of a public policy argument⁴³.

In other cases, religious symbols, including crosses, have been registered as trademarks⁴⁴. In a 2015 case involving a mark similar to (but not exactly the same as) a Sufi religious symbol, the OHIM Cancellation Division allowed the registration because it was not provided with evidence of the “utmost spiritual importance [of the symbol] in at least a part of the Community”, or offence caused specifically by use of the registered mark. The decision states that it would be an “unreasonably great restriction to exclude from registration all the words and images which have a connection with religion, unless the mark is blasphemous”⁴⁵. Evidence of a high degree of symbolic value, and the offence that would result from registration of the mark, is thus required in order to refuse registration to religious symbols that are strongly positive, and not in themselves offensive.

Symbols of cultural heritage have also been denied trademark registration, but there is only one recent case where this has been the grounds for refusal, and again the bar is set very high. In 2017, the EFTA Court found that artworks by Gustav Vigeland owned by the Municipality of Oslo should be denied trademark registration once they lost protec-

³⁹ EUIPO Trademark guidelines 2020, Chapter 7.3.

⁴⁰ EUIPO Boards of Appeal Decision of 10/09/2015, R 510/2013-1, Representation d'une Croix (fig.), para 12 and 58 (*Geiger C., Pontes L. M.* Trade mark registration... P.9). In the UK, the registration of the mark “Jesus” for clothing was denied (*Bonadio E.* Brands, Morality and Public Policy. P.46). UK judgment (IPO), No. O-210-03, IR No. 776 058, JESUS, para. 17–19. ECHR, Metropolitan Church of Bessarabia and Others v. Moldova, ECHR 2001-XII, para. 114 et seq. In regard to national symbols with a spiritual and political value, see 17/09/2012, R 2613/2011-2, ATATURK, § 31.

⁴¹ Representation of a cross (fig.).

⁴² Representation of a cross (fig.), para. 49, 61. See also 06/07/2006, R 495/2005-G, SCREWYOU, para. 20.

⁴³ Representation of a cross (fig.), para. 54.

⁴⁴ Community trademarks for religious goods or services (No. 8402273, No. 8919433 and No. 7232622).

⁴⁵ Oval shape.

tion under copyright law. The court felt that “accepted principles of morality are violated when particular works of authorship that are part of a nation’s cultural heritage are misappropriated or desecrated by applicants seeking to register these works as trademarks”, thereby posing a “genuine and sufficiently serious threat to a fundamental interest of society” because they would not be available to all. Since the court did not want to establish a precedent for protecting all public domain artworks, for Vigeland’s artworks to be denied trademark registration, they had to reach a high threshold value to the relevant public of an EEA State (i. e. Norway). The artworks had to “enjoy a particular status as prominent parts of a nation’s cultural heritage”⁴⁶. The public policy exception is used only “in exceptional circumstances” and where the “registration is regarded as a genuine and serious threat to certain fundamental values, or where the need to safeguard the public domain, itself, is considered a fundamental interest of society”⁴⁷.

To what extent can the public policy exception thus be used to protect against trademark registration of signs which have a positive connotation (i. e. they are not racist insults)⁴⁸ whose registration would primarily offend minority groups and indigenous peoples? The impact of trademark registration is generally considered across all relevant social strata, including minorities and ethnic groups⁴⁹. The public who are considered when the IPO or the court determines the level of likely outrage that would be caused by registration of the mark is what is known as the “relevant public” in trademark law. This is “the reasonable consumer with average sensitivity and tolerance thresholds” (i. e. not a small group with extreme views)⁵⁰. It would include not just the likely consumers of the goods or services, but also those (such as a religious minority) who might be offended by the registration of the mark even if they were not the intended consumers. It might also include those of other faiths and cultural affiliations, who may not be offended⁵¹. This is in line with the position taken by the United Nations Human Rights Committee that “limitations of rights for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”⁵². The European Court of Human Rights also seeks to balance protecting the feelings of religious people against commercial freedom of expression⁵³.

In conclusion, the public policy exception has been used more frequently for protecting “religious” rather than more broadly “cultural” symbols, and for protecting national rather than minority cultural symbols. Religious symbols with a positive connotation need to be of “utmost spiritual importance”, and culturally significant symbols such as the Vigeland artworks, had *national* value. As European trademark law becomes more sensitive to fundamental rights considerations such as freedom of speech, grounds of “offensiveness” may become less persuasive in courts seeking to uphold principles of “pluralism, tolerance and broadmindedness”⁵⁴. It may be necessary to invoke the “fundamental in-

⁴⁶ EFTA Court, Case E-5/16, Municipality of Oslo “Vigeland”, paras. 92–93, 95. See: *Geiger C., Pontes L. M. Trade mark registration...* P. 11–12.

⁴⁷ “Vigeland”, para. 8.

⁴⁸ See examples of racist insults whose registration has been refused in EUIPO trademark guidelines, 2020, Chapter 7.4.

⁴⁹ *Geiger C., Pontes L. M. Trade mark registration...* P. 9.

⁵⁰ EUIPO trademark guidelines 2020, Chapter 7.3. See also: *Von Bomhard V., Von Mühlendahl A. Concise European Trade Mark Law.*

⁵¹ Representation of a cross (fig.), para. 32.

⁵² CtHR, *Sekmadienis Ltd. v. Lithuania*, No. 69317/14, Jan. 30, 2018, para. 81.

⁵³ For example, Lithuanian advertisements for clothing using the captions “Jesus, what trousers!” and “Dear Mary, what a dress!” were allowed by the ECtHR, even though the religious community objected, and they had been found at the national level to be “contrary to public order and public morals”, see *Sekmadienis*, above.

⁵⁴ *Geiger C., Izyumenko E. Shaping Intellectual Property Rights...* P. 7.

terest of society” or human rights law, including provisions on discrimination, to support refusal of trademark registration of minority and indigenous religious and cultural symbols that have a positive connotation.

Some challenges remain. First, if the model of offensiveness in trademark law is modelled on ideas of moral concerns, and religious blasphemy or banalization of sacred symbols, it might be easier to protect against misappropriation of specifically “religious” than more generally “cultural” symbols. Second, refusal of trademark registration does not necessarily protect against continued misuse or offensive use by third parties, because keeping important religious and cultural symbols in the public domain encourages free use, but does not give minority communities any control over the use of their cultural symbols by others (see UNDRIP art. 31). These challenges will be discussed in relation to the Sámi sun symbol trademark case.

2. The Sámi sun symbol trademark case. A “patent” on the Sámi sun

This case study will be used to illustrate the use of the public policy exception to address cultural misappropriation, and some of the challenges and opportunities mentioned above.

The Sámi have traditionally worn silver jewellery with their traditional dress (Gákti), often made outside of Sápmi and sold by itinerant traders. In 2018, a story broke in the Norwegian media that a (non-Sámi owned) jewellery firm, Tana Gull, had taken out “a “patent” on the Sámi sun”⁵⁵. After registering and abandoning a few prior marks using the same sign, based on a Sámi sun symbol, the company had registered a trademark in 2009⁵⁶, and had started enforcing it (Figure 1).

The sun in question was a symbol that had been depicted on a historical Sámi drum of the bowl type originally from the Lule Lappmark region in Sweden⁵⁷. Now kept in the Grassi Museum für Völkerkunde, Leipzig, the drum had been taken from a Sámi shaman in 1693⁵⁸.

In the 17th and 18th centuries, the Sámi had been persecuted by Christian missionaries and local authorities as part of an attempt by the Swedish king to control resources

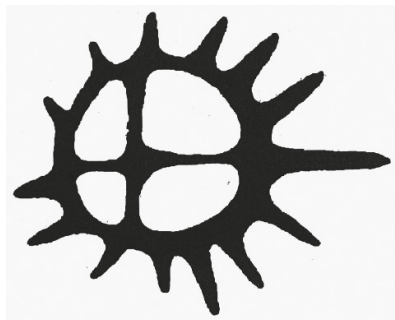


Figure 1. The Tana Gull logo registered in 2009

Photo source: Norwegian trademark register. Available at: <https://search.patentstyret.no/Trademark/200815738> (accessed: 28.06.2020)

⁵⁵ *Aslaksen E. A.* Har tatt “patent” på den Sámi ske sola.

⁵⁶ Norwegian IPO website, trademark registration and documents for Tana Gull trademark (registration No. 251306) can be found at: <https://search.patentstyret.no/Trademark/200815738> (accessed: 28.06.2020).

⁵⁷ A Swedish ethnographer called Ernst Manker (1893–1972), who worked at the Museum of Ethnography in Stockholm in the middle of the twentieth century, documented many of the drums in museum collections. The drum in question is No. 65 in: *Manker E. M.* Die Lappische Zaubertrommel: Eine Ethnologische Monographie. Vol. 1: Die Trommel als Denkmal Materieller Kultur (Acta Lapponica 1). Stockholm: Thule, 1938; Vol. 2: Die Trommel als Urkunde Geistigen Lebens (Acta Lapponica 6). Stockholm: Gebers, 1950.

⁵⁸ The persecution of the shamans fuelled a thriving trade in Sámi artefacts by the nineteenth century, involving missionaries, anthropologists and museums or private collectors. Sámi drums were dispersed around the world and many were acquired by European museums, see: <https://old.no/Sámidrum/locations.html> (accessed: 28.06.2020); *Joy F.* Sámi Shamanism, Cosmology and Art as Systems of Embedded Knowledge; *Silvén E.* Contested Sámi Heritage: Drums and sieidis on the Move, in National Museums and the Negotiation of Difficult Pasts // *EuNaMus Report. No. 8* / eds D. Poulot, J. M. L. Guiral, F. Bodenstern. Linköping: Linköping University Electronic Press, 2012. P. 173–186.

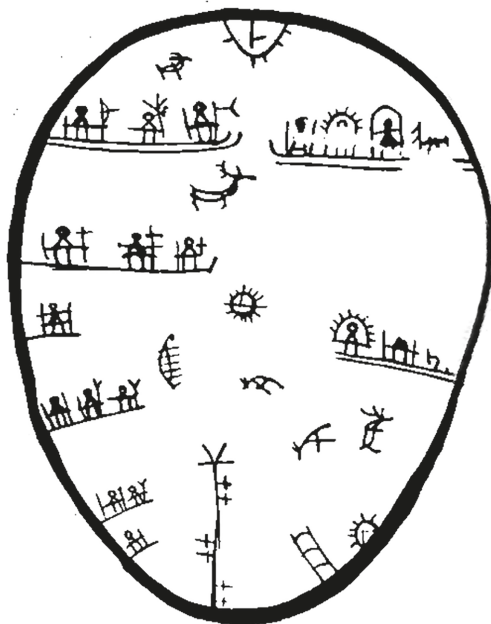


Figure 2. The 1693 drum on which the sun symbol was originally depicted

Photo source: Manker E. M. Die Lappische Zaubertrommel: Eine Ethnologische Monographie. Vol. 2: Die Trommel als Urkunde Geistigen Lebens (Acta Lapponica 6). Stockholm: Gebers, 1950. P.417

and collect taxes in the area. Sámi cultural practices, such as the use of drums by shamans, were denigrated, prohibited and driven underground. Use of the drum for “sorcery” was punishable by death⁵⁹.

At the time, drums were central to shamanic rituals. Sámi shamans, called *noaidi* in Northern Sámi, used the drum mainly for divination in relation to hunting, fishing and trapping, as well as for trance and out-of-body travel, prophecy and fortune-telling⁶⁰. Each shaman made their own drum, or inherited it through the family, so symbols drawn onto the reindeer skin-covered surface were somewhat individualized. Drums could represent the constellations, a geographical map, and be a spiritual map at the same time, depending on their orientation⁶¹. Sun worship was an important part of Sámi religious beliefs, especially amongst the Southern Sámi. Symbols of the sun thus usually have a central place on the drums⁶², although the sun is depicted in different ways. Some south-Sámi drums depicted a star map outlining the astral mythology of the night sky featuring animal constellations. On the painted drum surfaces the cosmos was divided into two to five realms

⁵⁹ Joy F. Sámi Shamanism, Cosmology and Art as Systems of Embedded Knowledge. P. 223.

⁶⁰ Ibid.; Solbakk J. T. Sámiš mytologi og folkemedisin // Tradisjonell kunnskap og opphavsrett / ed. by J. T. Solbakk. Karasjok: Callidlagadus and Sámi kopiia (online), 2007. P. 22, 24–25. Available at: <http://www.Sámikopiija.org/web/index.php?sladja=7&giella1=nor> (accessed: 28.06.2020).

⁶¹ Sommarström B. The Saami Shaman's drum and the star horizons // Scripta Instituti Donneriani Aboensis. 1991. No. 14. P. 136–168.

⁶² Solbakk J. T. Sámiš mytologi og folkemedisin. P. 22, 24–25.

and many of these depicted a Sun at the centre. The drum in question (Figure 2) depicts 6 levels, which makes it unique⁶³.

Starting in the seventeenth century, missionaries and local authorities represented the drums as symbols of paganism. While some Sámi abandoned their religious practices altogether and converted to Christianity, others hid the drums away and used them in secret well into the 20th century. Practitioners such as Peter Armstrand, a Swedish Sámi drum maker and healer, have revitalized Sámi spiritual practices today and created contemporary drums inspired by historical designs⁶⁴. A book published in 1988 by the Sámi artist Nils-Aslak Valkeapää, which won a major literary prize in Norway, revived community interest in the sun symbol and its meaning to the Sámi. This may have also inspired the trademark registrations by Tana Gull⁶⁵.

In 2018, the media reported that Tana Gull had started enforcing their trademark rights against Sámi craftspeople by sending legal letters demanding they stop using the sign as a decorative element in their work. The owner of the company was quoted as saying “We do not own the sun, but we do own this sun”⁶⁶. In May 2019, Anastasia Johansen, whose designs had been inspired by Valkeapää’s book, was one of the Sámi craftspeople who received a letter from Tana Gull. She said she found the restrictions on using the sun symbol in her products “incomprehensible”. Social media exploded with opposition and debate on the issue and a boycott of the jewellery company was proposed in support of Johansen⁶⁷. The jewellery company fought back against the bad press they were getting⁶⁸. By the end of 2019, another of the Sámi crafts businesses using the symbol, Alveskogen Design, had requested an administrative review of the trademark by the Norwegian Patentstyret or Intellectual Property Office (IPO).

In early 2020, the IPO found that the Tana Gull mark was based on a symbol of the Sámi sun god *Beaivi* and at the time of registration it was a religious symbol that was known to the Sámi, as evidenced by Valkeapää’s book⁶⁹. They thus invalidated the mark on the basis of the public policy exception in trademark law. There were two main grounds for this decision. First, the registration of a religious symbol was “liable to provoke indignation” among the Sámi, which was considered equivalent to being “contrary to morality”⁷⁰. Second, the IPO found that given the history of oppression, it was particularly important to ensure Sámi had access to their few remaining cultural and religious symbols, which was denied by giving Tana Gull a monopoly on use of the sign in trade. The IPO referenced protections given to Sámi culture under the Norwegian Constitution (section 108) and art.27 of

⁶³ Joy F. The Importance of the Sun Symbol in the Restoration of Sámi Spiritual Traditions and Healing Practice // Religions. 2020. No. 11 (6). P. 270–292.

⁶⁴ Ibid.

⁶⁵ Patentstyrets avgjørelse av 22. januar 2020 — Administrativ overprøving (hereafter Administrative review) // Norwegian IPO.2020. Available at: <https://search.patentstyret.no/Home/OpenFile?docnr=090167088194fc6d&appid=32-02&fileType=pdf> (accessed: 28.06.2020). Translated using Google Translate.

⁶⁶ Aslaksen E. A. Har tatt “patent” på den Sámi ske sola.

⁶⁷ Social media cooking for sun patents // Newsbeezee. 2019. Available at: <https://newsbeezee.com/norwayeng/social-media-cooking-for-sun-patents-threatened-with-boycott-nrk-Sápmi> (accessed: 28.06.2020).

⁶⁸ NRK beklager manglende tilsvarsrett og feil sitat i oppslag om solmotiv // NRK.2019. Available at: <https://www.nrk.no/Sápmi/nrk-beklager-manglende-tilsvarsrett-og-feil-sitat-i-oppslag-om-solmotiv-1.14575743> (accessed: 28.06.2020). Translated using Google Translate.

⁶⁹ Norwegian IPO. Administrative Review. 22 January 2020.

⁷⁰ In 2009, when the Tana Gull mark was registered, the 1961 Trademark Act governed trademark registrations. Section 14.1.1 of this Act says that a trademark cannot be registered if it “is contrary to law or public order or is liable to provoke indignation” (Google translation). In the 2010 Trademark Act, the word “indignation” is replaced by “contrary to morality”. The IPO review stated that this change in terminology was not intended to entail some change in reality, and they therefore viewed the terms in the same light. Norwegian IPO, Administrative Review, 22 January 2020.

the ICCPR. The registration of the mark was thus invalidated, and costs were awarded to Alveskogen Design. Today, the jewellery company still uses the mark as their logo⁷¹, but it cannot prevent others (including Sámi craftspeople) from using it in the course of trade. The symbol is thus now again available for anyone to use.

Since trademark law is territorial, invalidation of the mark in Norway does not of course invalidate registrations elsewhere. In fact, as Mattila has noted, Tana Gull registered the same mark in Finland in 2015, and this registration is still in force⁷². A regional approach, discussed below, is thus needed to address the problem.

The grounds for the administrative decision in this case will now be discussed in further detail, illustrating the importance of taking into account the burden of the past, the history of a community and their religious or cultural practice. The paper will discuss this question in regard to the focus on protecting religious rather than broader cultural symbols, and the limitations of protecting public domain access in preventing cultural misappropriation.

3. The focus on religion

As we discussed above, perhaps because of the powerful idea of blasphemy as a measure of moral outrage, there are more precedents in trademark law to protect against religious offensiveness than cultural misappropriation more generally. Offence to religious sensitivities through “profane” commercialization (a kind of “blasphemy”) was used as one of the arguments to refuse registration of the sun symbol, but this may not be aligned with how the Sámi today perceive the significance of such a symbol.

In the administrative review, the Norwegian IPO noted the religious nature of the symbol, citing its relationship to the Sámi sun god *Beaivi*. The use of the sign on Valkeapää’s book, a widely-known collection of poems about the sun god published in 1988⁷³ was used as evidence that the Tana Gull trademark sign would in 2009 have been recognized by the Sámi as a symbol of the Sámi sun god *Beaivi*. The IPO decision cites the “Representation of a cross” case, discussed above, to suggest that religious symbols of such significance should be kept off the register: “banal” commercialization of an important religious symbol would automatically be a ground of offence⁷⁴. No specific evidence was presented, however, to show that a significant proportion of the Sámi would have been offended by such “banal” commercialization in 2009 on religious grounds⁷⁵. Commercial use of the sun symbol was not in fact identified as a problem in this case: Sámi craftspeople were using the design themselves in their products until quite recently. In the press reports cited above, craftspeople objected more to the “incomprehensible” monopoly given to Tana Gull for use of the sign⁷⁶, or cultural misappropriation, than to religious concerns. As Joy indicates, the creation of handicrafts is special to Sámi because it is undertaken

⁷¹ Tana Gull and Sølvsmie AS. Available at: <https://www.tanagullogsolv.com/en> (accessed: 28.06.2020).

⁷² Trademark Registration No. 264831. Available at: <https://epalvelut.prh.fi/web/tietopalvelu/haku?appNum=T201551580®Num=264831> (accessed: 28.06.2020).

⁷³ Norwegian IPO. Administrative Review. 22 January 2020.

⁷⁴ Ibid. Representation of a cross (fig.).

⁷⁵ This would have been difficult to obtain in any case, after the fact. To demonstrate Sámi religious beliefs about the sun god, the review referred to two websites: www.snl.no/Beaivi and [www.snl.no/Sámi sk_religion](http://www.snl.no/Sámi_sk_religion). Norwegian IPO. Administrative Review. 22 January 2020.

⁷⁶ Social media cooking for sun patents // Newsbeez. 2019. Available at: <https://newsbeez.com/norwayeng/social-media-cooking-for-sun-patents-threatened-with-boycott-nrk-Sápmi/> (accessed: 28.06.2020).

within the tradition of duodji: “the memories of the ancestors of the Sámi lives on through the art and creation of handicrafts”⁷⁷.

Sámi objections to the trademark registration of such a symbol might in fact be quite complex. Although historically Sámi worshipped the sun god⁷⁸, today most Sámi in Norway practice Christianity. As was acknowledged in the administrative review, the Sámi have experienced years of dislocation, oppression, assimilation and stigmatization. Until as late as 1980, the Norwegian government pursued a policy of assimilation, or Norwegianization, of the Sámi⁷⁹. While there has been a revival of Sámi shamanistic practices in some areas, many Sámi still fear or experience discrimination in this regard⁸⁰. The sun symbol could thus be understood as an identity marker linked with pre-Christian religious practice, a link to Sámi cultural cosmology and religion, as well as a part of cultural memory and heritage, and a symbol of resistance⁸¹. Even in the 17th century, Sámi began to perceive their drums, not just as religious and/or practical objects, but as a symbol of resistance to destruction of traditional culture⁸². Sámi traditional craft — which may be offered for sale — is an expression of this complex relationship between traditional religious beliefs, language, and identity⁸³. Thus, there may not be a clear distinction between “sacred” heritage and “profane” commerce.

There is another — regional — complexity to this case. In accordance with the tradition of handicraft or Duodji, Sámi tend not to mix symbols from different areas of Sápmi together. The drum on which the sun symbol was depicted is from Swedish Sápmi, and has particular significance and value for the Sámi from the area where it originated. Perhaps for these reasons, the Sámi in Norway might not publicly claim strong religious affiliations to the symbol, although they may wish to prevent misappropriation⁸⁴. Perhaps this also helps to explain why Tana Gull registered the mark in Finland and Norway so far, but not in Sweden.

Whatever the situation in this case, one could imagine other cases where minority groups who have faced persecution for their beliefs, or wish to protect access to important cultural symbols they do not regard as religious, may not want to invoke arguments about “banal” commercialization of religious symbols to challenge trademark registrations. The case law on the public policy exception does not currently give much guidance on whether ideas about “blasphemy” and “banal commercialization” could be extended to cover cultural misappropriation. Further discussion is needed on this issue to avoid this provision

⁷⁷ Joy F. Sámi Shamanism, Cosmology and Art as Systems of Embedded Knowledge. P. 17.

⁷⁸ Lundmark B. They consider the sun to be a mother to all living creatures // Saami Pre-Christian Religion: studies on the oldest traces of religion among the Saami / eds L. Bäckman, Å. Hultkrantz. Stockholm: Almqvist & Wiksell International, 1985.

⁷⁹ Minde H. Assimilation of the Sámi — Implementation and Consequences // Aboriginal Policy Research Consortium International (APRCi). 2005. Available at: <https://ir.lib.uwo.ca/aprci/196> (accessed: 28.06.2020). Current Norwegian policy attempts to reverse this: The Power of Culture. Norway Ministry of Culture, Meld. St. 8 (2018–2019), Report to the Storting (white paper). Available at: <https://www.regjeringen.no/contentassets/9778c28ab1014b789bbb3de0e25e0d85/en-gb/pdfs/stm201820190008000eng-pdfs.pdf> (accessed: 28.06.2020).

⁸⁰ Joy F. The Importance of the Sun Symbol in the Restoration of Sámi Spiritual Traditions and Healing Practice.

⁸¹ Ibid.; Joy F. Sámi Shamanism, Cosmology and Art as Systems of Embedded Knowledge. P. 17.

⁸² Rydving H. The Saami drums and the religious encounter in the 17th and 18th centuries // Scripta Instituti Donneriani Aboensis. 1991. No. 14. P. 28–51.

⁸³ Joy F. Sámi Shamanism, Cosmology and Art as Systems of Embedded Knowledge. P. 17. See also: Guttorm G. Traditions and Traditional Knowledge in the Sámi Culture // Being Indigenous: Perspectives on Activism, Culture, Language, and Identity / ed. by N. Greymorning. London; New York: Routledge, 2019. P. 65–75.

⁸⁴ Joy F. The Importance of the Sun Symbol in the Restoration of Sámi Spiritual Traditions and Healing Practice.

in trademark law being too narrowly interpreted and thus functioning in a discriminatory manner against such groups⁸⁵.

Public domain (access to culture) arguments provided the second ground for refusing trademark registration in the sun symbol case. The follow section describes some limitations of the approach, and possible solutions.

4. The limits of protecting the public domain

The use of the public policy exception in trademark law provides defensive protection by preventing IP rights being exercised over a specific symbol or mark. Sámi access to the sun symbol, in the above case, was assured because the rights to use the symbol were returned to the public domain. This does not necessarily prevent cultural misappropriation or promote heritage safeguarding because anyone is allowed to use symbols in the public domain in any way they choose. Also, because trademark law is territorial, the Norwegian decision does not directly affect the registration of the same mark in Finland. The Sámi Parliament has expressed the wish to use IP protection not only defensively, to prevent unauthorized use of their culture, but also positively, as an instrument to support self-determination and respect for traditional norms and customs across Sápmi⁸⁶.

To this end, community-owned trademarks have been registered to provide some positive protection. In 1982, the Nordic Saami Council registered the Sámi Duodji trademark for Sámi handicraft products in Sweden. The Sámi Duodji mark identifies Sámi handicraft products. According to the guidelines developed for its use, it should:

- communicate to buyers that the product is made by a Sámi;
- protect Sámi handicraft from being copied and from unfair competition;
- promote a continuous improvement of the quality of Sámi handicraft;
- show that Sámi handicraft is a living tradition⁸⁷.

The Sámi Duodji trademark indicates the origin of a product (e. g. made by Sámi under specific conditions indicated above) but does not prevent others copying patterns and designs that have been transmitted among the Sámi for centuries. The Sámi Duodji mark also applies only to traditional handicrafts and not to modern innovations, which some craftspeople wish to sell and consider part of their heritage. An additional trademark (Sámi Made) has thus been proposed to indicate Sámi origin of a broader range of products (not only traditional *duodji*). This will help to ensure that these other products can be identified by consumers as new Sámi products that are based on ICH practices⁸⁸.

The owners of the mark (the Nordic Saami Council) have to enforce the mark themselves, but this is expensive, and difficult outside of Sweden, the only country where the mark is registered. The trademark is managed in Finland, Russia, Norway and Sweden by different Sámi associations, so administration can be complex and has to be coordinated. Additional mechanisms could be used to help promote and enforce the mark,

⁸⁵ *Richardson et al.* From “Oomoo” to “Oro”: nostalgia labels and cultural policy on the Australian trade marks register.

⁸⁶ *Mattila T.* Trademark protection of traditional cultural expressions of Sámi people in Finland // *Nordiskt Immateriellt Rättsskydd*. 2021. No. 2. Available at: <https://www.nir.nu/en/argang/2021> (accessed: 08.07.2021).

⁸⁷ Sámi Duodji and Sámi Made trademarks // Saami council website. Available at: <https://www.saamicouncil.net/en/the-sami-duodji-certificate> (accessed: 28.06.2020).

⁸⁸ *Mattila T.* Needs of the Sámi people for intellectual property protection...

including media engagement, additional certification labels, voluntary licenses or formal contracts⁸⁹, and codes of conduct.

Community-led coordinated regional strategies of this kind, including both defensive and positive protection, could support Sámi efforts towards self-determination and heritage safeguarding in the absence of a harmonized legal system, including *sui generis* intellectual property protection, for Sámi cultural expressions or traditional knowledge across Sápmi. The Nordic Sámi Convention, whose text was finalised in 2017, promises deeper Nordic cooperation on safeguarding of Sámi culture⁹⁰, although it has not yet been ratified by all parties. Only Norway, and not Sweden or Finland, has ratified the International Labour Organization's Indigenous and Tribal Peoples Convention, which also makes specific provision for protecting indigenous culture⁹¹. Sámi cannot therefore fully exercise their "right to maintain, control, protect and develop their intellectual property over [their] cultural heritage" (under UNDRIP art.31), although all three countries have ratified UNDRIP.

Sui generis protection for important cultural symbols does not need to be administratively onerous or difficult to implement. In Canada, official marks (including symbols of "Aboriginal bands and native organizations") can be registered for free by Canadian public authorities. They cover all classes of goods and services, and prevent third parties from using the name or logo commercially, in perpetuity without the need for re-registration⁹². With state support, cultural symbols could also conceivably be registered as national symbols under Paris 6^{ter}⁹³.

Taking an alternative approach, IPOs can deny trademark applications based on databases of significant cultural symbols at the point of application. In the US, for example, the Native American Tribal Insignia (NATI) database was created in 2001⁹⁴ to provide information to registration authorities (the United States Patent and Trademark Office, or USPTO) at the point when applications come in. This helps in identifying symbols considered of cultural or religious significance to indigenous peoples that should be denied trademark registration. An NGO representing Native American commercial interests, the Native American Intellectual Property Enterprise Council (NAIPEC), is also represented within the USPTO to inform its intellectual property policies. There have been some prob-

⁸⁹ The Pueblo of Zia successfully manage use of the Zia sun symbol in the US by third party companies under voluntary license. See: *Saez C. Indigenous Knowledge Misappropriation: The Case Of The Zia Sun Symbol Explained At WIPO // Intellectual Property Watch*. 2018. Available at: <https://www.ip-watch.org/2018/12/11/indigenous-knowledge-misappropriation-case-zia-sun-symbol-explained-wipo> (accessed: 28.06.2020); *Turner S. B. The case of the Zia: looking beyond trademark law to protect sacred symbols // Student Scholarship Papers*. Paper 124. 2012. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1124&context=student_papers (accessed: 28.06.2020).

⁹⁰ The English text of the Nordic Sámi Convention is available from the Sami parliament: <https://www.sametinget.se/105173> (accessed: 28.06.2020).

⁹¹ Indigenous and Tribal Peoples Convention (No. 169) // International Labour Organisation. 1989. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (accessed: 28.06.2020).

⁹² *Udy V. The Appropriation of Aboriginal Cultural Heritage: Examining the Uses and Pitfalls of the Canadian Intellectual Property Regime // Intellectual Property Issues in Cultural Heritage (IPinCH) blog*. 2015. Available at: <https://www.sfu.ca/ipinch/outputs/blog/canadian-intellectual-property-regime> (accessed: 28.06.2020). For a case study, see: *Shrumm R. Knitting for our Lives: The Appropriation of Cowichan Sweaters by the Hudson's Bay During the 2010 Vancouver Olympics // ARTiculate*. 2017. No. 2 (2). P. 120–161.

⁹³ State emblems and some certification marks are registered under Article 6^{ter} of the Paris Convention. This provides global, perpetual protection for certain emblems. South Africa has used article 6^{ter} to prevent misuse of Nelson Mandela's image on coins: "Mandela Wins Injunction to Prevent Use of Name and Image on Coins" // *INTA Bulletin*, 1 February 2005. Available at: <https://www.inta.org/INTABulletin/Pages/MandelaWinsInjunctiontoPreventUseofNameandImageonCoins.aspx> (accessed: 28.06.2020).

⁹⁴ See Native American Tribal Insignia website: <https://www.uspto.gov/trademark/laws-regulations/native-american-tribal-insignia> (accessed: 28.06.2020).

lems with implementation of this system, and not all indigenous peoples wish to register their symbols, but the system could provide possible inspiration for Norway⁹⁵.

Conclusions

In this paper, we have analysed a case study in which a provision in conventional intellectual property law, the public policy exception, was used to invalidate a trademark registration of a Sámi symbol in Norway. This case is of interest because intellectual property protection is often seen as a cause of cultural misappropriation, as it offers commercial enterprises the opportunity to register monopoly rights such as trademarks over signs that may be of cultural significance to communities. However, the public policy exception, which excludes registration of signs “contrary to morality or public policy”, can take account of public opinion, the public interest and human rights. This offers a way to address some kinds of cultural misappropriation and mediate some of the tension between heritage safeguarding and its commercialization.

There were two main grounds for invalidating the mark in question, a Sámi sun symbol from a drum originating in Swedish Sápmi. First, use of a religious symbol as a trademark was deemed to have been “contrary to morality”, because it would have been offensive to the Sámi in 2009. Second, public policy considerations and the Norwegian Constitution required ensuring continued access of Sámi craftspeople to their cultural and religious symbols. Determination of the case required a focus on the offensiveness of the sign at a specific moment, the point of time that the trademark had been registered in 2009. However, the Norwegian IPO acknowledged the relevance of historical factors such as discrimination and religious persecution of the Sámi, and specific protections afforded to Sámi culture and language in Norwegian law.

The paper points out two main challenges relating to the use of the public policy exception in cases such as this. First, religious symbols have received disproportionate attention in case law, with a focus on preventing “blasphemous” or “banalizing” commercialization. It is not clear how this can protect the more general category of important cultural symbols which may be sacralised as “cultural heritage” by minority groups or indigenous peoples. Some groups may not be eager to represent their cultural symbols as “religious”, especially in a context of historical oppression and discrimination. More research is needed to explore how the notion of blasphemy could be more broadly interpreted to include the inappropriate use of cultural symbols by third parties.

Second, simply protecting the public domain by enabling free use of cultural symbols by all does not always help indigenous peoples safeguard their heritage. Using symbols that are in the public domain, companies can free-ride on the reputation of communities and their heritage. Defensive protection against misappropriation can therefore be accompanied by other strategies including the registration of community marks, such as the Sámi Duodji and Sámi Made trademarks, although challenges remain in extracting maximum value from this approach. However, to develop a coordinated regional approach, both community action and legal or administrative support might be needed. Inspiration from other countries might be helpful in developing appropriate solutions.

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⁹⁵ These are discussed in: Zark B. Use of Native American Tribal Names as Marks // American Indian Law Journal. 2015. No. 3 (2). Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol3/iss2/7> (accessed: 28.06.2020).

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Этика, интеллектуальная собственность и коммерциализация культурного наследия

Х. Дж. Дикон

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Саамы — коренное население, проживающее в регионе Сапми, пересекающем северную Скандинавию (Норвегия, Финляндия, Швеция) и Кольский полуостров на Северо-Западе России. Статья посвящена истории символа солнца саами на барабане XVII в. из шведского города Сапми; этот символ был зарегистрирован в качестве товарного знака норвежской ювелирной компанией Tana Gull and Sølvsmie AS в 2009 г. Знак был признан недействительным в 2020 г., поскольку, по мнению Норвежского ведомства интеллектуальной собственности, регистрация религиозного символа скорее всего вызовет нарушение прав саами, чей доступ к их собственным культурным и религиозным символам должен быть защищен. Основанием для принятия решения послужило исключение из общего правила, из соображений публичной политики, а именно положение закона о товарных знаках, которое препятствует регистрации знаков, «противоречащих морали или публичной политике». Эта норма позволяет в силу закона учитывать общественное мнение, общественные интересы и права человека. Анализ этого случая используется для начала дискуссии о роли права интеллектуальной собственности в решении проблемы чрезмерной коммерциализации нематериального культурного наследия, например путем предотвращения незаконного присвоения культурных ценностей. Автор полагает, что понятие богохульства или религиозного преступления, совершаемого путем банальной коммерциализации, должно быть более широко сформулировано из соображений государственной политики, чтобы учесть незаконное присвоение элементов культуры. Утверждается, что защита общественного достояния путем предотвращения регистрации важных культурных и религиозных символов в качестве товарных знаков недостаточна для решения проблемы незаконного присвоения культурных ценностей в коммерческом контексте. Таким образом, позитивная защита посредством регистрации товарных знаков не менее важна, чем их охрана.

