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THE INTANGIBLE DIMENSIONS OF CULTURAL HERITAGE

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Agnese Mussatti
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The dissertation of Agnese Mussatti is approved.

PhD Program Coordinator: Prof. Maria Luisa Catoni, IMT

School for advanced Studies Lucca

Advisor: Prof. Lorenzo Casini

Co-Advisor: Prof. Andrea Averardi

The dissertation of Agnese Mussatti has been reviewed by:

Prof. Noé Wagener, Université Paris-Est Créteil

Prof. Tullio Scovazzi, Università degli Studi di Milano Bicocca

IMT School for Advanced Studies, Lucca

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A Barbara ed Elena,
ragazze nel loro tempo

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Vita

June 30, 1996	Born, Turin, Italy
2016	Master's Degree in Flute, Conservatoire de la Vallée d'Aoste, Aosta, Italy
2019	Traineeship, International Music Council, Paris, France
2020	Master's Degree in Law, 110/110 *cum laude*, Università degli Studi di Torino, Italy
2020-	PhD in Analysis and Management of Cultural Heritage, IMT School for Advanced Studies Lucca, Italy
2022	Traineeship, Council of Europe, Strasbourg, France
2022-	Research collaboration, Fondazione Santagata for the Economics of Culture, Turin, Italy
2023-2024	Visiting research period, Université Paris-Est Créteil & Institut des Sciences Sociales du Politique, ENS Paris Saclay, France
2024	UNESCO World Heritage Young Professionals Forum, New Delhi, India
2024-	Research collaboration, AlpTextyles – Interreg Alpine space, Regione Lombardia, Milan, Italy
2024-	Research fellowship, He_Re Lab Heritage Research, Università degli Studi di Firenze, Italy
2025-	Guest research fellowship, UNESCO Chair in Intangible Cultural Heritage and Sustainable Development, CY Cergy University, Paris, France

Publications

Peer-reviewed

Mussatti, A. (2022) "Il vincolo storico-artistico di destinazione d'uso: inammissibilità dello strumento, inadeguatezza della disciplina", in *Giornale di diritto amministrativo*, no. 3.

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Presentations

2025 • Collaboration and exchange of UNESCO Chairs on Living Heritage and UN Agenda 2030 Sustainable Development Goals, University of Tartu

Before, after, and beyond listing: legal pathways for viability, participation, and sustainability in ICH safeguarding

2024 • Annual Conference of AIPDA (Associazione Italiana Professori di Diritto Amministrativo) – National Coordination of Doctoral Students in Administrative Law, Genova

La dimensione immateriale del patrimonio culturale. Sviluppo di una metodologia di ricerca

• University Paris-Est Créteil – Laboratoire MIL (Marchés, Institutions, Libertés), Paris

La dimension de l'usage dans la conservation des bâtiments et des monuments. Regards croisés entre le droit français et le droit italien

• Seminar PEPS (Propriété, environnement, patrimoine et société), Institut des Sciences sociales du politique, ENS Paris-Saclay

Protéger la valeur immatérielle d'un immeuble : nouveaux périmètres jurisprudentiels

2023 • Conference *Heritages. Past and Present – Built and Social*. AMPS (Architecture Media Politics Society) – Czech Technical University, Prague

UNESCO safeguarding plans: integrated planning strategies for the (ever-expanding) cultural heritage sector

2022 • Advanced Topics in Cultural Heritage Law course, IMT School for Advanced Studies Lucca

The intangible dimension of cultural heritage

• Conference *Global Problems and Prospects in Public Law*. ICON-S – The International Society of Public Law,

University of Wroclaw

NFT and dematerialized art: how to democratize access through a (new) ownership title

2021 • Conference The Faro Convention Implementation. Heritage Communities as Commons: Relationships, Participation and Well-Being in a Shared Multidisciplinary Perspective. University Federico II, Naples

L'ecomuseo come pratica applicative della Convenzione di Faro in Italia: immaterialità e partecipazione

• Mundo Conference *The future of public law*. ICON-S – The International Society of Public Law, online

The Faro Convention and its impact on the intangible cultural heritage in Italy: reflections on the case of ecomuseums

Abstract

This dissertation systematically examines the concept of immateriality in cultural heritage, identifying its principal manifestations and evaluating its relevance within legal discourse. While primarily focused on the Italian legal system, the study adopts a comparative approach – most notably with France – with the overarching aim of developing a methodological framework applicable across diverse legal systems. This framework aims to facilitate the identification and in-depth examination of critical issues surrounding the broad research objective.

The analysis is structured around three core areas.

The first focuses on the dimension of immateriality around which a degree of international consensus has formed: the definition of Intangible Cultural Heritage established by UNESCO in 2003. Through the analysis of its domestic transposition (and its shortcomings) the study highlights the persistent misalignment between international and national legal mechanisms and outlines steps toward a more effective and comprehensive integration of this (first) dimension of immateriality.

The second expands the inquiry by questioning whether immateriality should be solely confined to UNESCO definition of ICH. It proposes repositioning the attribute 'intangible' at the outset of legal inquiry, enabling the recognition of additional intangible dimensions, including those present in materially constituted heritage. The study investigates so-called "extrinsic" forms of immateriality – external projections of cultural value that generate new legal situations.

Accordingly, the third area investigates the relationship between immateriality and subjectivity, in light of the growing complexity – outlined in the preceding phases – of the contexts in which immateriality reshapes legal principles and administrative processes. It questions the adequacy of current legal frameworks and considers whether reforms are needed to address the diverse interests at stake and the increasingly fluid boundaries of cultural heritage.

Combining legislative analysis with case-based evaluation, the study examines how administrative and judicial practices have responded to regulatory gaps. An administrative law perspective is integrated with sustained attention to international law – essential for understanding the ongoing interaction between global and domestic frameworks, and for advancing the broader objective of this study: to initiate a novel line of inquiry into the immateriality of cultural heritage – one that moves beyond the UNESCO conceptualization and is adaptable to diverse legal and cultural contexts.

Abbreviations

2003 Convention	UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage
2005 Convention	UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions
CFPCI	Centre français du patrimoine culturel immatériel
CGIs	Community, groups and individuals
DRAC	Direction régionale des Affaires culturelles
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPV	Entreprise du Patrimoine Vivant
EU	European Union
Faro Convention	Council of Europe Framework Convention on the Value of Cultural Heritage for Society
GA	General Assembly of States Parties
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICH	Intangible Cultural Heritage
ICOMOS	International Council on Monuments and Sites
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore

IPRs	Intellectual Property Rights
IUCN	International Union for Conservation of Nature
LHT	Living Human Treasures
MCM	Maison des Cultures du Monde
NGO	Non-governmental organization
OD	Operational Directives
PCI	Patrimoine culturel immatériel
TK	Traditional knowledge
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization

Introduction

Charting boundaries: concepts, research paths, and thesis framework

The association of modernity – as a transformative process of "disintegration and renewal" – with the dissolution of "all that is solid into air" is a theme deeply embedded in philosophical thought[1]. In this study, the linkage between progress and advancement – often an ambivalent, contradictory, yet undeniably dynamic movement – and the dissolution of previously stable categories is approached on two levels. First, metaphorically: as a critical interrogation of foundational legal certainties. Second, more concretely, as a reconsideration of immateriality as a valid and increasingly relevant category, warranting deeper analysis of its conceptual and practical implications.

Indeed, the topic of immateriality is assuming growing significance within the classical structures through which cultural heritage has traditionally been conceptualized, studied, and governed in academic, institutional, and legislative contexts. In the wake of this transformative process, issues related to the non-physical dimensions of heritage have first emerged through the established UNESCO framework for intangible cultural heritage (ICH). To date, the ICH system includes 788 elements inscribed by 150 States Parties across three listing mechanisms: the Representative List, the List of ICH in Need of Urgent Safeguarding, and the Register of Good Safeguarding Practices[2]. The increasing recognition of ICH as a category parallel to tangible heritage is reflected in the growing number of legal and policy instruments at both European and international levels.

A notable example of this trend is the 2024 ICOMOS International Charter and Guidance on Sites with Intangible Cultural Heritage, which advocates for the "recognition of intangible cultural heritage as an integral part of site-based heritage" and aims to support and guide

[1] The quotation is drawn from the well-known passage in Marx and Engels' *Manifesto of the Communist Party*, later revisited by M. Berman in A*ll That Is Solid Melts into Air: The Experience of Modernity* (New York, 1981), from which the second quotation – on the process of modernity – is also taken.

[2] Source UNESCO, https://ich.unesco.org/en/lists (accessed 10 May 2025). As will be discussed, adherence to the 2003 UNESCO Convention entails a commitment to the broad safeguarding of ICH in its entirety, irrespective of whether specific elements are inscribed on the official lists. Consequently, ICH 'elements' are far more numerous and pervasive in the reality under consideration.

ICOMOS members "to a more integrated tangible-intangible heritage practice" [3]. These statements collect global shift toward more inclusive and cross-sectoral standards in the legal and policy frameworks governing the preservation of cultural expressions traditionally regarded as tangible.

Crucially, however, the "intangible" seems no longer treated as a discrete legal or classificatory category. Instead, it is increasingly conceptualized as a transversal dimension that shapes how heritage is understood, constructed, and mobilized in contemporary legal and policy frameworks. This includes meaning-making processes, uses, skills, traditional and local knowledge systems – particularly within environmental governance and ecosystem conservation. The growing relevance of the intangible thus lies not only in its intrinsic value but also, and perhaps more significantly, in its instrumental function. It is now inseparably linked to the preservation and interpretation of material heritage, and it plays a critical role in addressing complex global challenges such as climate change, socio-cultural transformation, unregulated economic development, globalization, and conflict.

This evolving understanding is reflected in numerous policy and funding priorities. The European Union, for instance, has significantly expanded its commitment to ICH. The Horizon Europe program, as part of the 2023–2025 Work Programme under Cluster 2: Culture, Creativity and Inclusive Society, has launched a €12 million call for 2025 titled "Innovative approaches to intangible cultural heritage for societal resilience", whereby the main goal is to provide policymakers with a "comprehensive analysis of ICH's potential for societal resilience and its contribution to climate change mitigation and adaptation"[4].

Similarly, the role of local and traditional knowledge systems, customary uses, and adaptive cultural practices in addressing climate change has been formally acknowledged in the Global Goal on Adaptation (GGA – 2/CMA.5), adopted at COP28[5]. This recognition was

[3] Charter available at https://publ.icomos.org/publicomos/jlbSai?html=Bur&base=technica&ref=43849&file=2463.pdf&path=ICICH%20Charter%20EN-FR_final.pdf (accessed 19 June 2025).

[4] The call is available at https://research-and-innovation.ec.europa.eu/document/download/4a0e522f-0293-45f7-bb95-226d6172ba8c_en (accessed 19 June 2025).

[5] FCCC/PA/CMA/2023/16/Add.1, Decision 2/CMA.5, esp. para 9(g): "Protecting cultural heritage from the impacts of climate-related risks by developing adaptive

further reinforced during the Second High-Level Ministerial Dialogue on Culture-Based Climate Action held at COP29. Furthermore, the establishment of the *Loss and Damage Fund* at COP28 was designed not only to respond to quantifiable climate-related harms but also to address non-economic losses, within which intangible dimensions are increasingly being considered[6].

Hence, reasoning in terms of immateriality signals a transition toward a more dynamic and inclusive legal framework, where values, practices, and collective subjectivities are central to the evolving governance of heritage in the face of contemporary global challenges. This dissertation will examine how legal frameworks respond to and address this transition.

The interpretation of the dissolution of "all that is solid" in terms of value can be situated within the conceptual parameters that define the meanings of *immaterial*, on the one hand, and *intangible*, on the other – in other words, within the space that opens up between what is considered "irrelevant" or "non-inherent" and what is "non-physical" or "non-tangible."[7] Even before approaching the issue from a strictly legal perspective, there is a pervasive ambivalence surrounding phenomena that are untouchable or imperceptible to the senses. On one hand, these phenomena are often seen as mutable, elusive, and ephemeral – making them difficult to categorize, hence dismissed as irrelevant. On the other hand, they can be viewed as expansive and disruptive forces, capable of transcending established boundaries and resisting predefined taxonomies.

The linguistic and conceptual opposition between the physical – objective, identifiable, and utilizable – and the non-physical – indeterminate, ambiguous, and mutable – serves as a foundational premise of this study, aiming to systematically identify and analyze the

strategies for preserving cultural practices and heritage sites and by designing climate-resilient infrastructure, guided by traditional knowledge, Indigenous Peoples' knowledge and local knowledge systems"

[6] See in this respect also the research briefing presented at COP29 by the Entertainment + Culture Pavilion's *Legacy Solutions: Cultural Heritage in Global Climate Action*, 2024. Available at https://www.klimakultur.no/media/smtp21qk/legacy-solutions_-cultural-heritage-in-global-climate-action.pdf (accessed 10 May 2025).

[7] According to the Wex online legal dictionary provided by Cornell Law School's Legal Information Institute, *immaterial* refers to something that "has no essential bearing on the issue [...]– that is, something considered irrelevant to the matter at hand." By contrast, *intangible* refers to the absence of physical substance or existence. See: https://www.law.cornell.edu/wex (accessed 10 May 2025).

various intangible dimensions of cultural heritage that bear significance within legal discourse. Building on the above distinction, it can be argued that the focus lies on dimensions that, while *intangible*, are not necessarily *immaterial* in legal terms.

From a methodological perspective, it is important to clarify at the outset that this study acknowledges and builds on the existing conceptual distinction between 'intangible' and 'immaterial.' It recognizes its roots in the association between the absence of physical perception and the perceived lack of relevance, and aims to explore the legal implications of this relationship. However, especially in the transition from adjective to noun (i.e., intangible to intangibility; immaterial to immateriality), the two terms are used in the text with a much less rigid and often interchangeable approach. Instead, other systematic criteria can be highlighted.

In attempting to disentangle the various meanings associated with the concepts of immateriality, or intangibility, this research begins by critically engaging with existing conceptualizations. As a first step, it examines the consensus developed around a specific form of *intangible* cultural heritage, as articulated in the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. This form of intangibility is grounded in incorporeal elements transmitted across generations by groups, communities, and individuals who recognize these elements as integral to their identity and actively seek to ensure their continued viability. ICH represents the form of "absence of materiality" most commonly associated with cultural heritage – the most broadly recognized at both national and international level.

From this point of departure, a series of initial research questions arose concerning the construction of legal meaning around ICH and the rationale for developing a dedicated legal regime. What are the historical, political, and cultural origins of ICH? In what ways does legal discourse differentiate the legal value attributed to incorporeal elements from that assigned to physical objects? How are such elements protected within legal systems? And, most importantly, how is this supranational framework interpreted and implemented at the national level?

All these questions are addressed in Chapter 1 of the dissertation. In this context, the term *intangible* is often used consistently, in accordance with established international terminology.

The discussion then introduces an additional layer of analysis.

Is ICH, as conceptualized by the 2003 UNESCO Convention, the only manifestation of immateriality identifiable within legal discourse? And, by extension, is legal reasoning truly confined to a binary opposition between physical existence of objects and their incorporeal counterparts, each demanding distinct legal treatment based on their material status? Or does this dichotomy become more complex when examined through the lens of modernity, understood here as a process of dissolution and reconfiguration of the "solid," thereby necessitating a more nuanced understanding of legal categories and the realities they seek to capture?

Within this framework, the study explores alternative forms of intangibility that relate directly to the physical object itself. It advances the hypothesis that immateriality may not signify merely (or solely) the absence of matter, but rather a different interpretive approach to existing structures, objects, and meaning – an expansion of underlying systems and interconnections.

Adopting an investigative lens rooted primarily in the Italian legal system – while remaining open to comparative insights, as outlined in the following section – this research examines whether a dimension of immateriality (or multiple such dimensions) may be identified within the so-called *bene culturale*: the material object that forms the conceptual and regulatory cornerstone of the Italian cultural heritage framework, as codified in the 2004 Code of Cultural and Landscape Heritage. Indeed, under Italian administrative law, cultural property is identified with movable and immovable *things* that possess cultural interest as outlined by defined legal categories (Articles 2, 10, and 11 of the Code of Cultural Heritage). Even adherence to the category of ICH, in line with UNESCO guidelines, is domestically translated into a requirement of interrelation with a material substrate. This involves the identification of a tangible cultural asset that *also* embodies an "expression of collective cultural identity" (Article 7-bis).

The conceptual undertaking of this dissertation is thus to reposition the term 'intangible' and to investigate whether other such dimensions exist – that is, dimensions of relevance not tied to material essence, yet relevant to the legal discourse – beyond the interpretive framework proposed by UNESCO. Analyzing how certain dimensions of cultural assets may acquire legal relevance despite being intangible – that is, lacking physical and/or objective presence – requires careful consideration of the conditions under which such dimensions emerge, as well as the contexts in which they do so. Thus, immateriality becomes not merely a descriptive category, but a lens through which to

understand new approaches to cultural objects and the evolving relationships they generate[8].

In this regard, the dissertation surveys the existing literature to develop a methodological framework for the analysis. This framework introduces a distinction between *intrinsic* and *extrinsic* immateriality – not as a substantive categorization, but as a scholastic or formal device intended to structure and clarify the examination of different hypotheses concerning how immateriality may manifest in legal discourse. The former refers to the immaterial quality inherent in the very nature of the cultural legal good; that is, the cultural value that renders an object legally relevant due to its public interest. This value transcends the object's materiality, while remaining anchored to it for the purposes of legal identification, following the theory advanced by Massimo Severo Giannini. The latter refers to *extrinsic* forms of immateriality, challenging the presumed unity between material object and its cultural value. It may manifest either as a legally relevant element within the object itself or as a dimension that extends beyond it, arising through the interactions the object generates in external contexts – whether physical or conceptual.

In this context, the research addresses selected case studies across three scenarios, focusing on areas of inquiry that appear particularly contingent upon the transformative movement – both "disintegrative and renewing" – of recent administrative practices, judicial decisions, and potential new regulatory developments. First, the concept of *decorum* as a standard for protecting both the "contextual" and "projected" image of cultural property. Second, the dimension of *use*, exploring how specific uses influence the legal conceptualization of cultural assets and their associated functions of protection and enhancement. Third, *digitalization* as a setting in which assets lacking a physical substrate – whether born-digital, dematerialized, or digitally reproduced – give rise to new and evolving legal scenarios.

In this part of the dissertation, the term *immateriality* is generally preferred over *intangibility* for two reasons: (i) to clearly distinguish the argument from UNESCO's terminology; and (ii) to better capture the

[8] As effectively observed also by C. Grammatikopoulou, *Shades of the immaterial: Different approaches to the 'non-object'*, in interartive.org, 2012 available online at https://interartive.org/2012/02/shades-of-the-immaterial (accessed 10 May 2025), referring specifically to the art domain. "As a result of this approach" she notes, "the focus of attention is shifted from purely visual perception to other senses […] and different processes […]."

conceptual complexity surrounding the absence of matter – an absence that may be either not actual, yet legally peripheral, or indeed actual, but rendered "material" through its existence in different contexts.

These issues are examined in greater depth in Chapter 2 of this thesis.

A final (and perhaps overarching) question then emerged. The observation of various manifestations of immateriality arising from the "dissolution of solid structures" raises a key question: what legal implications emerge when an object embodies multiple, coexisting forms of immateriality in relation to the subjects it engages with? From a legal standpoint, it became essential to interrogate whether the foundational paradigms of contemporary cultural heritage law – such as ownership, social function, public access, and technical discretion in recognition and declaration processes – retain their original conceptual *solidity*, or whether they, too, *melt* into newer and more articulated frameworks. In this light, the conventional tripartite structure – comprising the State (or supranational entities), civil society (or the broader human community), and private interests – may no longer suffice to encompass the diverse manifestations of heritage immateriality and the plural relationships they generate.

Chapter 3 adopts this alternative perspective by shifting the focus from the *object* – that is, heritage and its various identifiable dimensions of immateriality – to the analysis of the *subject(s)* and the evolving nature of their relationship with it. In other words, once these layers of immateriality are brought to light, what consequences follow for the range of subjects involved and for the types of legal relationships that can be constructed or exercised in response to these dimensions? How, in turn, can administrative law – and established legal frameworks governing ownership, administrative evaluation, and public interest – meaningfully engage with this increasing complexity, that in this section we associated to the concept of 'modernity'?

Defining the horizon: expected outcomes and research objectives

This research aims to demonstrate how an inquiry into the immateriality of cultural heritage – understood not merely as non-corporeality, but as a shift in the attribution of legal relevance and in the number and nature of the subjects involved – can serve as a critical lens for interrogating the legal structures that shape the conceptualization and treatment of cultural assets. In this context, the solid melts into air not only in the

sense of losing its material substance, but also in the sense of assuming a different meaning – thus pointing to the need for a renewed and more nuanced legal discourse.

In this regard, it can be argued that the main innovation of this study lies in its reconfiguration of the concept of immateriality, moving beyond the dominant association with UNESCO ICH, which continues to shape much of the scholarly and institutional approaches. Instead, the aim is to reflect on immateriality as an alternative approach to the regulatory and administrative processes that define cultural interest and determine the modes of protection for cultural goods, once this concept is expanded to reflect the diverse contexts in which it gains significance.

This work also seeks to critically reassess the commonly accepted dichotomy between public and private interests in the determination of cultural value. By illuminating the more intricate and layered relationships among the diverse subjectivities engaged in cultural heritage processes, it highlights the ways in which additional dimensions of immateriality reshape these dynamics and challenge reductive legal classifications.

Chapter 4 of this dissertation will draw together the threads of the arguments developed in the preceding chapters, following the three analytical trajectories identified (ICH, other dimensions of immateriality, and the relationship between immateriality and subjectivity). This final chapter pursues a dual objective.

As the following methodological section will detail, the emphasis on the Italian legal context – essential for a rigorous engagement with the complex legal questions arising from a reconsideration of immateriality – is intended as a point of departure for a broader and more systematic analysis. The first (and more narrowly defined) objective is therefore to provide a comprehensive and coherent overview within the Italian legal system, contextualized within recent developments and focusing on those areas where deeper inquiry – or even a rethinking – of the existing frameworks is increasingly warranted. These areas reflect a moment of profound transformation in the cultural heritage landscape, one that cuts across multiple sectors and involves a wide array of actors.

The second and more ambitious objective – indeed, the guiding aspiration of the study – is to establish a methodological foundation for future research into immateriality as a legal and cultural category. This framework is envisioned as adaptable to various national contexts, capable of addressing unresolved questions that deserve closer

investigation. Ultimately, the goal is to foster a new research trajectory on the immaterial dimensions of cultural heritage, detached from specific reference to ICH, and engaged with the legal specificities of domestic contexts.

Setting the stage: methodological notes

Given the broad scope of the research undertaken in this thesis, some methodological clarifications are warranted.

The primary focus of this study is on the Italian legal system, approached through the lens of administrative law – that is, the body of public law governing the protection, enhancement, and management of cultural heritage – framed by a research objective centered on immateriality. Each chapter includes a detailed analysis of the relevant legal frameworks, alongside a section devoted to case-based reasoning. This structure reflects the fundamental need to begin with available legal rules (which are often incomplete or ambiguous in such areas) and critically engage with the administrative and judicial approaches applied in practice.

Although the thesis is open to a general comparative approach with several legal systems, a targeted comparison with France emerged and deepened as a result of a research stay at the École normale supérieure Paris-Saclay and the Faculty of Law at Université Paris-Est Créteil. This period facilitated an in-depth comparative analysis grounded both in traditional legal research and semi-structured interviews conducted with administrative officials responsible for ICH-related issues, as well as with scholars engaged in theoretical and institutional studies of the subject. The comparative perspective yielded significant insights, enriching the dissertation's analysis through a nuanced examination of administrative decisions and case law that reveal both points of convergence and divergence.

Over the course of the research, this comparative engagement with French administrative law has evolved into a key component of the thesis and now represents the most immediate avenue for extending the study. In recognition of this, original French sources are occasionally cited in their native language.

Furthermore, while the approach is predominantly rooted in administrative law – focusing primarily on the Italian system and, to a lesser extent, the French one – this is sometimes supplemented by insights from international law. Such integration is indispensable for

addressing the 2003 UNESCO Convention and related issues, notably the reflections on the right to cultural heritage developed in Chapter 3.

Overall, the sources employed include legislative texts, doctrinal contributions (Italian, French, and international), administrative and judicial decisions, interviews with administrative officials conducted during research stays, and interdisciplinary literature, particularly from heritage studies, memory, philosophy, and political science.

Finally, a note on the explanatory style adopted in this thesis is warranted. Given the expressed aim of situating this work within a broader, future comparative framework spanning multiple national legal systems, the thesis is not intended solely for experts in Italian law. While a focused analysis of a specific legal context was necessary to examine relevant mechanisms and structures in depth, it was equally important to provide a comprehensive overview of certain foundational concepts that may appear redundant to readers acquainted with Italian legal traditions. This deliberate choice serves to clarify key mechanisms and facilitate more immediate and effective comparisons with other legal systems.

Chapter 1 – INTANGIBLE CULTURAL HERITAGE: THE FIRST DIMENSION

1. Overview

In this study, we identify the first dimension of immateriality with the most widely recognized and established concept of intangible cultural heritage[9], as defined by UNESCO in the 2003 Convention for the Safeguarding of Intangible Cultural Heritage. This chapter offers a critical examination of the ICH paradigm, exploring its conceptual foundations and operational mechanisms through two main lines of analysis.

The first (developed in Section 2) explores the political, historical, economic, and cultural context that has fostered the evolution of current regulatory frameworks. By addressing ICH's scope across both diachronic and synchronic approaches, the section aims to identify the legal stakeholders involved in its formation, as well as the objective elements it seeks to protect. The analysis importantly extends to an investigation of the terminological origins of the concept and the protective orientation it has acquired over time. The establishment of a dedicated convention for intangible cultural expressions is widely regarded as the result of a conceptual subordination – not merely chronological – to earlier instruments concerning tangible cultural heritage. This evolution has also been influenced by geographical, political, and cultural dynamics, all of which are essential to gain a critical understanding of the contextual backdrop within which ICH has emerged.

The second line of analysis (addressed in Section 3) redirects the focus to national contexts, with a particular emphasis on the Italian legal framework. The section investigates how, once the international parameters of ICH have been outlined, the concept is interpreted and operationalized within Italy's legal tradition. A central question concerns how ICH is integrated into a system historically centered around *beni culturali* – tangible artifacts categorized by a predefined taxonomy of cultural value.

A comparative perspective will also inform this analysis. France – whose legal tradition is similarly grounded on the materiality of objects

[9] Henceforth, 'ICH'

constituting cultural property and the regulation of public interest through proprietary frameworks – offers a compelling basis for comparison, as it appears to have undergone a distinctive approach to incorporate ICH dynamics.

Ultimately, this chapter pursues two overarching objectives.

The first is to delineate the legal scope of ICH, both in its international definition and in its translation within domestic legal frameworks. In this latter regard, the analysis focuses on the extent to which ICH has been adapted to meet national standards of protection. In other words, it aims to determine whether domestic incorporation has upheld the foundational principles established by the international definition, or whether (and to what extent) those principles have been reinterpreted and reshaped to align with national legal traditions.

The second objective is to investigate the mechanisms for safeguarding ICH through a critical evaluation of both international and domestic administrative practices. This involves an in-depth look at cultural governance and contemporary policy-making, with particular attention to emerging trends and their legal implications. Drawing on the author's professional experience, the analysis highlights critical steps for effectively integrating this first dimension of immateriality into national legal systems. Central to this effort is acknowledging the inherently dynamic and evolving nature of ICH, which necessitates a reassessment of existing tools – listing and cataloging procedures, capacity-building programs, project planning models, and systems of recognition.

2. The 2003 Convention's adoption process: what to safeguard, how to safeguard

The UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage is the outcome of extensive efforts to probe the feasibility of an international legal instrument for the protection of *folklore*. The very shift in terminology – from 'folklore' to 'intangible cultural heritage' – already unveils the considerable distance spanning from early elaborations to contemporary conceptualizations, highlighting a terminological tension that lies at the core of the entire process of adoption. This evolution warrants careful examination, as it carries substantial implications, both legal and political, that reflect a fundamental transformation in the way cultural expressions are now conceived.

Within the broad temporal segment that marked this transition from folklore to ICH, debates revolved around two interrelated questions: *what* should be safeguarded, and *how* to translate this into regulatory terms.

In this regard, it is crucial to recall that intangible manifestations of cultural heritage existed in legal reality long before the development of any international framework. This resulted in a notable contrast: while some states had established legal traditions that acknowledged ICH, many Western states lacked comparable legal constructs. This disparity remains evident even in contemporary practice, as demonstrated by the delayed ratifications of (or continued non-participation in) international agreements [10].

The transition toward the establishment of an international framework for ICH must be therefore situated within a broader context – one that encompasses pre-existing national legal regimes, entrenched power asymmetries between Western and developing states, the pressures of accelerating economic globalization, and simultaneous shifts in geopolitical influence and cultural identity assertion. Within this landscape, the emergence and conceptual development of ICH marked a pivotal moment in the evolution of legal discourses on cultural

[10] The UK's recent ratification of the UNESCO Convention in 2024 exemplifies this pattern, following a long period of skepticism regarding the Convention's relevance to British heritage. See in this regard L. Smith, E. Waterton, "'The envy of the world?': Intangible heritage in England", in L. Smith and N. Akagawa (eds.), *Intangible Heritage*, London, 2008.

heritage, directly challenging previously dominant, Western-centric paradigms of protection.

Specifically, this transformation can be observed across four principal dimensions.

The first major shift entailed a departure from the exclusive focus on tangible cultural artifacts, extending recognition of practices, rituals, oral traditions, and knowledge systems, among other expressions. This new perspective emphasized the vitality and continuous practice of intangible cultural expressions, prioritizing their ongoing enactment and transmission over material representation and conservation.

The second significant development redefined the role of cultural heritage stewardship. Whereas States had traditionally assumed the role of sole custodians, the ICH framework foregrounded the agency of communities, groups, and individuals as the primary bearers and transmitters of such cultural practices.

The third transformation concerned the methodology of heritage identification. In contrast to earlier models that relied on expert-driven evaluations of universal or exceptional value, the ICH paradigm acknowledged a community-centered perspective, thereby embracing the diversity of methods for cultural interest assessment.

The fourth development redirected attention from static, finished cultural products to the underlying social and cultural processes that sustain them, highlighting the necessity of nurturing the broader cultural context that enables those expressions to thrive and persist.

In addition to providing a chronological overview of the development of the 2003 Convention, this initial section undertakes a thematic analysis of the recurring issues that have persistently engaged UNESCO's governing bodies and Member States. By tracing the evolution of these core themes over time, the discussion establishes a conceptual foundation for understanding the Convention's present-day principles and operational mechanisms, which will be examined in greater detail in the following Section 3.

2.1. The 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore

From its earliest drafting stages, the process leading to the adoption of the 1989 Recommendation on the Safeguarding of Traditional Culture

and Folklore[11] has been marked by intense policy and legislative action. The growing necessity to provide folklore with a legal framework for protection was the central pivot around which discussions were taking place both nationally and internationally. Prior to delving into the timeline of key events, it is essential to acknowledge the tension between two underlying yet opposite factors.

First, the crucial role played by developing nations in advocating for the creation of an international legal instrument to protect folklore, building upon the domestic initiatives that many of these states had already undertaken. That was the case in several states of Africa, Latin America, Asia, and the Pacific, where legislation was being enacted in response to growing concerns over the exploitation and misappropriation of traditional cultural expressions. The urgency to protect such heritage, crucial in revitalization, identity-, and nation-building processes, led to the adoption of legislation under different frames of copyright restrictions. In most instances, protection resulted in the assertion of state ownership and control over popular cultural expressions, such as traditional music, dance, and literature[12].

Accordingly, any discussion of 'folklore safeguarding' during the earliest stages of drafting must be situated within the conceptual boundaries outlined in those domestic regulatory policies. In these contexts, the object of protection is identified as "folklore and traditional culture," with corresponding safeguarding measures primarily implemented through copyright-based regimes developed in response to growing concerns over unauthorized use and exploitation.

At the same time, as the issue gained international prominence, a divergence between such copyright-centered frameworks and culturally driven approaches must also be considered. This tension became particularly evident in the distinct trajectories adopted by the principal

[11] Henceforth, the Recommendation.

[12] A notable example is Bolivia's Supreme Decree No. 08396 of 1968. As detailed in a communication from the Bolivian Ministry of Foreign Affairs and Religion to the Director-General of UNESCO dated 24 April 1973 (No. D.G.01/1006-79), Bolivia declared state ownership over its folk music – specifically anonymous, popular, and traditional music, works by unidentified contemporary folk composers, and music by Bolivian composers deceased for over 30 years. The Ministry also noted that legislation was underway to extend these measures to folk dance, popular art, and traditional literature. Similar legislative approaches were adopted in other countries, including Mexico (1956), Chile and Morocco (1970), Algeria and Senegal (1973), Kenya (1975), and Mali (1977), establishing comparable state authorship frameworks. In all cases, folklore was recognized as part of the nation's cultural heritage – variously described as 'traditional heritage,' 'cultural patrimony,' and similar terms.

international bodies involved – namely, the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Hence, any examination of the complex legal and policy process culminating in the 1989 Recommendation must account for these dual, and at times conflicting, dynamics: on the one hand, a nationally driven impulse to ensure protection; on the other, an international assessment of how to best achieve it, unfolding along a tension between copyright rationales and cultural policy objectives.

Such a multilevel process is usually traced back to 1963, a period marked by intensified cultural, institutional, and scholarly engagement with the role of local traditions in processes of identity formation. That year, the Bolivian Ministry of Foreign Affairs and Religion formally addressed the Director-General of UNESCO[13] pointing to "a blank in international legislation," expressing particular concern over the "intensive clandestine commercialization and export, in a process of commercially oriented transculturation destructive of the traditional cultures [...]"[14]. The subsequent adoption of the 1972 World Heritage Convention[15], with its pronounced emphasis on tangible cultural heritage, further prompted Bolivia to advance a dual request: (i) to explore the possibility of drafting an additional Protocol to the 1952 Universal Copyright Convention to establish state ownership over traditional cultural expressions of collective or anonymous origin, preventing their automatic relegation to the public domain; and (ii) to initiate the drafting of a Convention for the preservation and documentation of folklore.

This moment, usually considered the starting point for discussions on extending national protection regimes to the international level, should also be understood as the formalization of an effort already underway within UNESCO, responding to a sentiment among Member States[16].

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[13] *Communication*, No. D.G. 01/1006-79, cit.

[14] *Communication*, No. D.G.01/1006-79, cit.

[15] Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by the UNESCO General Conference at its 17th session, Paris, 16 November 1972.

[16] Among others, the 1971 draft study 'Possibility of Establishing an International Instrument for the Protection of Folklore,' which remained unsolved precisely because of the concerns raised on the application of a copyright framework in this area. Moreover, the 1973, 1975, and 1978 Intergovernmental Conferences on Cultural Policies of, respectively, Yogyakarta, Accra, and Bogota, whose Final Report's Recommendation gave rise to the Ten-year Plan for the Preservation and Promotion of the Performing Arts and Music in Africa and Asia. The issue was particularly apparent in the African continent, where

During this period, multiple meetings were convened, all centered on a common objective: developing legal frameworks capable of strengthening the protection of folklore in alignment with the expressed needs and priorities of States.

In parallel, similar objectives were being pursued through the 'Protocol Regarding Developing Countries,' as part of the 1967 Stockholm Revision of the Berne Convention for the Protection of Literary and Artistic Works[17]. In its 1964 Preparatory Report, the BIRPI[18] Study Group, entrusted with examining the issue, concluded that the adoption of specific international rules on folklore protection was not feasible. Instead, it recommended that individual states enact national legislation to prevent unauthorized use, noting that although the Berne Convention did not explicitly mention folklore, it did not preclude such national measures[19].

Now widely regarded as the first substantive attempt to address the international protection of folklore, the Stockholm Revision ultimately adopted a compromise solution. Rather than creating a dedicated instrument, a general supplementary provision was added to the Convention. To this day, Article 15(4)(a) refers to so-called 'anonymous works,' while deliberately avoiding any explicit reference to folklore:

> "In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."[20]

several initiatives were taking place. These include the African Study Meeting on Copyright, sponsored by BIRPI and UNESCO (Brazzaville, 1963); the Committee of African Experts to Study a Draft Model Copyright Law (Geneva, 1963); and the Session of Administrative and Legal Studies of the URTN, the National African Radio and Television Union (Tunis, 1964).

[17] Berne Convention for the Protection of Literary and Artistic Works, 1886.

[18] The Bureaux Internationaux réunis pour la protection de la propriété industrielle, littéraire et artistique, predecessor organization to WIPO, established in 1893.

[19] "Records of the Intellectual Property Conference of Stockholm", cit. In line with that vision, in 1977, the so-called Bangui Agreement relating to the Creation of an African Intellectual Property Organization was adopted, providing specific protection to folklore through copyright and cultural heritage protection measures. The document is available at https://www.wipo.int/wipolex/en/treaties/details/227 (accessed 19 November 2023).

[20] See B. Ubertazzi, *Intangible Cultural Heritage, Sustainable Development and Intellectual Property. International and European Perspectives*, Vol. 18, Cham, 2022, 158. The Author

Amid ongoing debates over whether the legal regulation of folklore expressions should be addressed at the international level or left solely to national legislation, the UNESCO Secretariat was formally tasked with studying the issue during the 12th session of the Intergovernmental Copyright Committee of the Universal Copyright Convention (Paris, 1973)[21]. From this juncture, interinstitutional exchanges initiated a prolonged debate centered on a pivotal question: while there was consensus on the necessity of international legal protection, should its scope be defined within or beyond the framework of intellectual property law?[22].

The answer in terms of a separation of folklore as a cultural matter from its IPRs aspects emerged in a 1975 UNESCO's study presented to the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Convention[23]. There, the legal protection of folklore was associated to its increasing significance as *cultural heritage*, along with the emerging threats to its authenticity and potential consequences of its exploitation. Accordingly, both the Intergovernmental Committee and Executive Board determined that copyright law alone was insufficient for such complex subject matter[24], hence partially outside their sphere of competence. Thus, they referred

highlights the limited scope of this article: (i) its optional nature often leads to its omission in national laws; (ii) protection applies only to works "lawfully made available to the public"; (iii) rights are exercised by a competent authority, not the community; and (iv) Article 7(3) excludes cases where the author is presumed dead for over 50 years.

[21] IGC/XII/17, LA.73/CONF.005/17.

[22] The issue of IPRs *vs*. cultural heritage protection for ICH (further explored in Section 2.4) involves an extensive scholarly debate. See, among contributions in reviews: S. Bradford, "Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law", in *Berkeley Technology Law Journal*, vol. 20, no. 4, 2005; M. Ogwezzy, "Protection of Indigenous or Traditional Knowledge Under Intellectual Property Laws: an Examination of the Efficacy of Copyright Law, Trade Secret and Sui Generis Rights", in *International and Comparative Law Review*, vol. 12., no. 1, 2012. Among collective volumes: C. Antons, W. Logan (eds.), *Intellectual property, cultural property and Intangible Cultural Heritage*, London, 2018; F. Francioni, A. F. Vrdoljak (eds.), *The Oxford handbook of International Cultural Heritage Law*, Oxford, 2020; L. Martinet, "The interactions between intangible cultural heritage and intellectual property law", in M. Cornu, A. Vaivade, L. Martinet, C. Hance (eds.) *Intangible Cultural Heritage Under National and International Law. Going Beyond the 2003 UNESCO Convention*, Cheltenham, 2020, 97-121. See also the monographic work of B. Ubertazzi, *Intangible Cultural Heritage, Sustainable Development and Intellectual Property*, cit.

[23] *Desirability of providing protection for folklore at the international level*, B/EC/IX/11; IGC/XR.1/1971/15; LA.75/CONF.002/COL.6. Those bodies will be henceforth referred to as 'Intergovernmental Committee' and 'Executive Committee'.

[24] Doc. B/EC/IX/11- IGC/XR.1.15, 7: "the problem was of a cultural nature and, as such, went beyond the bounds of copyright."

to the UNESCO Cultural Sector to investigate further how to develop such a regulatory international instrument.

After a lengthy internal debate over responsibilities and protection strategies[25], the 1985 meeting of the Committee of Governmental Experts on the Safeguarding of Folklore reached three key conclusions: (i) the instrument would take the form of a recommendation rather than a convention, allowing member states to implement its principles through legal or extralegal tools suitable to domestic legislation; (ii) an interdisciplinary approach was essential to cover all five identified areas; (iii) the General Conference should consider establishing clear infrastructure – such as an international registry, networks, and a standard typology – for folklore protection.

After thorough consultation with Member States[26], the process reached its culmination in 1989 with the adoption of the Recommendation on the Safeguarding of Traditional Culture and Folklore. There, the first internationally recognized definition of folklore was provided:

> For purposes of this Recommendation, folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others,

[25] The separation of work and responsibilities between cultural and copyright matters began to take shape in 1977, when UNESCO convened the Committee of Experts on the Legal Protection of Folklore, convened in Tunis, Tunisia, with WIPO as an observer. Progress continued with focused research on national legislations' approach; in this respect, a notable milestone was reached in 1982 when UNESCO and WIPO jointly developed the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (UNESCO/WIPO/FOLK/AFR/2). The Model proved particularly significant in laying the groundwork for subsequent developments in the relationship between traditional expressions and intellectual property rights, culminating into the WIPO's establishment of a separate Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, aimed at establishing ad hoc international regulation.

[26] Notably, these consultations emphasized themes that would later become central to the international discourse on ICH. States underscored the key role of communities – not only in the creative process, but also in shaping the social context and conditions of expression. They also advanced a layered understanding of community, distinguishing between practitioners and the wider groups that identify with the practice. On the point, see J. Blake, *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage. Elements of Considerations*, UNESCO Doc, CLT-2001/WS/8 Rev, 2002. The report was prepared by Janet Blake as the expert consulted by UNESCO within the study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore (30 C/Resolution 25).

> language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

In its structure, the definition follows established international legal practice[27] by providing an illustrative rather than exhaustive list of folkloric expressions – striking balance between flexibility and clear constitutional parameters. This approach closely mirrors the current ICH definition under the 2003 Convention, reflecting the enduring influence of this early conceptual framework.

Beyond formal considerations, several elements of this definition resonate with later debates on ICH discourse and policy, and align with the shifts in perspective we are about to explore. Two aspects, in particular, merit attention before proceeding.

The first points to a conceptual gap. While the Recommendation's Preamble presents folklore as a living, dynamic tradition – recognizing oral transmission and continued evolution – the definition itself treats folklore as a static, finalized product, and overlooks the whole creative processes and contexts from which these expressions emerge. This limitation would later fuel critical discussion and mark a significant departure from the 2003 Convention's broader focus on the underlying conditions of cultural creation.

The second refers to the recognized link between folklore and community identity – a core theoretical principle in the Recommendation, and one that would become central to the development of the ICH framework. In practice, however, a clear disconnect emerged between this principle and its operational structure. While affirming that folklore should be safeguarded[28] "*by* and for the group whose identity it expresses," the actual framework placed responsibility exclusively on States and scientific institutions[29]. Rather than empowering communities as active agents, they were positioned as solely passive *objects* of preservation – treated as equivalent to the

[27] J. Blake, Developing a New Standard-setting, cit.

[28] Although a proper definition of safeguarding is not provided, as opposed to the 2003 Convention.

[29] Retaining a leading operational role in areas such as the implementation of documentation systems, the establishment of research methodologies, the development presentation standards, training professionals, and the organization of dissemination and educational events.

cultural expressions they held[30]. This gap between stated principles and practical implementation remained a persistent point of tension, continuing through the drafting of the 2003 Convention and still shaping contemporary debates around the effective implementation of ICH policies. More insights in this regard are available in Section 3.2 below.

2.2. From 'folklore' to 'intangible cultural heritage'

Safeguarding arrangements toward ICH development have undergone an additional decade-long process of debates and revisions. Efforts were made essentially on three distinct fronts: the political one, involving member state's reports addressing implementation hurdles; the academic and expert community, engaged to identify shortcomings and areas requiring conceptual refinement; and UNESCO itself, focusing on policy programs and meetings to synthesize and evaluate progress made in the previous two areas[31].

In the last regard, three programs emerged as particularly noteworthy: the Intangible Cultural Heritage Program, the Living Human Treasures Program, and the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity – all stemming from the international community's growing acknowledgement, following the adoption of the 1989 Recommendation, of the necessity to protect oral and intangible heritage through suitable legislative frameworks.

[30] Consider, for instance, headings (d), 'Preservation of folklore' and (f), 'Protection of folklore,' where issues of respect and understanding for fostering cultural diversity, and guaranteeing the right to access, are provided for what is referred to as *their* folklore and *their* manifestations of intellectual creativity. All provisions revolve around tools that engage communities passively, in a dimension of "otherness" from the actors who actively intervene to safeguard.

[31] In this respect, a 1994 UNESCO questionnaire submitted to member states should be recalled, as it revealed key challenges and critical insights into the Recommendation enforcement. Among the relevant outcomes, conceptual inconsistencies persisted, especially around terms like 'folklore' and 'traditional popular culture.' Operational fragmentation was evident: only 3% of States supported an international convention, and just 17% found UNESCO's guidance useful. Legal protection remained largely national, focused on IP regulation (50% of responding states), though many lacked the necessary infrastructure. Implementation was weak – 33% were unaware of the document, 50% hadn't published it in official languages, and 69% failed to submit reports – hindering recognition, access, and trust in international protection frameworks. More insights in R. Kurin, "The UNESCO Questionnaire on the Application of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Preliminary Results", in P. Seitel, cit., esp. 20 ff.

These initiatives generated momentum for a wave of local conferences, seminars, and discussions within UNESCO's governing bodies, ultimately culminating in the 1999 Washington Conference[32] – a pivotal moment that marked the decisive step toward the creation of the actual Convention.

When navigating through the developmental trajectory and the implementation of reforms made over this decade, attention should be directed toward the following thematic objectives, serving as analytical lenses of this research.

(i) Refining terminology. The conceptual understanding of 'folklore' needed substantial expansion beyond its original definition.

(ii) Establishing a systematic methodology for listing and recognition. The evolving conceptualization of heritage led to the adoption of formal identification mechanisms aimed at primarily "visualizing" and "honoring" intangible heritage, alongside the creation of recognition frameworks to highlight exceptional contributions through awards and other forms of acknowledgment.

(iii) Elevating communities' role. This necessitated a comprehensive reassessment of community authority in relation to other stakeholders, with particular focus on ensuring appropriate representation and decision-making influence across all operational levels.

(iv) Strengthening governance and institutional frameworks. Key priorities in this regard included restructuring organizational systems – particularly enhancing financial allocation processes – and providing a clearer definition of UNESCO's coordinating role within the broader system.

While a comprehensive analysis of all programs extends beyond the scope of this research, some key developments deserve further attention.

Notably, the Living Human Treasures program stands out for its focus on recognizing individual practitioners and their expertise, highlighting an ongoing tension in ICH's development between protecting cultural practices themselves and supporting the individuals who embody them. In the wake of a trend that was gaining momentum – precisely, granting distinction and reward to outstanding traditions and possessors – in

[32] International Conference "A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation," 23-20 June 1999, Washington, USA.

1993, the Executive Board proposed the establishment of a system of living cultural properties within Member States' territories, following a proposal submitted by the Republic of Korea[33]. Under this framework, nations would compile comprehensive inventories of *individuals* who demonstrated exceptional mastery in creating and maintaining intangible cultural heritage. These national lists would then be submitted to the UNESCO Secretariat and shared across the member network, contributing to the development of a global repository of living cultural expressions and their skilled practitioners. The system operated on two complementary levels: at the national one, it prioritized immediate and substantial preservation efforts; at the international level, it facilitated knowledge exchange and network building among practitioners and institutions.

The initiative followed UNESCO's established methodology of listing – a policy approach that would later spark considerable debate during the Convention's development. At that time, the Guidelines for the Establishment of the Living Human Treasures System[34] defined preservation through collection and archiving of exemplary heritage as "the effective way forward.".

What is most interesting, however, is the great emphasis placed on individual practitioners and the associated creative practices. Indeed, according to the above Guidelines, the Living Human Treasures[35] were "*persons* who embody in the very highest degree the skills and techniques necessary for the production of selected aspects of the cultural life of a people and the continued existence of their material cultural heritage"[36]. Recognition stemmed precisely from their crucial

[33] UNESCO Doc, 142 EX/18 and 142 EX/48 Decisions, 1993.
[34] Updated version of 2002, prepared by the UNESCO intangible Heritage Section and the Korean National Commission for UNESCO. Indeed, the support provided by the Republic of Korea and Japan was pivotal in many ways, in terms of diplomatic, economic, and operational efforts. First, they offered and hosted workshops between 1998 and 2001 in several member states due to their previous experience in managing national systems similar to the Living Human Treasures one and, more generally, in the (already existing) methods of preservation of intangible cultural heritage. Page 13, introductory section, gives examples of existing living human treasure systems, of which Japan and Korea are the oldest. Moreover, a considerable financial support by Japan through the UNESCO/Japan Funds-In-Trust for the preservation and promotion of intangible cultural heritage should be reported. The fund played a substantial role also in developing the *Red Book of Endangered Languages of the World* in 1993 and the multi-language *Atlas of the World's Languages in Danger of Disappearing* in 1996.
[35] Henceforth, LHT.
[36] *Guidelines*, Part two, 19.

role in ensuring the perpetration and development of such creative processes.

Accordingly, the resulting heritage was portrayed as having a dual dimension: (i) the "people's learned *processes*, along with the knowledge, skills, and creativity that inform and are developed by them," and (ii) the "products they create." This double emphasis – on both the active role of practitioners and the dynamic processes involved – was seen as addressing key shortcomings of the 1989 Recommendation, which, as noted above, had been criticized for reducing folklore to a static inventory of items, without adequately capturing its living and participatory nature.

The methods of value recognition are also particularly noteworthy in this analysis, as they led to lasting implications for the selective mechanisms later debated at both international and national levels. In fact, selection criteria for ICH and LHT relied on issues of fragility, quality, and representativeness[37], aiming to establish a recognition system akin to receiving a major national or civic award – completed with ceremonial honors, as well as financial and medical benefits. These provisions inexorably evoke the very risks the Guidelines themselves acknowledge – i.e., the potential for "jealousy and dispute that are inevitable in respect to the elevation of particular people to the ranks of Living Human Treasures." To mitigate these risks, Guidelines strongly recommended – though not mandate – a legal framework with clear selection criteria and methodologies. We begin to see, here, how the structuring of a system of treasures and rewards already lays the groundwork for critical voices on the risks of hierarchy and fossilization in a domain meant to reflect the living and evolving nature of cultural expressions. Debates over selection, elevation, and representativeness will be central to the analysis of the Convention's listing system in the next section.

As a final note on the LHT system, it is important to highlight the reference to copyright as a necessary form of legal protection for cultural expressions, which the Guidelines ultimately frame as *real* intellectual property. Echoing the ongoing debates between UNESCO and WIPO surrounding the 1989 Recommendation, the Guidelines acknowledge divergent views on ownership – whether individual, collective, or state-based. At the time, the urgency of resolving this impasse was reaffirmed,

[37] Among others, the danger of extinction, irreparable loss of significance within contemporary culture and globalization, erosion of historical authenticity, or a decline in the number of people nurturing this heritage.

alongside the announcement of an international network aimed at harmonizing local and international legislation. This underlying tension between competing legal approaches – public versus private – remains a recurring theme throughout this study, reflecting the broader dilemma surrounding the value and governance of intangible forms of heritage.

In 1998, the Proclamation of the Masterpieces of the Oral and Intangible Heritage of Humanity marked UNESCO's third major initiative in advancing its 1989 commitments. It originated from Morocco's draft resolution advocating for the protection of Marrakech's Jemaa-el-Fna square as a "cultural space" – a designation that signaled a significant expansion in the conceptualization of ICH, emphasizing the importance of processes and contexts alongside the expression. A biennial proclamation system was thus established for selecting "cultural spaces or forms of popular or traditional cultural expressions," encouraging engagement from governments, NGOs, communities, and individuals in safeguarding this "depository and collective memory of peoples." Identification efforts aimed to preserve not only specific items but also the broader social structures enabling their transmission – including practitioners, contexts, and embedded knowledge. This was said to be the only way to resist the growing risk of "*folklorization*" posed by tourism and new economic trends[38]. Intangible heritage was accordingly redefined as comprising such cultural spaces – a way to imbue its conceptual boundaries with enhanced spatial, temporal, and operational depth. The latter were to be understood not only, tautologically, as physical spaces where popular, traditional, and cultural activities occur, but also as temporal frameworks (often periodic or cyclical) and as the very activities taking place within them. A multilayered definition was thus emerging, one encompassing all the elements established thus far: products, processes, environments, knowledge, and people.

The shift toward recognizing the social act of creation also forged vital links between heritage preservation and the protection of human rights. The Washington Conference's Action Plan later emphasized this connection, urging States to uphold their duty under Article 27 of the International Covenant on Civil and Political Rights by supporting communities in the creation, transmission, and attribution of traditional

[38] Indeed, among the assessment criteria was "the risk of its disappearing due either to [...] processes of rapid change, or to urbanization, or to acculturation".

knowledge[39]. It also called for a legal framework ensuring rights of access, participation, and benefit, while advocating the improvement of existing intellectual property regimes "in awaiting the adoption of a better protective scheme."

While the scope of reference expanded, however, the focus remained "qualitatively" narrow. Items were designated as 'masterpieces,' a term that reflects the selection criteria's emphasis on "outstanding value" or a "strong concentration" of ICH, which also justified the awarding of prizes.

Upon closer examination, this framing of "outstandingness" reflects the same logic behind labeling intangible heritage as "of humanity." Rooted in international law since the 1954 Hague Convention[40] – then refined in succeeding international treaties[41] – the idea suggests a collective interest in preservation. As Francioni explains[42], "the expression 'heritage of mankind' is to be understood not in the sense of establishing the international community as a titleholder, but rather in the sense of a common international commitment to its preservation and protection". Indeed, as Merryman had previously observed, it is the 'human component' that allows "an object valued by people in one culture to also be valued by others who resonate with its human component, even

[39] UN General Assembly Resolution 2200A (XXI) of 16 December 1966. "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[40] Convention for the Protection of Cultural Heritage in the Event of Armed Conflict, 14 May 1954. "[...]damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."

[41] To name a few: the 1966 Declaration of the Principles of International Cultural Cooperation, Article 1(3); the 1972 World Heritage Convention, Preamble second and sixth recital, and Article 6; the 1972 Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage; the 1976 Recommendation Concerning the International Exchange of Cultural Property; the 2001 Convention on the Protection of the Underwater Cultural Heritage, Preamble first recital. On the topic see, among others, G. Reichelt, "International Protection of Cultural Property", *Uniform Law Review* 1985; J. Blake, "On Defining the Cultural Heritage", cit.; J. Merryman, "Cultural Property Internationalism", *International Journal of Cultural Property*, vol. 12, no. 1, 2005; C. Forrest, "Cultural Heritage as the Common Heritage of Humankind: A Critical Re-Evaluation", in *The Comparative and International Law Journal of Southern Africa*, vol 40, no. 1, 2007.

[42] F. Francioni, "A Dynamic evolution of concept and scope: from cultural property to cultural heritage", in A. A. Yusuf (ed.), *Standard-setting in UNESCO: volume 1: normative action in education, science and culture*, Paris, 2007, 230.

if they do not connect with its specific cultural significance"[43]. As we shall see, the issue becomes particularly complex in the context of ICH, where intrinsic traits of universal value are difficult to identify. Moreover, the close association between universality and *exceptionality* risks introducing hierarchies, complicating the recognition of universality in a form of heritage that strongly asserts its local and dynamic nature[44].

In the context of the Proclamation, however, referring to an intangible heritage "of humanity" primarily served to elevate its status, countering the dominant influence of the 1972 Convention. This reflected the aim to grant intangible heritage equal symbolic and global recognition as its tangible counterpart – an aim that also justified the elitist focus on selecting masterpieces of "outstanding value." This intention was clearly acknowledged during the early drafting phase of the Proclamation at the International Consultation of Experts on the Preservation of Cultural Spaces (Marrakech, June 1997) where the following was stated:

> "Although there is a World Heritage List to honor the world's tangible immovable heritage of heritage significance, there is no direct counterpart for the world's intangible heritage. There were many reasons for this, including the difficulty in applying a legal framework like the World Heritage Convention to the realities of such oral cultural expression. Rather than attempt a new or amended Convention (which could take years), a prospective alternative is to recognize intangible heritage via a Proclamation of the Oral Heritage of Humanity."[45]

[43] J. H. Merryman, "The Public Interest in Cultural Property", in *California Law Review*, vol. 77, no. 2, 1989, 343.

[44] See D. Lowenthal, *Possessed by the past: the Heritage crusade and the spoils of history*, London, 1997, and J. Blake, *Developing new standard-setting*, cit., 12 ff, esp. 13: "The fact that folklore and traditional culture may often be universal in its appeal and accessibility (in a way that much 'high culture' or 'outstanding' sites and monuments are not) and in its ability to speak across cultural borders is a further argument in favor of calling it a 'universal heritage.'". Another problematic layer was glimpsed in assessments conducted at the 1999 Conference. In its essay *The 1989 Recommendation Ten Years On: Towards a Critical Analysis*, ed. by P. Seitel, cit., 60, A. McCan reports how several States noted that "While the intent of this terminology may be to valorize folklore, its effect could be construed as placing folklore within "public domain" and hence not subject to protection by copyright."

[45] Final report, Marc Denhez, Working paper on a proposed system to honor "cultural spaces" with remarkable intangible heritage, 1. The Report is available at https://ich.unesco.org/en/events/international-consultation-on-the-preservation-of-popular-cultural-spaces-declaration-of-the-oral-heritage-of-mankind-00803 (accessed 8 November 2023).

This perspective was maintained during subsequent phases[46], where much of the debate centered precisely on terminology – i.e., on the appropriateness of 'intangible' versus alternative descriptors (such as 'folklore,' 'oral,' or 'traditional'[47]) – and on the need to establish a valid counterpoint to UNESCO's *tangible* heritage framework.

One final aspect of the Proclamation warrants attention. At an operational level, applications were required to include ten-year action plans detailing strategies for conservation, support, and promotion in accordance with the 1989 Recommendation. This focus on structured, community-driven management marked a significant policy stance. However, with the adoption of the 2003 Convention, these requirements were relaxed, reducing the binding nature of the plans and removing specific implementation measures – an approach that stands in stark contrast to the World Heritage framework, which continues to mandate detailed management plans. These considerations will reemerge later in the chapter and are important to bear in mind, as they mark an initial step toward assessing the operational implications of recognizing intangible dimensions of heritage.

Overall, these programs helped laying the groundwork for the development of subsequent normative instruments. To this end, the Washington Conference's Action Plan recommended that "Government of States consider, if they so desire, the possible submission of a draft resolution to the UNESCO General Conference, requesting UNESCO to undertake a study on the feasibility of adopting a new normative instrument on the safeguarding of traditional culture and folklore".

On that basis, UNESCO's 30th General Conference of 30 November 1999 approved[48] the 30C/Resolution 25[49], calling for a preliminary study on the advisability of establishing such a standard-setting instrument at the international level for protecting traditional culture and folklore.

[46] The Washington Conference was organized in collaboration with the Smithsonian Institution and had the dual purpose of critically review the 1989 Recommendation in light of future development, and to conduct a comprehensive assessment of the state of ICH protection, normative frameworks and policies at the dawn of the new century.
[47] For a thorough analysis of merits and drawbacks of "candidate" terms, see J. Blake, *Developing a new standard-setting*, cit., 7 ff.
[48] Following a Draft Resolution submitted by Czech Republic, Lithuania, and Bolivia, with the support of Bulgaria, Côte d'Ivoire, Slovakia and Ukraine. UNESCO Doc, 30 C/DR.84.
[49] UNESCO Doc, 30 C/Resolutions, section B, para. 2(a)(iii).

2.3. The Convention's architectural phase: from conceptual framework to legal implementation

The Convention's culminating developmental phase can be summarized under a tripartite framework that highlights the core elements of its construction: first, the conceptual refinement of 'intangible cultural heritage' to replace folklore; second, the delineation of the forthcoming instrument's scope and boundaries in relation to States' sovereignty; and third, the establishment of operational mechanisms, which witnessed an evolution from protection-oriented approaches toward the broader concept of *safeguarding*.

With respect to the first dimension, the 2001 International Round Table "Intangible Cultural Heritage – Working Definitions," emerged as a decisive moment, marking a pivotal juncture in establishing terminological parameters and their related operational implications.

The discourse centered on transcending the limitations of the term 'folklore,' increasingly seen as inadequate in both scope and framework. Albeit 'intangible cultural heritage' was ultimately retained, the expression sparked considerable debate, particularly due to its chronological and systematic relationship to UNESCO's established framework for *tangible* heritage. The skepticism of those expressing concern about relying on existing mechanisms of protection had already been highlighted, pointing to an institutional subdivision that failed to capture the integrated nature of many cultural traditions[50]. In addition, it was observed that the term 'intangible', rooted in UNESCO's terminology as a "free translation from the pertinent Japanese legislation dating back to 1950"[51], entailed in its Latin root the meaning of non-corporeality (*in*-tangible) from which relevant legal arguments derived. Although protection of non-material goods was generally provided by law (i.e., with copyrights), "serious limitations and shortcomings from

[50] The Turin Round Table's Final Report accounts for participants claiming it was "important to explain what UNESCO means by 'intangible cultural heritage', rather than to define it, as such", suggesting that it should "seek to explain what intangible heritage is *considered* to be". Available at https://ich.unesco.org/doc/src/00077-EN.pdf (accessed 8 November 2023).

[51] F. Francioni, invited expert, *Intangible cultural heritage: working definitions*, 1. Available at https://ich.unesco.org/en/events/international-round-table-intangible-cultural-heritage-working-definitions-00057 (accessed 14 November 2023). On Japan (and Korea) as "archetypal global examples of how to protect living heritage" also P. Petrillo, "Living Heritage as a Global Public Good and Sustainable Development", in C. Wulf (ed.), *Handbook on Intangible Cultural Practices as Global Strategies for the Future*, Cham, 2024, esp. 61 ff.

the perspective of UNESCO's mission in this area" arose. Picking up the threads of a never dormant discussion on framing protection within or outside IPRs schemes, the issue was framed in terms of manifold tensions: ownership *vs.* public domain, individual *vs.* collective rights, product *vs.* creative process, invention *vs.* transmission. Tensions that, as we will see, will frequently resurface throughout this study.

Furthermore, the discussion surrounding the definition of 'creations' highlighted the need to strongly transition from focusing solely on finished products to considering the broader context of creative development. This expansion acknowledged communities as creators and custodians, positioning their well-being as fundamental to heritage preservation. Interestingly, this shift was said to necessitate moving beyond individual intellectual property rights – questioning whether "the relation of people to their culture should still be identified as a form of *'property'*"[52] – toward "universally accepted human rights" that encourage communities to "continue to enact their intangible cultural heritage through developing their own approaches to manage and sustain it"[53].

Relatedly, issues of universality again emerged, challenging the extent to which ICH was to be framed within a globalist legal discourse. The question was presented under a twofold framework: first, universality was to be reimagined not as a definitional standard but as a rationale for safeguarding, shifting the global dimension from classification to justification[54]. Second, it required a departure from the 1972 Convention's criterion of outstanding universal value, which was

[52] See the Final Report cited above.

[53] Questionnaires consulted during the meeting revealed how many States already conferred such a dynamic meaning of ICH (or anyway named) being the peoples' creative process and a context of expression. See the *Replies to circular letters addressed to National Commissions for UNESCO* (February and August 2000). Available at https://ich.unesco.org/en/events/international-round-table-intangible-cultural-heritage-working-definitions-00057 (accessed 14 November 2023). This testifies once again, as in the case of the tangible-intangible opposition, how terminological elaborations at UNESCO level have always entailed a dual soul: one internal to the institution, based on consolidated categories of action and knowledge, hence following a peculiar course of development; the other, external, involving legal and social experiences resulting from the acknowledgment of different categories and systems. A tendency toward Eurocentrism is evident, alongside an inclination to marginalize categories and cases rooted in legislative traditions outside the dominant framework, even when they embodied key elements of ICH.

[54] See J. Blake, invited expert, Introduction to the Draft Preliminary Study on the Advisability of Developing a Standard-setting Instrument for the Protection of Intangible Cultural Heritage, 11.

widely regarded as setting an excessively high threshold for ICH. The issue remained far from resolved, as the creation of a selection mechanism based on predetermined criteria of excellence was a matter of pressing debate.

Drawing upon these deliberations, the following definition of ICH emerged for further consideration:

> "Peoples' learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create, and the resources, spaces and other aspects of social and natural context necessary to their sustainability; these processes provide living communities with a sense of continuity with previous generations and are important to cultural identity, as well as to the safeguarding of cultural diversity and creativity of humanity."[55]

Regarding the second aspect highlighted, i.e., the scope and boundaries of the forthcoming instrument, the 31st UNESCO General Conference resolved to formally incorporate the safeguarding of ICH within the legal framework of an international convention[56]. In response to the Director General' study paper 31 C/43 on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore, the proposal was further shaped by three substantiative conditions[57]: (i) the convention should

[55] Following the 2002 Rio expert meeting (discussed below), another was held at UNESCO headquarters in Paris to develop a glossary of key terms related to intangible cultural heritage. There, the definition of ICH was further refined, taking on an almost final form: "(1) For the purposes of the present Convention, intangible cultural heritage means the practices and representations – together with their necessary knowledge, skills, instruments, objects, artefacts and places – that are recognized as such by communities and individuals, and are consistent with universally accepted principles of human rights, equity, sustainability, and mutual respect between cultural communities. This heritage is constantly recreated by communities in response to their environment and historical conditions of existence and provides them with a sense of continuity and identity, thus promoting cultural diversity and the creativity of humankind. (2) Intangible cultural heritage, as defined in paragraph 1 above, covers the following domains: (i) Oral expressions; (ii) Performing arts; (iii) Social practices, rituals and festive events; (iv) Knowledge and practices about nature."

[56] UNESCO General Conference, 31st session, Paris, 15 October to 3 November 2001, 31 C/Resolution 30.

[57] Records of the General Conference, 31st session, Paris, 15 October to 3 November 2001, v. 1: Resolutions, 573. The report, essentially, provides principles that will be extensively examined through the analysis of the Turin and Rio expert meetings, where topics are addressed in detail. Among them we can count: terminology issues (i.e., to prefer ICH instead of folklore, to clearly define its conceptual boundaries, to provide domains of

represent a logical continuation of the 1972 Convention; (ii) greater conceptual clarity was needed before proceeding; and (iii) the active *participation* of bearer communities – particularly Indigenous peoples – as well as *collaboration* with UN sister agencies (especially WIPO) had to be ensured.

On that basis, UNESCO Director-General was tasked with presenting a report on the need for regulation, the potential scope of such legislation, and a draft convention at the following General Conference. To support this, a global expert forum was held in Rio de Janeiro from January 22–24, 2002, focusing on the conceptual and operational scope of the proposed instrument[58].

At its 164th session, the Executive Board initiated the phase of intergovernmental negotiations by inviting the Director-General to convene one or more category II intergovernmental meetings of experts[59] to define the convention's scope and advance the preliminary draft[60]. Support for these efforts was reaffirmed by the Third Roundtable of Culture Ministers, "Intangible Cultural Heritage, Mirror of Cultural Diversity," held in Istanbul on September 16–17, 2002.

Eventually, three sessions of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage were held at UNESCO headquarters[61], including Member States' revisions and proposed amendments.

Deliberations centered on two fundamental axes[62]: the conceptual foundations of safeguarding and the mechanisms for its implementation. For our purposes, it is worth highlighting some

expressions); the question of IP narrowness for regulating the matter; the legal nature of a new normative instrument; the pivotal role of creativity and enactment of involved communities and, related to that, the shift toward greater consideration of the process rather than the product of expression; the need to prioritize cultural diversity and intercultural dialogue.

[58] International meeting titled "Intangible Cultural Heritage: Priority Domains for an International Convention". Final report available at https://ich.unesco.org/doc/src/00074-EN.pdf (accessed 8 November 2023).

[59] According to the Regulations for the general classification of the various categories of meetings convened by UNESCO, category II meetings are intergovernmental meetings other than international conferences of states.

[60] UNESCO Doc., 164 EX/ Decisions 3.5.2

[61] 23-27 September 2002; 28 February-1 March 2003; 12-14 June 2003.

[62] See, extensively, J. Blake, Commentary on the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage, Leicester, 2006, esp. 16.

contentious issues that bring us full circle in assessing the key themes addressed during this foundational phase.

First, the diverse range of perspectives recorded regarding the perceived *openness* of the ICH definition. While some States criticized its breadth – arguing that a pan-culturalist approach risked operational paralysis at the domestic level due to implementation challenges[63] – others welcomed it as essential for accommodating cultural diversity within varying domestic legal frameworks[64].