Ключевые слова: саами, нематериальное культурное наследие, коммерциализация, незаконное присвоение культуры, товарный знак, этика, интеллектуальная собственность.

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Дикон Харриет Джейн — д-р философии, магистр, бакалавр (Hons), приглашенный научный сотрудник, Университет Ковентри, Великобритания, CV1 5FB, Ковентри, ул. Прайори, 1; harriet@conjunction.me.uk

Safeguarding Intangible Cultural Heritage in Brazil in accordance with the UNESCO Convention

Francisco Humberto Cunha Filho

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Brazil is a complex federation formed by 26 States, the Federal District and 5570 municipalities, all autonomous and sharing powers and duties in many legislative and administrative matters, such as culture and cultural heritage. On October 5th, 1988, the country adopted its first effectively democratic and pluralist Constitution, known as the “Citizen Constitution”. It devotes special attention to the aforementioned topics based on the understanding that cultural heritage encompasses elements of a tangible and intangible nature that make reference to the identity, the action and the memory of the different groups that form Brazilian society, including textual mention of popular, indigenous and Afro-Brazilian cultures. In legal terms, however, it has been observed that since 1937 the country has had a national law for the protection of tangible cultural heritage, but only since 2000 has it issued a Decree on the safeguarding of intangible cultural heritage. In any case, this Decree precedes the UNESCO Convention on this subject, dated 2003 and incorporated into Brazilian law in 2006. At this time, the international regulation acquired a status of supranational to deal with matters pertaining to human rights. The content of the Convention did not result in any abrogation of the pre-existing rules in Brazil, however, it showed that the rules need to be complemented in two aspects. The first one, in a legal sense, to make explicit the humanitarian and environmental protection values that are indispensable in the policy of recognizing cultural manifestations and their elements. The second one, in a political sense given the characteristic of cooperative federalism, involves the necessity for the central government to stimulate the universalization of this policy in other entities of the Brazilian federation, which currently does not occur.

Keywords: Intangible Cultural Heritage, safeguard, UNESCO, Convention for Safeguarding of the Intangible Cultural Heritage, comparison, Brazilian law, constitutional law.

Introduction

The current Brazilian Constitution dates back to October 5th, 1988 and is considered the first truly democratic and pluralist one in the country, to the point that it’s popularly called “Citizen Constitution”, because, at least in the ideological field, interrupting a history of extreme injustices and social divisions, it has gained a long and almost utopian declaration of political, individual, collective, social, economic and cultural rights.

Concerning cultural rights, the Constitution adopted an enormous dimension of what should be understood as cultural heritage, in article 216, that “consists of the assets of a material and immaterial nature, taken individually or as a whole, which bear reference to the identity, action and memory of the various groups that form the Brazilian society, therein included: I — forms of expression; II — ways of creating, making and living; III — scientific, artistic and technological creations; IV — works, objects, documents, buildings and other spaces intended for artistic and cultural expressions; V — urban complexes and

Francisco Humberto Cunha Filho — PhD, Professor, University of Fortaleza, 1321, Av. Washington Soares, Edson Queiroz, Fortaleza, 60811-905, Brazil; humbertocunha@unifor.br

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sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value”¹.

If the transcribed text is well observed, mainly the expression “immaterial”, which means “intangible”, and the first two items that exemplify cultural assets, there will be no difficulty in concluding that the Brazilian constitutional legislation precedes the Convention for the Safeguarding of Cultural Heritage in approximately 15 years.

In order to make the constitutional rule effective, in the year 2000 the Brazilian government issued what was known as the Decree for the Registration of Intangible Cultural Heritage and, as of that date, established a policy for the recognition and safeguarding of elements categorized as knowledge, celebrations, forms of expression, places, as well as an opening for those who can be submitted to other classifications.

With this history of precedence, this article aims to investigate what impacts the 2003 Convention caused on Brazilian law, focusing on two aspects: a juridical-normative, which seeks to know whether the international norms innovated Brazilian law, promoting abrogation or addition; and the other, of a political nature, which examines whether Brazil fulfills the state obligations defined for the countries that incorporated conventional commands into their order.

The method used in this research is the bibliographic investigation and consultation of official data systems, covering, in the exhibition of the content, a little of the political organization of Brazil, aiming to reveal how the task of safeguarding the Intangible Cultural Heritage (ICH, from now on) is shared in this federation. Thereafter, the federal legislation on general rules in this area is presented and applicable not only to the central government, but to almost 5600 entities of the Brazilian federation. Finally, the Convention for the Safeguarding of the Intangible Cultural Heritage of UNESCO² (hereinafter, the Convention) is presented, specifically in the approaches, in order to have the basis that allows the conclusions of its impacts on Brazilian law.

1. Overview of Brazil's political organization

The first articulated sentence of the current Constitution of Brazil informs that the country is a democratic and federalist republic formed “by the indissoluble union of the states and municipalities and of the Federal District” (Art. 1), which form, in their unit, a person of public law, which is the Federal Union, all autonomous, under the constitutionally specified terms (Art. 18). In more didactic words, the Union represents, even at the international level, the unity of the nation; States are the largest internal political subdivisions and each comprise several Municipalities; there is also the Federal District, in which the capital of the country, Brasília, is located, a small territorial area considering the Brazilian dimensions, and which in terms of political organization keeps a mix of characteristics of a Municipality and a State. These elements make the constitutionalist doctrine a preference for understanding that Brazil is a *sui generis* federation³ due to its complexity.

Focusing on States, according to Art. 25, they “are organized and governed by the Constitutions and laws they may adopt”, observing the principles of the Federal Constitu-

¹ In favor of the fluidity of the text, from now on it is understood that the literal citations (in quotes) of the Brazilian Constitution can be consulted in this reference: Brazil. Constitution of the Federative Republic of Brazil: Constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments No. 1/92 through 72/2013 and by Revision Constitutional Amendments No. 1/94 through 6/94 / transl. and rev. by I. Vajda, P. Queiroz Carvalho Zimbres, V. T. de Souza. 6th rev. ed. Brasília: Undersecretariat of Technical Publications, 2013.

² Text of the Convention for the Safeguarding of the Intangible Cultural Heritage // UNESCO. Available at: <https://ich.unesco.org/en/convention> (accessed: 01.06.2020).

³ Bonavides P., Andrade P. de. História Constitucional do Brasil. Brasília: OAB Editora, 2004. P.453.

tion, and, in addition, they have an apparently wide residual competence, because those that are not prohibited are reserved for them. However, one of the forms of prohibition is indirect and occurs when powers are given over a large amount of matters exclusively to other entities, which effectively manifests itself in the broad set of legislative and material powers attributed to the Union and, to a lesser extent, to the municipalities, which leaves Brazilian states in a situation so legally difficult that it provides doctrinal ironies such as realizing that they, in the face of the Federal Constitution, have two options: repeat it or violate it⁴.

The Brazilian Constitution does not list the political entities that are part of the country, because, according to Art. 18, § 3, “The states may merge into each other, subdivide or dismember to be annexed to others or to form new states or federal territories, subject to the approval of the population directly concerned, by means of a plebiscite, and of the National Congress, by means of a supplementary law”. During the entire term of the constitutional text, this never happened; therefore, since October 5, 1988, Brazil has maintained the 26 States that form its federation, each with a varied and variable number of Municipalities.

These States as well as the Federal District are linked to one of the five geographic regions of the country, namely: in the North Region are the States of Acre, Amapá, Amazonas, Pará, Rondônia, Roraima and Tocantins; in the Northeast Region are the States of Alagoas, Bahia, Ceará, Maranhão, Paraíba, Pernambuco, Piauí, Rio Grande do Norte and Sergipe; in the Midwest Region are the Federal District and the States of Goiás, Mato Grosso and Mato Grosso do Sul; in the Southeast Region, the States of Espírito Santo, Minas Gerais, Rio de Janeiro and São Paulo can be seen; and in the South Region, finally, the States of Paraná, Santa Catarina and Rio Grande do Sul.

At this point there is an important explanation to avoid a comparison error that may involve the word “Region”, which has different meanings in Europe and in Brazil; in the old continent, it is usually an autonomous political entity under domestic law; in the South American country, according to Art. 43 of the Brazilian Constitution, it is only a “social and geoeconomic complex”, in view of which the Union will be able to articulate its action, “seeking to attain its development and to reduce regional inequalities”, devoid of, therefore, it has legal personality and its own powers and authorities.

Regarding the specific theme of culture, the Constitution follows the line of being minutely and verbose, to the point that it deserves a second vocation, that of “Cultural Constitution”, because it disciplines this subject abundantly, dedicating several articles and a specific section to it⁵. For the time being, it should be noted that among the cultural themes, safeguarding collective memory is treated with great importance in the Brazilian Constitution (Art. 5 LXXIII), with a fundamental right status and, consequently, the historical and cultural heritage can be defended by each citizen, through a judicial measure called “popular action”.

In terms of the distribution of competences in the matter, with regard to the creation of laws, Art. 24, in two of its items (VII and VIII), establishes that “The Union, the states and the Federal District have the power to legislate concurrently on: protection of the historic, cultural and artistic heritage, as well as of assets of touristic interest and landscapes of outstanding beauty; and liability for damages to the environment, to consumers, to assets and rights of artistic, aesthetic, historical, and touristic value, as well as to remarkable landscapes”. It is important to remember that this competing legislative competence must be practiced as follows: the “Union shall be limited to the establishment of general rules”;

⁴ Ferrari S. *Constituição Estadual e Federação*. Rio de Janeiro: Lúmen Júris, 2003.

⁵ Cunha Filho F.H. *Teoria dos Direitos Culturais: fundamentos e finalidades*. São Paulo: Edições SESC-SP, 2018. P. 115–135.

States can exercise “supplementary competence”, but if the Union fails to create general rules, those “exercise full legislative competence to provide for their peculiarities”; however, in this case, “the supervenience of a federal law over general rules suspends the effectiveness of a state law to the extent that the two are contrary” (Art. 24, § 1 to 4).

Concerning administrative matters, items III, IV and V of Article 23 of the Constitution specify that “The Union, the States, the Federal District and the Municipalities, in common, have the power: to protect the documents, works and other assets of historical, artistic or cultural value, the monuments, the remarkable landscapes and the archaeological sites; to prevent works of art and other assets of historical, artistic and cultural value from being taken out of the country, destroyed or from being deprived of their original characteristics; to provide the means of access to culture, education and science”. In addition, the emphasis given by § 1 of Art. 215 for the State to specifically protect “the expressions of popular, Indian and Afro-Brazilian cultures, as well as those of other groups participating in the national civilization process”.

This framework of co-responsibility of public entities is extended to society by § 1 of Art. 216, by prescribing that “The Government shall, with the cooperation of the community, promote and protect the Brazilian cultural heritage, by means of inventories, registers, vigilance, monument protection decrees, expropriation and other forms of precaution and preservation”.

It is important to emphasize a second role for States: what they do has a paradigmatic value in relation to the Municipalities that compose it, since, according to Art. 30, IX, of the Constitution of Brazil, they are responsible to “promote the protection of the local historic and cultural heritage, with due regard for federal and state legislation and supervision”.

2. The Brazilian Register⁶ Decree

Considering that the Convention for the Safeguarding of Intangible Cultural Heritage was adopted on October 17th, 2003, and signed on November 3rd, subsequently, Brazilian law, for this purpose, precedes it, because the legal discipline of registration for said assets is defined in Decree 3551, of August 4th, 2000⁷, which, by extension, created the National Program for Intangible Cultural Heritage⁸.

This anticipation has historical, economic and social justifications that, in order to be properly understood, it is necessary to remember, regarding the legal protection of Brazilian cultural heritage, that it began systematically in 1937, in the early days of the Vargas dictatorship⁹, in a delayed and prolonging period of the “heyday of statism”¹⁰, when Decree-Law n^o 25, dated November 30th of that year, which created the “Tombamento”¹¹, for many years the main normative instrument for the said task.

Historically and legally, the “Tombamento” is suitable for the protection of material cultural heritage, generally represented by churches, large buildings and monuments,

⁶ The main normative instrument for safeguarding intangible cultural heritage in Brazil is called “Registro”, hereinafter referred to with this English word and its variations, according to phrasal adequacy.

⁷ The laws and decrees mentioned in this text, with their original wording and subsequent modifications, can be found at the following website: <http://www4.planalto.gov.br/legislacao> (accessed: 01.06.2020).

⁸ This program had a very successful period in supporting cultural elements recognized by the Federal Government, which led it to be inscribed on UNESCO’s list of good practices in 2011.

⁹ *Gomes Â. de C. Capanema — o ministro e seu ministério*. Rio de Janeiro: Editora FGV, 2000.

¹⁰ *Scovazzi T. La definizione di patrimonio culturale intangibile // Patrimonio culturale e creazione di valore / ed. by G. M. Golinelli*. Padova: CEDAM, 2012. P. 156.

¹¹ A specific legal instrument for the protection of tangible cultural heritage existing only in the Brazilian law, which has some similarities with the “Classification” of the French law.

typical of the owners of tangible property. It happens that the country is composed mainly of people of African and indigenous origin, who have almost no such tangible goods, but members of a cultural universe very rich in manifestations and symbols. In order to safeguard this immaterial cultural heritage, the Presidential Decree No. 3551 / 2000 was edited.

The signatory authority of this diploma, the President of the Republic, understood that the legitimacy to use this type of rule was based on art. 84, item IV, of the Federal Constitution (“The President of the Republic shall have the exclusive power to: sanction, promulgate and order the publication of laws, as well as to issue decrees and regulations for the true enforcement thereof”), and art. 14 of Law No. 9649, of May 27th, 1998. This Law provided for the organization of the Presidency of the Republic and its auxiliary bodies; with regard to the Ministry of Culture, it imposed the following responsibilities: “a) national culture policy; b) protection of historical and cultural heritage; c) to approve the delimitation of the lands of the remaining quilombo communities¹², as well as to determine their demarcations, which will be ratified by decree”.

The Register mentioned here is not to be confused with that of copyright, because unlike this one, it does not aim purely and simply for the accuracy of the authorship of a work in the world of culture, for the purpose of protecting moral or patrimonial rights, preventing unauthorized persons from using protected creations. The essence of the registration of intangible assets has an iconographic nature, in the sense of specifying as much as possible the description of ways of creating, doing, and living in order to make them public, offering parameters to those who want to reproduce them faithfully, respecting the other elements that were considered at the time of recognition¹³.

The aforementioned characterization takes place by inscribing the element in specific books, which are as follows:

- *Knowledge*: for the knowledge and ways of doing rooted in the daily lives of communities;
- *Celebrations*: for the rituals and popular festivities that mark the collective experience of work, religiosity, entertainment and other social life practices;
- *Forms of Expression*: for literary, musical, plastic, scenic and playful manifestations;
- *Places*: for markets, fairs, shrines, squares and other spaces where collective cultural practices are concentrated and reproduced. In addition to these, the Cultural Heritage Advisory Council may determine the opening of other books for the registration of cultural assets of an intangible nature that constitute Brazilian cultural heritage and that do not fit in the books expressly mentioned.

The description of the content of each book reveals the characteristics that the cultural asset must have in order to live up to the registration that formalizes its status as a member of the Brazilian cultural heritage, according to the category in which it fits. However, for all of them, the legislation requires two constant characteristics: historical continuity and national relevance to the memory, identity and formation of Brazilian society.

Thus, for an element to obtain registration, it must be demonstrated that it has the general characteristics of the members of the intangible cultural heritage and, as a rule (with the normative exception for “forms of expression”), the specific characteristics of its segment, as can be seen in the following table.

Operationally speaking, the Registry has its own administrative procedure, composed of the following phases: initiative; instruction; deliberation.

¹² Community of slaves who fled slavery, which lasted until 1888, in Brazil.

¹³ *Petrillo P. L.* The Legal Protection of the Intangible Cultural Heritage: a Comparative Perspective. Cham: Springer, 2019. P. 249–250.

Table. General and specific characteristics required by Brazilian law for ICH

Asset	General characteristics	Specific characteristics
KNOWLEDGE (Knowledge and ways of doing)	a) historical continuity b) national relevance to the memory, identity and formation of Brazilian society.	a) rooting in the daily lives of communities
CELEBRATIONS (Rituals and parties)		a) the representation of the collective experience of work, religiosity, entertainment and other social life practices.
FORMS OF EXPRESSION (Literary, musical, plastic, scenic and playful manifestations)		
PLACES (Markets, fairs, shrines, squares and other spaces where collective cultural practices are concentrated and reproduced).		a) the concentration and reproduction of collective cultural practices.
OTHERS (That do not fit in the other books)		a) failure to fit into other books b) any other requirements established when the new book was created

Source: Prepared by the author.

The initiative, which consists of the power to provoke the registration process, was entrusted to the following persons and bodies: the Minister of State for Culture¹⁴; institutions linked to the Ministry of Culture; State, Municipal and Federal District Secretariats; civil societies or associations.

Proposals for registration must be addressed to the President of the National Historical and Artistic Heritage Institute — IPHAN (Instituto do Patrimônio Histórico e Artístico Nacional). Whoever submits the request must, in principle, prove the cultural value of the element, accompanying the request with the relevant technical documentation. The legislation specifies what should be understood by technical documentation, by establishing that there must be a detailed description of the asset to be registered, with the necessary proofs, in addition to mentioning all information that is culturally relevant to the process.

In order to facilitate and ensure the regularity of this task, the legislation foresees that the administrative registration processes will be supervised by IPHAN. However, if it is impossible for the proponent to instruct the petition, this will be done by other persons and bodies, such as those that make up the Ministry of Culture, the IPHAN units located in the States or entity (public or private), provided that they have specific knowledge about the matter.

Upon completion of the instruction, IPHAN will issue an opinion on the registration proposal; said opinion will be published in the Federal Official Gazette, so that, within 30 days, counted from its publication, eventual manifestations about the process are received. Once this period has elapsed, the existing random manifestations will be assessed and, with or without them, the process will be taken to the decision of the Cultural Heritage Advisory Council. With the registration, the following legal, political and social effects take

¹⁴ Currently, this ministry lost its status, becoming a secretariat linked to the Ministry of Tourism; despite this, the first designation is retained in this text, as it corresponds to the literalness of Decree No. 3551/2000.

place: registration in the corresponding book; designation with the title of “Cultural Heritage of Brazil”; documentation of the element registered by all admitted technical means; conservation of data with the material produced during the instruction of the process; wide dissemination and promotion of the element; receiving the benefits of the policies resulting from the National Intangible Heritage Program — PNPI (Programa Nacional do Patrimônio Imaterial), instituted by the Governing Decree, in which guidelines of its support and promotion policy “are designed to promote social inclusion and improve the living conditions of producers and holders of heritage intangible cultural heritage, and measures that expand the participation of groups”¹⁵.

There are those who add the occurrence of other effects, among which the opening of markets, being eloquent the case of “acarajé” (traditional food of the State of Bahia — Brazil) that, in the face of having been recognized as intangible cultural heritage of Brazil, managed to break the monopoly of an exclusive contract between the International Football Federation (FIFA) and multinationals in the food and beverage industry, obtaining a decision that ensured that it was sold at the soccer stadium in the city of Salvador, which hosted matches for the 2014 World Cup¹⁶. On the other hand, the case is ideal to remember the fear of Freland¹⁷ regarding certain undesired effects such as those resulting from mass tourism that can follow heritage recognition.

It is important to note that the condition of “Cultural Heritage of Brazil”, for the analyzed elements, is not for life. The legislation requires IPHAN to reassess registered cultural assets, at least every ten years, and forward it to the Cultural Heritage Advisory Council to decide on the revalidation of the title. In case of denial, it will still be registered as a memory and cultural reference in the period in which it was valid.

It should be noted that this Brazilian legislation is predominantly descriptive and, therefore, silent on the set of values that permeate and surround the cultural elements that can be recognized, that is, it does not contain directly indicative of respect for human rights, tolerance, diversity, to the environment etc. This is necessary, for example, when even the Supreme Court, having considered the “vaquejada” (game with cattle) unconstitutional, because it is cruel to animals, lawmakers declared it cultural heritage in Brazil, creating an amendment in the Constitution for this purpose.

As a result of this legislation, until May 2020, the following assets have already been registered as intangible cultural heritage in Brazil:

- *Celebrations*: Festa¹⁸ de Sant’Ana de Caicó/RN; Círio de Nossa Senhora de Nazaré/PA; Complexo Cultural do Bumba-meu-boi do Maranhão; Festa do Divino Espírito Santo de Pirenópolis/GO; Ritual Yaokwa do povo indígena Enawene Nawe; e Festa do Divino de Paraty); Procissão do Senhor dos Passos de Santa Catarina;
- *Forms of Expression*: Arte Kusiwa — pintura corporal e arte gráfica Wajãpi¹⁹; Toque dos Sinos²⁰ em Minas Gerais tendo como referência São João del Rey e as Cidades de Ouro Preto, Mariana Cartas Altas, Congonhas do Campo, Diamantina, Sabará, Serro e Tiradentes; Frevo; Jongo do Sudeste; Matrizes do Samba do Rio

¹⁵ Programa Nacional do Patrimônio Imaterial (PNPI) // Instituto do Patrimônio Histórico e Artístico Nacional. IPHAN. Available at: <http://portal.iphan.gov.br/pagina/detalhes/761> (accessed: 06.05.2020).

¹⁶ *Guanais E. Queros H. F. O.* Revista do IPAC. Instituto do Patrimônio Artístico e Cultural da Bahia. Vol. 1. Salvador: SECULT-BA/IPHAN, 2016.

¹⁷ *Freland F.-X.* Capturing the intangible: perspectives on the living heritage. Paris: UNESCO, 2009. P. 23.

¹⁸ “Festa” is a Portuguese word that refers to “popular festivities”.

¹⁹ Body painting and graphic arts.

²⁰ Ringing of the church bells in the mentioned cities.

de Janeiro: partido alto, samba de terreiro e samba-enredo; Samba de Roda do Recôncavo Baiano; Tambor de Crioula do Maranhão; Roda de Capoeira; Marabaixo; Literatura de Cordel;

- *Places*: Cachoeira²¹ do Iauaretê — lugar sagrado dos povos indígenas dos rios Uapés e Papuri; Feira²² de Caruaru/PE; and
- *Knowledge*: Sistema Agrícola Tradicional²³ do Rio Negro; Modo de fazer violão-de-cocho; ofício dos mestres de capoeira; ofício de sineiros; modo artesanal de fazer queijo de Minas nas regiões de Serro e das serras da Canastra e do Salitre/Alto Parnaíba; ofício das baianas de acarajé; ofício das panelleiras de Goiabeiras/ES; modo de fazer renda irlandesa tendo como referência este ofício em Divina Pastora/SE; e saberes e práticas associados ao modo de fazer Bonecas Karajás²⁴.

The first surveys on the subject showed that federal legislation, in terms of general rules, had repercussions in approximately half of the States of Brazil²⁵, and in an unidentified number of Municipalities. This assertion could be called into question by observing Goal 5, of the National Culture Plan, according to which, by 2020, the “National Cultural Heritage System should be implemented, with 100 % of the States and 60 % of the Municipalities with legislation and heritage policies approved”, that is, “in all States and in 3339 cities in Brazil”. In determining the fulfillment of this goal, until 2018, the Federal Secretariat of Culture offers ambiguous information, saying that 26 States and 1768 Municipalities have “cultural heritage legislation approved”, but does not specify whether this legislation includes the ICH; in addition, the aforementioned body highlights that the measurement of the goal “does not present data from States or Municipalities that have legislation and heritage policy, but only if there is heritage legislation”²⁶.

With the internalization of the Convention to the Brazilian legal system, the possibility of changes in federal legislation arose, in order to produce a cascade effect for the other entities of the federation (States and Municipalities), since this type of international document has, in the country, in the face of a decision by the Supreme Court, a supra-legal force, hierarchically positioned between the Constitution and the laws. This hypothesis, therefore, needs to be investigated, and it will be in the next topic.

3. State responsibilities

The safeguarding of intangible cultural heritage must correspond to measures aimed to ensure its viability, such as identification, documentation, research, preservation, protection, promotion, enhancement, diffusion — essentially through formal education and non-formal — and revitalization of this heritage in its various aspects. Such measures are the direct responsibility of the States, but they must be carried out with the participation of the relevant communities, groups, and non-governmental organizations and, when appropriate, the individuals who create, maintain and transmit this heritage and who are actively associated with its management. For these, and especially for communities

²¹ Waterfall.

²² Popular Market.

²³ Traditional agricultural system of Rio Negro (Brazilian Amazon).

²⁴ These lists can be viewed updated on the website: www.iphan.gov.br (accessed: 25.04.2020).

²⁵ Castro M. L. V., Fonseca M. C. L. Patrimônio Imaterial no Brasil. Brasília: UNESCO, Educarte, 2008.

²⁶ Secretaria Especial da Cultura. Plano Nacional de Cultura. Available at: <http://pnc.cultura.gov.br/category/metasp/5> (accessed: 25.04.2020).

and NGOs, Kono²⁷ and Zingari²⁸ advocate more participation, as communities are truly responsible for intangible cultural heritage and NGOs for the propulsion of activities and demands in face of the constituted authorities. Blake²⁹ adds, regarding the Convention, that communities are still in the “infantile” stage, reinforcing the need to increase their participation, assuming that this way they will acquire maturity to exercise their role in safeguarding activities.

In addition, international cooperation and assistance for the exchange of information and experiences, the development of common initiatives, and the creation of mechanisms to support States that, based on their national norms, legislated or resulting from customary practices, can be activated, recognizing that the safeguarding of intangible cultural heritage is a matter of general interest to humanity and, as a result, undertake to cooperate on a bilateral, sub-regional, regional and international level, in the aforementioned area.

Being more specific about what should be done, the Convention, within a range that contemplates many other possibilities of protection at the international level³⁰, specifies some instruments, activities, and behaviors, aiming at multiple purposes, which range from knowledge to promotion, but whenever possible with the participation of interested parties and respect for their practices.

Thus, to ensure identification, it is necessary to create inventories, regularly updated; these instruments go beyond mere census. There is an understanding that the fact that an intangible cultural asset appears on the list of inventories as having a different cultural value, this represents more than knowledge and is configured as recognition and increases the feeling of importance for those directly interested, for the society in which it operates and for the others with which it relates.

In order to ensure the safeguarding, development and enhancement of the intangible cultural heritage, the States, which may eventually receive international assistance, through the Convention have also committed themselves to: adopting a planned and integrated policy as a whole for public policies; create or designate specific organism(s) to deal with the matter; foster scientific, technical and artistic studies, as well as research methodologies on the subject; adopt the appropriate legal, technical, administrative and financial measures to, in addition to instrumentalizing the aforementioned actions, stimulate tradition and guarantee access to the heritage in question, including the natural spaces and places of memory essential to it, respected, as much as possible, the customs that are inherent to them. Such actions must present periodic reports, to be analyzed by the body designated in the Pact under study, namely, the Management Committee and, based on its report, to the General Assembly.

However, the participants of the Convention reveal that the insufficiency of the actions of the law, the economy and technologies for such an important and delicate purpose, by advocating values such as education, awareness and capacity building (training), emphasizing the need to specific programs, including by non-formal means, aimed at young people, communities and groups involved.

²⁷ Kono T. Convention for safeguarding of intangible cultural heritage — unresolved issues and unanswered questions // *Intangible Cultural Heritage and Intellectual Property* / ed. by Toshiyuki Kono. Antwerp; Oxford; Portland: Intersentia, 2009. P. 30.

²⁸ Zingari V. L. Ascoltare i territori e le comunità — le voci delle associazioni non governative (ONG) // *Il patrimonio culturale immateriale — Venezia e il Veneto come patrimonio europeo* / ed. by M. L. P. Forlati. Venezia: Edizioni Ca' Foscari, 2014. P. 71.

²⁹ Blake J. *International cultural heritage law*. Oxford: Oxford University Press, 2015. P. 185.

³⁰ Mucci F. *La diversità del patrimonio e delle espressioni culturali nell'ordinamento internazionale — da “ratio” implicita a oggetto diretto di protezione*. Napoli: Editoriale Scientifica, 2012. P. 167.

Furthermore, they understand that the feeling of co-responsibility of the entire social group must be developed, by emphasizing the obligation to keep the public informed of the threats that affect the heritage and, in a preventive or restorative reaction to them, of the activities carried out to protect it.

For the present study, it should be noted that the Convention assigns its Article 35 specifically to discipline as it should be applied in “federal or non-unitary constitutional systems”, of particular interest for the research now carried out, given the characteristics of the political organization of Brazil (Federation). For these States, it has been established that the provisions of the Convention within the competence of the central government, the obligations of the federal power will be identical to those of States that are not federal states; and with respect to the provisions of which application is attributed to each of the constituent States, countries, provinces or cantons, which, as a result of the constitutional regime of the federation, are not obliged to take legislative measures, the federal government will communicate them, with a favorable opinion, to the competent authorities of sub-national entities, with their recommendation for approving the mentioned policies.

In more accessible words, in complex (non-unitary) states, the Convention establishes two types of obligations for the central government, depending on whether, as in the matter of protecting intangible cultural heritage, it is the competence of the central entity or fractional entities. When the central government is in charge, it responds to the international community as if it were a unitary state; in case of sub-national entities in charge, the Federal Union will internally encourage compliance with the Pact. The Convention does not make it clear what the allocation is in the case of shared powers (legislative and administrative), it should be said, in this case, that the central power has both functions.

Conclusions

From the framework presented, we start to contrast how Brazilian law, practices and cultural policies with the precepts of the Convention, in order to detect their similarities and divergences and to observe the fulfillment of the two objective outlines for this research.

In legal-normative terms, it can be said that the Brazilian legislation regarding the ICH has not been revoked; in fact, it was fully received; however, it should have been expanded to include the axiological dimension of the Convention, according to which cultural recognition cannot include elements and manifestations incompatible with human dignity, sustainable development, peace and respect between human beings and between them and with other beings and the environment.

As for the political impact, despite Brazil's recognition of good practice in terms of safeguarding the ICH, in recent years these policies have lost priority, with budget cuts, political discrediting of cultural bodies in general and of heritage specifically.

Furthermore, the safeguarding role that the central government should have in the face of other entities of the federation, despite being provided for in the Law establishing the National Culture Plan, is a policy that is at very unsatisfactory levels.

In summary, the entire cultural and political environment is favorable to full compatibility between the UNESCO Convention and Brazilian law, but the valuation and integration aspects of public policies within the scope of the Brazilian federation, which the international document aims to disseminate, are still underutilized in Brazil.

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Охрана нематериального культурного наследия в Бразилии в соответствии с Конвенцией ЮНЕСКО

Ф. У. Куна Фило

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Бразилия представляет собой сложную федерацию, образованную 26 штатами, федеральным округом и 5570 муниципалитетами, все они автономны и разделяют полномочия и обязанности во многих законодательных и административных вопросах, таких как культура и культурное наследие. 5 октября 1988 г. страна приняла свою первую действительно демократическую и плюралистическую Конституцию, называемую «гражданской конституцией», так как она уделяет особое внимание вышеупомянутым вопросам и основывается на том, что культурное наследие включает в себя материальные и нематериальные элементы, отсылающие к идентичности, образу жизни и памяти различных групп, образующих бразильское общество; в тексте Конституции упоминаются народная, коренная и афробразильская культуры. С 1937 г. в стране действует национальный закон об охране материального культурного наследия, однако Декрет об охране нема-

териального наследия действует только с 2000 г. Этот Декрет предшествует Конвенции ЮНЕСКО 2003 г. по данному вопросу, инкорпорированной в бразильское законодательство в 2006 г., когда этот международный регламент приобрел статус наднационального для рассмотрения вопросов, касающихся прав человека. Содержание Конвенции не привело к отмене ранее существовавших в Бразилии правил, однако показало, что эти правила нуждаются в дополнении по двух направлениям — юридическому и политическому. Во-первых, нужно сформулировать гуманитарные и природоохранные ценности, которые необходимы в политике признания культурных проявлений и их элементов. Во-вторых, нужно учитывать характерную для кооперативного федерализма черту: центральное правительство должно стимулировать универсализацию этой политики в других субъектах бразильской федерации, чего в настоящее время не происходит.

Ключевые слова: нематериальное культурное наследие, охрана, ЮНЕСКО, Международная конвенция об охране нематериального культурного наследия, сравнение, бразильское право, конституционное право.

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Куна Фило Франсиско Умберто — PhD, профессор, Университет Форталезы, Бразилия, 60811-905, Форталеза, Эдсон Кейрос, пр. Вашингтон Суарес, 1321; humbertocunha@unifor.br

Safeguarding Intangible Cultural Heritage and the environment

Benedetta Ubertazzi

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The Convention for the Safeguarding of the Intangible Cultural Heritage (hereafter known as the Convention) was adopted within the framework of UNESCO in October 2003. Article 2 of the Convention establishes that intangible cultural heritage (ICH) must be compatible with sustainable development. Sustainable development in relation to culture consists of three intertwined dimensions: society, environment, and economy. Chapter 6 of the Operational Directives for the Implementation of this Convention establishes a framework related to “environmental sustainability”. The framework consists of three pillars. The first pillar relates to “environmental impacts in the safeguarding of intangible cultural heritage”. The second pillar relates to “knowledge and practices concerning nature and the universe”. The final pillar concerns “community-based resilience to natural disasters and climate change”. Through analysis of the Convention, the Convention’s Operational Directives and elements of intangible cultural heritage inscribed on the Representative List of the Convention, this article will provide case studies where, in line with these pillars, intellectual property rights, particularly geographical indications, aim to support environmentally friendly practices. In so doing, this article will also seek to show that intellectual property rights can recognise communities as bearers of knowledge about nature and as essential actors in sustaining the environment. Indeed, this work will suggest that although intellectual property rights, if not carefully drafted, can pose risks for environmental sustainability, when correctly adopted they have the capacity to empower communities. Thus, the aim of this work is to show how intellectual property rights can be tools to facilitate safeguarding and sustainability for both intangible cultural heritage and the environment.

Keywords: cultural heritage, environmental sustainability, intellectual property rights, UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, intangible cultural heritage, community.

Introduction

The Convention for the Safeguarding of the Intangible Cultural Heritage (ICH) was adopted within the framework of UNESCO in October 2003 (2003 Convention). Article 2 of the Convention establishes that ICH must be compatible with sustainable development¹. Sustainable development consists of three intertwined dimensions: society, environment and economy.