The role of the State in its capacity to act within its own legal standards also prompted extensive debate, particularly in relation to the actors involved. This included not only international bodies, with whom overlap was to be avoided, but also the newly emphasized category of "communities, groups, and individuals". The wording itself drew criticism among sates: some suggested the simpler term 'actors,' while others questioned the distinction between 'community' and 'group', or raised concerns about the potential incorporation of IP regimes due to the simultaneous mention of 'communities' and 'individuals.' Overall, states also expressed unease over the absence of a clear definition of community[65] (for instance, how do indigenous groups position themselves in relation to this concept?), not least because of the implications this ambiguity held for both collective and individual rights[66]. The question is central to the whole inquiry and will be further explored in the following section.

At the operational level, the listing mechanism proved especially contentious. Beyond earlier concerns regarding fossilization and

[63] Among others, Australia, Germany, and Czech Republic the latter asking to "Define as exactly as possible what is meant by safeguarding the intangible cultural heritage in order to avert very specifically all possible confusion between safeguarding by means of the instrument proposed and the protection of rights relating to intellectual property already ensured by means of other legal instruments."

[64] As pointed out by Japan and Sweden, noting, for instance, that "The convention's use of the intangible cultural heritage concept should be kept as general as possible so that while there may be an urgent need to emphasize such matters as the difficult plight of Indigenous peoples, the intangible cultural heritage should not refer to this area alone.".

[65] On this point, see S. Urbinati, "The Community Participation in International Law", in N. Adell (ed.). *Between Imagined Communities and Communities of Practices. Participation, Territory and the Making of Heritage*, Gottingen, 2017, 123-140; M. Jacobs, "Article 15: Participation of Communities, Groups, and Individuals. CGIs, not just 'the Community'", in J. Blake, & L. Lixinski (eds.), *The 2003 UNESCO Intangible Heritage Convention – A Commentary*, Oxford, 2020.

[66] In this regard, L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford, 2013, 148 ff.

hierarchical implications, the transnational nature of ICH raised issues around sovereign rights and safeguarding responsibilities, ultimately prompting the introduction of multi-state nominations[67]. Moreover, the suitability of the 1972 Convention's listing model was called into question given its focus on discrete items rather than evolving processes. In response, several proposals advocated shifting the emphasis toward practices rather than exemplars, to better reflect ICH's dynamic and processual character. We will return to this debate on several occasions, demonstrating how the enduring challenges posed by ICH remain closely tied to it in contemporary discussions.

[67] Azerbaijan: "The international lists provided for in Article 11 are very important. Furthermore, it should be permissible to include in these lists the same or similar items of the intangible cultural heritage proposed by two or more States which consider such items as their national property. This does not call into question the sovereignty of the states parties, as is clearly shown in the document".

3. The 2003 Convention's core tenets

The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage was adopted on 17 October 2003 by the UNESCO General Conference at its 32nd session and officially entered into force on 20 April 2006[68].

This section provides a descriptive overview of the Convention's core principles, building on the earlier analysis of the adoption process to further highlight some of the approaches that now define its key mechanisms. While largely descriptive, this examination also includes a critical analysis of the decisions and dynamics that shaped the Convention's definition.

Specifically, the discussion focuses on three areas of interest: the Convention's conceptual framework (Section 3.1); the relationships established between organs and stakeholders at both national and international levels (Section 3.2); and the primary safeguarding approach implemented (Section 3.3).

3.1. Conceptual foundations: the object of safeguarding, the action of safeguarding

The Convention establishes four general objectives in Article 1: (a) to safeguard the ICH; (b) to ensure respect for the ICH of the communities, groups, and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the ICH, and of ensuring mutual appreciation thereof; (d) to provide for international cooperation and assistance.

Echoing the title of the Convention, purpose (a) identifies its central focus – the intangible cultural heritage – and its primary objective: safeguarding it, positioning itself as the most significant of the four purposes, fundamentally influencing the interpretation and implementation of the others. How, then, does the Convention conceptualize ICH, and what specific meaning does it attach to the act of

[68] After conditions of Article 34 were fulfilled: "This Convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval, or accession, but only with respect to those States that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other State Party three months after the deposit of its instrument of ratification, acceptance, approval, or accession". Specifically, the 30th ratification came from Romania in 2006.

safeguarding? These definitional parameters merit close analysis, as they reveal the conceptual boundaries that States were willing to establish during the drafting process.

Under Article 2(1)(2), ICH is defined as follows:

> 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. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.
>
> 2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested *inter alia* in the following domains:
>
> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.

In Section 2, we have already given account of the longstanding process of conceptualization, starting with the 1989 Recommendation's definition – we refer to those remarks for an in-depth analysis of Article 2's conceptual, thematic, and political origins. Let us only recall here that 'intangible cultural heritage' has never been a term of unanimous consensus[69]. Not only the concept endorsed the tangible-intangible dichotomy established by the 1972 Convention, but it was also criticized for failing to convey a sense of popularity, or *commonality* – which would have fostered a strong connection to communities[70]. Difficulties in

[69] Many alternatives were explored, yet each "candidate" failed to consider or conveyed a misconception that was thought to be fundamental to the construction of the definition: 'folklore' was too "product-oriented;" 'traditional culture' left out the living aspect; 'oral heritage' was too narrow; 'treasures' was too paternalistic and westernized; and even 'intangible cultural heritage' was partly perceived as problematic.

[70] See in this regard J. Blake, *Developing a New Standard-setting*, cit., providing a list of essential elements for the elaboration of this definition (e.g., the spontaneous act of cultural

formulating the definition were closely tied to its intended function – namely, to delineate the scope of a legal instrument. This challenge was compounded by two factors: first, the definition was meant to complement an already "saturated" normative framework, populated with international definitions of cultural heritage and related issues such as human rights, sustainable development, and cultural diversity. Second, it needed to remain open to the influence of numerous intersecting disciplines, including anthropology, ethnology, and sociology, among others.

With this settled, we can now turn to some of the key features of this definition.

First, the subjective dimension foregrounded in the role assigned to "communities, groups, and individuals"[71].

CGIs are directly involved in the creation of ICH and play a key role in sustaining its existence by engaging in processes of heritagization. In other words, they recognize the inherent value of creative production and are responsible for its ongoing transmission and recreation. As we shall see, this is one of the most prominent ruptures from the legal perspectives that typically surround (tangible) cultural heritage frameworks. This holds true both at the international level (the 1972 Convention's approaches are a valuable example) and at the national – mostly Western – one. In both cases, authoritative recognition processes rely on predetermined criteria to assess the presence of cultural value, often of an exceptional nature. In contrast, with ICH, it is precisely the

creation; the social, cultural and intellectual context in which ICH is created; access and use, often governed by custom; methods of transmission, notably oral; transmission from generation to generation; evolving living culture; collectively held culture, reflecting values and beliefs of a group; importance to cultural identity; contribution to cultural diversity; spiritual and cultural significance).

[71] Sometimes referred to, in this research, as 'CGIs', following the proposal of M. Jacobs during the drafting phase, with the aim to convey, even in a short form, the whole intent of drafters rather than referring to a vague 'community.' However, the proposal is at odds with the practice, as J. Blake notes in her paper "Engaging "Communities, Groups and Individuals" in the International Mechanisms of the 2003 Intangible Heritage Convention", in *International Journal of Cultural Property*, no. 26, 2019, 113. Indeed, the subsequent documents related to the Convention (even the Operational Directives) only refer to 'communities', leaving aside important legal meanings related to the whole formula. The term 'community' should in any case be handled with care: Lixinski highlights the colonial baggage of the expression, rooted in its use as a managerial tool in colonial projects. At the same time, he argues, avoiding the challenge of defining community risks reinforcing dichotomies and the pervasive, yet often overlooked, dominance of the expert rule. See L. Lixinski, "A Third Way of Thinking About Cultural Property", in *Brooklyn Journal of International Law*, vol. 44, no. 2, 2019, esp. 579.

mutability of criteria that becomes prominent, with the emphasis placed on people and their subjective recognition.

Moreover, this mutability extends to the very concept of 'preservation,' which does not entail maintaining the original form passed down from the past but rather ensuring the transmission of a practice in its contemporary form, thereby subject to the changes brought by time and various social, economic, and cultural influences. In fact, the authenticity of ICH should evolve and reflect the changing cultural identity of people involved. The significance of community participation in dialogue with the State for their "prerogative of self-representation in this heritage"[72] is also reiterated in General Purpose (b)[73], dealing with the respect required for *their* intangible cultural heritage – in proximity, as just noted, to the sphere of human rights.

Second, the incorporation of the material component through the aside "as well as the instruments, objects, artefacts and cultural spaces[74] associated therewith".

On the one hand, this clarification has enabled the inclusion of elements in the relevant lists[75] that also take material form – whether as outcomes of a particular practice or as tools used in its enactment (for instance, in Italy, violins for the element 'Traditional violin craftsmanship in Cremona,' or puppets for the element 'Sicilian puppet theatre').

On the other hand, however, it reinforces the dichotomy between tangible and intangible dimensions by implying a need to assess which aspect makes the "most prominent contribution." Under this perspective the phrase "objects associated therewith" suggests that such objects are considered secondary (merely associated) in relation to the primacy of the intangible component, as the goal – the safeguarding of ICH – is clearly expressed to be different.

[72] A. Arantes, "Article 2(3), Safeguarding the Intangible Cultural Heritage", in J. Blake, L. Lixinski (eds.), *The 2003 UNESCO Intangible Heritage Convention: A Commentary,* Oxford, 2020, 85.

[73] And throughout the Convention's text, as we shall see. Notably, Article 11 ("States parties identify and define elements of ICH present in their territory with the participation of communities and groups") and Article 15 ("State Parties shall endeavor to ensure the widest possible participation and involve actively in management"). More on Section 3.3 below.

[74] The term comes directly from the Proclamation of Masterpieces. See Section 2.2 for further elaborations on this point.

[75] See below, Section 3.3.

As a matter of fact, the contrast between materiality and immateriality in cultural heritage is deeply entrenched in legal discourse, often reflecting an underpinning belief, more or less explicitly provided, that the latter is subordinate to the former. An illustrative ramification of this conception can be found, precisely, in the described need to align the Convention on *tangible* heritage with an instrument of equal nature for intangible manifestations. Once the new convention was drafted, another pressing issue emerged concerning overlaps – specifically, "mixed" cases where material and immaterial dimensions coexist, necessitating an assessment of their relative prominence[76]. Beyond the fact that this separation poorly reflects certain cultural systems worldwide, the issue is pushed to the extreme of a theoretical polarization, ultimately reinforcing a distinction rather than addressing the complexity of their interrelation. Does this distinction contribute to the effective safeguarding of either dimension, tangible or intangible? How does this systematization influence national legislation? The reflections that follow in this research will revolve around these key questions.

In the meantime, it is worth noting that, conversely, when addressing tangible heritage, the acknowledgment of an intangible dimension is generally accepted[77]. In the concept of 'cultural landscape,' for instance, "material cultural evidence may be insignificant or even absent" unless it is accompanied by "powerful religious, artistic or cultural associations of the natural element"[78]. Protecting such landscapes helps preserve biological diversity by linking the natural environment with the knowledge and practices associated with it. And yet, the question here is not posed in terms of how much the material value must be *prevalent* for it to be effective. Instead, the parallel concept of "cultural space" adopted by the Proclamation in 2001, although similar in its

[76] For the experts tasked with examining the domains of the 2001 Proclamation – later utilized in drafting the Convention – a prominent oral dimension was deemed an essential component. For oral expressions, the material dimension of a transcript or any other tangible medium was regarded as secondary or of lesser importance. Notably, it was observed that primary attention should be given to cases where the oral and intangible aspects serve as the "defining features" of a cultural expression.

[77] The issue was addressed also during the Rio meeting (see above, section 2.3), in the attempt to establish an integration for cultural sites and spaces. Participants noted that, within the Operational Guidelines for the Implementation of the World Heritage Convention, criterion VI provides that nominated property should be associated with events or living traditions, ideas, or beliefs, and with artistic and literary works of outstanding universal significance.

[78] Operational Guidelines for the Implementation of the World Heritage Convention, C, 39-iii.

conceptualization, was analyzed under the lens of *how much immateriality* it encompassed[79].

Also significant is the choice to maintain a second paragraph enumerating examples of domains of manifestation.

The decision was influenced both by the precedent set by the 1989 Recommendation and by input from Member States during the final stages of drafting, which emphasized the need to lend a more practical dimension to an otherwise broad and theoretical definition. The listed domains, however, are intended only as illustrative examples. Referred to *inter alia*, they do not constitute a closed or mutually exclusive list, but rather underscore the cross-cutting nature of ICH. As Macmillan notes, however, the list of domains serves as a kind of "lifeline" for a definition that contains significant elements of subjectivity, which could (and do, in practice) risk making the concepts of 'ICH' and 'community' overly vague. Given the inherent subjectivity of the criteria that define it, as well as the heritage it encompasses, adhering to somewhat predetermined, yet non-exclusive, domains help to navigate this transition[80].

'Safeguarding,' on the other hand, is defined at Article 2(3):

> "[...] measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage."

Not *protection*, then, as most normative documents and practices on cultural heritage usually refer to, but *safeguarding*. The term alludes to the inherent vitality and dynamism of ICH[81], implying the necessity to actively maintain all processes that enable its (re)creation and transmission, in addition to the final production itself.

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[79] In the Compilation of amendments by Member States concerning the first preliminary draft convention for the safeguarding of the intangible cultural heritage (CLT 2002/CONF.205/3 Rev.), Japan expresses its perplexity on this term as "it would be necessary to connect it explicitly with the intangible cultural heritage. Thus, for its definition, a phrase such as "in which the intangible cultural heritage of a given community is manifested" should be added".

[80] F. Macmillan, "Contemporary ICH: Between Community and Market", in C. Waeld et al (eds.), *Research Handbook on Contemporary Intangible Cultural Heritage. Law and Heritage*, Northampton, 2018.

[81] See Report 1 of the so-called *Glossary* adopted during the final stages of drafting, item 6 of the agenda: "[...] one distinctive characteristic of this type of heritage is its intrinsically dynamic nature, due to the fact that it is an integral part of the social organization and history of the communities concerned." UNESCO Doc. TER/CH/2002/WD/4.

Furthermore, safeguarding practices are translated into a multifaceted, politically shaped action – a responsibility of States[82]. The listed functions, which echo the 1989 Recommendation and subsequent documents, testify to the breadth of the scope of ICH on the one hand, but also to the variety of policies that States can adopt. Documentation and identification, preservation and protection, promotion and enhancement: these are all closely related concepts, often interactive with each other, yet well-identified in their scope thanks to the conceptualization that has shaped them in the decades preceding this Convention[83]. More in-depth discussions on the topic are addressed in the following section.

3.2. Operational framework: key actors in safeguarding

At the international level, two bodies are in charge of governing the safeguarding functions related to intangible cultural heritage: the General Assembly of States Parties[84], the sovereign body of the Convention, established under Article 4, and the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage[85], established under Article 5.

Such a relatively simple institutional structure is the outcome of a debate that took place during the Convention's drafting phase and has long questioned the advisability of (i) incorporating more governing and sub-governing bodies for widespread management and control; (ii) incorporating independent experts, NGOs, practitioners, or community representatives into the decision-making bodies. The Consolidated preliminary draft Convention for the Safeguarding of the Intangible Cultural Heritage[86] did establish, to this end, a so-called 'Scientific Committee' or 'Committee of Experts' made of non-governmental experts and "practitioners and custodians who are competent professionally or otherwise represent the interests of cultural communities," to be included within the relevant organs of the Convention to act as consultative bodies for scientific and technical aspects. Several comments from Member States, however, suggested its deletion, as the possibility to consult external bodies was already

[82] As specifically addressed in Part III of the Convention.
[83] In these terms A. Arantes, "Article 2(3), Safeguarding the Intangible Cultural Heritage", cit., 84, for an overview of each function's specific definition.
[84] Henceforth, the GA.
[85] Henceforth, the Committee.
[86] CLT.2003/CONF.206/CLD.2, CLT.2003/CONF.206/2.

included among the tasks of the Committee itself. The approach was maintained in the final version.

Ultimately, a streamlined, state-only structure was chosen[87] to address the concerns raised by many States, who sought to retain ultimate control over implementation policies. There was a widespread apprehension that transferring the protection of ICH beyond domestic and state control could lead to a loss of sovereignty and authority over the preservation of specific contexts of creation[88].

While the General Assembly primarily functions as the Convention's sovereign body, the Committee simultaneously plays a broad supportive role, and specific responsibilities related to the listing system, fund regulation, international assistance, and monitoring progress at both international and national levels. In this respect, it should be emphasized that the Convention takes a principles-based rather than prescriptive approach, establishing broad guidelines that require practical implementation through policy, legislation, and institutional frameworks. To provide more detailed guidance, the Committee develops Operational Directives for General Assembly approval. These directives have been regularly updated since their first iteration in June 2008, with the most recent version released in 2024[89], allowing for a constant refreshing of the major orientations and changes happening in the domain of ICH. Hence, they serve as an essential reference document for all stakeholders – including States, communities, NGOs, and field experts – by providing detailed procedures for listing, financial assistance, NGO accreditation, and community engagement in Convention implementation.

As a final note, the Committee is also given the option to consult external advisory bodies, in line with the drafters' decision to retain this option within its responsibilities, without establishing any specific ad hoc body. It resurfaces here what this chapter has already emphasized several times, that is, how the 2003 Convention derives in more than one respect from the 1972 World Heritage Convention. Such a derivation has often been described as a substantial subordination, especially at the theoretical and conceptual levels, but the same can be said for a more

[87] The General Assembly is composed of all states parties, and the Intergovernmental Committee of representatives of 24 states parties.
[88] See in this regard L. Lixinski, "Selecting Heritage: The Interplay of Art, Politics and Identity", in *The European Journal of International Law*, vol. 22, no. 1, 2011, 94 ff.
[89] https://ich.unesco.org/doc/src/ICH-Operational_Directives-10.GA_EN.pdf (accessed 30 January 2025).

operational type of derivation. However, while the 1972 Convention can benefit from established organizations like ICCROM, ICOMOS, and IUCN[90], no comparable institutions exist for ICH. Despite Articles 8 and 9 providing for similar advisory and accreditation mechanisms[91], member states have explicitly opted against creating equivalent bodies. As part of the 2019 "Reflection on the role of accredited non-governmental organizations within the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, consultations with States revealed that only a minority favored the establishment of "umbrella organizations"[92]. The most plausible explanation may be found in the need to maintain such a diversified reliance on various bodies (NGOs, other experts, or practitioners) to ensure the representativeness of ICH in all its (numerous) forms and the exploration of issues that often remain unaddressed in institutional environments.

At the national level, as anticipated, States bear primary responsibility for implementing the Convention's general purposes, as outlined in Part III. Article 11(a) imposes a general obligation to safeguard ICH within their territories, with specific tasks including identification, documentation, and visibility of ICH. Article 11(b) requires States to identify and define ICH elements present in their territory, to be carried out "with the participation of communities, groups, and relevant non-governmental organizations". Article 12, then, expands on this purview by stipulating the creation, updating, and regular reporting on national inventories. Articles 13 and 14 detail additional responsibilities: the first covers safeguarding measures such as policy development, legal frameworks, financial support, institutional nominations, scientific research, and documentation, while Article 14 emphasizes educational and awareness efforts to promote recognition and respect for ICH, including programs involving heritage practitioners in educational settings.

The operational structure outlined here reveals complex dynamics between stakeholders that warrant further scrutiny.

First, the conceptual and temporal breadth of the general obligation set out in Article 11(a): states parties are tasked with ensuring ICH safeguarding *beyond* (hence, before) its specific identification. That is to

[90] See Article 8(3) of the 1972 Convention.
[91] There is, in fact, a system of accreditation for NGOs currently governed by para 91 of the OD.
[92] See the final report of the meeting, LHE/19/NGO/3.

say, to extend policy actions even to elements that are *not* included in any inventory or list[93]. To this end, Articles 13 and 14 include a variety of concrete examples, including the development of competent bodies and institutions, the support of research, or the promotion of educational, awareness-raising, and information programs. In any event, no *objective* borders are provided: as underlined above, the listing mechanisms is an instrument, rather the ultimate goal of safeguarding. The border, instead, can be traced inside a geopolitical grid: safeguarding activities should be carried out only for the ICH "present on its territory," i.e., for the ICH that falls under the sovereignty of the State as linked to its territorial dimension – notwithstanding the case of multinational nominations[94].

The recurring emphasis on this terminology raises a critical question regarding the scope of State action *vis-à-vis* the (also expected) participation of CGIs, to which the Convention assigns specific prominence as bearers, creators, and transmitters of ICH. The role assigned to the latter is defined in terms of participation; yet, as crucial as they are, they seem to be positioned more as beneficiaries of safeguarding efforts rather than active operational partners in safeguarding.

Records from the Convention's draft reveal repeated calls to emphasize State sovereignty, leading to the final provision requiring safeguarding policies for ICH within national borders. On the other hand, participatory approaches to safeguarding faced resistance from several member states. Concerns were expressed about diminishing State

[93] As observed by C. Bortolotto, a distinction between the "spirit" of the Convention and its text should be made, even in light of the objectively unrealizable nature of this ambition, which will always suffer from structural incompleteness. See the Author's reflections in the French publication *Les inventaires du patrimoine culturel immatériel : l'enjeu de la participation, Rapport de recherche : Direction de l'architecture et du patrimoine*, 2008, esp. 29.

[94] Refer to the Operational Directives, paras I.5 and I.6. In fact, having States to safeguard the subjective dimension of the ICH that CGIs represent, should these latter move or migrate, mechanisms of multinational nominations or cooperation would have to be activated, competence would be broadened, and the transnational nature of ICH would be maintained. Additionally, as F. Lenzerini notes in "Intangible Cultural Heritage: The Living Culture of Peoples", in *The European Journal of International Law*, Vol. 22, no. 1, 2011, 17, the close link between ICH and human rights means that safeguarding ICH also serves to protect human rights, extending the Convention's scope beyond its original remit to encompass obligations under customary international human rights law.

authority in heritage identification and listing, or on the risk that involving "too many actors" could impede effective implementation[95].

However, the ensuring of CGIs participation not only is addressed in the above Article 11(b) but is directly stipulated in Article 15: "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." The prescription is even bolstered by the Operational Directives, which encourage States to establish "functional and complementary cooperation among CGIs" (para 79) and "a consultative body or a coordination mechanism to facilitate the participation of communities, groups and, where applicable, individuals, as well as experts, centers of expertise and research institutes" (para 80). Moreover, it is worth remembering that communities and individuals have been tasked with an advisory role at the international level, offering expertise through interactive dialogue and providing guidance when invited by the Committee (para 89, OD). Yet, the State-only composition of the latter body, the authority granted to States to make final decisions regarding ICH nominations, and the limited recognition of the scope, role, and rights of communities raise significant concerns.

The most notable of these is the centralist attitude just highlighted. Fearing that a more explicit subdivision of their safeguarding responsibilities could undermine their prerogatives, States have resisted any attempt to redistribute their duty to protect the ICH within their territories. This validates the assumption that effective models of State-community cooperation can seldom be identified below the principles of participation and inclusion promoted by the Convention. This is particularly true within legal frameworks that require cultural heritage designation at the national level to be based on public interest, assessed through objective and predefined criteria within authoritative processes of identification. The Convention, on the other hand, does not appear to reverse this pattern – States, following the standard framework of international conventions, continue to hold ultimate sovereignty. Yet, it adds a new layer of complexity by reinforcing the idea that communities (including groups and, in some cases, individuals) should actively and

[95] At the same time, some took more cautious stances – Germany, for instance, emphasized that "each state party should remain free in how to implement the Convention." Others, like the Republic of Korea, advocated for a meaningful role of communities in the process.

democratically engage in heritagization processes, "not only as targets or beneficiaries of safeguarding measures but as their instigators and implementers."[96]

On a practical level, however, participation lacks concrete operational mechanisms, leaving States with considerable discretion in domestic ICH regulation[97]. This creates a paradox where the attempt to standardize diverse cultural expressions under a single community framework may ultimately undermine the very diversity it seeks to protect: "We subjectivize groups or populations by making them 'communities'; we objectivize their practices and expressions by making them 'intangible heritage.'"[98] As a result, providing concepts such as 'participation' or 'involvement' with concrete meanings leaves room for great ambiguity. This is because the very concept of 'community' is difficult to grasp in an international law context. The latter, in fact, "is a question of fact, not a question of law"[99].

It is 'factual,' first of all, as it relies on subjective elements of definition. In the case of ICH, moreover, it is factual in that it embodies a dual reference (i) to the inner circle of "those involved *directly* in the enactment and transmission of the expressions and practices of ICH" and (ii) to the broader circle of the "population involved in appreciating, observing and participating in that heritage"[100].

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[96] Extract of the "Report of the Subsidiary Body on its work in 2011 and evaluation of nominations for inscription in 2011 on the Representative List of the Intangible Cultural Heritage of Humanity", UNESCO Doc. ITH/11/6.COM/CONF.206/13, 18, provided in the framework of the 6th session of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, held in Bali, 2011.

[97] See in this regard L. Lixinski, "Selecting Heritage: The Interplay of Art, Politics and Identity, cit.

[98] V. F. Hafstein, "Celebrating Difference, Enforcing Conformity", in *News from Other Worlds: Studies in Nordic Folklore, Mythology and Culture*, Berkeley, 2012.

[99] Permanent Court of International Justice: The Greco-Bulgarian "Communities", Advisory Opinion (31 July 1930), 22. On this point, see also F. Macmillan, "Contemporary ICH: Between Community and Market", cit., spec. 45.

[100] Subsidiary Body of the Committee (now replaced by an "Evaluation Body") 9th session, UNESCO Headquarters, November 2014, Item 4 of the Provisional Agenda: *Adoption of the summary records of the eighth session of the Committee*, point 532. Available as UNESCO Doc ITH/14/9.COM/4 Rev. The topic was already addressed at the "Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention," March 2006, Tokyo, Japan: "While some experts proposed that the definition of community should focus on the practitioners of the ICH, others suggested that it should also include those who are connected to the ICH but are not active practitioners. It was agreed that a sense of belonging together, or a sense of identity, based on shared ICH, should be included in the definition of community [...]".

It is factual, then, as it is shaped by cultural identity rather than, or prior to, a specific territory[101], as is common with other notions of community, thereby maintaining a transnational openness – especially considering the distinctive nature of intangible expressions: "it is due to its lived nature that intangible heritage is often transnational and the location and distribution of this form of heritage is contingent upon the location and distribution of its bearers."[102]

This, in turn, brings up another issue. Although communities in the ICH sphere may transcend national borders, it is precisely those borders that ultimately define the action perimeter of States. Notwithstanding the possibility of multi-state candidacies, as we have seen above, tensions can arise when geopolitical boundaries intersect with cultural identities. This overlap sometimes fosters nationalist tendencies that conflate State and community interests. Untangling these complex intersections of political, ethnic, identity-based, and geographic factors to achieve constructive collaboration often proves problematic[103]. As a result, and considering the ultimate discretionary authority of States, the inscription of ICH elements may serve as a tool for claiming sovereignty, leading to disputes over the "ownership" of intangible cultural expressions[104].

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[101] See F. Francioni, "Article 2(1). Defining Intangible Cultural Heritage", in *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, cit., 53, observing that "The idea of 'cultural community' adopted in the Convention is trans-territorial and trans-temporal". On the theme of trans-territorial communities and heritages, see the monographic contribution of M. Herzfeld, *Cultural Intimacy: Social Poetics in the Nation State*, New York, 1997. Also, V. Hafstein, "Claiming Culture: Intangible Heritage Inc., Folklore©, Traditional knowledge™", in D. Hemme, M. Tauschek, R. Bendix (eds.), *Prädikat "Heritage": Wertschöpfungen Aus Kulturellen Ressourcen*, Münster, 2007; C. Bortolotto, "Placing intangible cultural heritage, owning a tradition, affirming sovereignty. The role of spatiality in the practice of the 2003 Convention", in *The Routledge Companion to Intangible Cultural Heritage*, London, 2016. In French: L. Lankarani, "La définition, les causes, et les effets juridiques du patrimoine culturel immatériel transfrontière. Brèves observations", in L. Lankarani, F. Fines (eds.), *Le patrimoine culturel immatériel et les collectivités infraétatiques*, Paris, 2013.

[102] T. Curtis, "Intangible Heritage Beyond Borders: Safeguarding Through International Cooperation.", in *ICH Courier*, vol. 4, no. 1, available at http://www.ichcap.org/ebook/access/%20ecatalog_pt.php?Dir=24&catimage=&%20callmode= (Accessed 6 November 2023).

[103] In this respect, C. Bortolotto, *ibid*., giving account of some of these problematic aspects. See also T. Winter, "Heritage Diplomacy", in *International Journal of Heritage Studies*, vol. 21, no. 1, 2015.

[104] B. Aykan, "'Patenting' Karagöz: UNESCO, nationalism and multinational intangible heritage", in *International Journal of Heritage Studies*, 21(10), 2015, analyzing the dispute between Greece and Turkey over the inscription of the *Karagöz* theatre practice.

Besides, the tension between spatial, political, and identity dimensions is not only limited to interactions beyond national borders; it also manifests within the State itself. Different communities residing in the same territory may seek to preserve their distinct identities, leading to potential conflicts within the State's borders. That was the case with the proposed entry of an ICH element from Japan, the "Takayama Matsuri no Yatai Gyoji, Takayama spring and autumn float festivals," rejected by the Committee[105] because it closely resembled two previously inscribed elements from the same State Party, thus requiring to justify "what warrants an independent nomination, rather than a resubmission of an enlarged nomination that would include the communities concerned by all elements." This is where the challenge of defining the concept of community also extends to the notions of 'participation' and 'involvement' in heritage practices, which are difficult to define both from a legal standpoint (in a general and abstract sense) and from an operational perspective (in terms of practical application).

Another point to consider is that associating CGIs with "other subjects" (i.e., experts, NGOs, research institutes, etc.), the latter presumably outside States' interests and control, risks proving useless whenever the role of such 'other subjects', while formally independent, merges with State operations[106]. The core of the issue lies in the democratic principle of representation of interests. As Janet Blake observes[107], "in a number of countries [mostly developing ones] NGOs are not independent of State control and so cannot really be regarded as representing the communities of the Convention". Moreover, NGOs "also frequently represent expert interests" that advise both CGIs and governmental bodies, thus "they frequently have a dual role both as academics/researchers and as experts or officials within the

[105] Decision 6.COM 13.28. "Report of the Subsidiary Body on its work in 2011 and evaluation of nominations for inscription in 2011 on the Representative List of the Intangible Cultural Heritage of Humanity," UNESCO Doc., ITH/11/6.COM/CONF.206/13.

[106] In this regard, see the" Report of the Rapporteur of the subsidiary body on the modalities for the participation of communities or their representatives, practitioners, experts, centers of expertise and research institutes in the implementation of the Convention," Second Extraordinary Session of the Committee, Sofia, Bulgaria, February 2008. UNESCO Doc. ITH/08/2.EXT. COM/CONF.201/INF.4, Annex 1.

[107] J. Blake, *Engaging Communities*, cit. 19. On the topic see as well R. Kurin, "Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a critical appraisal", in *Museum International*, 56(1-2), 2004, esp. 72; C. Bortolotto, "UNESCO and Heritage Self-Determination: Negotiating Meaning in the Intergovernmental Committee for the Safeguarding of the ICH", in *Between Imagined Communities*, cit., 249–272; in the same source, also S. Urbinati, "The Community Participation", cit.

governmental bodies."[108] This brings us back to the critical assessments of the 1989 Recommendation, already pointing to the imbalance toward researchers and academics' "authorized heritage discourse,"[109] to the detriment of cultural communities' will. As a result, it remains difficult to clearly identify the diverse interests at stake, complicating efforts to ensure genuinely representative and democratic processes in policy development and protection measures. As discussed in the second part of this chapter, which focuses on national transpositions, the presence of multiple regulatory contexts in conceptualizing this heritage – universal in its need for safeguarding and local in its connection to the cultural identity of the communities concerned – raises critical questions about legal standing and models that could align with this participatory approach to heritage identification.

3.3. The listing system: the mechanisms of safeguarding

Safeguarding intangible cultural heritage, as outlined in Article 1(a), primarily entails the inscription of certain manifestations onto a list based on predefined criteria. Consequently, Articles 16 to 18 form the foundation of safeguarding efforts, shaping the roles, functions, and operational guidelines of all related bodies. Specifically, the Convention establishes two lists and one registry: (i) The Representative List of the Intangible Cultural Heritage of Humanity (Article 16); (ii) The List of Intangible Cultural Heritage in Need of Urgent Safeguarding (Article 17); (iii) The Register of Good Safeguarding Practices (pursuant to Article 18).

As international instruments, these three mechanisms are overseen by the Committee based on requests from one or multiple states. Indeed, the Operational Directives explicitly encourage multinational nominations, promoting joint proposals among parties (Section I.5). Additionally, inscriptions may be extended or reduced at the request of

[108] Notably, on the topic of experts, L. Lixinski, "International Cultural Heritage Regimes, International Law and the Politics of Expertise, in *International Journal of Cultural Property*, vol. 20, no. 4, 2013, and Id., "A Third Way of Thinking About Cultural Property", cit., esp. 578: "experts [...]are meant to be stand-ins for the community. In effect, however, the way expertise is governed allows this group to pursue agendas that do not necessarily align with the interests of communities whose aspirations they are meant to translate. The experts work for cultural property, not for the people living in, with, or around it, losing sight of the fact that their role is "to protect not only objects, but also the relationships between those objects and people."

[109] The expression has a later collocation in L. Smith, *The Uses of Heritage*, London, 2006.

the concerned state(s), provided there is consent from the relevant communities, groups, and, where applicable, individuals (Section I.6).

The inscription process follows standardized application forms[110], which undergo a conformity assessment (OD, para. 16) by the Evaluation Body – an advisory group within the Committee[111]. Once inscribed, the status of listed elements is monitored through periodic reports submitted by states parties.

Each list serves a distinct purpose: the Representative List aims to enhance the visibility of ICH, raise awareness of its significance, and foster dialogue to promote respect for cultural diversity; the List of ICH in Need of Urgent Safeguarding focuses on implementing measures to ensure the survival of endangered heritage; and the Register of Good Safeguarding Practices identifies and promotes national, subregional, and regional programs, projects, and activities that best reflect the Convention's principles and objectives[112].

The implementation of the listing system, based on the 1972 model, presents both opportunities and challenges that warrant specific examination. Indeed, the establishment of this process has faced objections from Member States, professionals, and scholars, many of whom remain skeptical today. Analysis of the reports from the Restricted Drafting Group (2002) and the Intergovernmental Meeting of Experts (2003)[113] reveals a substantial discourse surrounding this methodological approach. These discussions continue to inform contemporary considerations of ICH selection and provide a foundation for the next section's analysis of national implementations.

[110] Available online at https://ich.unesco.org/en/forms (accessed 16 November 2023).
[111] The Evaluation Body is composed of twelve members appointed by the Committee: six experts qualified in the various fields of the ICH representatives of states parties non-members of the Committee; six accredited non-governmental organizations, taking into consideration equitable geographical representation and various domains of intangible cultural heritage (see OD, para 27).
[112] As of 2025, the Representative List includes 667 elements (including 19 items from the former Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity), the List of ICH in Need of Urgent Safeguarding comprises 81 elements, and the Register of Good Safeguarding Practices features 40 entries.
[113] First Meeting of the Select Drafting Group, Paris, 20-22 March 2022, Final Report. UNESCO Doc GRR2/CH/2002/WD/6; Second Meeting of the Select Drafting Group Preliminary Draft International Convention on Intangible Cultural Heritage, Paris, 13-15 June 2002, Meeting Report; Compilation of amendments by Member States concerning the first preliminary draft convention for the safeguarding of the intangible cultural heritage (CLT 2002/CONF.205/3 Rev).

Overall, proponents of the listing system have advanced several compelling arguments in its favor. Foremost among these is precisely the system's demonstrated efficacy, as evidenced by its successful implementation within the framework of the 1972 World Heritage Convention.

Furthermore, advocates emphasize its capacity to enhance the visibility of ICH broadly, extending beyond the specific elements included in the lists. This perspective underscores a fundamental principle: the list serves as an instrument rather than a limitation, which explains the ultimate preference for representativeness over exceptionalism in the selection criteria. Of particular significance is also the observation that the obligation to safeguard ICH exists *independently* of inscription, with the latter functioning primarily as a mechanism for promoting ICH in its entirety. The listing system further serves as a political declaration of intent, with a view to selection that is consciously directed toward the enhancement of ICH and specific heritage practices[114], and operates as both a protective mechanism and a means of strengthening community pride and cohesion[115].

On the other hand, critics of the system have raised over time substantial concerns regarding its potential implications. A primary objection centers on the risk of establishing hierarchies among ICH manifestations. This concern is particularly salient given the system's roots in the 1972 Convention, which relies on the criterion of outstanding universal value – a standard later discarded to emphasize universality as an external reference rather than a measure of the intrinsic value of ICH for a specific community.

Additional concerns encompass the potential for so-called fossilization of living traditions, prompting proposals for time-based enrollments or turnover mechanisms not only to make effective the intent of showing the great diversity of ICH, but also to maintain dynamism and prevent

[114] Related to this is the question raised by some delegates during the drafting phase on the difference between the anthropological view of heritage and the political view of heritage, the former being descriptive, the latter being ruled by available resources. See also V. Hafstein, "Intangible Heritage as a list: from masterpieces to representation", in L. Smith, N. Akagawa (eds.) *Intangible Heritage*, London, 2008, 103 and 108.

[115] See R. Kurin, "Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention", in *International Journal of Intangible Heritage*, no. 2, 2007.

cultural stagnation[116]. Critics have also highlighted risks of folklorization – i.e., the commodification of cultural elements for tourism and other external purposes – and post-enrollment immobility, noting the absence of specified effects following successful inscription[117]. Additionally, concerns have been raised about resource allocation, with some suggesting that existing safeguarding practices might be more effectively supported. This has led to proposals advocating for the heritage list to be restructured as a compilation of best safeguarding practices, particularly considering the relatively recent formalization of ICH preservation and the need to share adopted methodologies[118]. In response to these considerations, Article 18 now establishes a systematic approach whereby the Committee periodically evaluates and selects programs, projects, and activities that demonstrate exceptional alignment with the Convention's core principles and objectives. This mechanism serves dual purposes: it ensures efficient resource utilization while facilitating the exchange of proven preservation methodologies among member states. Through this structured approach, the Convention balances the symbolic importance of heritage listings with the practical need for effective safeguarding strategies. The regular selection and promotion of successful initiatives creates a dynamic repository of good practices, providing valuable guidance to actors engaged in safeguarding efforts[119].

Notwithstanding these debates, the listing mechanism was ultimately retained, supported by "a general consensus about the value of such listing and the credibility that the screening process lends it."[120] In this respect, the emphasis on representativeness rather than exceptionalism

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[116] This issue has been raised both in academic discourse (see, for example, R. Smeets, "Living Heritage: To Be Listed Forever?" in J. Blake (ed.), *Safeguarding Intangible Cultural Heritage: Challenges and Approaches – A Collection of Essays*, Builth Wells, 2007) and within UNESCO discussions (notably during the 1st session of the Committee held in Algiers, Algeria, on 18-19 November 2006, UNESCO Doc. ITH/07/1.EXT.COM/CONF.207/12).

[117] Mexico, for instance, had precisely observed in this regard that "it would be desirable to add to the provisions governing the lists the main advantages arising from the inclusion of an item in each of the three lists, and the type of assistance which may be granted to items according to the list in which they are included", to "ensure greater transparency in the establishment of the lists."

[118] See observations from Finland, Norway and Sweden, for instance. Compilation of amendments, cit., 56 ff.

[119] Moreover, an idea of a more cooperative approach can be glimpsed in the framing of such programs as "national, subregional, and regional": a kind of "third way" appears to be emerging between the international dimension of listing – even though it may involve forms of cooperation through multi-state nominations – and the national one of safeguarding the ICH present in the state's territory

[120] Final Report of the Select Drafting Group, cit., 9.

had partially addressed some initial objections[121]. However, significant questions persist regarding the practical implementation of such a principle of representativeness and the specific procedures for list inclusion, warranting continued scholarly attention and analysis.

A recurring theme in debates on the listing system, particularly concerning the Representative List, pertains to the duty of States to ensure the participation of so-called CGIs. According to criterion R.4[122], elements can only be inscribed following the broadest possible participation of relevant CGIs and with their free, prior, and informed *consent*. This requirement presents two notable challenges. The primary issue is the absence of specific guidelines regarding how to obtain and verify such consent, with no established minimum threshold for compliance. While scholars have extensively explored the interpretation of these concepts[123], some argue that the most effective approach is to allow each community to determine its own consensus-building methods based on its distinct characteristics and needs.

UNESCO has made progress in addressing these concerns through its "Global reflection process on the listing mechanisms of the 2003 Convention"[124], launched in 2018. Meetings have been focusing on four identified critical branches: (A) overall approach to the listing mechanism; (B) issues related to the criteria of inscription; (C) issues related to the follow-up of inscribed elements, and (D) methodology for the evaluation of nominations. Following the recommendations of an Open-ended intergovernmental working group gathered in 2021[125], UNESCO has expanded the acceptable methods for demonstrating community consent. These now include the use of community languages

[121] The original version of the Draft Convention referred to "items which are considered as having outstanding specific value" and to tentative titles as "List of Treasures". On this point, see V. Hafstein, "Intangible Heritage as a List", cit., 107 ff.

[122] As part of the OD, para-I.2 – Criteria for inscription on the Representative List of the Intangible Cultural Heritage of Humanity.

[123] Including J. Cariño, "Indigenous People's right to free, prior, informed consent: reflections on concepts and practice", in *Arizona Journal of International & Comparative Law*, 2005, vol. 22, no. 1; M. Colchester and M. F. Ferrari, *Making FPIC - free, prior and informed consent - work: challenges and prospects for indigenous peoples*, Moreton-in-Marsh, 2007; .B. McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development", in *Berkeley Journal of International Law*, 2009, vol. 27, no. 2; B. Rudolff and S. Raymond, "A Community Convention? An analysis of Free, Prior and Informed Consent given under the 2003 Convention", in *International Journal of Intangible Heritage*, 2013, 8. 153-164.

[124] UNESCO Doc., Decision 13.COM 10. The reflection addresses both the Lists and the Register.

[125] UNESCO Doc., LHE/21/16.COM WG/7, Paris, 9-10 September 2021.

alongside official UNESCO languages in nomination documentation, and the incorporation of technological solutions, such as audiovisual tools, for both providing required information and expressing concerns. Current nomination files demonstrate widespread adoption of these new options[126]. Such developments complement the existing nomination form, which already required States to document community's vision, participation methods, and involvement in safeguarding measures. However, as will be examined later, the broad nature of these requirements – and the absence of more rigorous verification processes – often results in States providing tautological, formulaic responses that lack substantive detail about real community engagement.

Moreover, the difficulty of achieving communities' real consent stems from the inherent structures of groups that lack the economic and human resources to undertake the actions that the Convention envisages for them. The lack of formal regulations in the listing process heightens the likelihood of overlaps between the above concepts of "bearer community," "expert community," academia, and NGOs, blending the various interests that intersect with this heritage[127].

To this purpose, Article 14 and related paragraphs 81, 82, and 85 of the OD precisely provide that awareness-raising, capacity-building, training, and access to research are also directed to holder communities themselves, in the spirit of true involvement and making up for any objective shortcomings.

On closer inspection, however, the nomination form instructions explicitly encourage states parties to pursue such a broad stakeholder engagement, including participation from local and regional governments, communities, NGOs, research institutes, and centers of expertise, as outlined in Article 15 of the Convention[128]. While this inclusive approach aims to foster beneficial collaboration among stakeholders, it also introduces certain risks, particularly in contexts with limited resources or opportunities for participation, whereby overlapping would prevent all stakeholders (most importantly bearer communities) from real participation, and that States would not have to

[126] https://ich.unesco.org/en/files-2024-under-process-01303 (accessed 7 December 2023).
[127] On this point, an interesting study case is proposed by B. Rudolff and S. Raymond, "A Community Convention? An analysis of Free, Prior and Informed Consent given under the 2003 Convention", cit., focusing on the Committee's Subsidiary Body evaluation of nomination forms in 2011 with regard to the issue of community participation.
[128] UNESCO Doc., ICH-02-Instructions.

specify precisely *who* participated and *how* they did so[129]. This flexibility, while potentially beneficial for administrative efficiency, could lead to scenarios where those bearer communities, primary custodians of intangible cultural heritage, are not meaningfully engaged in the process[130].

In this context, one final issue warrants attention, which will be crucial in the next section on national implementations. As previously noted, the Register of Good Safeguarding Practices serves the dual function of (i) addressing the challenges inherent in the field of ICH safeguarding by facilitating the exchange of successful methodologies and capacity-building examples, and (ii) reinforcing the Conventions' fundamental objective of safeguarding *all* forms of ICH, extending beyond listed elements to encompass the entire creative processes. This promotional role aligns with the Committee's mandate as outlined in Section I.13 of the Operational Directives[131], making the Register a vital tool for safeguarding and promoting greater flexibility in the evolution of ICH.

However, the Register has not reached its full potential, as evidenced by both practical and academic indicators. From an operational perspective, the number of registered practices remains notably lower than entries in the Convention's other two lists[132]. From a theoretical standpoint, there

[129] See the references made in Section 3.2 above. See especially the works of L. Lixinski: "Selecting Heritage", cit. and Id., "Heritage Listing as a Tool for Advocacy: The Possibilities for Dissent, Contestation and Emancipation in International Law through International Cultural Heritage Law", in A*sian Journal of International Law*, vol. 5, no. 2, 2015.

[130] As Deacon observes, "States retain discretion regarding the way in which intangible cultural heritage is incorporated into legal frameworks at the national level, and they make final decisions on the inclusion of intangible cultural heritage in inventories (or indeed, final approval of international nominations to the UNESCO lists) [...]". H. Deacon, "Afterword: intangible heritage and national law", in *Intangible Cultural Heritage under national and international law*, cit., 198.

[131] Resulting in the duty of (i) encouraging states parties to create favorable conditions for the implementation of such programs, projects, and activities; (ii) making available information about the measures and methodologies used and experiences gained, and subsequently provide recommendations and methodological guidance; (iii) encouraging research on and evaluation of the effectiveness of safeguarding measures included in those projects.

[132] As recently reaffirmed by the General Assembly during its 10th session, June 2024, Paris, Item 7 of the provisional agenda: Proposed revisions to the Operational Directives for the implementation of the Convention. UNESCO Doc., LHE/24/10.GA/7.

appears to be a notable absence of research focused specifically on this aspect of the Convention's framework[133].

Recognizing this untapped potential, the Committee has initiated a dedicated review process as part of its global reflection on the listing mechanisms of the 2003 Convention. During its 17th Session in 2022, themes were established to improve access and visibility of the Register, focusing on innovative enrollment, promotion, access, and participation methods, including a digital observatory to enhance circulation[134]. Final amendments to the OD, reflecting these innovations, were made at the 10th session of the General Assembly in 2024[135]. Prominent among these are the recurring themes in this subsection, shedding light on the continued focus in academic and institutional debates. A fundamental consideration centers on the tension between representativeness and exceptionalism, as evidenced by the semantic shift from reference to 'best' to *good* practices in criteria for selection. Moreover, community participation and consent requirements have been strengthened through criterion G.3, which now mandates that programs, projects, or activities demonstrate not only the initial participation of relevant CGIs, but also their free, prior, *sustained*, and informed consent at the time of submission. Eventually, the risk of cultural fossilization is also addressed through requirements for knowledge sharing and dissemination. Submitting parties must now explicitly commit to coordinating and cooperating in the diffusion of good practices, positioning their initiatives as potential sources of inspiration across local, subregional, regional, or international contexts.

[133] As pointed out by H. Schreiber, "Article 18. Programmes, Projects, and Activities for the Safeguarding of the Intangible Cultural Heritage. 'Cinderella' of UNESCO Heritage Lists", in J. Blake and L. Lixinski (eds.) *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, cit., spec. note no. 8.

[134] This digital infrastructure would facilitate the sharing of good safeguarding practices in their broadest sense, extending beyond those formally recognized in the Register. See the report of the Expert meeting in the framework of the reflection on a broader implementation of Article 18 of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, Stockholm, Sweden 19 to 21 April 2023. UNESCO Doc, LHE/23/18.COM EXP/4. Also, the Report of the Open-ended intergovernmental working group in the framework of the reflection on a broader implementation of Article 18 of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO Headquarters, 4-5 July 2023. UNESCO Doc, LHE/23/18.COM WG ART18/4 Rev.

[135] Decision of the Intergovernmental Committee: 16.COM 14, UNESCO Doc. LHE/24/10.GA/7.

4. Integrating ICH into national legal frameworks of materiality

In light of the overarching aim of this study, it is now crucial to examine how the first dimension of immateriality has been integrated into national legal frameworks, with particular attention to the Italian context. This section therefore turns to an analysis of both the scope and the modalities through which internationally agreed principles have been implemented within Italy's cultural heritage legal tradition.

A substantial body of scholarship has explored the challenges of integrating international norms into domestic legal systems. Notably, Francioni observes that cultural heritage law enforcement "entails a continuous interaction and hybridization of different legal orders, private and public, domestic and international, national and regional, and soft and mandatory law. These different legal orders, coexist, interact, and collide [...]"[136]. The concept of ICH and the dynamics it entails are particularly salient in this context. Within a regulatory framework grounded in materiality – such as the Italian one – the implementation of the 2003 UNESCO Convention faces two primary interpretative challenges.

The first is conceptual: the Italian definition of cultural property (*beni culturali*) is historically anchored in materiality and typicality, classifying cultural assets according to predetermined criteria of interest. The second is operational: the UNESCO framework introduces a paradigm shift by emphasizing community participation in heritage recognition, thereby challenging the traditional top-down model in which the State, through expert evaluation, determines cultural value.

As a result, the interplay between these two legal orders – marked by differing approaches to protection – continues to produce interaction, friction, and hybridization, but also holds the potential for mutual enrichment.

It should be noted, in this regard, that the Convention affords considerable flexibility in domestic implementation. On the one hand, its broad conceptualization of safeguarding duties enables adaptation to diverse legal and cultural contexts; on the other, this very adaptability may create tension within legal systems traditionally centered on the

[136] F. Francioni, "Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law," in F. Francioni, J.Gordley (eds.), *Enforcing International Cultural Heritage Law*, Oxford, 2013, 9.

materiality of cultural expressions. In this light, Italy's ratification may signal a willingness to broaden the legal understanding of cultural heritage, making it particularly relevant to examine how international norms have been interpreted, adjusted, or assimilated to accommodate the distinctive nature of ICH.

As a matter of fact, the core objective of the Convention is precisely to assist States in fulfilling their obligations by allowing for an implementation that aligns as closely as possible with domestic legal standards and frameworks[137]. Therefore, the interpretation of the second part of this chapter should prioritize analyzing these incorporations not merely in terms of compliance with individual rules, but also in capturing the underlying *spirit* of the Convention. The focus, then, will be on assessing how and to what extent the Italian legal system has accomplished this purpose.

To achieve this, several methodological considerations must be outlined.

While we certainly recognize that ICH, as such, is a legal category rather than a phenomenon of reality – and acknowledging that the Convention operates posthumously to the existence of such phenomena in the real world – this section limits its attention to the principles outlined in this international document. Indeed, although the overarching aim of the research extends to a comprehensive examination of the different forms of immateriality beyond the legal boundaries established by the UNESCO 2003 Convention, this chapter is specifically designed to adhere to its scope. This approach is essential for assessing this *particular* dimension of immateriality, that is to say, ICH as conceptualized by UNESCO, and within the specific context of Italian law.

As a result, this analysis proceeds along two primary lines of inquiry: the existence and nature of a legal notion of intangible cultural heritage within Italian law (Section 4.1.1); the capacity of administrative structures and public policies to effectively safeguard it (Section 4.1.2).

To provide a comparative perspective, the study incorporates examination of the French legal system, which shares similar traditional emphasis on materiality (Section 4.2). This comparison will reveal that France's more direct integration of ICH concepts, in contrast to Italy's

[137] See in this sense several passages within the collective volume edited by M. Cornu et al. *Intangible Cultural Heritage under National and International Law: Going Beyond the 2003 UNESCO Convention*, cit.; S. Starrenburg, "Translating International Heritage Standards into Domestic Law", in L. Lixinski, L. K. Morisset (eds.), *The Routledge Handbook of Heritage and the Law*, London, 2024, 104.

more constrained approach, has facilitated the development of specific safeguarding measures. As will be discussed, this distinction appears more political than legal, suggesting that substantive alignment with international concepts should not be viewed as rigid or overly literal. Instead, an initial (formal) translation may lead to an application more attuned to domestic principles, thereby fostering effective safeguarding practices within the specific context of reference. As noted, states enjoy significant discretion, and the Convention's purpose is not punitive but supportive, allowing for the widest adaptation to internal dynamics.

What becomes evident, instead, is that having a structured framework for referencing ICH, combined with international alignment, enables the development of targeted safeguarding practices – sometimes even exceeding the original UNESCO standards. The key question, then, is to determine the extent to which such departures remain part of an internal shift rather than evolving into independent legal developments.

Ultimately, the discussion will also examine the interactions between Italy and France, particularly in light of their joint inscriptions on ICH lists. By analyzing emerging safeguarding strategies within evolving cultural policies, the aim is to highlight innovative approaches that could serve as mutual inspiration for shaping strategies that better reflect UNESCO's vision for ICH safeguarding.

4.1. Italy

4.1.1.Is there a legal notion of ICH in Italy?

With law no. 167 of September 27, 2007, Italy ratified the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage giving "full and complete execution"[138] to its provisions. Concurrently, the same year, it also incorporated into national legislation the UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions through law no. 19. These legislative measures established new protection objectives alongside existing domestic ones: safeguarding ICH as defined by the 2003 Convention and promoting cultural diversity, as outlined in the 2005 Convention[139].

The full impact of these principles' integration into Italian law – the 'spirit' to which we referred in the introductory section above – is now in a state of temporal suspension. The original assertion that Italy lacks a legal concept of ICH is now open to refutation by recently enacted law no. 152 of October 7, 2024, which introduces significant innovations on the subject. In addition to Chapter I, establishing "Provisions on historical reenactment events," Chapter II notably grants the government the authority to implement regulations for safeguarding intangible cultural heritage, aiming "to enhance the safeguarding of this heritage by fostering the broadest possible participation of the practicing communities" (Article 11). With an 18-month delegation of authority still pending implementation, there is the possibility that Italy will establish a dedicated legislative framework for ICH – marked, not least, by a commendable adherence to conventional principles regarding the role of holder communities and the widely debated paradigm shift in heritage processes.

The timing of this law's enactment coincides with the completion of this thesis, which was initially predicated on the complete absence of national legislation on ICH as defined at UNESCO level. The research relied on a highly fragmented landscape of regional legislative provisions and cultural policies, which often addressed the safeguarding of ICH tangentially or insufficiently. Below, we will therefore consider

[138] Article 2, law no. 167/2007.

[139] This encompasses all forms of expression stemming from individual, group, and societal creativity, which carry cultural significance (Article 4(3)), and embody symbolic meaning, artistic elements, and values reflective of cultural identities (Article 4(2)).

the key innovations introduced by this delegation, along with the distinct treatment of "historical re-enactment events," which warrants further reflection. However, in the absence of additional enforcement, we find it essential to examine the legal framework within which this proposed new code would operate and to assess its feasibility in relation to the existing legislative landscape.

According to Article 2 of the Code of Cultural and Landscape Heritage of 2004[140], cultural heritage is made up of cultural and landscape *property*. As this thesis will demonstrate, both elements of this conceptual pair exhibit a distinct immaterial dimension in their contemporary conceptualization. For now, let us turn our attention to the first element of this pair, most directly pertinent to this investigation. The so-called '*beni culturali*' are identified with "immovable and movable *things* which, pursuant to Articles 10 and 11, present artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest, and of any other *thing* identified by law or in accordance with the law as testifying to the values of civilization." In this list, the mention of ethno-anthropological interest may serve as a more direct reference to the intangible dimension we are researching here, as associated with local processes of heritage definition. This interpretation is also supported by recent guidelines for administrative and technical-scientific action, developed by a dedicated working group tasked with standardizing and streamlining the Ministry of Culture's activities concerning the intangible aspects of heritage[141]. These guidelines define ethno-anthropological assets in terms of their cultural diversity and local specificity, while also acknowledging the lack of a clear-cut definition. They recognize that the contributions of anthropological and ethnological disciplines are often confined to a highly theoretical perspective, one that tends to merge with the symbolic and identity-related dimensions of only *material* heritage. And indeed, in the imperative reference to 'things,' stemming from a specific legal and historical concept of 'property' and its associated ownership regime[142], we can grasp the extent of the obstacle that prevents the ICH paradigm from gaining access to Italian legislation. The Italian jurists Alibrandi

[140] Legislative Decree 22 January 2004, no. 42. Henceforth, the Code.
[141] See the Circular No. 21 of April 16, 2025, containing the Guidelines for Administrative and Technical-Scientific Action on Demo-Ethno-Anthropological and Intangible Cultural Heritage. Available at https://cultura.gov.it/comunicato/circolare-n21-del-16-aprile-2025-dg-abap-linee-guida-per-lazione-amministrativa-e-tecnico-scientifica-sul-patrimonio-culturale-demoetnoantropologico-e-immateriale (accessed 9 May 2025).
[142] For which we refer to the reflections proposed in the following Chapters 3 and 4.

and Ferri have effectively captured the point by asserting that "the cultural value has become so identified with the matter in which it expresses that it remains definitively captive to it, so that it stands as an object of legal protection inseparable from the thing that encloses it."[143]

From the earliest conceptualizations of *beni culturali*,[144] the issue of materiality has remained central to its definition. Subsequent developments have largely revolved around the initial classification as "*material* evidence of civilization" and the inescapable relation to things. Its opposite, instead – the notion of immateriality – has traditionally been viewed as a subordinate attribute, intrinsically tied to material presence: Massimo Severo Giannini's theory of immateriality, which will be further explored later in this study[145], specifically hinges on the prerequisite of physical existence for the expression of *inherent* immaterial value. Even advancements that initially appeared to move away from the focus on physical substrates,[146] having shifted from 'material testimony of civilization' to simply 'testimony of civilization,' were later overturned by the current 2004 Code, Article 184, which reaffirms the material conception of cultural property, and defines heritage as encompassing their totality.

Article 7-bis of the Code exacerbates this paradigm even further. Introduced by a later amendment to the Code through Legislative Decree no. 62 of March 26, 2008, it now provides the following:

> The expressions of collective cultural identity enshrined in the UNESCO Conventions for the Safeguarding of the Intangible Cultural Heritage and on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in Paris, respectively, on November 3rd, 2003 and October 20th, 2005, are subjected to the provisions of the Code insofar as they are represented by material evidence and the conditions for the applicability of article 10 are respected.

Already it is notable that 'ICH' has undergone a significant redefinition to 'expressions of collective and cultural identity'. This reinterpretation finds support in the Explanatory Report to the aforementioned 2008 Legislative Decree, noting that adherence to the 2003 and 2005 UNESCO

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[143] T. Alibrandi, P. Ferri, *I beni culturali e ambientali*, Milan, 2001, 47.

[144] Which date back, in the theorization of this particular formula, to the so-called *Commissione Franceschini*, during the second half of the last century. The point is discussed extensively in the following chapter, especially Section 2.1.

[145] See, especially, Chapter 2, Section 2.1.

[146] Such as Legislative Decree No. 112 of March 31, 1998, dealing with so-called administrative federalism: "Transfer of administrative functions and tasks of the State to regions and local authorities, implementing Chapter I of Law No. 59 of March 15, 1997."

Conventions necessitated "a redefinition of *contiguous but not perfectly coinciding subject areas* [emphasis added] to prevent misinterpretations of obligations under international agreements and, conversely, of the boundaries between traditional protection relating to 'things' of historical and artistic interest and the safeguarding pertaining to manifestations and values of intangible culture." That is to say, things that are entitled to identification as cultural property according to the rules of Italian administrative law must be kept theoretically and operationally distinct from UNESCO's objects of protection, which fall under the distinct domain international law. A recent ruling by the Plenary Assembly of the Council of State[147] went as far as to hold that the relevant procedures – the candidacy to UNESCO lists and the protection under Article 7-bis – are independent of each other. This is because, the Court argued, the reference to the 2003 Convention in Article 7-bis is only *functional* to better frame such expressions of collective cultural identity. Only when they materialize in tangible forms of existence and are recognized as cultural properties can they get the same level of protection offered by domestic legislation.

A critical temporal restriction compounds the material and operational limitations affecting ICH recognition within the Italian Code. Specifically, Article 10(5) prevents items from being classified as cultural property if they are created by living authors or were produced within the last seventy years[148]. This temporal constraint stands in fundamental tension with the nature of ICH, which is inherently contemporary and continuously evolving. While UNESCO also faces challenges in addressing the topic contemporaneity in ICH identification[149] – particularly due to the formal requirement that it be "intergenerational," hence transmitted over a specific amount of time – it is essential to acknowledge that the dynamic nature of ICH is intrinsically tied to its contemporary context and living practitioners.

This produces two significant considerations. First, although the ICH framework intentionally departs from the notion of individual authorship that underpins intellectual property rights, many national

[147] Italian Council of State, Plenary Assembly, No. 5 of 2003. The ruling addressed the issue of the extensibility of the administrative tool of cultural constraint to the immaterial dimension of a building – more on this point in Chapter 2, Section 3.2.
[148] Fifty years for things included at letter d-bis, para 3 of Article 10: "things, to whomever they belong, which are of exceptional artistic, historical, archaeological or ethno-anthropological interest for the integrity of the cultural heritage of the Nation."
[149] See, for instance, F. Macmillan, "Contemporary ICH: Between Community and Market", cit., esp. 48. The topic is revisited in Chapter 4, Section 2.

legal systems have fell back to a framework of IPR protections. Second, and more fundamentally, the exclusion of contemporary elements[150] poses an inherent conflict for cultural practices that are defined by their ongoing transmission and continuous recreation. The legal framework has yet to fully resolve these challenges. At its core, this situation necessitates a reconceptualization of what constitutes cultural property, and raises complex questions about collective cultural rights. The current regulatory environment struggles to adequately address these evolving dynamics, particularly regarding how to protect and preserve cultural practices that are simultaneously historical and actively contemporary.

In this context, the operational principles and guidelines introduced by Law 152/2024 may represent a meaningful step forward compared to the legislative landscape just observed. At the definitional level, and in direct response to the research question posed by this section, a formal definition of ICH is finally established by this law. Drawing from the international framework[151], Article 10 first affirms the State's *recognition* of ICH "as a component of identity and historical value for individuals, local communities, and the national community." It further highlights "the practices, representations, expressions, knowledge, skills, as well as the tools, objects, artifacts, and cultural spaces associated with them, which communities, groups, and individuals recognize as part of their cultural heritage."

This legislative development marks a significant departure from the current framework, offering the possibility of reconsidering how the ICH concept permeates Italian legislation *outside* the constraints of the Code, rather than continually seeking justification within a framework clearly designed for different kinds of cultural expressions. At present, it is evident that a significant gap exists within the Italian Code of Cultural and Landscape Heritage, which neither offers a formal definition of ICH nor makes direct reference to it in its provisions. The Code recognizes only a limited aspect of ICH – namely, those elements classified as 'expressions of collective cultural identity.' A comparison between the legal regime governing these expressions and the principles set forth in the new legislation highlights, on the one hand, the

[150] Except for identified cases: for instance, contemporary architecture (Article 11(e)) can be subject to public funding for conservational purposes as provided for in Article 37 when the superintendent has, at the request of the owner, acknowledged particular artistic value.
[151] Although "skipping" the typological identification of Article 2(2) of the Convention, except for a reference to linguistic expressions that will be addressed below.

shortcomings of current regulations, and on the other, offers reason for cautious optimism regarding future developments.

Indeed, for now, for expressions of collective cultural identity to receive legal recognition and protection under the Code's administrative mechanisms, they must satisfy two distinct criteria: (i) there must be a thing that is relevant *in itself* as cultural property[152], (ii) it must function as material evidence of collective cultural identity expression – i.e., it must serve as either the physical object, the medium of expression, or the location where the cultural practice "is recreated, shared, and transmitted, and wherein the community acknowledges it as a component of its cultural heritage, viewing it as representative of its historical narrative, a connection to its past, and worthy of preservation for the benefit of future generations"[153].

The extent to which these limitations confine the current codification of ICH to a merely *instrumental* role in enhancing material cultural property becomes especially evident when viewed through the lens of Article 11 in the new 2024 law. Under the 2004 Code, the involvement of the very individuals and groups responsible for creating, transmitting, and sustaining ICH (the 'CGIs') is notably absent. Instead, the framework relies on traditional, object-focused, and top-down protection mechanisms. Twenty years later, the new legislation marks a significant shift It not only recognizes the central role of 'practicing communities' but also explicitly references the Faro Convention – a significant step forward, considering the Italian legal doctrine's longstanding reluctance to the notion of 'heritage communities'[154]. The law's commitment to

[152] Meeting the specifications of Article 7-bis: "the conditions for the applicability of Article 10 must be met." Article 10, in fact, establishes a comprehensive taxonomy of cultural property within the Code's framework. Within it, only movable and immovable things are taken into consideration, emphasizing their material nature. These objects are then further classified according to their ownership regime and the specific cultural value, whether artistic, historical, archaeological, ethnoanthropological, or other recognized forms of cultural significance.

[153] The quote comes from the above ruling of the Plenary Assembly, No. 5 of 2003.

[154] The Council of Europe's Framework Convention for the Value of Cultural Heritage for Society, 2005 was ratified in Italy with law no. 133 of October 1, 2020. Article 2 defines heritage communities as "people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations." For insights on the mentioned critical doctrine see especially P. Carpentieri, G. Severini, "La ratifica della Convenzione di Faro «sul valore del patrimonio culturale per la società»: politically correct vs. tutela dei beni culturali?", in *Federalismi.it*, no. 8, 2021, and P. Carpentieri, "La Convenzione di Faro sul valore dell'eredità culturale per la società (da un punto di vista logico)", *ivi*, no. 4, 2017. More insights on the Faro Convention later in this section and specifically in Chapter 3.

community involvement extends beyond symbolic acknowledgment; it informs the law's substantive provisions. It embraces the dynamic nature of ICH, shaped through the ongoing renewal efforts of its practitioners, and affirms its broader cultural relevance. It emphasizes ICH's role in preserving cultural diversity and promoting interculturality, recognizing these elements as essential to meaningful community participation and as catalysts for both individual and collective growth[155]. As the next section will explore, the explicit recognition of "participatory procedures" as vital to the ongoing evolution of ICH, together with the call to "streamline the competencies and procedures of state administrations," represents a crucial operational shift. It reflects a fundamental distinction between ICH and the category of cultural heritage as traditionally defined by the Code.

Regarding the latter point, it is also important to recall that while the Code serves as the primary legislative framework for cultural heritage in Italy, the integration of UNESCO concepts into national law has, even prior to the 2024 reform, resulted in occasional references to ICH in other legislative provisions. A brief review of these instances is essential for evaluating the coherence and effectiveness of Italy's broader legal strategy for safeguarding ICH across multiple legislative instruments.

The most recent illustration in this regard can be found in law no. 206 of December 2023, 27 (Organic provisions for the enhancement, promotion and protection of made in Italy). Article 21, dealing with the "Promotion of the Enhancement and Protection of Intangible Cultural Heritage," – a peculiar formula that seems to suggest that the promotion is directed toward enhancement and protection activities themselves, in a vicious circle of mutual fostering – describes ICH as "the set of intangible property that expresses the country's collective cultural identity." Setting aside the inaccuracies inherent in characterizing ICH as a *national* collective identity, which overlooks the community dimension fundamental to UNESCO principles, the law also imposes additional obligations on the Ministry of Culture by explicitly mentioning intangible cultural property: "the Ministry of culture shall exercise the powers vested in the State in the field of *tangible and intangible* cultural property". In this respect, quite a few difficulties arise in grasping the meaning of intangible 'property,' which is different from 'heritage,' if we

[155] In accordance with the principles of human rights, and especially the right to take part in cultural life, as enshrined in Article 27 of the 1948 Universal Declaration of Human Rights and Article 15 of the 1966 International Covenant on Economic, Social, and Cultural Rights.

consider the characterization we have made so far of the legal attributes of cultural property in Italian law.

In 2020, as part of the measures undertaken to counteract COVID-19's effects, Legislative Decree No. 34[156] established a culture fund (Article 184) aimed at encouraging investments and other initiatives to protect, enjoy, enhance, and digitize the tangible and *intangible* cultural heritage. Article 185-bis was then included as an extra criterion for expenditures specifically aimed at improving and enhancing the *intangible* cultural heritage. In that instance, ICH conforms to the normative definition of the 2003 Convention, implying that the allocation of corresponding funding is contingent upon the identification of ICH elements in accordance with international provisions[157]. It remains unclear, however, whether the parameters traced by Article 185-bis serve to further elaborate on the reference in Article 184, where nothing is provided in this regard. Either way, from an operational perspective, the mentioning of 'intangible cultural heritage' instead of 'expressions of collective cultural identity' is insufficient: any reference to the conventional definition would however be subject to subsequent coordination with the rules imposed by Article 7-bis, whose material limitations we have illustrated above. Additionally, it should be remembered that rather than addressing the ICH as a whole, as required by the 2003 Convention, economic interventions of the kind envisioned by Legislative Decree 34/2020 would primarily address previously recognized types of ICH, e.g., elements of ICH *already* enrolled in a list. As a result, rather than reflecting a meaningful recognition of ICH, it seems more like an oversight by lawmakers, one unlikely to carry significant normative consequences.