Chapter 6 of the Operational Directives for the Implementation of this Convention (OD) establish a framework related to “environmental sustainability” (Para. 188 OD)².

Benedetta Ubertazzi — Post. PhD, Tenured Aggregate Professor, University Milan-Bicocca, 1, Piazza dell’Ateneo Nuovo, Milan, 20126, Italy; Contracted Associate Professor, St. Petersburg State University, 7–9, Universitetskaya nab., St. Petersburg, 199034, Russian Federation; benedetta.ubertazzi@ubertazzi.it

¹ Convention for the Safeguarding of the Intangible Cultural Heritage, adopted on 17 August 2003. Available at: <https://ich.unesco.org/en/convention> (accessed: 08.07.2019).

² Operational Directives for the Implementation of the Convention of the Safeguarding of the Intangible Cultural Heritage, adopted on 19 June 2008 and last updated on 6 June 2018 // UNESCO. Available at: https://ich.unesco.org/doc/src/ICH-Operational_Directives-7.GA-PDF-EN.pdf (accessed: 08.07.2019).

The framework consists of three pillars. The first pillar is the recognition by States Parties of “environmental impacts in the safeguarding of intangible cultural heritage” (Para. 190 OD). As part of this theme, States should also encourage “environmentally friendly practices” and “mitigate any possible harmful impacts” (Para. 190 OD). The second pillar, “knowledge and practices concerning nature and the universe” (Convention for the Safeguarding of the Intangible Cultural Heritage. Art. 2.2(d)), encourages the recognition of “communities, groups and individuals as the bearers of knowledge about nature and the universe and as essential actors in sustaining the environment” (Para. 189 OD). The third and final “pillar” of this framework relates to “community-based resilience to natural disasters and climate change” (Ch. VI.3.3 OD), according to which States Parties should “fully integrate communities, groups and individuals who are bearers of such knowledge into systems and programmes of disaster risk reduction, disaster recovery and climate change adaptation and mitigation” (Para. 191(c.ii) OD).

The purpose of this paper is to evaluate the relationship between intangible cultural heritage, intellectual property and environmental sustainability. Previous research in this field, such as Janet Blake’s chapter “Cultural Heritage and the Environment”³ has addressed the common ground shared by environmental and intangible cultural heritage interests, while Lucas Lixinski’s *International Heritage Law for Communities: Exclusion and Re-Imagination*⁴ provides a more critical evaluation of the relationships between intangible cultural heritage and sustainable development. This paper seeks to build on such past research and focus on the positive relationships between environmental and intangible cultural heritage interests. It also seeks to address the role of intellectual property rights as practical mechanisms that can facilitate the mutual sustainability of both environment and intangible cultural heritage. The approach of this paper is to establish a framework for environmental sustainability in an intangible cultural heritage context. This framework shall be derived principally from the 2003 Convention and its Operational Directives, as detailed in this introduction, as well as case studies of elements inscribed on the Representative List of the 2003 Convention. Once this framework has been established, this paper will then investigate the ways in which intellectual property rights can support environmental sustainability.

1. Intangible Cultural Heritage and sustainable environmental development

The contribution of ICH to environmental sustainability is recognised in many fields such as biodiversity conservation, sustainable natural resource management and natural disaster preparedness and response. As a living heritage, the body of knowledge, values and practices of intangible cultural heritage related to environment has the capacity to evolve and adapt for a more sustainable use of natural resources when necessary, permitting communities to better face natural disasters and the challenges of climate change. Furthermore, indigenous and local communities play a central role in the conservation and sustainable use of biological diversity⁵. In Kenya, for example, Kikuyu women are central to the breeding of food crops and the preservation of seeds. While human activities are consuming natural resources at increasing and unsustainable rates at the global level,

³ Blake J. *International Cultural Heritage Law*. Oxford: Oxford University Press, 2015.

⁴ Lixinski L. *International Heritage Law for Communities: Exclusion and Re-Imagination*. Oxford: Oxford University Press, 2019.

⁵ Blake J., Lixinski L. *The 2003 UNESCO Intangible Heritage Convention: A Commentary*. Oxford: Oxford University Press, 2020. P. 124–127.

many local communities have developed lifestyles and intangible cultural heritage practices that are intricately linked to nature and that respect the environment⁶.

Further to the second pillar concerning “knowledge and practices concerning nature and the universe”, State Parties are encouraged to “recognize communities, groups and individuals as the bearers of knowledge about nature and the universe and as essential actors in sustaining the environment” (Para. 189 (a) OD). Further, this recognition must include that which is “conducted by the communities and groups themselves, aimed at understanding systems of biodiversity conservation, natural resource management and sustainable resource use, that are recognized by communities, groups and, in some cases, individuals as part of their intangible cultural heritage” (Para. 189 (b) OD). Additionally, while this traditional knowledge must be accessible and transmitted for the purposes of “international cooperation” (Para. 189 (b) OD), “customary practices governing access to specific aspects of it” and the “natural spaces whose existence is necessary for expressing the intangible cultural heritage” must be continually preserved (Para. 189 (c) OD).

Additionally, States Parties are instructed to “recognize the potential and actual environmental impacts of intangible cultural heritage practices and safeguarding activities, with particular attention to the possible consequences of their intensification” by supporting community-based studies of these impacts and encouraging “environmentally friendly practices and to mitigate any possible harmful impacts” (Para. 190 OD).

Lastly, and following the same framework of community engagement and protection, along with dissemination of the traditional knowledge and practices concerning the environment that is respectful of the groups and communities involved, State Parties must recognise “knowledge and practices concerning geoscience, particularly the climate”, and “harness their potential to contribute to the reduction of risk, recovery from natural disasters, particularly through the strengthening of social cohesion and mitigation of climate change impacts” (Para. 191 OD). In order to accomplish the successful recognition and implementation of these efforts, in line with pillar three, State Parties are also instructed to “fully integrate communities, groups and individuals who are bearers of such knowledge into systems and programmes of disaster risk reduction, disaster recovery and climate change adaptation and mitigation” (Para. 191 (C.ii) OD).

Thus, the similarities between ICH and the environment are clear: both constitute exhaustible resources that need to be preserved for future generations⁷ and both are the subject matter of fundamental human rights, namely, the right to culture and cultural diversity and the right to a safe environment and to health⁸. The 2003 Convention only safeguards ICH. ICH, however, includes natural elements, as highlighted in art. 2.1 of the 2003 Convention, according to which “intangible cultural heritage... is constantly recreated by communities and groups in response to their environment, their interaction with nature”. Article 2.2(d), in addition, indicates that among the domains of ICH are those related to “knowledge and practices concerning nature”. By safeguarding ICH, the 2003 Convention therefore also indirectly preserves the environment⁹. In this framework, the relationship

⁶ Intangible Cultural Heritage and Sustainable Development // UNESCO. Available at: <https://ich.unesco.org/doc/src/34299-EN.pdf> (accessed: 10.07.2019).

⁷ *Blake J.* On Defining the Cultural Heritage // *International and Comparative Law Quarterly*. 2000. No. 49 (1). P. 80.

⁸ *Zagato L.* La Convenzione sulla protezione del patrimonio culturale intangibile // *Le identità culturali nei recenti strumenti UNESCO. Un approccio nuovo alla costruzione della pace? / ed. by L. Zagato. Padova: CEDAM, 2008. P. 63–66; Blake J.* On Defining the Cultural Heritage. P. 80; *Pinton S.* La tutela della identità culturale a fronte dei cambiamenti climatici nel diritto internazionale // *Le identità culturali nei recenti strumenti UNESCO... P. 123.*

⁹ *Marrie H.* The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the Protection and Maintenance of the Intangible Cultural Heritage of Indigenous Peoples // *Intangible Heritage / eds L. Smith, N. Akagawa. Abingdon: Routledge. P. 183.*

between ICH and the environment was correctly defined as one of the most “fundamental” aspects of ICH¹⁰. There are three typical situations that elucidate this relationship¹¹.

The first situation that highlights the relationship between ICH and the environment occurs when a balanced relationship between ICH and nature exists, so that by safeguarding the former the latter is also preserved and vice versa¹². This situation of balance manifests itself in the framework of the Convention in two different ways.

First, nominations from States may emphasise the relationship between the element to be inscribed and nature. The element “Naadam, Mongolian traditional festival”, nominated by Mongolia as a nationwide festivity that takes place in Mongolia every year in July, was described as involving a set of “rituals and customs” that “accentuate respect for nature and the environment”¹³. The element “Mediterranean Diet” is described as “a way of life guided by respect for diversity”¹⁴. Similarly, the element “Falconry, a living human heritage” nominated by Germany, Saudi Arabia, Austria, Belgium, United Arab Emirates, Spain, France, Hungary, Italy, Kazakhstan, Morocco, Mongolia, Pakistan, Portugal, Qatar, Syrian Arab Republic, Republic of Korea, and Czechia, is described as a practice “associated with nature conservation”, where “falconers train, fly and breed birds of prey (which alongside falcons, includes birds such as eagles and hawks), developing a bond with them and becoming their main source of protection”¹⁵. Also, the practice is described as “providing a connection to the past, particularly for communities for which the practice is one of their few remaining links with their natural environment and traditional culture”¹⁶.

Secondly, nominations of an element in the UNESCO Lists may highlight the obligation that the nominating States undertake to adopt measures to safeguard the nature and the proposed element. For instance, the element “Indonesian Angklung”, nominated by Indonesia, is a musical instrument consisting of two to four bamboo tubes suspended in a bamboo frame, bound with rattan cords. Indonesia undertook to safeguard the cultivation and in general the culture related to the use of the bamboo wood¹⁷. Again, with regard to the element “Falconry, a living human heritage”, its nominating States undertook to preserve falcons.

The second situation that highlights the relationship between ICH and the environment occurs when certain cultural traditions are incompatible with the protection of nature. This may happen for instance with regards to practices that are potentially destructive of animal and plant species, or to practices implying a “massive degradation of natural resources”¹⁸. The 2003 Convention establishes that “for the purposes of this Convention,

¹⁰ *Scovazzi T.* The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage // *The Legal Protection of the Intangible Cultural Heritage* / ed. by P. L. Petrillo. New York: Springer, 2019. P.4.

¹¹ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Fifth session, Nairobi, Kenya, 15 to 19 November 2010. 5.COM. See: *Chefs-d’oeuvre du patrimoine oral et immatériel de l’humanité P.20* // UNESCO. Available at: https://unesdoc.unesco.org/ark:/48223/pf0000147344_fre (accessed: 10.07.2019); *Goswami R.* Knowledge and Change, the Intangible and Development. Available at: <https://www.resilience.org/stories/2010-11-27/knowledge-and-change-intangible-and-development> (accessed: 10.07.2019).

¹² *Goswami R.* Knowledge and Change, the Intangible and Development.

¹³ Convention for the Safeguarding of Intangible Cultural Heritage, Fifth session, Nairobi, Kenya, 15 to 19 November 2010. 5.COM. 6.32. P.37 // Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage. Available at: <https://ich.unesco.org/doc/src/ITH-10-5.COM-CONF.202-DECISIONS-EN.doc> (accessed: 09.04.2020).

¹⁴ *Ibid.* 6.41. P.45.

¹⁵ Falconry, a living human heritage // UNESCO. Available at: <https://ich.unesco.org/en/RL/falconry-a-living-human-heritage-01209> (accessed: 09.04.2020).

¹⁶ Convention for the Safeguarding of the Intangible Cultural Heritage, Fifth session, Nairobi, Kenya, 15 to 19 November 2010, 5.COM. 6.45. P.37.

¹⁷ *Ibid.*

¹⁸ *Blake J.* On Defining the Cultural Heritage. P.80.

consideration will be given solely to such intangible cultural heritage as is compatible with... the requirements of... sustainable development” (art. 2.1). In addition, the Convention recalls “existing international human rights” (preamble) and declares that it will safeguard ICH only when it is “compatible” with those rights (art. 2.1). It is apparent, that the right to a healthy environment constitutes a human right of a universal nature.

The third situation that highlights the relationship between ICH and the environment occurs in the opposite case, namely when natural phenomena may damage or prejudice ICH. For this reason, the Committee defined the urgent context that is necessary to have the Secretariat examine an international assistance request with priority¹⁹. This urgent context according to the Committee occurs when a State party cannot overcome alone an “insurmountable situation” which follows from “a calamity” or “a natural or environmental catastrophe”²⁰. Similarly, the inscription of an element in the Urgent Safeguarding List is conditioned to the fulfilment of six fundamental criteria, among which the second concerns the risk of disappearance of the element consequent to relevant environmental transformations (Ch. (I.1 U.2(b)) OD). The following pages will further elaborate on the three-tiered framework in relation to environmental sustainability.

2. Intellectual property rights and environmental sustainability

The three pillars of the framework established by the Operational Directives for the Implementation of the Convention for the safeguarding of the Intangible Cultural Heritage relate to “environmental impacts in the safeguarding of intangible cultural heritage”, communities as “the bearers of knowledge about nature and the universe and as essential actors in sustaining the environment” and “community-based resilience to natural disasters and climate change”. These pillars provide vital conceptual frameworks for understanding the relationship between intangible cultural heritage and the environment, which will be explored in greater depth, with the aid of case studies, in this section.

The relationship between sustainability and intellectual property rights (IPRs) remains a source of academic discussion²¹. In relation to the sustainable development of ICH, IPRs are most commonly analysed with regard to economic sustainable development²². However, this paper seeks to address the implications of IPRs as safeguarding tools that contribute to environmental and social sustainability. It is undeniable that IPRs can pose risks for such sustainability. As the example of Bitto Cheese reveals, when GIs are registered without the participation of the whole ICH-practising community and when they are registered with specifications that do not accurately reflect ICH, such protection can be actively detrimental to the safeguarding and sustainability of ICH.

Bitto cheese has been produced since at least the 15th century and is a product of the Bitto Valleys in Valtellina (Sondrio province, Lombardy). In April 1995, Bitto cheese obtained

¹⁹ General information for the fifth session of the Committee // UNESCO. Available at: <https://ich.unesco.org/en/general-information-00330> (accessed: 15.09.2019).

²⁰ Convention for the Safeguarding of Intangible Cultural Heritage, Fifth session, Nairobi, Kenya, 15 to 19 November 2010, 5.COM. 10.2. P.37.

²¹ Important works on this topic include: Cultural Heritage in the European Union: A Critical Inquiry into Law and Policy / eds A. Jakubowski, K. Hausler, F. Fiorentini. Brill: Leiden. 2019; *Martinet L.* Traditional Cultural Expressions and International Intellectual Property Law // International Journal of Legal Information. 2019. No. 47 (1). P.6–12.

²² A recent development of immense interest to those interested in the economic sustainable development of ICH is ongoing work by the Evaluation Body, which is currently working on the development of a guidance document on commercialization and the prevention of decontextualization of intangible cultural heritage. See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage. Convention for the Safeguarding of Intangible Cultural Heritage, Fourteenth session, Bogotá, Colombia, December 9 to 14, 2019, 14.COM 10.

a PDO; as a result, the new Consortium of Valtellina Casera and Bitto was founded. The approved product specification introduced significant changes to traditional Bitto making processes. First, the PDO specification enlarged the production area to the entire Sondrio province, promoting the transfer of knowledge related to Bitto production to other areas of the province where Bitto-like cheese had never previously been produced. Second, the specification removed distinctions previously made between Bitto cheese and other cheeses from the province. Third, the production process mandated by the PDO specification did not require that the cheese must be produced in Alpine pastures during the Summer. Finally, the percentage of goat milk allowed was reduced from the traditional 20–30 to only 10 per cent, with an option of not using goat milk at all. The PDO specifications also permitted the use of animal fodder and enzymes and introduced various other provisions that overall represented a remarkable deviation from tradition. Rather than protecting Bitto cheese and the communities that had traditionally produced it, the PDO caused division, with some Bitto Valleys producers founding a Bitto Committee to safeguard the historical production method and area in 1994. Unable to use the Bitto name due to the presence of the PDO, producers making cheese according to traditional Bitto-making methods and located in the Bitto Valley were no longer allowed to use the Bitto name for their product. In the years since the registration of the PDO, there have been multiple conflicts between the PDO consortium and cheese producers from the Bitto Valley²³.

This paper, however, advances the argument that IPRs, particularly collective trademarks and geographical indications (GIs), can be an excellent tool for encouraging environmentally friendly practices in line with the first pillar, “environmental impacts in the safeguarding of intangible cultural heritage”. This paper will focus its attention predominantly on GIs²⁴. GIs can be environmentally friendly and compatible with the maintenance of biodiversity and landscape. Such GIs are referred to as “Green GIs”²⁵ and are considered capable of providing prospects for new forms of rural development, community autonomy, preservation of cultural traditions, and even conservation of biological diversity when the production of goods encourages the stewardship rather than the depletion of the natural resources from which they are made²⁶. Indeed, it has been claimed that “sustainability is embedded in GI concepts”, since GIs have a *terroir* component²⁷ (which is key to the preservation of local resources), allow collective governance and are a market tool combined with public goods²⁸.

²³ For a full account of these conflicts, see: *Rinaldo D., Pitardi V.* Open conflict as differentiation strategy in geographical indications: the Bitto Rebels case // *British Food Journal*. 2019. No. 121 (12). P.3102–3118.

²⁴ Using the term “GI” as an umbrella both for GIs as a specific right and a category, including other quality schemes, such as “Protected Designation of Origin” or “Appellation of Origin”. For more content on GIs and ICH, see: *Ubertazzi B.* EU Geographical Indications and Intangible Cultural Heritage // *International Review of Intellectual Property and Competition Law* (IIC). 2017. P. 1–26.

²⁵ *Ubertazzi B.* Sustainable development and Intellectual Property Rights: The case of Patachitra and GI. Available at: <http://hipamsindia.org/sustainable-development-and-intellectual-property-rights-the-case-of-patachitra-and-gi> (accessed: 18.02.2021).

²⁶ *Coombe R., Ives S., Huizenga D.* Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Products // *The Sage Handbook of Intellectual Property* / eds M. David, D. Halbert. London: Sage, 2014. P.207.

²⁷ Defined as “the essential or exclusive relationship between a product and its place of origin due to the specificities of the local environment and/ or other natural characteristics [i. e. physical factors], and to the local know-how, [i. e. the human factor]. This combination of physical and human elements is known as *terroir*” (*Zappalaglio A., Guerrieri F., Carls S.* Sui Generis Geographical Indications for the Protection of Non-Agricultural Products in the EU: Can the Quality Schemes Fulfil the Task? // *International Review of Intellectual Property and Competition Law*. 2019. No. 51 (1). P.35).

²⁸ *Samper L. F.* GIs, a strategic asset for sustainable development strategies, speaking at How GI strategies can help developing countries pursue sustainability objectives // *oriGIn* FAO Webinars. 2020.

With regard to terroir, GI products are the result of an interaction between the local environment and local wisdom: they combine a production area (reflecting the influence of the environment/climate on the product's development and characteristics) with the know-how of producers (such as techniques, traditional production methods and a connection to local wisdom and heritage). Thus a GI product is origin-linked, with a name and reputation associated to its origin²⁹. The link between the environment and the product is therefore integral to the nature of a GI product and as such sustainability of the environment is paramount for the sustainability of the product.

Among the primary justifications for using IPRs on traditionally produced goods is that GI specifications (and trademarks regulations) can be environmentally friendly and compatible with the maintenance of biodiversity and landscape. These specifications can also be flexible to ensure that they can adapt to changing circumstances and conditions — “sustainability is a pathway and not a state”³⁰ and specifications must be flexible to avoid freezing and standardization of intangible cultural heritage and to remain responsive to a changing environment.

Geographical Indications are also important tools for ensuring sustainability for the environment and ICH because they are collective rights. As such, GIs have the ability to represent a large number of stakeholders in a territory, allowing a strong and representative GI governance to agree on priorities (bottom-up sustainability) and meaning that they can represent pride and identity in the territory. Thus, “GIs present long-term benefits as they create value, enhance the marketability of goods and give an edge to developing countries to promote exports and rural development, thus generating sustainability and inter-generational equity”³¹. Additionally, Green GIs enable producers to secure the premium prices, which may be grounded on the fact that the relevant specification requires that the traditionally produced goods at stake are free from contaminants, such as herbicides and pesticides.

An example of a “Green” EU GI specification is that of jersey royal potatoes, which indicates that “Growers stand their seed growing on the second shoot and by far the majority of the crop is planted by hand. While artificial fertilisers are used, locally collected seaweed is used extensively, not only does it provide an excellent source of organic fertiliser, the salt content of the seaweed it is believed does much to enhance the flavour”³². Similarly, the EU GI specification of “Diepholz Moor Lamb” indicates that “The Diepholzer moorland sheep eat heather, bent, cotton grass, sedge and various herbs and grasses; also pine, birch, frángula and other woody plants. By means of selective herding, the sheep are pastured mainly on land on which no mineral fertiliser or plant protection product has been applied. Intensive fattening is not desirable and is therefore avoided, although in winter their feed is supplemented with feed produced on the farm”³³. In these examples of specifications, the capacity of GIs to recognize (and due to the nature of the GI itself, protect) positive environmental practices is evident. Although all three examples are GIs,

Available at: <https://www.origin-gi.com/content-page/item/15338-individual-webinars-programs.html> (accessed: 18.02.2021).

²⁹ Passeri S. How GI strategies can help developing countries pursue sustainability objectives // origin GI In FAO Webinars. 2020. Available at: <https://www.origin-gi.com/content-page/item/15338-individual-webinars-programs.html> (accessed: 18.02.2021).

³⁰ Samper L. F. GIs, a strategic asset for sustainable development strategies...

³¹ Ibid.

³² Specifications for the Protected Geographical Indication Café de Colombia // European Commission. Available at: http://ec.europa.eu/agriculture/quality/door/documentDisplay.html?chkDocument=1619_1_en (accessed: 08.07.2019).

³³ Ibid.

other IPRs, including the regulations of collective trademarks, for instance, are equally capable of recognizing and protecting environmentally friendly practices.

Well-drafted IPRs can be flexible, combining traditional production methods with an environmental conscience, as shown by the EU GI specification of Cafe De Colombia, which indicates that “[t]here are two methods for removing the mucilage: fermentation and mechanical removal, which uses the ‘Becolsub’ machine, or environmentally-friendly wet-method processing of coffee. <...> The process... known as the environmentally-friendly or Becolsub process, created by Cenicafé and approved by the Federation following analyses of its impact on the quality of the coffee... consists of a similar wet process but considerably reduces the use of water, which is a scarce resource in some regions. Unlike the earlier method of removing mucilage by fermentation, here it is removed by the mucilage removal equipment designed by Cenicafé. Despite the fact that the environmentally-conscious method reduces water consumption it does not affect the characteristic quality of Café de Colombia”³⁴.

GIs also provide consumer confidence in the purity of traditional products, as well as in their traceability. Thus, while securing higher returns for producers, GIs play an important role in achieving rural development and the maintenance of rural landscapes. Even though environmental sustainability was not the primary aim of GIs development, given GIs “derive from local, including natural resources... environmental benefits are increasingly seen as a positive potential GI externality”³⁵. One example of the benefits that can indirectly arise from GIs is revealed in empirical studies of the European olive oil industry. Characterized by the extensive use of GIs, studies have revealed that this industry is “a good example of agriculture with many associated positive environmental impacts such as lower rates of soil erosion, improved fire-risk control, water efficiency, lower pollution and higher levels of biodiversity and genetic diversity in olive-tree varieties”³⁶.

A further example of a GI that supports environmental sustainability can be seen in the Khao Hom Mali Thung Kula Rong-Hai Rice (Thailand) case study. In this case a GI was registered in April 2006. Since the registration of the GI, two environmental benefits have been noted: first, a reduction in transport — the GI is more sustainable than its reference product in terms of distance travelled (–65 %) rice seeds to milled rice distribution units and in terms of emissions released at the transportation stage (–10 %); and second, water footprint — less water is used for a higher output of the GI product³⁷. Such environmental benefits, it has been noted, are consistent with Sustainable Development Goal 15 “Life on Land”³⁸.

In addition to recognizing and supporting positive environmental practices, the GI specification recognizes the community as bearers of knowledge about nature and essential actors in sustaining the environment. As such, the Indian GI specification of “Coorg Arabica Coffee” is an example of how IPRs can support the second pillar of the ODS, “knowledge and practices concerning nature and the universe”. In particular, the specification indicates that the “modern method of cultivation in Coorg Coffee cultivation is an integral part of the lives of the people of Kodagu district and forms the backbone of the economy of the district till today. Increased productivity levels are achieved through the judicious management of resources and by taking advantage of favourable climatic conditions. The native method of cultivation is still followed but with the advent of new technology and

³⁴ Ibid.

³⁵ *Blakeney M. L.* Food Safety and Free Trade: Geographical Indications and Environmental Protection // *Frontiers of Law in China*. 2017. No. 12 (2). P. 162.

³⁶ Ibid. P. 167.

³⁷ *Napasintuwong O.* PGI Hom Mali Thung Kula Rong-Hai Rice in Thailand // *Sustainability of European Food Quality Schemes* / eds F. Arfani, V. Bellassen. New York: Springer, 2019. P. 87–109.

³⁸ See: *Passeri S.* How GI strategies can help developing countries pursue sustainability objectives.

improvement in agricultural science, few methods have been modernised. <...> Different soil management practices are also followed such as i) soil conservation measures, ii) soil moisture conservation measures and iii) drainage measures. Native methods like pruning, weeding and manuring is also followed for sustainable productivity of coffee³⁹. In addition, the specification highlights that “the coffee farmers growing Arabica and Robusta under shade trees provide ecosystem services through their farms and protect biodiversity. The shade also means that there is natural mulching from the leaves that fall onto the ground, which in turn helps avoid the use of strong fertilizers and pesticides”⁴⁰.

As this example shows, IPRs are capable of helping to protect the role of communities’ knowledge and adaptation strategies. This knowledge and capacity to adapt often form the basis of communities’ resilience in the face of natural catastrophes and climate change. As already mentioned, traditional communities typically manage local resources and the environment in a highly sustainable manner. They do so through the application of sophisticated resource management systems developed through knowledge of the natural environment. Such knowledge is to be intended as “a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use”⁴¹. For example, “the Turkana of northwestern Kenya have a highly sophisticated natural resource management system that has enabled them to survive in an environment that many would consider extremely hostile”⁴². “Indigenous and traditional groups empowered with rights, including IPRs, to control access to their lands and communities have a better chance of preventing misappropriation of their knowledge related to the sustainable use of the environment, and of negotiating favourable bioprospecting arrangements”⁴³.

A further example of how GIs can support environmental sustainability can be found in the work of the HIPAMS (Heritage Sensitive Intellectual Property and Marketing Strategies) India project⁴⁴. The Indian GI for Bengal Patachitra illustrates how communities with an IPR that protects cultural practices can lead to positive environmental impacts. The word “patachitra” is derived from the Sanskrit term “patta” (cloth) and “chitra” (which means painting). It is practised in several regions of India, with specific Patachitra styles originating in West Bengal and Odisha. Traditionally, the paintings have depicted mytho-

³⁹ Application for the Registration of Geographical Indication: Coorg Arabica // Indian Geographical Indications Registry. Available at: <http://ipindiaservices.gov.in/GIRPublic/Application/Details/604> (accessed: 15.07.2019).

⁴⁰ Ibid. P.8. Similarly, the EU GI specification for SIERRA DE MAGINA indicates that “los sistemas de no laboreo y semi-laboreo, suelen complementarse con técnicas de prevención de la erosión (pozas, ahoyado, aterezado, albarradas, etc.)” (eAmbrosia — the EU geographical indications register // European Commission. Available at: http://ec.europa.eu/agriculture/quality/door/documentDisplay.html?chkDocument=3209_1_es (accessed: 9.07.2019)).

⁴¹ Johnson M. Lore: Capturing Traditional Environmental Knowledge. Darby: Diane Publ., 1998. P.3–20.

⁴² Duffield G. Harnessing Traditional Knowledge and Genetic Resources for Local Development and Trade. Available at: www.wipo.int/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103975.pdf. P. 14 (accessed: 12.09.2019).

⁴³ Ibid. P. 18.

⁴⁴ The purpose of the HIPAMS project is to “investigate how developing ‘heritage-sensitive’ IP protection strategies can give communities greater control over the commercialisation of their heritage while contributing to its safeguarding and on-going viability”. More information about the project can be found at: Heritage Sensitive Intellectual Property & Marketing Strategies. About. Available at: <http://hipamsindia.org/about> (accessed: 12.04.2020). The project has produced toolkits to support the implementation of heritage-sensitive IP and marketing strategies, which can be accessed at: Heritage Sensitive Intellectual Property & Marketing Strategies. Toolkits. Available at: <http://hipamsindia.org/research-output/toolkits> (accessed: 12.04.2020).

logical stories⁴⁵. The precise nature of this “cloth painting” is set out in greater detail in the GI specification. Colour is a key quality of Bengal Patachitra that is recognized in the specification, which states that “Five basic pigments — White (Sankha), Yellow (Hingula), Black (Kala), Brown (Khayeri), Indigo (Neela) and their combinations are used for colouring”⁴⁶. As the specification goes on to note, “the materials used in the paint are from vegetable, earth and mineral sources”⁴⁷. Traditional, environmentally-friendly paint is, therefore, an integral part of this practice. By stating that Bengal Patachitra must be made using materials sourced in this way the GI recognizes the patachitra community’s knowledge regarding environmentally-sourced paints.

GIs can be used as a tool for the organization and promotion of agricultural value chains. They can create incomes for farmers and other stakeholders in the value chain, such as small processing units and petty traders, and therefore help them to face food lean periods and food and nutrition insecurity. An example of the value of GIs for the sustainability of value chains is “Arijska malina”. In this case study, a PDO was registered in relation to raspberries grown in the fields of Arilje. This PDO has had benefits for all levels of the production chain. For producers, benefits included (i) Certification costs were covered by the processors (ii) The processors (Drenovac, Nectar and other cooling chambers involved) helped stabilize the production process and ensure market outlets, especially in insecure years (iii) Producers were supported to ensure sustainability of production and resources by introducing other voluntary standards (GlobalGAP, organic, etc.; these standards are not compulsory for the PDO Ariljeraspberry, but some producers choose to have them) (iv) In 2020 there were no major losses for producers⁴⁸. For processors, positives of PDO certification have included: (i) developing new final products with added value — made of PDO Arilje raspberry (ii) some products increased sales over 30 % when compared to the similar product in the domestic market (raspberries juice) (iii) during the COVID-19 crisis, Arilje raspberries did not have any losses, and sold for good prices. And finally, for consumers, benefits of the PDO have included (i) In Serbia higher visibility of GI products thanks to final products and labelling of Arilje raspberries at retailer store (ii) Increased interest for “home made” products, and direct linkages with producers (Association of GI products)⁴⁹.

IPRs are also capable of safeguarding ICH in a way that both supports environmental sustainability and is socially inclusive, provided there is a clear framework and vision for the use of IPRs. An example of this relates to the prospective ICH element, “Alpine Food Heritage — Community knowledge, skills, practices and values”. Work on an application to nominate this multinational⁵⁰ element is currently underway and is the legacy of the European Union funded project “AlpFoodway — a cross-disciplinary, transnational and participative approach to Alpine food cultural heritage” (2016–2019). The Alpfoodway project created a sustainable development model for mountain areas based on the preservation and valorization of Alpine Space cultural food heritage and fostered the creation of a transnational alpine identity based on the common cultural values expressed in food

⁴⁵ Medinipur Patachitra // Heritage-sensitive Intellectual Property & Marketing Strategies. 2020. Available at: <http://hipamsindia.org/community/medinipur-patachitra-2> (accessed: 12.04.2020).

⁴⁶ Bengal Patachitra // Geographical Indications Registry. 2016. Available at: <http://ipindiaservices.gov.in/GirPublic/Application/Details/564> (accessed: 12.02.2020).

⁴⁷ Ibid.

⁴⁸ Obradovic A. “PDO Arijska malina” — basis for sustainability and value chain players // Association “Arijska malina” Organisation for PDO management. 2020. Available at: http://www.drenovac.co.rs/img/geo/presentation_eng.pdf (accessed: 26.06.2021).

⁴⁹ Ibid.

⁵⁰ The countries engaged in this application are: France, Italy, Switzerland, Austria, Germany and Slovenia.

heritage. Ultimately, the results of the project have benefitted heritage communities, local development professionals and organizations, cultural institutions, local, regional and national authorities, as well as enhancing protection and conservation of the Alpine Space.

In the context of IPRs that support environmental and social sustainability, one document produced by the AlpFoodway project that is of significance is the AlpFoodway Vision Paper, which seeks to provide a vision for the sustainable development of Alpine Food Heritage. One of the Vision Paper's aims is to "establish legal frameworks and safeguarding measures, including Intellectual Property Rights, to protect the Alpine Food Heritage and facilitate prospering of the communities concerned"⁵¹. As part of the explanation of the legal framework, the Vision Paper highlights "Tome des Bauges cheese-making" as an example of best practice. A traditional family cheese in the Massif des Bauges since at least the 17th Century, in 2002, the Tome obtained a French Controlled Designation of Origin (CDO) after years of work towards this goal by the SITOB (Syndicat Interprofessionnel de la Tome des Bauges), who worked alongside producers and the National Institute of the Designation of Origin in securing the CDO. In 2017, the SITOB also registered an EU protected designation of origin (PDO) on the Tome. In its analysis of the 2017 PDO, the Vision Paper indicates the significance that IPRs can have for communities and facilitating sustainable social development: "The PDO is... contributing to safeguarding the element and facilitates the reconciliation of the needs of modern production with those of an ancient and well-rooted tradition with a socially... sustainable development approach"⁵².

The PDO specification favours practices aimed at protecting the biodiversity of pastures, supporting the conservation and management of grasslands of high floristic diversity with positive effects on animal health, milk quality and cheese taste, as well as landscape quality⁵³. The PDO is the result of the enduring collective awareness and inclusive active participation of community members. This inclusive approach in the development of IPRs protection also allows the production of cheese to take place directly in the mountain pastures. Today this cheese-production practice is in decline, but it remains strongly linked to the sense of identity of a significant part of the pastoral community. The PDO is therefore contributing to safeguarding the element and facilitates the reconciliation of the needs of modern production with those of an ancient and well-rooted tradition with a socially, environmentally and economically sustainable development approach.

A second example of a best practice highlighted by the Vision Paper is that of "Mountain cheese producers in Allgäu". The association representing most community members in Allgäu is the "Alpwirtschaftlicher Verein im Allgäu e. V." (mountain farming association in the Allgäu region). The association includes herdsmen, members of the cooperatives, owners and tenants. It was founded in 1952 and represents an active community which assembles a few times each year for central events like the mountain cheese makers course and a mountain cheese award ceremony, where the cheese of up to 53 alpine pastures is presented. The Alpwirtschaftlichen Vereins im Allgäu, registered an EU PDO on the Allgäuer Sennalpkäse' cheese in 2016. The product specification contains several regulations regarding the locality and production techniques⁵⁴. This PDO was developed in an inclusive way, with the active participation of the community. The PDO is used by certain community members in association with a certified organic "bio" label. Thus, protection and promotion measures are effectively combined.