Tracing back in time, law No. 77 of February 20, 2006 is devoted to "special measures for protecting and enjoying UNESCO sites and elements." In such provision, the State acknowledges the extraordinary value of sites and elements already inscribed in UNESCO lists, considering them as peaks of the country's natural, cultural, and landscape heritage, both inside and outside its borders. Consequently, (i) it prioritizes interventions for the protection and restoration of cultural, landscape, and natural properties located within the

[156] So-called Relaunch Decree, then converted with amendments by Law No. 77 of July 17, 2020.

[157] "To support investments aimed at the redevelopment and enhancement of the intangible cultural heritage of the Organization United Nations Educational, Scientific and Cultural Organization (UNESCO), as defined by the Convention for the Safeguarding the Intangible Cultural Heritage, adopted in Paris on October 17, 2003 [...]".

boundaries of recognized sites and elements under UNESCO's provisions; (ii) it provides for management plans, aimed at ensuring their preservation and enhancement by outlining intervention priorities, implementation methods, and the necessary actions to secure public and private resources, as well as coordination with existing programs or regulatory instruments pursuing complementary objectives (e.g., systems for managing tourist flows). Lastly, (iii) it introduces ad hoc support measures for problem analysis, cultural and tourism services management, and promotion and dissemination at the school level.

Even on this side, however, a few issues arise. Intangible heritage *elements*, parallel to (tangible) *sites*, were only incorporated through a subsequent amendment (law no. 44 of March 8, 2017). As a result, not only are they chronologically subordinate to sites, but upon closer examination, they appear to be merely a formal addition. A thorough analysis of the measures proposed reveals that they primarily serve the preservation and promotion of tangible manifestations, lacking any coordination with intangible elements. Consider, for instance, the establishment of a priority of intervention for *restoration* activities, which can only assist tangible cultural heritage property, or the wording 'management plans,' which fails to encompass 'safeguarding plans,' and which thus recalls only the plans that the UNESCO Operational Guidelines[158] require for World Heritage inscriptions, neglecting any dedicated activities to safeguard intangible elements[159]. Moreover, the exclusive reference to UNESCO-listed elements remains restrictive when viewed against the broader international approach. Once again, the formal recognition of ICH appears to carry limited definitional and legal weight.

Ultimately, this review cannot fail to include a mention to the regional context, which indeed plays a central role in the domain of intangible heritage. According to constitutional requirements, Regions have concurrent competence[160] over the *enhancement* of cultural and environmental property and the promotion and organization of *cultural activities* (Article 117(3) of the Italian Constitution). In cultural matters, such regional legislative competence is separate from the preservation of cultural property (*tutela*), which falls exclusively under State authority,

[158] The UNESCO Operational Guidelines for the Implementation of the World Heritage Convention, para 108.
[159] The issue is explored in depth below, Section 4.1.2.
[160] In the subject matters covered by concurring legislation, legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation.

as established by Article 117(2)(s). One might argue, then, that compared to the *preservation* of cultural property – which is tied to a material understanding of cultural property both operationally ('preservation' is a function more properly disposed for physical items) and theoretically (the identification of cultural property remains anchored in a materialistic perspective) – the Constitution seems to ground a different attitude of public authorities in this regard.

Indeed, several regional laws expressly mention ICH – and do not refer, instead, to the "expressions of collective cultural identity" of Article 7-bis. Regional legislation has often engaged with this field ahead of national initiatives – a trend partly reflecting Italy's distinctive local character, whose national cultural heritage is frequently conceptualized as "an aggregate of regional and local traditions."[161]

Given the distinct areas of competence discussed above, regional cultural policies in Italy tend to fill the gaps left by state-level ICH provisions along two temporal lines. On one hand, significant legislative attention is directed toward the past, particularly in safeguarding linguistic heritage (minor or dialectal) and so-called historical reenactment manifestations. On the other hand, regions also focus on cultural activities that promote forward-looking expressions of human creativity and cultural innovation.

In the first regard, two points deserve attention. First, the strong focus on oral and linguistic heritage – despite its exclusion as a standalone domain in the UNESCO definition[162] – highlights the boundary nature of language. It straddles identity and pan-cultural concerns, while remaining a core intangible element in many cultures. This emphasis also signals a broadening of the ICH concept, shaped by the flexibility of regional approaches. A closer look at regional laws reveals a nuanced and varied treatment of language, reflecting different priorities. Some regions address it through targeted regulations, while others integrate it into broader frameworks, such as regional statutes or laws on cultural heritage, ecomuseums, minorities, or education[163]. Certain laws aim to

[161] In these terms G. Corso, "Articolo 1 - I principi", in M. Cammelli (ed.) *Il Codice dei beni culturali e del paesaggio*, Bologna, 2004, 71.
[162] Article 2(2)(a): "[...] oral traditions and expressions, including language as a vehicle of the intangible cultural heritage [...]". Refer also to Section 4.2.1 below.
[163] As in the case of Calabria, with regional law no. 15/2003, Umbria, with regional law no. 34/2017, or Campania, which includes "the protection and enhancement of the Region's cultural heritage, as well as its cultural, religious, and linguistic diversity, including local dialects" in its statute.

preserve dialects and local languages[164], others focus on the cultural dimensions of immigration[165], and special statute regions tend to emphasize their unique historical and cross-border linguistic traits – even regulating the use of language in public administration.[166].

Second, in relation to the said connection between intangible heritage and historical traditions, significant legislative activity can be observed in the field of historical reenactments[167] – those manifestations that are now addressed also at the national level through law no. 152/2024. A significant decision, the latter, as it reorganizes events "deemed significant to a local community," but sets them apart from the the broader framework of ICH, where they would more logically belong[168].

Following the proposed distinction, regional laws on so-called cultural activities – primarily concerning the regulation of the performing arts and cinema – would fall on the other side of the spectrum[169] . However,

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[164] See, for instance the case of Piemonte, where regional laws promote the knowledge of the "original linguistic heritage of the territory" (no. 26/1990, 37/1997, and 1/2005). The 'Sardinian language' is recognized as a living language and governed by regional law of Sardegna no. 26/1997.

[165] As illustrated in the Sicilian case, with law no. 85/1998 for studying the Sicilian dialect and the languages of ethnic minorities in the island's schools, and law no. 26/1998 for the preservation and enhancement of the historical, cultural, and linguistic heritage of Sicilian communities of Albanian origin and other linguistic minorities. Likewise, in Valle d'Aosta with regional law no. 47/1998 for the preservation of the linguistic and cultural characteristics and traditions of the Walser minority. See also, in Toscana, regional law no. 29/2009.

[166] Once again in Valle d'Aosta with law no. 196/1978, Articles 51, 52, and 54, addressing administrative matters related to employment.

[167] For example, Marche regional law no. 29/2018, "Enhancement and Support of Historical Reenactment Events"; Toscana regional law no. 27/2021, "Enhancement of *Intangible* Historical-Cultural Heritage and Popular Culture of Tuscany. Regulations on Regional Historical Reenactments"; and Umbria regional law no. 11/2024, "Enhancement of the Historical, Cultural, and Traditional Heritage of Umbrian Popular Culture. Regulations on Historical Reenactments and Historical Reenactment Events."

[168] Nonetheless, the law makes multiple references to the overarching context of the 2003 Convention. The reason behind the intention to establish a specific regulatory framework for historical reenactments may be inferred from the way they are framed – emphasizing their anthropological, historical, and documentary aspects, as well as explicitly linking them to "the protection and enhancement of cultural heritage for the purpose of promoting local economic, productive, and tourism development." Refer to A. Gualdani for an analysis of the underlying reasons for this choice, "La legge in materia di manifestazioni di rievocazione storica e delega al Governo per l'adozione di norme per la salvaguardia del patrimonio culturale immateriale: una prima riflessione", in *Aedon*, no. 3, 2024.

[169] By way of example: law no. 6/2004 and 7/2004 of Apulia Region; law no. 25/2009 of Veneto Region; law no. 36/2010 of Valle d'Aosta Region; law. 21/2010 of Tuscany Region.

this remains largely a formal distinction. In administrative practice, historical reenactments often overlap with initiatives rooted in traditional local culture or traditional activities carried out in historic venues, blurring the lines between these categories[170]. And underscoring once again, that comprehensive reorganization is indeed more than necessary.

Notably, in the area of cultural activities, a legislative mandate to establish a dedicated and autonomous Cultural Activities Code was issued as early as 2002, but was never implemented[171].

To date, cultural activities are recognized only at the constitutional level – a framework that has proven insufficient for both administrative bodies and courts to effectively interpret or expand their scope[172]. As a subject of shared competence between the State and the regions, this sector sees significant involvement from the former in fiscal and financial matters[173]. Meanwhile, the regions, where the connection between cultural activities and ICH is often more explicitly acknowledged, primarily exercise their authority in the realm of promotion.

It is worth noting in this regard that even the State law no. 175/2017, which sets out general provisions on the performing arts, explicitly references the 2003 UNESCO Convention and ICH in its opening, establishing the latter as a guiding framework. This underscores the close connection between the two sectors – ICH and cultural activities – hence a primary competence also at the State level, as argued by L. Casini most recently in "Patrimonio culturale", in B.G. Mattarella and M. Ramajoli (eds.), *Enciclopedia del diritto. I tematici, vol. III – Le funzioni amministrative*, Milan, 2022.

[170] We will revisit this topic in the next chapter, Section 3.2.

[171] Law no. 137 of July 6, 2002, Article 10(c), which identified theater, music, dance and other forms of live performance as an independently relevant category. The idea was then taken up by cited law no. 175/2017 (see note above), introducing "the revision and reorganization of existing regulations in the fields of theater, music, dance, traveling performances, circus activities, historical carnivals, and historical reenactments for the creation of a unified regulatory framework known as the *Codice dello spettacolo* [Performing arts Code]." The goal was to provide the sector with a more structured and effective system, aligning with principles of administrative simplification and budget optimization while enhancing artistic and cultural quality, fostering production and innovation, and promoting accessibility for the public. The delegation in question was recently postponed until August 2025.

[172] See in this regard D. Amirante, "Le attività culturali: una nozione da costruire", in A. Catelani, S. Cattaneo (eds.) *I beni e le attività culturali,* in G. Santaniello (dir.), *Trattato di diritto amministrativo*, vol. XXXIII, Padova, 2002, esp. 741 ff.

[173] First, as further evidence of the connection between entertainment and ICH, which is also highlighted in Law 175/2017, there is the so-called *Fondo Unico per lo Spettacolo* (FUS).

When cultural activities first emerged in the 1970s – both in doctrinal elaborations[174] and in legislation on administrative decentralization[175] – they were broadly defined, with only a general reference to future reorganization. Their primary characterization was functional, highlighting the region's role in promoting training and the dissemination of cultural and artistic expression. From the outset, they were understood as manifestations of human creativity without heritage status – intangible and separated from physical objects. As such, they were distinguished from cultural property both conceptually and operationally, with related administrative responsibilities assigned to the regional level.

With the enactment of Legislative Decree no. 368 on October 20, 1998, establishing the Ministry of Cultural Heritage *and Activities*, they not only came as a completion of the Ministry's title but seemed to gain autonomous legal significance as a separate, open-ended category. They were recognized "in all their manifestations," with particular emphasis on theatrical, musical, cinematographic, dance, and other forms of entertainment activities (Art. 2(b)). However, in the absence of a dedicated legal framework, a clear conceptual divide has gradually emerged between so-called "cultural-entertainment activities" and "cultural-tradition activities." This divide stems from the conceptual overlaps that have developed over time among UNESCO-defined intangible heritage – despite its specific classification within the domestic legal system – entertainment, and promotional initiatives[176].

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[174] S. Cassese, I beni culturali da Bottai a Spadolini, in *L'amministrazione dello Stato*, Milan, 1976, esp. 177 ff.; C. Camilli, "La normazione regionale in materia di istituzioni culturali", in *Riv. trim. dir. pubbl.*, 1981.

[175] Article 49 of Presidential Decree no. 616 of July 24, 1977, issued to implement the delegation of authority under Article 1 of Law No. 382/1975 for transferring administrative functions to ordinary regions. The Article defined them as "drama, music and film activities." Subsequently, Legislative Decree no. 112 of March 31, 1998, under Article 148(f), defined cultural activities as those focused on training and promoting various expressions of culture and art. Additionally, Article 155 of introduced the "proposal for a multi-year and annual plan for the enhancement of cultural heritage and the promotion of *related* activities." This wording effectively undermined even the minimal autonomy granted in Article 148, reinforcing the idea that the subdivision between cultural property and activities was merely a formal expedient. The interpretation of the latter as mere instrumental was also reflected at the jurisprudential level, particularly in Constitutional Court rulings no. 255 (July 21, 2004) and no. 285 (July 19, 2005), which defined cultural activities as "all activities attributable to the elaboration and dissemination of culture."

[176] An academic distinction between so-called "cultural property-activity" (to which a concept of intangible cultural property could be associated) and "cultural activities" is proposed by N. Aicardi, *L'ordinamento amministrativo dei beni culturali. La sussidiarietà nella tutela e nella valorizzazione*, Turin, 2002. 54.

Upon closer examination, the core issue lies precisely in the rigidity of these classifications, which in turn arise from the differing administrative approaches they necessitate, in alignment with constitutional mandates. This complexity is further deepened by territorial distinctions and the strong involvement of regional authorities, which, as noted, tend to link cultural activities closely to local expressions, often blurring the lines with ICH. At its core, the conceptual misalignment stems from the fact that cultural activities remain solely an administrative *subject* of intervention, lacking recognition as an autonomous category with its own regulatory framework. This limitation, combined with the challenges of fitting immaterial elements into traditional administrative structures, places cultural activities in an ambiguous position. Depending on the interpretive lens, they may be seen either as traditional expressions, mostly concerned with the past, or as contemporary activities resulting from the Republic's broader duty to promote cultural development, entailed in a future-oriented perspective. Ultimately, however, it is evident how these subdivisions – whether temporal, operational, or conceptual – reflect an overly stringent approach, hindering the broader goal of societal development and cultural enrichment.

The longstanding separation maintained by the legislature between these domains clearly illustrates a consistent view: immateriality, in all its forms, is seen as fundamentally distinct from the realm of cultural property. This perspective is again compounded when looking at the regional level, where numerous instances reflect what the Constitutional court, in a 2013 ruling, recognized as forms of "additional safeguarding," complementing the State's exclusive authority to identify cultural property under the Code's requirements[177]. Although the ruling specifically addresses to material heritage, its implications can be extended to our area of interest through analogical reasoning. In this regard, the Court argues that the absence of State classification does not preclude an item's residual cultural relevance to a territorial community. Within these limits, regional legislative power can be legitimately exercised – not in opposition to the State's role, but as a distinct and complementary form of protection, outside the traditional preservation/enhancement framework[178].

What practical challenges arise from the deep formal and ideological fragmentation within the Italian regulatory landscape? The next section

[177] Greater reflections in this respect are proposed in Chapter 3, Section 3.2.
[178] Constitutional Court, 17 July 2013, ruling no. 194.

will outline the key features (and notable gaps) in the administration and policy strategies for safeguarding the Italian concept of ICH.

4.1.2. Do the administrative structure and public policies have the capacity to safeguard ICH?

For a consistent examination of existing safeguarding mechanisms in Italian law, Part III of the 2003 Convention, devoted to States' role in domestic implementation, will serve as a key theoretical benchmark. In this respect, the Convention delineates three administrative approaches toward ICH: (i) its comprehensive safeguard, irrespective of list development, (ii) its identification and documentation, and (iii) its enhancement and promotion through "other (identified) measures."

On another note, this tripartition needs to be framed within the context of administrative functions relating to cultural heritage under Italian law. In this respect, the division is twofold: public administration duties are acknowledged under the functions of 'protection' and 'enhancement' of cultural property – in Italian, '*tutela*' and '*valorizzazione*.' Their description, provided both at regulatory level – from the legal elaborations of the late twentieth century[179] to the actual definition of the Code – and at the jurisprudential one[180], can be summarized as follows.

Tutela "consists of the exercise of functions and the regulation of activities aimed at identifying the properties constituting the cultural heritage and ensuring their protection and preservation for the purpose of public enjoyment" (Article 3, 2004 Code).

Valorizzazione "consists of the exercise of functions and regulation of activities aimed at promoting knowledge of cultural heritage and ensuring the best conditions for public use and enjoyment of it, including by people with disabilities, in order to promote the development of culture. It also includes the promotion and support of cultural heritage conservation efforts" (Article 6, 2004 Code)[181].

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[179] Specifically, Legislative Decree 31 March 1998, No. 112, already mentioned above.

[180] As in the case of several Constitutional rulings: see, by way of example, rulings no. 94/2003, no. 26 no. 9/2004.

[181] Added to this is also the definition of Art. 111, dealing with cultural property enhancement activities, which "consist of the establishment and stable organization of resources, structures or networks, or the provision of technical expertise or financial or instrumental resources, aimed at the exercise of functions and the pursuit of the purposes set forth in Article 6. Private entities may concur, cooperate, or participate in such activities."

The issue with these functions lies in their placement within regulatory boundaries that, as discussed in the previous section, are rooted in a tangible and proprietary understanding of cultural heritage. As the Constitutional court has remarked, protection "is primarily aimed at preventing the property from *degrading in its physical structure* and thus in its cultural content; and it is significant that the first activity in which protection is substantiated is that of *recognizing* the cultural property as such. [emphasis added]"[182] Enhancement, though largely consisting of non-standardized activities, still operates within these same regulatory confines.

The following sub-sections will elaborate on this point and present recent positions taken by Italian scholars and courts. In line with the international tripartition outlined above, each section will highlight the misalignment with Italy's regulatory frameworks. Simultaneously, the rise of new cultural policies focused on enhancement, increasingly in line with the international ICH framework, will be examined to assess potential future advancements in the domestic application of UNESCO's standards and principles.

The overall safeguarding of intangible cultural heritage

Safeguarding the intangible cultural heritage within a state's territory is the primary responsibility outlined Article 11(a) of the Convention. As previously remarked, this refers to the overall safeguarding of ICH, irrespective of whether it is included on any of the designated lists.

The first observation to make in this regard is that, in the absence of a legal definition of ICH, it is impossible to assign any legal relevance to this duty in Italian law. As mentioned, the Code of Cultural and Landscape Heritage notably lacks specific tools for this purpose.

The delegation of authority under Law 152/2024 could bring significant changes to this area, establishing principles that emphasize the promotion of intangible cultural expressions "in free, open, and *participatory* forms" (emphasis added). It also mandates the implementation of "measures to ensure the vitality and continuity of cultural practices, allowing communities, groups, and individuals to continually renew them in response to their environment, history, and interactions with one another and nature."

[182] Constitutional court, ruling no. 9/2004.

However, pending the formal implementation of this law, we can only acknowledge (and welcome) the legislature's evolving perspective, especially when contrasted with the equally recent stance held by the Council of State. The latter, when consulted on extending cultural restrictions to the intended use of cultural property, upheld the validity of existing preservation measures, rejecting further separation: "There is no diversity in the instruments of protection, as the measures established by the legislature to preserve the 'things' can also be effectively applied to safeguard the 'cultural activities' that take place for them and within them."[183]

This interpretation may appear somewhat at odds even with the historical position traditionally upheld by Italian legal scholarship, which maintains that "intangible cultural property has nothing to do with the legal provisions regulated in the Code: that is, with authorizations, concessions, exports, reconstructions, restorations, alienations, expropriations, preemptions, sanctions, etc."[184] This materially grounded perspective has often resulted in the complete exclusion of ICH from the legal framework governing cultural heritage, based on the argument that such elements require promotional rather than conservation measures. While it is true that enhancement activities could, in theory, address the specific needs of ICH, they remain functionally subordinate to the protection mandate outlined in Article 6(2) of the Code. This provision expressly requires that any enhancement initiatives must be compatible with, and must not compromise, protective measures. Furthermore, such initiatives may only be implemented in relation to cultural *property* that has been specifically identified and characterized as such.

Upon closer examination, this promotional approach aligns with the vision articulated in Article 9 of the Italian Constitution, which declares that the Republic *promotes* the development of culture, hence it has an active attitude in guaranteeing and arranging the necessary conditions for growth, stepping in to support the weakest cultural expressions and ensuring equal opportunities for all cultural voices across the national territory, while ultimately leaving the concrete evolution of culture to

[183] Council of State, Plenary Assembly, ruling no. 5/2023, cit.
[184] P. Carpentieri, G. Severini, "La ratifica della Convenzione di Faro «sul valore del patrimonio culturale per la società»: politically correct vs. tutela dei beni culturali?", cit., 259.

the free forces of expression[185]. It was observed, in this regard, that "culture needs freedom and support, i.e., economic contributions: the former is addressed by the Constitutions, the latter is taken care of by special laws authorizing expenditures for subsidies and grants or appropriate tax regulations for exemptions. "*But what does the Code of Cultural and Landscape Heritage have to do with it*?"[186]

This question can be approached from multiple angles. First, one might simply observe that the Code could serve as a legal foundation for the development of any cultural policies aimed at promoting intangible cultural heritage, as the refusal to adopt a conceptualization aligned with UNESCO standards suggests that, in the absence of such a framework, it is unlikely that any promotional policies for intangible forms of heritage will be enacted. As we shall see, this is exactly what occurs in the French context, where the inclusion of ICH in Article L-1 of the *Code du patrimoine* led to the introduction of several additional safeguarding measures. Should Italy enact a dedicated law for ICH, as indicated by the 2024 delegation, the matter would be addressed by appropriately situating this heritage within a specialized legal framework. As evidenced by the declarations of principle in Article 11 of law 152/2024, the legislature has already demonstrated no difficulty in outlining such a regime.

Second, one could argue that the Code is useless in this domain as long as an amendment to the concept of cultural heritage is inconceivable. If immaterial forms were recognized within the legal notion of cultural heritage, there would be no barrier to imagining protective measures for intangible or dematerialized assets – even extending beyond the scope of UNESCO definitions. These might include cultural practices, specific uses of buildings, or even the image associated with certain properties, as this study will continue to explore.

Nevertheless, the doctrinal debate in Italy seems to unravel along a binary approach that assumes the existing legal framework is both valid and unchangeable. This debate has crystallized into two exclusive alternatives: either placing immateriality *within* the Code's standards,

[185] In compliance with Article 33 of the Constitution that, instead, stipulates that the Republic guarantees the *freedom* of the arts and sciences. This doctrine refers to the thought of Italian scholar Giandomenico Romagnosi, spec. in *Scritti sull'educazione*, Florence, 1972. See, in addition, M. Ainis, *Cultura e politica. Il modello costituzionale*, Padova, 1991; M. Ainis, M. Fiorillo, *L'ordinamento della cultura. Manuale di legislazione dei beni culturali*, Milan, 2003; and also, the contribution of F. Rimoli, "La dimensione costituzionale del patrimonio culturale: spunti per una rilettura", in *Riv. giur. ed.*, no. 5, 2016.
[186] P. Carpentieri, G. Severini, *ibid*.

without touching its actual scope – that is, by providing safeguarding for ICH using the existing tools designed for material heritage; or placing immateriality *outside* the Code's purview, hence rejecting any overlap with the very notion of cultural property and exposing it only to (different) promotional forms of support. This latter approach is exemplified by cultural activities, whose promotion the Constitution entrusts to regional authorities. Yet, as noted, this constitutional attribution has not led to the development of a coherent or comprehensive regulatory framework.

In order to assess whether the Code is truly incompatible with a potential intangible dimension of cultural heritage, let us focus for a moment on the first of the identified alternatives.

Article 52 of the Code could provide a glimpse of such extensibility, as it deals with commercial activities conducted in areas of cultural value. As a general rule, it empowers municipalities to designate[187] public spaces of cultural value where commercial activities may be either prohibited or subjected to specific conditions. More specifically, the provision requires municipalities to also identify *premises*, regardless of ownership, in which *traditional craftsmanship and other traditional commercial activities recognized as expressions of collective cultural identity* under the 2003 and 2005 UNESCO Conventions take place. The aim is to ensure appropriate forms of promotion and safeguard, in compliance with the constitutional principle of economic freedom enshrined in Article 41. This must be done, moreover, "without prejudice to the provisions of Article 7-bis".

Bringing together the points discussed thus far, Article 52 appears to suggest that the only form of ICH recognized by the Code – that is, the so-called expressions of collective cultural identity referenced in Article 7-bis – may benefit from "ad hoc forms of promotion and safeguarding." However, at a closer look, it becomes clear that such measures, rather than tools for the protection of "traditional crafts and other traditional commercial activities" per se, are only meant to reinforce the protection of the physical properties in which such activities are *housed*. Let us recall, indeed, that under Article 7-bis intangible expressions must be represented by material entities possessing autonomous cultural value. Consequently, the enhancement of the activity carried out within a given building falls within the scope of what is commonly referred to as indirect protection, that is, the arrangements relating to the use and decorum of the property so that its cultural (material) entity is

[187] Prior to consultations with the superintendent.

preserved[188]. In Chapter 2, this topic will be addressed as an autonomous issue of interest, as these emerging "spaces of immateriality" can be considered (newer?) dimensions with significant implications at the operational level. For the purposes of this section, however, we can only infer that, with respect to UNESCO's definition, the provisions of Article 52 do not seem to highlight any relevant ground on which to anchor functional policies to address the issue of ICH.

The main hurdle outlined here closely mirrors the one previously encountered with law 77/2006 above (Section 4.1.1), whereby a reference to UNESCO-derived intangible *elements* was added in 2017, yet the law continues to operate within a predominantly material framework. Compounding this issue is the definition of 'safeguarding' provided by the Convention, which encompasses a broader range of activities aimed at ensuring the viability of ICH – not merely the protection of the final cultural product, but the preservation of the entire process of its creation, including its social, cultural, and historical dimensions, as well as its recognition within a given community. Indeed, this corresponds to the promotional function referenced above: a form of support that involves active engagement with the dynamic dimension of this heritage. However, without a regulatory framework that explicitly accounts for the specific features of ICH – such as the central role of communities, the significance of the creative process, and the inherently immaterial character of cultural expressions – it is unlikely that public authorities will be able to effectively fulfill this safeguarding function.

The notion that ICH requires only promotional or economic support was also affirmed by the Regional Administrative Court of Rome in the case law previously discussed[189]. Although the decision was later overturned, it is nonetheless notable that the Court endorsed a clear separation between cultural activities and cultural goods, reflecting a so-called "binary" system of protection: on one side, ordinary protective measures for tangible goods; on the other, promotional tools for intangible elements. The Court argued that such promotional measures could be grounded in specific provisions of the Code – specifically, Articles 7-bis and 52 cited above. However, whether these tools are truly embedded

[188] Indirect protection is addressed in Article 45 of the Code, which states that "The Ministry shall have the power to prescribe the distances, measures and other regulations aimed at preventing that the integrity of immovable cultural property be put at risk, that their perspective or natural light be damaged or *that conditions of the setting or decorous aspect of the buildings be altered*."

[189] T.A.R., Section II-quarter, 19 May 2021, no. 5864 – first instance of the case law ended with the Plenary Assembly of the Council of State no. 5/2023.

within the Code, as the ruling suggested, or instead fall under broader public policy responsibilities linked to Article 9 of the Constitution, the fact remains that no coherent legal framework currently exists to safeguard ICH as a whole. We now await the implementation of the 2024 delegation to finally address this gap.

The identification and documentation of intangible cultural heritage

Identification and documentation of ICH align with the provisions of Articles 11(b) and 12 of the Convention[190]. No specific method of enforcement is mandated; rather, these activities must be conducted "in a manner geared to its own situation" and undertaken "with a view to safeguarding."

There are two possible interpretations of the Italian public authority's approach to this requirement.

If we focus on the latter aspect – the general purpose of safeguarding – we might argue that identification, as a safeguarding measure, does not appear particularly effective. This argument is further supported by a practical consideration: the incompatibility between the Italian Code and the UNESCO framework for ICH arises not only from the Code's material definition of cultural property, but also from its methods for verifying or declaring cultural interest[191]. As a fundamental prerequisite for developing protection and enhancement measures, these identification procedures fall exclusively under the authority of State. There is no provision for participatory contribution from civil society or, more importantly in this context, from the communities that hold ICH elements[192]. Recognition of cultural interest occurs entirely within the public institutional apparatus, primarily through the exercise of so-

[190] (i) "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;" (ii) "draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory.

[191] Articles 12, 13, and 14 regulate the procedures for the *verification* of cultural interest, in the case of assets belonging to the State, the Regions, other territorial government bodies or public body and institution, and to private non-profit associations (essentially, what Article 10(1) provides), and the *declaration* of cultural interest, which occurs for the goods identified at Article 10(3).

[192] This issue is examined in greater depth in Chapter 3 of this study, which focuses specifically on the so-called subjective component of immateriality.

called technical discretion[193], that is, decisions based on technical-scientific criteria and expert judgment. On the other hand, judicial oversight is limited to instances where such administrative decisions turn out to be unreasonable, disproportionate, or illogical. Within this framework, community participation is relegated to an indirect role, mediated by a technical-scientific assessment that operates independently of the community's specific interests – namely, the commitment to transmitting, sustaining, and recreating intangible cultural expressions. As a result, one of the core principles of UNESCO's approach is effectively nullified.

Somewhat softening the rigidity of this perspective are the positions outlined in the recent guidelines for administrative and technical-scientific action on demo-ethno-anthropological and intangible cultural heritage (2025, mentioned above). In offering recommendations for the role of expert officials when imposing administrative constraints on (material) assets that embody expressions of collective cultural identity or elements of so-called ethno-anthropological interest, they emphasize a more nuanced approach. In these cases – guidelines state – the official acts both as a promoter and provider of technical-scientific support, as well as a mediator and network builder. A central and integral part of the intervention objectives is the construction or reinforcement of heritage communities and "communities of practice" as active agents in safeguarding efforts and related practices. The official is therefore responsible for encouraging their participation and integrating existing safeguarding and management initiatives, drawing on ethnographic methodologies. While the principle of technical-scientific discretion remains the cornerstone of investigative and procedural actions, the guidelines stress that dialogue, negotiation, and shared actions with the community are essential to the effectiveness and long-term sustainability of safeguarding processes.

[193] On the issue of technical discretion concerning the assessment of cultural interest, we refer to extensive Italian doctrine: among monographies, A. Rota, *Tutela dei beni culturali tra tecnica e discrezionalità,* Padova, 2002; among contributuons, A. L. Tarasco, "Beni culturali e sindacato giurisdizionale sulla discrezionalità tecnica", in *Foro Amm. T.A.R.*, 9/2004, 2443 ff..; G. Tropea, "Il vincolo etnoantropologico tra discrezionalità tecnica e principio di proporzionalità: "relazione pericolosa" o "attrazione fatale"?", in *Dir. proc. amm*., 2012, 718 ff..; G. Severini, "Tutela del patrimonio culturale, discrezionalità tecnica e principio di proporzionalità," in *Aedon*, 3/2016. Administrative case law has also repeatedly expressed on the subject: see, by way of example, Council of State, Section VI, September 23, 2022, no. 8167; Council of State, Section VI, March 3, 2022, no. 1510; Council of State, Section VI, September 10, 2021, no. 6253; Council of State, Section VI, September 4, 2020, no. 5357.

A notable example in this respect is the process that led to the declaration of cultural interest under the combined provisions of Articles 7-bis and 10(3)(a–d) of the Code for the property titled "*Palio di Siena. Bandiera di Mastuchino.*"[194] As previously noted, the Italian framework for recognizing expressions of collective cultural identity (that is, ICH) requires their association with a tangible asset recognized in itself as cultural property. This was the case with the aforementioned declaration, which aimed to safeguard a community's ritual and festive element by incorporating it into physical objects – specifically, flags and drums – that serve as embodiments of that expression. Setting aside the arguably illogical requirement to artificially anchor intangible cultural expressions to material objects, what stands out in this case is the participatory process that was initiated during the declaration procedure. It is particularly noteworthy, as illustrated in the attached report sheet, that the measure reflects both the values directly attributed to the objects by the community itself – albeit always mediated through the technical and scientific evaluations of the officials – and the specific use of the proposed assets aimed at sustaining the vitality of the associated practices and rituals, thereby avoiding their musealization. The acknowledgment that the process was carried out in a participatory manner represents an initial step toward a more substantive inclusion of the communities involved, despite the persistent shortcomings in the internal regulation of ICH[195].

It remains, nonetheless, a striking fact that these guidelines were only issued in 2025 – serving as a clarification of an administrative approach that, by now, should have been firmly established through a more substantive integration of the spirit of the UNESCO Convention on Intangible Cultural Heritage

It is also promising that law no. 152/2024 explicitly acknowledges the need to establish inclusive participatory processes (as stated in Article 11, paragraphs (h) and (i)). These processes aim to empower practitioners of intangible cultural elements to define and continuously update documentation and inventories within state databases.

[194] Decrees of 10 June 2024. The *Palio di Siena* had previously been proposed for inscription on the UNESCO ICH Representative List, but the candidature was rejected on ethical grounds, specifically concerning issues of representativeness and the exploitation of animals.

[195] Information retrieved in the relevant sheet at https://cultura.gov.it/comunicato/circolare-n21-del-16-aprile-2025-dg-abap-linee-guida-per-lazione-amministrativa-e-tecnico-scientifica-sul-patrimonio-culturale-demoetnoantropologico-e-immateriale (accessed 9 May 2025).

Additionally, the law calls for the streamlining of competencies and procedures within state administrations regarding ICH. At the same time, however, it is worth noting that Chapter I of the law, which focuses on historical reenactment events, establishes in Article 5 the creation of a 'Technical-Scientific Committee' composed of experts, academics, and institutional representatives appointed by the Ministry of Culture. This committee is tasked with "recognizing the qualification of historical reenactment bodies or events" and verifying their historical accuracy. No mention is found, instead, of the relevant communities or their potential involvement in this process – a significant omission that weakens the foundation for developing the broader ICH discipline.

On the other hand, cataloging and documentation, as general enhancement activities, are by no means underdeveloped. With the expansion and refinement of catalog systems and related documentation strategies, some initiatives even intersect with specific expressions of collective cultural identity, indirectly extending their benefits to certain forms of ICH. However, none of these initiatives explicitly function as inventories of ICH or of expressions of collective cultural identity. As we shall see, attempts to catalog intangible expressions face substantial limitations.

A latent tension should therefore be highlighted between the fragmented and uncoordinated nature of inventorying tools for ICH and the simultaneous advancement of diverse cataloging methods for cultural heritage in broader terms. This contrast suggests that a stronger focus on ICH dynamics could leverage an already well-developed framework of identification and documentation tools. This is precisely what is expected to take shape through the explicit mandate in the delegation of authority for the creation of a comprehensive "national list of intangible cultural heritage," along with two additional lists that mirror the tripartite structure of the international listing system[196].

The key assertion remains, however, that inclusion in inventories carries no inherent legal significance. As previously noted, the two domains of tangible and intangible cultural heritage and the associated activation processes are "similar but not perfectly coincidental," meaning that entry into catalogs and inventories does not automatically result in legal

[196] See letter (g), Article 11 of Law 152/2024. The additional two lists are a national list of ICH in need of urgent safeguarding and a list of good practices for safeguarding ICH. As noted by A. Gualdani (cit., 2024), at this stage the law makes no reference to the formal procedures for registration, raising concerns about the proper inclusion of relevant communities in decision-making processes.

consequences. Instead, it raises questions about the effectiveness of related cultural policies in enhancing visibility within the sector.

As outlined in the latest report on the implementation of the 2003 Convention and the status of elements inscribed on the Representative List (2021)[197], two major national inventories can be identified: (i) the National Catalogue of Cultural Properties, as provided by Article 17 of the Code, managed by the Central Institute for Cataloguing and Documentation (ICCD)[198]; (ii) the database of ICH, which, as of 2019, is complemented by the "MEPI" tool, the so-called Intangible Cultural Heritage Elements Inventory Module, implemented by Service I - Coordination and UNESCO Office of the General Secretariat of the Ministry for inventorying ICH elements under the 2003 UNESCO Convention.

Nonetheless, an examination of the relevant websites reveals a fragmented and complex landscape, making it difficult to gather clear or meaningful information.

In the first case – the National Catalogue of Cultural Properties – two access systems are available: one with restricted access, the so-called SIGECweb (the Ministry's General Information System for Cataloguing)[199], and the other with open access, with the aim of "contributing to and boosting the digitization, full use and enhancement of the resources available online"[200]. A review of the latter's database reveals that cataloged cultural properties are divided into categories such as historical, archaeological, photographic, architectural and landscape, naturalistic, numismatic, scientific, technological, musical,

[197] Periodic report no. No. 0092/Italy, available at https://ich.unesco.org/en-state/italy-IT?info=periodic-reporting (accessed 9 January 2024).
[198] So-called *Istituto Centrale per il Catalogo e la Documentazione*, see http://www.iccd.beniculturali.it/ (acessed 9 January 2024).
[199] http://www.sigecweb.beniculturali.it/ (accessed 9 January 2024).
[200] https://www.catalogo.beniculturali.it/ (accessed 9 January 2024).

and "demoethnoanthropological" properties[201]. The latter are further classified into movable and *intangible* goods[202].

From this structure, we can infer that in the first cataloging system: (i) intangible cultural properties are categorized as a sub-type of 'demoethnoanthropological goods,' hence no independent inventory for intangible cultural heritage is provided. This is compounded by the fact that, as noted above, this is only the catalog accessible to the general public, thus also plausibly incomplete. (ii) Interestingly enough, while some intangible goods are recorded, their descriptions often go beyond the legal definition in Article 7-bis, covering practices unrelated to any material support. This is because they are not legally relevant goods, but rather anthropological catalog entries – which leads us back to point (i): we are not dealing with an inventory of ICH but with a cataloging of so-called intangible goods in the anthropological sense. The lack of coordination between the two disciplines and operational methods employed contributes to the complexity highlighted.

As for the database of ICH, even more complex articulations emerge. The web page[203] proposes three different sources: (i) the "Integrated Project for Intangible Cultural Heritage and Cultural Diversity" (PACI), coordinated by the ICCD together with the Central Institute for Sound and Audiovisual Assets (ICBSA) and the Central Institute for Intangible Heritage (ICPI); (ii) the project "Intangible Cultural Heritage: The Inventorying of Intangible Entities in Audiovisual Documents," aimed at identifying "the Italian ICH present in audiovisual sources of demoethnoanthropological interest, available on the web or in public or private cultural places"; (iii) Italy's intangible cultural heritage inventories under the 2003 UNESCO Convention, developed following the PACI project. As for the latter, an inventory and a dedicated catalog exist for items already inscribed on the UNESCO Representative List[204].

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[201] The "demoethnoanthropological" interest is among those acknowledged in Article 2 of the Code. However, as previously noted, this recognition is limited to its manifestation in movable or immovable objects, thereby conforming to the standard framework. For further discussion on this point, see A. Catelani, S. Cattaneo (eds.), *I beni e le attività culturali*, cit., particularly 5 ff., and more recently, M. Timo, *L'intangibilità dei beni culturali*, Turin, 2022, 93 ff.

[202] G. L. Bravo and R. Tucci, in *I beni culturali demoetnoantropologici*, Rome, 2006, 35, observe that these assets are notably complex, as they lack a permanent presence in a specific territory. Instead, they manifest as performative acts on both determined and indeterminate occasions, making them unobservable outside these contexts.

[203] http://paci.iccd.beniculturali.it/paciSito/ (accessed 9 January 2024).

[204] http://www.iccd.beniculturali.it/it/780/inventari-convenzione-unesco-2003-dal-2019 (accessed 9 January 2024).

However, upon review, this list includes only six entries – falling short of encompassing all elements internationally registered, which should, according to the Convention's criteria, be reflected in a national inventory. Nor does it capture the full range of intangible heritage present across Italy.

In this context, it is also worth noting that, in the nomination forms for elements now inscribed on the Representative List, the requirement to document their inclusion in a national inventory (point no. 5 of the form) is not fulfilled through reference to a formal inventory – since no such inventory currently exists – but rather by citing a cataloging tool known as the MEPI form (Module for the Inventory of Intangible Cultural Heritage Elements)[205].

It is readily apparent that accessing these disparate inventories, each cataloging a specific aspect of intangible heritage (with only one of them being created "under the 2003 UNESCO Convention"), is challenging and counterproductive. The various and often indirect interpretations of intangible heritage found across regulatory sources contribute to a fragmented landscape, leading to issues of limited visibility and accessibility. This fragmentation is further exacerbated by the existence of additional catalogs managed by different ministries, as noted in the above-mentioned Report. Among them are the inventory of "production techniques, agricultural practices, and traditional Italian food practices," and the inventory of "rural practices and traditional knowledge," both overseen by the Ministry of Agriculture, Food and Forestry Policies[206].

It is also important to recall that the Convention calls for participatory approaches in inventory procedures (see Article 11(b)). In their periodic reports, States must explain how communities are involved in identifying, defining, and updating the intangible cultural heritage included in inventories (section B(2)(g)). In its most recent report, Italy offered only a vague and circular response: "communities identify and define their ICH to be included in the inventories and participate in its updating in close relation with professional anthropologists who work in the field." No further details are provided regarding the actual *methods* used to achieve this.

[205] The latest nomination form for the so-called Practice of Opera Singing (inscribed in 2023), reads at point 5(i)-*Name of the inventory(ies) in which the element is included*: "The MEPI - Module for the inventory of the elements of the Intangible Cultural Heritage - is a form, adopted in 2019, to fill following criteria explained in the Guidelines available on the website of ICCD - National Institute for Cataloguing and Documentation (ICCD)."
[206] See the above Report (note 186), 10.

We thus return to the core tension highlighted. As emphasized, Italy engages actively in identification efforts, with numerous inventories and cataloging projects often updated through evolving documentation methods[207], and various initiatives also underway at regional and local levels[208]. However, when focusing specifically on the UNESCO-mandated inventory, a different picture emerges. The many existing lists, each addressing different aspects of intangible heritage with varied approaches, obscure a clear understanding of full scope and status of Italy's intangible cultural heritage. Overall, the landscape of inventories remains marked by fragmentation, limited accessibility, and geographical or functional gaps.

Ultimately, it is hard to escape the conclusion that blurred definitions at the regulatory level lead to equally blurred identification at the operational one.

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[207] Consider, for instance, the EU-funded project "I-treasures - Capturing the Intangible Cultural Heritage and Learning the Rare Know-How of Living Human," which employed digital technologies to create a platform capable of documenting, providing access to, and creating new knowledge about ICH elements and practices that also come from Italian communities. The final report of the project, which is now concluded, is available at https://cordis.europa.eu/docs/projects/cnect/6/600676/080/deliverables/001-iTREASURESd13itreasuresfinalreportfinal.pdf (accessed 9 January 2024).

[208] An in-depth discussion of this is beyond the scope of this section. However, for the sake of completeness, we can recall here the Atlas of Folk Festivals in Piedmont Region (*Atlante delle Feste Popolari del Piemonte*) www.atlantefestepiemonte.it/ (accessed 9 January 2024); the Register of Intangible Heritage of Sicily Region (*REI - Registro delle Eredità Immateriali della Sicilia*) https://www.regione.sicilia.it/istituzioni/regione/strutture-regionali/assessorato-beni-culturali-identita-siciliana/dipartimento-beni-culturali-identita-siciliana/altri-contenuti/reis (accessed 9 January 2024); the inventory "Intangible search", collecting the intangible heritage of the Alpine regions carried out by the Lombardy Region in collaboration with local partners https://www.intangiblesearch.eu/home_page.php?db_name=intangible_search&lingua=inglese (accessed 9 January 2024); the Register of Intangible Heritage of the Lombardy Region https://www.regione.lombardia.it/wps/portal/istituzionale/HP/DettaglioServizio/servizi-e-informazioni/Enti-e-Operatori/Cultura/Beni-culturali/registro-eredita-immateriali-lombardia/registro-eredita-immateriali-lombardia , and the Archive of Ethnography and Social History, https://www.regione.lombardia.it/wps/portal/istituzionale/HP/DettaglioServizio/servizi-e-informazioni/Enti-e-Operatori/Cultura/Beni-culturali/aess-operatori/aess-operatori (accessed 9 January 2024); the Inventory of Campania's Intangible Cultural Heritage - IPIC, established by Regional Law no. 38/2017 https://cultura.regione.campania.it/ipic (accessed 9 January 2024). Similarly, the Molise Region has also taken steps within the framework of the Interreg IPA CBC Project '3C' (Italy-Albania-Montenegro) to create a Register of Intangible Heritage, serving as an interactive resource for communities, researchers, and social actors engaged in heritage processes (see http://ichmolise.eu/ accessed 9 January 2024).

Other measures to safeguard intangible cultural heritage

The Convention's Articles 13 and 14 establish key responsibilities for States regarding ICH after its identification. These responsibilities span three primary domains. (i) The legal-administrative domain requires States to provide financial support, develop strategic plans, and create cultural policy development strategies. (ii) The institutional domain focuses on creating dedicated bodies. (iii) The training domain encompasses both educational programs and initiatives to build relevant capabilities and expertise.

We have already discussed the limited scope of enhancement activities as outlined in the 2004 Code, emphasizing how the open and dynamic notion of enhancement still clashes with the regulatory framework devoted to 'cultural property' and 'expressions of collective cultural identity'. Here, however, we will focus on more recent cultural policy initiatives that appear especially aligned with international standards. While they may raise questions regarding their coherence with the domestic legal order, they nonetheless convey an advancement worthy of attention[209].

The most significant example in the first regard is the implementation of several safeguarding plans for Italian ICH elements, regardless of whether they are inscribed on the Representative List. To this case, because of its significance on an international scale and to give due space to the account of the author's personal experience in drafting of one of those plans, we refer to a dedicated sub-section below.

Law no. 77/2006, already mentioned in Section 4.1.1, is also a notable example. Despite the limited development prospects of the later added "elements of ICH," the provision still represents the most significant legal source for cultural policy initiatives dedicated to its safeguarding.

More recently, these tools have been complemented by the establishment of a so-called UNESCO National Observatory for Intangible Cultural Heritage within the Ministry of Culture, in consultation with the Ministry of Agricultural Food and Forestry Policy

[209] This, notwithstanding the developments foreseen in Law 152/2024, were specific attention is provided to, among other things, educational pathways in schools and universities, integration of ICH assessment into spatial planning, streamlining and simplifying national regulations on organizing events linked to ICH and related craft activities, supporting the development of professional roles and expertise, and establishing a forum of professional associations dedicated to safeguarding and enhancing ICH.

and the Ministry of Economy and Finance (Law No. 178 of December 30, 2020)[210]. The newly established body is expected to "promote the broadest understanding of the importance of intangible cultural heritage as a major factor of cultural diversity and a guarantee of the development and enhancement of intercultural dialogue,"[211] and support an integrated vision of the different types of cultural heritage (tangible, intangible and natural). In addition, it will monitor the state of those elements, conduct data analysis and research studies on the topic, and deal with those dissemination and training activities cited above, including the fostering of dialogue with and between communities, the dissemination of good practices, and the circulation of information and exchanges between professionals in the field.

These are all activities that would appropriately fall within the previous sub-section on the *overall* safeguarding of ICH, except that the Observatory, by explicit provision, is dedicated only to those elements *already included* in the relevant lists, thereby focusing on a narrower and more clearly defined scope of heritage. In this respect, it should be remembered that the same issue was raised in the analysis of Law No. 77/2006 and Legislative Decree No. 34/2020 (see previous section), where the consideration of only those elements already enrolled was mentioned as potentially affecting both the regulatory and the operational level. Currently, a Project for the Observatory of UNESCO Intangible Heritage is available[212], which investigates how the body should operate concretely. It would be especially valuable for this body to incorporate, within its operational framework, mechanisms for studying and monitoring the evolution of ICH, as well as to serve as a facilitator for dialogue and meeting space for the integration of holding communities into administrative processes.

Owing to time mismatch, Italy's Periodic Report makes no mention of such Observatory. Interestingly, instead, the Report indicates the development of ecomuseums as the primary strategy for safeguarding

[210] The Observatory was formally established in Rome on January 17, 2022.
[211] See interministerial decree no. 314, July 8, 2021 stipulated between the Ministry of Culture, Ministry of Agricultural Food and Forestry Policy and the Ministry of Economy and Finance.
[212] The project was developed by Fondazione Scuola dei beni e delle attività culturali in 2022. See the report *Il patrimonio immateriale UNESCO. Il valore degli elementi italiani iscritti alla Lista rappresentativa*, 2022, Fondazione Scuola dei beni e delle attività culturali, https://pubblicazioni.fondazionescuolapatrimonio.it/Il-patrimonio-immateriale-UNESCO-Il-valore-degli-elementi-italiani-iscritti-alla-Lista-rappresentativa/ (accessed 9 January 2024).

intangible cultural heritage under section B.3 ("other safeguarding measures"). The interest lies in that ecomuseums systems are regional and local tools – the Report itself speaks of "granting management and decision-making autonomy to the regions." These systems, which will be explored in greater detail in Chapter 3, serve as a significant case study due to their local focus and the incorporation of a robust intangible component in developing participatory cultural practices. It should be noted, however, that that ecomuseums are not designed solely for intangible heritage. Instead, they integrate intangible heritage as part of a broader, holistic approach to cultural heritage within the community's territory. Therefore, ecomuseums should not be seen as a direct strategy *for* ICH safeguarding, but rather within a posthumous reflection on how they may contribute, indirectly, to effectively safeguard ICH.

Also noteworthy, as a final note, is the recent launch, in 2023, of a Capacity-building course on the safeguarding of ICH in Italy, organized by the Ministry of Culture in collaboration with the UNESCO Regional Bureau for Science and Culture in Europe. Targeted at communities holding listed elements, relevant institutions, civil society organizations, researchers, and practitioners, this course is a new initiative in Italy, as it directly and primarily engages with those 'CGIs.' Unlike UNESCO research centers and chairs[213], which mainly involve the academic and expert fields, this program offers a unique opportunity for training, particularly for participants who are personally involved in transmitting elements of ICH, as well as for exchanging experiences, challenges, and good practices of safeguarding. Among the latter, precisely, is the circulation of safeguarding plans that several Italian communities have been putting into practice for the past few years.

The drafting of a safeguarding plan[214]

Among the "other measures for safeguarding" to which Article 13 of the Convention is devoted, paragraph (a) establishes that States shall endeavor to "adopt a *general policy* aimed at promoting the function of the intangible cultural heritage in society, and at *integrating* the

[213] Consider, for instance, the UNESCO Chair on Intangible Cultural Heritage and Comparative Law established within the University of Rome Unitelma Sapienza.

[214] This paragraph is based on a previous article by the author. Refer to A. Mussatti, "UNESCO safeguarding plans: integrated planning strategies for the (ever-expanding) cultural heritage sector", in Jitka Cirklová (ed.), *Prague – Heritages. Past and Present – Built and Social*, AMPS Proceedings Series, 2023.

safeguarding of such heritage into *planning programmes*". This should be done, paragraph (d) adds, through the adoption of "appropriate legal, technical, administrative and financial measures" that can ensure the transmission, access, and training in the management of such heritage.

The words underscored in italics shed light on the limited prescriptive force of these provisions. States are asked to adopt a "general" policy – we can assume, then, this can encompass a broad range of potential actions. Such policy, moreover, should "integrate" the safeguarding of ICH into planning programs – another crucial insight into how far policies can extend and, most importantly, into how ICH safeguarding plans are framed in terms of their *incorporation* into existing administrative measures rather than their standalone *creation*.

On the other hand, nothing is specified, not even in the Operational Directives, about what is meant by "appropriate" measures and what would be the implications of avoiding any safeguard planning. This issue is significant for two primary sets of reasons.

The first is a historical consideration rooted in the evolution of the Convention itself. Its immediate antecedent, the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity[215] required the submission of a detailed action plan outlining both legal and practical measures for the preservation, protection, support, and promotion of the identified heritage over a ten-year period. This included comprehensive account of the planned measures and their implementation[216]. By contrast, the 2003 Convention mandates safeguarding plans only for elements in need of *urgent* protection[217]; in all other cases, such planning remains merely a general recommendation.

Whether developed as stand-alone documents or integrated into broader national policies, safeguarding plans are only required to align with the principles of the Convention and ensure inclusive participation across all sectors of society (OD, para 174). So it is stipulated in paragraph 171, which deals with the possibility of ICH being involved in States'

[215] See Section 2.2 above.
[216] UNESCO Doc. 155 EX/15 (August 25, 1998), Annex IV, 4. Report by the director-general on the precise criteria for the selection of cultural spaces or forms of cultural expression that deserve to be proclaimed by UNESCO to be Masterpieces of the oral and intangible heritage of humanity. https://unesdoc.unesco.org/ark:/48223/pf0000113113 (accessed 19 August 2023).
[217] As provided by the Operational Directives, para I.1, criterium U.3 for inscription on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding.

development plans, policies, and programs. In the same vein, the Overall Results Framework for the 2003 Convention[218] treats safeguarding plans as possible, additional, and non-mandatory tools that can often emerge from broader national plans aimed at the *general* safeguarding of ICH[219]. Related to that, moreover, is the fact that safeguarding plans are also expected to cover non-listed elements[220]. This, on the one hand, is undoubtedly in line with the approach of the 2003 Convention, which seeks to protect ICH beyond single inscriptions. On the other side, however, it suggests that those plans have no binding or superordinate force throughout the inscription process, so they do not represent any standard of evaluation, contrary to what happens to (tangible) heritage sites when nominated for inscription on the World Heritage List.

This allows us to touch on a second element of consideration. The Operational Guidelines for the Implementation of the World Heritage Convention require that each nominated property be supported by a management plan or equivalent documented framework detailing the measures for preserving its Outstanding Universal Value, ideally employing participatory methodologies[221]. Accordingly, para 112 to 118-bis align with this requirement by stipulating that the submitting State adopt a proactive approach to property preservation, integrating the candidate property into a comprehensive management system that ensures thorough, practical, and participatory protection measures. Indeed, management plans for UNESCO World Heritage Sites are not only mandatory prerequisites for inscription, but are also embedded within an integrated approach to cultural heritage that promotes the conservation of the nominated property within a so-called 'wider setting' – a comprehensive system of interrelated tangible and intangible elements, addressing spatial, environmental, social, and developmental aspects, and developed collaboratively with relevant stakeholders through appropriate governance structures.

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[218] Resolution 7.GA 9, 2018.

[219] This is the case, for instance, with Spain's National Plan for the Safeguarding of Intangible Cultural Heritage, 2011, see https://www.culturaydeporte.gob.es/planes-nacionales/dam/jcr:73de51a5-978f-47c4-a67a-42b20e09fe41/08-inmaterial-eng.pdf (accessed 19 August 2023).

[220] See the Overall Result Framework, para 11.2: "Assessment according to: [...] National or sub-national strategies and/or action plans for ICH safeguarding are established or revised and are being implemented, including safeguarding plans for specific elements, whether or not inscribed."

[221] The rule draws on UNESCO's 2002 Budapest Declaration, which aims to strengthen conservation activities and ensure an appropriate and equitable balance between conservation, sustainability and development.

It appears, therefore, that the mandatory character of these plans not only reconfigures the role of State Parties, but that the prescribed level of detail concerning their structure and scope constitutes a substantial divergence from the approach adopted within the ICH domain.

Doubts arise, then, as to whether the problem with safeguarding plans is more of a formal nature. As Christian Hottin argued a few years after the development of the first version of the Operational Directives[222], safeguarding plans can indeed be (mis)interpreted as unnecessary when not directed toward those elements of ICH that specifically require certain safeguards, as they are included in the urgent list. This is because, on closer inspection, the issue lies in the ambiguity that still persists at the level of national administrations as to what 'safeguarding' versus 'conservation' means (and, as a result, how the problem stems essentially from a materialistic conception of the conservation function itself). If 'safeguarding' is replaced with 'management,' it is easier to understand how such plans can represent an effective tool for developing effective ways to safeguard ICH, providing a channel for circulation and exchange that goes even beyond the Register of good practices.

At the national level, the flexibility and non-binding character of these rules have resulted in a scarcity of case studies and limited exchange of experiences, thereby affecting compliance with safeguarding standards. In this context, the emerging trend in Italy of adopting ad hoc plans for both listed and unlisted ICH elements merits closer examination.

It is therefore essential to ensure these plans are widely disseminated to facilitate the exchange of good practices and relevant experiences, providing States with concrete models to emulate. Otherwise, efforts to develop long-term safeguarding strategies for ICH risk remaining isolated and being absorbed into broader frameworks, relegating ICH to a subsidiary role within the wider setting of comprehensive site management. To combat the loss of visibility of ICH, as well as its fossilization in the Representative list, it is essential to reflect on factors other than exceptionalism *per se* – a criterion explicitly rejected by the drafters of the lists, yet one that frequently re-emerges in the rationale underlying nominations. Instead, emphasis should be placed on "the

[222] C. Hottin, "Sept ans, l'âge de raison. Dynamiques et enjeux du patrimoine culturel immatériel", in Id. (ed.) *Le patrimoine culturel immatériel. Premières expériences en France*, Paris, 2011, 32-33.

quality of a project able to translate the Convention's safeguarding principles into concrete actions"[223].

Coming to the case study, in 2022, the author of this thesis participated as a research collaborator with Fondazione Santagata for the Economics of Culture, based in Turin, Italy, in assisting an Italian community belonging to a multi-state inscribed ICH element with the drafting of its safeguarding plan[224]. Specifically, the community received financial subsidies under Law No. 77/2006[225] to set out coordinated measures on the basis of the 2003 Convention's foundational principles (i.e., establishing transmission modalities, fostering research activities, setting up economic and sustainable development goals, defining approaches for participatory management, etc.). It is important to highlight from the outset that this plan is a tool adopted by the community for its element (often with expert assistance, as in this case) and is subject to final approval by the relevant administrative authority. This underscores its bottom-up nature, raising significant questions regarding the legal implications in the regulation of urban and cultural territories. This topic opens up a huge body of discussions that deserve a separate mention: it will be addressed in Chapter 3 of this study[226].

Returning to the case at hand, neither Law no. 77/2006, nor other Italian legislative measures focus on safeguarding plans[227]. In light of the misalignment highlighted in Section 4.1.1 between sites, elements, and related means of protection, Law 77 addresses only *management* plans in Article 3, in a direct line with the plans set forth in the 1972 Convention.

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[223] See C. Hottin, op. cit., 54: "Car c'est la qualité des dossiers, en définitive, qui seule compte, non point celle de l'élément, mais celle de la réflexion qui a présidée à l'élaboration du plan de gestion : là doit être le seul chef-d'œuvre, celui de la mise en œuvre d'un projet qui traduire en actions concrètes les principes de sauvegarde de la Convention."

[224] The community is the Hunting Horn Players (so-called *Equipaggio della Regia Venaria*). The element, nominated by France, Belgium, Luxembourg, and Italy, is the Musical Art of Horn Players, described in Nomination file No. 01581 for inscription in 2020 on the Representative List as an instrumental technique linked to singing, breath control, vibrato, the resonance of place, and conviviality. The plan is accessible here https://www.fondazionesantagata.it/pubblicazioni/piano-di-salvaguardia-per-larte-musicale-dei-suonatori-di-corno-da-caccia/ (accessed 3 February 2025)

[225] See Section 4.1.1 above.

[226] Specifically, Section 3.2.2.

[227] The only exception is the Circular of the Ministry Secretary General no. 17 of May 3, 2018, aimed at establishing criteria for allocating funds for ICH support actions and which refers to a "plan of safeguarding measures" among the evaluation criteria for funding requests: "a plan of safeguarding measures that identify the phases of action at local, national and international levels," together with a project for its implementation, increases chances of reception.

While this may seem a formal inconsistency, it has concrete implications. Much thought has already been devoted to the subordinate connection that binds the two Conventions and their respective scopes of application at the international level. As a result, issues of hierarchy and coordination are also likely to arise in the development of associated management and safeguarding plans.

At the national level, the discrepancy between the growth of comparable initiatives on Italian territory – which is indeed a rising trend[228] – and the scarcity of regulatory frameworks on which to rely is equally evident. In this regard, it should be emphasized that, in the case of the element at issue, the other states participating in the nomination (France, Belgium, and Luxembourg) did not finance any similar initiative for communities to endow themselves with such a plan[229]. This was only possible due to the vagueness and lack of prescriptiveness of the related provisions, which resulted, ultimately, in little interstate coordination and few opportunities to extend safeguarding plans to transnational cooperation between communities in the four countries. *A fortiori*, then, it becomes crucial to assess the key elements and methodologies used in structuring such a safeguarding plan.

The first methodological approach dealt precisely with the noted disproportionality between sites and elements, as the extensive material available on management plans allowed for an initial analogical reasoning to outline the project's foundational principles, scope, and ultimate objectives. Specifically, the World Heritage Resource Manual "Managing Cultural World Heritage," the Italian "Model of Management"[230], Law No. 77/2006, and pertinent case studies were consulted. At the same time, the research team also considered capacity-building programs and workshop materials accessible through UNESCO's ICH portal, which served as the basis for conducting community discussions, interactive role-playing, games, and more structured work on the plan's construction with the community. This has been particularly useful in stimulating a critical and creative approach

[228] This was also one of the central topics addressed in the Capacity-building course organized by the Italian Ministry of Culture and the UNESCO Regional Bureau for Science and Culture in Europe, mentioned at the end of previous section. Safeguarding plans have been also developed, among others, for the element *Opera dei Pupi* (Sicilian puppet theatre), UNESCO ICH since 2008, or the *Saper fare liutario cremonese* (Traditional violin craftsmanship in Cremona), recognized in 2012.

[229] Refer to further comments on the French approach in the following Section.

[230] See Italy's 2004 Guidelines of the Advisory Commission for UNESCO Sites' Management Plans.

within its members. As a matter of fact, UNESCO's repository of capacity-building materials contains units specifically devoted to the development of safeguard plans[231], which are indicative of the organization's willingness to somehow promote the drafting of such plans even for elements that do not require urgent safeguarding (no specific reference is made to this question of emergency within such materials, contrary to what the Operational Directives prescribe). There, a step-by-step guide is provided to facilitate formal and non-formal discussions on the plan's drafting. In line with this, the team at Fondazione Santagata collaborated with the community to create a three-phase plan that covers all identified steps.

The plan now consists of:

(i) A critical analysis of the status of measures in place to identify gaps and areas for improvement. At this stage, brainstorming activities, workshops, and role-plays proved crucial in identifying stakeholders and associated level of involvement, the essential values and functions, and existing safeguard measures, along with a critical assessment to identify the most urgent shortcomings to be addressed. Mapping these data was instrumental in confirming what the Operational Guidelines for Management Plans already indicated: namely, that cultural policy plans must necessarily extend their reach to encompass the broader underlying context. We refer here not only to possible additional values to be preserved (e.g., the perspectives highlighted by young people in the community at issue) but also to the specific needs of other heritage forms, the surrounding landscape, cultural and economic activities, and the relevant stakeholders involved. In this case, moreover, the presence of the Residences of the Royal House of Savoy, listed on the UNESCO World Heritage List in 1997, called for the plan to proceed on several fronts: on an individual level and related ramifications, to safeguard the ICH element, and, more generally, to collaborate with the broader target *area*.

(ii) The definition of activities aligned with five key objectives from the nomination file, ranging from transmission of musical practices to international collaboration[232]. Based on the community's assessment of

[231] UNESCO ICH Training materials, Units 45-47, *Developing safeguarding plans*, https://ich.unesco.org/en/contentoftrainingmaterials-00679 (accessed 9 January 2024).
[232] Section 3.B: 1. transmitting the musical practice to new players; 2. strengthening research and documentary processing to enrich the repertoire and knowledge; 3. promoting

shortcomings, each area of focus was assigned an overall long-term goal, followed by detailed targets and a list of concrete safeguarding measures to be implemented. Efforts have been made particularly in the definition of the latter as a way to emphasize the need for collaboration and cooperation among stakeholders and heritages involved.

It soon became clear that the gap between legal and policy frameworks and actual practice is too wide to allow for effective collaborative safeguarding. In this respect, the national context mirrors the international one. For example, Article 2 of law no. 77/2006 prioritizes interventions for assets included in the perimeter of UNESCO sites and elements, thus presumably for cultural properties and practices *other* than the one listed. Article 3, in turn, highlights the complementary role of other administrative programs (such as those related to tourism, urban planning, and sustainable development) and outlines legal tools available to coordinate and achieve broader goals of integration. Specifically, the agreements referred to in Article 112(4) of the Code provide an opportunity to "define common strategies and objectives for enhancement, as well as to develop the resulting strategic cultural development plans and programs, with respect to cultural property of public relevance."

However, the limited number of projects addressing intangible heritage, coupled with scarce opportunities for exchange among them, rendered implementation particularly challenging. In the case at hand, challenges during the drafting phase largely stemmed from (i) the absence of clear regulations on ICH and the lack of dedicated tools; (ii) limited knowledge of the element at the local context, which constrained stakeholder collaboration; and (iii) the localized nature of the heritage and the shortage of personnel able to support it consistently.

(iii) The systematic monitoring and evaluation of outcomes using predefined indicators and benchmarks.

The project spans three years, with periodic assessments guided by a chronogram and based on both qualitative and quantitative indicators to measure its impact.

In its "posthumous" function, after identification of the ICH element (possibly resulting in a national or international inventorying), the

intangible cultural heritage through the horn; 4. extending revitalization actions to other regions and fostering international collaboration; 5. envisaging support actions for safeguarding.

safeguarding plan becomes a pivotal tool to avoid crystallizing heritage in its very identification process. The plan's time-limited nature, requiring ongoing monitoring and revision, helps ensure continued engagement beyond mere listing. Although not legally binding, it represents a soft regulatory tool, developed with and by communities, and can function as a practical framework for managing ICH. If widely adopted, such plans could meaningfully contribute to broader territorial management, thanks to their integrated approach that emphasizes context and community leadership in heritage strategies.

This prompts the question of whether a shift in focus – from elements to practices – would yield greater effectiveness. Including safeguarding practices instead of elements in the relevant lists helps address issues of fossilization, stagnation, and decontextualization, while also fostering the circulation of knowledge. And finally, safeguarding practices may themselves constitute intangible heritage, holding a dual function of both soft regulatory tools *and* cultural elements. In this regard, it would be valuable to take a closer look at the strategies developed by the Council of Europe – not only at the legislative and policy level through the Faro Convention, but also through initiatives that promote, share, and disseminate good practices and shared action toward cultural heritage management, such as Strategy 21 and relevant good practices[233] and the Herein system[234].

As Council of Europe expert Prosper Wanner has observed, this shift entails prioritizing the documentation of practices and communities over heritage objects themselves, thereby offering a more dynamic and participatory model of value creation:

> "Heritage can also be temporary – once listed, it becomes heritage for a lifetime. Instead, there should be the freedom to belong to it or move away from it. This is the essence of living heritage: a dynamic, evolving process that shifts in tandem with society and the community that acknowledges it."[235]

[233] Recommendation of the Committee of Ministers to member States on the European Cultural Heritage Strategy for the 21st century, Council of Europe, CM/Rec(2017)1. Good practices available here https://www.coe.int/en/web/culture-and-heritage/strategy-21-good-practices (accessed 27 January 2024).
[234] See the platform here https://www.coe.int/en/web/herein-system/ (accessed 27 January 2024).
[235] Interview held on 8 November 2022, online.

4.2. A comparative glance: France

4.2.1.Is there a legal notion of ICH in France?

In its legal definition of cultural heritage, the French *Code du patrimoine*[236] upholds a similarly material perspective, consistent with the approach previously outlined in Italian law.

> Within the meaning of this code, heritage refers to all property, whether immovable or movable, belonging to either public or private ownership, that presents historical, artistic, archaeological, aesthetic, scientific, or technical interest. (Article L-1)

The categories of public interest that have historically guided cultural heritage protection – centered on the preservation of tangible artifacts and grounded in an ownership-based approach – have shaped the prevailing understanding of cultural property[237]. As a result, any intangible dimension is typically safeguarded only through its material traces[238]. By contrast, from the perspective of the subjects, common and shared interests – essential to ICH in the international framework – fall outside the scope of this Code, largely due to persistent challenges in assigning any proprietary title to such elements[239].