⁵¹ Vision Paper and Alpine Food Heritage Charter // Interreg Alpine Space. Available at: http://www.alpine-space.eu/projects/alpfoodway/project-results/wp4_o.t4.2_31.1_charter_visionpaper.pdf (accessed: 03.04.2020).

⁵² Ibid. P.37.

⁵³ Tome Des Bauges, EC No. FR/PDO/005/0254, 18.09.2002, Art. 4.6.

⁵⁴ Allgäuer Sennalpkäse, EU No: DE/PDO/0005/0897, 11.10.2011, Arts. 3 and 5.

In addition to highlighting the ways in which IPRs are already supporting the social and environmental sustainability of Alpine food heritage, a further important aspect of the Vision Paper, and one that is of particular relevance to this paper, was that it established guidelines for the future implementation of any additional IPRs. The guidelines for “Tome des Bauges cheese-making” set out that: “In line with inclusive social development of ICH, IPRs should lead to collective proprietarization of culture, contributing to inclusive social protection systems, multilevel governance systems and freedom of community. IPRs must allow bearers to choose their own value system. The development of IPRs governance systems will therefore favour engaging and empowering communities, and consequently fostered social equities and local capacity building... IPRs specifications and regulations should be drafted taking into account the need to grant to all local producers the possibility to amend them. If constant change is not foreseen and allowed to all community members, inappropriate standardization of production methods could arise... [and] IPRs adopted to protect ICH shall be capable of assuring environmental sustainable development, protecting biodiversity and preventing natural catastrophes”⁵⁵.

The AlpFoodway Project, and in particular the case studies of “Tome des Bauges cheese-making” and “Mountain cheese producers in Allgäu”, therefore demonstrates how intellectual property rights can support and facilitate socially inclusive environmental sustainability, empowering communities and placing them at the core of efforts to safeguard heritage.

Looking forward, the future for safeguarding both the environment and cultural heritage at the European level has been supported by the European Parliament resolution of 15 January 2020 on the European Green Deal⁵⁶. The Green Deal advocates a fundamental right to a clean and sustainable environment and to a stable climate for all people living in Europe and which has significant cultural dimensions, from circular economy to building renovation, to biodiversity; cultural heritage offers immense potential to support these environmental aims, drive climate action and support a just transition to a low carbon, climate resilient future⁵⁷. It is to be hoped, therefore, that the Green Deal will lead to support for further future initiatives for safeguarding cultural heritage and the environment that can learn from and build upon the approach to safeguarding (including the carefully planned use of IPRs) adopted by the AlpFoodway project.

Conclusions

The framework established by Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage demonstrates the relationship between ICH and environmental sustainability. The first pillar relates to “environmental impacts in the safeguarding of intangible cultural heritage”. The second pillar relates to “knowledge and practices concerning nature and the universe”. The final pillar concerns “community-based resilience to natural disasters and climate change”. This paper has advanced the argument that, in line with the first and second pillar, intellectual property rights, particularly geographical indications, CAN support environmentally friendly practices and recognise communities as bearers of knowledge about nature and essential actors in sustaining the environment. In order to do so, such intellectual prop-

⁵⁵ Alpfoodway internal document seen by the author.

⁵⁶ European Parliament resolution of 15 January 2020 on the European Green Deal. (2019/2956(RSP)) // European Parliament. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0005_EN.html (accessed: 18.02.2021).

⁵⁷ Cultural Heritage and the EU Green Deal // European Investment Bank. Available at: <https://institute.eib.org/2020/11/cultural-heritage-and-the-eu-green-deal/> (accessed: 18.02.2021).

erty rights must be conscious of the risks they can pose. But, as this paper has sought to argue, intellectual property rights can be an invaluable safeguarding mechanism, capable of supporting the sustainability of both intangible cultural heritage and the environment.

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Охрана нематериального культурного наследия и окружающей среды

Б. Убертацци

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Конвенция об охране нематериального культурного наследия принята ЮНЕСКО в октябре 2003 г. Статья 2 Конвенции устанавливает, что нематериальное культурное наследие должно быть совместимо с устойчивым развитием. В области культуры устойчивое развитие состоит из трех взаимосвязанных аспектов: общества, окружающей среды и экономики. Глава 6 Оперативных директив по имплементации Конвенции устанавливает рамки, связанные с «экологической устойчивостью». Структурно Конвенция подразделяется на три важнейшие составляющие. Первая из них связана с «воздействием на окружающую среду при сохранении нематериального культурного наследия», вторая относится к «знаниям и практикам, касающимся природы и Вселенной», последняя касается «устойчивости общин к стихийным бедствиям и изменению климата». На основе анализа Конвенции, Оперативных директив по имплементации Конвенции и элементов нематериального культурного наследия, включенных в Репрезентативный список Конвенции, в статье представлены тематические исследования, в которых, в соответствии с вышеупомянутыми структурными принципами Конвенции, права интеллектуальной собственности, особенно права на географические указания, применяются для поддержания экологически чистой практики использования материальных благ. В статье доказывается, что признание за локальными сообществами указанного права интеллектуальной собственности может означать их признание носителями знаний о природе в качестве основных участников поддержания равновесия окружающей среды. Высказано предположение о том, что, хотя концепции права интеллектуальной собственности, если они недостаточно разработаны, могут представлять риски для экологической устойчивости, при правильном восприятии они способны расширять возможности общин. Таким образом, цель данной работы состоит в том, чтобы показать, каким образом права интеллектуальной собственности могут быть инструментами содействия охране и устойчивости как нематериального культурного наследия, так и окружающей среды.

Ключевые слова: культурное наследие, экологическая устойчивость, права интеллектуальной собственности, ЮНЕСКО, Международная конвенция об охране нематериального культурного наследия, нематериальное культурное наследие, община.

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Убертацци Бенедетта — Post. PhD, штатный доцент, Университет Милан-Бикокка, Италия, 20126, Милан, площадь дель Атенео Нуово, 1; доцент по совместительству, Санкт-Петербургский государственный университет, Российская Федерация, 199034, Санкт-Петербург, Университетская наб., 7–9; benedetta.ubertazzi@ubertazzi.it

Religious heritage in international law: Nationalism, culture, and rights

Lucas Lixinski

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This Article explores the work that religious heritage performs in our thinking about the uses of heritage in the construction of politics, society, and culture. Seen as heritage, religion is an important part of nation-building, divorced from fundamental canons, and seen as a social practice, which for the most part is a positive development in line with the international human right to freedom of religion. The Article explores religious heritage in international law through the Russian experience both in the 1972 World Heritage Convention and the 2003 Intangible Cultural Heritage Convention. The author argues that, for the most part, heritage values prevail over religious ones, at least inasmuch as heritage is a proxy for secularism and cosmopolitanism. At the same time, however, the human right to freedom of religion can aid religious communities to tap into the possibilities for heritage safeguarding to protect their faith. Thus, while giving religion a privileged position may be seen as incompatible with the worldview of peace and dialogue among nations, which international law tends to privilege, heritage law processes can also aid religion and religious communities. The coupling of heritage law with human rights can create incentives for countries like Russia to engage more seriously with the possibilities of heritage mechanisms to protect certain religious practices and curb the ascent of dangerous nationalism. Russia should therefore seriously consider ratifying the Intangible Cultural Heritage Convention, at least inasmuch as this treaty can benefit the treatment of religious heritage and its use in the country, and also help promote freedom of religion as a human right with both individual and collective dimensions.

Keywords: religion, secularism, intangible heritage, world heritage, international law, conflict of rights, individual rights, collective rights, Russian heritage.

Introduction

Religious practice is intimately connected with social life. As such, it becomes an important element of culture and cultural life, contributing to a community's or people's identity. Religion is also enduring, either in its built elements (often monumentally beautiful, and thus outstanding examples of architecture from a given period) or its intangible characteristics (religious rites tend to be passed down from one generation to the next with little to no modification)¹.

For its centrality to social life and endurance, religion's association with cultural heritage seems easy and obvious. And, in effect, this association is seen in the way heritage is institutionalized and protected. UNESCO estimates, for instance, that about 20 % (twenty percent) of 1000-plus monuments and sites on the World Heritage List have important re-

Lucas Lixinski — Dr., Prof., The University of New South Wales, Sydney, NSW 2052, Australia; l.lixinski@unsw.edu.au

¹ See: *Lixinski L.* Religious Cultural Heritage: The Law and Politics of Conservation, Iconoclasm, and Identity // *Heritage at the Interface: Interpretation and Identity* / ed. by G. Hooper. Florida: University Press of Florida, 2018. P. 121–135.

ligious aspects connected to them, and contribute to a monument or site's "outstanding universal value"².

However, the "cult of heritage"³ is different from a religion, too, in many respects, which can make an otherwise easy relationship fraught with difficulties. For instance, the cult of heritage often requires easy and superficial consumption of snapshots, whereas religion requires paced, meditative and long-term commitment. Heritage is also predominantly secular, bridging between different civilizations in the interests of humanity and peace; as a result, it is accessible to all, sanitized, authorized⁴. Religious practice is often incompatible with these goals: not only has a version of religion (fundamentalism) been used historically to justify warfare, oftentimes religion still requires the exclusion of others from its sacred practices, which is incompatible with heritage's idea of being accessible to all.

Added to the mix are the ways in which religion can be used to reinvigorate national identity and nationalism, and the fact that religion is protected as a human right. The former connection is key in countries like Russia, in which religion survived the Soviet Union and re-emerged as a mechanism of social cohesion from the 1990s, but abhorred in societies like Turkey, in which religion is seen as an enemy of a secular society that requires secularism for its integrity. Common to the two is the question of whether religion is embraced as religion, or its transformation into heritage or culture neutralizes it and renders religion a historical relic that is subordinated to a broader national narrative. Religion as culture becomes an artefact of national unity, whether it is unity around one shared past and present that helps reject a more recent and difficult past (the Orthodox faith in Russia as the largest religion)⁵, or multiple overlapping pasts that melt into a secular pot of unity (the Orthodox and Islamic faiths in Turkey).

Said position is, of course, to be expected from international cultural heritage law, inasmuch as these instruments and frameworks have a clear mandate to protect cultural heritage, but not a mandate to protect religion. International human rights law, on the other hand, seems to have dual duties, to protect cultural identity and freedom of religion. But even the international human right to (freedom of) religion can admit limitations in favor of secularism.

In relation to freedom of religion as a human right, the framing of religion as cultural heritage can protect and promote faith. Protecting religious buildings as heritage preserves them also for worship, and is thus a conduit to practicing religion; and religious rituals themselves can be protected as intangible cultural heritage. The same tensions with respect to the religious or secular uses of religion arise here, but the human rights element signals towards safeguarding the interests of believers. At the same time, however, the heritage frame portrays religion as a collective endeavour, which does not sit well with freedom of religion as an individual right.

This Article explores some of the convergences and divergences between religion and cultural heritage, and international law's place in attempting to mediate these tensions. I argue that, for the most part, heritage values prevail over religious ones, at least

² Initiative on Heritage of Religions Interest // UNESCO World Heritage Center. Available at: <http://whc.unesco.org/en/religious-sacred-heritage> (accessed: 18.12.2020).

³ *Lowenthal D.* The Heritage Crusade and the Spoils of History. Cambridge: Cambridge University Press, 2005.

⁴ *Smith L.* The Uses of Heritage. Oxfordshire: Routledge, 2006.

⁵ On the diversity of religions in Russia and the predominance of the Russian Orthodox faith, see: *Agadjanian A.* Religious pluralism and national identity in Russia // International Journal on Multicultural Societies. 2000. No. 2 (2). P.97–124; *Shterin M.* New Religions in the New Russia // Nova Religio: The Journal of Alternative and Emergent Religions. 2001. No. 4 (2). P.310–321. For a comparison of majority religions in Russia and Turkey, see: *Tasch L.* Defining Nation and Religious Minorities in Russia and Turkey: A Comparative Analysis // Politics and Religion. 2010. No. 3 (2). P.327–351.

inasmuch as heritage is a proxy for secularism and cosmopolitanism. At the same time, however, the human right to freedom of religion can aid communities of faith to tap into the possibilities of heritage safeguarding to protect faith. Thus, while privileging religion may be seen as incompatible with a worldview of peace and dialogue among nations, which international law tends to privilege, heritage law processes can also aid religion and communities of faith. The coupling of heritage law with human rights can create incentives for countries like Russia to engage more seriously with the possibilities of heritage mechanisms to protect certain religious practices.

In privileging heritage over religion when there is any incompatibility, international heritage law reasserts structures that privilege the global over the local, and thus run the risk of excluding communities from their own heritage. Religion thus becomes a site of resistance against the normalizing and authorizing power of the heritage discourse. But it can also be a site of resistance against something else. When minority culture is at stake, and religion is part of minority identity, heritage listing can be a limited way of gaining recognition within or even despite the nation-state. However, the promise of emancipation through heritage-listing is often over-hyped, and its potential limited⁶.

In order to further explore these tensions, the Article is structured as follows: the next section (2) places religious cultural heritage in the context of the multiple instruments for the protection of cultural heritage under UNESCO, as well as the importance of religious heritage in Russia seen through the World Heritage List created under the 1972 World Heritage Convention (WHC)⁷, where Russian sites are overwhelmingly religious. Section 3 reconsiders the relationship between religion and heritage, but taking religion as the starting point, and using Russian intangible cultural heritage to discuss the possibilities of using heritage law to protect living heritage practices, making a case for Russia to ratify UNESCO's 2003 Convention for Safeguarding of the Intangible Cultural Heritage (ICH)⁸. Section 4 offers some concluding remarks.

1. Religious World Heritage as Nationalism and Secularism

One of the problems with the regulation of religious heritage is the multiple different layers of regulation. This chapter focuses on the regulation under state-centric international law, but fully aware that there are a number of background rules that affect the possible effectiveness of international law⁹. Many of these implementation problems arise from the fact that religion has a separate status in many jurisdictions (such as tax-exemption status), which is not accommodated by international law, which sees the state as unitary. Further, many religions are in themselves also transnational networks not fully accommodated within the confines of state territoriality, which is the basis for most of international law, particularly international heritage law¹⁰.

According to Alessandro Chechi, the definition of religious heritage encompasses heritage that meets two out of three criteria: 1) current religious value; 2) symbolic or pro-

⁶ For an in-depth discussion in a different context, see: *Lixinski L.* Heritage Listing as a Tool for Advocacy: The Possibilities for Dissent, Contestation and Emancipation in International Law through International Cultural Heritage Law // *Asian Journal of International Law*. 2015. No. 5 (2) P. 387–409.

⁷ Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC).

⁸ Convention for Safeguarding of the Intangible Cultural Heritage 2003 (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (ICH).

⁹ *Augustinos N.* The Role of Non-State Actors in the Cultural Heritage Field — The Case of the Orthodox Church and Its Heritage in Turkey // *Santander Art and Culture Law Review*. 2018. No. 4 (2). P. 280.

¹⁰ *Chechi A.* Protecting Holy Heritage in Italy — A Critical Assessment through the Prism of International Law // *International Journal of Cultural Property*. 2014. No. 21. P. 397.

fane value, related to associations of value to people not affiliated with that faith, which can be a living or dead religion; and 3) its artistic or cultural value, embodying the idea that many religious buildings are also masterpieces of a certain architectural style. This framework helps explain why religious heritage can be valued as such by believers and non-believers alike¹¹.

Most heritage classified as religious seems to be valued by believers, and therefore religious heritage is made fundamentally different from secular heritage by its living character. Living religious heritage, by ensuring the continuity of forms, ends up elevated above the documentary and historical values of heritage, and the continuity of religious practices becomes the primary goal of conservation, from the perspective of those living with it¹². In terms of conservation, the important difference is that religious heritage was born with its associated values clearly defined, whereas we require time and distance to be able to attribute value to secular heritage¹³. Therefore, the need to involve communities is much more present in dealing with religious heritage, as it is the original source of values needed to justify conservation efforts¹⁴.

There are several issues that need to be addressed in reconciling faith and conservation in the heritage context. Those include dealing with changing liturgical and functional needs of religious sites, the competing requirements of co-existing faiths, the fluctuating interest in religion by society at large, growing secular pressures on religious places, the museification of religious places and objects, the competing interests of scientific conservation and religious rules (for instance, the need in some religions for decay of wooden structures)¹⁵. These issues lead to potential solutions, such as more dialogue between religious communities and conservators (not always successful, particularly with respect to natural heritage, where scientific interests tend to prevail above all others, often to the detriment of the site)¹⁶, and the reconciliation of conservation rules and religious laws (such, as for instance, a ban on the use of pig skin in the conservation of Jewish or Muslim artefacts)¹⁷. The primary care for religious heritage, thus, should lie with religious communities themselves, and conservation professionals should be experts at the service of those communities¹⁸. But are these solutions in conservation practice, particularly the prominent role of religious communities, reflected in the specific international legal regimes around cultural heritage?

As far as the existing treaties under UNESCO for safeguarding cultural heritage go, most of them can apply in some way to religious heritage, too, even if that connection is not always openly made in the conventional texts. The first UNESCO treaty in this area, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, draws its inspiration from International Humanitarian Law (IHL) rules, particularly as

¹¹ *Chechi A.* Protecting Holy Heritage in Italy. P. 401.

¹² *Stovel H.* Introduction // Conservation of Living Religious Heritage: Papers from the ICCROM 2003 Forum on Living Religious Heritage: conserving the sacred / eds H. Stovel, N. Stanley-Prive, R. Kilick. Rome, ICCROM, 2005. P. 1–11; *Wijesuriya G.* The past is in the present: perspectives in caring for Buddhist heritage sites in Sri Lanka // *Ibid.* P. 31–43.

¹³ *Wijesuriya G.* The past is in the present: perspectives in caring for Buddhist heritage sites in Sri Lanka. P. 31.

¹⁴ *Stovel H.* Introduction. P. 2.

¹⁵ *Ibid.* P. 3–5.

¹⁶ For a case study of failure, see: *Nyathi P., Ndiweni C. B.* A living religious shrine under siege: The Njelele Shrine / King Mzilikazi's Grave and Conflicting Demands on the Matopo Hills Area of Zimbabwe // *Ibid.* P. 58–66. Cf.: *Whiting D.* Conserving built heritage in Maori communities // *Ibid.* P. 12–18.

¹⁷ See: *Zekrgoo A. H., Barkeshli M.* Collection management of Islamic heritage in accordance with the worldview and Shari'ah of Islam // *Ibid.* P. 94–101; *Maggen M.* The conservation of sacred materials in the Israel Museum // *Ibid.* P. 102–106.

¹⁸ *Stovel H.* Introduction. P. 10.

codified in the 1949 Geneva Conventions. And the Geneva Conventions do treat religious buildings and sites as a particular type of protected property. Thus, even if the Hague Convention was created to specify the rules for one specific type of protected property (cultural), they still rely on the same rules that apply to religious monuments and sites, and analogical application is natural, if not required, even if it is up to each state to determine what heritage is to be considered as protected under the specific regime during wartime.

The Hague Convention is relevant for present purposes because of the example of the Vatican City, a micro-state whose international personality is exercised by the Holy See, and which is the seat of the Christian Catholic faith for believers around the world¹⁹. The entirety of the Vatican City has been added to the list created by the 1954 Hague Convention, meaning the entire city is off-limits in the event of armed conflict²⁰. It is noteworthy, however, that in adding the buildings to the protective scope of this treaty, the Vatican City effectively renders those emblems of the Catholic faith protectable because of their cultural, and not religious, value. There are thus strategic advantages to the configuration of religion as culture, at least in that it means one can tap into a more protective regime like that of international heritage law. The tradeoff, however, is that values other than religion need to be identified, and from this legal frame's perspective supersede, religious sentiment.

The 1970 Convention on the Means to Prevent and Prohibit the Illegal Import, Export and Transfer of Ownership of Cultural Property mentions religious heritage specifically in its text, but it defers to states in deciding what heritage is worthy of protection²¹. In doing so, religious heritage aligns with the treaty's purpose of using heritage to promote national cultural identity, and religious artefacts as heritage align with nationalism²².

The WHC does not mention religion in its text, but the Operational Guidelines for the Implementation of the World Heritage Convention (2019) do mention religious or spiritual significance as a ground upon which to assess the importance of cultural landscapes, and in recognition that these cultural landscapes (broadly defined as the combined works of humans and nature) often have deep religious or spiritual meanings that justify their existence and safeguarding²³. Religious or spiritual values are also important for another subtype of world heritage, heritage routes (which often include pilgrimage routes)²⁴. It is noteworthy that religious or spiritual value does not factor into the assessment of "Outstanding Universal Value" of monuments and sites that is essential for inscription on the World Heritage List, which can be read as meaning that outstanding universal value needs to transcend religion and represent a secular or at least multi-faith relevance.

In spite of the only partial embrace of religion in the assessment of value of world heritage, religious elements are seen in a number of sites listed on the World Heritage List, as a result of the initiative of expert bodies and other organizations working with UNESCO on the implementation of the WHC. In thinking about religious communities as stakeholders, the view of the World Heritage Center's "Initiative on Heritage of Religious Interest" (launched in 2010) is that specific policies are required in order to protect and manage those sites, in a way that accommodates their distinct nature. More specifically, the concern is to avoid clashes between the views of the conservation or expert community (to whom international heritage law has traditionally primarily catered, alongside nation-

¹⁹ *Duursma J. C.* Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood Cambridge: Cambridge University Press, 1996. P. 386.

²⁰ *Ibid.* P. 396.

²¹ *Chechi A.* Protecting Holy Heritage in Italy. P. 400.

²² *Lixinski L.* Religious Cultural Heritage. P. 121–135.

²³ Operational Guidelines for the Implementation of the World Heritage Convention (adopted 10 July 2019), UNESCO Doc. WHC. 19/01. Para. 10.

²⁴ *Ibid.* Para. 24.

states)²⁵ and the views of the religious communities still using the site, seen as they are the people who will in effect undertake most of the conservation and management efforts.

By including religious communities in the process, the World Heritage system opens itself up to incorporating the views of non-state actors other than experts, in what is a remarkable development in the system. The “Statement on the Protection of Religious Properties within the Framework of the World Heritage Convention” recognizes the role that communities play in the “creation, maintenance, and continuous shaping of sacred places, and the custodial role played by them in caring for these as living heritage”²⁶. The same statement also commits to “enhancing the role of communities and the avoidance of misunderstandings, tensions, or stereotypes”²⁷. By putting religious communities front and center, it seems that the World Heritage system is willing to bridge the schism between the interests of conservation and the imperatives of interacting with heritage. It is still to be seen how these strategies are developed within the World Heritage system, and how they spread to other regimes under UNESCO. Also importantly, it remains to be seen how states will respond to these intended changes, especially in the context of minority religions.

Religion, and religious communities and sentiment, have long played a key role in Russian history and heritage. Much of pre-Revolution Russian heritage protection was aimed at straddling the East-West divide, since the country is on both sides of it, and in the 19th century it included religious Buddhist heritage in Eastern Russia, for instance²⁸. Much of ancient Russian heritage is related to religion that was a center of the daily interest of Russian people. The Russian Orthodox Church engages with the status of religious buildings as heritage by contributing to the reconstruction, restoration and renovation of churches and monasteries²⁹.

Even during the Soviet Union, which in its more radical conception was premised on the eradication of religion, heritage remained a strong political instrument³⁰, and with it, religion. The destruction of heritage, and iconoclasm and the destruction of churches in particular, was a part of the Bolshevik Revolution’s mythology and actual operation³¹. However, great effort was also undertaken to preserve and create heritage that was seen as useful to the Soviet cause. In other words, “By assuming the role of protector of cultural property and by forging a legislative space dictating that action, the young Bolshevik government sought to establish new values”³². The Soviet regime’s approach to heritage is often remembered because of Socialist heritage, that is, heritage that was produced during the Soviet regime to represent and narrate the ideals of the October Revolution. This heritage, while important, is only a second phase in Soviet heritage, the first one being dedicated to the protection of “Old Russia” heritage, and the history and memory of greatness that was important to validate the Soviet regime. Much of this heritage was religious in nature, which allowed for religion as culture to survive the Soviet regime’s distaste for it. Churches were tolerated during the Second World War, for instance, because of their abil-

²⁵ For a critical discussion, see: *Lixinski L.* International Cultural Heritage Regimes, International Law and the Politics of Expertise // International Journal of Cultural Property. 2013. No. 20 (4). P. 407–429.

²⁶ Statement on the Protection of Religious Properties within the Framework of the World Heritage Convention. Para. 4.

²⁷ *Ibid.* Para. 9.

²⁸ *Mironenko P.* Conservation Issues on UNESCO World Heritage Sites in Russia. From the Roerich Pact to Contemporary Challenges // Cultural Landscape in Practice / eds G. Amoroso, R. Salerno. New York: Springer, 2009. P. 145–150, 145–146.

²⁹ *Ibid.* P. 149.

³⁰ *Deschepper J.* Between future and eternity: a Soviet conception of heritage // International Journal of Heritage Studies. 2019. No. 25 (5). P. 492.

³¹ *Ibid.* P. 493–494.

³² *Ibid.* P. 494.

ity to galvanize nationalism, and thus played a secular role that was separate from religious rite, and aligned with Soviet aspirations³³.

Religious heritage was, however, decidedly made non-religious during the Soviet regime. The religious repression of the 1920s and 1930s, as well as Khrushchev's anti-religious campaign from the late 1950s to 1964, saw many religious buildings destroyed or closed. Attacks on these buildings were seen as attacks not only on the institution of religion, but also on the local communities themselves³⁴. Further, many surviving religious buildings were turned into stables, barns, cultural halls, garages, administrative offices, small factories, and libraries³⁵. State museums were created in former monasteries and churches, the buildings valued because of their "cultural and historic significance". Despite the view that these were destructive actions, however, there was a strong preservationist impulse behind them, and a recognition of religion as a major component of Russian heritage and identity³⁶. Museification of religious buildings had a dual purpose: the protection of heritage; and the use of monasteries as platforms for anti-religious propaganda³⁷. Some of these museums were transferred back to the Orthodox Church at the end of the Soviet regime, creating conflict between religious and secular cultural institutions³⁸.

At the end of the Soviet regime, religious buildings had their status as "towering examples of national heritage, potentially available to contenders for political and economic power as symbolic capital to exploit in their struggles for power" revived. Heritage became a central part of the struggle to redefine (and control) the national identity of post-Soviet Russia. But new renditions of Russianness "could not compete with long-standing renditions that played on themes of a strong state, patriotic wars, Russia's historic vulnerability to foreign invasion and, increasingly, on the theme of Holy Russia"³⁹. State and the Orthodox Church therefore formed an axis around which national identity was built⁴⁰.

This approach to heritage mattered both within and outside Russia. During the Soviet era, heritage and international politics were closely related, and the Soviet Union very purposefully politicized heritage at UNESCO during that period⁴¹. Therefore, it is safe to assume that the political power of heritage, tapped into through Soviet heritage diplomacy, was also used by the post-Soviet regime and its embrace of religious heritage. Religious heritage in Russia, therefore, is not really about religion: it is about the role of religion in politics, and religion as a coalescing force for creating and controlling national identity.

Russia has been a party to the WHC since 12 October 1988, which is not long before the collapse of the Soviet Regime. However, the participation in international legal instruments does not seem to have much domestic purchase, at least from the perspective of the WHC, since inscription on the World Heritage List does not have a significant effect

³³ *Smith S. A.* Contentious Heritage: The Preservation of Churches and Temples in Communist and Post-Communist Russia and China // *Past and Present*. 2015. No. 10. P. 187.

³⁴ *Ibid.* P. 186.

³⁵ *Ibid.* P. 188.

³⁶ *Ibid.* P. 178.

³⁷ *Ibid.* P. 184.

³⁸ *Takahashi S., Maejima N., Kobayashi H.* UNESCO World Heritage and the regional powers: Changing representations of religious cultural heritage // *Eurasia's Regional Powers Compared — China, India, Russia* / ed. by Sh. Tabata. Abingdon: Routledge, 2014. P. 232–233.

³⁹ *Smith S. A.* Contentious Heritage. P. 201.

⁴⁰ *Ibid.* P. 202.

⁴¹ *Geering C.* Protecting the heritage of humanity in the Cold War: UNESCO, the Soviet Union and sites of universal value, 1945–1970s // *International Journal of Heritage Studies*. 2020. Vol. 26, No. 12. P. 1142.

on internal tourism, and therefore little commercial influence. At the same time, however, there is significant political and social influence that flows from heritage status in Russia⁴².

A large proportion of world heritage sites in Russia has a religious element to them. Of the 18 Russian cultural sites on the World Heritage List (plus 11 natural sites), at least 11 are religious, making them the majority of Russian sites on the World Heritage List. Of those, only one is not tied to the Orthodox faith, and refers to the presence and impact of Islam in Russian history: the Bolgar Historical and Archaeological Complex, on the World Heritage List since 2014⁴³.

Among the many Orthodox sites, a key example is the Cultural and Historic Ensemble of the Solovetsky Islands, on the list since 1992 (that is, shortly after the collapse of the Soviet regime, and one of the earliest Russian sites on the List)⁴⁴. Initially, the Russian government wanted it listed as a mixed property, acknowledging both cultural and natural features of the site, but the site was ultimately listed only as cultural⁴⁵. The listing allowed for the continued management of the site as secular, but, over time, the Orthodox Church has gained increasing control over the management, conservation, restoration, and use of the site⁴⁶.

Therefore, the connection between World Heritage and religion, like with other areas of international heritage law discussed above, focuses primarily on the importance of religion for the past of a nation, which then can shape the present and the future selectively. The pervasiveness of religious heritage among Russia's World Heritage sites attests to the importance of religion for the shaping of Russian national identity. At the same time, though, the extent to which these heritage narratives actually aid religion, as opposed to serving a nationalist narrative, is unclear. Part of that unease is attributable to the fact that heritage law focuses on "objective" values of a building or structure, as opposed to the religious practice itself, which may or may not depend on specific physical support. The next section focuses on international heritage law's possibilities of protecting religion not as a building, but as a living practice.

2. Intangible Cultural Heritage and Religion as a Platform for Religious Rights

The last major treaty under UNESCO for our purposes, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICH) is also important for thinking about the relationship between heritage and religion. More broadly, the ICHC was conceived as a means to challenge many of the traditional tenets of heritage conservation and management, and to include communities more centrally in safeguarding processes, even if this promise has not always been fulfilled⁴⁷. When it comes to religious heritage, the definition of Intangible Cultural Heritage (ICH) in the convention mentions that belief systems can be considered intangible heritage (ICHC, Article 2). But the drafting history of the treaty indicates a consensus that religion itself is not part of intangible heritage, at least with respect to their canons. The rituals of religion can be considered ICH, but not religion itself

⁴² Takahashi S., Maejima N., Kobayashi H. UNESCO World Heritage and the regional powers. P. 232.

⁴³ Bolgar Historical and Archaeological Complex // UNESCO World Heritage Center. Available at: <https://whc.unesco.org/en/list/981> (accessed: 18.12.2020).

⁴⁴ Cultural and Historic Ensemble of the Solovetsky Islands // UNESCO World Heritage Center. Available at: <https://whc.unesco.org/en/list/632> (accessed: 18.12.2020).

⁴⁵ Takahashi S., Maejima N., Kobayashi H. UNESCO World Heritage and the regional powers. P. 233–234.

⁴⁶ Ibid. P. 235.

⁴⁷ For a fuller exploration, see: *Lixinski L. Intangible Cultural Heritage in International Law*. Oxford University Press, 2013.

in its moral and theological aspects⁴⁸. That way, the ICHC avoids passing judgment on the validity of religious practices, and embraces diversity in a more open way, allowing religious communities to ultimately control the meaning of their own practices. A remaining question with respect to ICH is to what extent, if any, the relationships between heritage and religion are changed by this new way of thinking about heritage.

Despite the exclusion of religion from the ICH definition, a range of religious practices are recognized within the ICHC, testifying to “their importance as elements of cultural identity”⁴⁹. Religious rituals like processions and sacred dances can be considered ICH for international law purposes, as long as they are seen not as “canonical or orthodox practices”, and as “popular religious customs” instead⁵⁰. Religious rituals have thus been listed from countries as diverse as Belgium, Croatia, the Republic of Korea, Bolivia, Luxembourg, Spain, and Zimbabwe⁵¹. These have been listed as religious practices, and also as practices that are labelled religious while in fact serving other purposes within the community, such as the protection of older and more powerful elements of social cohesion⁵².

If religion is quintessentially living culture, and rituals such as processions have been listed in the ICHC lists, how separate can heritage mechanisms really be from religion? After all, ICH listing has a commodifying effect that, albeit smaller than in other regimes, still has the power of fixating meaning, and, most importantly, fixating control. So, even if the ICHC system does not pass judgment on religious canon, it still has effects on, for instance, the political uses of heritage. Depending on how control over the meanings and uses of ICH is configured through the listing process, religion can be stripped off its political content, which is often central to a religion’s mandate and social relevance⁵³, or it can become a tool of resistance⁵⁴.

Taken together, the international legal framework around cultural heritage seems to have promoted an important shift in allowing for more community control over their own heritage. Thus, religious sensitivities can be more easily accommodated, even if they are necessarily sanitized in their translation for and through the other non-state stakeholders, namely experts and conservators. But heritage is still placed front and center, and that relevance presumably means that, when a religious community fundamentally diverges from the views of heritage managers about the uses of a religious site, the conservator’s view will prevail. Perhaps a framework that puts the protection of religious belief front and center will lead to a different result. International human rights law, and the right to freedom of religion under it, is one such framework.

International human rights law is a fairly developed framework, and cultural identity and heritage matters have often been adjudicated under it. The 1966 International Covenant on Civil and Political Rights is particularly important for present purposes, as it is the most widely ratified international human rights treaty of general application, and it con-

⁴⁸ *Cechi A.* Protecting Holy Heritage in Italy. P.400; *Ubertazzi B.* Article 2 (2): Manifesting Intangible Cultural Heritage // *The 2003 UNESCO Intangible Heritage Convention: A Commentary* / eds J. Blake, L. Lixinski. Oxford: Oxford University Press, 2020. P.70.

⁴⁹ *Francioni F.* Article 2 (1): Defining Intangible Cultural Heritage // *The 2003 UNESCO Intangible Heritage Convention: A Commentary*. P.55.

⁵⁰ *Ubertazzi B.* Article 2 (2): Manifesting Intangible Cultural Heritage. P.70 (citing: UNESCO, Representative List of the Intangible Cultural Heritage of Humanity 2009. UNESCO Publ., 2009. Element No. 4).

⁵¹ *Ibid.* P.70–71.

⁵² *Ibid.* P.71.

⁵³ See for instance: *Aykan B.* How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage // *International Journal of Cultural Property*. 2013. No. 20. P.381–405.