And yet, while the French legal framework closely mirrors the Italian regime, it introduces a formal distinction that offers valuable insight into

[236] In this section, the Code.
[237] P. Guillot, *Droit du patrimoine culturel et naturel*, Paris, 2006, spec. 7 ff.
[238] "Cette direction de travail essentiellement concentrée sur la question de la conservation matérielle des biens, fait que la protection de l'immatériel (valeurs culturelles, intérêt d'art et d'histoire) est exclusivement posée, pensée en termes de protection du support matériel. C'est en préservant la trace, qu'on en transmet la charge culturelle ou mémorielle", F. Benhamou, M. Cornu, A. Maget Dominicé, "Du patrimoine tangible au patrimoine immatériel : les enjeux des lignes de partage entre domaine public, communs et domaine privé", in *ANR PROPICE*, 2012, 8.
[239] Marie Cornu moreover observes that several circles can be identified within this idea of a "community of interests": "Le patrimoine immatériel est un patrimoine universel, il appartient à tous. En cela, il engage l'intérêt général de l'humanité [...] Mais il est aussi un domaine d'intérêt collectif des États, placés en première ligne dans le processus de patrimonialisation. Ce sont eux, qui inventorient, qui inscrivent, qui protègent. Enfin le patrimoine immatériel est un patrimoine communautaire, expression qui doit être entendue au sens large. C'est dans son rapport au groupe que le patrimoine se révèle, perspective inédite dans ce champ du droit du patrimoine [...]". M. Cornu, "À qui appartient le patrimoine culturel immatériel ?", in *Le patrimoine culturel immatériel au seuil des sciences sociales: Actes du colloque de Cerisy-la-Salle*, Paris, 2020. Further reflections on this point are presented in Chapters 3 and 4 of this study.

the legislature's approach. Notably, it explicitly codifies the notion of ICH. This inclusion brings forth distinctive elements that warrant examination, particularly given the similarities between the regulatory structures of both countries, each functioning as a "regulatory framework of materiality."

In this respect, one key aspect to examine is the theoretical foundation of ICH in France – specifically, the groundwork that enabled its conceptual and practical integration into domestic law. In this regard, two key precedents emerge.

The first is the strong emphasis on vocabulary definitions. Indeed, since France ratified the 2003 Convention in 2006[240], debates around the meaning of ICH have sparked significant theoretical reflection. In 2010, the notion was formally introduced into the *Vocabulaire de la culture et de la communication* within the homonymous Ministry, and was assigned a specific definition drawn from the international framework[241].

Although not legally binding, this lexical effort marked a step toward systematization, offering greater conceptual clarity for subsequent legislative developments. It also situated the notion of ICH within the Ministry's linguistic and administrative framework, enabling the formulation of public policies around a formally acknowledged – yet not fully codified – concept.

Codification eventually followed in 2016 with the adoption of law no. 2016-925 of 7 July 2016 "*relative à la liberté de la création, à l'architecture et au patrimoine*" which introduced an additional *alinéa* to the aforementioned Article L1[242].

Such inclusions were shaped, moreover, by a distinctive theoretical foundation, leading several policy commentators to argue that France

[240] Law no. 2006-791, 5 July 2006 "autorisant l'approbation de la convention internationale pour la sauvegarde du patrimoine culturel immatériel".
[241] Commission générale de terminologie et de néologie, Vocabulaire de la culture et de la communication (liste de termes, expressions et définitions adoptés), in JORF n° 0167 du 22 juillet 2010, Texte n° 105 :"Ensemble des connaissances, des représentations, des savoir-faire, des expressions et des pratiques culturelles propres à un groupe humain et susceptibles d'être transmis." The initiative was part of a project to enrich and promote the French language by producing a vocabulary of terminology and neology in specific fields, initiated by Decree no. 96-602 of July 3, 1996.
[242] [Le patrimoine] s'entend également des éléments du patrimoine culturel immatériel, au sens de l'article 2 de la convention internationale pour la sauvegarde du patrimoine culturel immatériel, adoptée à Paris le 17 octobre 2003 et du patrimoine linguistique, constitué de la langue française et des langues régionales. L'État et les collectivités territoriales concourent à l'enseignement, à la diffusion et à la promotion de ces langues.

already had the necessary tools in place to deal with this form of heritage. Further research into the roots of French ICH unveils, in fact, an intriguing relationship between intangible and ethnological heritage, the former being "a political category – in the sense of public action," the latter "a scientific classification"[243]. Exploring this duality is essential to grasp the theoretical foundation underpinning the codification and the development of related public policies in ICH safeguarding.

Indeed, since the 1980s, the Ministry of Culture has maintained an administrative framework dedicated to research and training policies for the protection of what is known as ethnological heritage[244]. Given its connection to practices and representations, the definition outlined in the founding report of these bodies turns out to be very receptive to acknowledging an intangible dimension of heritage[245].

The alignment between the two domains evolved into an alleged complete integration of the fields, as highlighted in the 2006 Report on behalf of the foreign affairs committee in the process of adoption of the law ratifying the UNESCO 2003 Convention[246].

It is precisely on these grounds that parliamentary discussions regarding the ratification of the 2003 Convention not only glimpsed alignment in

[243] As argued by J. L.Tornatore, "Du patrimoine ethnologique au patrimoine culturel immatériel : suivre la voie politique de l'immatérialité culturelle", in C. Bortolotto (ed.), *Le patrimoine culturel immatériel: Enjeux d'une nouvelle catégorie*, Paris, 2011. Available online at http://books.openedition.org/editionsmsh/357 (accessed 26 January 2024).

[244] An in-depth description of the establishment of such "units" is offered by C. Hottin, "L'ethnologie, un métier du patrimoine ? Réflexions autour de la question du patrimoine culturel immatériel", in *In Situ*, no. 30, 2016, and Id., "Le patrimoine culturel immatériel en France en 2015 : Autour de trois questions lancinantes", in *Le patrimoine culturel immatériel au seuil des sciences sociales : Actes du colloque de Cerisy-la-Salle*, cit.

[245] "Le patrimoine ethnologique d'un pays comprend les modes spécifiques d'existence matérielle et d'organisation sociale des groupes qui le composent, leurs savoirs, leur représentation du monde et, de façon générale, les éléments qui fondent l'identité de chaque groupe social et le différencient des autres. On y inclura donc : des agents : individus, groupes sociaux, institutions ; des biens matériels ou immatériels, œuvres virtuelles ou réalisées ; des savoirs organisés ; techniques, symboliques (magiques, religieux, ludiques) sociaux (étiquette, traditions de groupe), esthétiques ; des moyens de communication : langues, parlers, systèmes de signes." In: *Rapport sur l'ethnologie de la France : besoins et projets présenté au Ministre de la culture et de la communication*, Groupe de travail sur le patrimoine ethnologique présidé par Radjem Benzaïd, Paris, 1979.

[246] Rapport fait au nom de la commission des affaires étrangères sur le projet de loi No. 2605, autorisant l'approbation de la convention internationale pour la sauvegarde du patrimoine culturel immatériel. Available at https://www.assemblee-nationale.fr/12/rapports/r2875.asp#P128_9902 (accessed 26 January 2024), report drafted by the Deputy B. Bourg-Broc. Of the same opinion, within scholarly discussions, J. L. Tornatore, ibid. 213 ff.

definitional aspects but also in operational mechanisms for safeguarding. In a later report authored by Senator Joëlle Garriaud-Maylam[247], it was contended that many of the safeguarding activities outlined in the Convention were already being implemented within French domestic legislation. This was the case with the requirements of Article 13(b), (c), and (d) of the Convention – prompting for the establishment of bodies, support for scientific, technical and artistic studies, as well as research methodologies, and the adoption of measures of legal and nature – which were already being met through the existence of the *Mission à l'ethnologie* and the *Conseil du patrimoine ethnologique* within the Ministry of Culture. Hence, a strong case was made for France's longstanding readiness to embrace this new form of heritage, supported by its extensive history of ethnological research and training initiatives. Rather than being perceived as a major advancement in domestic legislation, the ratification was seen as an opportunity to incorporate internationally recognized frameworks for practices that the nation already acknowledged and promoted[248].

Nonetheless, the strong argument for overlap was contested in academic circles, where scholars rejected this framing due to the significant divergence in approaches: one being operational and community-driven, the other rooted in scientific research[249]. The core distinction, they argued, lies in the living and evolving nature of ICH, in contrast to ethnological heritage. While both share elements of dynamism and immateriality, ICH is not merely an object of study or a source of documentation; rather, it actively shapes and sustains cultural

[247] Report no. 369 (2005-2006), Joëlle Garriaud-Maylam, 31 May 2006.

[248] See the Compte rendu intégral des débats, cit.: "Cette convention n'ajoute aucune contrainte à ce que notre pays fait déjà, mais elle inscrit et valorise son action dans un cadre multilatéral reconnu. La ratification n'implique donc aucune modification de notre droit. Elle constituera en revanche un pas supplémentaire dans la reconnaissance de ce patrimoine dans notre pays et illustrera notre forte implication dans la défense de la diversité culturelle."

[249] "[...] la similitude des objets ne signifie pas l'identité des prises : le patrimoine ethnologique relève surtout du développement de la recherche, quand le PCI vise une sauvegarde globale qui fait appel à la participation. Et enfin parce que les ethnologues confrontés à cette convention ne vont absolument pas se comporter de la même manière que les autres professions liées au patrimoine face à un texte chargé d'une haute valeur juridique (traité multilatéral) et posant une injonction à la sauvegarde. […] pour l'immense majorité d'entre eux, le patrimoine est un objet de recherche et non une cause à servir." C. Hottin, "L'ethnologie, un métier du patrimoine ?", cit. See as well C. Bortolotto, "Le trouble du patrimoine culturel immatériel", in Id. (ed.), *Le patrimoine culturel immatériel. Enjeux d'une nouvelle catégorie*, cit., spec. 28; C. Jacquelin, "Expériencer le patrimoine", in J.L. Tornatore (ed.) *Le Patrimoine comme expérience : implications anthropologiques*, Paris, 2019: "le PCI, c'est le patrimoine ethnologique sans les ethnologues".

expressions. In this light, the earlier-noted "politicization" of ICH signals a shift in administrative focus – prioritizing the promotion of contemporary and future creativity over the theoretical and scientific study of a historically fixed past[250]. This shift also helps explain the emphasis on the heritage-creativity nexus introduced by the 2016 Law.

As a result, the methodological approaches of ethnology and those endorsed by the 2003 UNESCO Convention remain fundamentally incompatible. This tension is especially evident in ICH safeguarding practices, where the creation of inventories and lists cannot rely solely on ethnological methods that privilege expert knowledge over community participation in documentation processes. Nevertheless, this methodological divergence has not precluded the emergence of hybrid approaches that embody the spirit of the 2003 Convention[251]. In this sense, the aforementioned "precedent" is particularly relevant, as it has paved the way for the development of specialized safeguarding policies.

In more general terms, we can further observe that the French *Code du patrimoine* conceptualizes ICH with exclusive reliance to the international definition[252]. Indeed, Article L1 merely states that heritage also includes elements of the intangible cultural heritage "as envisaged by the 2003 UNESCO Convention." This approach sparked extensive debate during the enactment of the 2016 Law. Critics raised concerns about legal certainty, arguing that referencing international law alone could render domestic legislation inaccessible to French citizens. Others pointed to the challenges of codifying a concept rooted in community participation and associated rights – elements that sit uneasily within the legal traditions of the French Republic. Moreover, as Christian Hottin noted, fully replicating the international definition might have improved clarity by eliminating the need to consult external documents, but it would also have introduced a visual and structural imbalance when compared to the brief definition of tangible cultural heritage provided in

[250] In this regard J.L. Tornatore, *ivi*, 51, observes that ethnologic heritage is "une vraie fausse catégorie patrimoniale tant elle ne permettait pas, ou difficilement, de convertir sa production en objets dûment inventoriables, protégés et valorisables."
[251] The collaboration between ethnological advisor Jean-Louis Tornatore and the *Ballons des Vosges* regional nature park in the 2010s exemplifies this hybrid approach. More information by J.L. Tornatore itself in "Du patrimoine ethnologique au patrimoine culturel immatériel : suivre la voie politique de l'immatérialité culturelle", cit.
[252] As observed by J. S. Chateau, *Le Patrimoine immatériel au défi du droit public français*, 2021, 227, although legislators are accustomed to using international conventions ratified by the French state to define concepts, usually by simply "copying and pasting", it is rather unusual for them to simply refer to an international convention in order to find a definition within it.

the preceding paragraph. A more expansive introductory article defining this "different" type of heritage – currently lacking a tailored regulatory framework and therefore excluded from the Code's core rules – would have been unsuitable within a law that upholds a materialistic approach centered on the ownership of things with recognized cultural value.

The issue, then, can be approached from two opposite sides. From one perspective, the absence of operational mechanisms reduces the notion to a purely declarative statement, preventing the establishment of concrete procedures and policies for safeguarding – not only at the level of the object involved, but also, and most notably, concerning the implementation of explicit rights to intangible cultural heritage for holder communities[253].

On the other hand, there is a strategic advantage in defining a legal concept through external reference without specifying implementation details. This approach allows for flexibility, enabling a variety of practices to coexist within a single, adaptable framework[254]. The result is a broadened conceptual understanding that accommodates diverse interpretations and applications.

Building on this assumption – that the formal codification of ICH functions as a "container," affirming the legitimate existence of a distinct

[253] In this sense, we refer to the insights of Marie Cornu in the above mentioned article "À qui appartient le patrimoine culturel immatériel ?" on the question of communities as a subject of law in the balance between the French system's denial of any attribution of legal personality and the possibility of glimpsing some rights to them in the domain of ICH through an analogical application of a case on the subject of labor law (Cass. Civ. 2e, 28/01/1954, Dalloz, 1954, 217, note Levasseur, JCP, 1954.II.7978, concl. Lemoine).

[254] M. Cornu argues in this respect that this is indeed a "framework notion", "[...] une illustration, qui emprunte au droit privé cette idée d'une entité à contenu variable, enveloppe dans laquelle chaque État se détermine librement sur les composantes qu'il veut y intégrer.". See "La protection du patrimoine culturel immatériel", in M. Cornu and N. Mezghani (eds.), *Intérêt culturel et mondialisation. Tome II : Les aspects internationaux*, Paris, 2005, 201. Likewise, Brigitte Girardin, Delegate Ministry for cooperation, development and the French-speaking world, argued during the debates on the adoption of the law ratifying the 2003 Convention "[...] la convention [...] a donc pour premier mérite de créer un cadre universel de compréhension et de coopération pour ces politiques." Available in *Compte rendu intégral des débat*s, Sénat, Séance du 27 juin 2006, at https://www.senat.fr/seances/s200606/s20060627/s20060627002.html#section193 (accessed 16 January 2024).

form of heritage while operating within a legal framework still poorly suited to its nature[255] – two final lines of argument emerge.

The first concerns the adaptability of this notion for use in other relevant contexts, particularly its influence on practical approaches to preserving *tangible* cultural heritage. The question will be explored in Chapter 2, which, moving beyond the scope of the 2003 Convention, will delve into the issue of protection measures extended to immaterial dimensions embedded in culturally significant objects. In this respect, the French context offers abundant insights, spanning legal doctrine discussions on a theoretical side, to pertinent case studies in relevant jurisprudence.

The second line of inquiry involves the treatment of language, which reflects a delicate balancing act between international and national approaches to defining ICH. Indeed, while the French legal framework formally aligns with the definition set out in the 2003 Convention, it retains enough flexibility to incorporate elements specific to the national context. As a matter of fact, language was deliberately excluded from the Convention's Article 2 objective scope due to the complex challenges it presents regarding identity, culture, and territorial considerations[256].

Yet it holds true, as Rieks Smeets observes, that "when faced with the question as to what domain belongs to the Intangible Cultural Heritage, people almost invariably mention language"[257]. Similarly, Marie Cornu

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[255] "Même si l'administration s'intéresse aujourd'hui au patrimoine immatériel dans le cadre des politiques de protection et de valorisation du patrimoine, cette manifestation d'intérêt ne trouve guère de support juridique et s'attache aujourd'hui essentiellement à la fonction première d'inventaire et de qualification.", in *Dictionnaire comparé du droit du patrimoine culturel*, M. Cornu, J. Fromageau, C. Wallaert (eds.) Paris, 2012, 78.

[256] Language was perceived as a problematic category under the lenses of exceptionality in which the original masterpieces' selection was embedded (see Section 2.2). In its function of being a vehicle of culture and identity, hazardous hierarchical perspectives between valuable and less valuable cultures were dreaded. Nevertheless, language issues remained influential until the latter phases of drafting, showing their enduring relevance in the context of people's identity and cultural heritage. Consider in this regard the 'Compilation of Amendments' referenced earlier in this chapter, which includes contributions from several states highlighting discussions on language and proposing its inclusion as a separate domain. Eventually, a shift from objective exceptionalism, as such, to subjective importance in protecting minorities, human rights, and identity has allowed the value of language to be maintained within other regulatory frameworks. See, for instance, the European Parliament *Resolution on the application of the Convention Concerning the Protection of the World Cultural and Natural Heritage in the Member States of the European Union* (2000/2036(INI)) which interestingly provides that, in the application of such Convention, "the notion of cultural and natural heritage should embrace the preservation of linguistic diversity including notably regional and minority languages".

[257] R. Smeets, "Language as a vehicle of the intangible cultural heritage", cit., 156.

observes[258], that nominations to the UNESCO lists reveal a certain "wavering in the apprehension of the linguistic issue," as numerous elements inscribed in the Representative List either directly pertain to the linguistic domain or feature language as a core component – not merely as a means of transmission, but as heritage in itself[259].

In France, linguistic heritage expressly enters Article L1, in the dual sense of French language and as other regional languages that the State and local authorities protect through the enhancement of teaching, dissemination, and promotion activities[260]. This recognition is further reinforced by Article 75-1 of the French Constitution, which affirms that regional languages are part of France's heritage, and Law 94-665, which designates French as a fundamental component of national identity and heritage.

Through these declarative provisions, France has established an additional cultural dimension closely linked to intangible heritage, positioning language as an essential component of its cultural preservation efforts. At the same time, their practical impact remains limited. Notably, they do not establish enforceable rights[261], particularly in relation to the coexistence of French and regional languages. This creates a complex dynamic where language protection becomes both a cultural and administrative challenge, especially concerning the use of regional languages alongside French in public settings.

In this light, language embodies a dual nature: it functions as a living tool for everyday communication, while simultaneously acting as a bearer of cultural identity and expression in need of safeguarding. In the latter sense, although it is not recognized as an autonomous domain under the 2003 Convention, language features in the French national ICH inventory in two distinct ways: as a defining element that names and characterizes intangible heritage entries (i.e., the "*Cantu in paghjella*", the "*Bouladjel*", the "*Fest noz*", etc. – all expressions of minorities' languages), and as a cultural aspect preserved indirectly through the

[258] M. Cornu, "Defining the perimeter of the intangible cultural heritage: focus on language", in Id. et al. (eds.) *Intangible Cultural Heritage Under National and International Law*, cit., spec. 59.

[259] Just consider the whistled languages in Canary Islands and Turkey, or the living culture of three writing systems in Georgia.

[260] As introduced by Law 2021-641 of 21 May 2021 relative à la protection patrimoniale des langues régionales et à leur promotion.

[261] The *Conseil constitutionnel* has expressly provided that Article 75-1, which considers regional languages part of the French heritage, "*n'institue pas un droit ou une liberté que la Constitution garantit*": Décision no. 2011-130 QPC, 20 May 2011, Mme Cécile L. et autres.

safeguarding of the element enrolled (i.e., *la pratique du conte occitan en Périgord ou en Lot-et-Garonne*).

Borrowing the words of Cornu, "it is striking to see that the notion of cultural heritage can be used to frame intangible elements without referring to the more specified notion of intangible cultural heritage"[262]. This, indeed, illustrates a distinctive feature of French policy: an approach that extends beyond the conventional boundaries of ICH, contributing to a dynamic and evolving understanding of heritage within the domestic legal framework. This will be a recurring theme in subsequent analyses.

4.2.2. Do the administrative structure and public policies have the capacity to safeguard ICH?

This analysis draws upon the three administrative approaches outlined in Section 4.1.2, which were derived from the safeguarding duties detailed in Part III of the Convention. Our research yielded three primary findings in the French context: first, noteworthy developments in stakeholder networks; second, the emergence of distinct documentation strategies; and third, a noticeable emphasis on labeling practices specifically related to traditional craftsmanship.

Throughout this examination, we maintain a comparative perspective with parallel developments in the Italian context.

The network of stakeholders

It appears imperative to begin our inquiry by delving into the French administrative framework, that is, by examining the various actors involved in implementing public policies for safeguarding national ICH. Although France's centralized system tends to allocate fewer human resources to ICH than to other than to other sectors[263], the effective collaboration between institutional and research bodies proves particularly relevant to our investigation.

[262] M. Cornu, "Defining the perimeter of the intangible cultural heritage: focus on language", in *Intangible Cultural Heritage Under National and International Law*., cit., 64.
[263] Rapport d'information no. 601 (2020-2021), 19 May 2021, 33 (more on the following section): "[...] manque de moyens humains et financiers. À titre d'illustration, seuls deux agents sont chargés des questions de PCI au sein de l'administration centrale du ministère de la culture."

At the central level, matters related to ICH fall under the responsibility of Ministry of Culture and Communication[264], General Directory of Heritage. Within this framework, the DIRI (*Délégation à l'Inspection, la Recherche et l'Innovation*) of the department *Recherche, Valorisation et PCI* oversees ICH-related initiatives. Additionally, since 2012, the Committee for Ethnological and Intangible Heritage (*Comité du patrimoine ethnologique et immatériel*) has operated under the General Directorate for Heritage[265]. This Committee is primarily responsible for managing the inventory and nomination process for UNESCO's ICH lists, including reviewing nominations and issuing opinions upon the Minister's approval. More broadly, it provides guidance and coordinates efforts for the national implementation of the 2003 Convention.

What stands out, however, is the decentralized network supporting this administrative structure. Specifically, the Ministry's policy is reinforced by the Regional Directorates of Cultural Affairs (DRACs), local governments[266], and, most importantly, by civil associations active in the field. This coordinated model, rooted in decentralization and shared responsibility in formulating safeguarding strategies, has two key notable features. First, it maintains strong ties with non-institutional bodies and associations historically engaged in ethnological heritage, now evolved into ICH (see Section 4.2.1). Second, it employs a system of labeling, or recognition "tags," for specific organizations working in the field, which has led many observers to acknowledge the emergence of a dynamic, organic network of stakeholders dedicated to the safeguarding of ICH.

The importance of this issue becomes evident when compared to Italy's approach to cultural administration. Unlike France, the Italian Constitution strongly upholds the principle of subsidiarity, promoting agreements, coordination, and integration, particularly in relation to cultural heritage, as reaffirmed in Article 7(2) of the Italian relevant

[264] Henceforth, the Ministry.
[265] *Arrêté du 5 mars 2012 relatif au comité du patrimoine ethnologique et immatériel*, Bulletin officiel du ministère de la Culture et de la Communication, no. 208, 2012.
[266] With regard to the so-called *collectivités territoriales*, however, the *Rapport d'information*, cit., 22, points out that they are the least involved actor in ICH issues, very often due to the lack of awareness of the scope and potential of this area on the part of local councilors. It identifies, to this end, training activities and the distribution of a *vademecum* by the Ministry of Culture as possible solutions to make up for the lack of information. In the domain of inventories, a document of this sort was provided here https://www.culture.gouv.fr/Thematiques/Patrimoine-culturel-immateriel/Pour-les-acteurs-de-la-sauvegarde/Candidater-au-Patrimoine-culturel-immateriel/Inclure-une-pratique-culturelle-a-l-Inventaire-national (accessed 26 January 2024).

Code[267]. This framework also encourages the autonomous initiatives of citizens, individuals, and associations in pursuing activities of general interest. However, the absence of dedicated national legislation for ICH presents a significant barrier: without this framework, meaningful collaboration between governmental bodies and private sector stakeholders remains limited, even though other national laws include provisions that could support such partnerships. This limitation reinforces our earlier discussion about the importance of formal legal recognition for ICH, as it directly impacts the practical implementation of safeguarding efforts.

In examining the French case, particular attention should be given to the *Maison des Cultures du Monde* (MCM), an association that has been actively promoting the evolution and transmission of lesser-known traditional cultural expressions – often linked to specific cultural communities – since early 1980s. Due to its longstanding engagement in the field, MCM was involved in the early stages of the 2003 Convention's development, committing itself from the outset to spreading awareness on the topic[268] – even before France's official ratification.

Since 2011, MCM's documentation center, located in Vitré (Île-et-Vilaine), has been designated as the *Centre français du patrimoine culturel immatériel* (CFPCI), in accordance with Article 13(b) of the 2003 Convention, which calls for the establishment of competent bodies for safeguarding ICH. The CFPCI carries out a wide range of initiatives – promotion, education, training, exhibitions, and international cooperation – aimed at fostering cultural diversity. It serves as a resource and outreach hub for students, researchers professionals, museums, associations, and cultural communities, occupying a central role in the ICH ecosystem of stakeholders.

In acknowledgement of its efforts, the center was designated an *Ethnopôle - pôle national de recherche et de ressources en ethnologie* in 2016 – a label awarded by the Ministry of Culture to institutions contributing

[267] "The Ministry, regions and other territorial public bodies shall pursue the coordination, harmonization and integration of public property enhancement activities."
[268] For instance, with the organization, since 2004, of the *Journée du PCI* within the *Festival de l'Imaginaire*, which, as Séverine Cachat and Isabelle Chave point out in the article "Le Centre français du patrimoine culturel immatériel : origines et évolutions", in *In Situ. Au regard des sciences sociales* , no. 1, 2019, "*a probablement offert le premier lieu de débat, en France, sur le patrimoine culturel immatériel [...]*". See also https://www.maisondesculturesdumonde.org/journee-du-pci#:~:text=La%20Journ%C3%A9e%20du%20PCI%20a,l'UNESCO%20(2003) (accessed 26 January 2024).

to research and cultural action in ethnology and ICH at both local and national levels, with a focus on territorial development[269]. Indeed, the CFPCI plays a crucial role in connecting various practicing organizations and entities with cultural communities and civil society organizations, acting as a key intermediary with public authorities. This role extends to evaluating nominations for listing[270] and fulfilling its consultative duties as an accredited NGO at UNESCO.

Since 2013, the CFPCI has served as a central hub for communities preserving ICH elements, facilitating the creation of the *Association française des éléments inscrits au patrimoine culturel immatériel de l'UNESCO* (France PCI). It also hosts an annual gathering of French NGOs accredited by UNESCO, fostering exchange and collaboration in this field. The impact of these meetings is evident in the enhanced flow of information, strengthened cooperation, and increased collaboration between different heritage communities[271].

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[269] The *ethnopôles* are manifold. Among them: La Fabrique de patrimoine, Normandy; the Institut Culturel Basque; the CIRDOC – Centre International de Recherche et de Documentation Occitanes – Institut occitan de Cultura; the GARAE – Groupement Audois de Recherche et Animation Ethnographique. More information available at https://www.culture.gouv.fr/Thematiques/Ethnologie-de-la-France/Les-acteurs-de-la-recherche (accessed 26 January 2024).

[270] On the weight of the association sector in providing a meeting point with the central public actor, see, from a theoretical perspective, the observations of S. Grenet and C. Hottin, *La mise en oeuvre par la France de la convention de l'UNESCO pour la sauvegarde du Patrimoine culturel immatériel (PCI)*, 2007: "[...] la tradition française en matière de reconnaissance des groupes humains et des communautés cohabitant au sein de la communauté nationale ne favorise pas la mise en relation directe avec des communautés qui s'identifient comme telles et sont identifiées comme telles par les instances administratives ou scientifiques. D'où la décision prise de s'appuyer, pour la réalisation des inventaires, aussi souvent qu'il sera possible, sur les associations culturelles, économiques ou scientifiques qui sont en charge du secteur du PCI que l'on souhaite documenter. Ces structures intermédiaires entre les groupes humains et les responsables de la politique d'inventaires seront en charge de la réalisation de l'inventaire en lien avec le ministère de la culture." To this end, significant initiatives have been enforced at the State level since 2015, to increase this subdivision of roles: see C. Hottin, "Le patrimoine culturel immatériel en France en 2015: Autour de trois questions lancinantes", cit., describing limitations in the inventorying approach with the aim of enhancing the role of local authorities and associations in the identification and preservation of ICH.

[271] As argued by Lily Martinet, project manager for intangible cultural heritage at the French Ministry of Culture, during an interview held on February 21, 2024.
One notable example, among many, is the collaboration of the French community of the Art of dry-stone walling with the one of Alpinism for joint valorization and restoration activities for a trail along the current road leading to the Mont-Blanc tunnel, as well as the exchange of skills related to perfume in Pays de Grasse. More information here https://professionnels-pierre-seche.com/cooperation-pci.html (accessed 24 January 2024).

Additionally, the CFPCI brings together researchers conducting comparative studies on cultural policies implemented by other signatory states. Domestically, it functions as an observatory, analyzing how ICH is practiced and utilized by the various stakeholders involved. This research contributes to the field by generating valuable knowledge and insights, exemplified by the periodic, open-access publication of the *Cahiers du CFPCI*[272]. Its broad scope of activities could serve as a valuable reference for the newly established Italian observatory on ICH (see section 4.1.2), as well as a model for the creation of similar community associations. Such initiatives would facilitate the exchange of practices and experiences while strengthening the capacity of these groups to engage effectively with public authorities.

An increasing number of specialized federations are now part of the broader ICH stakeholder network[273]. While the specific fields in which these federations operate will be discussed throughout the study, two key points deserve attention here: (i) these federations support the development of non-institutional associations involved in ICH-related activities, which the French state actively incorporates into its cultural policies; and (ii) the domains associated with ICH are diverse and often shaped by domestic socio-cultural contexts.

To complete this overview, it is worth considering the research and institutional initiatives that have mapped stakeholder involvement in ICH safeguarding in France over time. These efforts have provided critical insights into the scale, diversity, and dynamics of participating organizations.

The first attempts date back to the early 2010s, revealing the presence of over 400 actors in the domain of ICH[274], and leading to notable milestones as the study *État des lieux des acteurs du patrimoine culturel immatériel français* by Léna Le Roux and Marion Rochard – a collaboration between the *Centre de recherche bretonne et celtique* and the

[272] https://www.maisondesculturesdumonde.org/cahiers-du-cfpci (accessed 24 January 2024).
[273] Examples include the Fédération des acteurs et actrices de musiques et de danses traditionnelles Fédération des écomusées et musées de société, Fédération des parcs naturels régionaux, and the Fédération des associations locales des Sites remarquables du goût.
[274] However, given the early ties between ICH and ethnological heritage, the first significant efforts to assess actor involvement, particularly associations, can be traced back to the early 1980s. See C. Hottin, "L'ethnologie, un métier du patrimoine ? Réflexions autour de la question du patrimoine culturel immatériel", cit., mentioning the *Répertoire de l'ethnologie de la France* or the *Projet Portethno*.

Ministry of Culture[275] – and the 2015 *Cartographie des réseaux numériques des acteurs du PCI* by Marta Severo and Francesca Cominelli[276]. The latter study was especially innovative in its use of digital data to map non-institutional actors, analyze their distribution, and develop a coordinated safeguarding strategy. Notably, it leveraged digital data to analyze social and collaborative networks happening in the real world, marking a major methodological advancement. By systematizing geographic, institutional, and social intersections, the project not only deepened substantive knowledge but also pioneered new digital tools for ICH safeguarding. Analyzing digital interactions as reflections of real-life exchanges helped identify connection types and stakeholder influences. This underscored how a strong State-level structure is balanced by equal contributions from the scientific sector and associations, with the latter serving as key intermediaries between institutions and civil society. The research also revealed patterns of interconnection and community growth during UNESCO nomination phases, shedding light on post-nomination network dynamics – whether through the contraction of overextended networks or the formation of new ones around specific heritage elements.

Documentation tools within and beyond the UNESCO standards

An examination of the Italian inventory system for ICH (see Section 4.1.2) has uncovered a direct connection between the lack of legal recognition and the State administration's difficulty in providing effective identification tools. While cataloging is a well-established practice within Italy's cultural administration, it frequently fails to ensure the distinct recognition of intangible cultural heritage. Instead, forms of ICH have to be pieced together across multiple, disconnected inventories, ultimately weakening one of the Convention's key objectives. Accordingly, inventories were described as numerous, spanning various scales (national, regional, and local), and updated using contemporary documentation methodologies. However, in most cases they were found to be inaccessible to the general public,

[275] L. Le Roux, M. Rochard, *État des lieux des acteurs du patrimoine culturel immatériel français*, rapport effectué pour le ministère de la Culture et de la Communication, direction générale des patrimoines, département du pilotage de la recherche et de la politique scientifique, 2012.

[276] The project is presented by the researchers in M. Severo, F. Cominelli, "Réseaux numériques du patrimoine culturel immatériel en France", in M. Severo, S. Cachat (eds.), *Le patrimoine culturel immatériel et numérique*, Paris, 2016, 41-58.

fragmented across different heritage categories, lacking visibility, and difficult to interpret.

France, by contrast, has adopted a distinctly different approach to inventory policy. Although its regulatory framework similarly leans toward materiality-focused cultural heritage practices – and despite a lukewarm reception to the 2003 Convention's ratification[277] – experts note that the inventory process has gradually evolved into a mechanism for acknowledging the very existence of ICH as a distinct category[278].

French ICH can be accessed through three main documentary sources: (i) a pre-Convention "inventory of inventories," (ii) the national ICH inventory, and (iii) two specialized platforms derived from the latter, addressing safeguarding concerns. These tools are designed for broad accessibility, each fulfilling a specific function while underscoring the State's commitment to providing practical safeguarding measures that extend beyond the Convention's requirements.

In 2007, the Ministry of Culture's *Direction Générale des Patrimoines*, within the department of Research Management and Scientific Policy, established a so-called *répertoire des inventaires*, also known as *inventaire des inventaires*[279]. This catalog complies all forms of records related to intangible cultural heritage before the 2003 Convention's entry into force, including bibliographic resources and databases concerning intangible elements. The objective was to provide a historical overview of ICH in France, focusing on the methodological foundations underpinning the actual inventory processes and its ethnological dimension, which we have seen to represent a critical precedent (see Section 4.2.1). Elements are classified using a taxonomy that highlights technical and methodological aspects, with each entry detailing sources, preservation methods, and involved institutional or non-governmental actors. In this way, the *répertoire des inventaires* diverges from several UNESCO departs from several UNESCO requirements, particularly the criterion of viability, which mandates inclusion of only living practices actively transmitted within communities. From this perspective, it lacks the nature to qualify as an inventory under the terms of the 2003

[277] Not only from the general public: see, for instance, the observations of C. Khaznadar, *Alerte, patrimoine immatériel en danger*, Arles, 2014, esp. 28.
[278] C. Hottin, "Le patrimoine culturel immatériel en France en 2015, cit.: "Au sein de l'institution patrimoniale, la pratique de l'inventaire a constitué une forme de reconnaissance [...] pour le patrimoine immatériel."
[279] On the subject, see S. Grenet, "Les inventaires en France", in C. Hottin (ed.), *Le patrimoine culturel immatériel. Premières expériences en France*, cit., 79 ff.

Convention. Nonetheless, it is precisely within this surveying methodology that we understand the Ministry's endeavors to incorporate safeguarding functions existing cultural responsibilities. Moreover, this initial attempt at "inventorying inventories" provides valuable insight into post-ratification policy development, marked by a theoretical and academic orientation that nourished subsequent policies of safeguarding and fostered a broad, engaged network of stakeholders[280].

This scientific, top-down approach played a key role in shaping the *Inventaire national du Patrimoine culturel immatériel*, launched in 2008 and now fully accessible online with PDF records for each entry[281]. Initially, the inventory relied on ethnographic surveys, reflecting its limited early popularity. As a result, the Ministry of Culture, along with research centers and associations, took a leading role in populating the database, aiming to stimulate broader participation[282].

Over time, both procedural and substantive reforms have shifted the model away from its original top-down orientation. At present, applications are accepted continuously, and involve all interested parties (including individuals, informal groups, and local public bodies). Applicants can engage with representatives of the *Comité du Patrimoine ethnologique et immatériel du ministère de la Culture*. In this regard, a 2018 interview with Isabelle Chave, Assistant to the Head of the Research and Scientific Policy Department, underscored the diversity of contributors

[280] Refer to the previous sub-section.

[281] See https://www.culture.gouv.fr/Thematiques/Patrimoine-culturel-immateriel/Le-Patrimoine-culturel-immateriel/L-inventaire-national-du-Patrimoine-culturel-immateriel (accessed 19 January 2024). As C. Bortolotto reports, "this choice was made in order for the visitors to easily print the form and take it with them as an information handout if they decided to visit or attend the ICH element in question". See "The French Inventory of Intangible Cultural Heritage: Domesticating a Global Paradigm into French Heritage Regime", in *Heritage Regimes and the State*, Göttingen, 2013, available at http://books.openedition.org/gup/394 (accessed 19 January 2024).

[282] See C. Hottin, "Le patrimoine culturel immatériel en France en 2015 : Autour de trois questions lancinantes", cit.: "[...] lors des premières enquêtes, le primat était clairement donné à l'expertise du chercheur (ministériel ou universitaire), tandis que le rôle des détenteurs de patrimoine culturel immatériel restait celui, classique en ethnologie, d'informateurs. La pratique a sensiblement évolué au cours du temps, avec des projets d'inventaires de plus en plus souvent confiés à des associations ou centres culturels directement au contact des communautés [...] ou encore menés par les associations de praticiens et détenteurs de PCI, l'appui fourni par les ethnologues se concentrant sur la méthodologie." In the same vein C. Bortolotto, op. cit., noting in this regard how "The idea of participation underpinning the structure of the inventory [was] the classic ethnographic relationship established between a researcher and an informant."

and application pathways[283] – a point later confirmed by Lily Martinet, current project manager for ICH at the French Ministry of Culture[284].

Final inclusion is based on ministerial surveys conducted in collaboration with communities, research institutions, and relevant cultural associations. Intangible elements in the national inventory are grouped into thematic categories that loosely align with UNESCO domains but are tailored to national contexts and trends[285]. Each element is accompanied by a downloadable factsheet detailing the involved community and its participation and consent, the element's geographic and historical background, possible related material assets, modes of transmission and viability, and proposed safeguarding measures. We will shortly revisit the quality and depth of information concerning the implementation of safeguarding activities.

Building on the foundation of the *Inventaire national*, a new tool, *PciLab*[286], was developed in 2017. While the former remains the official repository and the most reliable institutional source for French ICH, *PciLab* advances the strategies for identification and documentation. Developed by the *ethnopôle Institut occitan Aquitaine*[287] under the auspices of the Ministry's Department of Research Management and Scientific Policy, this tool aims at further enhancing some functions of the national inventory. If the latter focuses on the "intrinsic" safeguarding of the intangible element, the new platform makes it possible to add additional layers of valorization: the exploration of a geographic dimension within multiple elements (i.e., through interactive cartography), their relatedness and interoperability, thematic groupings, and video visualizations, thereby creating (and offering) a new value in cultural heritage management[288].

[283] As reported in M. Severo, "Le patrimoine culturel immatériel entre écritures amateure et institutionnelle : le cas de l'inventaire français", *Communication & langages,* vol. 211, no. 1, 2022, 56.
[284] Interview held on February 21, 2024.
[285] These include social and festive practices, oral and traditional expressions, physical activities (related to body movement and sports), performing arts, games, rituals, and various forms of knowledge and skills.
[286] https://www.pci-lab.fr/en/ (accessed 19 January 2024).
[287] As of 2019 converged in the *Centre international de recherche et documentation occitanes* (CIRDOC - Institut occitan de cultura), a public establishment for cultural cooperation with a national and international vocation. More information at https://www.oc-cultura.eu/off/ (accessed 19 January 2024).
[288] See on this point J. Castéret, M. Larché, "Le projet PciLab pour la valorisation numérique de l'Inventaire français du PCI", in M. Severo, S. Cachat (eds.), *Patrimoine culturel immatériel et numérique*, Paris, 2017, 147-162; M. Severo, cit.

A notable aspect of *PciLab* is its data processing approach. As Marta Severo explains[289], the *Institut occitan Aquitaine* utilized the semantic web, integrating *PciLab* data through a direct connection to Wikidata. Prior to the platform's launch, a preliminary phase involved integrating elements from the national inventory into existing French Wikipedia entries. Beyond technical and operational aspects, this integration allows information on French ICH to be accessed not only through institutional sources like the national inventory and *PciLab* but also in a more dynamic and informal way via Wikipedia[290]. This shift marks a departure from traditional inventory methods and presents a new conceptual approach to heritage. It also serves as a compelling case study for potential future legal implications, particularly as it highlights a broader public's role in defining and shaping cultural heritage[291]. "By publishing these sheets on Wikipedia, the Ministry accepts that each page is open to editing and modification by any citizen"[292], Professor Severo suggests, and therefore has to engage with other stakeholders using different modalities of conceptualization. Currently, the ability to contribute to the national inventory via Wikipedia is a feature available on the *PciLab* website itself[293], which thereby publicizes this opportunity. This reinforces the ICH participatory documenting process by creating a new space – or more accurately, by leveraging an existing space in a novel manner[294] – where mediation between the public authority and the community(ies) is promoted, preventing crystallization in the inventory sheets once officially enrolled[295]. The edit of information does not clearly translate from Wikipedia entries to the formal inventory, which remains

[289] M. Severo, *ivi*, 56 ff.

[290] Available here https://fr.wikipedia.org/wiki/Cat%C3%A9gorie:Inventaire_du_patrimoine_culturel_immat%C3%A9riel_en_France (accessed 24 January 2024).

[291] Contributions to Wikipedia pages can be made by anyone, even from outside the community. Consequently, such information does not flow into institutional inventories.

[292] M. Severo, *ivi*, 58. In her analysis, Professor Severo examined the different types of Wikipedia contributors and their varying contributions to the ICH element pages.

[293] https://www.pci-lab.fr/contribuer (accessed 24 January 2024).

[294] In this regard, numerous collaborative projects on the webspace are ongoing in France, revealing a moving trend. Among them, the project *WikiPatrimoine* (https://wikipatrimoine.fr/, *Wiki de Maisons Paysannes* (https://maisons-paysannes.org/wiki-de-maisons-paysannes/ accessed 25 January 2024), which also aims to exchange and provide training related to the knowledge, techniques and know-how needed.

[295] On the broader question of collaborative practices in heritage recognition and management see P. Poirrier, "Les politiques du patrimoine en France sous la Ve République. D'une politique étatique à une politique/Le politiche del patrimonio in Francia nella Quinta Repubblica: da una statale a una politica nazionale, 1959-2005", in M. L. Catoni (ed.) *Il patrimonio culturale in Francia*, Milan, 2007.

under the Ministry's competence, yet it provides an additional way of broadening the participation process and allows a more informal and up-to-date channel to be kept open[296]. The potential for discussions regarding the legal regulation of participation in heritage documentation processes remains open.

In this regard, we can draw the conclusion that the French inventory system not only offers compelling solutions concerning the accessibility, scope, and adaptability of inventories, but also exemplifies a methodologically significant use of digital tools that might serve as a valuable model for future policy actions and regulations. In this regard, the launch of the *Wiki Loves Living Heritage* initiative in 2023 is of particular significance, as it marked the celebration of the 20th anniversary of the 2003 UNESCO Convention. Bringing the issue to a global scale, the initiative invites heritage communities, Wikimedia contributors, and institutions responsible for ICH safeguarding to collaborate in the documentation and dissemination of living heritage worldwide, placing particular emphasis on enhancing digital accessibility and fostering broad participation and engagement in processes of heritage identification and valuation[297].

To complete this investigation, two additional issues must be addressed while examining the French documentation system, particularly in light of its potential as a model in this research for developing ad hoc methodology. Let us consider, then, the following two inquiries.

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[296] A similar tool was introduced in Finland in 2016, with the Finnish Heritage Agency creating a Wiki-inventory for Living Heritage. This serves as an initial step in the inventory process, leading to the National ICH inventory, where elements are included following nomination by the Ministry of Education and Culture. It thus fulfills a dual purpose: enhancing the visibility of ICH forms in the country and enabling extensive community participation in their recognition. More information available at https://www.aineetonkulttuuriperinto.fi/en/sopimus-suomessa/wikiluettelo (accessed 19 January 2024). Also noteworthy is the Belgian system, which allows users to create an account on the website containing the digital inventory of the national ICH. Through this platform, users can propose additions of elements, practices, or specific actions and, more generally, engage in dialogue with the inventory management as a preliminary step before the official application to the Department of Culture, Youth and Media. The step-by-step procedure is illustrated here: https://www.vlaanderen.be/cjm/nl/cultuur/cultureel-erfgoed/erkenningen/inventaris-vlaanderen-van-het-immaterieel-cultureel-erfgoed/aanvraag-indienen-voor-de-inventaris-vlaanderen#wie; here the inventory website https://immaterieelerfgoed.be/nl (both accessed 19 January 2024). Recorded cases of wiki-style ICH inventories have also been documented in the Netherlands; see, for more information, the Dutch Centre for ICH at https://www.immaterieelerfgoed.nl/ (accessed 19 January 2024).

[297] More at https://meta.wikimedia.org/wiki/Wiki_Loves_Living_Heritage (accessed 10 May 2025)

(i) Methodologically oriented, the first compares Italy's practice of developing safeguarding plans for intangible cultural elements (see Section 3.1.2) with the French context, especially for elements nominated jointly by both countries. Given the well-structured documentation system in France, the question arises whether challenges occur in implementing safeguarding measures beyond mere identification. That is, measures that ensure the viability of the element after inscription, addressing the concern that listing living heritage risks "freezing" it, as critics feared when the 2003 Convention's listing mechanism was introduced.

(ii) The second builds on the same observation that the French ICH inventory stands out by completeness and total accessibility[298], in opposition with the shortcomings of Italy's cataloging system. It should be noted, however, that the latest *Rapport d'information* on behalf of the Committee on Culture, Education and Communication on intangible cultural heritage deposed in the Senate[299] has emphasized a pressing need to address the problem of ICH visibility among the general public. The report, which results from consultations with field practitioners, points to the dispersiveness and overly academic focus of promotional initiatives, and downplays the value of the recent endeavors just discussed, such as *PciLab* and contributions through Wikipedia, arguing that they are still underutilized and too much geared toward theoretical elaborations. Ultimately, it reads, the general public is not really aware of what ICH represents and what it means to safeguard it. What is interesting to understand, then, are the implications produced, legally and otherwise, by this shift in perspective. By comparing the two countries' inventory systems, the goal is to assess how similar legal frameworks have responded to the needs of ICH, the tools they have provided, and ultimately, the extent to which intangibility is truly recognized within each country.

[298] The elements collected are 534, according to *PCILab* website. The updated list is available at https://www.culture.gouv.fr/Thematiques/Patrimoine-culturel-immateriel/Le-Patrimoine-culturel-immateriel/L-inventaire-national-du-Patrimoine-culturel-immateriel (accessed 19 January 2024). In this regard, it was also noted how the inventory often serves as an intermediate (as well more immediate) step to achieve inscription, compared to the lengthy international process (C. Hottin, op. cit.).

[299] *Rapport d'information* no. 601 (2020-2021), 19 May 2021. The report assesses the situation of ICH safeguarding in France and makes some recommendations for its improvement. It is available at https://www.senat.fr/rap/r20-601/r20-601.html (accessed 21 January 2024).

Regarding the first topic of inquiry, it appears France has not developed a specific plan to safeguard intangible cultural elements. This results, primarily, from a targeted survey on the Musical Art of Horn Players, the shared element inscribed in the UNESCO Representative List[300] whose drafting of the associated plan in Italy was detailed in Section 3.1.2. The French inventory sheet is, first of all, pre-dating the UNESCO inscription, and has not been updated since[301]. While it addresses concerns about the practice's viability and the implementation of safeguarding measures involving multiple stakeholders, these efforts are retrospective and lack a forward-looking approach. The national communities and institutions involved have presumably traveled different paths by differentiating the implemented safeguards: this indicates that there is still substantial room for improvement in the circulation of good practices, even among elements on the same entry.

Further examination revealed that only the most recent inscribed elements are equipped with planning tools for *future* safeguarding. But besides the fact that some communities appear to overlap ad hoc safeguarding plans with periodic UNESCO reports[302], measures for future safeguarding are part of *internal* sections of the inventory sheets, thus limited to the statement of broad objectives, not structured within an actual plan, and included in a document that is currently not updated unless specifically requested by the community involved. Lily Martinet noted in this regard that the lack of monitoring in the implementation of proposed measures is largely due to a shortage of human resources – as noted earlier, only two ministry officials handle ICH matters. Increasing staff capacity would probably enable ex-post evaluation – a need the Ministry itself acknowledges. From this, two additional conclusions can be drawn.

On the one hand, it can be argued that the French inventory's merit, along with its completeness and total accessibility, lies precisely in the inclusion of a more practical dimension, whereby the elements are not

[300] The Musical Art of Horn Players, also nominated by France through the multi-state candidacy form.
[301] In section VI.2, "Development of existing safeguarding measures," it reads that a plan has been developed with the aim, "in addition to the national inventory," to make "one day" the element part of the UNESCO Representative List – The element is part of the above list since 2020.
[302] For instance, the French community of the Art of dry stone walling, knowledge and techniques refers to a "strategic plan" in its website that turns out to be such periodic report. See https://professionnels-pierre-seche.com/plan-strategique.html (accessed 20 January 2024).

only cataloged along with historical or theoretical information but, especially in recent times, the sheets of inscription are complemented by an apparatus of practical measures for safeguarding and effective transmission. As Christian Hottin notes[303], the inventory has evolved to include more comprehensive records that specifically address the practical aspects of safeguarding planning. This progression has also helped illustrate the complexity and diversity of the network of stakeholders involved in French ICH.

On the other hand, the space dedicated to safeguarding measures within the inventory remains notably limited. This constraint is further exacerbated by several factors: (i) a *prospective* limitation, as, especially in less recent cases, records primarily document measures already in place; (ii) a *scope* limitation, as measures are listed but no further mention is available of broader planning initiatives[304] (i.e., urban plans, management plans for UNESCO sites, etc.); (iii) a *temporal* limitation, as the records lack provisions for ongoing community engagement and systematic monitoring. Likewise, there seems to be no account of how envisaged measures are evaluated in terms of their actual effectiveness. Indeed, beyond the distinction between measures already implemented and those envisaged for the future, the crucial issue remains the actual effectiveness and capacity of safeguarding measures (including those undertaken prior to formal inscription) to equip the holder community and the relevant actors with the necessary awareness and instruments to sustain what genuinely constitutes ICH: its ongoing practice and continuous recreation. Successful cases in this regard[305] demonstrate that, in the end, it is the process itself – preceding, accompanying, and

[303] The information comes from a question submitted to M. Hottin in the occasion of the *Semaine intensive* on the topic of listing ("*La mise en liste du patrimoine : objets, pratiques et normativités*") held at the École normale supérieure of Paris-Saclay University in January 2024.

[304] Even when expanded enhancement strategies are actually in place. See, for example, the case of the *Cité internationale de la tapisserie Aubusson*, which is mentioned in only one line in the relevant *fiche* within the "safeguarding measures" section. The lack of updating implies that the significant developments that the *Cité* project has undergone cannot be acknowledged in the inventory. For more information, see https://www.cite-tapisserie.fr/fr (accessed 20 January 2024).

[305] The case of the Ritual Ceremony of the Voladores in Mexico is particularly illustrative in this regard. C. Amescua-Chávez and M. P. Rebollo Cruz offer a detailed reflection on this in their contribution, "Anthropology as a Catalyst in Living Heritage World-Making Projects: The Case of the Voladores Ceremony in Mexico," in C. Wulf (ed.), *Handbook on Intangible Cultural Practices as Global Strategies for the Future: Twenty Years of the UNESCO Convention on Safeguarding Intangible Cultural Heritage*, Cham, 2025.

following inscription – that, by establishing a supportive framework for ICH, ensures the vitality of the practice beyond its inscription.

The Senate's 2021 report itself underscores the need for robust monitoring to identify implementation gaps, detect declines in support, and explore alternative measures to ensure effective transmission. Most importantly, as the report emphasizes, "it would demonstrate the value of inclusion in the UNESCO list or national inventory beyond merely providing fixed visibility over time"[306].

The second question under consideration remains closely aligned with this post-inventorying perspective. Here, the focal point shifts to visibility, or the role of raising awareness that results from the decision to spotlight certain elements of ICH for a vast "audience." More specifically, the issue concerns the concrete impact of inventorying, particularly in light of the 2021 Senate report, which highlights that ICH visibility has yet to achieve a satisfactory level in France[307].

Indeed, enrollment in the national inventory does not yield any legal ramifications – it solely serves a declaratory-recognitive function. As a result, no specific rights, dedicated valorization mechanisms, or access to financial support are granted[308]. Instead, safeguarding measures are left to the responsibility of the communities, emphasizing a primarily promotional approach. The same promotional approach that Italian doctrine deemed necessary (and sufficient) for this form of heritage.

In this respect, Senate's report frames inscription in the national inventory and on UNESCO lists as a means to strengthen national unity, with French listed elements contributing to shape the country's *image*, showcasing France's heritage on the global stage[309].

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[306] Rapport d'information, cit., 33.

[307] "It is essential to remedy the lack of awareness and understanding that still surrounds ICH in France, given the consequences this has on the knowledge and recognition of its elements and skills of excellence, as well as on their safeguarding, insofar as the essential role in the creation and transmission of ICH lies with the people, supported by local authorities." See the *Rapport d'information*, cit., 17.

[308] Leaving aside, in this regard, the relevant discourses on the implicit-indirect selection of a valuable heritage - and the parallel devaluation of what is not.

[309] "L'inscription d'un élément sur l'une des listes de l'Unesco est une opportunité de renforcer l'unité nationale, dans la mesure où les candidatures sont présentées au nom de la France et que les éléments inscrits véhiculent une certaine image de notre pays et constituent une vitrine de notre patrimoine à l'international.", ivi, 48. On the topic, see as well L. Boltanski, A. Esquerre, *Enrichissement : une critique de la marchandise*, Paris, 2017.

To this end, since 2018 the Ministry of Culture and Communication has allowed holder communities of elements inscribed in the national inventory to use the emblem "*Patrimoine Culturel Immatériel en France*". This logo, issued to beneficiaries (holders and practitioners of ICH elements), can be used for non-commercial safeguarding activities such as workshops, cultural events, and seminars. However, commercial use of the emblem is prohibited[310].

The issue, then, is twofold, and encompasses both legal and cultural policy considerations.

The first refers to the conditional nature of the emblem on an element's presence in the inventory, raising questions about potential challenges when an item requires de-enrollment. In the absence of formal regulations at both domestic and international levels, understanding the nature of the administrative act determining inscription in the inventory may produce different effects.

France has already experienced judicial disputes on this matter, such as the case of the de-registration of bullfighting, which was required before the Administrative Court of Paris. The court rejected the appeal, ruling that no legal consequences would arise from the inscription, thus precluding judicial review of the decision[311]. Ultimately, the issue revolves around the lack of formalism in the administrative procedures governing enrollment, as well as the Ministry's decision to assign a label and submit it to certain conditions.

Efforts to address this informality began in 2012 with the establishment of an enrollment procedure body, the *Comité du Patrimoine Ethnologique et Immatériel*. However, the committee found itself entangled in a legal case following its denial of an element's inclusion in the national

[310] In Italy, prior to law no. 152/2024, the Italian Ministry of Culture had not introduced any labeling initiatives equivalent to this emblem because, indeed, a formal national list of ICH has not (yet) been established. In this light, the introduction with this law of a "logo bearing the words: 'Italian Historical Reenactment,'" issued by the newly established Technical and Scientific Committee for Historical Reenactment Bodies and Events, marks a noteworthy innovation – despite its evident grounding in a past, historically oriented framework. Currently, the procedures for issuing, authorizing the use of, and revoking this logo are to be defined by a decree of the Ministry of Culture.

[311] TA Paris, 3 April 2013, *Fondation Franz Weber et autres*, no. 1115219 and 1115577/7-1. The ruling was appealed, but in the meantime the Ministry proceeded with the withdrawal of the element, hence the Administrative Court of Appeal rejected the claim (CAA Paris, 1 June 2015, no. 13PA02011). The case is investigated by C. Hance and L. Martinet in "The judicialization of heritagization procedures", in M. Cornu et al., *Intangible Cultural Heritage under National and International Law: Going Beyond the 2003 UNESCO Convention*, cit.

inventory[312], based on the absence of a sufficiently broad scientific committee. The administrative Court to which the appeal was filed[313] ruled that the denial of registration was an individual administrative act subject to judicial scrutiny on grounds of an excess of power; in that instance, the excess was embodied in that additional requirement of drawing up the inventory card through an enlarged committee – a requirement that did not formally exist. The Ministry of Culture was thus ordered to reconsider the request.

The element in question was ultimately inscribed in the national inventory and added to the Register of Good Safeguarding Practices in 2020. Nevertheless, the judgment is crucial in underscoring, once again, how the formality of enrollment procedures is far from being achieved, posing potential future intersections with cultural rights issues. Moreover, it raises concerns regarding the attribution of specific legal effect to the registration act and, more broadly, to the very implementation of an international obligation at the domestic level. As in the case just reviewed, the registration is administratively contestable, albeit with the formal difficulties noted out, but the reception of the ICH Convention does not produce cultural rights immediately enforceable. Analogous cases[314] have demonstrated that the matter is still unsettled and, therefore, that no obligation would have direct effects on the domestic legal system.

On the other hand, the issuance of labels to ICH holders, albeit it serves informational purposes, is an option that fails to align with the principles of the Convention, as well with the concerns expressed during the debates surrounding the adoption of a listing system. At the same time, the tool is in full compliance with this idea of inventory as a platform to *showcase* the French ICH worldwide. As will be discussed extensively throughout the next sub-section, labels are a central topic within a particularly developed sector related to ICH in France – that of knowledge and craftsmanship. Upon closer examination, the above Report refers to the concept of "*savoir-faire d'excellence*," bringing the discussion back to a problematic terrain of universalism vs. exceptionalism vs. representativeness, where the use of recognition emblems produces an ambivalent value. On the one hand, it provides a

[312] The so-called *yole ronde*, a Martinican sailing boat.
[313] See the ruling TA Paris, 12 July 2016, no. 1520410/5-1.
[314] See S. Starrenburg, *Translating International Heritage Standards into Domestic Law*, in *The Routledge Handbook of Heritage and the Law*, London, 2024, esp. 105 referring to: Afdeling bestuursrechtspraak van de Raad van State, 14 December 2016, ECLI:NL:RVS:2016:3342.

form of recognition (or encouragement) to ICH holders, in the absence of other post-subscription effects. On the other hand, it leads to the itemization of a few, specific, and identified elements of ICH, rather than embracing its full scope. The point, then, is to focus on the (legal and extra-legal) dynamics underlying the recognition of labels or the use of emblems, in order to understand the extent to which the normativity of these instruments is effective and can serve cultural policy goals toward the general safeguarding of ICH.

Labeling ICH: the focus on savoir-faire within and beyond UNESCO standards

Our investigation has revealed a notable tendency in France toward cataloging practices[315]. Public policies appear to be oriented by a standard of distinction between elements that fall *within* or *outside* predefined groupings: not only lists, in the real sense of the term, but also categories identified through the awarding of labels and identifying marks. This aligns with the discussion in Section 3.3 on international listing systems and the observations of scholars like Valdimar Hafstein on how heritage is *constructed* through selection[316].

In the French cultural sector, labeling extends well beyond our immediate focus. It includes various designations that help shape distinct cultural systems and inform related strategies – covering cities, villages, high-quality products, geographical indications, and more[317]. Here, however, our attention is drawn to a specific correlation that emerges between ICH, know-how (to which we will refer to as '*savoir-faire*') and the issuance of labels as a means of distinction and safeguarding. This interest arises from a cross-observation of the strong focus on artisanal *savoir-faire* in public policies related to ICH in France (evident in its prominent place in the ICH inventory[318]) and the growing

[315] On the subject, see P. Tanchoux, F. Priet (eds.), *Les labels dans le domaine du patrimoine culturel et naturel*, Rennes, 2020.
[316] Among others, V. Hafstein, "Intangible Heritage as a List: From Masterpieces to Representation", cit., as well as R. Bendix, "Heritage between economy and politics: an assessment from the perspective of cultural anthropology", in L. Smith, N. Akagawa (eds.), *Intangible Heritage*, cit., spec. 255.
[317] Consider, by way of example, the labels Petites Cités de Caractère, Le plus beau villages de France, Appellation d'origine protégée, etc.
[318] Isabelle Chave, "Une écriture opérative du fait technique : savoirs et savoir-faire au sein du patrimoine culturel immatériel", in *In Situ*, no. 42, 2020, available online http://journals.openedition.org/insitu/28007 (accessed 26 January 2024). The author

number of labels promoting this sector. This interconnection is clearly illustrated in the 2023 National Strategy for the *métiers d'art*[319], aimed at preserving the excellence of those "artisan occupations that require traditional, highly technical, and often exceptional skill": "As intangible heritage, French craft professions are based on the transmission of gestures and techniques from generation to generation. […] This is why awards and labels (such as the *Prix Avenir Métiers d'Art*, the title of *Maître d'art*, and the EPV label) have been created to promote these highly skilled manual know-hows."

Labeling is both a widespread phenomenon covering several craft practices and a specific trend observable within the National Inventory's sheets, thereby fulfilling an enhancement function that takes on two primary purposes: (i) to meet the recognition aspirations of practitioners and enhance that visibility that the 2021 *Rapport d'information* highlights as essential to increase; (ii) to facilitate the transmission and long-term viability of these practices.

As Isabelle Chave noted in her 2017 research on labels, recognition marks, and normative procedures in existing *fiches d'inventaire*[320], references to such distinctions are frequent within the ICH domain. A prominent example is the title *Maître d'art*, often awarded to artisans practicing the enrolled element[321]. A discerning observer will recognize the parallel between this label and *Living Human Treasures* program, discussed in Section 2.2 above as a pivotal step in the adoption process

points out that after the inventory was launched in 2008, and until 2019, the category of "*savoir-faire*" reached 110 records relating to craft practices, making the field, with almost one record in five (23%), one of the two broadest categories of the national inventory, along with that of traditional games. Indeed, we find elements mentioning specific labels in the case of the *Porcelaine de Limoges*, the *Pêche à la sardine de Saint Gilles Croix de Vie*, the *Faïencerie d'art de Malicorne*, *Les gestes des métiers d'art verriers*, *Les savoir-faire des émailleurs sur métal*, *Les savoir-faire des lissiers d'Aubusson-Felletin*, *Les savoir-faire des santonniers de Provence*, etc.

[319] The initiative was supported by the Ministries of Culture and Trade, Crafts and Tourism and it is available at https://www.economie.gouv.fr/files/files/887%20-%20DP%20Strat%C3%A9gie%20nationale%20en%20faveur%20des%20m%C3%A9tiers%20d'art%20(002).pdf (accessed 26 January 2024).

[320] "Labels et procédés normatifs dans l'Inventaire français du PCI : un bilan 2017", available online as part of the Osmose project, https://dpc.hypotheses.org/1890 (accessed 26 January 2024). The research was later revisited and updated by Jean-Sébastien Chateau in his doctoral thesis, *Le Patrimoine immatériel au défi du droit public français*, esp. 163 ff.

[321] That is the case, for instance, with the Porcelaine de Limoges, the Gestes des métiers d'art verriers, or the Facture d'instruments anciens à clavier.

of the Convention. The title *Maître d'art* is avowedly inspired by this model and has been in use in France since the mid-1990s[322].

Granted by the Ministry of Culture in collaboration with the Scientific Director of the *Institut national des métiers d'arts* (INMA), the title is awarded to individuals or enterprise leaders whose activities demand exceptional manual skill, the so-called *savoir-faire*, in the production, creation, or transformation of heritage. These activities exhibit exceptional technical precision and artistic quality, justifying their recognition and protection for transmission to students. A key aspect of the title is the formal commitment made by the *Maître* to mentor an apprentice. In return, financial support ensures both the material continuity and cultural sustainability of these practices.

In line with this objective, a complementary program – *Maîtres d'Art — Élèves* – was launched by the Ministry of Culture, in partnership with the Ministries of Economy, Education, and INMA. This three-year initiative, unlike the lifelong *Maître d'art* title, is tailored to support transmission. INMA oversees candidate selection, develops personalized training plans, and provides ongoing guidance. The program's dual goal is clear: to ensure the survival of rare skills through hands-on apprenticeship, and to equip students with complementary knowledge – ranging from business management to chemistry and art history – helping to secure the future of France's *savoir-faire*[323].

Similarly, the label *Entreprise du Patrimoine Vivant*[324] (EPV) is a government-recognition mark awarded for five years to French companies across various sectors[325]. It recognizes businesses that demonstrate exceptional techniques, rare production skills, and a strong reputation for long-standing, territory-rooted craftsmanship. Unlike the *Maître d'art* title, the EPV initiative emerged after the 2003 Convention and aligns with safeguarding objectives. It encourages the transmission

[322] Article 22 of the Law no. 2014-626 of June 18, 2014 "relative à l'artisanat, au commerce et aux très petites entreprises" has amended the 1996 law and given a definition of métiers d'art. A similar trend is found in the Belgian legal system within the Décret relatif aux biens culturels mobiliers et au patrimoine immatériel de la Communauté française, 2002, mentioning the so-called *Trésors culturels vivantes*.

[323] See the latest publication here https://www.calameo.com/read/00537511476273827fa78 (accessed 20 January 2024). Noteworthy is also how a gender-balanced situation emerges in the conferring of these titles.

[324] Law no. 2005-882 of 2 August 2005 "en faveur des petites et moyennes entreprises", Article 23.

[325] Since 2011, also the gastronomic one.

of rare skills through incentives such as tax benefits for product development and apprenticeships, increased visibility, and export promotion. References to the EPV label can be found in various inventory *fiches*, including the *Tapisserie d'Aubusson*, *L'art de la construction en pierre sèche*, the *Savoir-faire des cristalliers de Daum*, among others.

While both the *Maître d'art* and EPV labels recognize individuals or businesses for their *savoir-faire*, other labels focus on the products resulting from these skilled practices[326]. Broadening the perspective, these labeling strategies often operate within larger ecosystems, such as *Pôles métiers d'art*. These hubs bring together craft businesses within a region to foster collaboration, promote specific practices, and support future economic, tourism and cultural development[327].

These label systems, however, reveal key challenges that require further investigation. Specifically, this prompts further inquiry into labels' legal significance and practical effectiveness, their roles as instruments of cultural policy, and how well they align with UNESCO's standards. With this in mind, we now turn to a closer examination of these key questions.

First, the emphasis on the exceptional and superior nature of identified *savoir-faire* is largely at odds with the spirit of the 2003 Convention. As previously discussed, UNESCO has consistently rejected the emphasis on exceptional values, instead favoring criteria of representativeness and the subjective significance of heritage for its holder community. In contrast, this "rewarding" system introduces a logic of selection that can lead to exclusion. While the Convention does rely on lists as safeguarding tools, it upholds a fundamentally inclusive vision, emphasizing the protection of ICH in its entirety, beyond frameworks of exclusivity or exceptionality. Awarding labels and marks to valuable practitioners or products goes in the opposite direction of nurturing an

[326] Examples include *Woolmark* for wool products crafted with specific expertise, *France Terre Textile* for quality manufacturing in the textile sector, and geographical indications for industrial and artisanal products (*Indication géographique protégeant les produits industriels et artisanaux* or IGPIA).

[327] On the topic, see J.M. Kosianski, "Les pôles métiers d'art : des démarches empiriques de développement local relevant des réseaux de solidarité territoriale à finalité productive ?", in *Revue d'Économie Régionale & Urbaine*, no. 3, 2004; F. Cominelli, op. cit., 160 ff., discussing also other models of *pôles* (i.e., the *Pôle d'économie du patrimoine*, the *Pôle de compétitivité*).

even more elitist environment[328]. Furthermore, emphasizing individuals or companies as holders of *savoir-faire* aligns more closely with intellectual property frameworks. The issue will be revisited in the following chapters.

In this respect, it should also be noted that mechanisms of selection inherently impact the very concept of community. A sharp distinction arises, then, between the individual *Maître* or enterprise, recognized and rewarded for their expertise, and the necessity to involve the entire community in the processes of identification and transmission. It might be argued that these designations are merely one tool among many, and that recognizing individual professionals does not preclude broader community involvement. Indeed, the community often include a wide array of actors – individuals who identify with the practice, those involved in material supply, or local institutions committed to ensuring the element's survival as an integral part of the territory[329]. Upon closer examination, legislations relating to ICH – particularly in non-Western contexts – do, in fact, include mechanisms for the identification of "living human treasures". In the Republic of Korea, for instance, the 2015 legislation – building upon provisions already established in 1960s – continues to provide for the designation of an 'expert bearer,' entrusted with the responsibility of safeguarding cultural practices and ensuring their transmission. Only in cases where no such bearer is identified, the duty of protection shifts to the level of government closes to the practicing community, or to the State itself if the practice is recognized as having national significance[330].

It holds true, however, that such a strong emphasis on professionals and their exceptional qualities within the community creates an imbalance in a concept that UNESCO envisions as broader and non-individualized – having moved beyond initiatives like the Living Human Treasures

[328] For completeness, it is worth noting that excellence is generally associated with the know-how rather than the practices themselves, which, aside from the renowned *grandes maisons* of France, are often poorly recognized and largely unknown to political and economic institutions.