⁵⁴ See for instance: *Xue A.* Religion, Heritage, and Power: Everyday Life in Contemporary China, PhD Dissertation. Edith Cowan University, 2014.

tains a specific provision protecting freedom of religion (Article 18), in addition to a provision protecting minority cultures (Article 27).

With respect to Article 27, very little of its jurisprudence relates to religious practices, mostly focusing on other practices such as language, economic activities, and Indigenous law. Commentators also indicate that generally matters relating to religious minorities would be dealt with under Article 18, and subsumed under that article's protection⁵⁵. That subsumption will place the interests of minorities under the "public morals" limitation to freedom of religion, inasmuch as that clause is read as meaning the views of the majority. However, the Human Rights Committee has made it clear that "public morals" measures must reflect a pluralistic view of society, and not that of the majoritarian culture⁵⁶. Further, the provision on minority rights is fairly unique to the ICCPR, and other comparable international human rights treaties do not have a specific provision on minority protection, and would thus deal with religious heritage issues under the right to freedom of religion. Therefore, and because not all cultural heritage is minority-related, I will focus primarily on the right to freedom of religion as a means through which religious heritage can be interpreted in international human rights law. The question to be answered is whether religious community interests can be accommodated in the event of clash with heritage protection.

Within the framework of the ICCPR's freedom of religion provision, protection is extended not only religious practices themselves, but also to the very right to have or adopt a religion⁵⁷. Limitations are however permissible to this right, based on a number of grounds, and subject to a standard proportionality analysis (that is, that the limitation is required by law, connected to a specific governmental goal, and ultimately the impingement on the freedom is proportionate to the benefit for the government's goal)⁵⁸. Public morals is a permissible ground applicable in the context of religious minorities, as seen above.

In order to make a case that heritage protection measures impinge on freedom of religion (for instance, curtailing a religious community's ability to change the interior of a heritage-listed temple), the religious community will have to make a case that the infringement on their ability to change the interior of the temple curtails their ability to practice a specific and essential tenet of their religion. In other words, the protection of freedom of religion is not possible for all religious practices within a certain belief system; rather, the religious practice needs to be essential to the belief system, as the jurisprudence on conscientious objection shows⁵⁹. When it comes to cultural heritage protection, it means that a certain degree of latitude is given to the state to protect the heritage-based interests of non-believers. Therefore, even the protection of freedom of religion puts heritage interests above religious interests in most cases, unless a compelling case can be made for why the heritage protection measure will affect a fundamental tenet of religion.

Religion and heritage can therefore be seen from at least two relative positions: the listing of religious practices as heritage; and heritage interests in conflict with religious practices. In both of those instances, the effect of heritage is to focus on religion as a platform for identity that relates to society at large, rather than a inward-looking, self-reinforcing set of beliefs. In this respect, the relationships between religion and heritage may seem at odd with the commitment to protect religious freedom as a human rights, which focuses on religion for its own sake, and also largely on religion as an individual, rather

⁵⁵ *Joseph S., Schultz J., Castan M.* The International Covenant on Civil and Political Rights: Cases, Materials, Commentary. 2nd ed. Oxford: Oxford University Press, 2004. P. 789.

⁵⁶ *Ibid.* P. 510–511.

⁵⁷ *Ibid.* P. 504.

⁵⁸ *Ibid.* P. 507–508.

⁵⁹ For the ICCPR, see: *Ibid.* P. 511–512. For the European Convention of Human Rights, see: *Lixinski L.* Intangible Cultural Heritage in International Law. P. 166–167.

than collective, endeavour. However, that apparent mismatch does not withstand closer scrutiny.

The international human right to freedom of religion, while seemingly protecting the right of all to practice and profess their faith, does not in fact protect religion for its own sake. Rather, it protects the ways in which people choose to use their religion. What is protected is not the core of religious tenets, but the ability to practice them. The case law of the European Court of Human Rights seems to confirm the same idea in the *Case of the Jewish Liturgical Association Cha'Are Shalom ve Tsedek v. France*⁶⁰. This case revolves around the regulation of ritual slaughter of animals for consumption. In its judgment, the European Court determined that the practice was essential for Judaism, but it did not enter into the question of whether ritual slaughter could be impinged upon by law; instead, it focused on a system of governance and certification of kosher meat. Thus, human rights law can sidestep the core belief and thus allow states to regulate it indirectly, with more leeway⁶¹.

Secondly, with respect to the right to freedom of religion as an individual or collective right, there are strong arguments to be made about this right being exercised on an individual basis, and at any rate with the primary of its individual aspects over collective ones⁶². The recognition of religious heritage would suggest otherwise, at least inasmuch as heritage, particularly intangible heritage, is safeguarded for the benefit primarily of communities, and only then smaller groups or even individuals⁶³. Nevertheless, the effect of safeguarding religion as an individual right is not to exclude its collective dimensions, but rather to again dissociate tenet from practice: religious tenets can be held collectively, but said collectivity is abstract, controlled by a privileged few individuals, and there is therefore room for abuse. Focusing on the practice does away, or at least greatly dilutes, the possibility of using religion for oppressive purposes, whether that is within the religious group (which is when conflict between individual or collective rights usually flares up in the context of religion), or in the relations of the religious group with the community at large (which is on what heritage focuses, alongside international human rights cases on the persecution of religious minorities)⁶⁴. Therefore, the work that heritage law does in highlighting the collective aspects of religion should not be seen as detracting from the work of the right to religious freedom, and religion as culture has an important role to play in human rights questions, by allowing for greater dialogue among religious communities, complementing the focus of international human rights law.

⁶⁰ Case of the Jewish Liturgical Association Cha'Are Shalom ve Tsedek v. France (Application No. 27417/95), judgment of 27 June 2000.

⁶¹ For more commentary on this case, see: *Lixinski L. Intangible Cultural Heritage in International Law*. P. 167–168. On the European approach in general, see: *Temperman J.*: 1) Recognition, Registration, and Autonomy of Religious Groups: European Approaches and their Human Rights Implications // *State Responses to Religious Minorities* / ed. by D. Kirkham. Farnham: Ashgate, 2013. P. 151–165; 2) *Of Crosses and Homophobia: The European Court of Human Rights on which Manifestations of Religion One May Bring to Work*. Available at: <http://ssrn.com/abstract=2316736> (accessed: 18.12.2020); 3) *Religious Symbols in the Public School Classroom* // *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* / ed. by J. Temperman. Leiden: Brill, 2012. P. 142–176.

⁶² *Scolnicov A. The Right to Religious Freedom in International Law: Between group rights and individual rights*. Abingdon: Routledge, 2011. P. 2.

⁶³ On the discussion of the relationships between communities, groups, and individuals in the context of ICH safeguarding, see: *Jacobs M. Article 15: Participation of Communities, Groups, and Individuals — CGIs, not Just “the Community”* // *The 2003 UNESCO Intangible Heritage Convention: A Commentary*. P. 273–289; *Soggetti G. D. Article 15: Participation of Communities, Groups, and Individuals — Participation and Democracy* // *Ibid.* P. 290–305.

⁶⁴ See generally the paradigmatic case of *Kokkinakis v. Greece*, Judgment, Merits and Just Satisfaction, App. No. 14307/88, A/260-A, [1993] ECHR 20, (1994) 17 EHRR 397, IHRL 2980 (ECHR 1993), 25th May 1993, European Court of Human Rights [ECHR].

A similar issue on the engagement of a religious community with broader society, but with respect to built heritage, was the subject of a case before the US Supreme Court. In *Boerne v. Flores*⁶⁵, a local congregation in Boerne (Texas) wanted to expand their church to accommodate their growing numbers⁶⁶. The church was at the time unable to accommodate all those coming to services, but it was also listed under local regulations protecting the historical district. The case served as an important test of the Religious Freedom Restoration Act (RFRA), which protected religious practices by requiring the government to prove a compelling interest in order to justify an interference substantially burdening religion, and that the interference is the least restrictive means of furthering that interest (a threshold very similar to the proportionality test adopted by international human rights bodies). RFRA had been passed in order to re-establish the compelling government interest test, which had been watered down with respect to religion in a case involving the ceremonial use of Peyote, where the Court held that government should not be required to prove a compelling interest, and that laws of general application were subject to less strict scrutiny⁶⁷. RFRA rejected those cases, going back to previous case law on the compelling government interest test⁶⁸, but adding the least restrictive means prong.

The US Supreme Court decided that RFRA exceeded governmental authority, and thus struck it down. It said that RFRA was a federal intrusion into states' rights to regulate for the health and welfare of their citizens ("welfare" being the category under which heritage protection falls)⁶⁹, and that it was not designed to identify and counteract laws that were likely to be unconstitutional because of their treatment of religion. Because RFRA was too broad, it was struck down in its totality. Therefore, the necessity of proving that a practice was essential to a belief system was also done away with, making the law under the United States Constitution less protective of religion, and giving more leeway to cultural heritage protection. But states can choose to regulate differently, and exempt religious buildings from historic preservation laws (even if these exemptions could be seen as favoring certain religions, thus violating the separation between church and state and the Constitution overall, at the opposite end of the spectrum we have discussed so far)⁷⁰. The main decision of *Boerne v. Flores*, in this context, is that the federal government cannot make those decisions for communities.

Laws of general applicability (such as cultural heritage laws) with incidental burdens on religion are to be protected⁷¹, and RFRA's sweeping application would impair government's ability to create laws of general application. Persons affected by heritage protection laws (assumed to be neutral)⁷² are not more affected because of their religious beliefs; geography is the determining factor (that is, living in a specific protected area), rather than

⁶⁵ *City of Boerne v. Flores*, 521 US 507 (1997) (6-3 decision).

⁶⁶ For a fuller discussion of this case in the context of cultural heritage law, see: *Lixinski L. Religious Cultural Heritage*.

⁶⁷ *Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 US 872 (1990).

⁶⁸ In *Sherbert v. Verner*, 374 US 398 (1963); and *Wisconsin v. Yoder*, 406 US 205 (1972).

⁶⁹ See generally: *Williamson E. C. City of Boerne v. Flores and the Religious Freedom Restoration Act: The Delicate Balance between Religious Freedom and Historic Preservation // Journal of Land Use & Environmental Law*. 1997. No. 13 (1). P. 107–159.

⁷⁰ *Guiffre E. If They Can Raze it, Why Can't I? A Constitutional Analysis of Statutory and Judicial Religious Exemptions to Historic Preservation Ordinances // Scholarship @ Georgetown Law*. 2007. Available at: http://scholarship.law.georgetown.edu/hpps_papers/20 (accessed: 18.12.2020).

⁷¹ *City of Boerne v. Flores*, 521 US 507 (1997), 531.

⁷² *Hatcher Jr. R. B. City of Boerne v. Flores: Defining the Limits of Congress's Fourteenth Amendment Enforcement Clause Power // Mercer Law Review*. 1998. No. 49. P. 565–588. Heritage protection laws, however, are not necessarily neutral, they are just assumed to be so in this case vis-à-vis religious protection laws.

religion itself, at least insofar as built heritage is concerned⁷³. It was characterized by the US Supreme Court as an “attempt [at] substantive change in constitutional protections”⁷⁴, by allowing religious beliefs to displace the needs of a secular society, thereby opening the way for certain religions to intrude on the lives of practitioners of other faiths. Religious protection went too far under RFRA, an act that was supposed to not allow government impingement on religion, instead of allowing religious impingements on government, which seemed to be one of its effects. After all, claims that a law burdens the exercise of religion are difficult to contest⁷⁵, and the logic of international human rights law of requiring that the religious practice be central to the belief system is very subjective.

Therefore, even human rights law, a field of law that is meant to protect religion before protecting heritage, seems to still privilege in many instances heritage protection. That logic can be seen in international human rights cases, in which there is a burden on the religious community to prove that the religious practice being impaired by heritage protection is essential to the belief system, a decision ultimately made by the human rights body and that removes from religious communities the ability to enforce the parameters of their own religion against others. And, in a comparable US case, the communities themselves do not even get the chance to argue that their religious belief system is disproportionately burdened: as long as the heritage protection law is neutral and of general applicability, it can burden religion.

The position under human rights law (and US constitutional law) is thus that secularism (and heritage as a symbol of it) takes precedence over religion, even if the two can coexist if religious communities are willing to accommodate heritage protection norms. At the same time, however, to think of religion as heritage through the lenses of human rights also makes room for the accommodation of difference. The protection of the rights of others in international human rights law, a legitimate ground for restriction of freedom of religion, can tone down the possible uses of religion to promote group thinking that excludes outsiders, as well as the related use of religion to create or encourage nationalistic thinking. Therefore, human rights law, by forcing the accommodation of the concerns of the larger community, and not just the perspective of believers, prevents the totalization of religion. Cultural heritage law brings to the table the recognition of religion as a collective endeavor, and not just an individual right that is harder to consider in its social effects. Human rights law and cultural heritage law thus both bring important elements to our thinking about religion and the role that it plays in society, particularly when religious practice is so deeply embedded in society so as to achieve heritage status. This combination helps engage religion and the rights of believers in a productive dialogue that does not necessarily subject religion to the demands of secularism, but instead creates pathways for acknowledging the culturally relativist role of the human right to freedom of religion in the shaping of harmonious communities.

Cultural relativism with respect to human rights is a key feature of the regime governing intangible cultural heritage, despite the limitation in the definition of intangible heritage that only allows for the recognition of intangible heritage that is in compliance with international human rights standards⁷⁶. What this embrace of relativism shows is that cultural heritage law is a space where identities can be rendered more malleable, and dialogue had more productively, than in the realm of international human rights law. Community control over intangible heritage also means that, instead of religion being coopted by the

⁷³ *City of Boerne v. Flores*, 521 US 507 (1997), 535.

⁷⁴ *Ibid.*, 532.

⁷⁵ *Ibid.*, 534.

⁷⁶ For this discussion, see generally: *Lixinski L. The Convention for the Safeguarding of the Intangible Cultural Heritage and Human Rights: Relativism and Collectivism 2.0? // The 2003 UNESCO Intangible Heritage Convention: A Commentary. P. 463–477.*

state to serve a nationalist narrative, it serves a community's aspiration to cohesion and dialogue with society at large.

Russia is not a party to the ICHC, but there is Russian practice under this treaty because of a transitional provision that incorporates the program of Masterpieces of the Oral and Intangible Heritage of Humanity (a predecessor to the ICHC) into the Representative List of the Intangible Cultural Heritage of Humanity⁷⁷. Therefore, Russia is effectively tied to the ICHC in this respect, and that connection offers a window to examine the possibilities of safeguarding Russian religious heritage in international law.

Specifically, one of the two Russian items from the Masterpieces program is the "Cultural space and oral culture of the Semeiskie"⁷⁸. This manifestation of intangible heritage was added to the Masterpieces program list in 2001, and then incorporated into the ICHC list in 2008. The Semeiskie community is constituted primarily of "Old Believers", which date back to the seventeenth century and were repressed over the course of the history of the Russian Orthodox Church, particularly by Catherine the Great. Exiled to Siberia, they were able to preserve important elements of their culture, and the space east of Lake Baikal where they concentrated has become an important area for the practice of their religion, but also a significant remnant of pre-seventeenth century Russia. This religious community and their practices, through persecution and exile, became a time capsule of Russian history and identity. The end of the Soviet Union also ended their isolation, but their contact with mainstream Russian culture has also put pressure on their cultural traditions, even if they are willing to safeguard much of their intangible practices themselves⁷⁹.

Cultural spaces in the ICHC are akin to cultural landscapes in the WHC (which, as discussed above, is where most of the connection between world heritage and religion is to be found in the Operational Guidelines). There is thus an important element to the connection between place and human groups, and the role of religion in cementing and amplifying those connections. Religion can thus serve not only as a cultural practice in its own right, but also a means to ground communities. For Russia specifically, the safeguarding of the Semeiskie cultural space is a strong indicator that other ways of thinking about religion as culture are possible in international law, and to promote narratives that are not about nationalism at the exclusion of others, but to remember that religion can be (but should not be) used to persecute minority groups, and that ultimately those once-persecuted groups contain the same values we wish to promote through culture and cultural dialogue. Religious heritage as ICH, therefore, underscores the role of religion in bridging different groups, and that in the long-term the exclusion of certain groups on the basis of their religious beliefs or lack thereof is a hollow enterprise, as fundamentally all communities have a right to coexist.

In light of the above, to safeguard religion and the right to freedom of religion through heritage is no easy task, because it requires thinking of religion in its collective aspects, whereas religion is usually imagined and protected as an individual right. Nevertheless, there are past examples of imagining religion as the collective practice of a community within domestic rights frameworks, and therefore international human rights law can make an accommodation for these collective dimensions, while remaining mindful of the need to protect individual religious identity first.

Further, religion as culture does not need to be always secularized to be safeguarded, as the example of Russian intangible heritage shows. Hence, there is a strong case to be

⁷⁷ For a commentary, see: *Aikawa-Faure N.* Article 31. Transitional Clause on the Relationship to the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity // *The 2003 UNESCO Intangible Heritage Convention: A Commentary.* P.408–431.

⁷⁸ UNESCO Intangible Cultural Heritage. Cultural space and oral culture of the Semeiskie. Available at: <https://ich.unesco.org/en/RL/cultural-space-and-oral-culture-of-the-semeiskie-00017>.

⁷⁹ *Ibid.*

made for Russia to ratify the ICHC, so religion can be brought to life as a cultural manifestation, but one that is centrally controlled by the communities of faith to pursue their identities conditioned to tolerance values that are in sync with core religious tenets, as opposed to the risk of cooption of religion to promote nationalism that is otherwise seen in international heritage law. The secularization of religion that is a key effect of cultural heritage law in other domains does not always address the problem of intolerance, it can simply hide it away by creating a barrier between religion and the world. Safeguarding religion as intangible heritage necessarily renders that barrier porous and makes much needed room for engagement with religious tenets subordinated to human rights values that are already at the core of most religions.

Conclusions

Cultural heritage law, religion, and human rights are part of a complicated equation about the shaping of national identity and the promotion of intercultural dialogue and just societies. For the most part, international heritage law leans towards the secularization of religion, and focuses on the social work that religion does. While this turn to secularism can be seen as going against religious tenets, it is actually well in line with the protection of the human right to freedom of religion, inasmuch as it prevents the abuse of religious canon against certain communities, groups, and individuals, whether internal or external to the specific religion. There is therefore much to be gained from thinking about religion as cultural heritage. Problems remain in the use of religion as a driver of nationalism, which is facilitated by thinking of religious heritage as divorced from (religious) communities, as seen in the example of the WHC, even though significant efforts are being undertaken by UNESCO in this area. But the focus on religious heritage as living heritage, enabled by treaties like the ICHC, allow for heritage and religion to contribute to a broader conversation about humanity and the values we wish to espouse. There is a strong case for Russia to ratify the ICHC so as to benefit from these possibilities of intercultural dialogue within the framework of Russia's cherished religious heritage.

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Религиозное наследие в международном праве: национализм, культура и права

Л. Ликсински

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В статье исследуется та роль, которую религиозное наследие играет в нашем мышлении об использовании нематериального культурного наследия в политическом, социологическом и культурном аспектах. Рассматриваемая как наследие, религия выступает важной частью национального строительства, оторванной от фундаментальных канонов и воспринимаемой как социальная практика, что, по мнению автора, по большей части является развитием в правильном направлении в соответствии с международно признанным правом человека на свободу вероисповедания. В статье исследуется религиозное наследие в международном праве через российский опыт восприятия как Конвенции о Всемирном наследии 1972 г., так и Конвенции о нематериальном культурном наследии 2003 г. С точки зрения автора, ценности такого наследия преобладают над религиозными, по крайней мере поскольку концепция нематериального культурного наследия выступает в качестве посредника для распространения секуляризма и космополитизма.

Однако в то же время право человека на свободу вероисповедания способно помочь религиозным общинам использовать возможности сохранения наследия для защиты веры. Таким образом, в то время как придание религии привилегированного положения рассматривается как несовместимое с ориентацией на установление мира и диалога между нациями, которой международное право имеет тенденцию отдавать приоритет, процессы имплементации права наследия также обладают потенциалом содействия религии и религиозным общинам. По мнению автора, связь правовых норм о нематериальном культурном наследии с концепцией прав человека создает для таких стран, как Россия, стимулы более серьезно заниматься возможностями имплементации механизмов защиты этого наследия для охраны определенных религиозных практик и сдерживания роста опасного национализма. Поэтому России следует серьезно рассмотреть вопрос о ратификации Конвенции о нематериальном культурном наследии, по крайней мере для того, чтобы она принесла пользу обращению с религиозным наследием и его использованию в стране, а также способствовала расширению свободы вероисповедания как права человека, признаваемого и в индивидуальном, и в коллективном измерениях.

Ключевые слова: религия, секуляризм, нематериальное наследие, мировое наследие, международное право, коллизия прав, индивидуальные права, коллективные права, российское наследие.

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Ликсински Лукас — д-р наук, проф., Университет Нового Южного Уэльса, Австралия, NSW 2052, Сидней, UNSW; l.lixinski@unsw.edu.au

The restitution of illicitly exported cultural properties: Recent Italian cases

Tullio Scovazzi

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The question of restitution of removed cultural properties to which existing treaties do not apply for chronological or other reasons, is far from being settled under customary international law. It seems that an evolutionary trend is developing in present customary international law according to which claims related to the movements of cultural properties should be addressed in order to achieve an equitable solution, taking into account all relevant circumstances. These circumstances include: factors surrounding the removal of the cultural property from the state of origin, in particular the legality of the removal under the law of the state of origin or the substantive injustice of the removal; the importance of the cultural property for the state of origin, including its emblematic character; harm to the integrity of the cultural context from which the cultural property was removed; the amount of time since the cultural property was removed from the state of origin; the appreciation for and the care used to preserve the cultural property in the state of destination; the state of origin's commitment to care for the preservation of the cultural property if it is returned to it. Agreements between the Italian Ministry of Cultural Properties and activities by American museums are aimed at resolving disputes over the return of cultural properties in order to reach an equitable solution taking into account all relevant circumstances. This objective should govern relations between states of origin and states of destination of cultural properties, and should also be shared, if this is the case, also by non-state entities concerned. Non-adversarial procedures, such as negotiation, mediation or conciliation, should be put in place to achieve the objective.

Keywords: restitution, removed cultural properties, customary international law, non-adversarial procedures, mediation, conciliation, illicitly exported cultural properties, Italian cases.

1. The Euphronios krater

The story of the *Euphronios krater* (a big vase used to mix wine and water) well documents the gravity of the looting of archaeological sites and the consequent international trafficking of cultural properties that affected Italy in the last decades¹. It also shows how notable to address the question of the restitution of illicitly exported cultural properties is the practice developed by the Italian Ministry for Cultural Properties and Activities (hereinafter: the Ministry) to conclude agreements with foreign museums².

Tullio Scovazzi — Professor of International Law, University of Milano-Bicocca, 1, Piazza dell'Ateneo Nuovo, Milan, 20126, Italy; tullio.scovazzi@unimib.it

¹ On the looting see: *Watson P., Todeschini C.* The Medici Conspiracy — The Illicit Journey of Looted Antiquities from Italy's Tomb Raiders to the World's Greatest Museums: New York: Public Affairs, 2006; *Felch J., Frammolino R.* Chasing Aphrodite — The Hunt for Looted Antiquities at the Worlds' Richest Museum. Boston: Houghton Mifflin Harcourt, 2011.

² See: *Fiorilli M.* Cultural Properties and International Agreements // International Meeting on Illicit Traffic of Cultural Property / ed. by J. Papadopoulos. Rome: Gangemi Editore, 2010. P. 161; *Scovazzi T.* Analisi e significato della pratica italiana // La restituzione dei beni culturali rimossi con particolare riguardo alla pratica italiana / ed. by A. L. Scovazzi. Milan: Giuffrè Editore, 2014. P. 3.

After having been manufactured by Euxitheos, the vase was painted and signed by the Athenian artist Euphronios (active between 520 and 470 B. C.), one of the three great masters of red-figure vases. It is one of the best Attic vases, the only complete among the twenty-seven known as painted by Euphronios. The obverse side represents the god Hermes who supervises the transport by *Hypnos* (Sleep) and *Thanatos* (Death) of the corpse of the Trojan hero Sarpedon, killed in battle. The reverse side represents warriors arming themselves. At the time of Euphronios, the most valuable Greek vases were manufactured and painted in Athens and then exported to Central Italy where the Etruscans bought them for high prices.

In 1972 the *Euphronios krater* appeared for the first time in the collections of the Metropolitan Museum of Art of New York (hereinafter: the Metropolitan Museum). It was bought in exchange for 1 000 000 US \$ and several ancient Greek coins. In an interview given on 12 November 1972, the director of the Museum, Mr. Thomas Hoving, provided quite vague information about the provenance of the property:

We got it from a dealer who was the agent for a person who has had this in the family collection since about the First World War and we don't talk about the name of these people because they have other things that we might want to buy in the future.

<...> we bought it from somebody who happened to be in the country of Switzerland, who was acting as the agent for somebody who was even in another country whose family had it since around the First World War and that goes back a nice long time³.

The story became even less credible when Mr. Dietrich von Bothmer, the curator of Greek and Roman art at the Museum, disclosed that the previous owners of the property were the members of an Armenian family who because of unfortunate events were forced to leave their home in Lebanon and emigrate to Australia⁴.

After some time, the truth was unveiled following an unexpected event. An Italian antique dealer died in a car accident. In his pocket the police found a piece a paper with the names of several people involved in the trafficking of illicitly excavated archaeological properties. The Italian authorities concentrated their interest on Mr. Giacomo Medici, another Italian antiquarian. In cooperation with the Swiss police, they inspected a three-roomed warehouse held by Mr. Medici at the free-port of the Geneva airport. What they found was astonishing. In the warehouse were kept about 3000 artifacts, often of very high quality, most of them illegally excavated in Italy⁵, together with a detailed archive that shed light on a chain of people involved at different levels in the illegal trafficking, export and sale of archaeological properties: diggers (so-called *tombaroli*, in Italian), middlemen, traders, restorers, experts, European and American museum curators and collectors. Pictures were also found that provided useful evidence about the relevant facts. In the case of the *Euphronios krater*, the pictures documented the vase when found in a clandestine excavation⁶, the vase during the restoration and the vase exhibited at the Museum, with Mr. Medici and Mr. Robert Hecht (the American antiquarian who bought the vase from Mr. Medici and sold it to the Museum) smiling next to it. Besides recovering the items deposited in the warehouse, the Italian police and prosecutors were able to reconstruct the

³ The interview is published in: Meyer K. *The Plundered Past*. New York: Arts Book Society, 1973. P. 302.

⁴ Ibid. P. 93.

⁵ Including frescos detached in the area of Pompei from a villa clandestinely excavated and irreparably damaged by the looters.

⁶ The looters used the *polaroid* technique, also to avoid the risk of entrusting a photographer with the printing of the pictures. The *polaroid* technique, which was developed in the United States after World War II and introduced in Europe some years later, provides sure evidence that the excavations were made after the enactment (1909) of the Italian legislation that prohibited unauthorized archaeological excavations.

whereabouts of many archaeological properties that had already been sold to museums and collectors⁷.

It was finally proved that the *Euphronios krater* had been clandestinely excavated in 1971 at Cerveteri, in the core of the area inhabited in ancient times by the Etruscans⁸. It was illicitly⁹ exported from Italy to Switzerland and, after a number of transfers, sold to the Museum by Mr. Hecht, who imported it legally¹⁰ in the United States¹¹. It seems that the customs officer at the airport in New York made a pertinent comment when he asked to inspect the box that Mr. Hecht brought and saw the vase: "I don't know anything about Greek art, but you've really got something beautiful here"¹².

After the discovery of its real provenance, the problem for the Italian authorities was how to get the vase back.

2. The Agreements

The problem was finally solved by the conclusion of an agreement between the Ministry and the foreign museum concerned. Agreements of this kind have been concluded subsequently also with other foreign cultural institutions, such as the Museum of Fine Arts di Boston, the Princeton University Art Museum, the John Paul Getty Museum of Los Angeles, the Cleveland Museum of Art and the Dallas Museum of Art¹³. While usually called "agreements", this kind of instruments cannot be considered as international treaties, belonging to the category of contracts between States and foreign nationals¹⁴.

The agreements allow the State of origin to overcome the obstacles posed by the uncertain outcome of litigation before a foreign court on the ownership of the claimed properties. They also allow the foreign museums to preserve their reputation as truthful cultural institutions that do not encourage the pillage of the heritage of foreign countries and do participate in the fight against the destruction of cultural contexts and the illicit traffic resulting therefrom. Both parties agree on the strengthening of their relationship through future cooperative activities, including loans granted by Italy of archaeological properties of high value.

While the text of most agreements is kept confidential, an exception is the agreement signed on 21 February 2006 by the Ministry and the Commission for Cultural Properties of the Region of Sicily¹⁵, on the one hand, and the Metropolitan Museum, on the other.

⁷ Unfortunately, it was not possible to locate a rare Etruscan *Sarcophagus with Spouses* which appears in one of the pictures seized. Was it sold to a private collector who keeps it hidden?

⁸ See: Rizzo M. A. Gli scavi clandestini a Cerveteri // Ministero per i Beni Culturali e Ambientali. Bollettino d'Arte. 1995. No. 89–90. Annex. P. 15.

⁹ Illicitly, according to Italian law.

¹⁰ Legally, according to United States law.

¹¹ Today such an import would be illicit also according to United States law, because of the Agreement between Italy and the United States concerning the imposition of import restrictions on categories of archaeological material representing the pre-classical, classical and imperial Roman periods of Italy (Washington, 19 January 2001; renewed in 2006 and 2011).

¹² See: Meyer K. The Plundered Past. P. 91.

¹³ In 2012 an agreement was concluded with a Japanese institution, the Tokyo Fuji Art Museum. It provides for the return, under certain conditions, of the *Tavola Doria*, an anonymous painting of the 16th century reproducing a portion of *The Battle of Anghiari*, a lost fresco by Leonardo da Vinci on a wall of *Palazzo Vecchio* in Florence.

¹⁴ This type of legal instruments, which has an important background in the field of exploitation of natural resources (for example, concessions to foreign companies for oil exploration and exploitation), are used here to pursue a rather different purpose.

¹⁵ Under the Italian constitutional system, Sicily is the only region entitled to exercise an exclusive competence as regards the cultural properties existing in the region.

In the premise of the agreement, the Ministry states that the Italian archaeological heritage “is the source of the national collective memory and a resource for historical and scientific research”. It also recalls some basic aspects of the Italian legislation on cultural properties, in particular that:

— the archaeological heritage includes the structures, constructions, architectural complex, archaeological sites, movable objects and monuments of other types as well as their contexts, whether they are located underground, on the surface or under water (preambular para. B);

— to preserve the archaeological heritage and guarantee the scientific character of archaeological research and exploration operations, Italian law sets forth procedures for the authorization and control of excavations and archaeological activities to prevent all illegal excavations or theft of items of the archaeological heritage and to ensure that all archaeological excavations and explorations are undertaken in a scientific manner by qualified and specially trained personnel, with the provision that non-destructive exploration methods will be used whenever possible (preambular para. C).

In fact, under the Italian Legislative Decree 22 January 2004, No. 42 (Code of Cultural Properties and Landscape), all cultural properties found by anyone in any way in the subsoil or on the seabed belong to the State demesne, if immovable, or to the inalienable patrimony of the State, if movable (Art. 91, para. 1). The finder is entitled to a reward which cannot exceed one-fourth of the value of the properties found. A reward is also granted to the owner of the immovable property where the find has been made and to the holder of a concession for research¹⁶. The reward may be paid either in money or through the cession of part of the properties found (Art. 92, para. 4)¹⁷. A special procedure, as specified in Art. 93, applies in order to determine the amount of the reward. Legislation based on similar principles has been in force in Italy since 1909 (Law 20 June 1909, No. 364; Law 1st June 1939, No. 1089; Legislative Decree 29 October 1999, No. 490).

In the premise of the agreement it is also stated that the Metropolitan Museum:

— believes that the artistic achievements of all civilizations should be preserved and represented in art museums, which, uniquely, offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The interests of the public are served by art museums around the world working to preserve and interpret our shared cultural heritage (preambular para. F);

— <...> deplores the illicit and unscientific excavation of archaeological materials and ancient art from archaeological sites, the destruction or defacing of ancient monuments, and the theft of works of art from individuals, museums, or other repositories (preambular para. G);

— <...> is committed to the responsible acquisition of archaeological materials and ancient art according to the principle that all collecting be done with the highest criteria of ethical and professional practice (preambular para. H).

The first objective of the agreement is the return of a number of archaeological items that the Ministry has requested, affirming that they “were illegally excavated in Italian territory and sold clandestinely in and outside the Italian territory” (preambular para. E). The Metropolitan Museum, “rejecting any accusation that it had knowledge of the alleged illegal provenance in Italian territory of the assets claimed by Italy, has resolved to transfer the requested items in the context of this Agreement” (preambular para. I). The transfer does not constitute an acknowledgment on the part of the Metropolitan Museum of any

¹⁶ No reward is due to the finder if he has entered into an immovable property without the consent of the owner (Art. 92, para. 3).

¹⁷ A tax credit of value corresponding to the reward can be granted on request to those who are entitled to the reward.

type of civil, administrative or criminal liability for the original acquisition or holding of the requested items. The Ministry and the Region Sicily waive any legal action in relation to the returned items.

The items in question magnificently document the spreading of ancient Greek civilization in Southern Italy. They are the *Euphronios krater*, four vases (namely, a *Laconian kylix*, a red-figured Apulian *dinos* attributed to the Darius painter, a red-figured *psykter* decorated with horsemen and a red-figured Attic amphora by the Berlin painter), a set of fifteen Hellenistic silver items¹⁸ and a *pyxis*. They have been displayed at an exhibition held from December 2007 to March 2008 at the Quirinale Palace in Rome (the residence of the President of the Republic), together with other objects recovered from abroad¹⁹.

The second, but not secondary, objective of the agreement is to promote cultural co-operation between the parties. In exchange for the *Euphronios krater*, “to make possible the continued presence in the galleries of the Museum of cultural assets of equal beauty and historical and cultural significance”, the Ministry agrees to make four-year loans to the Metropolitan Museum of archaeological objects of equivalent beauty and historical and artistic significance selected from a list of twelve artefacts specified in the agreement (Art. 4, para. 1). In exchange for the transfer of the four above mentioned vases, the Ministry agrees to “loan a first-quality Laconian artefact to the Museum for a period of four years and renewable thereafter” (Art. 3, para. 2). In exchange for the Hellenistic silvers, the Ministry agrees to make to the Metropolitan Museum loans of cultural properties “of equal beauty and historical and artistic significance <...> on an agreed, continuing and rotating sequential basis” (Art. 5, para. 3)²⁰. Throughout the forty-year duration of the agreement (Art. 8, para. 1), the mutual co-operation extends to excavations, loans and restorations of cultural objects (Art. 7)²¹.

After its return to Italy as a consequence of the 2006 agreement between the Ministry and the Metropolitan Museum, the *Euphronios krater* is now exhibited at the *Museo Nazionale Etrusco di Villa Giulia* in Rome. But would the agreement have been concluded, if a car accident had not occurred? The other agreements have paved the way for the restitution of several unique cultural properties, as the following instances show.

Under the agreement concluded in 2006 with the Museum of Fine Arts of Boston, the Ministry achieved the restitution of thirteen items, including the marble statue of *Vibia Sabina*, wife of the Roman emperor Hadrian²², and several vases.

¹⁸ The fifteen refined items of gilded silver, called *Morgantina Silvers*, are the most important set of jeweller's art coming from Hellenistic Sicily. They were illegally excavated after 1978 from the archaeological site of Morgantina, an ancient city destroyed by the Romans in 211 B.C. They were bought by the Museum for 3 000 000 US \$. After the return, they are now exhibited at the *Museo Archeologico Regionale* of Aidone.

¹⁹ See the catalogue of the exhibition: *Nostoi – Capolavori ritrovati*, 2007. *Nostoi* means “returns” in Greek.

²⁰ “The Museum shall arrange and bear the costs of packing, insurance and shipment of the requested and loaned items for transit to and from Italy” (Art. 6, para. 4).

²¹ According to A. K. Briggs “this unprecedented resolution to a decades-old international property dispute has the potential to foster a new spirit of cooperation between museums and source nations, spawn stricter museum acquisition and loan policies, reduce the demand for illicit cultural property, and permanently alter the balance of power in the international cultural property debate” (*Briggs A. K. Consequences of the Met-Italy Accord for the International Restitution of Cultural Property // Chicago Journal of International Law*. 2007. No. 7 (2). P.623).

²² See: *Polvoledo E.* Returning Stolen Art: No Easy Answers // *The New York Times*. 27 October 2007. P.B13. Available at: <https://www.nytimes.com/2007/10/27/arts/design/27ethi.html> (accessed: 16.12.2020). According to a joint press communiqué of 28 September 2008, “the agreement includes the creation of a partnership in which the Italian government will loan significant works from Italy to the MFA's displays and special exhibitions program, and establishes a process by which the MFA and Italy will exchange information with respect to the Museum's future acquisitions of Italian antiquities. The partnership

Under the agreement concluded in 2007 with the John Paul Getty Museum of Los Angeles, the Ministry achieved the restitution of the *Venus of Morgantina* (a statue of 2,20 m, with head and limbs in marble and body in limestone, illegally excavated in Morgantina²³ and exported after having been cut in three pieces, paid by the Museum 18 000 000 US \$), the *Trapezophoros* (a support for ritual table that represents two griffons attacking a hind, illegally excavated nearby Ascoli Satriano, paid by the Museum 5 500 000 US \$)²⁴, as well as several vases;

Under the agreements concluded with the Princeton University Art Museum (2007)²⁵, the Cleveland Museum of Art (2008) and the Dallas Museum of Art, the Ministry achieved the restitution of respectively eight, fourteen and six cultural properties.

Other cultural properties illegally exported abroad are claimed or might be claimed by Italy. Some of the claims relate to properties that were not included in the above mentioned agreements with American museums, such as the bronze statues of the *Victorious Youth* (or *Athlete*), attributed to Lysippus and held by the John Paul Getty Museum²⁶, and the *Cleveland Apollo*, attributed to Praxiteles and held by the Cleveland Museum of Art.

3. An evolutionary trend in present customary international law

The question of restitution of removed cultural properties to which the treaties in force do not apply for chronological or other reasons is far from being settled under customary international law. While it is not possible to elaborate here on the matter²⁷, it seems that an evolutionary trend is developing in present customary international law according to which claims relating to movements of cultural properties should be addressed in order to achieve an equitable solution, taking into account all the relevant circumstances, such as, *inter alia*:

- the factors surrounding the removal of the cultural property from the State of origin, in particular the legality of the removal under the law of the State of origin or the substantive injustice of the removal;
- the importance of the cultural property for the State of origin, including its emblematic character;
- the harm to the integrity of the cultural context from which the cultural property was removed;
- the amount of time since the cultural property was removed from the State of origin;
- the appreciation for and the care used to preserve the cultural property in the State of destination;

also envisages collaboration in the areas of scholarship, conservation, archaeological investigation and exhibition planning". The statue is now exhibited at the archaeological site of *Villa Adriana* in Tivoli.

²³ For other cultural properties found in Morgantina see note 18 above.

²⁴ The *Venus of Morgantina* is now exhibited at the *Museo Regionale Archeologico* of Aidone, the *Trapezophoros* at the *Museo Civico-Diocesano* of Ascoli Satriano. The picture of Mr. Medici next to the *Trapezophoros* at the John Paul Getty Museum was found in the already mentioned warehouse at the Geneva airport. In 2012 the museum returned to Italy also several marble fragments that belonged to the same tomb from which the *Trapezophoros* had been illegally excavated.

²⁵ See: *Polvoledo E.* Princeton to Return Disputed Art to Italy. P. B7.

²⁶ The statue was found on the seabed of the Adriatic Sea. It was clandestinely imported in Italy and then illegally exported abroad. See: *Lanciotti A.* The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze" // *Cultural Heritage, Cultural Rights, Cultural Diversity — New Developments in International Law* / eds S. Borelli, F. Lenzerini. Leiden: Brill, 2012. P.301; *Scovazzi T.* Un atleta non ancora giunto a destinazione // *Rivista di Diritto Internazionale*. 2019. No. 102. P.511.

²⁷ Some elaboration can be found in *Scovazzi T.* *Diviser c'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property* // *Rivista di Diritto Internazionale*. 2011. No. 94 (2). P.341.

- the State of origin's commitment to care for the preservation of the cultural property if it is returned to it.

In this regard, the participants to the International Conference of Experts in the Return of Cultural Property, held in Seoul on 16 and 17 October 2012, recommended, *inter alia*, that

States discuss cases relating to the return of cultural objects not governed by international legal instruments, seeking equitable solutions taking into account all the relevant and specific circumstances, such as integrity of the cultural context, significance of the object for the States concerned, ethical propriety of its removal, treatment of the object by the present possessors, and the State's of origin commitment to security and care of the objects <...>

States, in attempting to reach equitable solutions, consider means of co-operation with other States, entities and individuals through cultural policy in general, including loans, temporary exhibitions, joint excavation activities, research, and restoration.

The Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Properties (Paris, 1970), adopted by consensus on 18th May 2015 by the Meeting of States Parties to the convention²⁸, provide as follows:

For items of illegally exported, illegally removed or stolen cultural property imported into another State Party before the entry into force of the Convention for any of the States Parties concerned, States Parties are encouraged to find a mutually acceptable agreement which is in accordance with the spirit and the principles of the Convention, taking into account all the relevant circumstances <...> (Op. Guid. 103).

The agreements between the Italian Ministry of Cultural Properties and Activities and the American museums go in the direction of settling disputes on the return of cultural properties in order to reach an equitable solution taking into account all the relevant circumstances. This objective should govern the relationship between the States of origin and the States of destination of cultural properties and should also be shared, if this is the case, also by non-state entities concerned. Non-adversarial procedures, such as negotiation, mediation or conciliation, should be put in place to achieve the objective.

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²⁸ See: Scovazzi T., Ferri P. G. Recent Developments in the Fight against the Illicit Export of Archaeological Objects: the Operational Guidelines to the 1970 UNESCO Convention // *Art Antiquity and Law*. 2015. No. 20 (3). P. 195.

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Реституция незаконно вывезенных культурных ценностей: недавние итальянские кейсы

Т. Сковацци

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Вопрос о реституции перемещенных культурных ценностей, на которые действующие договоры не распространяются по хронологическим или иным причинам, далеко не решен в рамках обычного международного права. В современном международном обычном праве наблюдается тенденция, согласно которой претензии по поводу перемещения культурных ценностей должны рассматриваться для достижения справедливого решения с учетом всех сопутствующих обстоятельств. Эти обстоятельства включают: факторы, связанные с изъятием культурного достояния из государства их происхождения, в частности законность изъятия в соответствии с законодательством государства происхождения или материальную несправедливость изъятия; важность культурного достояния для государства происхождения, в том числе его символический характер; ущерб целостности культурного контекста, из которого было изъято культурное достояние; количество времени, прошедшего с момента изъятия культурного достояния из государства происхождения; признание и забота, проявляемые для сохранения культурных ценностей в государстве назначения; обязательство государства происхождения заботиться о сохранении культурных ценностей, если они будут возвращены ему. Соглашения между итальянским Министерством культурных ценностей и культурной деятельности и американскими музеями направлены на урегулирование споров о возвращении культурных ценностей для достижения справедливого решения с учетом всех сопутствующих обстоятельств. Достижение такого решения должно стать основой отношений между государствами происхождения и государствами назначения культурных ценностей; данную цель должны разделять и заинтересованные негосударственные образования. При этом следует применять неконкурентные процедуры, такие как переговоры, посредничество или примирение.

Ключевые слова: реституция, изъятые культурные ценности, международное обычное право, примирительные процедуры, медиация, мировое соглашение, нелегально экспортированные культурные ценности, итальянские кейсы.

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Сковацци Туллио — профессор международного права, Университет Милана-Бикокка, Италия, 20126, Милан, пл. дель Атенео Нуово, 1; tullio.scovazzi@unimib.it

Restitution of stolen cultural properties: Lessons and challenges from recent Korean cases

Gyoocho Lee

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The Republic of Korea adopted the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on 14 February, 1983. The Convention has some disadvantages in that its scope does not cover the cultural properties stolen from Korean territory during the Japanese colonial era, which lasted from 1910 to 1945, and the Korean War from 1950 to 1953 because it cannot be retroactively applied to cultural properties stolen during these years, and it falls within the field of public international law. Hence, in order for the Korean government and the legal community to seek more effective methods of restitution of cultural properties stolen during these periods, alternative legal tools need to be discussed. Some good examples include the donation or purchase of stolen cultural property, arbitration of disputes over the restitution of cultural property, bilateral international instruments concerning the restitution of cultural property, and the restitution of stolen cultural property through the application of foreign domestic public law or private international law. In particular, the main focus of this article is on the restitution of stolen cultural property through foreign domestic public law or private international law. At the beginning of the article, it is illustrated where overseas Korean cultural properties are located. The article then delves into why the focus is on the restitution of stolen cultural property through the application of foreign domestic public law or private international law. Three examples are discussed based on these scenarios. The article concludes by looking at the lessons learned from these cases and the challenges that the Korean government and legal community are likely to face.

Keywords: restitution, cultural property, stolen cultural property, cultural heritage law, private international law, bona fide acquisition.

Introduction

The Republic of Korea (hereinafter: Korea) accepted the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: 1970 UNESCO Convention) on 14 February, 1983¹. To implement the 1970 UNESCO Convention, Korea has had the Ministry of Culture, Sports, and Tourism prevent and preserve the illegal transaction in cultural property through the establishment of museums and art galleries. Furthermore, Korea has let the Cultural Heritage Administration (hereinafter: CHA) administer legal regimes, regulate specialists who deal with cultural heritage, operate educational systems to invoke public awareness, in-

Gyoocho Lee — Juridical Science Doctor, tenured professor of law, Chung-Ang University School of Law, 84, Heukseok-Ro, Dongjak-Gu, Seoul, 06974, Republic of Korea; cion2004@hanmail.net

¹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris, 14.11.1970 // UNESCO. Available at: <http://www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=13039> (accessed: 23.05.2020) (hereinafter: UNESCO, 1970 UNESCO Convention).

investigate and document cultural properties for their protection, and supervise archaeological excavations².

Article 7 of the 1970 UNESCO Convention states that, at the request of the State Party of origin through diplomatic channels, another State Party will seize and return cultural property on its territory stolen from a museum, religious institution or public monument and the former has to pay just compensation to an owner who has purchased the cultural property in good faith or holds a title which is valid in accordance with national law (UNESCO, 1970 UNESCO Convention). However, the 1970 UNESCO Convention³ has some weaknesses in that its scope does not cover the cultural properties stolen from Korean territory during the Japanese colonial era lasting from 1910 to 1945 and the Korean War ranging from 1950 to 1953 because it cannot be applied to cultural properties stolen during the Japanese colonial era and/or the Korean War retroactively and in that it falls within the field of public international law.

In this regard, the Convention on Stolen or Illegally Exported Cultural Objects (1995) (hereinafter: 1995 UNIDROIT Convention), which complements the 1970 UNESCO Convention, needs to be discussed⁴. The 1995 UNIDROIT Convention covers all stolen cultural objects in civil matters and has self-executing effect unlike the 1970 UNESCO Convention⁵. Still, even the 1995 UNIDROIT Convention does not have retroactive effect⁶. In addition, Korea is not a party to the 1995 UNIDROIT Convention.

Hence, in order for the Korean government and legal community to seek more effective methods of restitution of cultural properties stolen during those periods, alternative legal tools need to be discussed. Some good examples are donation of or purchase of stolen cultural property, arbitration of disputes over the restitution of cultural property, bilateral international instruments concerning the restitution of cultural property, and the restitution of stolen cultural property through the application of foreign domestic criminal law⁷ or of private international law. In particular, the main focus of this Article is on the restitution of stolen cultural property through the application of foreign domestic criminal law or of private international law.

² Republic of Korea, Report on the application of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property // UNESCO. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/rep_of_korea_2010-11natrep_1970_en.pdf (accessed: 20.06.2020).

³ 이동기, “문화재환수협약의 성립경위와 현황”, 『국제사법연구』, 제15호, 2009. 12, 169–174면 [Lee Dong-Ki. History and Current Status of the Cultural Property Repossession Convention — Including Relationship with the UNESCO Convention // Korea Private International Law Journal. 2009. Vol. 15. P. 169–174].

⁴ 석광현, “UNIDROIT 문화재환수협약 가입절차와 유의점”, 『국제사법연구』, 제15호, 2009. 12, 324–378면 [Suk Kwang Hyun. Some Issues on Korea’s Accession to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects // Korea Private International Law Journal. 2009. Vol. 15. P. 324–378]; 송호영, “문화재반환사건에 있어서 민법 및 국제사법상 몇 가지 쟁점”, 『국제사법연구』, 제15호, 2009. 12, 298–323면 [Song Ho-Young. Some civil and international private law questions on the return of cultural property // Korea Private International Law Journal. 2009. Vol. 15. P. 298–323]; 이재경, “불법반출문화재의 반환청구”, 『국제사법연구』, 제15호, 2009. 12, 263–297면 [Lee Jaekyung. Restitution of Illegally Exported Cultural Objects: Condition and Procedure of Restitution // Korea Private International Law Journal. 2009. Vol. 15. P. 263–297].

⁵ The 1995 UNIDROIT Convention // UNESCO. Available at: <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention> (accessed: 06.06.2020).

⁶ 손경한, “문화재환수협약의 개요와 한국의 대응방안”, 『국제사법연구』, 제15호, 2009. 12, 216면 [Sohn Kyung Han. Introduction to 1995 UNIDROIT Cultural Objects Convention and Korea’s Accession Thereof // Korea Private International Law Journal. 2009. Vol. 15. P. 216].

⁷ In terms of the criminal seizure in Korea, see cf.: 이순옥, “문화재환수와 관련된 형사법상 압수 및 몰수”, 『국제사법연구』, 제24권 제2호, 2018. 12, 397–430면 [Lee Soon-Ok. A Study on the Criminal Seizure and Confiscation related to Restitution of Cultural Properties // Korea Private International Law Journal. 2018. Vol. 24, No. 2. P. 397–430].

For this purpose, at the outset, the Article illustrates where overseas Korean cultural properties are located. Afterwards, it delves into why it focuses on the restitution of stolen cultural property through the application of foreign domestic criminal law or of private international law. Next, it discusses three examples based on these scenarios. In conclusion, the Article discusses the lessons from those cases and the challenges that the Korean government and legal community are likely to face.

1. Current situation of overseas Korean cultural properties

As of 1 April, 2020, overseas Korean cultural properties were located in 21 countries (table 1). Taking into account the Japanese colonial era between 1910 and 1945, Japan had the largest portion of them, amounting to 81 889 items. Even though some Korean cultural properties were returned to Korea based on bilateral agreement between Korea and Japan in 1965, many Korean cultural properties possessed by Japanese citizens and legal entities and omitted by Japanese government have failed to be restituted by the bilateral treaty⁸.

Table 1. Overseas Korean Cultural Properties in 21 countries as of 1 April, 2020

Country	Institution	Items
Japan	Tokyo National Museum, etc	81 889 (42,40 %)
United States	Metropolitan Museum of Art, New York, etc.	53 141 (27,52 %)
China	The Palace Museum, Beijing, etc.	12 984 (6,72 %)
Germany	Museum für Ostasiatische Kunst (Museum of East Asian Art), Köln (Cologne), etc.	12 113 (6,27 %)
United Kingdom	British Museum, London, etc.	7638 (3,96 %)
France	Musee Guimet, Paris, etc.	5684 (2,94 %)
Russia	State Museum of Oriental Art, Moscow, etc.	5334 (2,76 %)
Canada	Royal Ontario Museum, Toronto, etc.	4276 (2,21 %)

Source: Overseas Korean Cultural Heritage Foundation, Statistics. Available at: http://www.overseaschf.or.kr/front/comm/htmlPage.do?H_MENU_CD=100302&L_MENU_CD=10030201&SITE_ID=ENG&MENUON=Y&SEQ=106 (accessed: 10.06.2020).

The second largest portion of them was found in the United States of America, amounting to 53 141 cultural items. It is something of an expected outcome in that Korea had experienced the rule of the United States Army Military Government in Korea, which

⁸ 김중수, “일본 유출 문화재의 환수 및 활용 방안”, 『민속학연구』, 제24호, 2009. 6, 69–94면 [Kim Jong Soo. An approach of redeeming and utilizing cultural properties plundered by Japan // Korean Journal of Folk Studies. 2009. Vol. 24. P. 69–94]; 엄태봉 [Um Taebong]: 1) “제6차 한일회담 시기의 문화재 반환 교섭 연구: 교섭 과정과 그 의미를 중심으로”, 『동북아논총』, 제60호, 2018. 6, 116–159면 [A Study on the Issue of the Return of Cultural Properties during the 6th Korea-Japan Talks: Focusing on the Negotiation Process and Its Significance // Journal for Northeast Asian History. 2018. Vol. 60. P. 116–159]; 2) “초기 한일회담 (1차–3차) 시기의 문화재 반환 교섭에 대한 외교사적 연구”, 『한국학』, 제43권 제1호, 2020. 3, 265–297면 [The Diplomatic History of the Negotiations of the Return of Cultural Properties at the early stage of KoreaJapan talks // Korean Studies Quarterly. 2020. Vol. 43, No. 1. P. 265–297]; 3) “한일회담 문화재 반환 협상의 재조명”, 『아태연구』, 제26권 제2호, 2019. 6, 199–228면 [A Rethinking on the Negotiation on the Return of Cultural Properties in the Korea-Japan Talks // Journal of Asia-Pacific Studies. 2019. Vol. 26, No. 2. P. 199–228].

lasted from 9 September 1945 to 15 August 1948, and the Korean War (1950 to 1953). The third largest portion of Korean cultural properties was located in China, amounting to 12 984 cultural items.

2. Restitution of stolen cultural property through the application of foreign domestic criminal law or of private international law

The Cultural Heritage Protection Act, which was enacted on 10 January, 1962 and effective since the same date, was not applicable to the cultural properties stolen prior to its effective date⁹. Even the provision prohibiting good faith acquisition of a stolen cultural property under Cultural Heritage Protection Act has been effective since July 27, 2007. Hence, the Cultural Heritage Protection Act¹⁰ is not an effective legal framework to restitute overseas Korean cultural properties stolen during the Japanese colonial era, the ruling period of the United States Army Military Government in Korea, or the Korean War. In this regard, it should be noted that Korea's first Civil Act had retroactive effect. Korea's Civil Act, which was enacted on February 22, 1958 and effective since January 1, 1960¹¹, has had retroactive effect unlike its subsequent revisions because the drafters of the enacted Civil Act of 1958 acknowledged the potential inconsistency and conflict between the enacted Civil Act of 1958 and the civil law applied to Korea during the cruel and painful Japanese colonial periods ranging from 1910 to 1945. In other words, Article 2 of the Addenda of the enacted Civil Act of 1958 prescribes that "Unless otherwise provided, this Act shall also apply to matters before the date of enforcement of this Act: provided, however, that no effect taken already under the previous Act shall be affected by this Act". Furthermore, Article 27 subparagraph 2 of the Addenda of the enacted Civil Act of 1958 prescribes that

The following statutes shall be repealed:

1. The Civil Act, Act for Enforcement of the Civil Act, and Act on Computation of Age applied in accordance with Article 1 of the Chosun Civil Ordinance;
2. Provisions of statutes applied in accordance with the Chosun Civil Ordinance and Article 1 of the Ordinance which conflict with the provisions of this Act;
3. Provisions of Military Government statutes which conflict with the provisions of this Act.

When it comes to acquisition by prescription, bona fide acquisition etc., the Civil Act of 1958 had provisions identical to the current Civil Act. In other words, the former included the provisions relating to: (i) period for acquiring ownership of movables by possession (Article 246); (ii) bona fide acquisition (Article 249); (iii) special provisions on stolen or lost articles (Articles 250 and 251); (iv) acquisition of ownership of lost articles (Article 253); (v) acquisition of ownership of treasure-trove (Article 254); and (vi) state ownership of cultural heritage (Article 255).

Article 246 (Period for Acquiring Ownership of Movables by Possession)

(1) A person who has for ten years peaceably and openly held possession of a movable with the intent to own it, shall acquire the ownership of such a movable.

(2) In a case where the possession under the preceding paragraph was commenced in good faith and without negligence, ownership shall be acquired after five years have elapsed.

Article 249 (bona fide Acquisition)

If a person who peaceably and openly was assigned a movable, had possession of it in good faith and without negligence, he shall acquire its ownership immediately even if the assigner is not a legal owner.

⁹ Article 1 of the Addenda of the Cultural Heritage Act of 1962 (Act No. 961).

¹⁰ Act No. 17409, revised on 9 June, 2020 and effective since the same date.

¹¹ Act No. 471.

Article 250 (Special Provision on Stolen or Lost Articles)

If the movable mentioned in the preceding Article is a stolen or lost article, the injured party or loser may demand the return of the article within two years from the time when the article was stolen or lost: Provided, That this shall not apply in a case where the lost or stolen article is money.

Article 251 (Special Provision on Stolen or Lost Articles)

If the assignee has bought the stolen or lost Article in good faith at a sale by auction, in a public market, or from a merchant selling articles of the same kind, the injured party or loser may demand the recovery of the article after he reimburses the assignee for the price paid for it.

Article 253 (Acquisition of Ownership of Lost Articles)

The ownership of a lost article is acquired by the finder if its owner does not claim his right within one year after public notice has been given in accordance with the provisions of the Act.

Article 254 (Acquisition of Ownership of Treasure-Trove)

The ownership of a treasure-trove is acquired by the discoverer if its owner does not claim his right within one year after public notice has been given in accordance with provisions of the Act. But the ownership of a treasure-trove discovered on the property or among other things belonging to another person is acquired by the discoverer and the owner of the land or the thing in equal shares.

Article 255 (State Ownership of Cultural Heritage)

(1) Things which are important for scientific, artistic, or antiquarian research shall belong to the state, not following the provisions of Article 252 (1) and the preceding two Articles.

(2) In the case of the preceding paragraph, the finder, the discoverer, and the owner of the land or things where the treasure-trove was discovered, may submit a request for proper compensation from the state.

Hence, even though the Civil Act of 1958 had retroactive effect, the provisions, such as acquisition by prescription and bona fide acquisition, of the Civil Act of 1958 were somehow disadvantageous to the original owner of a stolen cultural property during the Japanese colonial era, the ruling periods of the United States Army Military Government in Korea, or the Korean War. Because of these reasons, the Korean government and/or the Korean legal community have started to look at domestic criminal law of a foreign country and/or private international law under which a foreign material law favorable to an original Korean owner of a stolen cultural property is applicable to a case related to the stolen cultural property.

3. Restitution of royal seals of Queen Mun-Jeong and of King Hyun-Jong

In 1547, King Myung-Jong between 1545 and 1567, who was born in 1534, made this royal seal for his mother, the second Queen of King Jung-Jong between 1506 and 1544, who was born in 1488 (figure 1).

In 1651, King Hyo-Jong between 1649 and 1659, born in 1619, made this royal seal for his eldest son, King Hyun-Jong between 1659 and 1674, born in 1641, when the latter became as the prince of the nation (figure 2). As far as the two cases are concerned, the National Stolen Property Act of 1949 came into play^{12,13}. In 2013, the Cultural Heritage Administration of Korea notified Homeland Security Investigations (hereinafter: HSI) of the

¹² 18 USC 2314 (1949), whose title is “Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting”, prescribing that “Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud [omitted] [s] hall be fined under this title or imprisoned not more than ten years, or both”.

¹³ 이규호, “미국내 소재 우리 문화재의 환수를 위한 법적 고찰-미국 연방도품법을 중심으로-”, 『법조』, 제61권 제3호, 2012, 253–293면 [Lee Gyooho. A Study on the Return of Korean Cultural Objects Located in America-Focused on the National Stolen Property Act // Legal Profession. 2012. Vol. 666. P. 253–293].



Figure 1. Royal seal of Queen Mun-Jeong (1547)

Source: National Palace Museum of Korea.



Figure 2. Royal seal of Hyun-Jong (1651)

Source: National Palace Museum of Korea.

USA that the two items were stolen and asked HSI of the USA to investigate this case on 23 May, 2013 for the royal seal of Queen Mun-Jeong and on 9 July, 2013 for the royal seal of King Hyung-Jong. The HSI of the USA arrested the two items from their holders on 27 September, 2013. The Cultural Heritage Administration of Korea confirmed that they are genuine on 24 July, 2014. On 19 September, 2016, the Department of Justice of the USA brought a lawsuit for civil confiscation in a district court of California (CA). The district court in CA rendered a default judgment, which ordered civil confiscation on 10 April, 2017. On 2 June, 2017, the civil confiscation decision took effect. On 30 June, 2017, the former President Obama of USA returned the royal seals to the Korean government at the Korea-US summit^{14,15}.

4. Restitution of Royal Seal of the second Queen Jang-Yeol (1624–1688) (1676)

4.1. Facts

This royal seal concerns Queen Jangyeol Yeol between 1624 and 1688, the second wife of King Injo between 1623 and 1649, born in 1595, in Chosun Dynasty (figure 3). In 1676, the 2nd year of the rein of King Sukjong between 1674 and 1720, born in 1661, it was made for her. Many Korean cultural properties were stolen or illicitly exported during: (i) Japanese occupation era (1910–1945) and (ii) Korean War (1950–1953).

State and Royal Seals of the Chosun Dynasty (1392 to 1897) and Korean Empire (1897 to 1910) are classified as state properties pursuant to past and present relevant laws. Hence, the state and royal seals of the Chosun Dynasty and Korean Empire have been owned by the Republic of Korea. The plaintiff, a Korean citizen and private collector of cultural properties, bought an item called “Japanese Hardstone Turtle” from Bremo

¹⁴ ICE Returns Valuable Royal Seals to South Korea // Department of Homeland Security. Available at: <https://www.dhs.gov/blog/2017/07/21/ice-returns-valuable-royal-seals-south-korea> (accessed: 06.06.2020); US returns “looted” royal seals to South Korea after 60 years // BBC News. 2017. Available at: <https://www.bbc.com/news/world-asia-40468059> (accessed: 06.06.2020).

¹⁵ 이규호, “문정왕후 어보와 현종 어보의 환수절차와 미국 연방도품법의 의의”, 『Museum News』, 2017. 8. 29 [Lee Gyoo-ho. The Restitution of Royal Seals of Queen Mun-Jeong and of King Hyun-Jong and the Overview of National Stolen Property Act // Museum News. August 29, 2017]. Available at: <http://www.museumnews.kr/187sp08cal170829> (accessed: 20.06.2020).



Figure 3. Royal Seal of the second Queen Jangyeol of King Injo (1676)

Source: National Palace Museum of Korea.

Auctions in VA, USA on January 30, 2016. The plaintiff's purchase price was 9500 US \$ (excl. 25 % operation fees). Later on, the National Palace Museum of Korea posted a plan to buy cultural properties publicly in the second half of 2016. The plaintiff applied to sell his said item to the Museum for 250 million Korean won (203 169 US \$ as of May 18, 2020). The Museum retained it without its purchase and refused to return it to him because it had been a stolen state property through in-depth consultations. As a corollary, the plaintiff brought a lawsuit primarily to seek the return of the royal seal and secondarily to seek for damages of 250 million Korean won incurred due to the tortious act of the Korean government.

4.2. The holding of the court of the first instance¹⁶

4.2.1. Legal issues

The legal issues in this case relate to: (i) whether the Court has international jurisdiction over the dispute; (ii) who had original ownership of the royal seal; (iii) whether there is proof to show that it was stolen; (iv) whether the plaintiff is a bona fide purchaser of the royal seal based on what applicable law.

International Jurisdiction. The Plaintiff is a Korean citizen residing in Korea. The defendant is the Korean government, i. e., the Republic of Korea. The foreign element in this case is in that the plaintiff bought the royal seal from an auction house located in Virginia via online auction. There is no dispute between the plaintiff and the defendant in this case in terms of international jurisdiction¹⁷.

The original ownership of the royal seal. Both parties agreed that the Korean government has owned the royal seal because the Korean government succeeded the Chosun Dynasty. Therefore, there is no dispute over this issue.

¹⁶ Seoul Central District Court Decision on 25 August, 2017, Case No. 2017 Gahap 518187.

¹⁷ See the Act on Private International Law (Act No. 13759, on 19 January, 2016) prescribing that "(1) In case a party or a case in dispute is substantively related to the Republic of Korea, a court shall have the international jurisdiction. In this case, the court shall obey reasonable principles, compatible to the ideology of the allocation of international jurisdiction, in judging the existence of the substantive relations; (2) A court shall judge whether or not it has the international jurisdiction in the light of jurisdictional provisions of domestic laws and shall take a full consideration of the unique nature of international jurisdiction in the light of the purport of the provision of paragraph (1)".

Evidence to show it was stolen. The royal seal was presumed to be stolen in 1950 during the Korean War. The Court found that the Baltimore Sun Newspaper reported in November 17, 1953, that 47 royal seals, including this item, were stolen and illicitly exported to the USA and the Korean government requested the US government to return them to Korea. Furthermore, the Court observed that, on May 21, 1956, the Korean ambassador called legal consultant for cultural heritage of the Department of State to confirm the shape and size of the item. Prior to this finding of the Court, both parties did not contend during its pendency before the court of the first instance.

Whether the plaintiff is a bona fide purchaser of the royal seal based on what law. The plaintiff argued that Korean law should be applied to the case in question. According to Korean law, the plaintiff was allowed to acquire the stolen royal seal in good faith. Meanwhile, the defendant argued that Virginia state law should be applied to this case. A good faith acquisition of stolen properties is prohibited pursuant to Virginia state law. In this case, it should be discussed whether online auction of cultural property made any difference in this case. When it comes to *lex situs* of the subject matter at the time of the completion of the causal act or fact, it should be discussed when the online auction was completed. Suppose that the online auction was completed in Virginia, Article 19 (1) of the Act on Private International Law of Korea will be applied to this case. In this scenario, Virginia law will be applied in favor of the defendant¹⁸.

On the other hand, suppose that the plaintiff receives the notice that the online auction was completed in Korea. Then, Article 19 (2) of the Act on Private International Law of Korea¹⁹ will be applied to the instant case. In the second scenario, the governing law will be Korean law favoring the plaintiff. The court of the first instance applied Virginia law to this case in favor of the defendant.

4.2.2. Holdings

The first argument of the plaintiff was that “Since the royal seal in this case is not a stolen property, he has legally acquired ownership of the royal seal by auction. The state refuses to return it to the plaintiff while occupying it. Hence, A primarily claims that the state has an obligation to return it to the plaintiff pursuant to Article 213 of the Korean Civil Act”. The second argument of the plaintiff was that “Even if the royal seal were a stolen property, the plaintiff obtained it in good faith pursuant to Article 249 of the Korean Civil Act. The defendant can reimburse the price of the royal seal and request its return pursuant to Article 251 of the Korean Civil Act. Nonetheless, the National Palace Museum of Korea under the auspice of the defendant made a public announcement to buy cultural properties owned by individuals and legal entities and showed the attitude as if it was buying the royal seal from the plaintiff. However, the Museum unilaterally refused to purchase and to return, the royal seal, so that the defendant infringed the property right of the plaintiff. Hence, the defendant will be obliged to pay the plaintiff a substantial amount of the value of the royal seal in this case as compensation for damages caused by illegal acts. The plaintiff first seeks the payment of 250 000 000 won, which is the calling price for sale of the royal seal in this case”.

In this case, the Seoul Central District Court looked at the private international law of Korea in order to find material law applicable to this case. The court observed that “When

¹⁸ Article 19 (1) of the Act on Private International Law of Korea prescribing that “(1) Real rights, or other rights subject to registration, concerning movables and immovables shall be governed by the *lex situs* of the subject matter”.

¹⁹ Article 19 (2) of the Act on Private International Law of Korea prescribing that “(2) Any change in acquisition or loss of the rights prescribed in paragraph (1) shall be governed by the *lex situs* of the subject matter at the time of the completion of the causal act or fact”.

the plaintiff was awarded a bid at the auction site, the royal seal was located in Virginia, USA, and, afterwards, the royal seal was brought into Korea”. Then, it held that “The law applicable to the issue as to whether A acquired the ownership of the royal seal was the Virginia state law, which is *lex situs* of the subject matter at the time of the completion of the causal act or fact”. It went on to hold that “Common law countries do not recognize good faith acquisition of stolen goods due to the dominant principle of ‘*nemo dat quod non habet*’ in the common law system, and Virginia law also does not recognize good faith acquisition of stolen goods. Even if the plaintiff was awarded an auction at the auction site, the royal seal was a stolen property, so that the plaintiff was not able to claim ownership of the royal seal according to Virginia law”. By holding so, the court dismissed the plaintiff’s claim. Indeed, in accordance with Virginia state law, good faith acquisition of stolen goods is not allowed in Virginia^{20,21}.

Title 8.2. Commercial Code. Sales § 8.2-328. Sale by auction

- 1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.
- 2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.
- 3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer’s announcement of completion of the sale, but a bidder’s retraction does not revive any previous bid.
- 4) If the auctioneer knowingly receives a bid on the seller’s behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

4.2.3. Comments

The present Civil Act²² prescribes acquisition by prescription (Article 246) and bona fide acquisition (Article 249). Even though the provisions concerning bona fide acquisition are not applicable to “transactions, such as trade, etc. of cultural heritage publicly announced as a stolen... article” under Article 87 (5) 2 of Cultural Heritage Protection Act, the latter has been effective since 2007²³. Even the first enacted Cultural Heritage Protection Act²⁴ had taken into effect since 1962²⁵. While we take into account the overall legal landscape of the past and present cultural heritage laws in Korea, it is fair to say that application of Virginia state law is in favor of the defendant in this case.