[329] See on this point F. Cominelli, *Métiers d'art et savoir-faire*, Paris, 2015, 172 ff.: "[...] la mise en œuvre d'un savoir-faire est rarement le fait d'un seul individu. L'artisan ne se trouve guère seul et isolé dans son lieu de travail, au contraire, son réseau de relations s'étend sur plusieurs niveaux." The concept of "Art Worlds" was proposed by H. Becker (Berkeley, 1992) as precisely corresponding of all actors whose activities are necessary to the production of particular work: in this case, not only artisans but also people dealing with supply, transmission, teaching, research, promotion, tourism, etc.

[330] In this respect, P. Petrillo, "Living Heritage as a Global Public Good and Sustainable Development", cit., 63.

program[331]. Not to mention the fact that the Convention primarily refers to communities and groups, acknowledging individuals only in specific cases. As Li Wang observes in her doctoral dissertation, the rarity of *savoir-faire* correlates with prestige, creating an exclusionary dynamic that, precisely, obscure the communal context in which it is embedded[332]. That said, during an interview with Lily Martinet[333], the *Maître* title was described as fostering integration and community pride. In most cases, it is recognized as a *collective* symbol of excellence, lending visibility and legitimacy to the practice as a whole.

As a result, two lines of thought emerge: one theoretical, grounded in UNESCO's core principles and vision, and one practical, focused on the tangible benefits that mechanisms diverging from those standards can still offer to the visibility of ICH. This tension – between frameworks that reward individuals, and a Convention grounded in community-based values – raises a critical question: how can we reconcile the recognition of individual excellence, often tied to fiscal incentives, with the principle that heritage belongs first and foremost to communities? This dilemma sits at the intersection of cultural rights and a more interventionist state approach to heritage safeguarding.

Indeed, the question is also difficult to frame in light of another key principle of safeguarding: the establishment of *conditions* that empower communities to recognize and transmit their heritage on their own terms, and to assess whether change serves as a positive force or a threat to the evolution of ICH[334]. While labels provide significant support and incentives for professionals' work, they also introduce direct state influence into processes that, according to the Convention's standards, should be primarily driven by the decisions of the communities themselves – even when this means discontinuing the development of a practice, free from economic pressures influencing their choice.

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[331] Even within that framework, the *Guidelines for the Establishment of National "Living Human Treasures" Systems* (UNESCO, 2002) define selection criteria based on excellence "in the application of the knowledge and skills displayed." This approach does not equate excellence with the individual but rather by the mediated effect of the application of knowledge. Additionally, the guidelines emphasize the importance of context, group involvement, and representativeness.

[332] Li Wang, La Convention pour la sauvegarde du patrimoine culturel immatériel - Son application en droits français et chinois, Paris, 2013, 372.

[333] Interview held at the Ministry of Culture on February 21, 2024.

[334] As established by the 2015 Ethical Principles, especially numbers 1, 6, 8, and 10. Following an expert meeting held in Valencia, Spain, in March-April 2015, the Intergovernmental Committee endorsed, at its tenth session in Windhoek, Namibia, twelve Ethical Principles for safeguarding intangible cultural heritage (Decision 10.COM 15.a).

A compelling case is the French *Compagnonnage* system, inscribed in the UNESCO Representative List in 2010 and described precisely as "a unique way of conveying knowledge and know-how linked to the trades that work with stone, wood, metal, leather, textiles and food"[335]. The associated community, in fact, albeit within this *savoir-faire* and excellence system, has developed an autonomous process of self-management and transmission that makes different actors (i.e., artisans, pupils, residents, researchers, institutions, etc.) interact in safeguarding efforts through initiatives such as educational travels, rituals, apprenticeship, evaluations, research projects, and more. The question is, again, how the State can position itself with respect to the recognition of any rights to communities that self-manage in this way.

At the same time, it should also be noted that reward systems that privilege specific enterprises or individuals may inadvertently stifle competition, limiting the opportunities for new *Maîtres* or businesses attempting to enter the field. These newcomers may find it difficult to gain traction against established actors already benefiting from public support. This dynamic introduces a clear economic dimension that falls outside the original cultural scope of the 2003 Convention. The very existence of a National Strategy for the *Métiers d'Art* reveals an underlying economic growth interest that might contrast with the Convention's original spirit[336]. It would be worth questioning, in this regard, whether such measures would be more appropriately framed within the development and promotion of the diversity of cultural expressions proper to the 2005 UNESCO Convention[337], which includes among its principles "to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning" (Article 1, letter g) and affirms "the complementarity of economic and cultural aspects of development" (Article 2, number 5). As Cominelli observes, the implementation of these ICH practices (referring here to the safeguarding of *savoir-faires*) cannot be entirely detached from

[335] https://ich.unesco.org/en/RL/compagnonnage-network-for-on-the-job-transmission-of-knowledge-and-identities-00441?RL=00441 (accessed 1 February 2024).
[336] In the *Portail de la Direction générale des Entreprises* we read, for instance, that the goal is to increase EPVs to 2,500, up from the 1,448 enterprises counted in 2022, and that in light of the visibility it brings at the international level the label will be particularly highlighted in the French pavilion at the Osaka World Expo, to be held from April 13 to October 13, 2025, whose theme will be "Audacity and Know-How". See https://www.entreprises.gouv.fr/fr/commerce-et-artisanat/dispositifs-et-labels/label-entreprise-du-patrimoine-vivant (accessed 1 February 2024).
[337] 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

economic realities, being shaped by the forces of supply and demand. Yet this same logic can lead to the disappearance of certain know-hows when they are no longer marketable or when production costs are unsustainable, leading to the decontextualization and distortion of ICH[338].

Furthermore, another challenge lies in the inherently living and subjective nature of ICH. Not only the willingness of communities to eventually stop recognizing and passing on practices should be considered – a problematic scenario when it comes to labels like the lifelong title of *Maître d'art* – but also the potential territorial relocation of these practices. Overall, we find ourselves facing many of the same considerations previously highlighted regarding the application of IP-derived tools for safeguarding ICH, along with all the associated difficulties previously outlined[339].

In the following chapter, a distinct approach will be taken to evaluate the specific characters of labels, marks, and other such tools that influence cultural manifestations from an economic perspective. To this point, we have assessed how such instruments support (or conflict with) UNESCO's standards. What if, instead, we reframe them as tools able to convey a *different* form of immateriality of cultural heritage? In other words, would it be possible to shift the focus (i) from ICH to other intangible dimensions of cultural heritage and (ii) within these dimensions, from cultural value as opposed to any economic consideration, to the economic enhancement of certain cultural properties as a way of projecting their intangible dimension into different contexts?

[338] F. Cominelli, Métiers d'art et savoir-faire, cit., 142.

[339] Consistent in this regard is the Evaluation Body's Report provided during the 12th session of the Intergovernmental Committee, December 2017, Jeju Island, Republic of Korea – UNESCO Doc, ITH/17/12.COM/11. Point no. 27 observes: "States parties are reminded that the inscription of an element on one of the Lists does not imply that exclusive rights are claimed over that element, nor does it prevent other states parties from doing the same. In this regard, states parties are further reminded that the 2003 Convention does not seek to establish a system of protection based on geographic origin or geographic indication. The Body is concerned that some countries may be exploiting or misusing the Lists as a means to authenticate the practice of an element in that specific country. It is important to recall that certain elements are shared across different countries and are not restricted to one specific country or specific groups. Even the identification of a specific community in the form does not necessarily exclude others from practicing the element." Likewise, point no. 30: "It is essential to indicate in the file whether or not the practitioners are salaried employees and in what way the element forms part of an economic process."

5. Chapter conclusions

The first chapter of this study focused on the most recognized and widely accepted form of immateriality of cultural heritage: 'intangible cultural heritage' as defined by the 2003 UNESCO Convention.

The investigation followed two principal lines of inquiry: first, examining ICH conceptualization through its development in international UNESCO frameworks (Sections 2 and 3); second, analyzing its domestic implementation in Italy – the primary focus of this study – with France serving as a comparative reference (Section 4).

Beneath this broad theoretical distinction, a closer examination of ICH development uncovered a far more complex interaction between international and national frameworks than initially apparent. This relationship unfolds as a multidirectional exchange from its inception: ICH emerged from local traditions in developing contexts, where States sought recognition of traditional cultural expressions at the supranational level as an alternative to the prevailing (Western) emphasis on tangible heritage, aiming to prevent misappropriation and economic exploitation without proper acknowledgment of the original bearers. But the same occurs in its subsequent "return" to national contexts, following the international formalization of the concept.

This continuous evolution highlights an ongoing dialogue between international principles and domestic realities, yet two fundamental challenges persist – challenges that have been present as definitional traits since ICH's emergence. The first is its non-material nature, which remains difficult to define within legal and administrative frameworks traditionally designed for tangible heritage conservation. The second is its strong subjective dimension, which disrupts conventional models of authoritative legal recognition typically used in Western systems to determine what qualifies as cultural heritage. These issues remain central to understanding how UNESCO's conceptualization of immateriality is incorporated at the national level. At the same time, they also expose tensions at the international level, where certain operational mechanisms have drawn criticism throughout this analysis regarding their alignment with foundational principles.

Rather than merely observing the shortcomings of domestic transposition – particularly in Italy, where legislation authorizing a distinct ICH regime was only enacted in 2024 – this preliminary conclusion suggests examining the underlying, substantive reasons for adopting an ICH framework. Indeed, assessing the scope of this first

dimension of immateriality and its significance within international and national contexts can be achieved through a formal verification of its implementation and existence (in this regard, we have highlighted the importance of the *nominal* recognition of ICH in domestic contexts as a way to foster related cultural policies). However, for a deeper understanding, this must be complemented by a more critical analysis of the underlying reasons for internal shortcomings or deviations from the original concept.

The examination of historical and conceptual foundations that led to the development of a notion of ICH was instrumental in clarifying the possibilities for internal adaptation. In this regard, focus should center on understanding why this dimension of heritage warrants legal recognition in the first place. This requires viewing ICH primarily as real, living, and evolving phenomenon rather than merely a legal construct.

As noted, the very idea of an ICH concept emerged to address specific needs within historically, politically, geographically, and culturally distinct contexts. While UNESCO's recognition of its value to humanity has elevated its status globally, this should not be mistaken for a requirement of uniform replication of ICH paradigms across different national settings. Rather, it calls for contextual adaptation – preserving core principles while respecting local legal frameworks and cultural traditions. In this respect, the analysis of the French context has been particularly insightful in illustrating how transposition can effectively accommodate domestic specificities – consider, for instance, the extensive stakeholder networks involved in ICH's safeguarding, or the structured labeling and inventorying system in place (Section 4.2.2.). At the same time, it has been noted that these developments can sometimes diverge significantly from the fundamental principles promoted by UNESCO. The point, then, is to understand where the balance lies between addressing context-related needs of specific domestic situations regarding ICH dynamics while maintaining alignment with internationally shared principles.

The critical issue, beyond the Italian legal tradition's challenges regarding materiality vs. immateriality and authoritative vs. bottom-up procedures – topics extensively and critically analyzed in Section 4.1 – is shifting focus toward substance. Specifically, this would mean (re)starting from the characteristics of the Italian context and exploring how they intersect with a concept of heritage that prioritizes its evolving,

living, locally rooted, and subjectively defined nature, and how existing realities might benefit from legal conceptualization.

From this perspective, future analysis should first establish the necessity of an ICH concept before assessing its effectiveness. This should begin with formally naming it – ICH instead of expressions of collective cultural identity, for instance –, proceed to systematic inventorying, and ensure active involvement of local communities in both identifying practices and developing safeguarding mechanisms. In this regard, the chapter has underscored a growing trend of community engagement in the development of safeguarding plans, signaling an urgent need to ensure the survival and sustainable transmission of these practices. The expectation is, on the one hand, that the delegation granted to the government in 2024 will recognize that ICH constitutes a distinct category of heritage – one that rests upon different foundational principles, requiring tailored legal instruments rather than mere extensions of those used for material heritage.

On the other hand, and more broadly – as Chapter 4 of this study will explore in greater depth – the expectation is that this development will extend even *beyond* the current ICH notion, evolving toward forms that are contextually grounded and increasingly attuned to innovative elements, social and cultural transformations, and the foregrounding of creative and subjective dimensions. In this manner – following the original pattern – it will create fertile ground for the continued growth and exchange between governmental levels, and for the development of the ICH concept itself, which, by its very nature, evolves over time as a shared principle to advance, continuously adapting to the needs of its underlying contexts and communities concerned

Chapter 2 – OTHER DIMENSIONS? THE IMMATERIALITY OF CULTURAL PROPERTY

1. A change of perspective

In Chapter 1, attention was directed to the legal translation of 'intangible cultural heritage' (ICH) into domestic legal frameworks, examining how its incorporation has become entangled with deeply rooted, material-based conceptions of cultural property.

This second chapter builds upon that foundation, turning more directly to the concept of cultural property itself and aiming to refine its boundaries. The analysis unfolds along three principal transitions: (i) from the well-established legal concept of ICH toward a re-positioning of the 'intangible' attribute upstream, exploring its manifestations across different dimensions of cultural heritage; (ii) from an international-to-national analytical lens to a strictly national perspective; and (iii) from a focus on ICH as a defined legal category to a deeper interrogation of cultural property as it functions within specific domestic legal contexts.

Through these three analytical shifts, the research advances its overarching aim of clarifying how intangibility manifests across different aspects of heritage and acquires legal significance.

To frame this shift in perspective, however, some logical premises must first be addressed.

The focus on the intangible dimension of cultural property aligns with its treatment in the Italian legal context, where the concept of *bene culturale* plays a central role. The relationship between property and heritage, however, and how they may overlap, relate, or be seen in an evolutionary progression, remains an active area of scholarly discussion. The investigation into how the legal discourse defines these concepts within the cultural domain has been extensively debated by scholars[1], yielding insights that significantly inform the present analysis.

[1] Among others, L.V. Prott LV, P. J. O'Keefe, *Law and the Cultural Heritage,* 1984, and Id. and P. J. O'Keefe, "'Cultural Heritage' or 'Cultural Property'?", in *International Journal of Cultural Property*, vol. 1, no. 2, 1992 ; A. Przyborowska-Klimczak, "Les notions de 'biens culturels' et de 'patrimoine culturel mondial' dans le droit international", in P*olish Yearbook of International Law*, vol. XVIII, 1989-1990; J. Blake, "On Defining the Cultural Heritage", in

Molded by the regulatory framework in which they operate, fully grasping their scope requires considering different factors: their ties to human development, the tension between state sovereignty, supranational principles, and community rights, as well as the influence of non-legal disciplines on their interpretation, to name a few. Far from being just a translational-linguistic matter – and rather, trying to prove that legal substance hides behind a translational hurdle – the use of the term 'heritage' or 'property' can be framed differently if approached with international or national lenses of inquiry.

Internationally, the shift from 'property' to 'heritage' is often framed as a diachronic expansion – of definitions, legal regimes, and stakeholders. Prott and O'Keefe [2] note that the adoption of the term 'heritage' in international law marked a change in perspective, reflecting two fundamental postures in regulatory approaches: a move away from the emphasis on ownership and market value, and broader concerns with collective protection and access. Crucially, these conceptual shifts have been largely shaped by Western legal and cultural paradigms.

To fully grasp the foundation of these shifts, however, it is crucial to acknowledge that the relationship between property and heritage at the international level is far from being a linear one. As Francioni observes[3], the 1954 UNESCO Hague Convention's Preamble – where 'cultural property' first gained international prominence – already reflected a shift toward collective values, declaring that "damage to cultural property belonging to any people whatsoever means damage to the cultural *heritage* of all mankind, since each people makes its contribution to the culture of the world" (emphasis added). In the wake of the same arguments, subsequent regulations that still employed the 'cultural property' formula mostly considered other values than ownership and market ones, going as far as to enhance the national interest of the source

The International and Comparative Law Quarterly, vol. 49, no. 1, 2000; M. Frigo, "Cultural property v. cultural heritage: A "battle of concepts" in international law?", in *International Review of the Red Cross*, vol. 86, no. 854, 2004; F. Francioni, "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage," in Abdulqawi A. Yusuf (ed.), *Standard-Setting in UNESCO: Normative Action in Education, Science and Culture, Essays in Commemoration of the 60th Anniversary of UNESCO 2007*, vol. 1, Leiden, 2007; F. Macmillan, "The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural 'Patrimony' or Private Property?." in *Northern Ireland Legal Quarterly*, vol. 64, no. 3, 2013; L. Lixinski, "Definitions: From Cultural Property to Cultural Heritage (and Back?)", in Id., *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford, 2019.

[2] L.V. Prott LV, P. J. O'Keefe, "'Cultural Heritage' or 'Cultural Property'?", cit.

[3] F. Francioni, "A Dynamic Evolution of Concept and Scope", cit. 225 ff.

country and the international community of preventing dispersal and loss.

Francioni thus identifies a substantial conceptual shift in that 'heritage' transcends the logic of belonging – whether to private individuals or States as source countries – and extends to a universal and transboundary perspective centered on humanity's collective interest in heritage safeguarding. In his words, the idea of world heritage "goes well beyond that of cultural property, as it requires a radical shift in perspective from the national interest of the State to which the property *belongs* [emphasis added], to the general interest of humanity in identifying and preserving a cultural or natural site so exceptional as to be of universal value"[4]. Heritage, therefore, conveys meanings that property alone cannot capture: it speaks to intergenerational responsibility, shared identity, and enduring human value.

Particularly relevant to our research, the disconnect between property and heritage concepts was also traced back to earlier association of cultural manifestations with a tangible and aesthetically driven perception of objects. The key challenge, consequently, became determining what elements could legitimately fall within the legal scope of protection. In this respect, Prott and O'Keefe grounded their arguments on a taxonomic vision, arguing that 'property' could not hold up, both terminologically and legally, to the configuration of cultural manifestations that "have different protective needs"[5]. This was surely the case for natural heritage and cultural landscapes, which were incorporated into the 1972 UNESCO Convention[6], but also applies to intangible cultural expressions, ultimately included within the UNESCO 2003 Convention on the safeguarding of intangible cultural *heritage*.

In contemporary international law, cultural heritage has indeed become the dominant term of art[7]. This, however, provided its predominance is

[4] *Ibid*., 229.

[5] L.V. Prott LV, P. J. O'Keefe, "'Cultural Heritage' or 'Cultural Property'?", cit., 311 ff. "While the legal concept of 'property' might cover most of the items in the first two categories of the cultural heritage (monuments and sites, movable objects) and some of the third (intangibles, some of which are controlled by the rules of intellectual property law), it does not include all of that category; nor does it include the fourth (rituals, ceremonies, oral history and the performing arts) and it is doubtful how far it applies to the fifth (information relating to the other four categories)."

[6] "It would have been quite impracticable, indeed, to bring under the concept of 'property' natural sites that cannot be properly defined in terms of 'natural property'" refers Francioni, op. cit., 229. The same was already argued by J. Blake, "On defining", cit., 67. See as well J.H. Merryman, "The Public Interest in Cultural Property", cit., 341 ff.

[7] J. Blake, cit., 67.

understood as reflecting a fundamental shift in how we approach cultural protection paradigms and related interests involved[8]. The term now encompasses a broader scope, including intangible elements and the associated social and creative processes that shape cultural expression. Nonetheless, 'property' as a legal concept has demonstrated remarkable persistence even as the understanding of cultural heritage has expanded[9].

The term, as such, is still employed in both legal and academic discourse, particularly when referring to *tangible* manifestations of heritage – this is evident, for instance, in the 1972 Convention, which consistently uses 'property' when addressing its monuments, groups of buildings, and sites. The notion maintains significance also within the different movement that, from national to enlarged borders, highlights its increasingly global relevance[10].

In some respects, the *property* framework is argued to better capture the complex array of interests underlying its protection (i.e., not only the international civil society's ones, but states, private owners, artists, markets, and even the interest of the artworks themselves[11]). Lixinski adds nuance to this view by highlighting how holder communities can (and should) be involved in relevant decision-making processes:

> "[...] economics and ownership as control are important for communities if they are to be included in decision-making about their heritage. It gives them the leverage they need to be part of heritage management processes. Without property title or some other version of control, there is absolutely no reason for communities' views to be considered" [...] "Their views may be seen as challenging the cosmopolitan spirit of heritage as a universal language [...] Heritage internationalism, therefore, and the move to the concept of 'heritage' it

[8] L. Lixinski, "Definitions: From Cultural Property to Cultural Heritage (and Back?)," cit., 25, observing how this change involves three primary fronts: (i). from monuments to people; (ii) from objects to functions; and (iii) a move "from preservation *per se* to purposeful preservation, sustainable use and development."
[9] *Ivi*, 21.
[10] Lorenzo Casini, ""Italian Hours": The globalization of cultural property law", in *International Journal of Constitutional Law*, Volume 9, 2, 2011 and, curated by the same author, *La globalizzazione dei beni culturali*, Bologna, 2010. Also: N. Mezghani, M. Cornu (eds.), *Intérêt Culturel et Mondialisation*, Paris, 2004; S. Labadi, C. Long (eds.), *Heritage and globalisation*, London, 2010.
[11] This is the classification proposed by E. Jayme in 2005, "Globalization in Art Law: Clash of Interests and International Tendencies", in *Vanderbilt Journal of Transnational Law*, 38, 2005, 929.

> embodies, has the effect of creating *disincentives* for the inclusion of certain stakeholders."[12]

This tension between public vs. private approaches to heritage – rooted in the control dynamics inherent in a proprietary perspective and its implications within the realm of immateriality – is "sown" here, to be taken up multiple times throughout the course of the research. It is within this conceptual crossroads that the implications of ownership frameworks are most visible, particularly when applied to the immateriality of cultural heritage.

Merryman's widely cited definition of cultural property as "objects that embody the culture – principally archaeological, ethnographical, and historical objects, world of art, and architecture; *but the category can be expanded to include almost anything made changed by man*"[13] can serve as a final reflection in this regard. Not only does this definition retrace both axes along which the property vs. heritage debate has evolved in international legal discourse (the interests it evokes – thus its protection paradigm – and its materiality), but the final open-ended formula gives us the extent of how such concepts are ultimately conventional and "liminal,"[14] – historically situated and evolving at a pace often mismatched with legal developments.

This conceptual tension takes on new contours when viewed through the lens of domestic law contexts. While international instruments have often drawn inspiration from national traditions, the reverse process – reinterpreting international standards within domestic frameworks – can introduce significant challenges, particularly where legal language and traditions diverge. The case of Italy is illustrative in this regard. With its deep-rooted legal and cultural tradition, shaped by an abundance of heritage sites and objects, the Italian legal system exemplifies how terminological and conceptual distinctions are embedded in national law. As with many other civil law systems, the use of 'cultural property' (*beni culturali*) is used to denote movable and immovable objects classified under predefined categories of cultural significance. This designation places them within an ownership paradigm, yet are subject to limitations imposed by public authorities to

[12] L. Lixinski, *ivi*, 26.
[13] J.H. Merryman, "The Public Interest in Cultural Property", cit., 341.
[14] I.e., conceptually shaped by the developments in non-legal fields. The attribute is found in Italian legal doctrine, as discussed in greater detail in the following section.

ensure the protection of the public interest in their preservation[15]. Heritage, in turn, is intended as a collector of their totality[16] – indeed a different definition from the ones highlighted above. The challenge, then, lies in navigating this more layered and nuanced conceptual terrain, along with their logical and legal hold.

This chapter unfolds precisely at the intersection of these different levels of analysis. Acknowledging the complex paradigms around which the legal discourse frames the relationship between 'property' and 'heritage,' the discussion builds on the observation that the multitude of existing definitions, perspectives, and potential approaches has ultimately led to polarization. The issue is not the plurality of legal concepts per se – which is, in fact, necessary for legal certainty and for accommodating divergent national and international frameworks. Rather, the challenge lies in how these definitions often become entrenched in rigid binaries. As a result, contemporary discourse on cultural heritage tends to operate within sharply drawn dichotomies: tangible vs. intangible, property vs. heritage, or ownership vs. universality[17].

Yet, if the goal of this research is to explore the intangible dimensions of cultural heritage, remaining confined within these dichotomies would confine us to question only what fits within such a binary understanding of heritage. This would imply, on the one hand, that the immediate answer to the question "what is (are) the intangible dimension(s) of cultural heritage" would be that this is, tautologically, the 'intangible cultural heritage' as defined by UNESCO in 2003.

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[15] See Article 2 of the Italian Code of Cultural and Landscape Heritage, Legislative Decree no 42/2004.

[16] Together with landscape property: "Cultural heritage consists of cultural and landscape property.". Likewise, the French *Code du patrimoine* defines cultural property in Article L1. It holds true, however, that the inherent polysemy of the concept, combined with its interaction with supranational regulations, suggests that limiting the domestic notion of heritage solely to the realm of cultural and landscape property would be inadequate. Suffice it to recall, here, the recent debates in Italian legal doctrine over the most appropriate way to translate 'cultural heritage' as described in the 2020-ratified Faro Convention. The broad definition put forth raised significant concerns about the risk of terminological ambiguity, prompting arguments in favor of translating it as "legacy" (*eredità culturale*) rather than heritage. More on the topic in Chapter 3, where scholarly references are provided.

[17] In this sense, already in the mid-Eighties, L. V. Prott and P. J. O'Keefe, *Law and the Cultural Heritage*, cit., 8: "[...] for various reasons each Convention and Recommendation has a definition drafted for the purposes of that instrument alone; it may not, at this stage, be possible to achieve a general definition suitable for use in a variety of contexts."

On the other hand, any search for immateriality *elsewhere*, e.g., in the heritage that international law qualifies as 'tangible' and that domestic law also considers as cultural 'property,' would be limited to identifying only that well-consolidated definition of intangible cultural heritage within the (also deeply rooted) description of tangible. In other words, our investigation would be restricted to identifying those "practices, representations, expressions, knowledge, skills," that emerge as a relevant dimension within material manifestations of cultural heritage. And indeed, this perspective is consistent with the prevailing approach found in existing (including non-legal) literature and policy documents – immateriality is framed as the set of community's practices, histories, rituals, etc. that come out when discussing how to best protect or valorize buildings, historic centers, and any other object possessing cultural value[18]. While this is undoubtedly a valid research strategy, it hampers the exploration of alternative conceptualizations of intangible dimensions that are not bound by preconceived and standardized frames of reference. From a legal perspective, this prompts an inquiry into the fundamental definitions of 'property' and 'heritage' within different regulatory frameworks, along with the possibility of broadening or redefining their boundaries.

From this derives the logical shift from 'intangible cultural heritage' to the 'intangible dimension of cultural heritage', and from 'cultural heritage' to 'cultural property,' beginning with the foundational core of Italian legislation on the subject – and from there, embarking on analyses that will ultimately engage (again) the intersection with cultural heritage.

The core challenge extends beyond simply contrasting property with heritage paradigms. Rather, it calls for a fundamental reassessment of the very concept of cultural property. Indeed, if we acknowledge that the latter entails immaterial dimensions with independent legal significance, then we must reconsider how contemporary public law can approach its regulation. More broadly, the goal is to ascertain whether in both concepts (of property and heritage) the issue of immateriality is a matter of absence of, or lesser emphasis on, a material expression. If so, this would justify its treatment as a separate legal category, such as

[18] See, for instance, the whole body of essays presented on the occasion of the 14th ICOMOS General Assembly and International Symposium: 'Place, memory, meaning: preserving intangible values in monuments and sites', 27 – 31 October 2003, Victoria Falls, Zimbabwe. Likewise, see the works of J. Djabarouti, with specific focus on UK cultural heritage (https://scholar.google.com/citations?user=zct9cv0AAAAJ&hl=en accessed 28 March 2024). Legal references are surveyed in depth throughout sections 2.1, 2.2, and 2.3 below.

'intangible cultural heritage' or 'intangible cultural property.' Alternatively, this could represent a pervasive, transversal dimension that inherently defines the heritage character, irrespective of how culture, then, takes shape in reality.

2. Building a conceptual framework: intrinsic and extrinsic immaterialities

Scholars have long explored the relationship between materiality and immateriality in cultural expressions, leading to the development of three primary approaches. Simultaneously present in academic discourse, these perspectives progressively expand beyond the inherent qualities of the object, intersecting and evolving through reciprocal influence. Their examination will provide the conceptual foundation for Section 3, where case studies and emerging hypotheses will be introduced to further explore additional dimensions of immateriality within the traditional legal construct of cultural property.

The following analysis proposes the articulation of *extrinsic* immaterialities as a complement to the notion of *intrinsic* immaterialities. The distinction is a conceptual one, adopted for analytical clarity and to substantiate the hypothesis that, beyond intrinsic immateriality, additional *distinct* dimensions can also be identified.

The first approach, extensively developed within Italian legal scholarship, conceptualizes immateriality as the cultural value inherent in every cultural property. Under this view, all cultural goods – where 'good' denotes an object imbued with legal significance – *are* immaterial. This perspective is examined in Section 2.1.

The second approach shifts the locus of immateriality from an intrinsic attribute of the object to potential external projections. Scholars in this field have identified what is termed "economic immaterial," a dimension in which cultural value generates additional economic utility. Section 2.2 will delve into this aspect.

The third approach advances a theorization of immateriality as an extrinsic qualification of the physical cultural good. Here, however, the focus lies on the adaptive function of regulatory frameworks in responding to evolving sociocultural contexts and competing interests, with the aim of safeguarding the immaterial value associated with cultural assets. This perspective will be further analyzed in Section 2.3.

2.1. The cultural value

Since the second half of the last century, the immateriality of cultural property has drawn sustained attention in Italian legal doctrine.

Embodied mainly in the thought of Massimo Severo Giannini[1], the issue intersects both with developments in international law and the distinctive features of Italy's legislative framework. The latter, shaped by a long-standing need to regulate a vast and diverse cultural patrimony, has historically engaged both private and public law, dating back to the pre-unification era. Giannini's central concern was identifying a common legal denominator capable of encompassing this heterogeneous set of objects. Eventually, the conclusion was reached that such unifying feature was actually *twofold*: the public nature of cultural property, and its inherent immateriality[2].

In the renowned essay *I beni culturali*, dating 1976, the author develops his arguments as a critical reflection on the work undertaken by the so-called "*Commissione Franceschini*"[3], of which he was a member. Tasked in the mid-1960s with assessing the state of cultural heritage protection in

[1] M.S. Giannini, "I beni culturali", in *Riv. trim. dir. pub.*, 1976, which the following remarks will reference. Subsequent authors include S. Cassese, "I beni culturali da Bottai a Spadolini", in Id., *L'amministrazione dello Stato. Saggi*, Milan, 1976.; V. Cerulli Irelli, "Beni culturali, diritti collettivi e proprietà pubblica", in *Scritti in onore di Massimo Severo Giannini*, Milan, 1988, vol. 1. Also, A. Bartolini, "Beni culturali (diritto amministrativo)", in *Encicl. dir.*, Milano, 2013. The entire no. 1 of 2014 of the journal *Aedon - Rivista di Arti e Diritto online* should also be mentioned, along with L. Casini, "«Todo es peregrino y raro...»: Massimo Severo Giannini e i beni culturali", in *Riv. trim. dir. Pub*, vol. 3, 2015.

[2] It should be noted, however, that the legal acknowledgement of immateriality as an underlying trait of cultural property follows a long legacy of material conceptualizations surrounding this topic. As we shall see (and as was partially noted in the previous chapter), this perspective has never been fully abandoned in Italian legislation. Since the early 1900s, Italian laws on cultural property have consistently referred to "immovable and movable things of historical, archaeological, paleontological, or artistic interest" (law 20 June 1909, no. 364, so-called Legge Rosadi on antiquities and fine arts. Earlier was the disposition of law no. 185 of June 12, 1902, so-called Legge Nasi, dealing with the protection and preservation of monuments and objects having value of art or antiquity. Similarly, the so-called Leggi Bottai of 1939 reaffirmed this material focus, referencing movable and immovable works of art and natural beauty (specifically, *cose d'arte e bellezze naturali*) within an aestheticized framework – one that Giannini would later critically examine in terms of its validity. More insights on the significance of these laws in establishing the foundation for later regulations on cultural property in Italy are available in S. Cassese,"I beni culturali da Bottai a Spadolini", cit.

[3] Commissione di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio (Commission of Inquiry for the Protection and Enhancement of Things of Historical, Archaeological, Artistic and Landscape Interest), established by Law no. 310 of 26 April 1964, whose complete work is published in Per la salvezza dei beni culturali, Rome, 1967, vol. 3.

Italy, the Commission's 84 Declarations proposed a general definition of cultural property as "*material* testimony having value of civilization."[4]

Giannini expands upon this definition, which he endorses in its tangible configuration, and observes that the concept of cultural property, as such, is inherently liminal. In other words, while it holds legal validity, he argues that the meaning and scope of cultural property are shaped by non-legal disciplines such as anthropology, sociology, and history[5]. This underpins the "historicity," or "historicizability" of cultural property – an acknowledgment that its value neither fixed nor universal but subject to evolving cultural, stylistic, and social paradigms.

Crucially, Giannini contends that the notion must be detached from earlier aesthetic-centric approaches that equated value with artistic merit (*pregio*). Recognizing its historical dimension instead affirms a variable, context-dependent understanding of cultural value, one informed by external and dynamic criteria. Hence the conceptualization of *Commissione Franceschini* as "testimony of civilization" within a given historical-cultural framework.

Consequently, Giannini argues, if one is to identify a unifying characteristic amid the heterogeneity of ownership regimes and material forms that cultural property assumes, the "preciousness" or aesthetic value of the object cannot serve as a legally relevant criterion. Instead, the author advocates for the above public nature and immateriality of all cultural property.

With regard to the former, Giannini asserts that the diverse range of objects is unified by their collective designation as being "of public interest," a concept central to all Italian cultural property regulations. Indeed, once an object is recognized as culturally significant, it incurs a legal obligation to be accessible for public benefit – through preservation, accessibility, or cultural enhancement. Public authorities may override private ownership claims, when necessary, in service of

[4] The so-called *Declaration I* of the Commission reads as follows: "All assets related to the history of civilization form part of the Nation's cultural heritage. This includes archaeological, historical, artistic, environmental, and landscape assets, as well as archival and library holdings, and any other material testimony of civilizational value, all of which are subject to the law."

[5] M.S. Giannini, "I beni culturali", cit., 8 (translated): "while there are still unresolved questions regarding the definition of culture or civilization, the term 'cultural property' takes on a meaning that may be empirical for scholars studying civilizations and cultures. However, for jurists, [...] it remains a liminal concept – one to which legal regulations do not provide their own content or definition in terms of other legally concluded traits but instead rely on references to non-legal disciplines."

this higher protective standard. This leads to Giannini's argument that cultural properties should be viewed primarily as *beni di fruizione* – goods intended for public benefit rather than merely as objects of ownership.

In turn, cultural value functions as a unifying trait in itself. But instead of being made to coincide with the thing to which it refers, it is conceived as a distinct, immaterial element that coexists with but remains separate from the tangible medium. Cultural value, though inherent, is independently regulated and safeguarded by public institutions. Simultaneously, various property rights may apply to the physical object, classifying it as a "patrimonial good" (*bene patrimoniale*) in legal terms. This establishes an important distinction: cultural property and patrimonial goods are separate legal concepts, though embodied in the same physical item[6].

In its different expression and ownership regime, cultural property is thus dual in nature: on the one hand, there is the physical medium, which involves patrimonial interests, i.e., it is either privately or publicly owned (and then private or public law rules will apply respectively). On the other hand, there is the immaterial cultural interest that justifies state intervention for public benefit. Ultimately, then, cultural property is "immaterial, rather than material; it embodies the value of civilization as an immaterial component inherent in one or more material entities, yet legally distinct from them, as these entities serve as physical supports but are not themselves legally relevant assets."[7]

In fact, it is the inherent cultural immanence of the object that qualifies it as a cultural *good* – that is to say, the result of an intangible value that

[6] To illustrate this concept, the author refers to a masterpiece painting, which functions simultaneously as both a patrimonial good (subject to ownership rights) and as a cultural property (carrying cultural value that demands public protection). These two aspects exist in parallel but are legally distinct. See M.S. Giannini, cit., 23 ff.

[7] Ivi, 26. In a sense, the vision echoes what Victor Hugo had earlier observed in *Guerre aux démolisseurs* (1832): "Il y a deux choses dans un édifice, son usage et sa beauté. Son usage appartient au propriétaire, sa beauté à tout le monde." Here, 'beauté' represents the immaterial cultural value, still unfiltered from the aestheticizing ideals of the nineteenth century; use, instead, denotes its proprietary regime, which again is considered in its "otherness" from cultural considerations. Hugo's perspective, moreover, aligns with the notion of protecting cultural items from destruction. When considered within the post-World War II context, it exemplifies the key features of the emerging concept of cultural property: its materiality (which implies the risk of destruction), its cultural value (increasingly separated from purely aesthetic considerations), and its public interest (independent of ownership). Giannini's theory reinterprets these aspects within a framework that reflects the context of Italian legislation and scholarly discourse.

transcends and governs the physical entity, although without negating it[8].

At this stage, it is essential to assess how this theory holds up against contemporary developments and challenges, while also considering the possibility of expanding the boundaries of immateriality beyond its exclusive association with cultural value. In this context, two critical issues arise: (i) the requirement that cultural value be inherently tied to a physical object and (ii) the necessity of its determination through expert evaluative judgment[9].

As a matter of fact, these principles underpin much of the legal discourse on cultural property within Italy's current regulatory framework. Article 2 of the 2004 Code of Cultural and Landscape Heritage[10] describes it as "movable and immovable *things*" of an interest that *experts* verify or declare following a specific identification process. As discussed in Chapter 1, the concept of immateriality, as referenced in the 2003 UNESCO Convention, is only allowed under the strict conditions of Article 7-bis.

Relying solely on this established notion of immateriality risks circular conclusions. This study, instead, seeks to identify novel categories with potential legal relevance, expanding upon – rather than reiterating – the recognized immaterial value that underlines cultural property's legal status. Indeed, recent technological, social, and political developments have introduced a more complex layering of reality[11] that demands careful examination. While Giannini's observations remain valid, emerging dynamics suggest that this unifying trait may no longer suffice – a possibility that Giannini himself anticipated. He acknowledged that

[8] See C. Lamberti, "Ma esistono i beni culturali immateriali? (in margine al Convegno di Assisi sui beni culturali immateriali)", in *Aedon*, no. 1, 2014.

[9] "Cultural value, on the other hand, is determined by art critics and historians, who, when not influenced by economic operators, act independently of them. Hence the divergences between cultural evaluations and financial valuations [...] which legally demonstrate the autonomy of cultural value from other types of value.", M. S. Giannini, *ivi*, 27.

[10] Henceforth 'the Code,' as usually referred to in this study.

[11] See in this regard C. Vitale, "La fruizione dei beni culturali tra ordinamento internazionale ed europeo," in *La globalizzazione dei beni culturali*, L. Casini (ed.), Bologna, 2010, who at 176 speaks of a "a notion of cultural heritage that does not coincide with that relating to cultural property used by our Code [the Italian one], because it seems to go beyond both the aspect of materiality in the strict sense and that of territoriality."

evolving societal needs would demand legal protection for new forms of cultural property beyond those envisioned in existing law[12].

Decades after this theory, new challenges have indeed emerged. Consider, for instance, the possibility of recognizing cultural value in *entirely intangible* cultural property, where no physical structure exists, or conversely, cases where the *res*-physical support is present, yet its immateriality is not intrinsic, i.e., it does not remain confined to the cultural value per se, but rather extends to an *extrinsic* appearance, being projected into other fields of reality[13]. As this chapter will explore, cultural property may possess a cultural value that extends to its functionality, which may even ultimately confer cultural value upon it. This raises compelling issues on the effective modes of protection, access, and enjoyment.

Ultimately, then, we question at a later stage the potential for such cultural value to exist independently of a physical object. Sabino Cassese anticipated this line of inquiry in his seminal essay *I beni culturali da Bottai a Spadolini*, where he pointed to a "'closure' of cultural heritage to only those aspects that Malinowski[14] called culture in the material sense":

> "Giannini - it is true - admits that, in some categories, the patrimonial good may not even exist; and he acknowledges that there are other typologies of cultural goods, not yet analyzed, that pose problems of technical and financial aid and organization (literary, musical, theatrical, cinema events, etc.). However, the reconstruction of cultural property is entirely focused on things that are cultural property: underlying this conception there is always a 'thing' that is subject to a patrimonial right: all examples of the relationship between the two regimes are cases in which the private individual has a property right (or similar)."[15]

A critical consideration remains, then, regarding how cultural property is identified. The traditional paradigm relies on a unidirectional, expert-driven process flowing from specialists to civil society in a declaratory

[12] "The day when, due to the course of events in our society, concerns of public protection of other forms of cultural property would arise, beyond those for which there is currently specific legislation, provision would have to be enforced."
[13] In these terms G. Morbidelli, "Il valore immateriale dei beni culturali", in *Aedon*, no. 1, 2014.
[14] Refer to B. Malinowski, *A scientific theory of culture*, Chapel Hill, 1944.
[15] *Ivi*, 177 (translated).

capacity[16]. Yet, as also discussed in Chapter 1, the increasing recognition of subjective dimensions – particularly the active role of communities and private individuals as custodians of cultural expression – necessitates a reassessment of this framework.

This tension is evident even in Giannini's thought, which defines administrative decisions as purely technical judgments with a declarative function. In his view,

> "There is no comparative balancing of interests involved in the declaration of a cultural property, meaning that there are no reasons why it may be more or less appropriate to declare something as cultural property. If it is the case, it is only necessary to state why it is, which jut calls for an assessment of technical, not administrative, discretion."

This theoretical framework resonates on a much broader scale, aligning with what Tainter and Lucas[17] described as the 'empirical-positivist approach' in historic preservation – a predominantly Western perspective that has permeated heritage regulation following its integration into related disciplines (such as history or archaeology). On a different note, the whole discourse can also be framed within Smith's 'Authorized Heritage Discourse,' introduced in 2006[18]. Within this vision, "the idea that 'heritage' is innately valuable" is an underlying tenet, which brings with it "the idea that the proper care of heritage, and its associated values, lies with the experts, as it is only they who have the abilities, knowledge and understanding to identify the innate value and knowledge contained at and within historically important sites and places."[19]

Revisiting the previous observation on the growing intricacy of the realities that law and public administration are called to address, a rigid adherence to expert-driven assessments – disregarding broader,

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[16] See in this regard G. Sciullo, "Patrimonio e beni," in C. Barbati, M. Cammelli, L. Casini, et al (eds.), *Diritto del patrimonio culturale*, Bologna, 2020. A substantial portion of administrative rulings also lean toward this position: among others, Council of State, Section VI, 24 March 2003, no. 1496, speaking of a recognitive and declaratory nature of such decision, not involving a choice among various possible solutions for achieving a specific public interest. See also Council of State, Section VI, 22 January 2004, no. 161, or, more recently, Council of State, Section VI, 24 March 2020, no. 2061.

[17] J.A. Tainter, G J. Lucas, "Epistemology of the Significance Concept," in *American Antiquity*, vol. 48, no. 4, 1983.

[18] L. Smith, *Uses of Hertiage*, London, 2006. The following quotation is at 29.

[19] A similar stance is held in W. E. Boyd et al., "Rigidity and a changing order ... disorder, degeneracy and daemonic repetition": Fluidity of cultural values and cultural heritage management.", in C. Mathers et al. (eds.) *Heritage of value, archaeology of renown: Reshaping archaeological assessment and significance*, Gainesville, 2005.

pluralistic evaluations – appears increasingly inadequate. This debate has particular resonance in Italy, where discussions about administrative discretion focus on whether it should remain a strictly technical activity or be extended to its "pure" dimension. Historically, both doctrine and jurisprudence have identified an inseparable link between the protection of cultural heritage and technical discretion, precluding any balancing of interests. Under this model, only a specialized technical body can determine the presence of an "innate" and prevalent cultural value, without weighting other competing interests, albeit public[20].

However, this position results in two key limitations. First, it implies the "blind" foregrounding of a single (and perhaps insufficient) public interest in the preeminent good "culture": on this point, precisely, the Constitutional Court in 2013, departing from the "historical" position highlighted above, and affirming that

> "The qualification as 'primary' [of certain values] means that they cannot be sacrificed for other interests, even if those interests are constitutionally protected. However, this does not place them at the top of an absolute hierarchical order. The balance, being dynamic and not predetermined, must be assessed by the legislature when establishing laws and by the court during review, according to criteria of proportionality and reasonableness [...]."[21]

On the other hand, it also entails the automatic sacrifice of other interests, or the *a priori* exclusion from potential participation in heritage processes, especially in situations where multiple elements emerge – cultural, urban, commercial, economic, material and immaterial elements of the whole context and related interests involved. This limitation becomes increasingly problematic given recent constitutional and administrative jurisprudence that favors a more balanced approach[22]. Such legal developments emphasize proportionality and reasonableness to prevent any single right from becoming a 'tyrant' against other constitutionally recognized and protected legal situations"[23]. These issues will be taken up throughout the unfolding of the present and following chapters.

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[20] In this sense Council of State, Section VI, ruling no. 3652/2015. The Constitutional Court had already recognized the pre-eminence of the cultural interest in a 1986 ruling (no. 151).
[21] Constitutional Court, ruling no. 85/2013
[22] Refer, for instance, to the Constitutional court, rulings 85/2013 cited above, no. 264/2012, no. 63/2016 and, at within the administrative jurisdiction, Council of State, Section VI, no. 8167/2022 and Section IV, no. 2836/2023.
[23] The quotation is extracted from constitutional rulings cited in the note above.

2.2. The "economic immaterial"

To speak of an 'economic immaterial' aspect of cultural property is to enter a complex theoretical framework that calls for prior revision of fundamental assumptions[24]. The preceding section has laid down the groundwork for this exploration; indeed, it is imperative to fist address the theorization of an immateriality *intrinsic* to cultural property before delving into any consideration of an *extrinsic* existence of it.

The theoretical distinction between 'cultural' and 'patrimonial' assets implies that the owner's rights of enjoyment and disposition of the thing, though limited by the acknowledgement of a public interest, remain unaffected in terms of economic value. In this regard, Giannini refuses the idea that an item's worth as cultural property directly correlates with its commercial value, as the latter is governed by market forces that often deviate from experts' assessment. As a result, a divergence may exist between the two[25]. In addition, this indicates that economic considerations related to cultural property tend to align with that "conflicting private side" that public regulatory frameworks seek to address. Consequently, administrative protection of cultural property serves as a means of distancing it from economic-proprietary logics[26]. In fact, economic aspects in cultural property law are often solely addressed in terms of compensation for expropriation, exercising preemption rights, rewards, etc.

However, layered upon this "classical architecture" is an evolving perspective on how public administration can ensure the enjoyment of cultural objects. As reality becomes increasingly complex with the involvement of additional stakeholders, technological advancements, socio-cultural progression, and cultural production, alternative models of economic valorization have emerged as complementary strategies for public fruition. This challenges the original view which positions public

[24] The Italian expression "*immateriale economico*" is to be referred to G. Severini, "L'immateriale economico nei beni culturali", in *Aedon*, no. 3, 2015, then followed by the studies collected in A. Bartolini, G. Morbidelli (eds.) *L'immateriale economico nei beni culturali*, Turin, 2018.

[25] M.S. Giannini, cit., 27.

[26] G. Severini, "L'immateriale economico dei beni culturali", cit., effectively describes the point by noting that "the formation of a cultural heritage order is the story of the emancipation of social value from private economic value." See also L. Casini, "Patrimonio culturale e diritti di fruizione", in *Riv. trim. dir. pub.*, 3, 2022, 660: "Even today, the cultural heritage legislative system is set up according to the logic that public ownership is preferable to private one."

access and economic exploitation of cultural property as conflicting, with the latter perceived solely as a constraint on collective and free cultural enjoyment.

In the Italian legal system, valorization[27], in general terms, is an administrative function of shared legislative competence between State and the regions[28]. Broadly defined, it includes promoting awareness of cultural heritage and ensuring conditions for its public use and enjoyment, including accessibility for individuals with disabilities – with the overarching goal of fostering the development of culture[29]. Both scholars[30] and constitutional jurisprudence[31] have extensively examined its relationship with the function of protection ('*tutela*'), emphasizing their complex interplay and mutual instrumentality. This connection reflects the evolving notion of cultural property and the ways in which fruition unfolds[32].

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[27] Please note that the English translation of '*valorizzazione*' will be interchanged between 'enhancement' and 'valorization': no real difference will underlie the choice of their use, to facilitate the reader's understanding.

[28] Article 117, para 3 of the Italian Constitution: "Concurring legislation applies to the following subject matters: [....] enhancement of cultural and environmental property, including the promotion and organization of cultural activities."

[29] Article 6 of the 2004 Code of Cultural and Landscape Heritage.

[30] See, among the numerous scholars who have dealt with the topic, S. Cassese, "I beni culturali: dalla tutela alla valorizzazione," in *Giornale di diritto amministrativo*, no. 7, 1998; L. Casini, "La valorizzazione dei beni culturali", in *Riv. trim. dir. pubbl.*, 2001. By the same author , see also the monographic work *Ereditare il futuro. Dilemmi sul patrimonio culturale*, Bologna, 2016 and, more recently, *Advanced Introduction to Cultural Heritage Law*, cit. Noteworthy is also the book chapter "Valorizzazione e gestione", in *Diritto del patrimonio culturale*, Bologna, 2020. Furthermore, M. Ainis and M. Fiorillo, "I beni culturali," in S. Cassese (ed.) *Trattato di diritto amministrativo*, Parte Speciale, vol. II, Milano, 2003.

[31] Constitutional court, ruling no. 9 of January 13, 2004: "[protection] is directed primarily at preventing the property from degrading in its physical structure, hence in its cultural content; in this regard, it is significant that the first activity in which protection is substantiated is the identification of the cultural property as such. Enhancement is directed primarily to the enjoyment of the cultural property so that the improvement of the state of preservation also pertains to the latter in the places where enjoyment takes place and the manner of that enjoyment." To this we can add the previous Constitutional Court ruling no. 94 of March 8, 2003, and, in more recent times, ruling no. 194 of July 3. 2013; ruling no. 140 of July 9, 2015; ruling no. 251 of November 25, 2016; ruling no. 138 of June 10, 2020.

[32] S. Cassese, in "I beni culturali: dalla tutela alla valorizzazione," observes that enhancement, unlike protection, is not enshrined in specific procedures, means or institutions; ultimately, it does not concern the cultural property itself, but rather the *organization* by which the property is managed and protected. On the protection-valorization dichotomy, see extensively L. Casini, most recently in the monographic work *Advanced Introduction to Cultural Heritage Law*, cit., esp. 54 ff. "The relationship between protection and valorization and, therefore, between conservation, protection, enjoyment, and knowledge is far more articulated and arises as a result of a broader process of democratization and expansion of the number of people interested in cultural heritage."

Here, the focus lies on a particular form of enhancement, specifically labeled as 'economic'[33] to differentiate it from its source, *cultural* enhancement, which could be positioned further along the continuum that connects protection and valorization.

On the one hand, it was observed that a more detailed articulation within the original conceptualization of cultural property (typically entrenched into a balance of public interest vs. proprietary rights) showed that economic value can be seen not only in terms of divergence, but also within a *convergent* logic with respect to the public interest.

On the other hand, this perspective ultimately invites a reconsideration of the very idea of immateriality, as economic concerns can intersect with the immaterial component of cultural property – the value, or, as some scholars have defined it, with the *image* of cultural property[34]. If immateriality is understood as the legal attribute of an object, i.e., its distinguishing "cultural *quid*", once the latter steps outside the public-private tension and embraces broader perspectives, immateriality itself may be viewed through this alternative lens. The concept evolves beyond the confines of cultural property as an inseparable fusion of physical object and intangible cultural significance. What was previously considered only as an intrinsic value inherent to the object itself can now be understood as having both internal and external dimensions.

The concept of "economic immaterial" thus refers to the *outward expression* of the cultural value (its image) aimed at serving new objectives of valorization – the latter understood as the set of ways to increase access, fruition, knowledge, and relevance of cultural property, including economic utility and wealth creation. The ultimate aim, then,

[33] The so-called 'economic' valorization has been thoroughly defined by G. Morbidelli ("Introduzione", in *L'immateriale economico nei beni culturali* cit., 4) as "an opportunity generated by cultural valorization [...] within a virtuous circle, which starts with the indispensable protection, then goes on with (first) valorization, which is functional to fruition, and continues with (second) valorization, centered on and linked with fruition in its various forms, and which finally generates resources for protection." The point has also been the subject of several studies in economics: see, for example, the distinction between heritage's value of use and value of existence in M. Vecco, *Économie du patrimoine monumental*, Paris, 2007, 80.

[34] See, for instance, G. Resta, "L'immagine dei beni culturali", in G. Alpa, G. Conte, V. Di Gregorio, A. Fusaro, U. Perfetti (eds.), *I beni culturali nel diritto. Problemi e prospettive*, Naples, 2010, 123 ff; A. Tumicelli, "L'immagine dei beni culturali", in *Aedon*, no. 1, 2014; G. Sciullo, "I beni culturali quali risorsa collettiva da tutelare - una spesa, un investimento," *ivi*, no. 3, 2017.

is to raise awareness, deepen understanding, but also generate revenue[35]. It has been observed in this regard that immateriality, besides intrinsic relevance, "facilitates connections between cultural property and the conduct of economic activities, and at the same time it has in itself economic significance."[36]

When cultural property is discussed in terms of "economic immateriality", it refers to the use of its *image*, which separates from the "thing-value" union and gains legal significance on its own. In traditional views, where materiality is seen as the dominant and fixed characteristic of cultural assets, economic exploitation can threaten public enjoyment, raising concrete concerns about the "publicness" inherent in all cultural property, following Giannini's theory. On the contrary, the possibility to recognize also extrinsic forms of immateriality – namely, the external projection of the asset's image – renders materiality even ancillary, and allows for partially mitigating the problem of enjoyment.

The use of such an image runs parallel to, rather than in conflict with, the physical object. In such cases, the public interest incurs only minimal compromise. Overall, this perspective challenges the original vision that enhancing cultural property does not consist in increasing its values, as those values are already (and only) inherently existing in cultural property; rather, it is believed that enhancement lies in executing measures that enable, streamline, and amplify the opportunities for accessing the values embodied by the protected property[37].

This chapter explores how cultural assets' projected images can gain legal significance, focusing on mechanisms for regulating their form ad dissemination. Far from claiming to be exhaustive (the very nature of immateriality perhaps would not allow it), it is useful to begin with concrete examples. Indeed, notwithstanding that each national legal order may frame the topic differently, scholars have identified a number of regulatory frameworks and mechanisms already in place that carry

[35] Revenue that, in turn, can be reinvested in the fundamental task of protection, which logically takes precedence over enjoyment. See L. Casini, "Patrimonio culturale e diritti di fruizione", cit., 661.
[36] G. Sciullo, cit. See also G. Severini, "L'immateriale economico nei beni culturali", cit. (translated): "The economic utility of enhancement is thus first and foremost contextual and indirect: it uses the cultural property as an attractor. In turn, the economic utility projected can interact with the better enjoyment of the heritage asset, attracting capital and resources that fuel the possibility of better public enjoyment."
[37] T. Alibrandi, P. Ferri, *I beni culturali e ambientali*, cit.

considerable implications for the economic exploitation *and* enhancement of a cultural property's image.

One notable example is the ability of public administrations to leverage the image of cultural property for trademark registration, as provided by Article 19(3) of the Italian Industrial Property Code[38].

The issue ties in with another topic thoroughly examined in the first chapter, and of which prevalence was recognized in the French legal system: that of labels[39]. In that case, too, a potential clash between UNESCO's cultural standards and economic objectives associated with labeling was recognized, yet the conclusion was reached that economic valorization could positively impact the fundamental protection needs of cultural heritage. Similarly, the newly introduced logo acknowledging the quality of "*Rievocazione storica italiana*" for historical reenactment events under law no. 152/2024[40] aligns with this approach. Indeed, the purpose of these events is explicitly linked (also) to their role in promoting local economic, productive, and tourism development (Article 2).

The two cases – public trademarks and labels – share a common feature: they highlight distinctive heritage elements, including aesthetic qualities, natural features, traditional practices, and artisanal production, through a dual approach to valorization. This includes *intrinsic* valorization, focused on the element itself, and *mediated* valorization, aimed at promoting the broader area in which the element is situated.

This topic warrants examination from an additional perspective. Amidst the inherent tension between preserving physical cultural assets – which often requires specific protective measures like restricted access or specialized conservation – and ensuring public accessibility, various enhancement approaches emerge that address different dimensions of

[38] Legislative Decree no. 30 of February 10, 2005, recently amended by Law no. 103 of July 24, 2023. For the reader's convenience, we recall that the Article allows both local and national administrations to obtain trademark registrations incorporating distinctive graphic elements drawn from the cultural, historical, architectural or environmental heritage of the relevant territory. These trademarks can be used for commercial purposes (including licensing and merchandising activities), provided that the generated revenue is then allocated toward financing institutional activities or covering any past deficits of the institution.

[39] See, especially, Chapter 1, Section 4.2.2.

[40] Law of 7 October 2024, no. 152, Disposizioni in materia di manifestazioni di rievocazione storica e delega al Governo per l'adozione di norme per la salvaguardia del patrimonio culturale immateriale.

cultural property. Consider, for instance, how craftsmanship, artistic practices, and traditional uses associated with cultural property can function as immaterial extensions of the physical asset. This relationship between tangible and intangible aspects can be examined through two analytical lenses.

One involves leveraging the craft and art sectors as a way to provide reproductions, reinterpretations, and other expressions that ensure alternative channels for accessing and engaging with the *single* cultural asset.

Another approach could focus on enhancing the physical asset by supporting – financially and otherwise – the practices and uses associated with it, which ultimately would reflect the *context* in which the cultural property emerged and evolved over time[41]. In this view, enhancement efforts would extend beyond the original, individual asset to include its surrounding environment. This could be interpreted through the lens of 'intangible cultural heritage,' as defined by UNESCO (which indeed encompasses practices, knowledge, and traditions), or more broadly, as involving the diverse activities – both commercial and traditional – that shape the property and its cultural setting. Here is where the first section of this chapter may be revisited: merely categorizing the immateriality of cultural property as 'intangible cultural heritage' would fail to capture this further nuance, which considers (i) the extrinsic immateriality of the physical good, in the sense now discussed; (ii) UNESCO ICH not only as cultural heritage in its own right but also as a means of further enhancing the image of the physical cultural property.

The latter example brings forth a more general concern regarding the reproducibility of the cultural property's image. The issue is highly topical, as it entails a discussion on the compatibility of circulating images with the cultural value of the original property. On the other hand, considerations regarding advancements in new technologies and the digital realm – which offer expanding opportunities for virtual reproduction, digitization, and enhanced access to images of cultural property – complicate the ability of public authorities to regulate these actions in terms of "culturality," appropriateness, and decorum. The argument raises, in turn, a question of authenticity, as the potential for endless repurposing of the very essence of the good (its immaterial-

[41] See on this point X. Greffe, La Trace et Le Rhizome - Les Mises En Scène Du Patrimoine Culturel, vol. 11, Québec, 2014.

cultural value) could diminish what Walter Benjamin described as "aura"[42] and John Merryman defined as a public interest in "truth."[43]

Based on the foregoing, we can finally draw some methodological insights for the next stages of this research. It is evident that the primary challenge with an economic immaterial lies in the difficulty of establishing an adequate legal framework for a form of immateriality that is, in theory and sometimes also practice, disconnected from any material basis. Because it is extrinsic, it can also be considered independent of the physical object, which complicates its integration into the conventional framework of cultural heritage protection and enhancement. The task ahead is to assess, therefore: (i) whether this extrinsic immateriality can be recognized as a distinct area of interest and (ii) what legal potential resides in this emerging dimension.

2.3. New interests and protection paradigms

The third notable approach adopted by legal scholars in investigating the existence of an immaterial dimension of cultural property emerges in response to this "externalization" of the values attached to the object. The previous analytical framework introduced the concept of 'economic immaterial' – defined as strategies that enhance a property's image and intrinsic immaterial value through revenue-generating initiatives. These economic measures ultimately support the preservation, accessibility, and continued existence of the physical medium. However, while insightful, this economic perspective remains incomplete. Scholars have increasingly argued for recognizing an immaterial dimension that operates beyond this logic.

Researchers across different disciplines – including law, archaeology, architecture, urban planning, and anthropology – have explored the potential presence of immaterial elements within built heritage conservation practices. Their inquiries ask whether immateriality shapes conservation methodologies, how it is defined, and whether it warrants recognition as an independent concern.

Indeed, at the turn of the century, traditional approaches to cultural property came under scrutiny in both academic and institutional sectors,

[42] W. Benjamin, The Work of Art in the Age of Mechanical Reproduction, 1935.
[43] "[...] the shared concerns for accuracy, probity, and validity that, when combined with industry, insight, and imagination, produce good science and good scholarship", in J.H. Merryman, "The Public Interest in Cultural Property", cit., 359.

and both on a national and international scale. This timeframe aligns with the global emergence of key frameworks, including UNESCO's 2003 and 2005 Conventions on intangible cultural heritage and cultural diversity, the Council of Europe's Framework Convention on the Value of Cultural Heritage for Society (2005), and the introduction of concepts such as "cultural landscapes" and "cultural routes."[44]

In parallel, since the 14th General Assembly of ICOMOS, titled "Place - Memory - Meaning: Preserving Intangible Values in Monuments and Sites" (Victoria Falls, Zimbabwe, 2003[45]), discussions have focused on integrating material cultural property within broader narratives of values, practices, and memory discourses – all of which were deemed to impact conventional forms of protection and conservation.

ICOMOS's work remains a critical reference point[46]. In its most recent Charter and Guidance on Sites with Intangible Cultural Heritage, adopted at the 2024 General Assembly in Ouro Preto, Brazil[47], it explicitly states that "contemporary heritage practice acknowledges that the conservation of heritage sites is often crucial to the safeguarding of intangible cultural heritage." Within the Charter, a deeper consideration of intangibility and its subjective nature – embedded in community custodianship and expertise – emerges as a central concern.

In this evolutionary overview, it is also crucial to acknowledge a far earlier antecedent. In early 1960s – concurrent with ICOMOS founding[48] – a Council for Cultural Cooperation was created within the Council of Europe, tasked with examining the project of a European Conference for

[44] The convergence of approaches within UNESCO's Conventions was formalized through the Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage, unanimously adopted on October 22, 2004, by participants of the International Conference on "The Safeguarding of Tangible and Intangible Cultural Heritage: Towards an Integrated Approach," held in Nara, Japan. This was followed by the UNESCO World Heritage Committee's Decision 7 EXT.COM 9 19, titled "Co-operation and Coordination between the UNESCO Conventions concerning Heritage."

[45] To which should be linked the Declaration of the Kimberley Workshop on the Intangible Heritage of Monuments Sites, held prior to the ICOMOS General Assembly in Zimbabwe in Kimberley, South Africa. The workshop focused on drafting an initial version of a declaration for managing sites with intangible heritage significance. Document available at https://icich.icomos.org/wp-content/uploads/2024/02/Kimberley-Declaration-31-Oct-2003.pdf (accessed 14 February 2025).

[46] See in this regard also the Québec Declaration on the Preservation of the Spirit of Place (2008).

[47] Document available at https://openarchive.icomos.org/id/eprint/3367/1/ICICH%20Charter%20EN-FR_final.pdf (accessed 14 February 2025)

[48] Warsaw, 1965.

the preservation and development of groups and areas of buildings of historic and artistic interest. Although focused on a broad definition of cultural heritage[49], its initial focus was on "immovable and tangible assets consisting of natural areas of historical or artistic interest, groups of buildings which may be regarded as monuments, as well as monuments proper within their appropriate setting and environment"[50]. At the same time, though, there was already an emerging awareness of the "non-material setting" in which such heritage was embedded, encompassing environmental, socio-cultural, economic, tourism, and architectural elements [51].

Extensive research endeavors culminated in a series of actions and policy recommendations aimed at heightening States' attentiveness to (i) a newfound dimension emerging from heritage policies – namely, a social *value* that necessitates preservation and active integration into people's lives; (ii) the imperative to implement more integrated policies that treat cultural property as a social and economic tool that contributes to the design of a human environment; and (iii) the emergence of new uses, reuses and narratives that underpin ancient property, contingent upon the communities residing in and engaged in preservation efforts.

Over time, Council of Europe policies evolved to emphasize the relationship between heritage and sustainable development. This shift reframed conservation from a focus on isolated monuments to a broader, integrated management of living environments. In current discourse, heritage is increasingly understood as a vehicle and a vital resource from cultural, social, economic, and environmental perspectives, contributing

[49] "The concept of the cultural heritage is without doubt a very broad one. Indeed, it includes immovable assets such as natural areas where preservation is warranted for scientific or aesthetic reasons and also movable assets, generally known as "works of art"; it even covers assets whose existence is merely suspected – paleontological or archaeological remains before excavation – and non-material assets, such as popular languages and traditions." Conference of Ministers chiefly responsible for the preservation and rehabilitation of groups and areas of buildings of historical or artistic interest, Report by the Spanish Minister for Education and Science, Doc. CCC/ACV (69) 55.

[50] *Ivi.* All following quotations refer to the same document.

[51] L. Lixinski, "Definitions: From Cultural Property to Cultural Heritage (and Back?)," cit., 4, recognizes a similar shift in perspective already in the Hague Convention of 1954 in the reference to groups of buildings, which "reflected a move in preservationism that sought to (re)contextualize cultural heritage, and focus not only on isolated buildings, but in larger architectural fabrics."

to the sustainability of the three interconnected systems: nature, society, and economy[52].

Nonetheless, practical application continues to lag behind theoretical progress. While interest in context-aware preservation is growing, institutional implementation remains inconsistent and cautious.

Within this landscapes, legal frameworks play a crucial role in shaping stakeholder relationships and prioritizing competing interests. As values diversify, the distinction between tangible and intangible elements blurs, and the concept of authenticity continues to evolve (just think to the progression from the foundational principles of the Venice Charter to the contextual approach of the Nara Document 1994[53]), legal interpretation must keep pace to address these shifting understandings.

As Wells and Lixinski have observed

> "The law is principal to architectural and urban conservation because private property owners must adhere to specific rules and regulations defined by local, state, and federal governments. It is therefore not possible to discuss how architectural and urban conservation practice can change without assuring the centrality of law in all such discussions."[54]

The point echoes a central point raised earlier in Giannini's legal theory of immateriality: the merely declarative appraisal of administrative duties pertaining to cultural heritage protection. As noted, this entails an empirical approach to cultural property, as well as a limitation to a so-called "Authorized Heritage Discourse" according to which experts are

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[52] See Council of Europe's publications Forward Planning: The Function of Cultural Heritage in a Changing Europe, Strasbourg, 2001 and Heritage and Beyond, Strasbourg 2009.

[53] *Nara document on authenticity*, 1994. See in particular points 11 to 13: "All judgements about values attributed to cultural property as well as the credibility of related information sources may differ from culture to culture, and even within the same culture. It is thus not possible to base judgements of values and authenticity within fixed criteria. [...] Depending on the nature of the cultural heritage, its cultural context, and its evolution through time, authenticity judgements may be linked to the worth of a great variety of sources of information. Aspects of the sources may include form and design, materials and substance, use and function, traditions and techniques, location and setting, and spirit and feeling, and other internal and external factors." Among other goals, the document reflects a desire to broaden conservation practices beyond a Western-centric focus, embracing strategies that allow for the destruction and reconstruction of sites, where less emphasis is placed on the originality of materials or status. In this respect, see R. Mason, "Fixing historic preservation: A constructive critique of "significance"", in *Places*, 1, 16, 2003.

[54] J.C. Wells, L. Lixinski, "Heritage Values and Legal Rules: Identification and Treatment of the Historic Environment via an Adaptive Regulatory Framework (part 1)", cit., 3.

the only ones entitled to recognize a value that either exists or not in physical assets, within a polarization that prevents further discussion on evolving meanings, memory discourses, and community perceptions.

A critical re-examination of what Wells and Lixinski described as "orthodox approaches to heritage"[55] allows to further extend the identifiable dimensions of immateriality. We will therefore consider, throughout this chapter, the possibility of an additional immaterial dimension, one that is untethered from intrinsic value and extended, instead, to an extrinsic projection of it. Unlike traditional approaches grounded in expert judgment, this perspective relies on socio-cultural value assessments, prompting a shift toward the legal attribution of value. This shift, in turn, raises important questions about the diversification of actors and interests involved in the recognition of heritage value. As a result, existing legislative tools designed to support this broader immaterial dimension must be critically examined. This analysis will build on themes introduced in the current chapter and, more significantly, serve as a foundation for the following chapter, which focuses on the subjective component in cultural property law and offers a new lens on immateriality.

[55] *Ivi*, 7.

3. Two trajectories of investigation: decorum and use

The three scholarly approaches to the study of cultural property's immateriality discussed above can be grouped into two main interpretive perspectives. The first views immateriality as an intrinsic, inseparable trait of the object – an essential characteristic that confers upon it the status of a cultural *good*. The second broadens this perspective, framing immateriality as something that extends beyond the object's physical form, shaped by the interactions it generates in external, physical or conceptual contexts. It is crucial to highlight that these dimensions are not mutually exclusive; rather, they function simultaneously and interdependently within cultural objects. The distinction drawn here serves purely analytical purposes.

This section explores two distinct investigative scenarios. The first focuses on the outward projection of a cultural object's intrinsic immateriality beyond its physical boundaries. What kinds of relationships can be formed as the asset moves beyond materiality? Under what conditions does this occur, and how do legal and administrative frameworks respond and regulate these interactions?

To address these questions, we will employ the concept of decorum as our analytical framework. The standard of decorum recurs throughout legal discourse as a benchmark that must be satisfied when immaterial values project outward.

The second scenario, in contrast, takes a critical approach to the concept of intrinsic immateriality itself, analyzed through the framework of use. In this case, we investigate how an object's function may define its value, and how external uses can influence this valuation, even when originating outside the object's material form.

Both scenarios employ a case-based methodology, exploring how regulatory frameworks, administrative practices, and judicial interpretations have collectively shaped this analytical context. By examining these practical applications, we can derive meaningful insights regarding the identification and characterization of immaterial dimensions in cultural property.

3.1. Decorum as a framework for assessing cultural property's value projection

The term 'decorum' is directly drawn from Italian cultural heritage law and administrative jurisprudence, appearing explicitly in several provisions of the Code of Cultural and Landscape Heritage[56].

The recurring emphasis across these provisions reveals a fundamental concern with the visual representation of cultural objects. At its core, the focus is on upholding a specific *image* – one that embodies both visual and contextual coherence intrinsically connected to the physical manifestation. In this framework, decorum serves as a standard for maintaining the essential character of the thing, particularly when external influences might alter its appearance, thereby guaranteeing continuity within its *context*[57].

What relationship is formed between this 'image' and the intrinsic immateriality that defines the object's cultural value? Upon closer examination, the two concepts do not overlap. The concept of decorum serves as a standard for assessing the *external* expression of the inherent cultural value. It comes into play when the property's connection to the external world is considered, guiding actions to preserve its proper state of existence.

The Council of State reinforced this perspective in 2016[58], defining *decoro* (specifically "urban decorum," though the definition can be extended to a broader concept) as an intangible purpose of administrative action.

[56] Article 45(1) identifies decorum as a key standard in implementing so-called "indirect protection" measures. It authorizes the Ministry of Culture to set specific parameters (such as distances, dimensions, and technical requirements) to prevent changes that might compromise the aesthetic integrity, contextual setting, or decorous appearance of immovable cultural property. Article 49(1)(2) addresses advertising bills and hoardings on cultural property, allowing superintendents to approve signage only if it does not compromise the appearance, decorous aspect, or public enjoyment of the cultural property concerned. Article 52(1-ter) governs commercial activities within monumental complexes and surrounding tourist-heavy areas, protecting their decorum from actions that might undermine their cultural significance. Similarly, Article 120(2) requires that sponsorships respect the appearance and decorous character of cultural assets, as specified in the governing contract. For a complete overview, Article 96 should also be mentioned, allowing expropriation of cultural property for instrumental purposes, including the preservation or improvement of their decorum.

[57] S. Cassese, in "I beni culturali: dalla tutela alla valorizzazione", cit., referring to the administrative function of *tutela* as "preservation within context."

[58] Council of State, Section V, rulings no. 3861/2016 and no. 1816/2017.

> "[Decorum is] an intangible purpose of administrative action – not a subject, not an activity in itself – which corresponds to the value inherent in maintaining a discernible level of overall *quality* in the management of public spaces, characterized by *harmony and consistency with the historical context*, achieved through the selection of material additions and uses, especially commercial but not limited to them. Depending on the context and the tool employed, it may result from the protection (and enhancement) of cultural heritage, urban planning or commercial regulations, or municipal policies regarding public land concessions: all due to the competencies vested by law."

This prompts us to consider certain challenges related to the topic and to formulate some research questions for further exploration.

A preliminary issue arises concerning the meaning of the term from a linguistic perspective even before considering its legal implications. The notion is indeed what the Italian legal doctrine refers to as "indeterminate legal concept"[59], and "concept of value" – that is, a general clause whose regulatory parameter has wide margins of flexibility, as it evokes "evaluative standards found not only in collective discipline but also in social consciousness."[60] As a matter of fact, in its overall understanding 'decorum' encompasses values such as dignity, appropriateness, honor, ornament, and "harmonious proportion"[61].

Accordingly, these standards found their way into legal discourse. For instance, decorum was defined it in terms of "style and historical-artistic significance", which involves "ensuring historical and stylistic continuity between the monument and its environmental context"[62]. It is hard not to notice, however, an underlying vision anchored in a perception of cultural property as material and inherently "precious," coming from an undisputable past, and reflecting a particular understanding of the associated quality standards. This can present

[59] On the topic, particularly within the cultural framework, see M. S. Giannini, *I beni culturali,* cit.; G. Morbidelli, "Art. 10", in M.A. Sandulli (ed.), *Codice dei beni culturali e del paesaggio*, Milan, 2012, spec. 126; G. Severini, "Tutela del patrimonio culturale, discrezionalità tecnica e principio di proporzionalità", cit.; A. Bartolini, "Il bene culturale e le sue plurime concezioni", in *Dir. Amm*., 2, 2019, 223 ss. At a theoretical level, in relation to the definitional issue and the vagueness of the language, see A. Falzea, *Ricerche di teoria generale del diritto e di dogmatica giuridica*, I, Milan, 1999; C. Luzzati, *La vaghezza delle norme*, Milan, 1999; G. Pino, *L'interpretazione nel diritto,* Turin, 2021. Also, the encyclopedic item of E. Fabiani, "Clausola generale", in *Enc. dir., Annali*, V, Milan, 2012.

[60] See M. Clarich, M. Ramajoli, *Diritto amministrativo e clausole generali: un dialogo*, Pisa, 2021, 56; the quotation is from Cass. civ., 8 May 2000, no. 5822, in *Foro it*., 1, 2003, 1846 ff.

[61] See the definition provided by Italian dictionary *Treccani*, available online at https://www.treccani.it/vocabolario/decoro2/ (accessed 15 May 2024).

[62] Council of State, Section VI, ruling no. 3893/2012.

considerable challenges in handling complex situations that involve changing settings or distinct interests and values, making it difficult to establish a clear hierarchy. Above all, it becomes challenging to determine the foundation of the relationship with the surrounding context and how social, cultural, economic, or tourism-related changes can be appropriately integrated within the framework of a "decorous appearance".

Administrative judges have highlighted the epistemological limitations of such evaluations, which often rely "not in precise scientific methodology, but rather in historical and philosophical considerations that are intrinsically tied to specific territorial contexts and subject to ongoing evolution," affecting the objectivity and consistency of assessments conducted by experts in the field – such as art historians, anthropologists, architects, and urban planners – who serve within public administration[63]. Indeed, related as it is to the preservation of a certain image, it follows that cultural property might intersect with moral or aesthetic standards that defy objective analysis – particularly when cultural preservation overlaps with competing interests like environmental protection private property rights, economic initiative, or the protection of public order.

More broadly, this raises important concerns about how administrative discretion is exercised, even with the principles of reasonableness and proportionality in place. Indeed, the concept of decorum shifts the focus from the norm to a factual assessment influenced by extra-legal parameters. The primary concern, then, involves the authoritative model of heritage recognition, which precisely relies on technical discretion.

At the same time, however, the broad flexibility of this concept allows administrators to respond dynamically to evolving cultural landscapes and changing societal needs. This adaptability proves particularly beneficial when applying preservation standards across diverse cultural contexts. Notably, legal scholars have defined such general clauses as the "breathing organs of law," underscoring their vital role in maintaining a dynamic legal system[64]. For the purposes of this research, this invites a closer look at how administrations have interpreted and applied the notion of decorum in practice.

The tension between discretionary authority and oversight ultimately connects to touches on fundamental questions of legal certainty and the

[63] Council of State, Section VI, ruling no. 8167/2022.
[64] M. Clarich, M. Ramajoli, cit., 59.

risk of administrative overreach in establishing hierarchies of cultural value. Further complicating this is the involvement of multiple levels of administration. Indeed, in terms of competencies, the protection and enhancement of cultural property involve the participation of multiple administrations, whether at the state or local level. As a result, it can be difficult to determine whether the preservation of decorum falls under *tutela* (protection), *valorizzazione* (enhancement), or issues related to trade regulation. This ambiguity surfaces particularly in cases where efforts to promote cultural property's enjoyment may alter its visual appearance or raise questions about permissible commercial activity in historic spaces.

Based on the foregoing, our analysis aims to determine the full range of "projections" that emerge in legally significant situations where preservation of decorum standards is at stake. This includes examining the surrounding context in which the property is embedded, which will be considered form both physical and non-physical – including digital – dimensions. This will be particularly pertinent when considering cultural property significance as a collective entity (e.g., in the case of "typical" cultural property[65], but also in hybrid situations as discussed in the previous chapter, where elements of UNESCO ICH are incorporated in urban contexts within wider cultural frameworks). This issue specifically pertains to a variant of decorum, referred to as urban decorum, which involves multiple disciplines far beyond the regulation of the cultural domain (e.g., urban planning, economics, tourism, etc.), as recognized by the Constitutional Court mentioned above [66].

As this research unfolds, we will also examine how this topic connects to the broader themes of cultural property *use* and *cultural destination*, which will receive comprehensive treatment in Section 3.2.

[65] The Code mentions, for instance, "squares, streets, roads and other urban open spaces of artistic or historical interest" in Article 10(4)(g), or "complexes of immovable things that constitute a characteristic aspect having aesthetic and traditional value" in Article 136 (Buildings and areas of notable public interest) – interestingly, the latter is found in the section dedicated to landscape assets.

[66] For an examination of the topic of urban decorum, we refer to P. Carpentieri, "Il decoro urbano: il problema degli usi e della conservazione dei centri storici. I beni culturali e la normativa urbanistica", in *GiustAmm.it*, no. 12, 2014, and M. Carrer, "Le ordinanze sul decoro urbano", in *Le Regioni*, no. 1-2, 2010, the latter also referring to terminological dilemmas intersecting with public order values, prompting local authorities to use urban decorum as a "background concept" precisely because it lacks a single definition and can be interpreted in various ways according to the general needs to protect the "safety" or "security" of both the city and its citizens.

But the question of decorum takes on additional significance when considering scenarios where an asset's inherent value, as reflected in its outward appearance – i.e., its image – is disseminated into contexts that enable its multiplication, increase its accessibility, and, as a result, promote its circulation. When such an image detaches from the material object and is employed for different purposes – whether commercial or non-commercial ones – significant issues may arise, as evidenced by a wide range of legal doctrine and administrative rulings that will be discussed in the next subsections. This phenomenon can manifest within economic realms, such as sponsorship, reproduction for advertising purposes, or brand utilization, as well as within purely artistic domains, such as contemporary reinterpretations of cultural property, intersecting with issues related to art, freedom of art, copyright law, and landscape protection. In such contexts, the emphasis shifts from the physical preservation of the object in its context to a primarily immaterial perspective that focuses on *extending* immateriality into *other* contexts, thereby necessitating the application of different (or additional) regulations.

The research will be structured around two primary questions.

First, how does legal discourse – spanning regulatory frameworks, administrative practices, and judicial interpretation – define and give substance to this general clause, particularly with regard to preserving a property's "contextual setting" or the "external image" it projects? Does the inherently indeterminate legal notion of decorum rely on a fixed, idealized, and aestheticized standard, or is it adaptable to historical and contextual changes?

Indeed, if decorum is anchored to a predefined and idealized standard that must be preserved, it becomes difficult to integrate contextual changes, contemporary societal interpretations, and environmental impacts into the technical assessment. Thus, while it is useful to analyze how the concept is applied in administrative decisions, it is equally necessary to interrogate its procedural foundations and the extent to which it accounts for the interests of affected stakeholders.

A second line of inquiry looks prospectively at decorum's potential to illuminate legally significant immaterial aspects of cultural property. Specifically, it examines whether decorum can inform how these aspects contribute to the conceptualization, assessment, and protection of cultural property within contemporary dynamics, ultimately striving for a more nuanced and responsive approach to cultural interest.

To explore these questions, the research examines selected cases across legal, administrative, and jurisprudential settings, focusing on two distinct scenarios.

The first concerns the preservation of decorum, or "image," in relation to the contextual and urban dimensions of cultural property (Section 3.1.1). In these cases, a direct and tangible connection remains between the physical asset and its cultural significance. The second scenario (to be discussed in Section 3.1.2) examines how decorum is assessed when cultural properties are reproduced or employed in ways that project their image beyond physical forms, often serving additional (typically commercial) purposes.

3.1.1. The 'contextual image' of cultural property

This section explores a specific interpretation of decorum as 'contextual integrity' – the preservation of cultural property's appearance in relation to its physical and urban surroundings. This concept is particularly applicable to building complexes and immovable heritage, where decorum functions as a standard for maintaining a coherent *spirit* and aesthetic continuity. It operates within a complex yet fluid network of social, economic, cultural, and environmental relationships – interwoven elements that collectively uphold the contextual integrity of tangible assets. In this sense, we argue that investigation on how the standard of decorum is interpreted illuminates a form of "extrinsic immateriality" – the outward projection of the object's value (intrinsic immateriality) and the relationships that its projected image engenders.

Our analysis begins with a case in which decorum is framed through specific regulatory provisions: the protection of Venice's canals. Recognized for their cultural significance[67], the canals are safeguarded

[67] The Legislative Office of the Ministry of Cultural Heritage and Activities (Opinion no. 12089, June 30, 2004) was the first to clarify that cultural protection applies only to human-made properties. It later specified that agricultural land can qualify as cultural property in two cases: (i) when it holds relational cultural value, that is to say, while maintaining agricultural use, the land is connected to history, being witness to events and happenings, or having hosted monuments or other evidence concerning specific events; (ii) when it holds intrinsic cultural value due by human intervention, such as "historical uses still visible" that somehow altered its original natural form. In this regard, G. Severini, "Culturalità del paesaggio e paesaggi culturali", in *Federalismi.it*, no. 16, 2020, who identifies the qualities of originality, artificiality, historicity, and the connection with the cultural space as the elements that, in exceptional cases, elevate a landscape to cultural

not only for their physical integrity and safety, but also for their *decorum*. Protective measures enacted by competent authorities aim at identifying incompatible uses, specifically concerning vessel traffic. Under Decree-Law no. 103 of July 20, 2021[68], restrictions may be imposed based on specific technical criteria, including gross tonnage, length, height, and emission levels.

In this way, decorum enters the legal domain as an indeterminate concept concretized by regulation, which delineates its scope in relation to uses deemed incompatible with the canals' contextual setting.

The case is relevant for two reasons. First, because it involves ad hoc legislative intervention to define the conceptual boundaries of decorum, shaping how the immaterial value is projected into the external world. Second, because it invites a broader reflection on the relationship between the canals as a distinct cultural asset and their *surrounding context* – the city of Venice – and how this relationship contributes to a cohesive urban identity.

Indeed, this example highlights how protected assets can form complex, interconnected networks where their individual designations through separate administrative processes create overlapping spheres of influence. When these cultural properties interact and establish contextual relationships, they generate additional considerations that adds on their initial individual classifications as cultural property. An additional immaterial dimension thus emerges from these layered relationships, stemming from the need to ensure contextual integrity of their images that gains significance precisely through their interaction.

This necessitates an examination of how these contexts become relevant in administrative decisions and the extent to which administrative evaluation can encompass and define this additional dimension. In the case under examination, Venice's canals are cultural assets in their own right, yet they also form part of the city's urban landscape – holding a UNESCO World Heritage recognition and grappling with issues such as

property status, granting it stronger protection than standard landscape assets. The Council of State, Section VI, ruling no. 3893/2012, reinforces this view, observing that the protection of immovable cultural property applies to tangible elements – whether fully artificial (e.g., buildings) or natural features shaped by human care and adaptation (e.g., parks and gardens) – rather than to mere visual aspects.

[68] Titled "Urgent measures for the protection of waterways of cultural interest and the preservation of Venice, as well as urgent provisions for labor protection." On this point, L. Casini, "La salvaguardia di Venezia "città acquatica": dall'utopia alla realtà", in *Aedon*, no. 2, 2021.

mass tourism and cultural commercialization. The key question, then, is whether the interplay of these elements generates additional immaterial dimensions that merit recognition in administrative practice, potentially informing a broader reconceptualization of cultural property and the related criteria for maintaining a *decorous appearance*.

In 2013, the Regional Director for Cultural and Landscape Heritage of Lombardy issued a decree declaring a "context"[69] (*ambito*, in Italian) – a formulation that already is telling in its very essence – of particularly important cultural interest according to Article 10(3)(a)[70] of the Code. This designated context included a church and its surrounding areas, encompassing both a formally recognized cultural property – the church itself – and several predominantly natural areas, consisting of privately owned cadastral parcels primarily used as olive groves. The latter were also granted *direct* cultural protection and were therefore recognized as cultural property in their own right for the following reasons: (emphasis added)

> "Direct preservation is necessary to protect, in their distinctive features, the *conditions of environment and decorum of the Church of San Pietro in Oliveto and the surrounding areas*, which have long been devoted to agricultural use, particularly the cultivation of olive trees. In such areas, traditionally present on the site, are recognizable not only the value of significant historical-artistic importance, but also a valuable *overall quality*, that allows for the *maintenance of the existing relationship between the monument and its context*. Therefore, they need declaration of cultural interest and suitable protection in order to preserve these residual characteristics from any improper transformations."[71]

In essence, the surrounding lands (a predominantly natural element) were not protected for their own historical-artistic value (though such value may exist in natural assets[72]), but because their *extrinsic appearance* – their projected image – contributed to maintaining the "decorum and environmental conditions" of the church. These conditions emerged from, and were ultimately defined by, the instrumental and dependent relationship between the two elements of the cultural constraint. The

[69] Located in the Municiaplity of Limone sul Garda (Brescia, Italy).
[70] "Cultural property shall also include the following, when the declaration provided for in article 13 has been made: (a) immovable and movable things of particularly important artistic, historical, archaeological or ethno-anthropological interest, which belong to subjects other than those indicated in paragraph" – the latter being the State, the regions, other territorial government bodies, as well as any other public body and institution, and private non-profit associations, including civilly recognized ecclesiastical bodies.
[71] Historical-artistic report attached to the administrative provision.
[72] Refer to note no. 67.

contextual fit was ensured – and thus the maintenance of a standard of decorum – only through the direct protection of the lands surrounding the primary property.

In 2020, the decision was overturned by the Regional Administrative Court of Lombardy[73], siding with landowners who contested the designation. The Court determined that the surrounding areas were more appropriately classified under indirect protection[74] as they lacked inherent cultural attributes warranting full designation. In doing so, the Court effectively *reconceptualized* the relationship that the administration identified as foundational to the holding the overall image of the cultural property. Such a relationship was to be preserved as part, precisely, of "an intangible purpose of public administration" – safeguarding cultural property by preserving its physical integrity and visual prominence, while maintaining the surrounding context unchanged to uphold its setting and decorous appearance.

Setting aside the specifics of the case, where the designation of the agricultural land as cultural property indeed lacked sufficient justification in the administrative act, the core issue lies in the reasoning behind extending direct protection. The decision under review illustrates how the interplay of different cultural elements gives rise to additional immaterial dimensions that become integral to the cultural constraint. This occurs because the "context" and the standard of decorum it ensures not only support the inherent immateriality of the protected property but also safeguard the new relationships that emerge from this interaction.

There are instances, however, where the distinction between direct and indirect protection is clearly articulated within the administrative act itself.

In 2009, the Superintendence for Architectural and Landscape Heritage of the provinces of Brescia, Cremona and Mantua recognized a predominantly natural element – the lake system surrounding Mantua –

[73] T.A.R. Lombardia, Brescia, Section I, ruling no. 436/2020.

[74] That is, the form of protection mentioned above (Article 45 of the Code), which specifically allows for the conservation of the "setting or decorous appearance" of cultural property by granting the Ministry of Culture the authority to establish distances, dimensions, and other regulations to prevent alterations that might compromise this aspect.

as cultural property under Article 10(3)(d) of the Code[75]. This included its hydraulic infrastructure, irrigation strategies, and related waterways. In addition, a non-lake area was also identified as a buffer zone and granted indirect protection under Article 45, where construction of any kind of building was explicitly prohibited.

This case presents both legal configurations.

On one side, we observe a transformation in which human interventions have altered a predominantly natural element into what is classified as a 'cultural property by reference.' Experts determined that the cultural significance derived from the historical evolution and continuous management of the waters surrounding the city. The latter were deemed "essential to the *city's configuration*," incorporating layers of political, military, agricultural, and engineering history, as well as artistic and iconographic elements – forming a central component of the city's identity.

But what remains crucial, as it was in the case of Venetian canals, is that this distinctive hydrogeological environment surrounding Mantua, shaped through continuous human intervention, contributes significantly to the city's *external* appearance – a visible embodiment of its historical depth. As a result, protection extends to an intricate interplay between inherent values of the lake system and the necessity of preserving a distinct representation of *other* cultural elements[76]. Here, then, safeguarding an immaterial dimension of cultural property is not about preserving harmony to avoid disrupting material and visual integrity. Instead, protecting a certain contextual integrity holds visual,

[75] So-called 'cultural property by reference': "Immovable and movable things, to whomsoever they may belong, which are of particularly important interest because of their *reference* to political or military history, to the history of literature, art and culture in general, or as testimony to the identity and history of public, collective or religious institutions". These asset's value, therefore, derives not from intrinsic but rather from extrinsic cultural considerations. Specifically, it derives from the association with various events of the past, within a broad understanding of what 'history' is. The topic will be discussed in greater details in the following section and in Chapter 3, esp. Section 3.2.1.

[76] Mantua is included within the World Heritage List since 2008, https://whc.unesco.org/en/list/1287/ (accessed 24 March 2024). It is important to recall that UNESCO sites do not inherently receive protection as standalone entities, neither automatically impose restrictions or limitations, as the Constitutional court confirmed with ruling no. 22/2016. Instead, due to their diverse typological characteristics, they may benefit from various specialized protection measures tailored to specific cultural or landscape assets. Rather, such constraints are subject to the discretion of legislative bodies, which assess and implement them as deemed appropriate. The designation thus integrates into a wider administrative and cultural framework.

cultural, and historical values that make it a cultural element in its own right, as well as a crucial element that contributes to the image of (other) associated cultural property.

On the other hand, the administrative act also delineates a "context frame", identified to fall under indirect protection regulations, and applicable to a different territorial section. The imposition of indirect protection on such an environmental setting (i.e., *cornice ambientale*) as referred to in both administrative and judicial documents, has been endorsed also by the administrative judge, up to the Council of State[77], which has emphasized the crucial nature of the setting as "a peculiar and exceptional part of the context frame of the lakes," stressing the need for "adequate protection to preserve the *contextual characters* of the historical asset."

This case, then, illustrates a layered taxonomy of cultural protection: a 'broader setting' subordinate to primary cultural values, alongside independently recognized cultural assets that nonetheless form unique connections with other elements, in an intricate classification of "contexts" with varying levels of cultural value – ranging from direct and indirect to mediated, formally designated, and those associated with UNESCO recognition.

Regarding the latter, an additional question arises about the interaction between so-called core zones and buffer zones in relation to UNESCO's primary site protection. This dynamic partially reflects the previously mentioned distinction between direct and indirect protection. Within this framework, too, the issue emerges of how the property is safeguarded and how its physical presence and cultural value are projected in contexts that not only acknowledge its existence but also contribute to its broader conceptualization.

Within this intricate network of interactions, it becomes essential to determine whether an additional immaterial dimension arising from the asset's projection within its context derives specifically from upholding the need to preserve its "external appearance."

In this respect, an additional consideration must be addressed. In the establishment of other immaterial dimensions relevant to the very conceptualization and protection of cultural property – arising from

[77] Council of State, Section VI, ruling no. 3893/2012. The case originated from a request to annul both direct and indirect constraint measures, filed by two companies that were executing a plan for the construction of residential and hotel properties in the area under consideration.

their relationship with the *context* and an overarching *contextual fit* – a broader spectrum of interests and legal implications emerges. In such cases, in fact, administrative cultural decisions may intersect with other constitutionally protected interests. This convergence often leads to complex balancing exercises, which courts and public authorities have found difficult to navigate.

One illustrative case from the 2010s[78] involves an administrative dispute concerning the recognition of cultural value to a so-called "system of votive crosses," and the indirect protection of vast neighboring territorial areas[79] to prevent *visual interference* from a proposed photovoltaic facility.

Here, thus, three distinct elements emerge: (i) the cultural property, holding intrinsic cultural value – i.e., the system of votive crosses; (ii) the extended surrounding territorial areas, subject of indirect protection to ensure the visibility of the main asset; (iii) the project to install wind turbines in those same areas, which, as contended by the Council of State, aligns with an "environmental interest in ecological transition, aiming to shift the production system towards a more sustainable model, reducing the environmental impact of energy and industrial production, as well as overall lifestyle."

The core legal conflict revolved around the tension between cultural and environmental protection, with the latter situated at the intricate intersection of cultural, health, and climate interests. Specifically, the Court focused on the areas under indirect protection, which were designed to maintain the property's visual integrity by preventing alterations to its appearance, limiting land use to agriculture, and prohibiting the initiation of industrial and civil projects. The judges explicitly recognized that public intervention establishes a specific protection regime for surrounding and neighboring areas by shaping the "environmental frame" that defines outward appearances and influences the transmission of the "typical value" inherent in any material evidence of civilization. The overarching objective was therefore to prevent any changes to the "environmental and decorous context, perspective, and view" of the principal cultural property.

[78] Culminated in Council of State, Section VI, no. 8167/2022. All the following quotations refer to such ruling.
[79] Regional Directorate for Cultural and Landscape Heritage of Molise, Decree no. 27-28 of 26 August 2014.

However, given the extensive scope of the protected territories, the Court emphasized the necessity of balancing competing constitutional interests, particularly those related to cultural preservation and environmental protection. The Court found that the administration's broad discretionary authority over the surrounding lands was disproportionate, considering these areas played only a secondary, supportive role to the primary cultural asset. As the ruling put it, "The public interest in protecting cultural heritage does not outweigh or urgently necessitate give up on the indispensable environmental interest in ecological transition," as the proper balance between the cultural heritage and environment lies in the "need to integrate the latter with the necessity of preserving the former. The full integration among the various disciplines involved in land use requires abandoning the model of parallel protections of differentiated interests, which exacerbate the conflict among the different parties involved in decision-making processes." In essence, it affirmed the necessity of a balancing approach that avoids absolute prioritization and single consideration of one constitutionally protected interest over another, rejecting a rigid hierarchical framework.

This case first raises a procedural-administrative question as to what kind of assessment the administration should make in determining the boundaries of decorum, including *material* ones – in this instance, it was precisely the territorial scope and the related constraints that generated contention. Interestingly in this respect, there are also cases where entirely *intangible* components turned out to be decisive in the relevant assessment. A notable example is the rejection in the context of so-called *autorizzazione unica* for a renewable energy power plant, as it was located within the buffer zone of an area designated as a "territory expressive of identity."[80] This area is subject to protection due to its cultural significance, and it is particularly impacted by traditional practices and uses that were documented through an ethno-anthropological reconstruction showing the ongoing conduct of transhumance – an element also inscribed in the UNESCO ICH list. This case is of particular interest from an administrative perspective because it underscores, on the one hand, the increasing acknowledgment of intangible aspects by the entrusted officials. But on the other hand, it also highlights the

[80] The case dates back to 2020 and involves the proposed installation of a wind farm in the Montescaglioso area of Basilicata. The provision available at https://cultura.gov.it/comunicato/circolare-n21-del-16-aprile-2025-dg-abap-linee-guida-per-lazione-amministrativa-e-tecnico-scientifica-sul-patrimonio-culturale-demoetnoantropologico-e-immateriale (accessed 9 May 2025).

ongoing challenge of integrating the human and intangible dimensions of cultural assets, their uses, and the functionality of the territory into broader sustainable development practices.

A subsequent question emerges, then, regarding the legal foundation for such decisions, and how they can be reconciled with conflicting constitutionally protected interests, such as environmental protection and public health, but also other public and even private concerns, including property rights and economic initiative. This need for reconciliation arises from the growing shift away from an isolated assessment of individual interests toward an integrated approach, recognizing the increasingly interconnected nature of all the elements involved. In these cases, administrative actions must navigate this growing intricate web of competing interests. In the case at hand, the Court refers to such integrated balancing and the application of the principle of proportionality. One might question whether a broader form of discretion would accommodate the need for integration and, consequently, allow for justiciability beyond criteria applied to mere technical discretion.

As a final reflection, we might ask whether the contextual dimension of cultural property, to avoid overburdening the principal cultural constraint, could instead be addressed within other categories and legal tools, besides the standard of decorum. While our analysis has thus far examined cases where such protections are embedded within direct or indirect cultural safeguards, it is worth considering whether the "contextual fit" standard could also be effectively upheld through alternative legal frameworks. These frameworks could extend beyond the limitations of cultural property constraints and instead be integrated into broader cultural spaces and landscapes.

To fully engage this question, it is necessary to expand our investigations and transcend the boundaries of Italian jurisprudence. Comparative analysis could indeed prompt further reflections.

Similarly to the case just addressed, in 2020, a French company sought to install a wind farm in the Loire valley, but the administration refused to grant the necessary permit because of the impact the height of the turbines would have generated on landscapes and protected cultural heritage, in light of Article L. 181-3 and, indirectly recalled, Article 511-1 of the French Code of *Landscape.* These provisions require environmental authorization for installations that may cause harm to nature, the environment and landscapes, [...] the conservation of sites and monuments, as well as archaeological heritage elements." In other

words, it is through the category of landscape that indirect heritage protection is achieved for all aspects of contextual fit and appearance.

The dispute specifically concerned the village of Illiers-Combray, classified as *Site Patrimonial Remarquable* under Article L-631 of the Code of *Heritage*, and three surrounding rural municipalities: Méréglise, Vieuvicq, andt Montigny-le-Chartif[81].

The administrative refusal aimed to protect both the landscape and the cultural properties (the church and the castle, classified as historical monuments, and the village as a remarkable heritage site). But, most importantly, the central argument focused on preserving the "*characteristic view* [emphasis added] of the bell tower rising above and the preserved gardens surrounding the village, as part of a *broader approach to the landscape* in keeping with the descriptions of this village *evoked in Marcel Proust's work*,"[82] which also moved local organizations to enhance the site through heritage protection initiatives, the creation of footpaths illustrating Proust's work, and the organization of commemorative and touristic events.

Brought before the Court, up to the *Conseil d'État*[83], the judges considered the administrative refusal as rightful in consideration of a specific argument: that Article L. 511-1 could entail a broad interpretation of *landscape* protection, going as far as to include "an immaterial component related to its depiction in a recognized literary work."[84] Within such an extended, integrated space, landscape and cultural heritage converged. In the latter case, the two declared historical monument and the *site remarquable* had triggered the establishment of a

[81] Indeed, according to Article L-631, also "rural areas and landscapes that form a coherent whole with these cities, villages, or neighborhoods, or that may contribute to their conservation or enhancement, can be classified as remarkable heritage sites. The classification of remarkable heritage sites serves as a public utility easement affecting land use for the purpose of protecting, conserving, and enhancing cultural heritage. Remarkable heritage sites are equipped with tools for mediation and citizen participation."
[82] CA Versailles, 2ème chambre, 11 April 2022, no. 20VE03265.
[83] Conseil d'État, 6ème - 5ème chambres réunies, 4 October 2023, no. 464855.
[84] CA Versailles, cit.: "il résulte de l'article L. 511-1 du code de l'environnement précité que l'exigence de protection des paysages induite par ces dispositions, qui est définie de façon très large peut conduire à refuser une autorisation d'implantation d'éoliennes afin de préserver un paysage présentant une composante immatérielle liée à son évocation au sein d'une œuvre littéraire reconnue. Pour rechercher l'existence d'une atteinte à un paysage au sens de ces dispositions, il appartient à l'autorité administrative d'apprécier, dans un premier temps, la qualité du site sur lequel la construction est projetée puis d'évaluer, dans un second temps, l'impact que cette construction, compte tenu de sa nature et de ses effets, pourrait avoir sur le site."

public utility easement in relation to the use of the territory, aimed at "protecting, conserving, and enhancing the *aesthetics* of the village" and its literary associations. In affirming the ruling, the Court concluded that the wind turbine project would cause significant harm not only to the monuments and the designated site, but also to the broader landscape and heritage value of Illiers-Combray, "where public and private actors engage in cultural activities centered around the work of Marcel Proust, whose literary evocations are still in part materially inscribed in these locations." The decision rested on the view that administrative measures could be justified by "elements of historical, memorial, cultural, and artistic dimensions, including literary ones, if applicable."

The case is notable in several ways. First, a significant difference from the Italian case analyzed above lies in the absence any substantial consideration of the potential conflict between cultural interests and environmental concerns, particularly in terms of ecological transition and public health. The French Court's analysis focuses primarily on determining whether the rejection of the wind farm was legally justified, based mainly on cultural and landscape considerations.

Nevertheless, when evaluating the effectiveness of the tools used to preserve and articulate additional dimensions of the cultural asset, the case offers an alternative perspective. It expands the scope of existing interactions to include a distinct classification within landscape and heritage frameworks, considered to *collectively* shape the cultural and visual values that must be preserved.

Significantly, it creates the opportunity for grounding public interest in an *idea* of landscape and cultural property, that is, in a literary reference and description of a place – hence a good that does not actually exist[85].

[85] To find an Italian parallel, we must delve into the early 1900s, making the comparison more valuable for theoretical analysis than for practical application. The so-called "Law Rava," no. 411 of 16 July 1905 (Declaration of inalienability, for the purpose of reforestation, of maritime wrecks in the province of Ravenna, for the conservation of the pine forest) aimed at preserving a pine forest in the province of Ravenna. Legal scholars argue in this respect that the goal was mostly reconstructive, i.e., was not to protect the physical place itself but rather the *cultural-historical significance* it embodied for its literary references. Its preservation, in fact, was aimed at reconstructing a literary place which was celebrated by a novel in Boccacio's Decameron and depicted in the panels of Botticelli's school, as well as in Dante Alighieri's Divine Comedy. The association with the French case is immediate. Here, however, we are dealing with a *regulatory* measure that defines the scope of activity for various public administrations in dealing with a public good. Effectively, the law did not establish any special strategy for protection; instead, it imposed a special qualification

This raises compelling parallels with the Italian framework, in particular with Article 10(3)(d), which, as we have seen and will continue to explore, allows for the recognition of cultural value derived not from intrinsic material characteristics, but from broader historical or literary references. In such contexts, the preservation imperative shifts away from a focus on the individual asset and instead seeks to safeguard a particular essence – such as a "characteristic view" or a "broader landscape interpretation" – infused with immaterial dimensions and symbolic meanings. Indeed, these meanings stretch across an extended spatial and cultural context, rather than being anchored in a single, discrete cultural asset.

What is even more intriguing in the French case is how the administration's assessment also integrates interests related to community activities conducted at the site, based on its specific literary significance. In this regard as well, the preservation of a certain level of consistency and external appearance of the property would rely on elements *outside* ordinary legislation and assessment tied to contextual dimensions and local uses of the property.

3.1.2. The 'projected image' of cultural property

This section redirects the inquiry toward cases where the standard of decorum becomes a pivotal lens for examining how law and administrative practice engage with the external projection of an object's cultural value. In other words, it explores how the object's *intrinsic* immateriality is leveraged for its unique evocative cultural significance and projected externally, giving rise to situations of *extrinsic* immateriality. In such cases, adherence to a standard of decorum may emerge from a distinct perspective of interest.

A particularly illustrative example is found in sponsorship contracts. Under these agreements, private parties provide financial resources or

to the place in light of its historical references, borrowing quality and aestheticizing standards from existing laws on natural beauty and art of the time. A literary basis, although not specified (the law did not mention any of the cited authors) could justify the acknowledgment of particular significance for a public good. References and insights are found in G. Severini, "Paesaggio": storia italiana, ed europea, di una veduta giuridica", in *Aedon*, 1, 2019. Also, A. Crosetti, "Le valenze culturali dei beni forestali nei più recenti riconoscimenti normativi", *ivi*, 1, 2020.

services to support the preservation or enhancement of a cultural asset[86]. In return, they acquire the right to associate their commercial endeavors with the property's *image* or name in various business operations. The law mandates strict adherence to protection requirements, specifically mentioning preservation of "the artistic or historical character, the appearance, and *decorum* of cultural property"[87]. This regulatory approach encapsulates the complex interplay under scrutiny: at its core lies the reciprocal exchange of symbolic value through images – the image of cultural property on one side, the image of the contracting party on the other. Underlying this is the persistent material presence of the asset, which reflexively benefits from protection and enhancement activities undertaken.

Hence, in terms of image association, benefits are mutual, and the material and immaterial dimensions of cultural property interact within a regulated commercial context[88]. As observed by the Ministry of Culture in its 2012 technical standards and guidelines[89], "a palatable advantage can be derived by the sponsor from the juxtaposition of the company or products with the prestigious cultural heritage of the Nation." This means that the party offering benefits can exploit the image-value of the asset in its immaterial dimension of attractiveness, "culturality," and notoriety. Likewise, the cultural asset benefits from protection and enhancement initiatives, which concern both its image and the material support of existence.

The key question, then, concerns the extent to which administrative authority exercise control over standards of decorum when the

[86] Legal doctrine distinguishes between two main types of sponsorship contracts: "pure" sponsorship, where the sponsor's contribution is solely financial, and "technical" sponsorship, which involves a broader partnership in which the sponsor designs and carries out all or part of the intervention, covering the associated costs. A hybrid form, combining elements of both financial and technical sponsorship, was later introduced and formally recognized in the Ministerial Decree of 19 December 2012, *Approvazione delle norme tecniche e linee guida in materia di sponsorizzazioni di beni culturali e di fattispecie analoghe o collegate*.

[87] Article 120 of the Code.

[88] In this regard, sponsorship contracts represent a form of economic enhancement for cultural property that continue to be met with skepticism by public authorities, as they are perceived as potentially compromising the property's identity value and implying a degree of appropriation by the sponsor (Ministerial Decree, December 19, 2012, cit., 38). The Italian legal scholarship on this topic is extensive; notable examples include A.L. Tarasco, *Diritto e gestione del patrimonio culturale*, Bari, 2019. More recently, S. Antoniazzi's contribution, "Beni culturali e partenariato pubblico-privato atipico nel Codice dei contratti pubblici", in *Federalismi.it*, no. 8, 2024, offers further insights.

[89] Ministerial decree 19 December 2012, cit.

sponsorship generates immaterial associations external to the physical cultural asset.

Typically, sponsorship is considered an "evolved form of 'use' of the cultural property, thereby falling under a penetrating discretionary power of authorization."[90] However, this interpretation has generated significant debate within Italian legal scholarship.

Some argue that administrative authorities can legitimately wield authorizing power to assess compliance with standards of decorum because sponsorship is seen as a form of use of cultural property, governed by Article 106 and subsequent provisions of the Code. Others contend, instead, that effective control is "legally untenable, as it is not supported by any conforming and sanctioning power"[91].

At its core, the debate turns once again on the relationship (and potential tension) between material and immaterial dimensions of cultural property, in the attempt to grasp any autonomous character of the latter in relation to the physical medium.

Advocates of the first position argue that references to decorum, appearance, and artistic character to be preserved "express the essence of the cultural interest that justifies the very qualification of the thing as a cultural property [...] therefore, an *assessment that goes beyond the preservation of the material support to concern directly the image of the asset* is needed, in its most obvious aesthetic-perceptual scope, but also its identity value – perhaps within an expanded context and referring to the landscape or environment evoked or summarized by the object."[92]

The opposing view relies on Article 120 of the Code, which mandates compatibility assessments "in accordance with the provisions of the Code." However, these provisions primarily empower administrative authorities to protect immaterial dimensions that are only *intrinsic* to the cultural asset. Sponsorship agreements present a unique challenge because they create a deliberate separation between the material and immaterial dimensions of cultural property, even though both aspects remain legally and logically present. The sponsored use of a cultural property's image often occurs in contexts physically removed from the asset itself. These uses may eventually affect the property's physical form through specific sponsored interventions, but the immediate

[90] P.F. Ungari, "La sponsorizzazione dei beni culturali", in *Aedon*, 1, 2014.
[91] A. Bartolini, "L'immaterialità dei beni culturali", *ibid*.
[92] P.F. Ungari, cit.

impact is on the property's immaterial aspects. This disconnection creates a regulatory gap: the current legal framework lacks specific provisions to safeguard these detached immaterial aspects, leaving public authorities with limited tools to intervene where risks to decorum or image arise.

In this respect, it is worth mentioning the additional perspective of scholars who argue that the issue goes even beyond a question of administrative powers. The point is rather identified in the absence of a dedicated supervisory body equipped with sufficient technical and specialized expertise to oversee both immaterial and economic dimensions[93].

A review of a number of sponsorship agreements reveals that, effectively, (i) there is no explicit attention to the matter of decorum/image, nor does any controversy arise regarding this specific aspect – which suggests that, in practice, the administration has limited authority to safeguard such an immaterial component. This observation aligns with the theoretical constraints on administrative power discussed above. (ii) As several commentators note[94], the lack of standardized contractual provisions and evaluation criteria in sponsorship agreements creates substantial challenges for effective oversight and balance of the economic benefits against the cultural-historical significance of the asset's image. Without established metrics or guidelines, public authorities struggle to make consistent and objective determinations.

This challenge was particularly evident in the sponsorship contract for the restoration of the Colosseum. Concerns were raised[95] regarding the disparity between the "quantity and duration of rights (primarily rights to use images, space and information)" granted to the sponsor[96] along with its related association "*Amici del Colosseo*," and, on the other hand, the inability to accurately determine, due to lack of expertise, the economic-cultural value resulting from the association of the company's

[93] See A.L. Tarasco, cit., 40 and *passim*.
[94] Not only by the aforementioned legal doctrine but also, and perhaps more importantly, by *Corte dei conti* in Resolution no. 8/2016/G of August 4, 2016, titled "*Iniziative di partenariato pubblico-privato nei processi di valorizzazione dei beni culturali*". Available online at https://www.archiparma.it/wp-content/uploads/2016/09/delibera_8_2016_g.pdf#page=7.46 (accessed 15 May 2024).
[95] Court of Auditors, Resolution No. 8/2016, cit., 49 ff.
[96] Tod's S.p.A.

brand to a culturally significant property of such prominence[97]. Indeed, this case underscores a fundamental gap in current administrative capabilities. The lack of specialized expertise in valuing cultural-commercial partnerships creates uncertainty about the equitable exchange of benefits in sponsorship arrangements. Such concerns have led some to call for the creation of specialized entities to manage the State's immaterial cultural assets, inspired by international examples[98] and aimed at a comprehensive understanding of heritage that extends beyond mere cultural qualification. We will delve deeper into this point in the concluding portion of Section 3.

The topic of sponsorship contracts paves the way for a broader discussion on the issue of reproduction. As mentioned, this section will narrow the focus to a particular aspect within the huge scope of the topic – leaving questions related to digitization, de-materialized assets, non-rivalry, and questions of authenticity to the reflections of Section 4. Attention will be directed, in that case, to possible legal discourses surrounding digitized and dematerialized reproductions, and the questions entailed in current controls within systems of licensing and concession.

Here, instead, the emphasis lies on the legal status of cultural property's images, explored from two distinct yet interrelated angles: (i) the visual reproductions that exist and circulate independently of the physical asset as a form of *extrinsic* immateriality; and (ii) the inherent visual appearance and cultural significance of the asset reproduced – its *intrinsic* immateriality.

The central issue is the extent to which public administrative control can legitimately reach from the intrinsic immateriality of a cultural asset to its external, circulating images that reproduce its visual appearance. This distinction provides a useful framework for examining whether administrative powers originally designed to protect the physical and inherent qualities of cultural property can or should be extended to cover image reproduction and distribution in contemporary (often digital) contexts.

[97] On the point, see also T.A.R. Lazio, I, 3 July 2012, ruling no. 6028 and Council of State,, Section VI, 31 July 2013, ruling no. 4034.

[98] See A.L. Tarasco, cit., 41 and 252 ff; G. Severini, "L'immateriale economico nei beni culturali", cit. The authors refer, for instance, to the now "*Mission Appui au patrimoine immatériel de l'État*," former *Agence du patrimoine immatériel de l'État* of the Frenh State. More information available at https://www.economie.gouv.fr/apie/qui-sommes-nous (accessed 15 May 2024).

In fact, as noted by Forte[99], there is a fundamental distinction between protecting the physical integrity of cultural property and controlling their "representations." While it would be unacceptable, for instance, to deface the original Mona Lisa, adorn the Riace Bronzes with outlandish costumes, or arm Michelangelo's David with a weapon[100], it remains highly debatable whether similar alterations can be prohibited when applied to reproductions of these works, as these alterations clearly pose no threat to the preservation of the original pieces. Rather – and this is the point – they may still offend a broader sense of *decorum*.

In an effort to examine the issue's theoretical foundations and potential future implications, subsequent reflections will be guided by the following questions. What impact does the need to adhere to such a standard of decorum have on the circulation of cultural property's images? How does the public administration evaluate compatibility with the material asset? What is the ultimate impact on the effectiveness of protection and enhancement measures of the property involved, when considering such an immaterial (projected) dimension?

At the regulatory level, the issue is governed by a layered and often ambiguous framework. Reproduction falls under general rules regulating the use of cultural property, which prohibit uses "incompatible with their historical or artistic character, or detrimental to their preservation" (Article 20 of the Code). These provisions are complemented by specific procedures and restrictions that define the conditions under which reproduction is permitted[101]. Generally, reproduction requires authorization from the Ministry, regional authorities, and any other public territorial bodies responsible for the care of cultural property. The only consistently prohibited form of reproduction is the creation of casts from original sculptures or reliefs, regardless of material (Article 107) – a circumstance, the latter, that highlights how the legislature's prevailing concern stays on material

[99] P. Forte, "Il bene culturale pubblico digitalizzato: note per uno studio giuridico", in *P.A.Persona e Ammnistrazione*, 3, 2019, spec. 293.

[100] These are real cases that have affected some of Italy's most famous cultural properties over time. Some will be taken up later in this section.

[101] While it is beyond the scope of this paragraph, for the sake of completeness, it is important to note that the types of reproduction encompass both the initial acquisition of the image of cultural property and any subsequent reproductions of it. Moreover, reproduction can be static (photographic shots) or dynamic (filmed shots), and it includes not only the two-dimensional photographic aspect but also the three-dimensional aspect, that is, objects derived from the derivative use of the image of the cultural property. See on this point L. Tarasco, cit., 64 ff.

protection of the item reproduced rather than its possible immaterial projection[102].

The intended purpose of reproduction, then, serves as an additional parameter of distinction. Reproductions are generally not authorized free of charge; a concession fee is required, calculated by the competent authority based on factors such as the nature of the activity, method of reproduction, intended use, and the economic benefit to the user (Article 108, para 1)[103].

Two categories of exceptions are also envisaged.

(i) No *concession* fee is required for reproductions made by individuals for personal use or study purposes, or by public or private entities for enhancement aims, provided they are implemented on a non-profit basis (para 3)[104].

(ii) As of 2014[105], no *authorization* is even required for reproducing and disseminating images (thus it is completely free) "for the purpose of study, research, free expression of thought or creative expression, promotion of knowledge of cultural heritage"[106].

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[102] See L. Casini, "Riprodurre il patrimonio culturale? I "pieni" e i "vuoti" normativi", in *Aedon*, 1, 2018. Following this line of materiality in the legislature's concerns, it should be noted that reproduction is instead permitted, as per Article 107(2), if it is the result of casts from *copies* of existing originals or otherwise made by techniques that exclude direct contact with the original.

[103] The provision is to be read in accordance with the most recent Ministerial Decree no. 108 of 21 March 2024 – Amendments to the Decree of the Minister of Culture of 11 April 2023, Rep. No. 161, on "Guidelines for the determination of minimum amounts of fees and charges for the concession of use of property handed over to state institutes and places of culture."

[104] Ministerial Decree no. 108/2024 has recently clarified that reproductions of this kind include images inserted in scholarly and non-scientific publications, newspapers and news periodicals, exhibition catalogs with a circulation of up to 4,000 copies – which were previously considered for-profit initiatives – and in materials used for enhancing public enjoyment, as well as for promotional or valorization purposes. Important is the clarification that "the entrance fee is not in itself sufficient to characterize an enhancement initiative as for-profit; rather, all circumstances under which the initiative is carried out must be evaluated." This marks a significant improvement over the restrictive approach of previous guidelines, which classified any operation involving even a minimal payment as for-profit.

[105] Decree law No. 83 of May 31, 2014, converted with amendment by law no. 106 of July 29, 2014.

[106] As a matter of fact, the provision mostly referred to reproductions and dissemination of images made with smartphones and cameras in museums and other places of culture. A recent discussion on the delineation of these two derogatory assumptions is available in C. Videtta, "Le immagini dei beni culturali. Riflessioni a margine del dibattito", in *Aedon*, no. 2, 2024.

What we can first acknowledge in this regulatory landscape is central role fo the economic dimension.

First, there is an "external" economic impact on the meaning of administrative valorization. Despite the entrenched opposition between social-cultural fruition and profit-driven purposes, we have already observed that a stark separation of any economic element in cultural considerations does not reflect the reality of cultural heritage management[107]. In the case of reproductions, concession fees are said to support a system of economic income that favors indirectly the heritage involved.

At the same time, an internal economic logic is also detectable in the functioning of reproduction. Indeed, fees appear to be imposed on profit-oriented uses (e.g., on advertising campaigns, promotion of brands, services and products) as a form of compensation for such a "deviation of use," where the risk of the latter not being in line with standards of decorum stems from the impossibility of drawing an immediate reference with a *cultural* kind of valorization. Hence, authorizations and concessions fees are perceived as filters able to curb the uncontrolled economic exploitation of the immaterial dimension of cultural property (their image), particularly when such use may be deemed incompatible to a standard of decorum. From the legislature's perspective, uncontrolled and free reproductions would primarily satisfy the *private* interest in profit, gained from the increased prestige of the associated product or service, without providing any benefit in return to the *public* interest in enjoying the cultural property.

However, it is the opinion of several scholars that "the collection of rights to reproduce images of the public cultural heritage privileges

[107] See, especially, section 2.1 above. Already in 2004, Lorenzo Casini observed, in a commentary published shortly after the entry into force of the Code, that in Article 6 (*Enhancement of the cultural heritage*) "the introduction of the term 'utilization,' placed next to fruition, thus referring to the use of cultural goods other than public enjoyment [...] completes the hypotheses of intervention on cultural property, evidently including the use in economic terms of cultural heritage." L. Casini, "Valorizzazione e fruizione dei beni culturali", in *Giorn. Dir. Amm*, no. 5, 2004, 3. But as early as 1998 Cassese already argued that "revenue generation from cultural property allows for more revenue; and that more revenue can ensure better protection and wider enjoyment of cultural property.", S. Cassese, "I beni culturali: dalla tutela alla valorizzazione", in *Giorn. Dir. Amm*., 1998, 673. See also G. Resta, "Chi è proprietario delle Piramidi? L'immagine dei beni tra property e commons", in *Politica del diritto*, no. 4, 2009, 586: "it is a now widespread and well-established legislative policy option to encourage the "valorization" of cultural property making their reproduction and economic exploitation subject to the authorization of the relevant administrations and, above all, the payment of a fee."

patrimonial income over productive investment [...] therefore renounces the creation of work and wealth and, consequently, the fiscal income derived from it"[108]. Apparently, the actual revenue generated by such fees (along with those collected for other use concessions) are reportedly "marginal within the array of items that constitute the total income from the (public) management of state institutes and cultural sites"[109]. A growing number of cultural institutions worldwide have therefore reversed this course, opting for a full liberalization of image reuse[110]. This shift is grounded on the fundamental assumption that not only it generates economic benefits through increased visibility and attractiveness but also fosters non-economic gains by expanding public access and engagement.

When evaluating the effectiveness of reproduction fees as a control mechanism, alternative management models offer valuable insight. Notably, the York Museum Trust allows free downloading and use of its online collection – which mainly consists of images of public domain objects or those not subject to third-party copyright restrictions. Their images policy states that "no moral rights are waived. York Museums Trust will object to the use of images taken by us in a derogatory or inappropriate manner."[111] This clearly reflects a model of ex-post control – rather than limiting access upfront, the institution maintains a generally favorable stance toward the dissemination of its objects' images, while reserving the right to intervene if images are misused.

Noteworthy in this regard is also the case of the Metropolitan Museum of New York, which, in addition to a policy of full liberalization of most

[108] D. Manacorda, "L'immagine del bene culturale pubblico tra lucro e decoro: una questione di libertà", *Aedon*, 1, 2021.
[109] A.L. Tarasco, cit., 57. Interesting data are presented by M. Modolo, "La riproduzione del bene culturale pubblico tra norme di tutela, diritto d'autore e diritto al patrimonio", in *Aedon*, 1, 2021.
[110] Consider, for example, the case of the Rijksmuseum in Amsterdam, which has adopted this policy since 2012, followed by, among others, the Metropolitan Museum in New York, the National Museum in Stockholm, the National Gallery of Denmark, the Los Angeles County Museum of Art, the Yale University Art Gallery, the Walters Art Museum di Baltimora, lo York Museums Trust, lo Statens Museum for Kunst of Copenhagen, the British Library. In Italy we can mention, among others, the Egyptian Museum in Turin, the National Museum of Matera, or the National Central Library of Rome and Florence. An updated list provided by the network OPEN Glam (https://openglam.org/ accessed 15 May 2024), shows the institutions that worldwide have adopted such open access policies. See https://docs.google.com/spreadsheets/d/1WPS-KIptUJ-o8SXtg00llcxq0IKJu8eO6Ege_GrLaNc/edit#gid=1216556120 (accessed 7 June 2024).
[111] See https://www.yorkmuseumstrust.org.uk/contact-us/image-requests/ (accessed 25 May 2024).

images (images of works deemed to be in the public domain, or those to which the museum waives any copyright it might have), guarantees the possibility to manipulate and rework open-access images downloaded, or to require higher-resolution version of them[112].

At a closer look, Article 108 of the Italian Code cited above would not preclude comparable practices: as noted, the provision does not, in itself, prohibit issuing free licenses. Indeed, the entity responsible for the property could preemptively authorize the reuse of reproductions for any purpose[113]. The question becomes, accordingly, what position such an entity wishes to take in the broader context. A context that, moreover – when expanding our perspective to international regulations – should align with the spirit already enshrined in the Council of Europe's Faro Convention[114]. "Everyone, alone or collectively, has the right to benefit from the cultural heritage and *to contribute* towards its enrichment" (Article 4). And to fully exploit cultural heritage's potential as a factor in sustainable economic development it is necessary to raise awareness and utilize its *economic aptitude* (Article 10).

In the wake of a global shift in perspective from authority to civil society in heritage processes – the latter as integral to building the value of cultural heritage in contemporary scenarios – the current approach in Italian legislation may fail to keep pace with this vision.

But the prominence of profit-related aspects in image reproduction warrants closer scrutiny. While the presence of profit motives serves as an *extrinsic* criterion for determining the imposition of reproduction fees, it does not constitute an *intrinsic* limitation on how reproduction is carried out, hence the specific control of its decorous appearance. As a matter of fact, no fee is required, and the activity is deemed free, when the purpose is non-commercial in nature (see paragraphs 3 and 3 bis of Article 108). In these instances, the legislature presumes that reproduction serves a purpose of *cultural* valorization[115]: liberalization is provided since those cases entail *ex lege* a form of increased enhancement in terms of access, knowledge, or dissemination.

[112] See https://www.metmuseum.org/policies/image-resources (accessed 25 May 2024)
[113] M. Modolo, "Promozione del pubblico dominio e riuso dell'immagine del bene culturale", in *Archeologia e calcolatori*, 29, 2018, 80.
[114] Framework Convention on the Value of Cultural Heritage for Society, 2005. Ratified by Italy in 2020 with law no. 133. On the topic, see Chapter 1 and Chapter 3 of this study.
[115] See A. Tumicelli, "L'immagine del bene culturale", cit., for a survey of the legislative development and approach to free reproduction in the field.

Conversely, when inherent immateriality of the object is projected outward for a commercial purpose – e.g., its image is reproduced in an advertising campaign – the public body's power is not to assess the profit-making purpose of the activity in order to determine the fee, but rather to verify its compatibility with an external standard of decorum. This means that, even if an economic exploitation of the image is permitted, the focus is on the way in which such reproduction is carried out. Within these arrangements, the administration may intervene to establish obligations and limits that ensure respect and compatibility between the circulating image and the property's intrinsic value.

A clear illustration is found in a 2018 ruling of the Civil Court of Palermo[116] following the Foundation *Teatro Massimo*'s request to hold a credit institute[117] liable for the unlawful use and reproduction of the theater's image in an advertising campaign. According to the Foundation, the unlawfulness was due to the fact that (i) no authorization had been requested – thus no concession fee had been paid either; (ii) the activity caused intangible damage to the image of the prestigious theater by virtue of its association with the credit institution.

However, the Court rejected the argument of intangible damage, noting that commercial purpose alone is not sufficient to limit any kind reproduction activity; rather, what matters is *how* the reproduction is the executed. In this case, the mode of reproduction was said in no way being disparaging or detrimental to the historical-artistic value of the theater. The image's pairing with a children's carousel was deemed "entirely positive and promotional," thus compatible with the monument's value.

What does this assessment reveal about the way public administration (and judicial scrutiny) interprets and applies the standard of decorum? The legal ambiguity of the concept, as mentioned at the outset of this section, implies that interpretation often relies on factual and extra-legal judgments. However, the emerging contours of administrative control go as far as to allow the relevant institution to act as a true "guardian" of the image's value, even though this value becomes detached, both physically and formally, from the one inherent in the original cultural property. Upon closer examination – and as reiterated by the recent

[116] Trib. Palermo, Section. I civ., ruling of 15 September 2017, no. 4901.
[117] Banca Popolare del Mezzogiorno S.p.A.

Ministerial decree no. 161/2023[118] – an authorization is required even in cases of "free reproductions", despite these being "for personal use, study, or enhancement purposes", and in any case "implemented on a non-profit basis" (see para 3 of Article 108).

What emerges is a form of control over the circulating image where economic exploitation resulting from reproduction is relegated to a merely ancillary role in relation to the overarching objective of the Code's *protection* of cultural heritage. The latter, as recently affirmed, is the safeguarding of "the *functional destination* of cultural property, to be enjoyed in a culturally qualified manner by the community, in ways that lead to the development of culture and the promotion of knowledge, by the public, of the historical and artistic heritage of the Nation"[119].

The public authority is therefore entitled to determine the boundaries of the standard of decorum, which in turn is grounded in the prior identification of what specifically constitutes the "functional destination" of the property it has in its custody. It is from this very control over decorum that a legitimate "right to image" of cultural property emerges.

Indeed, a distinct strand of Italian jurisprudence has emerged affirming the existence of a genuine "right to image" for cultural property, grounded in the principle of decorum. The establishment of this right stems from vigorous scholarly debate on the subject, primarily centered on the legal framework's capacity to limit the use of property (in this case, its reproduction) for the purpose of safeguarding an immaterial aspect of the object – the integrity of its image[120].

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[118] "Regardless of the fee or compensation identified, the concession for the use and reproduction of cultural property *is still subject to prior verification of the compatibility* of the intended use of the reproduction with the historical-artistic character of the same cultural property, pursuant to Article 20 of the Code of Cultural Property and Landscape, as set forth in Legislative Decree No. 42 of January 22, 2004" (Article 2).

[119] So ruled the Court of Florence in a 2022 order on Michelangelo's David image reuse, on which we will elaborate later in this section.

[120] The legal basis for the "right to image" of cultural property has evolved over time. Initially, it was grounded in personality rights under the Italian Civil Code. A ruling by the Court of Cassation (no. 18218/2009) had indeed determined that Article 10's prohibition against misappropriation of personal image could be logically extended to legal entities. This interpretation empowered public administrations and cultural institutions to pursue legal remedies against unauthorized use of their assets' image, addressing both intangible damage harm and economic losses from uncompensated usage. More recently, the Bologna Court of Appeals reaffirmed this right in ruling no. 1792 (24

To provide more concrete details, we can explore the various legal disputes that have arisen over time regarding Michelangelo's David, housed at Florence's *Gallerie dell'Accademia*.

In this evolving legal narrative, one prominent controversy arose when a U.S. firearms retailer utilized the property's image for advertising[121] – raising significant concerns regarding both unauthorized use and, more importantly, the inappropriateness of such commercial application[122].

Another key dispute occurred in 2017[123], when Italy's Ministry of Culture brought a case against a travel agency that was both profiting from inflated ticket prices and using unauthorized images of the museum and the statue in promotional materials.

Beyond the Court's determinations regarding commercial practices, injunctive relief, and the withdrawal of materials concerned, the significant development in this case was the progressive establishment of a legitimate right to image for cultural property. That is to say, the judicial recognition of an intangible damage to the property's cultural value along with potential economic detriment. The Court emphasized that "the indiscriminate use of the asset's image diminished its *attractiveness*." Though the term remained ambiguous – referring both to public cultural appeal and economic potential – the decision confirmed that reproduction control serves to preserve the asset's cultural value, with economic considerations viewed as only secondary consequences.

The recognition of this right was further solidified in a subsequent case involving the superimposition of David's image on a male model on the cover of an Italian edition of a U.S. lifestyle magazine. Following the

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September 2024), concerning the unauthorized commercial use of Velázquez's portrait of Duke Francesco I d'Este, housed at the Galleria Estense in Modena.

An alternative view in legal doctrine places image protection within the scope of property rights, arguing that public bodies, as custodians of State-owned assets, may lawfully restrict commercial exploitation when such use risks diminishing the asset's cultural or symbolic value. See, among others, C. Scognamiglio, "Proprietà museale ed usi non autorizzati di terzi", in *AIDA - Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 1999; A Tumicelli, cit.; G. Manfredi, "La tutela proprietaria dell'immateriale economico nei beni culturali", in *Il diritto dell'economia*, vol. 30, 2017.

Finally, as subsequent analysis will demonstrate, the existence of a right to control cultural property's image has been founded within the regulatory structure for reproduction provided by the Code of Cultural and Landscape Heritage. Hence the specific reference to a right to image of cultural property, as argued in numerous judicial decisions.

[121] Armalite.inc. The photo shows the David clutching a rifle produced by the company.

[122] This, compounded by issues related to the geographical location of the illicit conduct, which occurred outside Italian borders and was therefore difficult to fight legally.

[123] Tribunale di Firenze, order no. 13758/2017.

Ministry of Culture's legal action seeking compensation for both material and immaterial damages resulting from unauthorized image use, the Court of Florence[124] explicitly affirmed the existence of a right to image. The Court grounded its ruling in Articles 107 and 108 of the Code, which directly implement Article 9 of the Italian Constitution. Within this framework, administrative autorities are empowered to control cultural property reproduction – that is, to authorize and charge compensation – thereby extending protection beyond preservation of intrinsic immateriality (the cultural value) and physical integrity, to encompass also the extrinsic immaterial dimension, i.e., the circulating image.

The whole system was anchored in the very principle of decorum, which serves as the legal and cultural basis for this comprehensive protection. Hence, regulatory approaches to cultural property reproduction already entailed the two distinct concerns: (i) the unauthorized use related to economic implications (such as the failure to pay a fee for commercial reproduction), and (ii), the mitigation of intangible harm to the "decorous appearance" of the asset's image.

The jurisprudential recognition of a "right to image" for cultural property reached a pivotal point with the Court of Florence's order no. 1910 of 2022. This case concluded a protracted legal dispute initiated by the Ministry of Culture against Studi d'Arte - Cave Michelangelo S.r.l. for the declaration of unauthorized commercial use of the David's image. The conflict arose in 2018[125] from an advertising campaign campaign by the apparel company Brioni S.p.A, which had utilized a replica of the statue, produced by Studi d'Arte S.r.l., attiring the David in branded garments. The Ministry, emphasizing the urgent necessity to safeguard the artwork's cultural integrity, sought not only a declaration of unauthorized image use but also the removal of associated images and a broad prohibition across Italy and Europe on any commercial use of the statue's image in any medium.

Initially, the company complied, pledging to use the replica solely for educational purposes in sculptor training – an acceptable use under the Code. On this basis, the Court, in a 2019 order, dismissed the Ministry's injunction, citing the absence of *periculum in mora*. However, it later emerged that the company had continued to exploit the image

[124] Tribunale di Firenze, ruling no. 8150/2020.
[125] Tribunale di Firenze, 2 January 2019, order no. 15147/ 2018. On the whole judicial affair, see the commentary by A. Pirri Valentini, "La riproduzione dei beni culturali: tra controllo pubblico e diritto all'immagine", in *Giornale di diritto amministrativo*, no. 2, 2024.

commercially via its website – clearly a profit-oriented usage that undermined the cultural asset's integrity by diluting its unique status as an element of corporate branding. This practice could potentially mislead third parties into believing such usage was both lawful and tolerated. And this, although most website images derived from a replica, as the general public *lacked the capacity* to distinguish between the authentic work and its reproduction.

This last reference to public perception captures the core of the underlying rationale. As the ultimate goal of the regulatory protection of cultural property is to ensure a clear "functional destination for culturally qualified asset, as well as unrestricted enjoyment by the entire community aimed at fostering the advancement of culture and the promotion of public knowledge of the Nation's historical and artistic heritage," such protection cannot disregard an extension of the public power to control the *image* of the cultural asset. In this light, the Court concludes, the central issue transcends economic considerations, which indeed remain incidental. As previously examined, these economic aspects operate on two levels: externally, through the incidental financial benefits accruing to the State, which are subordinate to broader objectives, and internally, through the reproduction framework itself. Rather, the key consideration is whether commercial exploitation aligns with the standard of decorum.

What all hypotheses have in common, including those related to free reproduction, is an *additional value* beyond mere economic exploitation: the historical-artistic character of the property (its intrinsic immateriality) that grounds the need for protection extended not only to physical integrity, but also to the extrinsic projection of its image. Such outward projection is regulated in terms of compatibility with standards of public enjoyment: the dissemination of the asset's image is allowed when it is found compatible with the purpose of enabling a "process of knowledge, qualified and accomplished, of an object, or of a reality that becomes part and heritage of individual and collective culture." Under this light, the protection of a right to image becomes a full and effective provision, transcending the simple prohibition of strictly offensive uses of cultural property.

This judicial reasoning significantly informs our current examination. In fact, the examined case law demonstrates that administrative authorities, in assessing compatibility, are granted significant discretion in defining this immaterial dimension of cultural heritage.

Unlike sponsorship agreements – based on contractual negotiation and subject to public procurement rules – reproduction is subject to administrative instruments such as authorization and concession powers. Decisions are based on the general criterion of protection of the overriding public cultural interest – in this case, compliance with the ideal and expressive value of the property concerned, the *purported* significance of such an object for contemporary society. A question emerges, then, as to whether the control of "validity" and social acceptance for images that reproduce the outward appearance of cultural goods and circulate in different contexts should be extended to include stringent oversight of the very cultural value.

Assuming that such control is necessary, can we argue that it is effective? Italian doctrine pointed out in this regard that "there has never been a consideration of creating an organization or a body specifically responsible for economic rights derived from third-party use of public cultural property. Neither the central administration of cultural property nor other recipient administrations employ a third party to conduct checks and controls on the legality of uses, including their compatibility with historical and artistic values."[126] This is because the issue is not widely recognized, and misuses are not typically detectable through the traditional organization of public administrations – a gap that, as we will see in Section 4, becomes even more critical in the digital context.

Secondly, should this dimension of immateriality, which extends to the asset's circulating images, should be rightly confined to the (sole) assessment of administrative authorities?

Consider the earlier examples of cultural institutions that have chosen not to monetize images of their heritage but instead embrace a role aligned with the Faro Convention, focusing on contributing to the broader societal development, and reshaping their role to serve the community as an active participant in defining the cultural value. If we agree that some oversight is indeed necessary to prevent uses that may undermine the cultural identity embodied in the immaterial value of the property, then attention should be directed to the role of public administrations and cultural institutions as custodians and regulators of the cultural meanings to be conveyed in society (and those to be prohibited). To date, such a form of control seems indeed excessive, especially considering that this permission does not guarantee the applicant the right to *obtain* it. The administrative body can grant or deny

[126] A.L. Tarasco, cit., 102.

consent based on its own appreciation[127] – and this holds true even for instances that are *ex lege* compatible and free under the ordinary regime of reproductions.

We might also ask whether this framework poses any issues concerning artistic freedom. Take, for instance, the reimagined image of Michelangelo's David used in the magazine advertisement. Because the context was commercial, the case fell within the ordinary framework of Article 108. It is worth considering, however, what would have happened if a similar image had been produced by an artist – such as in the well-known case of Duchamp's L.H.O.O.Q., which reinterpreted the image of the Mona Lisa. Such operations could be considered expressions of the constitutionally guaranteed freedom of expression and art. In this scenario, it would pertain to a "free reproduction" according to the derogatory hypotheses provided, which the judge himself recognized as the cases that ground the very existence of a right to image. The very rationale under exceptions is grounded in the fact that they embody the ultimate goal of cultural heritage protection – the public enjoyment. They would therefore contribute to the construction of *other* social values, reflecting contemporary meanings and trends, or fostering a broad public discourse about cultural heritage.