²⁰ 이규호, “도난문화재에 대하여 선의취득은 배제되는가?”, 『Museum News』, 2017. 9. 12 [Lee Gyoo-ho. Is bona fide Acquisition Not Applicable to Stolen Cultural Property? // Museum News. September 12, 2017]. Available at: <http://www.museumnews.kr/188sp08cal170912> (accessed: 20.06.2020).

²¹ 2014 Virginia Code (VA Code Ann. § 8.2-328 (2)).

²² Act No. 14965, revised on 31 October 2017 and effective since 1 February, 2018.

²³ The provision prohibiting bona fide acquisition, which became effective since 27 July, 2007, pursuant to Article 1 of Addenda of Cultural Heritage Protection Act (Act No. 8346) revised on 11 April, 2007 and effective since the same date.

²⁴ Act No. 961, enacted on 10 January, 1962 and effective since the same date.

²⁵ Article 2 of Addenda of the enacted Cultural Heritage Protection Act of 1962 repealed the Order Protecting Treasures, Historic Sites, Scenic Spots and Natural Monuments (Imperial Order No. 6 of August 1933).

Article 246 (Period for Acquiring Ownership of Movables by Possession)

(1) A person who has for ten years peaceably and openly held possession of a movable with the intent to own it, shall acquire the ownership of such a movable.

(2) Where the possession under the preceding paragraph was commenced in good faith and without negligence, ownership shall be acquired after five years have elapsed.

Article 251 (Special Provision on Stolen or Lost Articles)

If the assignee has bought the stolen or lost Article in good faith at a sale by auction, in a public market, or from a merchant selling articles of the same kind, the injured party or loser may demand the recovery of the article after he reimburses the assignee for the price paid for it.

Cultural Heritage Protection Act

Article 87 (Relationship with other Acts)

<...> (5) The provisions concerning bona fide acquisition under Article 249 of the Civil Act shall not apply to transactions, such as trade, etc. of any of the following cultural heritage: provided, however, that where a transferee purchases cultural heritage in good faith through auction or from a cultural heritage dealer, etc., the victim or the person who loses such cultural heritage may pay to the transferee the price that the transferee has paid and claim the return thereof:

1. Cultural heritage designated by the Administrator of the Cultural Heritage Administration or a Mayor/Do Governor;

2. Cultural heritage publicly announced as a stolen or lost article;

3. Cultural heritage with an essential part thereof or record showing its source deliberately mutilated.

(6) Necessary matters concerning public announcement under paragraph (5) 2 shall be determined by Ordinance of the Ministry of Culture, Sports and Tourism. <...>

4.3. The holdings of the court of the second instance²⁶

Article 1 of Act on Disposition of Former Palace Property (Act No. 119, enacted on April 8, 1950 and effective since the same date) before its abolition by Act No. 339 enacted on September 23, 1954 prescribed that “The properties belonging to the former palace are owned by the state”. The Seoul High Court held that “Based on the Act on Disposition of Former Palace Property, the royal seal was owned and managed by the state and it was presumed to be stolen and illicitly exported to the USA during the Korean War. Hence, it was a stolen property”. The appellate court went on to hold that “Based on Section 8.2-403 (1) of the Virginia Commercial Code, good faith purchase of stolen goods is not allowed”.

Title 8.2. Commercial Code Sales § 8.2-403.

Power to transfer; good faith purchase of goods; “entrusting”

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though (a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a “cash sale”, or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

The appellant added a claim to return the royal seal based on his possessory right etc but the appellate court held in favor of the appellee by dismissing the appellant’s appeal.

²⁶ Seoul High Court Decision on 20 September, 2018, Case No. 2017 Na 2053997.

Later on, the decision of Seoul High Court became final and conclusive because the Korean Supreme Court dismissed the appellant's petition to it²⁷.

Conclusions

In order to foster the voluntary disclosure of the Korean cultural properties that have been purchased by individuals from overseas, the Cultural Heritage Administration needs to prepare various types of reward systems for the contribution to restitution, and it is necessary to set the requirements and criteria for the compensation in detail. By doing so, it will be possible to meet the legal sentiment of the general public. Otherwise, the Korean government will end up discouraging individual collectors of overseas Korean cultural property from collecting them actively. In addition, it is necessary to have their efforts projected into the history of the cultural assets that have been restituted so that the efforts of those who contributed to the repatriation of our cultural assets located abroad are not in vain. The Korean owner can take advantage of the American state laws which do not allow bona fide purchase of stolen goods.

It should be noted that Korean legal community as a whole is likely to be faced with the following challenges. First, except for national and/or royal seals, it is difficult to show that overseas Korean cultural properties were stolen. Secondly, except for the restitution of overseas Korean cultural properties from the USA, it is a very challenging task to avoid the good faith acquisition defense. Thirdly, except for the restitution of overseas Korean cultural properties from the USA, the original owners in Korea need to take into account the regulation relating to export permission of the country where they are located in, e. g., France. Fourthly, the Cultural Heritage Act enacted in 1962 cannot be applied retroactively to the cultural properties stolen during the Japanese occupation period (1910–1945) and Korean War (1950–1953). Also, the provision prohibiting good faith acquisition of a stolen cultural property under Cultural Heritage Protection Act has been effective since it has been effective since July 27, 2007. Lastly, sometimes it is not an easy task to determine *lex situs* of the subject matter at the time of the completion of the causal act or fact under private international law rules when it comes to online transaction of cultural properties.

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²⁷ Korean Supreme Court Decision on January 31, 2019, Case No. 2018 Da 279835.

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Реституция похищенных культурных ценностей: уроки и вызовы недавних корейских кейсов

Г. Ли

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Республика Корея приняла Конвенцию 1970 г. о мерах по запрещению и предупреждению незаконного ввоза, вывоза культурных ценностей и передачи права собственности на них 14 февраля 1983 г. Конвенция имеет некоторые недостатки в том, что ее сфера действия не охватывает культурные ценности, похищенные с корейской территории в японскую колониальную эпоху, длившуюся с 1910 по 1945 г., и в Корейскую войну, длившуюся с 1950 по 1953 г. Конвенция не может быть ретроактивно применена к культурным ценностям, похищенным в японскую колониальную эпоху и/или Корейскую войну; кроме того, в этом вопросе она вторглась бы в сферу международного публичного права. Поэтому для того, чтобы корейское правительство и правовое сообщество смогли найти более эффективные методы реституции культурных ценностей, похищенных в то время, необходимо обсудить альтернативные правовые инструменты. Примерами могут служить дарение или покупка похищенных культурных ценностей, арбитраж споров о реституции культурных ценностей, двусторонние международные документы, касающиеся реституции культурных ценностей, и реституция похищенных культурных ценностей посредством применения иностранного внутреннего публичного права или международного частного права. Обращается внимание на реституцию похищенных культурных ценностей путем применения иностранного внутреннего публичного права или международного частного права. В начале статьи говорится о том, где находятся зарубежные корейские культурные ценности. Затем анализируются причины, по которым основное внимание уделяется реституции похищенных культурных ценностей через применение иностранного внутреннего публичного права или международного частного права. Далее приводятся три примера, основанные на этих сценариях. В заключение рассматриваются уроки, извлеченные из этих дел, и обозначаются проблемы, с которыми могут столкнуться корейское правительство и правовое сообщество.

Ключевые слова: реституция, культурные ценности, похищенные культурные ценности, право культурного наследия, международное частное право, добросовестное приобретение.

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Ли Гюхо — д-р юрид. наук, ординарный профессор права, Университет Чунг-Анг, Республика Корея, 06974, Сеул, Донгяк-ГУ, Хьексок-По, 84; cion2004@hanmail.net

Age as a criterion of value for tangible cultural heritage objects under Russian law

Maria A. Aleksandrova

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UNESCO's activities are dedicated to the conservation of both intangible and tangible cultural heritage. One of the most difficult issues in constructing a system for the protection of tangible cultural heritage objects is the criteria for identifying objects as cultural heritage. Obviously, it takes time to assess the cultural or historical value and significance of a tangible object. In most cases, granting the status of a cultural heritage object is assigned much later than its creation. However, international acts also do not contain specific requirements for how old a particular object should be in order to qualify it as an object of cultural heritage. UNESCO's practice is known for several cases of adding to the World Heritage List relatively young sites. The Russian Cultural Heritage Object Act (2002), along with the laws of some other countries, establishes a specific age (40 years) that any object must reach in order to become a cultural heritage object. An exception is made only for memorial apartments and buildings (they can be attributed as objects of cultural heritage immediately after the death of famous personalities) and for objects of archeology (they must be at least 100 years old). This rule of law is mandatory, which means that it does not make other exceptions to the rule of 40 years. Such a rule of law significantly distinguishes the Russian approach from foreign legislation. On the one hand, such regulation may negatively affect the possibility of protecting outstanding objects from the late Soviet and early new Russian period. On the other hand, the approach of granting the status of cultural heritage objects to many relatively new objects can negatively affect urban development. The author proposes to evaluate and review this provision of law in order to find the optimal balance of public and private interests.

Keywords: UNESCO, cultural heritage object, age of cultural heritage object, tangible cultural heritage, public and private interests, cultural heritage protection.

1. International law criteria in brief

It is known that the international community realized the need for legal protection of the intangible cultural heritage much later than the need to protect tangible cultural and natural heritage¹. However, despite the relatively long history of international legal protection of tangible cultural heritage², many national legal systems are still searching for the

Maria A. Aleksandrova — PhD in Law, Associate Professor, St. Petersburg State University, 7–9, Universitetskaya nab., St. Petersburg, 199034, Russian Federation; m.aleksandrova@spbu.ru

¹ The first universal international act dedicated to the safeguarding of the intangible cultural heritage — the Convention for the Safeguarding of the Intangible Cultural Heritage was adopted in 2003 (hereinafter: the 2003 Convention). The Russian Federation has not yet acceded to the 2003 Convention.

² It's well known that the idea of the full protection of the tangible cultural and natural heritage was most fully expressed in the 1972 Convention for the Protection of the World Cultural and Natural Heritage. Nevertheless, the history of international legal protection of material cultural heritage in its most general form dates back to the 30s of the last century, when the prominent Russian artist and graduate of the law faculty of St. Petersburg University, Nikolai Roerich, initiated the adoption of an international act on the protection of cultural property — The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of April 15, 1935 (Roerich Pact). Roerich Pact is an inter-American treaty.

most beneficial legal solutions. Specific legal mechanisms for the protection of tangible cultural heritage remain imperfect in many national legal systems. Thus, one of the most sensitive issues is the criteria for attributing objects as tangible cultural heritage. Among these criteria, the age of objects is highlighted, i. e. the period of time that must pass from the moment of creation of the object to the legal possibility of identifying the object as tangible cultural heritage.

At the level of international legal acts, the criteria for identifying objects as tangible cultural heritage are formulated very generally. The 1972 Convention for the protection of the world cultural and natural heritage of UNESCO (hereinafter referred to as the Convention)³ is dedicated to the protection of tangible objects of extraordinary universal value for all mankind. However, the provisions of the Convention form the basis of the national legislation of most participating countries as the basic principles on which systems for the protection of objects of national significance are built. In Art. 1 of the Convention, cultural heritage refers to monuments and places of interest. In particular, monuments include works of architecture and other objects that have outstanding universal value from the point of history, art and science.

The Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter referred to as the Guidelines) establish a complex multi — step mechanism for identifying objects and a multi — factor system of signs of cultural heritage objects, based on two criteria-integrity and (or) authenticity⁴. According to Par. 82 of the Guidelines, objects can be recognized as meeting the criterion of authenticity if their cultural value is truthfully and reliably expressed through a variety of features, including: form and design; materials and substances; use and functions; traditions, techniques and management systems; location and setting; language and other forms of intangible heritage; spirit and feelings; and other internal and external factors. According to Par. 88 of the Guidelines, integrity is a measure of the unity and soundness of natural and/or cultural heritage and its attributes. The establishment of the integrity criterion requires an assessment of the extent to which the object: includes all the elements necessary to express outstanding value; is of sufficient size to fully represent the features and processes that reflect the value of the object; suffers from adverse effects of economic development and/or abandonment.

At the same time, modern scientific literature draws attention to the fact that the concept of authenticity is not always identified with the concept of material identity. Moreover, for humanitarian and sometimes political reasons, there are proposals to abandon the authenticity criterion in favor of the continuity criterion in order to ensure that cultural heritage items that were destroyed, for example, during armed conflicts, but subsequently restored, can be included in the lists. The concept of integrity in such cases can be interpreted very broadly⁵.

In accordance with Par.1 Art. 1 of the Convention on the protection of the architectural heritage of Europe⁶, architectural heritage refers to the following types of real estate:

³ Convention for the Protection of the World Cultural and Natural Heritage (Concluded in Paris on 16.11.1972). The document entered into force for the USSR on January 12, 1989. Available at legal database "Consultant Plus": <http://www.consultant.ru> (accessed 25.06.2021).

⁴ Sections II. D and II. E of the Operational Guidelines for the Implementation of the World Heritage Convention. Adopted on June 30, 1977 by the World Heritage Committee. Last revised 2017. See also Appendix No. 4 to the Guide — Nar Document of Authenticity. Available at: https://kgiop.gov.spb.ru/media/uploads/userfiles/2017/08/10/26_11_2013_4.pdf (accessed: 25.06.2020).

⁵ See for example: *Jokilehto J.* Considerations on authenticity and integrity in world heritage context // *City&Time*. 2006. No. 2 (1). P. 1–16. Available at: <http://www.ceci-br.org/novo/revista/docs2006/CT-2006-44.pdf> (accessed: 25.06.2020).

⁶ Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121) (Concluded in the city of Granada on 03.10.1985. Entered into force for the USSR on March 1, 1991) // Legal database "Consultant Plus". Available at: <http://www.consultant.ru> (accessed 25.06.2021).

monuments, complexes of buildings, and attractions. All the listed categories of objects that differ in their functionality and composition should be united by a common feature — all of them must be of clear historical, archaeological, artistic, scientific, social, or technical interest. At the same time, the definition of clear interest at the supranational level is not given; such definition should be identified in the national legal order of the participating countries⁷.

As we can see, the peculiarity of all the features of cultural heritage objects that are enshrined at the international level is their extreme abstraction. The functions of filling the features of cultural heritage objects specified in international acts with formalized content are delegated to national legislators.

Special attention should be paid to the fact that international acts do not emphasize the age of an object as a self-contained criterion for attributing objects as the cultural heritage objects⁸. Thus, there is no direct correlation between the age of an object and its value in international legal acts.

2. Russian legislation and practice

Russian legislation has certain specifics regarding the definition of criteria for identifying objects as objects of cultural heritage. According to the provisions of Russian legislation, cultural heritage objects are a specific category of objects accepted for state protection under the procedure established by law.

In accordance with Art. 3 of The Cultural Heritage Objects Act of Russian Federation of 25.06.2002 No. 73 (hereinafter: the Cultural Heritage Act)⁹ the necessary features of cultural heritage items include the following: 1) objects must relate to real estate or other objects with historically related territories, works of painting, sculpture, decorative and applied art, objects of science and technology and other items of material culture; 2) objects must arise as a result of historical events; 3) objects must be of value from the point of view of history, archeology, architecture, urban planning, art, science and technology, aesthetics, ethnology or anthropology, social culture; and 4) objects must be evidence of epochs and civilizations, authentic sources of information about the origin and development of culture.

It is obvious that the Russian legislator, following international trends, uses criteria of both material (“immovable things”, “objects of material culture”) and non-material value of objects (“evidence of epochs and civilizations”) as attributes of an object of cultural heritage. The Russian legislator also pays attention to the criterion of authenticity: cultural heritage objects must be authentic sources of information about culture¹⁰.

⁷ In this aspect the example of Great Britain is very remarkable. In British law on the protection of monuments, the term “interest” is actively used. Attention is drawn to the term “special architectural or historical interest”, the presence of which can be recognized in relation to a building that has a very weak external visual quality (little external visual quality), but during the construction of which innovations in the field of materials or engineering were applied. See: Principles of Selection for Listed Buildings. November 2018. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757054/Revised_Principles_of_Selection_2018.pdf (accessed: 25.06.2020).

⁸ In the UNESCO practice there are cases when sites of a very small age were listed. So, the city of Brasilia, built in 1960, created using the ideas of Le Corbusier, was listed in 1987.

⁹ The Cultural Heritage Objects Act of Russian Federation of 25.06.2002 No. 73 // Legal database “Consultant Plus”. Available at: <http://www.consultant.ru> (accessed 25.06.2021).

¹⁰ The concept of authenticity is also given in Art. 3.1.6 of The Russian Federation State Standard 55528-213 “Composition and content of scientific and design documentation for the preservation of cultural heritage objects. Monuments of history and culture” (hereinafter: Standard) as a determining factor in the value of the object of cultural heritage. However, it should be noted that the criteria of authenticity given in the Standard cannot be put by law enforcement bodies in substantiating their decisions for the following

So, placing descriptions of all major signs of cultural heritage objects into the very beginning of the Cultural Heritage Act (Art. 3) should be considered as the legislator granting them a universal status — any object that applying for inclusion into the List of the revealed (newly identified) cultural heritage objects (hereinafter referred to as the Prelist), and then in the Unified State Register of cultural heritage objects (hereinafter referred to as the Register) must match the given criteria.

The implementation of the statutory procedures to identify new objects involves the progressive transformation of the legal regime of an ordinary object into a cultural heritage object (an object that has characteristics of object of cultural heritage → newly identified cultural heritage object → cultural heritage object). The stages of this process are as follows: 1) detection of the alleged signs (features) of the object of cultural heritage in the object (Par. 1–2 Art. 16.1 of the Cultural Heritage Act)¹¹; 2) organization by the State Cultural Heritage Protection Office (hereinafter referred to as the Protection Office) the initial check of the presence of these signs (Par. 3 Art. 16.1 of the Cultural Heritage Act)¹²; 3) the inclusion of an object which has signs of cultural heritage object in the Prelist (Par. 4 Art. 16.1 of the Cultural Heritage Act); 4) verification of value of the newly identified object by the State Historical and Cultural Expertise (hereinafter referred to as the Expertise) (Par. 1–2 Art. 18 of the Cultural Heritage Act); and 5) the inclusion of the identified cultural heritage object, which received a positive conclusion of Expertise, into the Register (Par. 3 Art. 18 of the Cultural Heritage Act).

From the moment of inclusion in the Prelist, the legal regime of the object changes significantly — it begins to be subject to the requirements of the Cultural Heritage Act for the preservation of the object; the rights of owners to use the object are significantly limited in the public interest. Further inclusion of the identified object in the Register leads to the final consolidation and detailing of the public restrictions regime.

Par. 12 Art. 18 of Cultural Heritage Act claims that the Register may include newly identified tangible cultural heritage objects that have been at least 40 years old since their origin or date of creation, or since the date of historical events which such objects are connected with. This “age limit rule” contains exceptions for two types of objects. Firstly, talking about memorial apartments and houses of outstanding people for the Russian culture, age period can be shortened — at any time after death of such people these objects could be attributed to be the cultural heritage objects. Secondly, in order for the objects of archaeological heritage to be included into the Register, the “age limit” of such objects is being increased regulatory — at least a hundred years should pass.

The given law expression about “age limit” of cultural heritage objects cause a number of questions in the area of law, politics and legal engineering.

At first, it is not quite clear if the “age limit” rule operate as obligatory for objects that go yet to the Prelist, but not to the Register, in other words — does the age matters to the identification (revealing) of the object?

reasons. Firstly, in accordance with the provisions of Art. 4 of the Law of the Russian Federation on June 29, 2015 No. 162-ФЗ “On Standardization in the Russian Federation”, the specified Standard does not belong to the category of regulatory legal acts and is of a recommendatory nature. Secondly, the indication of authenticity as a determining factor in the value of objects of cultural heritage given in the Standard is not precise. As noted earlier, the Guidelines use not only a criterion of authenticity, but also a criterion of integrity of cultural heritage sites. In the Cultural Heritage Law, the concept of “value factors” of a cultural heritage object is missing. Thus, the definition of authenticity given in Standard can be considered as not entirely accurate arrangement of selected provisions of the Guidelines.

¹¹ According to this norm, any person or organization can submit an application for identifying an object that has the features of a cultural heritage object.

¹² Due to the federal structure of the state, in Russia there are three levels of the protection bodies — Ministry of Culture of the Russian Federation, regional protection offices and local protection offices.

Caselaw (that is still not so capable) answers confirmatively. In the existing acts, the courts rule that the requirement for the expiration of the 40-year period is a necessary condition for including an object not only in the Register, but also in the Prelist. Therefore, objects claiming to be included in the Prelist, must meet both the criteria specified in Art. 3 and Art. 18 of the Cultural Heritage Act. Special attention should be paid to the fact that Russian procedural legislation gives any individual the right to appeal to court against acts of cultural heritage protection office if such a person believes that these acts do not meet the requirements of the law.

Thus, in one of the appellate decisions of the Sverdlovsk regional court, the administrative plaintiff claimed that the order of the Protection Office to refuse to include the object in the Prelist was declared illegal. The claim was rejected on other grounds, but the decision, in particular, indicates the legality of the decision of the Protection office to refuse to include the object into the Prelist due to the fact that 40 years have not passed since the creation of the disputed object — a radio-television transmitting station¹³.

A similar position is given in the decision of the Balakhninsky City Court of the Nizhny Novgorod region, which indicates that the historical and cultural value of an object that has the characteristics of a cultural heritage object, for the purposes of inclusion in the Prelist, is determined by the following criteria: 1) compliance with the criteria defined in Art. 3 of the Cultural Heritage Act; and 2) compliance with the origin or date of creation, or the date of historical event which such object is connected with to the requirements defined in Art. 18 of the Law¹⁴.

The same goes to the position of the Saratov regional court in the case in which the administrative plaintiff went against the order of the Protection Office to include an object that had signs of cultural heritage in the list of identified cultural heritage objects (the Prelist). The claimant referred to the fact that the building was built in 1979, so, at the time of the decision to include it in the Prelist, less than 40 years had passed, which prevented the decision to include the building in the Prelist. The court, having agreed that the identified objects included in the Prelist must be older than 40 years, nevertheless, rejected the claim, since it was established that the building was not built in 1979, but in 1900, and that the disputed object is part of a group of buildings (architectural ensemble), built in the late 19th century¹⁵.

Finally, one of the last cases where these rules were invoked took place in St. Petersburg. As it follows from the case file, several public organizations have applied to the Regional Protection Office of St. Petersburg with a request to identify an object. The Protection Office refused to include it in the Prelist, referring to the fact that 40 years have not yet passed from the construction of the object. The Office's refusal to include the object in the Prelist was appealed by an interested individual in court. The District court during the hearing established the exact date of the object's construction and dismissed the administrative action, citing the fact that at the time of the trial, the 40-year period has not expired. The decision was appealed to a higher instance, and the Court of Appeal — City Court of St. Petersburg — agreed with the decision of the lower instance¹⁶.

¹³ Court of Appeal of the Sverdlovsk Region Case No. 33a-12702/2018 of 02.08.2018 (“Ural Chronotope Case”).

¹⁴ Balakhninsky City Court (Nizhny Novgorod region) Case No. 2a-462/2017 of 03/13/2017 (“House of Culture of the Transport Administration of the Chernoramensky Torfotrest Case”).

¹⁵ Saratov Regional Court case No. 3a-49/2016 of September 20, 2016 (“Depot, ensemble of the railway station ‘Pokrovsk’”).

¹⁶ Kuibyshevsky District Court of St. Petersburg Case No. 2a-3302/19 of 11/15/2019; St. Petersburg City Court of Appeal 17.06.2020 (“Sports and Concert Complex ‘Peterburgsky’”). This case received a significant public outcry due to the fact that the building was hastily demolished during the trial. Thus, the refusal to provide temporary legal protection led to the very sad consequences — destruction of the object.

It seems that the given position of the courts regarding the “age limit” for inclusion of objects in the Prelist cannot be supported for the following reasons.

Firstly, in Par. 1 Art. 16.1 of the Cultural Heritage Act it is stated that the Regional State Cultural Heritage Protection Office should undertake work to identify and make governmental accounting of objects which have the characteristic of cultural heritage from the Act. Therefore, the characteristics that an object of cultural heritage must possess to be included in the List of identified objects are determined only on the basis of Art. 3 of the Act.

Secondly, Par. 12 Art. 18 of the Act directly refers to the identified objects. A literal interpretation of this rule leads to the conclusion that the 40-year period should expire by the time the decision is made to include the newly identified object in the Register.

Finally, the same conclusion is reached by an attempt of teleological interpretation of the above legal norms. Russian legal system provides for a comprehensive and multi-stage system for identifying cultural heritage objects. The purpose of this system is to provide well-timed and omnidirectional protection to objects that have a proven public interest in their preservation. Since the society is interested in the most effective identification of such objects, the organization of work on their identification, according to the Russian law, can be carried out not only by authorized state bodies, but also by any interested individuals or legal entities.

Moreover, in contrast with some examples of foreign regulation, the Russian Regional State Cultural Heritage Protection Office cannot ignore the appropriate form of requests from concerned parties to identify objects — within the time limit established by law, the protection body must organize work to establish the historical and cultural value of the object. If the value of an object is previously confirmed, the Regional State Cultural Heritage Protection Office must decide to include it in the List of identified objects and from this moment the protection must be given.

In accordance with the Art. 18 of the Cultural Heritage Act, the decision to include an identified object in the Register or to refuse to include should be made on the basis of the Governmental historical and cultural expertise and must be taken by the relevant body within a period of no more than one year from the date of the decision to include an object that has the characteristics of a cultural heritage object in the List of identified objects (Prelist). Thus, it seems that during the year, an object that has the characteristics provided in Art. 3 of the Act (from the point of view of the Russian Regional State Cultural Heritage Protection Office) can wait before the expiration of the 40-year period.

In our opinion, this interpretation of the relevant provisions of the Cultural Heritage Act most fully reflects the very idea of providing preliminary protection to identified cultural heritage objects.

The list of exceptions to the 40-year rule, which was given earlier, is obviously mandatory — only memorial apartments and houses can become cultural heritage objects before the specified period. We believe that this approach of the legislator is unjustified from the political and legal point of view, and, therefore, needs to be reviewed.

As it was mentioned there are no clear requirements in international legal acts for the age of monuments as mandatory markers of the value of objects. Foreign experience also indicates either the complete absence of an age criterion, or an open list of exceptions to the rule on a certain age limit.

For example, in Germany, the protection of cultural heritage is assigned to the management of land. None of the modern laws of the federal lands provides for a specific age, after reaching which a particular object can be considered as a monument. This kind of age limit existed in the past — in the Prussian legislation of the early 20th century. Since the middle of the last century, such restrictions have been abandoned. In the legislation of several lands (Bavaria, Saxony-Anhalt), when defining the term monument, it is specified that this regime is given exclusively to objects from the past, but it is not specified at what

point the “past” should begin. In practice, objects that have taken relatively little time from the origin are rarely placed under state protection. In such cases, the historical and cultural expertise must prove that the object is a striking example of a bygone era (for example, the new building of the Bundestag in Bonn after the transfer of the capital to Berlin, etc.)¹⁷.

The United States has a national register of historic objects worthy of preservation, created under the Historic Preservation act of 1966. At the same time, each object nominated for inclusion in this register is evaluated for compliance with the established criteria (criteria for evaluation). The guidelines for applying these criteria allow for inclusion in the national register of objects that have been established for at least 50 years ago and also if they meet special requirements called “criteria considerations”. However, the 50-year mark is not so compulsory. In fact, the age of an object is determined only by the number of criteria that must be taken into account¹⁸.

As we can see, the requirements of Russian legislation to the age limit of cultural heritage objects stand out from both in continental legal systems and in common law countries due to their unjustified imperativeness. The purpose of such legislative regulation is not quite clear. It is obvious that under certain conditions and in exceptional cases, objects created not long time ago may also need effective protection by giving them the legal regime of cultural heritage objects. We consider it to be a necessity to review Par. 12 Art. 18 of the Cultural Heritage Act in terms of establishing an open list of exceptions to the general rule on the 40-year minimum age of an object required for its inclusion in the Register.

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Возраст как критерий ценности объекта культурного наследия по российскому праву

М. А. Александрова

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¹⁷ See for example: *Davydov D., Hönes E.-R., Ringbeck B., Stellhorn H.* *Denkmalschutzgesetz Nordrhein-Westfalen. Kommentar*. 6. Aufl. Wiesbaden: Kommunal- und Schul-Verlag, 2018; *Davydov D.* *Zu nah an der Gegenwart. Die Zeitgrenze als Merkmal des Denkmalbegriffs // Denkmalpflege als kulturelle Praxis*. Hannover: C. W. Niemeyer Buchverlage GmbH, 2018. S. 64–68.

¹⁸ National Register Bulletin. Available at: www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf (accessed: 15.06.2020).

Деятельность ЮНЕСКО посвящена сохранению как нематериального, так и материального культурного наследия. Одной из наиболее сложных проблем построения системы охраны является критерий отнесения объектов к материальному культурному наследию. Очевидно, что для оценки культурной или исторической ценности и значения объекта требуется время. В большинстве случаев придание объекту культурного наследия специального правового режима существенно отстоит по времени от момента его создания. Международные конвенции не содержат конкретных требований к возрасту объекта для квалификации его в качестве памятника. Практика ЮНЕСКО знает случаи включения в Список всемирного наследия относительно молодых объектов. Российский закон об объектах культурного наследия (2002 г.), наряду с законами некоторых других стран, устанавливает конкретный возраст (в России — это 40 лет), которого должен достичь объект, чтобы стать объектом культурного наследия. Исключения составляют лишь мемориальные квартиры и здания (они могут быть отнесены к объектам культурного наследия сразу после кончины известных личностей) и объекты археологии (им должно быть не менее 100 лет). Эта норма сформулирована как жесткое императивное правило, не знающее иных исключений, что существенно отличает российский подход от зарубежных аналогов. С одной стороны, такое регулирование может поставить под удар охрану выдающихся объектов позднесоветского периода, с другой — появление механизма поставки под охрану значительно числа относительно новых объектов культурного наследия способно негативно повлиять на развитие городов. Автор предлагает осуществить ревизию норм российского законодательства о возрастном критерии объектов культурного наследия с целью поиска оптимального баланса общественных и частных интересов.

Ключевые слова: ЮНЕСКО, объект культурного наследия, возраст объекта культурного наследия, памятник истории и культуры, публичные и частные интересы, охрана культурного наследия.

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Александрова Мария Александровна — канд. юрид. наук, доц., Санкт-Петербургский государственный университет, Российская Федерация, 199034, Санкт-Петербург, Университетская наб., 7–9; m.alexandrova@spbu.ru

Proprietary fragmentation and public-private management of UNESCO sites owned by the Italian state

Antonio L. Tarasco

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This article is intended to develop the topic of the relationship between UNESCO sites owned by the Italian state and the profiles of their profitability and sustainability. If it is true that a common characteristic of Italian (and not only) UNESCO sites is the heterogeneity of the legal titles of ownership of such objects, then at the same time, for UNESCO sites belonging to the Italian state (25 out of 55: 45,55%), the heterogeneity of management models is added to the multiplicity of legal regimes. In this case, the plurality of these properties affects both the valorization of the object and the quality of its management. The negative consequences of the fragmentation of the management of a UNESCO state site can be grouped as follows: 1) differences in recruitment approaches; 2) differences in management models; 3) qualitative differences in work experience; 4) differences in economic profitability; 5) differences in the accounting system. If such diversity is hardly understandable even when objects belong to different institutions, it is even less understandable when they belong to the state. The consequence of the absolute heterogeneity of the legal and organizational framework is the heterogeneity of economic results. The gap is huge and unacceptable: The Etruscan tombs of Tarquinia and Cerveteri bring in the following revenue: € 38 964,84 (2018) and € 57 127,00 (2019). At the same time, the income of the Archaeological Park Colosseum is: € 46 347 249,57 (2018) and € 48 465 096,71 (2019). If it is true that the award of UNESCO site status to a cultural monument is independent, as it should be, of its economic capabilities, then it is also true that increasing its economic profitability contributes to the achievement of the objectives of the UNESCO Convention: the protection and valorization of the cultural heritage object. Hence it is necessary to conduct autonomous financial reporting of UNESCO sites, which is currently absent in many state-owned UNESCO sites or they do not have their own accounting and financial autonomy. In conclusion, the topic of the fragmentation of ownership of the 55 Italian UNESCO sites and its impact on governance and financial returns allows us to explore the actual attention that the national legal system actually attaches to UNESCO sites, that is, the importance that, in addition to official declarations, UNESCO sites have in the domestic legal system.

Keywords: UNESCO, proprietary fragmentation, management plans, property rights, management of cultural heritage, valorization of the cultural heritage object, UNESCO sites.

1. Italian state UNESCO sites: public property

The theme of the fragmentation of the ownership of the 55 Italian UNESCO¹ sites and its effects on management and financial returns enables us to investigate, from an original point of view, the actual consideration that the national legal system recognizes for UNESCO sites, i. e. the de facto importance that, beyond official declarations, the UNESCO sites have within the internal legal order².

Antonio Leo Tarasco — Lawyer, Full Professor “abilitato” in Administrative Law, Ministry of Cultural Heritage and Activities and tourism, 22, Via di San Michele, Rome, 00153, Italy; leo.tarasco@gmail.com

¹ A list of the 55 Italian sites is available at: <http://whc.unesco.org/en/statesparties/IT> (accessed: 15.12.2020).

² The literature about UNESCO sites is very extensive. Among all, see: *Guerrieri A.* La tutela dei siti UNESCO nell'ordinamento italiano, tra prospettiva interna e comparata // *Il Diritto dell'economia*. 2019. No. 1. P. 461; *Armao G.* Tutela e valorizzazione integrata del patrimonio culturale dei siti UNESCO. Il ca-

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As is known, the “Italian UNESCO sites and elements” have long been contained exclusively in the Convention for the Protection of the World Cultural and Natural Heritage signed in Paris on November 16, 1972 by the countries adhering to the United Nations Educational, Scientific and Cultural Organization (UNESCO), and enforced in Italy by Law no. 184 of 6 April 1977; this was then supplemented — thanks to art. 1, paragraph 1, letters b), c) and d) of Law no. 44 of 8 March 2017 — by the Convention for the Safeguarding of Intangible Cultural Heritage, adopted in Paris on 17 October 2003, and enforced in Italy by Law no. 167 of 27 September 2007.

Leaving aside for present purposes the elements of intangible cultural heritage and focusing only on tangible UNESCO sites belonging, even on a non-exclusive basis, to the Italian State, one can observe that the analysis of their position within the Italian government’s organisation of cultural heritage enables not only the concrete management methods of each site to be analysed, but also to understand if and to what extent the organizational reforms of the Italian Ministry for cultural heritage and activities and tourism (hereinafter MiBACT) have taken into account the UNESCO qualification previously operated by the United Nations (UN).

As is known, the inscription of a site by UNESCO, if on the one hand it does not alter the legal status of the goods which it includes, on the other hand it obliges the Contracting States to recognize that the heritage identified by the International Organization “constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate” (art. 6, Convention); furthermore, “the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of cultural and natural heritage <...>” — according to art. 4 — “belongs primarily to that State”, that is, to the state in which the sites are located.

The recognition of a site as “world heritage” does not therefore imply that the site is owned by a sole entity; like a web, the UNESCO site covers places that the history of administration has scattered all over the place. Nonetheless, once a place is recognised as a “world heritage site”, public authorities cannot remain indifferent towards ensuring not only a level of protection for the site but also adequate management such as to allow the public to grasp the original unitary value of the site.

In other words, the recognition of UNESCO sites is independent of the sites’ ownership model; it occurs for naturalistic or historical and cultural reasons, and — rightly — has nothing to do with the underlying proprietary ownership model: this is the case for the historic city of Rome; the historical centers of Florence, Naples, Siena, San Gimignano; the Amalfi Coast; Venice and its Lagoon. If anything, it is the duty of the public administration to ensure that the diversity of the legal regime does not adversely affect a site’s need for protection or public enjoyment, ensuring uniform enjoyment. If and how this happens will

so del sito seriale “Palermo arabo-normanna e le Cattedrali di Cefalù e Monreale” // *Aedon*. 2018. No. 1. P. 1; *Camerini X*. L’attuale quadro normativo internazionale della tutela del patrimonio culturale mondiale // *Rivista di Diritto delle Arti e dello Spettacolo*. 2018. No. 2. P. 7; *Uccello Barretta L*. Quale tutela per i siti patrimonio dell’UNESCO? // *Osservatorio AIC*. 2016. No. 1. P. 1; *Migliorati C*. Il sito archeologico di Pompei a rischio di cancellazione dalla lista del patrimonio mondiale // *Diritto comunitario e degli scambi internazionali*. 2013. No. 4. P. 723; *Garzia G*. La valorizzazione dei beni e degli spazi pubblici di interesse culturale attraverso la diffusione delle moderne tecnologie informatiche: il caso della c. d. “Piazzetta degli Ariani” di Ravenna // *Aedon*. 2013. No. 3. P. 1; *Marchetti S*. La gestione dei Siti UNESCO di Villa Adriana e di Villa D’Este a Tivoli // *Ibid*. 2011. No. 1. P. 1; La globalizzazione dei beni culturali / a cura di L. Casini. Bologna: Il Mulino, 2010; and there, in particular, the essay of: *Macchia M*. La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli // *Ibid*. P. 57–85.

On the protection of cultural heritage against illicit trafficking, cfr.: *Frigo M*. Approaches Taken by the Security Council to the Global Protection of Cultural Heritage: An Evolving Role in Preventing Unlawful Traffic of Cultural Property // *Rivista di diritto internazionale*. 2018. No. 4. P. 1164.

be the theme of this contribution, which will analyse the concrete management methods and their results, including the financial ones.

Italian jurisprudence has dealt with Italian UNESCO World Heritage sites mainly because of the possibility that this qualification may or may not, per se, lead to the independence of the area, regardless of the adoption of administrative measures that identify the area in question as cultural or landscape property.

The Italian Constitutional Court (C.cost. 11 February 2016, no. 22) has clarified that UNESCO sites “do not enjoy protection of their own right, but, also because of their considerable typological diversity, they benefit from different forms of protection for cultural and landscape heritage, according to their specific characteristics”. Consequently, it declared as inadmissible the questions of constitutional legitimacy of articles 134, 136, 139, 140 141 and 142, paragraph 1, of the Legislative Decree no. 42, raised with reference to articles 9 and 117, first paragraph of the Italian Constitution. They do not provide the municipal administration with an obligation to protect UNESCO sites in its territory, nor do they include these sites among the landscape assets subject to legal restrictions; and art. 142, paragraph 2, letter a), of the same Decree — in the part in which it does not exclude the urban areas recognized and protected as UNESCO heritage from the possibility of derogating from the landscape authorization regime provided for areas A and B of the municipal territory — in relation to the interposed parameters provided by the articles 4 and 5 of the UNESCO convention.

This principle is followed by the majoritarian strand of administrative jurisprudence (Regional Administrative Court of Lazio, Latina, section I, 30 January 2020, no. 46; Tar Campania, section VII, 13 December 2018, no. 7151, according to which the recognition of an area as a UNESCO site does not coincide with the automatic imposition of an absolute building constraint on it). In particular, according to Regional Administrative Court of Toscana, section I, 12 December 2019, no. 1694, “the inclusion in the UNESCO list does not entail any automation for the purpose of qualifying the asset that is a cultural asset, given that pursuant to art. 7 bis of Legislative Decree no. 42/2004, for this purpose, the conditions for the applicability of art. 10 must exist”.

This strongly majoritarian jurisprudence is partially contradicted by other rulings which have to date remained isolated. According to Regional Administrative Court of Lazio, Rome, section II-quater, 29 May 2020, no. 5757, for example, the UNESCO Convention of 1972 would oblige the State in which the site declared “World Heritage” is located to ensure its safeguarding regardless of any formalized binding measures. According to the administrative judges, in fact, “UNESCO World Heritage sites as recognized as having ‘outstanding universal value’ from the point of view of cultural or landscape interest must benefit from a degree of protection at least corresponding to that guaranteed to the landscape assets bound by the National Authorities insofar as they are recognized as having ‘significant’ landscape interest, pursuant to art. 136 of Legislative Decree no. 42/2004 (Code of Cultural Heritage and Landscape), or declared ‘particularly’ important cultural interest pursuant to art. 13 of that same Code: the principle of proportionality and reasonableness requires to ensure a degree of protection corresponding to the degree of value of the protected asset”. According to the administrative judges, it would be paradoxical not to protect the most valuable goods; if this happened, a “dangerous ‘protection vacuum’ would be created precisely for areas of greater value, even of a ‘universal’ level of value — declared ‘Common Heritage of Humanity’ precisely on the basis of the recognition of their absolutely ‘exceptional’ importance (therefore of an importance of higher degree than the importance of only a ‘notable’ degree required in the internal system for the subject to landscape constraint pursuant to art. 136 of Legislative Decree no. 42/2004)”.

2. From UNESCO state sites ownership to management plans

By focusing on UNESCO sites owned by the Italian state (25 out of 55: 45,55%), one can observe how the heterogeneity of legal ownership is also associated with a heterogeneity of management models. The effects on the management of the fragmentation of a given UNESCO World Heritage site, owned by the State, can be summarized as follows:

1) differences in management models; 2) differences in the recruitment of staff, especially of the top figures; 3) differences in quality and methods of use; 4) differences in economic profitability; 5) differences in the accounting framework, which are also associated with difficulties in clearly reconstructing costs and revenues in managing the site; 5. 1) the absence of a clear reconstruction of the costs and revenues of the site which consequently makes it impossible to define any strategic program to reduce costs and/or increase revenue.

Looking for example at the Bourbon royal complex of Caserta, one can notice how the unity of the UNESCO site is broken up by the different ways in which the various elements are managed, each of which is subject to multiple proprietary regimes (State: Royal Palace; Municipality: complex of San Leucio). The fragmentation in ownership affects the management of the site, since the management of the municipal part is public and entirely direct. The site is nothing more than an office of the Municipality: it is neither an organ of the Municipality nor a third party body with a legal personality. In the state part, on the other hand, management is partly direct and partly, for certain services, outsourced to the public sector. However, the Royal Palace of Caserta is not a mere office but rather a ministerial body that is qualified as a management office (among other things of a general kind, atypically general as it is not articulated in subordinate management offices). It is evident that this organizational diversity (negatively) influences the enjoyment of the site since the conditions for the enjoyment of the site are different, including from a financial point of view (different entrance fees). This is why, for example, by visiting one there is no certainty that the others can be visited on the same day and at the same time. And if the diversity of enjoyment (not so much from a proprietary point of view) is already in principle unequal between several elements of the same UNESCO site, this is even more so when the site develops in a single Municipality and, moreover, only a few meters apart (as in the case of Caserta).

If one takes a wider look at all of the 55 Italian World Heritage sites, it becomes apparent how these describe a rather varied panorama by reason of the legal regime they belong to: sites of exclusive private ownership can be found (think of the Amalfi Coast), as well as sites where the property is public and private (Venice and its lagoon); sites belonging to foreign states that insist on the Italian territory since they are geographically located within it (Vatican City). When the enjoyment of the sites occurs mainly by admiring its exterior, as in the case of the historical centers, the plurality of subjects who own the individual elements that make up the site does not significantly affect the enjoyment of the site; in such cases, the applicable legal framework is offered not only by the law of cultural heritage (national and international law) but, first and foremost, by urban planning law.

This situation is only apparently simpler when the UNESCO site includes elements belonging exclusively to a single public entity and, for present purposes, to the Italian State. In this case, it is not so much the ownership that is fragmented, but rather the various management models. Analysing these assets allows one to verify the (ir)rationality of the choices of the legislator on an organizational level.

Indeed, some sites (Castel del Monte; Cenacolo Vinciano; Etruscan necropolises of Cerveteri and Tarquinia) that feature a traditional model of direct management by the site owner, with the exception of certain public services. Such structures are governed in the same way as they were governed before the 2014 reform (Prime Ministerial Decree no. 174 of 29 August 2014), namely without any legal (administrative), financial and accounting autonomy; the directors are then recruited internally to the Administration of cultural heritage among officials (non-managers). This means, among many other things, that the non-executive director cannot, in principle, take on expenditure commitments which are instead the responsibility of the superordinate executive; the absence of a budget determines the impossibility not only to immediately receive financial resources but also to clearly report the expenses.

Within the same Italian state, other UNESCO World Heritage sites have been identified by the organizational regulations as institutes with a special autonomous status, pursuant to art. 33, paragraph 3, letter a) and b), Prime Ministerial Decree no. 169 of 2 December 2019. These sites, like the ones mentioned above, are also directly managed by the body owning it (the Italian State, specifically the MiBACT). However, the particular legal qualification it assumes within the ministerial organization gives them legal, financial and accounting autonomy that the ones mentioned above do not possess³. In this way, at least the above mentioned limitations are overcome. This happens, for example, in the UNESCO World Heritage site which includes the archaeological areas of Pompeii, Herculaneum and Torre Annunziata (where the Archaeological Park of Pompeii and the Archaeological Park of Herculaneum are located). Similarly, in the “Historic Centre of Rome” we find, in addition to private places or those belonging to various public bodies, the Archaeological Park of the Colosseum and the Barberini Palace, the National Roman Museum and the Archaeological Superintendence of Rome, which all possess legal, financial and accounting autonomy within the state organization⁴.

In other cases, the UNESCO site includes both institutes with special autonomy and museums without any autonomous profile: this happens, for example, for the site “Venice and its Lagoon” which includes both the Accademia Gallery of Venice — which has special autonomy pursuant to art. 33, paragraph 3, letter a) of Prime Ministerial Decree no. 169/2019 — and three museums (Galleria “Giorgio Franchetti” alla Ca’ d’Oro; the Archaeological Museum, the Museum of Oriental Art; Museum of Palazzo Grimani) which have no legal, financial or accounting autonomy since they are organizational structures of the Regional Museum Directorate of Veneto (art. 42, Prime Ministerial Decree no. 169/2019). In other cases, a UNESCO site, as far as its ministerial status is concerned, is in use by third parties (as is the case of “Su Nuraxi” in Barumini, assigned to the Regional Museum Management of Sardinia and therefore has no financial and accounting autonomy, but is granted for use to the Municipality of Barumini and entrusted by the latter to the “Fondazione Barumini Sistema Cultura”, in Sardinia). This case, although scarcely known or analysed, is interesting from a legal point of view since it testifies to the fact that the outsourcing of the management of an archaeological area declared common heritage of mankind to a private entity is common (from a legal point of view, this case would be equivalent to outsourcing the management of the archaeological area of the Palatine and the Colosseum or of Pompeii, Herculaneum and Torre Annunziata, both equally archaeological areas declared universal heritage by UNESCO). Another management model (and which could be

³ So-called statutory autonomy is entirely negligible, devoid of any practical consequence and improperly attributed to a profile of autonomy of the institute or place of culture (the statute, in fact, is not approved by the institute but by the top political authority; which appears to be the exact opposite of the concept of autonomy).

⁴ For the distinction between museums-organs (organizational structure of the ministerial juridical person) and museums-bodies (endowed with independent legal personality with respect to the constituent ministerial body) see Consiglio di Stato, section V, 24.3.2020, No. 2055, part. § 4.1.2 and § 5.

On the normative level, for the distinction between museum-organs and museum-bodies, see d. m. 23 December 2014 about “Organizzazione e funzionamento dei musei”. In particular, on accounting autonomy, see article 3; on museums with special autonomy, including accounting and financial autonomy, distinguished among them, see article 8. For state museums not endowed with special autonomy, which are not included in Annex 2 of the Ministerial Decree of 23 December 2014, and which belong to the Regional Museums Directorate of the respective Region, see also articles 42 and 43, D. P. C. M. 2 December 2019, No. 169.

In the literature: *Tarasco A. L.*: 1) *Diritto e gestione del patrimonio culturale*. Bari; Roma: Laterza, 2020. P. 147; 2) *Patrimonio culturale // Enciclopedia italiana di scienze, lettere ed arti*. Roma, Istituto della Enciclopedia Italiana fondato da Giovanni Treccani, 2020. Vol. II. Appendice X; 3) *Sostenibilità del debito pubblico e gestione del patrimonio culturale (prima e dopo il coronavirus) // Cura e tutela dei beni culturali / eds G. Esposito, F. Fasolino*. Padova: Wolters Kluwer, Cedam, 2020. P. 297; 4) *Il patrimonio culturale. Concetto, problemi, confini*. Napoli: Editoriale scientifica, 2019.

defined as mixed) is the direct management model of property by the MiBACT Regional Museum Management (according to the scheme of the absence of financial and accounting autonomy) and the entrustment to third parties only of site enhancement activities (this is the case for the “Early Christian Monuments of Ravenna”: see below): in this case, it is not the management of the site as a whole which is outsourced (as in the case of Su Nuraxi), rather, only of certain aspects of the enhancement.

3. The financial results of the management of UNESCO state sites: a jagged picture

The heterogeneity of the legal and organizational framework stands alongside equally heterogeneous financial results. Even from this point of view, if you analyze the financial returns of the various Italian UNESCO World Heritage sites that belong to the Italian State, whether exclusively or not, and are entrusted to MiBACT, one uncovers a rather varied reality. Considering that at least 90 % of state revenues derive from ticket sales⁵, the diversity of returns allows us to analyze the geography of use and, therefore, the interest of visitors towards individual sites. Reading the data, it turns out that the recognition of the site as a “world heritage site” does not lead to the overcoming of the notorious gap between sites of greater attraction and poorly visited sites. Yet, by presupposing an equal amount of dignity for all of them, also thanks to the UNESCO recognition, the different levels of tourism appeal highlight the persistent rigidity in the demands of cultural tourism. As all statistical surveys have long revealed⁶, cultural tourism remains focused on a narrow list of places, and this is true also for UNESCO sites.

The divide between sites is huge. The state UNESCO elements which are part of the site “City of Vicenza and the Palladian Villas of the Veneto” (namely Villa Badoer of Fratta Polesine) only made € 4638,10 (in 2019) and € 5346,50 (in 2018) from the sale of tickets. The revenue of Tempietto sul Clitunno, in Perugia, as part of the serial site “The Longobards in Italy. Places of Power” range between € 15 thousand (€ 14 897,00 in 2019 and € 15 668,00 in 2018). Similarly, revenue for the site “Etruscan Necropolises of Cerveteri and Tarquinia” reach a couple thousand euros (€ 38 964,84 in 2018 and € 57 127,00 in 2019). Even the state places that are part of the UNESCO site “Rock Drawings in Valcamonica”, despite collecting larger sums (and therefore being proportionally visited by a larger number of people) still make modest profits, as can be indirectly deduced from the ticket revenues (€ 161 415,00 in 2019 and € 159 442,90 in 2018).

At the top of the ideal classification of Italian state World Heritage sites for highest financial returns, there are the state-owned properties which are part of the site “Historic Centre of Rome, the Properties of the Holy See in that City enjoying Extraterritorial Rights and San Paolo Fuori le Mura”, namely the Colosseum, the Domus aurea, the Roman Forum and the Palatine, Meta sudans, the Arch of Constantine, the Crypta Balbi, Palazzo Massimo alle Terme, Palazzo Altemps, the Baths of Diocletian: overall, all these sites made a total of € 123 733 802,17 in 2018 and € 79 943 047,64 in 2019⁷; in particular, just the archaeological site of the Colosseum collected € 46 347 249,57 in 2018 and € 48 465 096,71 in 2019. One must also add to such proceeds the revenue of the National Roman Museum, the Ancient Pinacoteca, the roman state museums of the Regional Direction Museums Lazio and the sites of the Archaeological Superintendence of Rome, all included in the above-mentioned “Historic Centre of Rome” site.

⁵ Tarasco A. L. Diritto e gestione del patrimonio culturale.

⁶ L'Italia dei musei. Rome // Istat. 2019. Available at: www.istat.it/it/files/2019/12/LItalia-dei-musei_2018.pdf (accessed: 12.12.2020).

⁷ Unlike data previously exposed, these also partially include sources of income other than the ticket office alone.

As anticipated, measuring the financial proceeds of sites of exceptional universal value for the entire humanity is important for at least two reasons. Firstly, having estimated that the sale of tickets constitutes more than 90 % of the revenue of institutes and state-owned cultural sites in Italy, measuring total profits of the UNESCO world heritage sites also means measuring the attractiveness of those sites. The financial data shown coincide with those deriving from the ticket office. On top of this there may be an additional source of returns which on average is no higher than 10 %. In summary, with reliable approximation it can be said, at least in Italy, that the financial return is a measure of the effective use of the sites (also of UNESCO sites), since the area of financial return deriving from marketing and *fundraising* activities is very small, despite the flood of publications on the best practices observable at the moment.

Secondly, if it is true that the recognition of the “outstanding value” of the UNESCO site is independent not only of the property ownership regime but also of its profitability, it is also true that the increase in its income potential constitutes a tool for the full realization of the aims of the UNESCO Convention: the protection and enhancement of heritage. The increase in profitability, despite not being an end in and of itself, represents a rather significant means of ensuring the achievement of long-term objectives.

4. The financial dimension in the 1972 Paris Convention

The financial profile is one of the dimensions that the 1972 treaty recognizes as essential to “ensure the identification, protection, conservation, preservation and transmission to future generations of cultural and natural heritage” (art. 4, part 1). These objectives must be achieved by each State which must “do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation”; the actions to be implemented concern the “financial, artistic, scientific and technical” fields (art. 4, part 2). For this purpose, Law no. 77 of 20 February 2006 containing “Special measures for the protection and fruition of Italian sites and elements of cultural, landscape and environmental interest inscribed in the ‘World Heritage List’ and placed under UNESCO protection” was issued. This provision provides for the creation of financial interventions to support the enhancement, communication and use of the Sites and of the elements themselves (art. 4)⁸. The increase in profitability is, therefore, one of the useful means to implement the Convention itself.

Therefore, as the Italian Constitution affirms, there is no opposition between cultural promotion and the creation of for-profit commercial activities (see art. 97 of the Italian Constitution), nor is the existence of any such opposition suggested by the founding acts of the 1972 Paris Convention.

⁸ The interventions and the amount of state contributions towards UNESCO sites, regardless of the owner of the sites (whether it is the state or otherwise), is established by decree of the Ministry for Cultural Heritage and Activities and Tourism, in agreement with the Ministry for the Environment and of the Protection of the Territory and the Sea, with the Ministry of Agricultural, Food, Forestry and Tourism Policies and with the Permanent Conference for relations between the State, the Regions and the autonomous Provinces of Trento and Bolzano (art. 4, paragraph 2, Law No. 77/2006). Since its entry into force (2006) to 2018, 335 projects have been funded by the MiBACT, for a total of € 27 236 263,06. Over four million euros have been used by the Sites to draw up and update their Management Plans.

For a prompt reconstruction of experiences applying Law No. 77/2006, see: Il Libro Bianco: Legge n. 77/2006 / Ministry for Cultural Heritage and Activities and Tourism. Soveria Mannelli: Rubbettino, 2013.

The implementation methods to access the support measures are defined by the notice of the Secretary General MiBACT 28 May 2019, No. 24 which first identifies the possible recipients of the funding, as well as the contact persons of the sites and elements to whom the task of submitting the funding applications is entrusted and to report on the implementation of the approved projects.

As true as this may be, it is also the case that the qualification of a site (or part of a site) as a mere instrumental office of the public body that owns the site (San Leucio complex), the absence of legal, financial and accountant autonomy (Castel del Monte; Leonardo's Last Supper; Etruscan Necropolises of Cerveteri and Tarquinia; Early Christian monuments of Ravenna) represents an unjustifiable organizational arrangement. Indeed, the absence of such autonomy prevents from the outset such activity from being accountable and limits possible dynamism in the management. Similarly, the direct management of the site, even where there is legal, financial and accounting autonomy, would still not lead to a full exploitation of the income potential.

Unfortunately, the Italian management tradition has always stood out for notoriously inverting the relationship between means and ends, unjustly believing that the maximization of the ends requires the sacrifice of the financial dimension. The misunderstanding of the 1972 UNESCO Convention has accentuated this prejudice, perhaps giving excessive importance to the "symbolic value of sites and elements of cultural heritage" (art. 1 of Law no. 77/2006); this seems to have contributed to the "spiritualization" of the theme of site management, neglecting the concept of financial sustainability and, if anything, focusing attention on exclusively dredging public resources. This is naturally a misunderstanding that is fuelled by the ignorance of other normative sources: for example, the "management plans" provided for by art. 3 of Law no. 77/2006 also include "actions that can be carried out to find the necessary public and private resources, in addition" to the "support measures" referred to in art. 4 of Law no. 77/2006. In turn, an adequate organizational architecture that ensures good management is perfectly instrumental to achieving these purposes which are perfectly harmonious with respect to the Italian constitutional framework. If it is true that the purpose of the 1972 UNESCO Convention is to prevent the "deterioration or disappearance of any item of the cultural or natural heritage" which would constitute a harmful impoverishment for all the peoples of the world, the value premise which the Convention is based on is "the importance... of safeguarding this unique and irreplaceable property to whatever people it may belong", "the outstanding interest" of natural cultural heritage which requires them "to be preserved as part of the world heritage of mankind as a whole".

If this is the final shared objective pursued by the Paris Convention of 1972, it is true that nowhere does the treaty exclude the economic and income-related importance of the sites: this is also deduced from the theme of the "adequacy of resources" which seems to have been introduced when the Convention speaks of "insufficient economic, scientific and technological resources of the country where the property to be protected is situated" with respect to which the Convention proposes to offer its own additional and not replacement support. Indeed, precisely in consideration of the priority of the financial commitment of the State and that only subsidiary and possible international Organization, the theme of self-maintenance of the properties declared cultural or natural heritage of humanity assumes strategic importance: in fact, if it is true that the recognition of a UNESCO site is independent, and rightly so, of its income potential, it is true that the increase in its self-maintenance capacity is instrumental with respect to the achievement of the aims of the UNESCO Convention (protection and enhancement).

As anticipated, the legal framework deriving from the 1972 UNESCO Convention appears fully compliant with the Italian constitution: the increase in the profitability of the site (whether it is a UNESCO site or not) represents one of the means of management prefigured by the Constitution (art. 97, paragraphs 1 and 2 of the Italian Constitution) in order to achieve the ultimate aims of cultural promotion, which is provided by art. 9 of the Constitution. While respecting the primacy of the ultimate goal (cultural promotion and, therefore, the inner growth of man as a visitor of the site), the importance of the means shouldn't be underestimated and deemed an instrument of "commodification". Indeed, the means prefigured by the Constitution to achieve any public purpose are represented by the "efficiency" (art. 97,

paragraph 2, Italian Constitution; see below, in this paragraph) of administrative activity; this concept translates into the obligation of each Administration, including the holder of cultural goods, to act according to *efficacy* (relationship between expected and achieved objectives), *cost-effectiveness* (relationship between resources used and resources available) and *efficiency* (relationship between objectives achieved and means employed). In turn, the obligation to ensure “efficiency” is linked to the precept of paragraph 1 of that same art. 97 of the Constitution which commits all public administrations to compete to ensure the equilibrium of balance sheets and the sustainability of the public debt.

If this is the constitutional framework, it is clear that this *modus operandi* is barred from the outset when there isn't even the possibility of accurately reporting the management of the UNESCO site in financial and accounting terms due to the absence of a budget and the impossibility of assuming autonomous spending commitments (as is the case for the Etruscan Tombs of Cerveteri and Tarquinia, as well as in Castel del Monte). While this is a common limit for hundreds of Italian institutes and places of culture, it appears more remarkable in the case of UNESCO sites that art. 1 of Law no. 77/2006 solemnly declares “due to their uniqueness, points of excellence of Italian cultural, landscape and natural heritage and their representativity at an international level”. This notation shows how, at least in these cases, the international qualification did not affect the internal organization, unlike for the two UNESCO World Heritage sites “Villa Adriana” and “Villa d'Este”, unified in a single site with special autonomy since 2014 (Prime Ministerial Decree no. 171/2014).

5. UNESCO site management plans: outsourcing

5.1. The case of “Su Nuraxi” in Barumini (Sardinia)

With the above in mind, in order to achieve these purposes (“finding the necessary public and private resources”: art. 4 of Law no. 77/2006) the organizational prerequisites useful for understanding the direction taken and/or to be pursued appear fundamental. Whilst such UNESCO state-owned sites continue to be managed in the most traditional way possible (direct public management with no independent accounting reporting), others offer evidence of different management plans, inspired by a healthy outsourcing of functions.

In some cases, as for the archaeological site of “Su Nuraxi” in Barumini (Cagliari, Sardinia), the “Barumini Sistema Cultural Foundation” is entrusted with the task of protecting, preserving, managing and enhancing the cultural heritage of the Municipality of Barumini, including the area which has been declared a world heritage site (i. e. the Su Nuraxi Archaeological Area, the Casa Zapata Museum Center and the Giovanni Lilliu Cultural Heritage Communication and Promotion Center).

In particular, the area of “Su Nuraxi”, assigned to the Regional Directorate of Museums of Sardinia and, therefore, with no financial or accounting autonomy, is granted for use to the Municipality of Barumini and entrusted by the Municipality to the “Barumini Sistema Cultural Foundation”. It is interesting to highlight how the Foundation presents profits as the difference between revenues (€ 2 342 796,00 in 2019; € 2 236 256,00 in 2018) and production costs (€ 2 159 510,00 in 2019; € 2 101 753,00 in 2018); which produces a net operating profit of € 180 519,00 in 2019 and € 129 906,00 in 2018.

However, it should be noted that the Foundation receives public grants worth € 1 055 937,00 (in 2019) and € 1 051 232,00 (in 2018). The presence of these contributions, while it demonstrates the non-integral self-sufficiency of the Foundation, does not neutralize the high self-maintenance capacity of the private law entity in which various public actors participate as well as the capacity to constantly monitor costs and revenues.

5.2. The case of the “Early Christian Monuments of Ravenna”

In addition to the full management plans of an archaeological area declared world heritage, among the UNESCO sites belonging to the state it is possible to identify a further kind, namely places for whose management the Public Administration decided to establish *ad hoc* legal entities, pursuant to art. 112 of Legislative Decree no. 42 of January 22, 2004, to which enhancement activities can be exclusively entrusted.

This is what happened for the “Early Christian Monuments of Ravenna”. These include the Basilica of Sant’Apollinare in Classe, the Baptistery of the Aryans, the Mausoleum of Theodoric. These sites also lack special autonomy (and, therefore, legal, financial and accounting autonomy); as such, they do not have their own management functions but belong to the Regional Directorate of Museums of Emilia Romagna (MiBACT) pursuant to Ministerial Decree of December 23, 2014 on “Organisation and operation of state museums”; this leads to limitations of a financial (giving and receiving money), accounting (reporting revenues and costs), and legal (adopting measures and entering into contracts) nature. Nonetheless, ticket revenues in 2018 (€ 1 108 685,00) decreased in 2019 to below 800 thousand euros (€ 797 836,00); however, the overall costs and therefore the quantification of losses are unknown.

The revenues of the “Archaeological Park of Classe RavennaAntica” Foundation are more than double the above amount. This foundation was established with the purpose of enhancing, also for tourism purposes, the archaeological, architectural and historical-artistic heritage consisting of the ancient city of Classe, the Basilica of Sant’Apollinare in Classe, the Domus of the “Stone Carpets” in Ravenna, the eighteenth-century Church of Sant’Eufemia and the fourteenth-century Church of San Nicolò and, therefore, in part also of the state-owned places included in the site declared by UNESCO as “world heritage”. The Foundation is the concessionaire of various additional assets alongside the Early Christian Monuments of Ravenna (directly managed by MiBACT). It also manages certain commercial services within the properties declared world heritage and brought back under the direct care of MiBACT (which therefore bears the entire maintenance costs).

The Foundation’s total revenues in 2018 were € 2 406 340 while in 2017 they were € 1 818 056. Considering also the costs (€ 2 363 570 in 2018 and € 1 700 205 in 2017), the Foundation achieved a net profit of € 1 248 in 2018 and € 1 919 in 2017 (although this result was also achieved thanks to the contributions from various public bodies which amounted to € 1 134 574 in 2018 and € 992 239 in 2017). Therefore, whilst focusing on the same territory that boasts the recognition of the UNESCO brand, and even if the sites managed by the Directorate-General for MiBACT Museums are different from those managed by the RavennaAntica Foundation, state revenues appear to be about half of those made by the foundation; it should also be noted that — even if they not accurately quantifiable — the costs of preserving UNESCO elements are borne exclusively by MiBACT (and not by the Foundation).

If the ultimate purpose of the Foundation is the conservation and public use of Ravenna heritage as well as the promotion of further historical-archaeological research, these objectives are achieved thanks to intense commercial activity which, since 2000, has been exercised through the management of the museum of the Domus dei Tappeti di Pietra di Ravenna, the management of the archaeological site of the Ancient Port of Classe, the museum site at the ex church of S. Nicolò in Ravenna entitled “TAMO All the adventure of mosaics” and the additional services of the Civic Archaeological Museum Tobia Aldini in Forlimpopoli, in agreement with the Municipality of Forlimpopoli (the owner). The intensification of the management of these sites and, therefore, of commercial activities has determined, starting from 2015, the modification of the (fiscal) nature of the entity that has assumed the connotation of a “commercial entity” (also if not for statutory purposes).

This stage in the life of the Ravenna Antica Foundation confirms in practice how carrying out commercial activities, even on UNESCO sites, is completely possible and leads to beneficial financial effects which, on the contrary, are not recorded when the subject (MiBACT) presumes to carry out the traditional business of selling tickets only, without also pursuing an aim of financial equilibrium.

In other words, the experience confirms that the values encapsulated in articles 9 and 97 of the Italian Constitution are fully compatible, and not conflicting. Focusing exclusively on maximising the ends (article 9 of the Constitution) leaves unresolved the problem of finding adequate financial resources (article 97 of the Constitution). This is the case even where cultural resources, all things equal, would enable profits to rise.

The coexistence within one area declared a “world heritage site” of a publicly-managed structure and a private structure, albeit with non-profit ends and made up of (mostly) public persons, seems to confirm the argument put forward elsewhere on the possibility of achieving cultural promotion ends according to a method of company efficiency which can be put in place by entities other than those that own the goods, and irrespective of the legal nature of that managing entity.

Furthermore, entrusting a state archaeological area which has been declared a world heritage site (such as the one of Su Nuraxi) to a private Foundation demonstrates that its inalienability, pursuant to article 54 comma 1 of Legislative Decree no. 42/2004 does not imply that its management cannot be entrusted to third parties. This legal route, despite not being fully well-established, has scarcely been experimented on a large scale in administrative practice, but the few examples of such cases in the field of UNESCO have all been successful.

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А. Л. Тараско

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Статья посвящена таким аспектам объектов ЮНЕСКО, принадлежащих итальянскому государству, как их прибыльность и устойчивость. Если общей характеристикой итальянских (и не только) объектов ЮНЕСКО является неоднородность юридических титулов обладания такими объектами, то в то же время в отношении объектов ЮНЕСКО, принадлежащих итальянскому государству (25 из 55: 45,55%), к множественности правовых режимов добавляется неоднородность моделей управления. Плюрализм упомянутых свойств влияет как на валоризацию объекта, так и на качество управления последним. Негативные последствия фрагментации управления государственным объектом ЮНЕСКО подразделяются на следующие различия: 1) в подходах к набору персонала; 2) в моделях управления; 3) в опыте работы; 4) в экономической рентабельности; 5) в системе бухгалтерского учета. Если такое разнообразие едва ли понятно даже тогда, когда объекты принадлежат разным институтам, то оно еще менее понятно, когда они принадлежат государству. Следствием абсолютной неоднородности правовой и организационной базы является неоднородность экономических результатов. Разрыв огромен и недопустим: этрусские гробницы Тарквинии и Черветери приносят следующий доход: 38 964,84 евро (2018) и 57 127,00 евро (2019). В то же время доход археологического парка Колизей составил 46 347 249,57 евро (2018) и 48 465 096,71 евро (2019). Если верно, что присуждение культурному памятнику статуса объекта ЮНЕСКО происходит независимо от его экономических возможностей (как это и должно быть), то верно и то, что повышение его экономической рентабельности способствует достижению целей Конвенции ЮНЕСКО: охране и валоризации объекта культурного наследия. Отсюда вытекает обязанность ведения автономной финансовой отчетности объектов ЮНЕСКО, которая в настоящее время отсутствует во многих государственных объектах ЮНЕСКО, до сих пор не имеющих собственной бухгалтерской и финансовой автономии. В заключение отмечается, что тема фрагментации права собственности на 55 итальянских объектов ЮНЕСКО и влияния фрагментации на управление и финансовую отдачу позволяет выявить то фактическое значение, которое национальная правовая система на самом деле придает объектам ЮНЕСКО, т.е. значение, которое, помимо официальных деклараций, объекты ЮНЕСКО имеют во внутренней правовой системе.

Ключевые слова: ЮНЕСКО, фрагментация собственности, планы управления, управление культурным наследием, валоризация объекта культурного наследия, объекты ЮНЕСКО.

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Тараско Антонио Лео — юрист, полный (хабилитированный) профессор административного права, Министерство культурного наследия, деятельности и туризма, Италия, 00153, Рим, ул. Сан Мишель, 22; leo.tarasco@gmail.com