But what if such images – expressions of artistic freedom – were particularly offensive or inappropriate in relation to the identity value of the asset? If it is true that there exists a right to image that goes beyond economic aspects, which may indeed be incidental, where is the limit, and above all, who draws it? Can the temporal contingency of entrusting a specific cultural institution or administration, influenced by a particular political context, determine what aligns with decorum and artistic character?

A noteworthy example in this context is the recent advertising campaign by the Ministry of Tourism, "Open to Meraviglia,"[128] which precisely reinterpreted the image of a cultural property – Botticelli's Venus. In that

[127] See W. Cortese," Commento all'art. 107", in M. Cammelli (ed.), *Il Codice dei Beni Culturali e del Paesaggi*o, cit.; as well as E. Sbarbaro, "Codice dei Beni Culturali e diritto d'autore: recenti evoluzioni nella valorizzazione e fruizione del patrimonio culturale", in *Riv. dir. ind*., no. 2, 2016; V. Ferretti, Manuale di diritto dei beni culturali e del paesaggio, Napoli, 2019. Of interest also is the Civil Cassation, SS.UU, ruling no. 93/1997, on the topic of denial of permission.

[128] https://www.italia.it/it/open-to-meraviglia (accessed 15 June 2024). On the topic see the contribution of F. Caponigri, "Serious Artistic Interest in Michelangelo's David in Florida and in Florence: A Tale of Art & Cultural Property between Two Places", in *Aedon*, 2, 2023.

case, the promotional campaign intersects with that economic aspect highlighted above as the indirect economic valorization of cultural property. It is unclear whether the case falls under free concessions of paragraph 3, Art. 108, or whether it is an instance of free reproduction, according to para. 3-bis. Either way, the degree of subjectivity associated with the assessed compatibility to a standard of decorum is substantial, contrasting with other reinterpretations that, due to their profit motive, may be seen as causing similar intangible harm to the image of cultural property. Hence, where do we draw the line between reinterpretations that enhance public enjoyment and are therefore compatible, and those that do not? In the case of *Teatro Massimo* mentioned above, its image's use was deemed compatible because it was associated with a children's roundabout. In the case of the David's image featured in a cover magazine, it was deemed degrading and mortifying.

This brings us back to the core issue: decorum is an indeterminate legal concept that evokes "evaluative standards found not only in collective discipline but also in social consciousness."[129] The idea of public administration as custodian of moral values, applied moreover to images of cultural property – to their *outward* projection – implies granting the latter great power to determine standards of value, which should instead be more appropriately conditioned on social and historical development, at the forefront of the very development of culture. While administrative decisions remain guided by principles of proportionality and reasonableness, it would be necessary to rethink the participatory framework and the strategies for protecting and promoting cultural property. The goal would be to develop flexible methods that can adapt to changing tastes, meanings, and societal values – since society itself is the ultimate beneficiary of cultural enjoyment.

Such a vision entails a deeper, more nuanced understanding of the immaterial dimension of the asset, recognizing that its external dimension exists independently of its physical form. Discussions regarding the potential to regulate or control any additional value of immateriality will ensue from this different posture. And in this way, administrative action in interpreting these indeterminate standards of value can indeed become the "breathing organ" of law – to borrow a striking expression[130].

[129] M. Clarich, M. Ramajoli, cit.
[130] *Ivi*, note no. 142.

3.2. Use as a framework for assessing cultural property's inherent value

Upon further review, Section 3.1 has already addressed the concept of use as a pathway toward examining additional dimensions of the object's immateriality. Thus far, the discussion focused on a "negative" interpretation of compatibility, viewing use as a potential external intervention that could either extend or diminish the asset's intrinsic immateriality, namely its cultural value, and affect its decorum.

This section offers a different perspective. While the previous approach saw use as an external factor[131] that might compromise the property's cultural significance and "decorum,"[132] here use is recognized as an integral element of the asset, inherently woven into the cultural property's essence and cultural value.

Accordingly, attention turns to a more active dimension of use, and examines the activities conducted *within* or *around* cultural property, their legal relevance to the asset, their influence on the legal conceptualization.

Ultimately, the aim is to assess whether use can be considered in itself a form of extrinsic immateriality of the asset to which is *associated*. We argue that this type of immateriality can lead to a different conceptualization of cultural property itself, where the balance between materiality and immateriality may be altered, and distinct protection requirements may arise.

Three key scenarios illustrate cases where use significantly enhances the value of a structure or object, requiring legal intervention to ensure proper protection.

(i) Regulatory protection of use. Legal frameworks occasionally extend protection beyond physical preservation to include a property's

[131] As cultural property are "goods of fruition," (see Section 2.1 above) their primary function, thus *general* use, is universal enjoyment. Within the Italian legal framework, so-called *special* uses are also envisaged, which interact with the primary purpose of the thing and are therefore regulated by the authorization and concession regime outlined in Articles 106-108 of the Code. See extensively the examples of the previous section.

[132] In this regard, D. Manacorda has rightly observed that "This "cultural function," pivots the attention of those who fear a use not aligned with the cultural significance of the property, which, however, being historically changeable, can hardly be regulated by law." See "L'immagine del bene culturale pubblico tra lucro e decoro: una questione di libertà", in *Aedon*, no. 1, 2021.

designated function. That is the case with Article 51 of the Code, addressing artists' studios.

(ii) Use in administrative and judicial practice. Administrative actions and court rulings have developed criteria for assigning legal significance to activities that define a property's cultural value. These decisions might create precedent for protective measures, though they remain outside the scope of positive law.

(iii) Enhancement measures at local and regional levels. Initiatives such as recognition labels (e.g., *negozi storici*), targeted incentives, and related temporary usage restrictions aim at promoting activities conducted within culturally significant buildings, and typically occur at regional or local levels. Although they lie outside the legal framework for cultural property identification and protection, falling exclusively within the State's competency, they shape how use influences the perception and management of physical assets.

This section will focus primarily on the first two scenarios, while referencing enhancement measures where relevant. In fact, scenario (iii) was already discussed in Chapter 1 in relation to domestic interpretation of UNESCO ICH[133], and will be revisited in Chapter 4[134], hence it merits only peripheral consideration here.

Our investigation will proceed along two lines.

First, we will explore how legal discourse – positive law, administrative practice, and judicial review – addresses the relationship between material structures and their particular use (Section 3.2.1). The focus is on whether use is treated as a criterion of cultural significance and whether the current legal framework, largely oriented toward material preservation, can also protect this immaterial dimension.

Second, we will revisit the theme of context from Section 3.1, exploring how use shapes both the perception and the legal protection of culturally significant sites. We will also examine whether interventions on such uses have an impact on administrative responsibilities related to the protection and enhancement of these assets (Section 3.2.2).

[133] Chapter 1, Section 4.1.
[134] Chapter 4, Section 2.2.

3.2.1. Use as the defining element of the object's value

The concept of *destinazione culturale* (cultural destination or purpose) refers to how a cultural object serves its function of being universally accessible and enjoyed. Typically, this aligns with the object's inherent immaterial qualities, hence the aim of the administrative constraint to protect the artistic or historical value of the object from incompatible alterations of such function (as outlined in Article 20 of the Code).

When a specific use of the object can be identified, as long as it *interpenetrates* with the material structure, the constraint poses no significant problem. Indeed, it is a well-established standpoint in Italian legal doctrine and jurisprudence that protection of cultural property pertains solely to physical assets: whatever use corresponds to such "cultural function" must be interpenetrated, or "identified"[135], within the physical structure, and administrative restriction applies to both, as the ultimate purpose of putting a constraint on possible uses is to ensure complete protection to the object.

This is typically referred to as a "purpose constraint" (*vincolo di destinazione*), and the formula was recently bolstered by a ruling of the Civil Court of Rome[136] in a complex case discussed below. The Court distinguished between restrictions aimed at preventing alterations that compromise cultural value (a classic purpose constraint) and those targeting specific activities associated with the object (a *vincolo di destinazione d'uso*, or use restriction). The Court emphasized that the

[135] Consider, for instance, the case law that mentioned the "*embodying* [...] of values and testimonies linked to the history of culture" (*Bar confetteria Roma già Talmone* in Turin, Council of State, Section VI, 28 February 1990, no. 321); the "*objective identification*" of the "values to be protected in the material structure" (*Farmacia del Campo di Siena*, Council of State, Section VI, 18 October 1993, no. 741); or again the "*identification* and *interpenetration* of historical-cultural values with material structures, as well as the connection of the assets and their use with the historical-cultural events of the city" (*Caffé Genovese*, Cagliari, Council of State, Section VI, 17 February 1999, no. 170).

[136] Civil Tribunal of Rome, 31 January 2018, ruling no. 2373. The argument has however been reiterated explicitly several times by both doctrine and jurisprudence and finds illustrative reasoning in the words of the Constitutional Court already in 1990: "The restriction absolutely cannot concern the cultural activity in itself, considered separately from the asset, as this activity must adhere to constitutional principles of freedom [...]. Therefore, expanding the interpretation of protection to encompass a specific use restriction for the exclusive benefit of a particular person, aimed at ensuring the continuity of activity within a specific property, is inadmissible [...]. The usage restriction solely prohibits alterations, precluding the establishment of a function ensuring the continuation of a prior activity. Instead, it aims to prevent future innovations that may compromise the cultural value inherent in the asset." (Constitutional court, ruling no. 118 of 1990).

latter – especially when applied to commercially driven activities – is inadmissible, as it exceeds the bounds of legitimate limitations on private property in the public interest. Instead of protecting cultural value, it ensures the continuation of a profitable activity, infringing on the constitutional right to free economic initiative (Article 41).

This raises significant legal complexities when the cultural value resides in the activity itself. For instance, what happens if the activity's operator relocates? Would the protection follow the activity, privileging individual economic decisions over the object's material identity? It holds true, in fact, that one thing is to restrict private property rights due to an identified social function of the *object*; it is quite another, instead, to restrict any private economic *initiative* over it. This would end up favoring the private owner or operator of the activity by granting significant economic benefits in light of a recognized value to the activity it performs.

How, then, should we qualify the activities that directly determine an object's cultural value? If the use of an asset – the activity conducted within it – constitutes both its *intrinsic* immateriality, in the sense that it shapes its cultural value, and its *extrinsic* immateriality, in that its legal status as an asset depends on the presence of that very activity, which is itself immaterial in nature, is it truly sufficient to confine use within the physical boundaries of the object?

Even from a practical standpoint, further questions arise. What measures are necessary to protect a use, and how do we protect it by making it the primary recipient of conservation and enhancement measures, overshadowing the materiality of the Code's definition? What would happen if the activity changed its "material container"? Is the value identified with the activity, thus in its (immaterial) use, or in its container? And therefore, if cultural property are "objects of cultural value," how do we define cases where cultural property are objects *containing uses* of cultural value?

These questions guide the forthcoming case studies, organized according to the taxonomy introduced above. The investigation begins with a focus on artists' studios – the only legally recognized use constraint in Italian law. From there, it continues with selected cases drawn from recent administrative practice and judicial decisions. This systematic examination aims to demonstrate that the regulation of cultural property faces significant contemporary challenges in this domain – and that current approaches and solutions, while representing

important steps forward, have yet to resolve the core legal challenges posed by immateriality.

Artists' studios: the sole exception in positive law

The sole use restriction explicitly allowed under Italian law applies to 'artists' studios', as outlined in Article 51, paragraph 1 of the Code[137]. Although no precise definition is given, the article's formulation offers some guidance. These are the workplaces of distinguished individuals, "considered as a whole and in relation to the context," and recognized as being of particular important interest due to their historical value.

Unlike ordinary restrictions, protection of artists' studios requires more rigorous and proactive administrative action: not only are incompatible uses prohibited, as the law would generally provide, but a specific, unchangeable designated function is mandated and cannot be altered. Thus, the cultural content takes precedence over its physical container: the immutability of purpose reflects the understanding that the designated use is the essential conduit through which the asset's cultural significance is conveyed[138].

This principle was affirmed by the Constitutional court in 2003, prior to the enactment of the Code of Cultural and Landscape Heritage: requiring preservation of a property's intended use is a "supplement and refinement of the general obligations to preserve cultural property"[139] which places a constraint on an immaterial dimension – in this case, precisely the cultural property's use.

A 2017 decision by the Council of State provides further insight into the reasoning behind this exceptional approach to protection[140].

> "The studio serves as a museum of the artist's professional life, providing a visible trace of the uniqueness of their individual production and research methods. Through this type of restriction, the law aims to preserve not the trace of the artist's life, but the testimony of the material conditions of the formation and action *process* [emphasis

[137] "It is forbidden to change the designated use of artists' studios, or to remove their contents, consisting of works, documents, relics and the like, when such contents, considered as a whole and in relation to the context within which they are contained, are declared to be of particularly important interest for their historical value, under article 13". In addition, Article 11(1)(b).
[138] Besides, it is also prohibited to remove physical contents such as artworks, documents, memorabilia, and similar items.
[139] Constitutional Court, ruling no. 185, 4 June 2003.
[140] Council of State, no. 5737/2017.

> added] that underlies the works that made them famous: a process that the law considers embodying a cultural value in itself [...]"

The goal, therefore, is to preserve the environment that inspired the artist's creativity, with the ultimate aim of protecting the "historicity" of the place, rather than the place alone. This requires extending preservation efforts – which are thus "supplemented," as the Constitutional court argued – to include the protection of the immaterial dimension of the studio: its use. In this context, the creative *process* stays at the heart of the protective interest itself. Only by preserving the entire setting, which includes both the physical conditions and the resulting creativity, can the cultural value be really protected.

This situation warrants several important considerations.

The first concerns the underlying justification for imposing use restrictions specifically on artists' studios, while excluding other categories of cultural property from similar protections. What factors hinder the extension of similar protection to other categories of cultural property?

Following from this, we must examine the inherent limitations of this exceptional protection. This involves evaluating whether the regulatory framework governing artists' studios adequately addresses the specific circumstances it was designed to protect. Does it fully capture and effectively regulate the distinct characteristics and preservation needs of these cultural spaces?

Regarding the first point, it is important to acknowledge that many analogous situations exist where the preservation of the function – the activity carried out inside – carries more cultural weight than its physical structure alone. We will see this extensively in the next subsections.

However, the scope of Article 51 has traditionally been interpreted narrowly. Since restrictions of this kind place a more stringent limitation on property rights than usual cultural-historical constraints – which generally only involve assessing "negatively" the compatibility of uses with protected values – it has been argued that the rule should be read in a strict manner.

It is also widely acknowledged that the public protection model for cultural property performs a so-called "conforming function"[141] on ownership rights due to the existence of a public interest in such properties. However, when it comes to protecting activities, uses, or specific functions related to cultural objects, legal interpretation tends to be far more restrictive. This is because placing public constraints on immaterial aspects represents a particularly significant limitation on private property control and management discretion.

Recent trends in administrative case law signal a shift away from this rigid, positivist approach. A 2023 ruling by the Plenary Council of State[142] marks a turning point, reframing the issue from a narrow, rule-bound interpretation (limited to Article 51) to one grounded in the broader objectives of cultural property protection.

> "The fact that the law has identified, in a general and abstract way, the necessity of imposing a use restriction on a particular category of cultural asset – specifically to preserve the environment and places where the artist worked, in order to maintain the integrity of the cultural values inherent in it, without requiring a specific administrative evaluation – does not render such a protective restriction inadmissible for other categories of cultural assets. It merely means that, while for artists' studios the imposition of a use restriction directly follows from the mere classification of the asset and the recognition of its nature, for other categories of cultural assets, an administrative evaluation of the specific circumstances is required. This evaluation must explain the reasons why different uses of the asset would be detrimental to the preservation of its artistic or historical characteristics or its material integrity"

Under this new interpretation, the administrative authority retains discretionary power to identify additional categories of cultural property beyond artists' studios.

In the following sections, we will examine these specific scenarios – corresponding to the administrative practices referenced at the beginning of Section 3.2.

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[141] With respect to cultural property, specifically, see A. Gambaro, "I beni", in A. Cicu, F. Messineo, L. Mengoni, P. Schlesinger (eds.), *Trattato di diritto civile e commerciale*, Milan, 2012, esp. 324. See also R. Di Raimo, "La «proprietà» pubblica e degli enti privati senza scopo di lucro: intestazione e gestione dei beni culturali", in *Rassegna di diritto civile*, 2010 and F. Longobucco, "Beni culturali e conformazione dei rapporti tra privati: quando la proprietà 'obbliga'", in E. Battelli, B. Cortese, A. Gemma, A. Massaro (eds.), *Patrimonio culturale: profili giuridici e tecniche di tutela*, Rome, 2017.

[142] Plenary Council of State, ruling no. 5 of 23 February 2023. Discussed in detail in the following subsection.

Turning to the second question raised earlier – whether the current regulation of artists' studios fully captures the reality it intends to govern – a critical consideration emerges. If administrative discretion can extend protection to other categories of cultural property in service of broader preservation objectives, we must examine whether the existing positive constraint appropriately reflects the reality it aims to regulate. Are there other cases that align conceptually with the rationale behind Article 51 but fall outside its protection?

One particularly relevant example is the widespread presence of house museums (*case museo*)[143] in Italy, residences of distinguished historical figures now accessible to the public. These properties share key traits with artists' studios, particularly in terms of their cultural function. Hence, we argue that such spaces, too, may warrant protection for their *functional role*.

In 2013, a ministerial commission proposed amending Article 101 of the Code, which governs institutes and places of culture[144], to incorporate a specific definition of house museum – "a musealized dwelling of historical significance, documenting the type of domestic life of historically specific social environments, along with its related furnishings and everyday objects." This proposed classification aimed to distinguish house museums from traditional museums, which, as legal scholars note[145], do not "preserve a pre-existing order" or maintain the environment that shaped and inspired the artist's life – the so-called "intangible echo of the individual's private life." The museum, in fact, constitutes a space that remains receptive to new acquisitions, primarily focused on engaging with contemporary society and reflecting its evolving cultural values, thus continuously adapting and transforming over time.

[143] For example, in Milan, the Boschi Di Stefano House Museum, the Museum Bagatti Valsecchi, the FAI - Villa Necchi Campiglio and Museum Poldi Pezzoli, which together are part, since October 2, 2008, of the Museum Houses Circuit of Milan, resulting from an agreement signed in 2004 with the Lombardy Region, the City of Milan, the Province of Milan, and the Cariplo Foundation. In Rome, we can mention the examples of the Giorgio and Isa de Chirico Foundation, the House Museum of Giacomo Balla, the Alberto Moravia House Museum, and the Luigi Pirandello House Museum.

[144] The Article regulates cultural institutes and places, identified as museums, libraries and archives, archaeological areas and parks, and monument complexes.

[145] G. Severini, *Discorso sulle case museo*, Rome, Museo Canonica, 18 October 2016. Available at https://www.giustizia-amministrativa.it/web/guest/-/severini-discorso-sulle-case-museo (accessed 29 June 2024).

Eventually, however, no legislative action followed. Today, house museums exist mostly as labels of private foundations[146], with no legal recognition at the public level as either places of culture or cultural property. Governed by private law, their continued function depends solely on the discretion of the founding entities, with no legal mechanisms ensuring their preservation or continuity.

House museums are occasionally regulated locally through regional legislation. For instance, regional law of Lazio, no. 24 of 15 November 2019 defines them as "dwellings where prominent figures from the world of culture, politics, science, and spirituality have lived or carried out their activities" (Article 2). Article 19(c) further requires them to engage in activities that promote awareness of the figure associated with the house museum. Ultimately, these provisions achieve a similar outcome – mandating promotional and dissemination activities that emphasize the house museum's immaterial aspect (the use), ensuring it is reflected in the preservation of the house's physical structure and contents. However, this represents merely a form of "alternative protection" for such an immaterial dimension, diverging from the protection provided by the Code[147].

The case echoes an earlier case that again involved a regional law of Lazio (6 December 6, 2001, no. 31, "Protection and enhancement of historical premises"), whose constitutional legitimacy was challenged as it mandated the safeguarding of historical premises through registering and maintenance funding, which entailed the imposition of a use constraint. Constitutional concerns arose from the grounds that the regional law encroached upon the State's exclusive authority over tutela – the identification and protection of cultural property – under Article 117 of the Constitution.

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[146] Similar examples exist internationally, such as the Literary Homes and Museums of Great Britain (LitHouses, 2003) and the *Asociación de Casas-Museos y Fundaciones de Escritores* (1998). In France, the "*Maison des Illustres*" label, introduced by the Ministry of Culture in 2011, promotes sites honoring figures significant to the nation's history. While it carries no legal or financial weight, it ensures public access for a set period and prevents commercial repurposing. The label also facilitates access to national and European funding, fostering a network of memorial sites essential to historical understanding.

[147] These goods are sometimes classified as "minor" cultural property. See P. Carpentieri, "Tutela e valorizzazione dei beni culturali (nota a C. Cost., 28 marzo 2003)", in *Urbanistica e Appalti*, 2003. On that ruling, see also the insights provided in the following note. Also, G. Severini, "Commento agli art. 1 e 2", in M.A. Sandulli (ed.), *Codice dei beni culturali e del paesaggio*, Milan, 2011.

Already in that case, the Constitutional Court upheld the law by reframing the issue. It ruled that since the premises were not formally classified as cultural property but as "other goods," they could legitimately be recognized by regional or local communities for *enhancement* purposes. This recognition, in contrast, did not trigger the application of *tutela*[148].

By extension, the same logic applies to house museums. They can be recognized at the regional level and governed under separate regulatory frameworks without conflicting with the State's authority over protection. Yet, it remains unclear why these properties – closely aligned in function and historical value with artists' studios – should not be brought under the same national legal protections as cultural assets whose distinctive *destinazione d'uso* warrants protection.

But then, if the category of artists' studios fails to fully capture all cases involving places associated with prominent cultural figures – where preservation must extend beyond the physical structure – then what alternative solutions might address this gap effectively?

One possibility could be to implement substantive changes in the legal definition of cultural property, enabling the legitimate protection of immaterial aspects independently of physical preservation. This goes along the lines of the 2023 Plenary Assembly ruling and the interpretation that foregrounds general protection objectives instead of strict adherence to positive law. This argument will be further developed in the case analyses that follow.

But even staying on the existing regime, some additional considerations arise. If we assume that, in some cases, use restrictions are supported by positive law – and bolstered by case law interpreting them as a "complement and specification of the general obligations to conserve cultural property" – we can begin to consider this datum. The protection of cultural property aims to preserve its integrity, which at times requires preserving its function. But is this enough? If the use restriction is primarily directed at protecting the *object*, what do administrative authorities have to address needs specifically related to that use? How can the preservation of function be ensured in a way that avoids stagnation or formalism?

[148] See Constitutional Court, 28 March 2003, no. 94. On the topic, see also the ruling comment of S. Foà, "La legge regionale sulla tutela dei locali storici è legittima perché non riguarda "beni culturali" ma beni "a rilevanza culturale". La Corte costituzionale "sorvola" sulla distinzione tra tutela e valorizzazione", in *Le Regioni*, no. 6, 2003.

One could argue that such needs should be addressed at a later stage, through the enactment of *enhancement* measures on the asset. But upon closer examination, this is not about "ensuring *better* conditions for the enjoyment of cultural property." This involves adhering to the very foundational purpose for which restrictions were imposed on the asset in the first place, hence putting in place activities aimed at *identifying* the asset for its cultural interest and ensuring its real *fruition*[149]. The use of a cultural asset can sometimes be central to this identification, as the framework for artists' studios already demonstrates.

A compelling case from Italian administrative case law provides a valuable framework for understanding this point. The property in question can be considered part of that house museum category highlighted above, as it was the "family home of Judge Rosario Livatino," a young judge murdered by the Sicilian mafia in 1990. After his death, a protective measure was placed on his house under Article 10, para 3, letters (a) and (d) of the Code, as the house was "representative of historical memory," and efforts were to be made in order to "raise awareness and disseminate founding values such as the pursuit of legality, justice, and the fulfillment of one's duty."[150]

While the property contained documents and personal effects that merited preservation, its primary value lay in its role as a site of remembrance and civic engagement. The house had become a symbol of "cultural and social movement," resistance to organized crime, and a meeting place for youth and activist groups. The restriction thus had to protect not only the physical site but also its ongoing use – its role in fostering awareness and social commitment and as a "symbol of the struggle for legality."

Due to minimal emphasis on the property's material and aesthetic aspects (e.g., it was argued that no value was present in either the

[149] The Explanatory Report to the Cultural Heritage and Landscape Code, 2005, effectively illustrates that "Enhancement involves striving for improvement in the implementation of the service of enjoyment [...] The function of enhancement [...] presupposes a prius, consisting of the ordinary activity of fruition of cultural heritage. The latter precedes valorization as it is inherently linked to protection, serving as its necessary outcome [...] Valorization requires something additional. It relates to the methods through which knowledge of the asset is expanded and the qualitative and quantitative aspects of enjoyment are improved, and it acts on an asset that is already protected and generally usable."

[150] From the report attached to the Decree of the Director General of the Department of Cultural Heritage and Sicilian Identity of the Sicily Region dated September 9, 2015, no. 2589.

building or the things it contained), the constraint led to legal challenges[151]. Ultimately, however, the judge validated the house recognition as a cultural property precisely by reaffirming its value rooted in "principles that, at a given historical moment, can guide the evolution of society."

What must be emphasized in this case is that alongside this established concept of immateriality intertwined with the building's physical structure, an extrinsic manifestation was already acknowledged within the administrative provision. This was evidenced by the outreach activities to be conducted within the house and the expressed necessity to ensure their continuation. These initiatives, when combined with the property's intrinsic values, formed a comprehensive and more complex dimension of immateriality where "extrinsic" aspects also emerge. It is precisely such a complexity that should prompt further reflection regarding the potential expansion of regulatory protection frameworks for this kind of properties.

As demonstrated in this case, the interplay between physical attributes and functional role in facilitating ongoing cultural engagement represents a multifaceted preservation challenge that current regulatory structures may not adequately address.

Administrative practice. An example from case law on historic restaurant activities[152]

Following a series of conflicting rulings on whether constraints may apply to the "intended use" of cultural property, a 2023 Plenary Assembly ruling[153] has clarified the interpretative framework – such constraints are legitimate when the underlying administrative act is sufficiently justified. The ruling redirects attention from law to administrative action, emphasizing the "gray" areas of legislation that

[151] Culminating in *Consiglio di Giustizia Amministrativa per la Regione Siciliana*, jurisdictional section, 15 February 2021, ruling no. 107.

[152] This section outlines what the author has previously expressed in the following two publications, from which some passages may therefore be quoted. Please refer to A. Mussatti, "Il vincolo storico-artistico di destinazione d'uso: inammissibilità dello strumento, inadeguatezza della disciplina", in *Giornale di diritto amministrativo*, no. 3, 2022; and Id., "Il vincolo culturale è sull'immobile, ma può tutelarne anche l'uso. Tutto cambia affinché nulla cambi?", in *Giustizia – Rivista di riferimento della Scuola forense V.E. Orlando*, no. 1, 2023.

[153] Plenary Assembly of the Council of State, 13 February 2023, no. 5 – already anticipated several times in this study, starting from Chapter 1, Section 4.1.

remain open to interpretation and adaptation, shaped by contextual factors such as cultural, social, and technological developments.

As the latest and most authoritative decision from the highest administrative court, this ruling forms the core of the present analysis, which examines the rationale for extending protection to this distinctive immaterial dimension.

In 2018, a convoluted legal dispute arose over the restaurant *Il Vero Alfredo*, located in the historic center of Rome. The case originates from a civil eviction lawsuit filed by the restaurant's manager against the company that acquired ownership of the entire building in 2016[154]. With judgment no. 2373 of 31 January 2018, the Civil Court of Rome declared the termination of a lease dating back to 1950.

A key distinction, underscored by the civil judge, emerged between "destination" and "use" constraints, as we referenced at the very beginning of this section. The reasoning stemmed from the restaurant manager's objection, arguing against the eviction based on two administrative measures that acknowledged the cultural significance of its business. One was a resolution of the municipality of Rome conferring the status of *Negozio Storico d'Eccellenza* (Historic Shop of Excellence)[155] as part of a broader effort to preserve the city center by promoting historic commercial activities. This initiative, although not imposing a formal restriction, was already geared toward preserving the "spirit" of historic centers and preventing their disappearance. The second was a pending cultural constraint proceeding initiated by the Ministry of Culture[156], which effectively obstructed civil action.

According to the Court, however, the need to protect the business was irrelevant to both the mandatory execution of the property's release and potential cultural constraint, as both measures were designed solely to protect the building's material features. In this respect, the judge

[154] Atlantica Properties S.p.a. The building was originally in public ownership and was transferred to the *Fondo Comune di Investimento Immobiliare di Tipo Chiuso* (FIP) under Decree Law no. 351/2001, converted into Law no. 410/2001. Already recognized as culturally significant under Articles 10(1), 10(5), and 12(1) of the Code, the complex was also subject to ministerial authorization for its sale. Notably, at that time, the administration required the preservation of the property's existing uses, explicitly prohibiting any temporary or permanent repurposing that would be incompatible with its cultural significance or detrimental to its conservation and public accessibility.

[155] Rome Municipality Council Resolutions of February 6, 2006, No. 36 and February 1, 2010, No. 10.

[156] At that time, the Ministry of Cultural Heritage and Activities and Tourism. Henceforth, the Ministry.

clarified that while a *destination* constraint legitimately protects the cultural value by preventing incompatible alterations, a *use* restriction, requiring the continuation of a specific business, would infringe upon the constitutionally protected freedom of private economic initiative.

This case highlights three key analytical frameworks.

First, the extension of preservation measures to operational constraints, particularly when the activity constitutes the defining element of the property's cultural value.

Second, the legal tension between cultural heritage preservation objectives and constitutionally guaranteed protections for property rights and private economic initiative.

Third, the conceptual distinction between prohibiting incompatible use and mandating specific utilization, especially when the latter enhances the property's intrinsic immateriality (namely, its cultural value).

The formal constraint on the building came on July 13, 2018, with the issuance of Ministerial Decree No. 50. The cultural interest of such a "physical and symbolic space of meeting of worlds and individuals"[157] was said to emerge from the *inseparable union* between the material dimension – its physical setting, furnishings, and the artworks of Gino Mazzini – and the immaterial dimension of the property, constituted by the food and wine tradition and the "aspects related to the cultural tradition of the place's conviviality." Most importantly, continued use as a restaurant was deemed essential, as the venue offered a unique lens into both the contemporary and historical customs and life of Rome, as well as the "Italianness" imagery abroad, particularly in the United States and Latin America.

From a legal standpoint, the cultural constraint was grounded in the following provisions of the Code:

(i) Article 10(3)(d), which identifies so-called cultural property "by reference" in light of an emerging historical interest[158].

[157] As assessed by the historical report attached to the decree and conducted by the relevant expert.

[158] For the reader's convenience, the Article concerns "Immovable and movable things, to whomsoever they may belong, which are of particularly important interest because of their *reference* to political or military history, to the history of literature, art and culture in general, or as testimony to the identity and history of public, collective or religious institutions"

(ii) Article 7-bis, introducing the so-called "expressions of collective cultural identity"[159].

Accordingly, preservation was mandated, on the one hand, for the material components of the asset insofar as they qualified as cultural property due to their *external* historical interest. On the other hand, preservation was also required for protecting the restaurant business, seen as a representation of collective cultural identity – that is, as intangible cultural heritage under national law, in accordance with Article 7-bis. This entails being embodied in a physical medium (in this case, the building) and meeting the criteria outlined in Article 10, i.e., being located in premises recognized *in themselves* as cultural property. In the inseparable interconnection of materiality and immateriality – specifically, between the premises and the activity – a testimonial value emerged and needed to be protected.

Against the ministerial decree and related acts, the building's owner appealed to the Administrative Regional Tribunal of Lazio in Rome, arguing that the use constraint unjustly benefited the current restaurant operator – previously found to lack legal standing by civil judgment – and infringed constitutional protections for private economic initiative and property (Articles 41(1) and 42(2) of the Constitution). The appeal also claimed administrative overreach, asserting that the Code provides no legal basis for use constraints outside specifically enumerated cases[160].

Each judicial decision in this case merits examination, as the progression of rulings reflects a shifting judicial rationale and highlights the underlying legal tensions, as well as the complex interplay of competing principles.

In the first instance[161], the T.A.R. upheld the appeal, adopting a strict textual interpretation of the legislative dictate. The Court found no legal basis for imposing a use restriction[162]. grounded in a rigid conceptual and ontological separation between cultural 'property' and cultural 'activities.' Within this binary framework, the authoritative measures designed to *preserve* the former were to be kept separate from the *promotional* measures intended to support the latter. A further distinction emerged between generic historic-traditional cultural activities and the

[159] For a full explanation of the scope and limitations of this Article, formal recipient of the Italian translation of the UNESCO 2003 Convention, see Section 4.1 of Chapter 1.
[160] I.e., Article 51 – examined in the preceding section.
[161] T.A.R. Lazio, Rome, judgement no. 5864 of May 19, 2021.
[162] Other than the intended case of artists' studios, see note no. 8 above.

specific nature of 'expressions of collective cultural identity.' As the second aligned with the spirit of the UNESCO 2003 Convention, advocating for a bottom-up identification process that directly engages holder communities, it stood in sharp contrast to the top-down, authoritative approach employed in domestic legislation to declare cultural interest. Accordingly, the ministerial decree lacked any legal basis and constituted an abuse of power, as it imposed irrational, disproportionate, and extra-legal restrictions on private property and economic initiative freedom.

Contested by both the operating company and the defendant administration, this ruling was later overturned by higher courts.

The sixth section of the Council of State emphasized several key arguments from the appeal, including: (i) Article 20(1) of the Code on incompatible uses as the legal basis of the ministerial decree;" (ii) the potential for integrated administrative action to "protect the immaterial [...] by overcoming the traditional constraining regime;" (iii) the legitimacy of the decree's underlying rationale, grounded in a technical-discretionary assessment not subject to substitution by another equivalent evaluation; (iv) the inadmissibility of conflation between the UNESCO candidacy procedure and ministerial protection efforts.

On these grounds, the Council of State recognized the admissibility of a use constraint within the contested ministerial act, contrary to the initial ruling. Nevertheless, it decided to refer the matter to its Plenary Assembly[163], acknowledging the case's complexity and the absence of a coherent regulatory and jurisprudential foundation for resolution without further clarification. Specifically, the Court pointed to a striking inconsistency in the relevant case law concerning the admissibility of use constraints and raised concerns about Article 7-bis of the Code. The provision was seen as problematic both for introducing novel legal challenges related to the protection of intangible cultural heritage and for its lack of clarity regarding the requirement of "material testimony," as well as the interaction between material and intangible elements under the Code's framework.

Accordingly, the case was referred to the Plenary Assembly, which ultimately affirmed the general admissibility of use constraints. Such constraints were deemed permissible not only in relation to cultural

[163] In order to carry out the so-called "nomofilactic" function, (in Italian, *funzione nomofilattica*), thereby making its decisions binding for the so-called simple sections of the Council of State.

property "by reference," but also in any other circumstance where the need to safeguard the *purpose* – ultimately aimed at best preserving the object – relied on adequate justification for the administrative decision. In its reasoning, the Court reviewed and synthesized the three prevailing jurisprudential approaches, ultimately endorsing the interpretive framework known as the "motivation thesis"[164].

This position holds that the admissibility of use constraints depends on the adequacy of the underlying rationale, requiring a clear and well-argued administrative justification tailored to the specific cultural value at stake. This thesis, the Court noted, is reinforced by the Code's provisions on use regulation: the administrative authority is *encouraged* to broaden its operational scope, particularly by restricting incompatible uses to maintain the property's *integrity*. When needed, it may exercise discretionary judgment to preserve specific uses, though cannot mandate specific managers or operators[165].

This would enable the broadest possible protection for cultural heritage, as mandated by Article 1 of the Code – those "general objectives of protection" we also mentioned in the previous subsection. The

[164] The first is a more restrictive approach that challenges the admissibility of use constraints on the grounds of incompatibility with positive law (the identified exception of Article 51 and constitutional as well as conventional provisions relating to ownership rights and the freedom of private economic initiative). Conforming to this orientation are the judgements of the Council of State, Section VI, of 16 September 1998, no. 1266; 12 July 2011, no. 4198; 2 March 2015, no. 1003; Council of State, Section IV, 29 December 2017, no. 6166; Section V, 25 March 2019, no. 1933. As noted, the first instance court also adhered to this interpretation (T.A.R. Lazio-Roma, Section II-quater, 19 May 2021, no. 5864). The second is a jurisprudential opinion that concurs with the overall prohibition of use constraints yet adds a further derogatory circumstance – all cases in which the property has undergone a "particular transformation" with its destination or has maintained a close link with a historical-cultural initiative of significant importance. In these instances, the use restriction would be admissible to ensure the "immediate and direct conservation of the property." Conforming rulings: Council of State, Section VI, 28 August 2006, no. 5004; 6 May 2008, no. 2009; Section IV, 12 June 2013, no. 3255.

[165] This perspective is supported by foundational, though somewhat dated, rulings in administrative jurisprudence. For example, the first ruling on use constraints adhered to this vision – Council of State, Section VI, 10 October 1983, no. 723, regarding the so-called *Fiaschetteria Beltrame*. "The imposition of limits on use is not foreign to the system of constraints aimed at protecting items of historical or artistic interest," the judges stated. This was accompanied by a "broad and detailed motivation regarding those premises and their characteristics." Later rulings, such as Council of State, Section VI, 18 October 1993, no. 741 and Section VI, 16 November 2004, no. 7471, further supported this view. Additionally, in the well-known case of *Caffè Greco* (T.A.R. Lazio, Rome, Section II-ter, 7 February 2011, no. 1164), the operating license was included in the constraints as the premises were considered a "valuable example of public gathering" and a "center of cultural meetings."

continuation of the property's specific use would be legitimately included in any administrative constraint whenever it is *inseparable from*, and *essential to* the cultural value protected, with its alteration being detrimental to proper preservation. According to the Plenary Assembly, the rationale for protecting such an immaterial dimension "lies in the recognized *impossibility* of separating the tangible dimension from the intangible in cultural property."

Moreover, the ruling endorses a flexible interpretation of the Code, recognizing that cultural property should be viewed through a contemporary and dynamic lens: "while based on tangible objects, it can also encompass an additional immaterial dimension." How this "additional dimension" qualifies and the boundaries within which it is drawn are the focal points of the following observations.

An initial concern emerges in how Article 10(3)(d) is currently being interpreted in administrative practice.

It appears that the current understanding has resulted in a broad categorization of diverse assets as "cultural property by reference"[166]. This widespread application suggests that administrative bodies are relying on this article's framework whenever an aspect of the asset's immateriality arises, according to the interpretation proposed in this study[167]. The "reference to history" is treated as an external form of immateriality, which exists separately from the physical object and connects only through the object's role as a historical witness. However, this relationship between the physical object and history is fundamentally no different from how cultural property is traditionally classified. The only real difference lies in how the cultural value element is identified. In this light, even historical reference should be understood as an intrinsic rather than extrinsic form of immateriality.

Greater complexity arises when the property hosts ongoing activities, as in the case under examination. Courts have extended the same legal framework to such cases, interpreting the activity as integrated with the object through the principle of interpenetration. However, this conflation is problematic. An ongoing activity cannot simply be viewed as a component of the object that provides external historical reference and adds to its value. Instead, the activity represents a separate entity that coexists within the same property and has different (or at least

[166] See, for instance, the cases analyzed in Section 3.1 above and the ones explored in Chapter 3, Section 3.2.1.
[167] See Section 2 of the present chapter.

separate) protection needs. From this perspective, one might argue that it is not the object itself but the *use* that connects to historical events[168]. This is because such use, or activity, ultimately constitutes a form of *extrinsic* immateriality – an immaterial dimension that contributes to building the cultural interest of the property, and extends beyond an intrinsic, subordinate nature associated with protection of the object's materiality.

In some ways, this perspective reflects the position of the first-instance judge, who rejected extending protection to the activity and called for legislative reform, specifically the reconsidering the proposed (but unadopted) Code of Cultural Activities[169]. In doing so, the judge emphasized the distinct and independent nature of use in these cases, separate from the material preservation of the object itself.

A second key issue is the Court's stance that administrative restrictions adhere to legal principles and do not constitute expropriation. This becomes problematic if, at the same time, it is asserted that such power also encompasses the protection of the activity.

As recently highlighted in legal doctrine[170], this view fails to consider the potential for uneconomic use of the asset, along with its broader implications for property rights. Indeed, the possibility that market developments or exceptional circumstances render the activity unprofitable – and thus make the use of the property uneconomic – indicates that protecting the activity as an immaterial component of the asset may no longer align with that "social function" that private property performs. In such cases, the restriction may effectively equate to expropriation, infringing on economic freedom and necessitating compensation. As a matter of fact, even Article 52(1-bis) of the Code stipulates that when local administrations identify premises where "traditional handicrafts and other traditional commercial activities" take place, not only must protection be ensured, but also "appropriate forms of promotion and safeguarding." This proactive approach would prevent the activity precisely from becoming uneconomic, while also respecting constitutional principles. Conversely, extending standard protective measures to immaterial dimensions may fail to achieve the intended result.

[168] See Council of State, Section V, 25 March 2019, no. 1933.
[169] As outlined in Law No. 137 of July 6, 2002. More on this topic in Chapter 1, Section 4.1.
[170] See G. Morbidelli, "Della progressiva estensione della componente immateriale nei beni culturali e dei suoi limiti", in *Aedon*, no, 1, 2023. Available online https://aedon.mulino.it/archivio/2023/1/morbidelli.htm (accessed 7 May 2024).

Upon closer examination, this reasoning could extend even beyond an argument on conforming vs. expropriatory nature of administrative powers. It invites deeper reflection on the difference between protecting the activity and imposing obligations on the operator[171]. Indeed, if we consider the potential for the latter to close or relocate its business, it becomes difficult to assess the actual impact of the administrative constraint on such an immaterial aspect of cultural property. The challenge arises especially as these commercial cultural activities are claimed to be part of the UNESCO-recognized "expressions of collective cultural identity". Recalling the 2003 Convention's emphasis on the subjective dimension of ICH[172], it is indeed hard to distinguish between the activity and the individual-subjective component. If practicing the activity is framed under the UNESCO paradigm, we might infer that this pertains to a *particular* style of execution, to the expression of a given group of people which contribute to the building's cultural characterization. As a result, changes in business management, or the manager's own decision to relocate its business, may impact the building's integrity, hence the *materiality* on which restrictions insist. In such cases, does the building retain cultural value in its entirety, or does it experience even greater damage due to the disruption of what is referred to as "interpenetration"?

The Civil Court of Cassation recently addressed this dilemma[173], reaffirming the irrelevance of the human component – thus further distancing the recognition of such expressions of collective cultural identity from UNESCO's original conception. As the Court explains, when a property subject to a commercial lease is also designated as a cultural asset of particularly significant interest, including its intended use, the existence of such a restriction does not prevent the owner from taking legal action against the tenant to terminate the lease. In such cases, however, the owner must preserve the designated *use*, in accordance with the protective measure.

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[171] "[...] the ministerial decree focuses exclusively, in addition to material elements (room, furnishings and bas-reliefs) *susceptible to preservation regardless of the identity of the manager*, on the gastronomic and convivial cultural tradition of the venue, descended from its history as a theater of public and private gatherings and events, *still persisting today once its founder has passed away*". Also: "[...] the restriction must not impose any obligation to carry out or continue the commercial and entrepreneurial activity, nor assign a reservation of activity in favor of a particular manager [...]".

[172] Refer to Sections 2 and 3 of Chapter 1.

[173] See Civil Court of Cassation, Third Division, judgment no. 19350 of 15 July 2024.

By removing the subjective dimension from the activity and requiring it be preserved exactly as conceived by its founder, "there is a risk that that identity tradition will be transformed over time into its own 'theatricalization,' into the mere interpretation of this testimony, detached from popular sentiment. This disregards the essential bottom-up process that continually nurtures and evolves the sense of identity."[174] In the effort to preserve the essence of a material entity, a substantial risk emerges of inhibiting its dynamism to the point of distortion, turning living traditions into mere relics and consequently depriving them of vitality and significance. This was already the case with artist' studios[175]: despite protection designed to preserve a certain order and spirit, they risk overly rigid conservation. This illustrates the broader point – immaterial dimensions, especially when tied to specific uses and functions, cannot benefit from static protection alone.

When the latter is recognized as an expression of collective cultural identity, or as intangible heritage according to UNESCO definition, the issue becomes even more apparent. Confining it to a static state could prove more harmful than allowing natural evolution, even in the absence of formal protection.

Therefore, we can conclude that the failure to address the activity through alternative methods of protection generates issues in both directions: (i) from the activity to the manager, as an economically unsustainable use unduly burdens private initiative; (ii) from the manager to the activity, where changes in management, relocation, or lack of expertise jeopardize the transmission and sustainability of the activity.

While public authorities cannot interfere with private initiative, a viable alternative may lie beyond the confines of public law. Drawing from the Ministry's position – later validated by the Court – one potential solution involves developing specialized intellectual property frameworks for specific operational methods and performance techniques, thereby compensating for the limitations of administrative intervention.

This is not a purely hypothetical scenario. A notable case involves a restaurant that was declared to be of particularly significant cultural interest under Article 10, paragraph 3 (a) and (d), with the accompanying

[174] P. Marzano, "Vincolo culturale di destinazione d'uso: il sindacato giurisdizionale sulle valutazioni della p.a. e il rischio dell'"effetto paradosso", in *Aedon*, no. 1, 2023.
[175] See the preceding subsection.

report explicitly recognizing a significant immaterial component[176]. The existence of this intangible dimension was assessed by designated officials with subject-matter expertise (setting aside, for now, the question of experts and holder communities). Simultaneously, the company owning the restaurant registered several trademarks associated with it.

The key issue, then, lies in delving deeper on the interactions between distinct legal regimes. Indeed, the intersection of these different regulatory spheres (international, public, and private), along with constrained administrative capacity and regulatory ambiguity, underscores the need to consider the broader implications of conflating national protections of the activity with UNESCO's ICH.

As extensively highlighted in Chapter 1[177], the scope of ICH differs significantly in the context of national implementation. References to UNESCO in domestic law should not imply duplicative protection but rather serve to align with the definitional framework provided by the Convention. However, as the Court observed, such references do not automatically trigger the UNESCO candidacy process, nor do they constrain national cultural assessments, which are governed independently by Article 7-bis. While this approach aligns to some extent with the need of preserving domestic legislative autonomy with protecting UNESCO ICH elements, it is important to examine whether this reasoning strategically sidesteps certain linguistic and legal complexities that could potentially limit its application.

Notably, the judgment refers to UNESCO 'sites' rather than 'elements,' despite the latter being explicitly recognized in law No. 77/2006[178]. More critically, as noted above, framing the activity as an expression of collective cultural identity highlights the central role of the manager, whose contribution may reflect culturally significant choices rather than purely entrepreneurial decisions.

A further complication arises under Article 7-bis itself. Restrictions based on expressions of collective cultural identity are only permissible when the material asset (rather than the expression[179]) possesses

[176] This refers to the restaurant *Tre Marie* and the decree issued on 6 September 2021.
[177] See esp. Chapter 1, section 3.1.
[178] Further comments on the law (addressing special measures for protecting and enjoying UNESCO sites and elements) are provided in Chapter 1, Section 4.1
[179] These expressions are deemed cultural, according to the UNESCO definition, only after undergoing a distinct process of bottom-up identification, which differs from the top-down approach typical of administrative authority.

independent cultural value. Without this prerequisite, the "qualified connection" between asset and intangible expression lacks legal significance. This distinction separates such expressions from more general cultural activities: in the former case, protection presupposes the asset's intrinsic cultural status and the interpenetration of tangible and intangible dimensions.

This implies that the judge, without further clarifying the distinction between 'cultural activities' and 'expressions of collective cultural identity,' upholds three distinct scenarios: (i) cases where cultural property "by reference" is connected to historical events; (ii) cases where objects lacking intrinsic cultural value are connected to cultural activities that confer them public relevance; and (iii) cases where objects with intrinsic cultural value also encompass expressions of collective cultural identity as per Article 7-bis[180].

The central question, then, becomes whether a broader and more nuanced theoretical framework for "intangible manifestations" is necessary – one that goes beyond the current regulatory constraints, which comprise all such cases within the expanded application of Article 10(3)(d), as previously discussed.

The Plenary itself persists in addressing the matter within a binary perspective, simultaneously adhering to Article 13's established administrative procedures while also acknowledging "alternative forms of protection of a horizontal and participatory nature that can coexist with these standard procedural forms." Yet, a more compelling analytical approach would invert this logic: rather than deriving objects of protection from existing mechanisms, it would begin with the nature of the intangible manifestations themselves to identify (or develop) the most appropriate protective tools.

[180] To this framework, a further subgroup must be added, as outlined in Article 52, paragraph 1-bis of the Code. This provision recognizes "traditional crafts and other traditional commercial activities" as "expressions of collective cultural identity within the meaning of the UNESCO Conventions referred to in Article 7-bis" and subjects them to promotion and valorization measures. Although this involves the authority of non-state administrations – specifically, "municipalities, after consulting the superintendent" – the overlap within such a complex regulatory structure suggests a degree of confusion. The Plenary offers a definitive interpretation: the promotional and protective measures under Article 52, paragraph 1-bis must be distinguished from the protection provided by Article 7-bis, which remains enforceable as long as the specified requirements are met. However, questions persist regarding the practical effectiveness of this intricate protection system. While it enhances the adaptability and responsiveness of existing rules, it also introduces fragmentation and rigid specificity, potentially failing to accommodate the intangible cultural expressions that fall under administrative concern.

This perspective raises two final questions arise.

First, whether administrative law allows room to meaningfully integrate the immaterial dimension of cultural property. Second, whether protection processes can be enhanced with the addition of more collaborative and participatory forms of cultural identification. The latter would imply shifting emphasis to the subjective component, recognizing the validity of UNESCO's methods in shaping ICH definition through the community's participation.

Ultimately, these considerations have significant implications for administrative discretion and judicial oversight[181]. As we acknowledge the increasing complexity of situations subject to administrative scrutiny, it would be no longer a matter of declaratory administrative decisions based on technical-scientific assessments[182]. Instead, this would entail nuanced comparative analysis and interest balancing, with meaningful private stakeholder participation in the administrative decision-making process. As a result, a reevaluation of the automatic prioritization of public cultural interests would be needed.

In the end, this complexity extends beyond the cultural objects themselves – the expanding manifestations of cultural heritage – to encompass the issue of stakeholders directly involved in implementing protective measures. This multifaceted challenge calls for a more refined approach, which will be explored in further detail in the following section and, especially, Chapter 3 of the study.

Administrative practice. An example from case law on historic movie theatres

[181] In terms of full jurisdiction. The main reference on the point is ECHR Article 6 on the right to a fair trial. In 2008, for case 72034/01 (*Družstevní záložna Pria and others v. Czech Republic*, para. 111), the ECtHR reinforced this view by adding that the Article was considered violated "where the domestic courts had considered themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the relevant issues independently". Among Italian scholars, see M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo*, Naples, 2012; id. "Il sindacato del giudice amministrativo sulle valutazioni tecniche complesse: orientamenti tradizionali versus obblighi internazionali," in *Dir. proc. amm.*, 2012; Id., "Art. 6 CEDU e la continuità tra procedimento e processo", in *P.A. (Persona e Amministrazione)*, no. 2, 2018. See also, in the same issue of the latter journal, F. Goisis, "Il canone della Full jurisdiction, tra proteiformità e disconoscimento della discrezionalità tecnica come merito. Riflessioni critiche sull'art. 7, co. 1, d.lgs 19 gennaio 2017, n. 3".

[182] As provided by the Council of State, Section VI, for ruling no. 677 of 8 February 2008.

In a key passage of the previous 2023 Plenary ruling, it is acknowledged that historic restaurant activities represent just one example within a broader class of cases which also encompasses "theaters, movie theaters, pharmacies, or bookstores of historical interest."[183] The Court notes that "these assets significantly contribute to the country's cultural offerings, and any restriction on the property and its contents cannot overlook the assignment of a *specific use to it* [emphasis added], as failing to do so would nullify the administrative measure."

This section examines the legal proceedings concerning *Cinema America*, a historic theater venue that illustrates key developments in how cultural heritage law has evolved, influencing both doctrinal and jurisprudential interpretations of the issue at hand. The case is particularly instructive, having resulted in two contrasting judicial outcomes separated by a significant regulatory change that significantly shaped interpretive approaches to classifying properties whose cultural significance is defined by their use.

Cinema America is a movie theater located in Rome, built in the mid-1950s, and operational until 1999. After falling into disuse, the property was acquired by a private company[184] intending to demolish it and build a multipurpose facility through a privately initiated recovery plan, departing significantly from its original function. The event triggered two primary responses: (i) a social reaction, marked by the occupation of the building and various protest movements, which included both civil society and prominent figures from political and cultural circles advocating for the preservation of its original use; (ii) an institutional reaction, resulting in the imposition of two cultural restrictions in 2014 under Article 10(3)(d), one targeting its decorative features, the other the entire structure[185]. Both restrictions were contested in Court: while initially upheld[186], the Council of State annulled them on appeal[187].

From the Court's considerations, two principal determinations emerged:

(i) The historical reference under Article 10(3)(d) necessitates association with a *specific* historical occurrence. In that case, no such concrete connection was established, notwithstanding the venue's significance to national or local history. That is to say, the structure appeared to be tied

[183] Quotations from the Plenary 2023 ruling.
[184] Progetto Uno S.r.l.
[185] Ministerial decree 19 Novembre 2014, no. 137 and no. 139.
[186] T.A.R. Lazio, Rome, Section II-quater, 5 October 2015, no. 11477.
[187] Council of State, Section VI, 14 June 2017, no. 2920.

to a "vague and broadly defined era – the period of success of the local film industry – lacking definitive temporal parameters or explicit connections to particular figures or events."

(ii) Factual events are not inherently relevant to determining legal compliance. While the contested administrative decision referenced social activism and building occupation, and the appellant argued that public pressure resulting from illegal occupation influenced the imposition of the restriction, the Court held that such circumstances did not impact the legal framework governing these actions, which must be assessed solely based on their compliance with applicable legal provisions. In this case, such compliance was not demonstrated.

From these findings, two broader implications follow.

(i) Cultural property classified "by reference" constitute a hybrid[188] category, yet they qualify for protection only when reference to historical facts derives from specific, identifiable events rather than general cultural contexts. Consequently, the preservation of a particular use must be a direct result of this historical connection, not the primary justification for implementing protective measures.

(ii) Notwithstanding the asset's value and its connections to broader societal, communal, and contextual elements, immediate public reactions or collective actions cannot serve as legally valid considerations in determining preservation measures.

Six years later, the building was subject to another administrative restriction through act no. 85 of 24 January 2020. The measure reaffirmed the particularly important interest as per Article 10(3)(d) of the Code. Specifically, the historical-relational significance of *Cinema America* was recognized as evidence (i) of a type of cinema architecture designed for public enjoyment; (ii) of the fusion of architecture and art, including its decorative elements; and (iii) of the rise, expansion, and eventual decline of single-screen cinema as a form of popular film enjoyment from the late 1950s to the late 1990s, as well as for its continuous and consistent role as a social gathering place and cultural reference point, fostering the dissemination of film across various social classes.

As the restriction was following a court ruling that had already conclusively determined such constraints to be inadmissible, the matter was relitigated on the grounds of both procedural and substantive

[188] See the observations made in the previous subsection.

defects. However, judges at both first[189] and second[190] instances sustained this new restriction. Their reasoning centered on how changes in positive law, reflecting "a trend toward the continued expansion of the notion of cultural property," warranted a revised interpretation. Specifically, while the cultural protection applied to *Cinema America* still relied on the same historical-relational criterion, it was now founded on a broader interpretation of cultural property that allowed the building to be classified within this expanded legal framework.

The introduction of Law no. 220 of 14 November 2016, titled "Discipline of cinema and audiovisual," indeed facilitated the protection of cinemas and arthouse theaters as cultural property under Article 10(3)(d)[191]. In this context, the Court held that previous jurisprudential requirements regarding temporal specificity of historical references were superseded. The distinctive nature and purpose of the new restriction emerged from legislative provisions establishing protection of movie theaters "in light of a specific historical-cultural interest, distinct from the more general 'relational' interest previously delineated by the Code."[192] Furthermore, the Council of State found that the technical-scientific report accompanying the administrative measure effectively demonstrated *Cinema America* significance as a rare and notable example of a *distinct* historical moment.

Yet this evolution raises critical questions. Does the "progressive expansion" of cultural property concepts – endorsed by both courts – adequately address the need for clearly defined rules on use restrictions, particularly when such restrictions are essential to preserving an asset's cultural value? Is the addition of a new category under Article 10(3)(d) alone sufficient to provide legal certainty?

To answer these questions, we should analyze the regulatory framework set forth in Article 8 of the 2016 law.

While the provision designates movie theaters as cultural property under Article 10(3)(d), paragraph 2 assigns to *regional* authorities the responsibility for implementing direct measures to maintain their intended use. In other words, regions may prohibit changes in use of buildings *already* recognized as culturally significant, with a view to their

[189] T.A.R. Lazio, Section II Quater, 5 June 2020, ruling no. 5972.
[190] Council of State, Section VI, 14 March 2023, no. 2641.
[191] Article 8 specifically states, "The declaration of particular important interest mentioned in Article 10, paragraph 3, letter (d) of the Code of Cultural Heritage and Landscape [...] may also apply to movie theaters and arthouse theaters."
[192] Quotation from the T.A.R. Lazio ruling.

enhancement. This division of responsibilities clearly creates a structural tension. Theaters acquire cultural status based on their historical relevance under Article 10, yet the power to impose use restrictions – the very element establishing such historical connection – rests within regional valorization initiatives rather than standard cultural protection mechanisms, which remain under exclusive State control.

In practice, use limitations rely primarily on administrative practices, now bolstered by the support of the aforementioned Plenary Assembly. Yet this remains, precisely, a matter of legal interpretation. The actual legislative framework provides limited concrete guidance, with explicit provisions covering only artist's studios and posthumous regulatory interventions, leaving much of the broader question of use restrictions unaddressed in positive law.

In this respect, Lazio provides a noteworthy model. A 2017 law[193] explicitly targets properties used for cinematographic and multifunctional cultural activities. It introduces a comprehensive framework for revitalizing and repurposing these spaces, while imposing strict limits on changes in use: no more than 30% of the existing space may be converted for commercial, artisanal, or service-related functions, thereby preserving their primary cultural function.

Although this regional approach may soon face challenges due to a new legislative proposal (reportedly nearing approval)[194], the Lazio Regional Administrative Court, Section II, ruled in late 2024[195] in favor of its dispositions, reaffirming the existence of a "fair balance between freedom of economic initiative and the protection of socio-cultural values" within this provision. Notably, the ruling also challenges the misalignment observed above between competencies, authorities, and related functions stemming from the national legislation of 2016. The Court presents a compelling argument that the national law does not contain an implicit prohibition against extending enhancement measures through regional legislation to venues that *lack* formal cultural interest designation. Rather, national provisions should be seen as establishing a "minimum level of protection," which can be legitimately supplemented by an "incremental protection approach" at the regional level.

[193] Regional law 18 July 2017, no. 7, titled "Provisions for urban regeneration and building rehabilitation" (*Disposizioni per la rigenerazione urbana e per il recupero edilizio*).
[194] The proposed regional law, as outlined in Regional Council Resolution No. 171 of August 9, 2024, is titled "Simplifications and Incentive Measures for Land Governance."
[195] T.A.R. Lazio, Rome, Section. II, ruling of 19 December 2024, no. 23104.

But while this interpretation aligns with the identified judicial trend toward progressively broadening the scope of cultural property, it still rests on an interpretation that, from a strictly formal perspective, appears only partially supported by the current legislative framework.

Indeed, what the 2016 law ultimately reflects is a different trajectory toward increasingly granular specification of properties eligible under Article 10(3)(d) of the Code. This adds another layer of complexity to the interpretive issues already seen in cases like historic restaurants. A similar trend is also evident in two 2014 ministerial directives concerning cinemas and historic libraries, which required cataloging and evaluation to determine whether they merited restrictions under the same provision. Notably, the Ministerial Directive of August 26, 2014, focused on cinemas of historic interest, called for a census aimed at "restrict the use of cinemas in historic centers and suburbs with cultural and social value" – a measure designed to complement existing policy instruments such as tax incentives and credits targeted at small cinemas[196].

Lastly, the judicial approach to reconciling private property rights with the administrative measure's conforming function situates this conflict within the broader framework of "objectives of general interest"[197]. According to this reasoning, "the appellant's [i.e., the company planning to alter the *Cinema*'s function] right to modify the property remains intact, provided the proposed uses are *compatible* with its cultural character and obtain Superintendence approval for any interventions." The issue is, precisely, that relying on the compatibility of alternative uses is not a sufficiently robust standard for this kind of preservation extended on the property's (specific) use.

These questions intersect with a final, open observation.

At the beginning of this analysis, we highlighted the considerable social mobilization triggered by the threatened closure of *Cinema America*. The initiative garnered substantial local support, rallying residents and film professionals alike. This grassroots movement initially led to the venue's illegal occupation and, through continued engagement with institutional

[196] Declaration statement by then-Minister of Culture Franceschini, see https://cultura.gov.it/comunicato/direttiva-sul-censimento-dei-cinema-storici (accessed 8 August 2024).
[197] As upheld by the Court of Justice, Case C-200/96, April 28, 1998.

actors, to the creation of a foundation dedicated to preserving its original use and revitalizing the surrounding neighborhood[198].

The influence of this movement in shaping the fate of *Cinema America* is widely acknowledged, recognized not only in academic discussions[199] but also, as noted, by the plaintiff company in the above case law, arguing that the Ministry's restrictive measure was more the result of public pressure than legal obligation. All four rulings in the case, however, unanimously maintained that those facts were *irrelevant* to the legitimacy of the administrative decision.

It is worth questioning, however, whether such grassroots mobilization is indeed to be disregarded when evaluating the cultural value of an asset – first by the public authority and potentially by courts. Indeed, the immaterial dimension of cultural property cannot be easily disentangled from the "social aspect" of those who actually benefit from it[200]. From a legal perspective, the growing intersection of diverse interests raises the question of whether cultural heritage protection should evolve to reflect collective rights – especially those advanced by civic groups and associations.

To tackle this question, two avenues of inquiry can be followed.

The first is analogical. Domestic administrative case law – particularly in the environmental field – offers useful parallels. Courts have consistently broadened the scope of legal standing for environmental associations beyond strict environmental concerns. Judges have determined that these organizations can take legal action to safeguard a wide array of environmental interests, including the conservation and enhancement of urban, rural, and natural landscapes, as well as historical centers. These elements are recognized as essential assets that contribute to the unique and *irreplaceable* character of specific

[198] The story of *Fondazione Piccolo America* (available at https://piccoloamerica.it/, accessed 8 August 2024) traces back to the occupation of the cinema by a group of young students in early 2010s, seeking to maintain cultural gatherings spaces and alternatives to the tourism-driven model of consumption in the neighborhood. On the topic we refer to the study of V. Di Grazia. L. Tricarico, A. Pirri Valentini, "From grassroots cultural movements to institutionalized urban regeneration projects: The cases of La Friche la Belle de Mai (Marseille) and Piccolo America (Rome)", in *Cities*, vol. 159, 2025.

[199] V. Di Grazia. L. Tricarico, A. Pirri Valentini, "From grassroots cultural movements to institutionalized urban regeneration projects:", cit.

[200] Echoing the wording of the Faro Convention itself, as already addressed in this study, and to which we will also return in the following chapter.

geographical regions[201]. In this light, we can ask whether similar reasoning could justify actions by organizations like the Piccolo America Foundation, with administrative decisions grounded in a concept of cultural property that, due to its extrinsic immateriality, extends and connects to the contemporary contexts that surrounds it.

Alternatively, remaining within the cultural sector itself, the other approach is comparative, drawing on the French legal system, which has served as the primary comparative framework throughout this research.

A notable case concerns the historic Fouquet's restaurant in Paris, whose potential closure sparked both legal and civic debate, offering valuable parallels to the Cinema America case.

The *Fouquet's* restaurant was considered a symbol of the so-called "*vie parisienne*." This role has earned it numerous titles aimed at emphasizing its testimonial value of a long history of high-ranking patrons, often from artistic and literary circles (hence the name of *Maison du cinema*), as a venue for art award ceremonies and celebrations related to cultural festivals[202]. The *Fouquet's* has been affected both by a social and juridical debate over its eligibility as *Monument Historique* (finally admitted in 1988 with the entry in what was then the *Inventaire Supplémentaire des Monuments Historiques*[203], and a second time in 1990), and by litigation before the administrative judge who overturned the first administrative decision of inscription in 1988.

When its owners threatened a substantial rent increase, sparking fears of conversion into a shopping arcade or fast-food outlet, artists and public figures formed an association – *Remontons les Champs-Élysées* – whose

[201] Quotation from T.A.R. Campania, Naples, Section VII, 3 May 2018, no. 2965 and Council of Administrative Justice of the Sicilian Region, ruling no. 811/2012. Along the same lines, T.A.R. Toscana, Florence, Section III, 20 October 2006, no. 4568; T.A.R. Lombardia, Brescia, Section I, 18 March 2013, no. 259; T.A.R. Lombardia, Milan, Section II, 22 October 2013, no. 2336. More

[202] Information retrieved from the relevant dossier D/1/75/161-3 kept at the *Médiathèque du patrimoine et de la photographie*, Paris.

[203] The regime of the "*inventaire supplementaire*" was introduced by Law of 23 July 1927, which amended Law of 31 December 1913, and remained in force until 2005. The actual version of Article L621-25 of the French *Code du patrimoine* removed the reference to such an inventory and now provides that: "*Les immeubles ou parties d'immeubles publics ou privés qui, sans justifier une demande de classement immédiat au titre des monuments historiques, présentent un intérêt d'histoire ou d'art suffisant pour en rendre désirable la préservation peuvent, à toute époque, être inscrits, par décision de l'autorité administrative, au titre des monuments historiques*."

main purpose was to "safeguard the cultural heritage of Paris *in all its aspects*"[204].

Two elements emerge already at this point. One is the impact of social mobilization on the eventual administrative decision; another is the nature of civil society's demands for administrative protection.

In Fouquet's case, the community's "emotional"[205] connection to the restaurant's symbolic value prompted demands for its designation as cultural property. This illustrates how public sentiment regarding cultural spaces, particularly concerning their immaterial qualities and established functions, can influence and expand the conventional scope of administrative authority in heritage designation decisions[206].

In the case at hand, it was precisely in these terms that the discussion at the ministerial level was held, prompted by these social mobilizations and the restaurant's enormous appeal as a long-standing representation of Paris' artistic life.[207] Expert discussions centered on two primary issues: the feasibility of protecting the activity and spirit associated with a tangible asset, and the original purpose of cultural protection, essentially aimed at preserving the structure and its architectural design.

It is also important to emphasize that civil society's demand for public protection of the restaurant business manifested as a formal request for the preservation of cultural property. When the community advocates for maintaining the building's particular use, it chooses this approach over alternatives such as seeking financial support for the business, requesting a trademark, or pursuing other forms of public intervention. The reason behind this choice lies in a different conception of cultural heritage – "in all its aspects" – offering a much broader interpretation than its ordinary, codified boundaries. Ultimately, they assume there is no real separation between preserving the physical property and preserving its "spirit."

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[204] Agence France-Presse, 19 October 1988, "Le Fouquet's : l'Immeuble du restaurant sera protégé".

[205] The expression is borrowed from D. Fabre's collective book *Émotions patrimoniales*, Paris, 2013.

[206] The issue of declared cultural value vs. memorial perception is further examined in Chapter 3, Section 3.2.1, as part of a broader discussion on the relationship between immateriality and the subjective component.

[207] From the collection of press reports available in the dossier (see note no. 243 above) was found an interview given by the Ministry of culture at the time, Jack Lang, on 19 October 1988, praising the strong mobilization that had consolidated around the lobbying activities exerted by the managers to defend the survival of the place and identifying in it the source of the process that eventually led to the inscription.

This led to a deeper debate in France on whether legal definitions of cultural property should expand to reflect such "diversified demands for protection." Minutes from the 1988 meeting of the *Commission Régionale du Patrimoine Historique, Archéologique et Ethnologique*, aimed at finalizing the decision on protection, reveal a clear sense of urgency about modernizing legal frameworks. The goal, ultimately, was to elevate the recognition of cultural interest by integrating the dimension of extrinsic immateriality. Indeed, the committee members observed that while the 1913 law allowed for heritage listings based on historical (rather than just aesthetic) value, this type of interest maintained blurred boundaries, making it difficult to establish a clear taxonomy for cases where historical significance arises from their commemorative value and the continuing role of the activity in preserving historical characteristics.

Eventually, *arrête* no. 88-1253, responsible for the first inscription, identified three reasons to justify the restaurant's protection: (i) the quality of decorations – the only material aspect, moreover, disputed by several experts; (ii) the restaurant's role as a testimony of the *grand cafés* in *Champs-Élysées* Avenue; (iii) its importance in the literary and cinematographic life. Interestingly, this initial decision addressed the *restaurant* as the primary subject of the administrative measure.

In 1990, however, the Paris Administrative Court overturned the measure[208], specifically emphasizing the conflict between (material) and activity protection, as in the Italian cases just analyzed. The court found that the administration had acted beyond its legal authority, aiming to preserve the activity rather than a demonstrable historical or architectural feature. Crucially, however, the judgement only focused on the *type* of protection at stake, or rather, on the rationale for such a decision, untethered from attachment to the requirement of the materiality of the place.

Later that same year, a second administrative decision (no. 90-1297) was issued, this time listing only specific parts of the property rather than the entire building. Unlike the earlier ruling, this measure went unchallenged. Currently, the official protection of Fouquet's "spirit" focuses exclusively on its interior spaces[209]. Despite this revised administrative framework, however, the substance of the protection remains unchanged: it continues to recognize the decorative quality of the interiors, the restaurant's symbolic role among the grand cafés of the

[208] TA Paris, June 29, 1990, no. 8901069/6.
[209] Specifically, "the ground-floor hall, mezzanine, and salons, along with their decorations, within the part of the building housing the restaurant."

Champs-Élysées, and its lasting cultural relevance in the realms of cinema and literature.

As with the Italian cases, we can conclude that the "containment" of immaterial dimensions, difficult to assess at the legal-administrative level, leads to excessive formalism of decisions that remain fundamentally unchanged.

A more detailed analysis of the social dynamics that shape such administrative decisions is offered in Chapter 3, and these reflections serve as a foundation for the concluding remarks in Chapter 4. For a deeper exploration, we refer the reader to those sections.

Administrative practice. An example of use as a standard of non-culturality

As we conclude this section, let us reverse our analytical lens. Rather than asking how the immaterial dimension of *use* contributes to the recognition of cultural value, we can examine whether it also influences the *denial* of such value – whether the use of a given asset might lead administrative authorities to determine that it lacks cultural interest. Our argument is that, even in these cases, the immaterial dimension of use remains central to the cultural property assessment process.

In 2010, the Superintendence for Architectural and Landscape Heritage of the provinces of Venice, Belluno, Padua, and Treviso designated the *Cinema Teatro Concordi* as a property of particular cultural interest. While the building's designated use as a movie theater fundamentally shaped the cultural value of its physical structure, the official declaration primarily emphasized its material aspects. Specifically, the building was deemed worthy of protection as an exemplar of 1930s architectural and engineering innovation.

An administrative dispute followed when the property owner challenged the designation as it intended to convert the building into a mixed-use complex comprising commercial space, residential units, and parking facilities[210].

Notably, the Council of State's ruling centered on an evaluation of the *context* surrounding the building, which informed its analysis of both its use and, ultimately, its cultural significance. The Court explicitly

[210] Ruled by T.A.R. Veneto, Venezia, Section II, no. 734/2012 and, in second instance, Council of State, Section VI, ruling no. 1003/2015.

considered "the concrete coordinates of space and time in which it is situated" and "the *vitality of the context* of which the property itself is an integral part."

On these grounds, the assessment focused on two key contextual factors: the prolonged disuse of the building and the cessation of its function as a cinema. These factors led the Court to reevaluate the function of the property – once central to its cultural significance – and conclude that it was no longer compatible with the contemporary urban and social landscape. Ultimately, the relationship between the building's intended use and its contemporary context became the decisive factor in denying its cultural value designation.

The Court reasoned that preserving the property would *inevitably entail* protecting its function as a cinema. However, this preservation requirement raised three significant concerns. First, it would encounter legal challenges regarding the permissibility of mandating a specific "destination of use," as already discussed in detail throughout this section. Second, the economic unsustainability, given the property's actual state and context. Third, the inconsistency with the spatial and temporal considerations essential to cultural property protection.

When the intended use conflicts with the present-day context (considering both space and time), this dissonance serves to negate the property's cultural significance. This approach ensures that protected properties remain contextually coherent, echoing earlier reflections on *decorum* and the importance of appropriate integration into the surrounding environment.

As anticipated, this perspective offers a notable departure from previous arguments by reversing the established logic: instead of examining how the immaterial dimension defines cultural value, it now acts as a reason to deny it. Nonetheless, its role in heritage administrative processes remains fundamental.

3.2.2. Use as a contextual element of the object's value

To close this section on use, it is essential to undertake a final examination of the impact of usage patterns occurring *around* cultural sites and complexes, rather than *within* the designated properties themselves. Through a dynamic interplay of contrasts – interior versus exterior, single versus many, material versus immaterial, preservation versus transformation – we explore here how contextual uses can

fundamentally shape the identity of cultural property, building on the earlier discussion of decorum in Section 3.1.1.

Several key questions arise. To what extent surrounding activities affect a site's cultural value and its ability to fulfill cultural functions? How can heritage protection frameworks accommodate living cultural practices that interact with physical structures while maintaining their fundamental integrity? It its true, in fact, that treating contextual practices as essential to a cultural site's environment we risk creating artificial preservation conditions – effectively "musealizing" these spaces. This approach could demand maintaining a static environment, potentially conflicting with natural market evolution and the broader socioeconomic development of the area. This highlights the delicate balance required between preserving cultural significance and allowing for organic societal growth.

A preliminary review of the regulatory framework in place provides a foundation for further analysis.

Article 52 of the Code governs the management of "areas with archaeological, historical, artistic, and landscape value, including historic buildings and premises." Through its local branches, the public administration is responsible for determining which activities should be permitted or encouraged[211] and which, conversely, should be restricted[212].

[211] Paragraph 1-bis of the article deals with this promotional role: "Municipalities, after consulting with the superintendent, shall identify the premises, regardless of their ownership, where traditional handicrafts and other traditional commercial activities are conducted, which are recognized as expressions of collective cultural identity [...] in order to ensure suitable forms of promotion and safeguarding." Recalling the requirements of Article 7-bis, which stipulates that expressions of collective cultural identity must be embedded within tangible cultural assets, Article 52 broadly refers to "historical traditional premises." The key point of interest in this provision is that, within such locations, the administration can identify specific uses as particularly significant and take steps to promote and safeguard their continued existence. However, this is not done to protect the expressions themselves – since that is already the goal of Article 7-bis – but to enhance the preservation of the areas and premises where these activities take place, thereby enhancing their overall cultural value.

[212] Addressing "monumental complexes and other cultural properties impacted by particularly significant tourist flows, as well as the areas adjacent to them," paragraph 1-ter mandates that the "competent territorial offices of the Ministry, in agreement with the region and the municipalities, [...] take appropriate measures to *prohibit* uses that are deemed incompatible with the specific requirements of protection and enhancement." It thus suggests a negative stance, requiring the administration to restrict activities deemed incompatible with the cultural significance of the place concerned.

These dual regulatory provisions serve a unified purpose: assessing how specific uses affect the property's cultural value and identity, thus guiding decisions to either encourage or restrict such activities. Ultimately, the emphasis is less on the activity itself, which is not relevant here as an element of interest per se, and more on its role in enhancing comprehensive forms of protection of "areas of cultural value and historic traditional premises"[213].

A recent ruling by the Regional Administrative Court of Lazio also reaffirmed this idea acknowledging that "the Administration may indeed protect traditional activities [...] even to the extent of preventing artisans and other small 'traditional' operators from disappearing due to market-driven dynamics."[214]

The Court further clarifies this protection is grounded "not solely in considerations related to human presence, urban decorum, or residential livability," but in the very logical and proportionate assessment of a cultural interest. It follows that traditional activities, even when external to the property itself, contribute essentially to its core identity, thereby broadening the scope of cultural evaluation entrusted to the public administration.

From this review, a specific context emerges where the issue of use may warrant critical assessment. In most cases, in fact, questions of this kind arise in areas where diverse cultural interests converge, giving rise to a complex interplay of tangible and intangible elements that collectively shape a site's comprehensive cultural identity – reflected in expressions such as 'areas of cultural value' or 'historic premises.' This issue becomes particularly salient in the context of historic centers and *borghi* – small villages characterized by distinctive spatial, landscape, historical, and cultural-aesthetic qualities. In Italy, these cultural spaces represent a fundamental component of the national cultural heritage and thus merit particular attention within this analysis.

[213] In the same vein, Article 1, paragraph 4, of Legislative Decree No. 222 of November 25, 2016, states that "For the purposes indicated in Article 52 [...] the municipality, in agreement with the Region and after consulting the competent Superintendent of the Ministry of Cultural Heritage and Activities and Tourism, may adopt resolutions to designate, after consulting trade associations, *areas or zones* of particular archaeological, historical, artistic, and landscape value where the exercise of one or more activities, identified by type or category of merchandise, is prohibited or subject to authorization [...] as being incompatible with the requirements of protecting and enhancing cultural heritage."

[214] T.A.R. Lazio, Rome, Section II ter, ruling no. 17020 of 1 October 2024.

Historic centers and *borghi* lack a precise legal classification – an issue that has long intrigued Italian legal scholarship[215] – yet they provide valuable insights for further reflection. The complexity of their classification stems from the interplay of diverse elements at stake, including landscape, tangible, and intangible cultural components, making it difficult to define their legal status and develop appropriate preservation measures.

Indeed, their classification fluctuates between various national designations, which lack a uniform typology, and international ones, which often require complex coordination efforts and are generally seen as necessitating stricter oversight and more robust protection policies by the relevant administrations.

Within the regulatory framework of the Code, historic centers and *borghi* could fall under Article 10(g), covering "public squares, streets, roads, and other urban open spaces of artistic or historic significance," implying direct (*ex-lege*) recognition of their cultural value. Alternatively, they might be acknowledged as landscape heritage and included within the framework of a "considerable public interest" as per Article 136, issued after the declaration of a regional commission[216]. The Article refers to "complexes of immovable things that create a *distinctive appearance with aesthetic and traditional value* [emphasis added], including historic centers and small villages." The formula has received specific interpretative clarification from administrative case law, which mandates the combination of "the expression of nature with that of human labor, the outcome of artistic creativity,"[217] hence the simultaneous presence of the value of identity with the specific aesthetic requirement of the "natural beauty"[218].

[215] More punctual regulatory elaborations actually exist for historic centers, both in the field of urban planning and cultural heritage, starting with the so-called Gubbio Charter of 1960. On the topic, see the whole no. 2/2015 of *Aedon*, "Città d'arte e centri storici"; more recently, see also E. N. Fragale, "Il problema dei centri storici tra le sfide poste dalla sharing economy e le nuove istanze di salvaguardia", in *Munus*, 2020; A. Simonati, "Il giudice amministrativo nei meandri del centro storico: alla ricerca di un paradigma unitario, fra governo del territorio e salvaguardia del patrimonio culturale", in *Nuove Autonomie*, no. 2, 2021. On the topic of *borghi* see the contribution of A. Pirri Valentini, "Per una qualificazione giuridica dei borghi", in *Aedon*, no. 2, 2024.
[216] See Articles 137-138 of the Code.
[217] Council of State, Section VI, 21 June 2006, no. 3733, recently bolstered by T.A.R. Lazio, Rome, Section. II, 30 November 2023, no. 17967.
[218] T.A.R. Lazio, Rome, Section II-quater, 27 January 2021, no. 1080.

In both cases, categorization as cultural or landscape property would bring the discussion on use back within the limits of what has already been noted in previous sections.

On the other hand, the protection of historic centers and traditional villages can operate within more complex frameworks that integrate both international designations, such as UNESCO World Heritage Sites and ICH[219], alongside domestic regulations.

This is the case with the Historic Centre of Naples[220], whose rich cultural fabric (encompassing universities, museums, academies, conservatories, libraries, churches and monumental complexes, as well as traditional economic activities, traditional knowledge, and centuries-old craft practices) requires tailored protection and enhancement measures. In accordance with the regulatory framework mentioned above, local administrations have imposed restrictions on certain commercial activities that could potentially distort "the identity and cultural vocation of the city's territory"[221]. They have significantly introduced specific provisions for a street, "*Via San Gregorio Armeno*," where restrictions apply to a distinct type of merchandise – prohibiting any activity unrelated to handicrafts linked to nativity art and requiring artisans to be listed in the appropriate register.

The influence of certain activities on both the morphology and meaning of the place was thus acknowledged: such uses occur in specific areas, produce distinctive goods or services, and contribute to shaping the cultural identity of the historic center. What is at issue, in such cases, is not the protection of the activity in itself, as an expression of intangible heritage – which might still be the case, yet be subject of a distinct legal approach – but rather the preservation of identified uses that prove

[219] See R. Raimondi, "La conservazione dei centri storici protetti dall'UNESCO", in *Riv. giur. edil.*, 2004.
[220] https://whc.unesco.org/en/list/726 (accessed 7 August 2024).
[221] Resolution No. 246 of 21 July 2023 of agreement between the Municipality, the Region, and in agreement with the Superintendence of Archaeology, Fine Arts and Landscape of Naples. See https://www.comune.napoli.it/flex/cm/pages/ServeAttachment.php/L/EN/D/1%252F1%252F9%252FD.98eb5b7e68066050797c/P/BLOB%3AID%3D15607/E/pdf?mode=download (accessed 7 August 2024). The resolution, which was brought to court, was upheld by administrative jurisprudence. The Court endorsed it, noting that it is "commendable and justified, as it represents a fully reasonable and coherent exception within a regulatory framework that is currently consistent, logical, and geared towards protecting multiple values upheld by the Constitution: the preservation of cultural property and the support of business initiatives.", T.A.R. Naples, Section. III, 25 October 2023, no. 5817.

essential to the cultural characterization of an asset – despite the challenges in its legal classification.

A 2014 administrative dispute in Florence's historic center[222] – another UNESCO World Heritage Site[223], home as well to numerous cultural properties under national cultural heritage law[224] – further illustrates these dynamics. The city administration, in coordination with heritage authorities[225], attempted to relocate certain market stalls to different areas of the city for reasons of urban decorum[226]. The decision was contested on the grounds that such activities constituted protected expressions of collective cultural identity, arguing that relocation would violate international provisions on ICH.

Besides the incorrectness of the claim, not supported by any legal evidence – such activities did not meet one of the requirements of Article 7-bis, neither appeared to be declared as such at the international level – what is worth considering is the judge's peculiar interpretation of the concept of immateriality in this case. The reasoning shifts from classifying activities as ICH and providing them with appropriate safeguarding, to regulating (or relocating) them to preserve a broader *area*'s cultural and identity dimension. The latter, the Court stated, cannot be considered fixed in time, crystallized in a given (commercial, cultural, or social) situation. Instead, this scenario is rightfully subject to periodic assessment by the administrative authority, which is justified in light of the natural changes that commerce and culture may undergo. The "active preservation of the essential characteristics of such places,"[227]

[222] T.A.R. Toscana, Florence, Section II, 27 January 2014, no. 160, confirmed by Council of State, Section V, 19 April 2017, no. 1816.
[223] https://whc.unesco.org/en/list/174/ (accessed 7 August 2024).
[224] We recall here that there is no direct correlation between UNESCO recognition and the imposition of a cultural constraint, as reiterated by T.A.R. Napoli, Section IV, in 2016, ruling no. 4920, and 2017, ruling no. 917. On the point, see also M. Timo, "Il riconoscimento del centro storico di Napoli come patrimonio culturale mondiale non produce vincolo paesaggistico automatico", in *Giustamm.it,* no. 3, 2018.
[225] Specifically, the Superintendence for architectural, historical, landscape, artistic, and ethno-anthropological heritage.
[226] Council resolution no. 68 of December 22, 2011, Municipality of Florence.
[227] Quotations from the Council of State's ruling cited above. See also, adhering to the same vision, T.A.R. Lazio, Rome, Section II, 10 March 2017, no. 3386: " the rationale [...] is not the protection of the building purely for its "static" artistic, historical, or cultural value, but rather on the "dynamic" aspect that gains unique cultural significance within the urban scenario due to the relationship between its quality, location, and the commercial activity conducted there over the years. This activity plays a crucial role in defining the property's historical and cultural value, which is why it is protected by the relevant local administration as part of its broader responsibility to regulate the territory [...]".

complex entities composed of tangible, intangible, and landscape elements, "must also consider the *intangible and qualitative dimensions* in order not to be ineffective by focusing solely on the preservation of the material aspect." A stance that addresses earlier concerns about the risk of imposing a fixed expression on places that are deemed cultural *in light* of the way they are "used."

What the Court highlights, therefore, is not the immateriality of the individual activity – which in this case was even legally inadmissible – but precisely that immateriality we are trying to detect in the present section: the immaterial dimension of a "physical," albeit composite, cultural property, subject to the evolving cultural, historical, social, and economic context that the administrative authority, in fulfilling its cultural responsibilities, must necessarily consider for consistent protection.

It is no coincidence that precisely such composite forms of cultural property, where the immaterial dimension is evident not only through activities recognized as ICH but also due to the fluid boundaries defining their essence, pose significant challenges for legal qualification. Determining the public interest that the corresponding legal property category should align with is challenging, just as finding administrative tools capable of managing such fluidity is difficult – especially since this may not always be confined to the regulation of commercial activities.

Consider, for instance, cases where such activities are not commercial in nature, but only fall under traditional practices that characterize places, being tied to the history of the territory and the evolution of its communities. These forms of use, embedded in broader (mostly physical) cultural properties and sites, also affect their proper preservation and enhancement. However, they find themselves caught between the challenge of being formally recognized as intangible cultural heritage – an issue we explored in depth in Chapter 1 – and the difficulty of fitting them into broader (or alternative) categories of tangible cultural assets, which still lack formal recognition. Alternatively, they can be seen as occupying a space where multiple legal frameworks intersect. Setting the stage for further reflections in the concluding chapter of this thesis, these frameworks shift the focus from the public value inherent in the need to preserve the immaterial, to the need to grant *sui generis* frameworks of protection, including collective rights to the individuals and communities who embody and sustain these traditional cultural practices.

4. The non-physical in itself: brief notes on digitization

4.1. Reasoning by contrast: do purely immaterial cultural property exist?

In examining how intangible elements function within cultural heritage – here, particularly, within the traditional framework of (cultural) property – a final question arises: Do purely immaterial forms of cultural property exist? More specifically, can cultural property be entirely defined by its immaterial aspects without reference to any physical form?

We have already examined this issue through the lens of international law, considering entirely intangible elements – those classified under the ICH category – as a disruptive paradigm in the traditional framework of Italian domestic law. The research now seeks to identify whether additional cases merit consideration – cases that might further test the boundaries of traditional cultural property concepts and potentially expand our understanding of the immaterial dimensions of cultural heritage.

Discussions on the corporeal vs. incorporeal nature of things within legal discourse have deep historical roots, dating back to ancient legal systems. Roman law distinguished between *res corporales* and *res incorporales*, providing an enduring framework that continues to influence modern legal thought. In Gaius' *Institutiones*, a taxonomy of '*res*' was proposed based on sensory perception: *res* "*quae tangi possunt*" (those which can be touched) versus *res* "*quae tangi non possunt*" (those which cannot be touched). According to this theorization, the latter exist because "*iura constitunt*" – they have a foundation in law[228]. Hence, they do not exist in nature, which means that they do not have a pre-legal condition[229]. Unlike "the land, the slave, the dress, or the gold" – which

[228] As noted by R. Orestano, Il problema delle persone giuridiche in diritto romano, Turin, 1968, then bolstered by M. F. Cursi, Res incorporales e modello proprietario nella tutela dell'informazione globale, in A. C. Amato Mangiameli (ed.), Parola chiave: informazione. Appunti di diritto, economia, filosofia, Milan, 2004; G. Turelli, Res incorporales e beni immateriali: categorie affini, ma non congruenti, 2012, available online https://iris.unibs.it/handle/11379/164510?mode=complete (accessed 20 March 2024). The translation of "having foundation" in the law instead of "consist of" legal rights well explain the idea of an objective rather than subjective division.

[229] See V. Zeno-Zencovich, "Cosa", in *Dig. disc. priv. - Sez. civ.*, vol. 4, Turin, 1989, 438.

can be touched in reality, thus qualify as *res corporales* – they only correspond to rights, such as "usufruct, servitudes, or inheritance".

From a historical perspective, the main difference with Roman law lies precisely in this "foundation in law", which inhibits any effective existence in the real world. Nowadays, immaterial goods are no longer intended as rights – i.e., as assets that Gaius assimilated to the notion of *res* for logical stability – but rather as *objects* of rights. Thus, they also exist outside the legal world[230] and become relevant to the latter as "portion of the objective reality whereby the actions of subjects articulate, and to which the norm refers its evaluations."[231]

The point entails, in itself, a reference to the long-standing tradition that distinguishes between 'things' (*cose*) and 'goods' (*beni*)[232]. Returning to a previously discussed topic[233], the underlying theory of this discourse delineates a clear boundary between pre-legal reality and its legal classification, establishing that certain real-world things can be subject of rights, thereby becoming 'goods' within the legal realm. Within this framework, a good in legal terms is "an ideal entity by definition" – an abstract legal construct rather than a tangible object. Therefore, when questioning the (im)materiality of the underlying asset, "it would be more accurate, to refer to it as an 'immaterial thing' rather than an 'intangible good,'[234] the latter being just a legal qualification of the former.

The regulatory framework generally recognizes that goods may encompass more than physical things. Although our focus remains on public law and does not address this directly, it is important to

[230] See the theorization of B. Windscheid, *Pandektenrecht*, and, in within the Italian legal doctrine, G. Pugliese, cit., 1182, to which he refers.
[231] M. Are, cit., 247. See also G. Pugliese "Dalle res incorporales del diritto romano ai beni immateriali di alcuni sistemi giuridici odierni", in *Riv. trim. dir. proc. civ*., 1982.
[232] Beyond the references to the historical origins of this theory that will be discussed later in this section, it is worth mentioning here – without aiming to be exhaustive – the well-known studies of S. Pugliatti, with regard to the private sphere: "Beni (teoria generale)", item in *Enciclopedia del Diritto*, V, Milan, 1959; "Cosa (teoria generale)", item in *ibid*., 1962; and the monographic work *La proprietà nel nuovo diritto*, Milan, 1964. On the public law side, we refer to the contributions of M. Sandulli, "Spunti per lo studio dei beni privati di interesse pubblico", in *Diritto e economia*, 1956, and M. S. Giannini, "Ambiente: saggio sui diversi suoi aspetti giuridici", in *Riv. trim. dir. e proc. civ*., 1975. Among the monographic works, Id., *I beni pubblici,* Milan, 1963; G. Palma, *Beni di interesse pubblico e contenuto della proprietà,* Turin, (republished) 2019. On the topic of goods and property, please refer to more extensive discussions in Chapter 4.
[233] Though in that instance it was considered within the specific context of cultural public value. See Section 2.1 above.
[234] M. Are, item "Beni immateriali" (dir. priv.), in *Enc. Dir*., V, 1959, 248.

acknowledge intellectual works as a central category in modern theories of immaterial property. While beyond the scope of this investigation, the subject remains tangential to – and at times intersects with – the discussions we will explore in the following sections. Within this view, the question of corporeality vs. incorporeality in terms of "perceptible physicality" of the thing through the human senses has already been recognized as insufficient, as it is confined in its historical dimension. In other words, it remains anchored in the current state of economic, technical and technological developments that fix the extensibility of our senses at the present time.

Along these lines – and building on Mario Are's thought – the qualification of goods as 'im-material' or 'in-tangible' gives them a negative connotation that entails the non-existence of something. Usually: the materiality of the thing that is object of rights. Immaterial works can instead be considered, in a *positive* dimension of existence, as the phenomenon of the human thought in its abstract and living essence. Human thought, in fact, differs from the matter, albeit it normally "objectifies" in it (as long as we are able to perceive thus far), and is distinct from subjects, although it derives and relates *from* and *to* them[235].

The intuitiveness of this theory lies precisely in its breakdown of the two moments of existence of the entity: the pre-legal, and the legal one. This allows for more pregnant considerations on what the regulatory framework requires, then, to qualify the intangible *entity* as a *good* and what "level" of materiality (perceptibility) is required. It holds true, in fact, that for an entity to be considered legally relevant, it must somehow manifest and objectify itself into something on which the law can intervene, either with private or public frameworks of protection. This is because "immateriality does not consist in disregarding materiality, but rather in the *instrumentality* of the materiality for us to acknowledge it."[236]

The degree of materialization required by law for such recognition forms one of the central pivots of this study. Indeed, the following inquiry

[235] In this regard, M. Are, cit., 250. "By substituting a positive concept for the old negative formula, in the subsequent determination of the intangible entities that become the subject of law we might use, to better identify the concept, instead of the expression 'intangible good' or 'incorporeal', the term 'intellectual good.' […] From the foregoing, it follows the definition of the immaterial entity, as a pure construction of individual thought, fixed abstractly at a specific moment in its becoming, as opposed to its author, to the subjects to whom it is addressed, as well as to the creative act, and this with characters of original objectivity". Translation by the author.
[236] M. Are, *ibid*, 252.

intends to challenge the established legal discourse, historically built around the key traits of inherent uniqueness of goods (i.e., their limited availability in nature) and the consequent need to regulate their use through utility and ownership regimes.

Specifically, the focus lies in the realm of technological advancements and the growing presence in cultural heritage frameworks of two emerging trends: (i) the digitization of existing cultural artifacts; (ii) the creation of born-digital cultural contents. These developments present challenges that extend beyond the problem of materiality, undermining the very requirement of uniqueness or scarcity and the question of how we *perceive* and *enjoy* cultural assets. Indeed, the digital realm demands a different approach to accessibility and control, as digital contents can exist simultaneously in multiple forms, through multiple channels, and across different timeframes, making it difficult to fit within existing regulatory frameworks.

While acknowledging the rapidly evolving nature of this research field, which may soon produce outdated outcomes, our aim is to determine whether processes of digitization and digital production, when relating to the cultural domain:

(i) represent a new approach to enhancing physical cultural property. This includes analyzing whether these processes are essentially *material* transformations that affect the (physical) cultural goods' functionality, potentially adding digital services that increase their foundational character of accessibility.

(ii) Whether these processes raise a more fundamental question about the legal conceptualization of cultural property. This stems from the need to classify inherently non-physical and non-rivalrous[237] digital entities within legal frameworks, along with the practical challenges of managing such assets through administrative systems.

Ultimately, the investigation considers two distinct possibilities for understanding how digital elements relate to cultural property.

One is that digital elements constitute an independent form of cultural property – defined not by reference to a physical object, but through their digital creation process. This perspective would entail a different posture to how the very notion of "good" is conceived.

[237] See G. Resta, "Chi è proprietario delle piramidi? L'immagine dei beni tra property e commons", cit., 574 ss.

The alternative possibility is that the digital represents an (additional) immaterial dimension of the physical object, representing a new method for accessing and experiencing it, albeit the latter remains fundamentally material in nature. This view prompts specific considerations about how we can expand the ways these material cultural goods are used, enhanced, and managed in the digital realm. Among many: What legal framework should govern these digital applications? Should we apply regulations concerning the reproduction and circulation of images of physical goods, or focus on mechanisms for enhancing cultural property? Within this context, should intellectual property protection extend to digital creators, and how do these frameworks interact with public law regulations on cultural property?

4.2. The digital as an administrative issue

The application of digital processes fits within a broader discourse on globalization, which increasingly permeates the products, services, and objects we engage with on a daily basis, in an interconnected economic and cultural landscape[238]. Accelerated in part by the changes brought about by the pandemic, digitization now shapes a significant portion of human activity, offering virtual spaces for interaction, education, cultural enrichment, and commerce. Digital technologies are reshaping the ways in which we access and engage with cultural values.

This evolution has driven the creation of regulatory frameworks and implementation guidelines at multiple levels, beginning with the 2003 UNESCO Charter on the Preservation of Digital Heritage[239] and extending to more recent national and supranational provisions. Overall, it is glaring how information and communication technologies now feature prominently in most international cultural heritage documents, underlining the potential of digital tools to enhance enjoyment, foster social and cultural development, and support economic growth[240].

[238] See, extensively, L. Casini, *La globalizzazione dei beni culturali*, cit.

[239] UNESCO Doc., CL/3865, adopted at the 32nd session of the General Conference of UNESCO, 17 October 2003.

[240] Beginning with the Council of Europe's Faro Convention (2005), which in Article 14 urges member states to "develop the use of digital technology to enhance access to cultural heritage and the benefits that stem from it," the connection between cultural heritage and the information society has gained increasing prominence. Significant developments have also occurred in EU law and policy. The Council of the European Union's Conclusions on Participatory Governance of Cultural Heritage (2014/C 463/01), paragraph 21, emphasizes

This section examines whether and how digital processes introduce – or perhaps more precisely, "extend outward" – an additional layer of immateriality to cultural heritage. The focus is on how digital applications influence the experience of cultural property, particularly whether the diverse tools available in the digital sphere – such as digital collections, databases, virtual exhibitions, augmented reality applications, artificial intelligence, machine learning, and cloud computing, among other innovations – raise administrative questions about their protection and enjoyment. Additionally, we seek to explore what types of interventions are required from public administration and cultural institutions to adapt traditional frameworks focused on integrity and authenticity, and whether these changes affect the very structure and procedures of administrative systems.

Before proceeding, it is necessary to acknowledge the challenges posed by the growing array of digital resources at our disposal. To structure the inquiry, we explicitly exclude issues related to creative works and their associated IP and copyright frameworks. Nor does this section engage in ontological debates about whether digitized or born-digital cultural products possess independent cultural significance[241]. Instead, we focus on the administrative challenges posed by digital technology, particularly regarding public cultural goods that exist outside proprietary structures and remain freely accessible. This approach enables us to explore the role of cultural institutions in managing digitization processes and to highlight critical observations.

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the use of digital means to increase access to and participation in the governance of cultural heritage across all social groups. Additionally, Directive 2019/1024 (also discussed below) recognizes that "Libraries, including university libraries, museums, and archives, hold a substantial amount of valuable public sector information, particularly as digitization projects have greatly expanded the volume of digital public domain materials," and highlights the potential of digitized cultural heritage collections and metadata to fuel innovative reuse, particularly in education and tourism sectors. The European Commission plays a central role in shaping policy discussions coordinating stakeholders and providing funding to improve conditions for digitization and digital preservation. This commitment is formalized the 2021 Recommendation (C/2021/7953) on a common European data space for cultural heritage, as well as the related Expert Group (CEDCHE), which monitors progress in its implementation. Central to these efforts is Europeana, the European digital cultural platform, positioned at the heart of building this common data space for cultural heritage. Further insights will follow.

[241] We reserve this approach to the next section, where we will present a more ontological argument, adopting a broader perspective on how digital products may shape future cultural goods that are entirely immaterial due to their digital nature, while considering the implications for the public sector.

From this perspective, two key concerns warrant attention.

The first relates to digital representations of tangible cultural property produced through digitization. These images detach from the inherent link between the object and its cultural value – its intrinsic immateriality – and migrate into the virtual domain. It becomes essential to delineate the legal contours of this digital space in order to assess whether, and to what extent, these images retain a connection to their material originals, whether issues of authenticity arise, and how access should be regulated.

The second concern builds upon the first, moving from fundamental questions of accessibility to exploring new methods for enhancing cultural content. Do digital processes involving cultural property require a redefinition of cultural services? Who are the relevant stakeholders in place, and what roles do they play? These questions call for a reexamination of how cultural engagement is managed in emerging hybrid contexts – where physical and digital, present and future, essential and complementary dimensions intersect.

Italian scholars have framed cultural digitization as a "(new) way of enjoying cultural goods that complements traditional methods and enhances the framework for their protection, management, and promotion, without requiring duplication of the goods themselves"[242]. The challenge, then, lies in understanding how this form of "augmented enjoyment" aligns with existing national and supranational regulations, and what issues arise from the proliferation of such digital products in the contemporary world. Specifically: how does this impact the public interest in enjoying cultural heritage, which includes having it (physically) accessible, identified, and protected in its cultural significance? Are forms of digitization an "augmented enjoyment" that requires supplementary services? Do these services enhance the economic value of the immaterial dimension of the good, or are they simply new access methods that could eventually reshape how heritage is experienced and enjoyed in the long run? Ultimately, does displaying digital material, providing digital services, and controlling potential reuses necessitate a reconfiguration of standard procedures and principles in the administrative structure?

[242] P. Carpentieri, "Digitalizzazione, banche dati digitali e valorizzazione dei beni culturali", in *Aedon*, no. 3, 2020.

A decisive issue arises in this regard at the intersection of digital processes and the regulatory regime in place for cultural property reproduction[243].

As noted, digital processes bring a variety of digital images into a non-physical space, offering the potential to transcend geographical and temporal limitations. Precisely, this space possesses the physical *potential* for non-rivalry – meaning that images are not subject to exclusion from mutual enjoyment – yet it faces *actual* limitations due to the spillover of such images within the regulatory legal frameworks governing reproduction. Indeed, these images entail processes of reproduction as a crucial step in their digital transformation[244]; they serve as intangible projections of a physical cultural property, thereby placing, through virtual reproduction, the values of the cultural assets into new (de-materialized) dimensions. These images must therefore be viewed in relation to the original object: they are not standalone entities, but rather digital and enhanced representations[245] that extract visual and cultural elements from the source. Hence, they function as multiplications, or amplifications, of the original item they reproduce. Consequently, how the public actor decides to control the circulation and reuse of reproductions in the digital realm intersects closely with both legal and cultural policy concerns, reflecting broader choices about the cultural system as a whole.

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[243] Already examined in this study in relation to decorum and the compatibility of externally projecting the good's immaterial aspect (its *image*) into other relevant contexts. See section 3.1.2 of this chapter.

[244] Though not limited to mere reproduction, as the focus is on establishing "many-to-many relationships," where multiple cultural assets can be linked to a single digital resource, and a single cultural asset can correspond to various digital resources. As a result, digital cultural heritage does not encompass the full range of cultural goods; instead, it serves as a means of representing and interpreting them. This perspective is outlined in the National plan for the digitization of cultural heritage (*Piano nazionale di digitalizzazione del patrimonio culturale*), drafted by the Central Institute for the Digitization of Cultural Heritage – Digital Library of the Ministry of Culture, chapter 6, para 6.1.2. More on the plan later in this section.

[245] P. Forte, whose theory on a proper ontology of digital cultural property will be examined later in the next section, observes in this regard that "Digitization is leading us toward a scenario where the two dimensions that pertain to a single object (the "analog" original) are not mere replicas of one another; rather, one serves as an enriched version of the other, making them distinguishable yet inherently connected. We are already encountering the possibility that these two dimensions can "travel" separately, circulating in the world, generating meaning and value, being utilized, exchanged, contracted, held, and critiqued independently of each other." Quotation from "Il bene culturale pubblico digitalizzato. Note per uno studio giuridico,", in *P.A. Persona e Amministrazione*, no. 2, 2019, 252.

Concerns first emerge regarding the authenticity of the original good – specifically, the potential loss of its "aura"[246] when its image is widely repurposed and circulates in environments where oversight is inherently hard to maintain. On the other hand, this contrasts with the potential benefits of fostering new, more meaningful ways of accessing cultural heritage, encouraging creativity and cultural enrichment beyond the confines of physical spaces[247].

This tension is mirrored at the legal level, within a regulatory framework shaped by European policies promoting the liberalization of public sector information, yet marked by significant exceptions for cultural heritage[248]. While these exceptions are apparently designed to safeguard cultural rather than economic interests, their implementation – particularly in the Italian context – occurs within a complex system of authorizations and concessions. As previously discussed, this framework can significantly restrict the circulation of cultural images within virtual environments.

As is well known, the EU Directive 2019/1024 on open data and the reuse of public sector information[249] advocates for open access models and policies[250]. This is further compounded by the 2021 Commission Recommendation on a common European data space for cultural heritage, which specifically endorses digitization of cultural assets as a means to expand access and diversify the ways heritage can be experienced, fostering "greater opportunities for reusing cultural assets in innovative and creative services and products across various sectors, including other cultural and creative industries, as well as tourism."[251]

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[246] As it is defined in the renowned essay of W. Benjamin, *The work of art in the age of mechanical reproduction*, cit.

[247] On this topic see, in general terms, G. Resta, "Chi è proprietario delle Piramidi?", cit., spec. 574 ff.

[248] Frames it as a "normative bipolarity" R. di Meo, "La riproduzione digitale delle opere museali fra valorizzazione culturale ed economica", in *Il diritto dell'informazione e dell'informatica*, no. 3, 2019.

[249] Which recasts in a one document the previous Directives 2003/98/EC and 2013/37/EU. In Italy, the Directive was transposed through Legislative Decree no. 36 of 24 January 2006.

[250] They would "encourage the wide availability and re-use of public sector information for private or commercial purposes, with minimal or no legal, technical or financial constraints;" "promote the circulation of information not only for economic operators but primarily for the public;" [they] "can play an important role in promoting social engagement, and kick-start and promote the development of new services based on novel ways to combine and make use of such information." See Whereas no. 16.

[251] Whereas no. 1 of the Recommendation C(2021) 7953.

However, in addition to generally allowing limitations in domestic legislation of member states regarding the accessibility of those data[252], specific derogatory measures are provided within the Directive for documents for which libraries (including university libraries), museums, and archives hold intellectual property rights, as well as to those held by public bodies. In such cases, domestic frameworks may authorize reuse for both commercial and non-commercial purposes, as these subjects "should be able to charge above marginal costs in order not to hinder their normal running."[253] And therefore, domestic licensing frameworks may impose conditions on reuse requiring holders to adhere to regulations on liability, personal data protection, fair use, document integrity, and source attribution – and provided these conditions are objective, proportionate and non-discriminatory. The Directive goes as far as to provide that "the total income from supplying and allowing the re-use of documents over the appropriate accounting period shall not exceed the cost of collection, production, reproduction, dissemination, data storage, preservation and rights clearance and, where applicable, the anonymization of personal data and measures taken to protect commercially confidential information, together with a *reasonable return* on investment." That is, a form of profit that aligns with that economic enhancement perspective we have already explored in this chapter.

In Italy, these exemptions have led to a detailed set of regulations within the relevant Code[254] governing the so-called *use* of cultural property (Title II, Chapter I, Section II), which contrasts with the provisions aimed at ensuring their *enjoyment* (Title II, Chapter I, Section I)[255]. The

[252] See, in particular, Whereas no. 44 – "The re-use of documents should not be subject to conditions. However, in some cases justified by a public interest objective, a license may be issued imposing conditions on the re-use by the licensee dealing with issues such as liability, the protection of personal data, the proper use of documents, guaranteeing non-alteration and the acknowledgement of source. If public sector bodies license documents for re-use, the license conditions should be objective, proportionate and non-discriminatory" – and Article 8 – "The re-use of documents shall not be subject to conditions, unless such conditions are objective, proportionate, non-discriminatory and justified on grounds of a public interest objective."
[253] Ibid.
[254] As provided by Legislative Decree 24 January 2006, no. 36, Article 1(2).
[255] In this context, it is relevant to refer to M. S. Giannini's thesis on cultural goods as goods of enjoyment, as discussed earlier in Section 2.1. Additionally, J. H. Merryman's concept of "access" in the development of cultural property policy is also worth citing – see Id.,"The Public Interest in Cultural Property", cit., 360. More generally, the aim of enjoyment is connected to the overarching goal of fostering cultural development as outlined in Article 9 of the Constitution. This connection is supported by a vast body of doctrine on the topic,

conceptual and regulatory distinction between *use* and *enjoyment* becomes particularly salient when reconsidering the legal treatment of digital images, previously described as "enriching" the physical cultural asset, and projected into an intangible space capable to offer the highest level of cultural enjoyment[256].

However, from the interplay between supranational and national regulatory frameworks, a system emerges in which digital objects – embodying the reproduction of a physical cultural asset – are generally subject to a regime requiring prior authorization for their use *and* reproduction[257]. This authorization must come from the administrative authority responsible for the asset's custody – whether the Ministry, regional governments, or other territorial public bodies – as established under Article 107 of the relevant Code[258]. Yet, how does a system designed for analog phenomena maintain its coherence when applied to digital contexts? It becomes increasingly difficult to determine which uses are permitted, prohibited, or subject to fees, how to distinguish between profit and nonprofit purposes, and, most importantly, to understand the rationale behind applying such rules in a virtual environment.

The issue, widely debated among scholars, centers on the role of public administrations and cultural institutions in imposing limits on virtual phenomena, as well as on the appropriateness of maintaining an intricate framework of exclusive rights over images of cultural property. From this perspective, it also remains unclear whether control applies solely to the *act* of reproducing cultural property – which in this context would cover only a *segment* of the digitization process, thus be subject to discretionary administrative oversight despite the potential for expanding enjoyment inherent in digital tools – or, alternatively,

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starting with F. Merusi, "Sub art. 9", in G. Branca (ed.), *Commentario della Costituzione*, Rome, 1975; G. Rolla, "Beni culturali e funzione sociale", in *Le Regioni*, 1987; more recent, R. Cavallo Perin, "Il diritto al bene culturale", in *Dir. amm.*, no. 4, 2016. In addition, the monograpic works of M. Ainis, *Cultura e politica. Il modello costituzionale*, cit., and V. Caputi Jambrenghi, *La cultura e i suoi beni giuridici*, Milan, 1999.

[256] The existence of "a certain level of contradiction – at least symbolically – with the 'communal-oriented nature' of cultural goods," was noted by G. Resta, "Chi è proprietario delle piramidi", cit., 586.

[257] The appropriateness of the Italian legislator's decision to regulate both the reproduction and the instrumental and temporary use of cultural goods under the same legal framework is questioned by M. Croce in her article "La digitalizzazione delle collezioni museali. Stato dell'arte e prospettive", in *Aedon*, no. 2, 2023.

[258] For a more detailed analysis of the regulatory framework in place we refer to Section 3.1.2 of this chapter.

whether these rules also encompass the *use* of existing reproductions. The latter would directly impact the accessibility of digital images in the virtual space, influencing their role in fostering creativity and the exchange of cultural values.

As a matter of fact, contextualizing control over digital images within the traditional rationale – where reproduction limits public enjoyment – is increasingly difficult, given that virtual spaces inherently guarantee broader and simultaneous access. But the question could also extend to the numerous legal challenges, competing interests, and requests for participation that arise in such "digital scenarios," among which it is difficult to disentangle. As noted in the 2021 EU Commission's Recommendation on a common European data space for cultural heritage[259], advanced digital technologies "allow innovative forms of artistic creation, while opening up new ways of digitally engaging with and enjoying cultural content through co-curation, co-design and crowdsourcing, empowering public participation."

To balance the public administration's responsibility to preserve the decorum of cultural property with the opportunities for broader dissemination and economic benefit, the National Plan for the Digitization of Cultural Heritage[260] proposes the development of certification methods, such as identification codes for the digital identity of cultural assets. These measures aim to strengthen the link between physical assets and their digital representations, ensuring accessibility while preventing ineffective regulatory strategies that lag behind rapid digitization. This approach promotes control not as restriction, but as a way of "producing certainty," ensuring continuity with the original asset and the monitoring of digital interactions established:

> "It is essential to create a system that enables cultural property to thrive in the digital environment for various purposes, including: connecting the cultural property to the administrative processes that impact it, once these are managed digitally; associating the cultural property with relevant digital resources and the big data generated through interactions; facilitating the tracking of interactions with the cultural

[259] Commission Recommendation (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage C/2021/7953.

[260] The National plan for the digitization of cultural heritage (*Piano nazionale di digitalizzazione del patrimonio culturale*), drafted by the Central Institute for the Digitization of Cultural Heritage – Digital Library of the Ministry of Culture, promotes and organizes the digital transformation process for the 2022-2026 period, primarily targeting museums, archives, libraries, central institutes, and state cultural institutions that own, protect, manage, and enhance cultural property.

> property, including those of legal significance, occurring within the information systems of the administration and third parties."[261]

Moreover, concerning the protection of authenticity amid the expanding circulation of digital images, it is worth noting how the regime applied to public cultural goods, whose reproduction rules are not bound by time limits, appears even more disproportionate when compared to the Italian Copyright Law (no. 633/1941). Even after the implementation of EU Directive 2019/790[262], the law states that "upon expiration of the protection term for a visual artwork, any material resulting from its reproduction shall not be subject to copyright or related rights, unless it constitutes an original work." This creates a paradoxical situation where the State property regime is more restrictive, particularly in terms of time limits, than the rights granted to the author, despite the fundamental principle that public cultural property exists primarily for public enjoyment[263].

From another perspective, challenges also arise around what might be termed the "economic argument." Scholars have noted that this "widespread policy choice"[264] is driven by an economic need to expand financial resources for the protection and broader enjoyment of cultural goods, ensuring that "the interest of the State and other territorial public entities in determining and controlling the number of reproductions of the asset available on the market" is protected[265]. However, within such

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[261] *Ivi*, chapter 6, para 6.1.2, 39. In the long term, PNRR investment will finance the creation of a platform for the "Digital Identity Certification System for Cultural Property," whose goal is "to establish a connection between the systems that identify and describe cultural property and those that define its legal regime. This will enable the attribution and certification of a cultural property's digital identity through fully digital processes, integrating the essential elements that define it."

[262] Specifically, Article 14: "Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation." On the topic, see G. Sciullo, "'Pubblico dominio' e 'Dominio pubblico' in tema di immagine dei beni culturali: note sul recepimento delle Direttive (UE) 2019/790 e 2019/1024", in *Aedon*, 1, 2021.

[263] In contrast, the Bologna Court of Appeals (judgment no. 1792 of 24 September 2024) explicitly distinguished the right to the image of cultural property from intellectual property framework, noting it operates on different foundational principles. The Court thus determined that the unlimited duration of these image rights is justifiable because public protection serves the preservation of collective identity across time.

[264] See G. Resta, *ivi*.

[265] C. Scognamiglio, "Proprietà museale ed usi non autorizzati di terzi", cit., later taken up by G. Resta, *ivi*. On the point see also A. L. Tarasco, *Diritto e gestione del patrimonio culturale*, cit.

a virtual and dematerialized context, focusing on the economic rationale for state revenues could prove to be particularly limiting if those legal arrangements persist.

On one hand, it constrains market growth and investment potential that could emerge from a more open liberalization of digital reproduction and reuse, alongside the exploration of alternative entrepreneurial approaches, rather than simply restricting access to digital images[266].

On the other, it overlooks evolving methods of heritage protection and valorization aligned with social and global trends toward new forms of cultural engagement. Ultimately, it risks undermining the very interest in protection and enjoyment if these values manifest differently in the digital realm.

These perspectives are now endorsed across various institutional contexts. The Court of Auditors has consistently stated, including recently[267], that "Open Access has long been a powerful wealth multiplier, not only for cultural institutions but also in terms of boosting GDP," and that "the vast potential of cultural heritage digitization, not only in advancing science and knowledge but also as a major driver of cultural growth." Eventually, that "economic models based on the 'sale' of individual images are outdated and uneconomical."

Similarly, the National plan for the digitization of cultural heritage actively promotes expanding digital access and fostering exchanges among diverse social actors within a "digital cultural ecosystem," aimed at creating new services, stimulating innovative enterprises, and opening opportunities for wider stakeholder involvement.

In contrast, examining how current legislation still regulates the reproduction regime reveals how outdated the system remains in lights to those emerging trends. This is evident, for instance, in Paragraph 3 of Article 108, stating that "no fee concession is owed for reproductions requested or carried out by individuals for personal use or study

[266] On this point see extensively the conflicting views analyzed by A. L. Tarasco *Diritto e gestione del patrimonio culturale*, cit.; D. Manacorda, "L'immagine del bene culturale pubblico tra lucro e decoro: una questione di libertà", cit.; M. Cammelli, "Immateriale economico e profilo pubblico del bene culturale", in G. Morbidelli, A. Bartolini (eds.), *L'immateriale economico nei beni culturali*, cit., and other bibliographical references cited *supra* while reflecting on decorum and compatibility issues of reproductions. See especially above references to the OPEN Glam database of institutions that worldwide have adopted open access policies.

[267] In addition to Resolution no. 50/2022/G cited above we refer here to Resolution no. 76/2023/G.

purposes, or by public or private entities for enhancement purposes, provided they are non-profit." However, "applicants are still required to reimburse the expenses incurred by the granting administration."While this reimbursement aligns with the marginal cost recovery permitted under EU Directive 2019/1024 for free regimes, its application to digital reproductions suggests an underlying assumption: that the object must first be digitized. This implies seeking reimbursement for an operation (digitization) that, if properly regulated, could itself generate broader economic and cultural gains. Treating digitization merely as a cost to be recovered overlooks its potential as a catalyst for enrichment and sustainable growth in the digital age.

We thus come to the second point proposed above. As previously mentioned, the issue is not merely about the existence of digital images and administrative control over the reuse of their "projected values." It also concerns defining digital products as *services* that enhance and add value to the original physical cultural asset[268]. Upon closer examination, the control over digital images in relation to their potential for reuse – and, by extension, the role of digital technology in shaping a framework for cultural heritage enjoyment aligned with global trends – depends largely on how that role is conceptualized. Ultimately, it hinges on the type of authority entrusted to public administrations.

Accordingly, it becomes necessary to assess the value of the digital in relation to our engagement with cultural property, in light of this research's objectives – identifying which aspects of immateriality are essential in tackling the challenges of ensuring appropriate protection for future cultural heritage. This requires moving beyond the view of digital images as mere external projections of assets, and instead considering them as mediums offering distinct (and enriched) forms of access to the property itself. Indeed, one thing is to consider the existence of the digital – i.e., of digital images and digital fruition services – as enhancements to physical enjoyment. Following this logic, cultural institutions, in their capacity, may consider digital processes as supplementary services, to which they can rightfully attach the appropriate "price" and regulatory frameworks for their use. As it was observed[269], these cultural institutions would operate as "autonomous economic operators" that assess their own budgetary decisions, which

[268] On these questions, extensively, P. Carpentieri, "Digitalizzazione, banche dati digitali e valorizzazione dei beni culturali", cit.
[269] *Ibid*.

may reasonably involve imposing restrictions on access to specific content or services.

An alternative viewpoint regards the digital as a fundamentally new and future-oriented way of accessing and experiencing cultural heritage. From this perspective, prioritizing digital services as part of the subjective right to cultural heritage and enjoyment would become essential[270]. Digital access would become ot merely optional but a core obligation of public administrations and cultural institutions, tied directly to their duty to protect and promote cultural property.

This aligns with the supranational push for a common European data space for cultural heritage, aimed at accelerating digitization efforts, enhance preservation capabilities, and facilitate comprehensive digital transformation. The relevant Recommendation[271] calls on member states to create frameworks fostering digital transformation and long-term resilience amid technological change, encouraging harmonized methodologies and greater availability and accessibility of digitized materials within this collective European space. Beyond recognizing digitization as a key driver in the contemporary world, it explicitly refers the need to include among digitization and digital preservation goals "the most *physically* visited cultural and heritage monuments, buildings and sites," as well as "the low level of digitization for specific categories of cultural heritage assets."[272] This forward-looking approach frames digital access as the future pathway for experiencing cultural heritage, establishing it as an essential right to be ensured rather than a supplementary service to be optionally chosen.

And indeed, given the ongoing digital advancements, fulfilling this duty entails promoting various alternative forms of cultural enjoyment, better suited to diverse needs, including those arising from disabilities or other limitations – as demonstrated by the experiences of the recent pandemic – beyond what is traditionally understood as 'enjoyment.' As the above Recommendation further articulates, digitization goes beyond preserving heritage at risk of deterioration or destruction. Even when such risks are low, it remains a priority due to the high reuse potential

[270] See E. Bertacchini, F. Morando, "The Future of Museums in the Digital Age: New Models of Access and Use of Digital Collections", in *International Journal of Arts Management*, vol. 15, no. 2, 2011.
[271] C/2021/7953, cit.
[272] The initiative "Twin it! 3D for Europe's culture," launched in 2023, plays a key role in advancing these ambitious goals. Explore the collection on the Europeana platform, available since May 2024: https://www.europeana.eu/en/galleries/15694-twin-it-a-pan-european-collection-of-heritage-3-d-models (accessed 25 February 2025).

of digitized cultural assets. Beyond preservation and restoration, digital technologies offer cultural institutions "new ways to engage wider audiences, providing immersive experiences, virtual access to restricted or temporarily closed sites, and improved accessibility for individuals with visual impairments."

This perspective is further reinforced by the gradual expansion of emerging legal positions in cultural property regulation. Within the broader context of examining the various forms of immateriality discussed so far, the digital plays a crucial role in re-evaluating and problematizing these evolving legal frameworks. Recognizing immaterial dimensions within physical cultural assets moves us beyond a generalized right of use, paving the way for diverse social demands to emerge.

It has already been noted that the Faro Convention, which promotes the right of heritage communities *to* cultural heritage, emphasizes the importance of a commitment from signatory states to develop technological applications aimed at enhancing access to cultural heritage and its associated benefits[273].

In this context, the concept of "immaterial restitution," proposed by the Royal Museum for Central Africa in Tervuren, Belgium, offers a compelling case. As part of the *Transformative Heritage* project[274], the museum is pursuing a digitization initiative aimed at restitution, grounded in a non-Eurocentric, interdisciplinary framework. The project involves provenance research, digital infrastructure assessments, and local consultations to facilitate both digital restitutions and reconnection of historically dispossessed communities with their material cultural heritage. In parallel, Belgian State Secretary Thomas Dermine has proposed a phased restitution policy, separating the immediate transfer of ownership rights to the Congolese community from the physical return of objects, which would follow through a bilateral scientific commission[275].

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[273] See Article 14 of the Faro Convention, titled "Cultural heritage and the information society."

[274] https://www.africamuseum.be/en/research/discover/projects/prj_detail?prjid=717 (accessed 25 September 2024).

[275] https://press.africamuseum.be/sites/default/files/media/provenance%20research%20and%20restitution%20policy/doc/Persdossier_EN_voorweb.pdf#page=8.06 (accessed 25 September 2024). The case is not, in any event, an isolated one. See, on this point, A.

Without delving into an assessment of the initiative's merits, its ethical and post-colonial dimensions, or the practical feasibility of its implementation[276], the case remains particularly compelling for how it highlights the complex challenges and diverse perspectives introduced by digitization.

First, it prompts a shift in how we value cultural property, moving from the physical object's immateriality to its dematerialization and (possible) enhancement through different forms of access. This could lead – as some cases have already indicated[277] – to the use of digital technology as a service that supports cultural reappropriation projects, extending beyond physical restitution. Building on earlier discussions about the liberalization of image use by museums and cultural institutions, these projects aim to actively involve communities with specific ties to the heritage in question in decisions regarding its digital circulation. This may include establishing agreements on what content to disseminate and in what form, including aspects of traditional knowledge, as well as determining how certain images and their accompanying narratives are digitally presented.

Second, it separates ownership from physical access, suggesting that digital technologies, such as NFTs or licenses, could redefine ownership in the digital realm, potentially leading to alternative proprietary and possession frameworks, hence additional legal positions in place and more avenues for experiencing cultural heritage.

Whitaker, A. Bracegirdle, S. de Menil, M. A. Gitlitz, and L. Saltos, "Art, Antiquities, and Blockchain: New Approaches to the Restitution of Cultural Heritage," in *International Journal of Cultural Policy*, 2020. Likewise noteworthy is the *Looty* restitution project, which produces NFTs of looted objects and sells them, allocating 20% of the proceeds to scholarships for young African artists. See https://news.artnet.com/art-world/looty-nfts-digital-restitution-of-stolen-objects-2121054 (accessed 25 September 2024).

[276] For further discussion on these issues, we refer to the arguments of K. Christen, "Opening Archives: Respectful Repatriation", in *The American Archivist*, no. 74, 2011; T. Odumosu, 'The Crying Child: On Colonial Archives, Digitization, and Ethics of Care in the Cultural Commons', in *Current Anthropology*, no. 61, 2020; L. Lixinski, "Digital Heritage Surrogates, Decolonization, and International Law: Restitution, Control, and the Creation of Value as Reparations and Emancipation", in *Santander Art and Culture Law Review*, no. 6, 2020, the latter pointing to the risk of "backfire, and instead of bridging the divide, rendering all cultural heritage that has a digital surrogate a lesser form of heritage' as well as 'a lower the value' of objects to the detriment of heritage communities."Also, C. Stahn, "Beyond to Return or Not to Return: Towards Relational Cultural Justice" in *Confronting Colonial Objects: Histories, Legalities, and Access to Culture*, Cultural Heritage Law and Policy, Oxford, 2023.

[277] For instance, the Reciprocal Research Network: http://digitalsqewlets.ca/sqwelqwel/belongings-possessions/rrn.php (accessed 24 September 2024).

Revisiting the initial two hypotheses on how digital services relate to the protective responsibilities of cultural institutions, it is important to acknowledge that each entails its own set of challenges.

The first position treats digital applications as supplementary to physical access, imposing strict regulations and financial obligations on cultural institutions. However, this stance conflicts with the nature of digital products and emerging policies advocating integration between physical and digital domains, creating a regulatory disconnect.

On the other hand, neglecting the economic potential of digital assets could turn out to be a major loss of profits, which would spill-over into a chain of progressive strategies of digitization and valorization. Furthermore, as the situation stands, more extensive forms of digitization would inevitably incur costs that would be challenging to manage under a completely free model.

From this perspective, it is essential to reason beyond a strict dichotomy and explore developments that can only be imagined and constructed based on existing regulations, assessing the capacity to withstand the ongoing forces of change. If digital technology enables a closer engagement with the cultural value of the asset, we must consider how to approach this engagement. This involves creating models for interaction, collaboration, and integrated management that reflect the reality of digital cultural services as an essential aspect of modern engagement, while recognizing their economic potential and the need for responsible governance.

4.3. The digital as an ontological issue

As we conclude our examination of the immaterial dimensions of cultural property, we ultimately explore a hypothesis that seeks to transcend the current legal framework, drawing upon considerations that are fundamentally provisional in nature. In a context of rapidly evolving techniques, values, and conceptual boundaries, it is essential to consider the possibility of new legal frameworks where the digital realm carries an inherently different significance. Rather than attempting to find legal ways that "contain" it within the boundaries of the original system, we should concentrate, in this last section, on perspectives that leverage its extensive potential within a more fitting frame. Drawing on emerging doctrinal theories that advocate for the legal autonomy of a

category of so-called digital cultural goods[278], we attempt to assess this "ontological hypothesis" through the lens of public law principles.

Looking at an ever-growing range of examples, we examine the possibility that digital processes have a *constitutive* impact in two cases: (i) when tangible cultural property is digitized – as we have seen in the section above – as such processes of enhancement add value beyond mere reproduction, potentially granting the digital version a distinct character[279] and autonomous legal standing. And (ii) when digital content is created from scratch. This can arise from a wide range of examples: it can happen with the digitization process itself, seen as an additional creative act that uses specific technologies in unique ways to convey knowledge and re-shape it. In such cases, the emphasis is on the *method* of enjoyment beside the objects being enjoyed. Also, it can be an autonomous creative process that leads to new cultural products, including creative uses of programming and computation functions, or forms of "objectification," where, for instance, artistic performances are recorded and digitized, with the resulting digital product becoming an asset that circulates independently of the original act. Moreover, by extending this reasoning, we can imagine forms of intangible cultural heritage (or expressions of collective cultural identity) evolving through the use of new technologies in community expression[280]. As observed,

[278] Particularly noteworthy is the thesis presented by P. Forte in the essay "Il bene culturale pubblico digitalizzato. Note per uno studio giuridico," cit. Some of the concepts discussed in that work, which considers specifically the case of digitization of cultural property, will be referenced in this analysis. The potential for expanding digital uses of the image of physical cultural assets to create new assets is also suggested by A. Bartolini, "L'immaterialità dei beni culturali", cit., observing that "looking to the present and future, the immaterial aspects of our time (such as media, digitization, and the Internet) will soon lead to the recognition of intangible goods – such as artistic expressions created with digital tools – as essential representations of our contemporary civilization."Finally, the idea is echoed in E. Sbarbaro,"Codice dei Beni Culturali e diritto d'autore: recenti evoluzioni nella valorizzazione e fruizione del patrimonio culturale", cit., spec. 71.

[279] An assumption also endorsed by the National cultural heritage digitization plan, which recognizes the value of digitization as it "transcends the auxiliary role of the digital good as merely a replica or copy of the physical original, affirming the legitimacy of an independent path of knowledge, characterized by its own uniqueness and originality. This originality does not stem from the object itself, but from the intellectual process that shapes the digital good, giving rise to new meanings that are not only "conceivable" but also transmissible." Available at https://digitallibrary.cultura.gov.it/wp-content/uploads/2023/04/PND_V1_1_2023_v2.pdf#page=2.03 (accessed 4 September 2024), spec. 15.

[280] *Contra* P. Carpentieri, "Digitalizzazione, banche dati digitali e valorizzazione dei beni culturali", cit. Even P. Forte, who advocates for an independent perspective on these

"the future generations will have a concept of immateriality different from that traditionally defined in contemporary ruler's and intellectual's mindset, for which digital's immateriality will be more essential than material forms. Furthermore, the speed at which these changes happen is such that we cannot legitimately say how future generations will relate to the cultural production of their age [...]"[281].

This duality between *digitized* and *born digital* creations is echoed in several supranational instruments. Just consider the above-mentioned UNESCO Charter on the Preservation of Digital Heritage[282] – which is moreover coeval with the 2003 UNESCO ICH Convention[283] – declaring that digital heritage, consisting of unique resources of human knowledge and expression, embraces "cultural, educational, scientific and administrative resources, as well as technical, legal, medical and other kinds of information *created digitally, or converted into digital form from existing analogue resources*. Where resources are "born digital," there is no other format but the digital object."

Likewise, in the Council of the European Union's Conclusions of 21 May 2014 on cultural heritage as a strategic resource for a sustainable Europe (2014/C 183/08), cultural heritage is acknowledged as comprising "the resources inherited from the past in all forms and aspects – tangible, intangible *and digital (born digital and digitized)*". The same approach is reaffirmed in the 2021 Commission Recommendation on a common European data space for cultural heritage (Article 3).

Although there may be agreement on the objective identification of this phenomena, some emerging legal issues must be highlighted. From this perspective, we revisit previous discussions regarding the fundamental enjoyment value of cultural property within the Italian legal framework. Any analysis exploring the possibility that digital cultural goods exist as

matters, holds that "digital assets are distinct from "intangible" or so-called "volatile cultural goods," which are cautiously defined as "expressions of collective cultural identity" under Article 7-bis of Legislative Decree No. 42 of January 22, 2004. Consequently, the arguments, doubts, and hesitations that continue to surround the latter do not apply to digital ones.", cit., 256.

[281] L. Marcato, "Culturally digital, digitally cultural, towards a digital cultural heritage?", in S. Pinton, L. Zagato (eds.) *Cultural Heritage. Scenarios 2015-2017*, Venice, 2017, 513. Available online at https://anpia.it/wp-content/uploads/2018/03/Sapere-lEuropa-Sapere-dEuropa.pdf (accessed 29 August 2024).

[282] UNESCO Doc., CL/3865, cit.

[283] Although there are no direct cross-references between the two documents, the Medium-Term Strategy 2002-2007 (UNESCO Doc., 31 C/4) acknowledged the potential for "new technologies to offer new opportunities in this context [...] such as the creation of hybrid cultural expressions.".

ontologically distinct entities – and that their digital nature represents a significant form of immateriality – must first examine how the need for enjoyment is embedded within the ontological boundaries of such goods. That is to say, if we consider digital property not merely as enhancers of existing assets[284] but as legal assets in their own right, subject to their own legal relations, it becomes essential to understand how enjoyment of these goods is shaped by their intrinsic characteristics – namely, their intangible and non-rivalrous nature – and how public actors interact with them to grant appropriate protection and valorization.

As observed, these digital assets are "physiologically public in nature"[285], characterized by their ephemeral and intangible qualities, as they exist in a non-rivalrous manner, transcending temporal, geographical, and social boundaries. This challenges traditional frameworks of ownership, possession, and access in cultural property regulation and calls for a different regulatory approach.

Before we reach the straightforward conclusion that the digital realm ultimately "enhances" this central purpose of fruition[286] – whether by improving usability (making a physical cultural asset, confined to one location, accessible to many) or by enriching the experience (through digital elements that amplify enjoyment) – the issue must be examined through the lens of both existing and mising legal frameworks, as well as the principles underpinning the current heritage protection. Generally, as we saw in the previous section, the matter remains unregulated, shedding light on a situation where developments are advancing too quickly for legal frameworks to keep pace, particularly in domestic law[287].

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[284] A. Bartolini, "Il bene culturale e le sue plurime concezioni", cit., 236, refers to the concept of the image of a cultural good as an element that can also enhance its economic value. In this view, the image remains a "by-product": "the image, understood as a reflection of the ideal value expressed by the original, becomes an intangible good in its own right." However, Bartolini argues that such an intangible good (what we have called "extrinsic immateriality") is not an independent cultural public good but serves solely as a by-product, as it merely reproduces the cultural good and its intrinsic value.

[285] P. Forte, cit., 263; G. Resta, "Chi è proprietario delle piramidi?", cit., 575.

[286] "The digital heritage is inherently unlimited by time, geography, culture or format", states the UNESCO 2003 Charter. Accordingly, some scholars have accurately described it as "facilitated enjoyment" because it transcends the limitations of time and space. See E. Cavalieri, "La fruizione dei beni culturali tra ordinamento internazionale ed europeo", in L. Casini, *La globalizzazione dei beni culturali*, Bologna, 2010, 195.

[287] In this regard, see also M. Cataldo, "Preservare la memroria culturale: il ruolo della tecnologia", in *Aedon*, no. 2, 2020, which also highlights concerns about the so-called democratization introduced by digital tools.

The UNESCO Charter assists us, in a way, in pinpointing such questions. By emphasizing that digital materials exist in numerous forms – such as texts, databases, still and moving images, audio, graphics, software, and web pages, among a growing range of formats – it crystallizes their shared nature in intangibility, which it describes as "ephemeral." This character highlights the need for "purposeful production, maintenance, and management" to ensure these digital assets are *retained* (Article 1). This is connected to the broader issue of ensuring public access (Article 2), an objective tied to the complex mediation efforts that member states must navigate in establishing legal frameworks able to combine "the legitimate rights of creators and other rights holders and the interests of the public to access digital heritage materials".

Indeed, a crucial question arises in this respect: who are we discussing when we talk about the *production* of digital heritage? And consequently, who is responsible for its protection and in what capacity, based on what regime?

Given the wide range of actors involved, the answer is far from simple. Production may stem from public institutions digitizing physical cultural assets for preservation, enhancement, or as part of a broader cultural heritage digitization strategy; private companies commissioned to perform digitization tasks; public-private partnerships managing cultural property collaboratively; individual artists, researchers, or creators; or, more recently, an AI system generating new digital creations or reworking existing content[288].

Depending on this framing, the issue intersects with a layered framework of concerns. influencing how these phenomena are classified, what rights attach to them, and who holds responsibility for their protection and management. In various scenarios, questions of copyright, intellectual property rights, and other forms of exclusivity

[288] The growing urgency to consider such hypotheses is evidenced is by recent actions of the U.S. Copyright Office, which has granted copyright registration for an image titled *A Single Piece of American Cheese*, created entirely using AI-generated material via the Invoke platform. According to the USCO, this work qualifies for copyright protection due to creator Kent Keirsey's selection, coordination, and arrangement of the AI-generated elements. However, only the final image is protected, not the individual AI-generated components. The key factor remains the creative decision-making process of a human author, which resembles that of a collage artist – where disparate elements are deliberately arranged and structured into a cohesive composition. At the policymaking level, refer also to the USCO's 2025 studies "Economic Implications of Artificial Intelligence for Copyright Policy Context and Direction for Economic Research" and "Copyright and Artificial Intelligence Part 2: Copyrightability."

afforded to digital creators may arise, adding further complexity to the evolving legal landscape[289].

In this analysis, we will set aside existing concerns on copyright and other private law mechanisms to protect creators, though these issues remain closely related and must ultimately be integrated into broader research on the public value (including *future* value in the public domain) of these cultural artifacts. Here, the focus is instead on the potential for public protection of digital cultural property as a distinct category, and on the frameworks and authorities necessary to oversee its enhancement, management, and further uses.

In terms of how protection frameworks may apply to digital cultural goods, a glaring peculiarity of these assets should be emphasized, placing them in an intermediate position between arguments about the inadequacy of ordinary tools – designed for physical objects and the legal relationships rooted in their materiality[290] – and perspectives that, instead, insists on starting from their physical components. As the UNESCO Charter already pointed out, these goods are ephemeral, hence they are housed within "hardware and software that bring them to life" (Article 3) and ensure they are retained. At a closer look, this brings them closer to the classical architecture of cultural property, in a material-immaterial hybrid where their true essence, ephemeral, is held within a physical medium. Yet, unlike traditional goods, their value lies entirely in their intrinsic intangible nature, which is also an *extrinsic* form that can be projected and embedded in other mediums, as its connection to material structures is purely functional[291], and does in any way contribute to the characterization of the property. Hence, a form of "material protection" of the containers – both technical and legal – is crucial, even as rapid technological advancements may eventually produce fully dematerialized forms of storage, requiring new forms of technical expertise. Particular attention must be paid to this instrumental relationship, as it can create specific requirements for presenting and

[289] As P. Forte, cit., notes at 266. See also S. Aliprandi, "Vincoli alla riproduzione dei beni culturali, oltre la proprietà intellettuale", in M. Serlorenzi, I. Jovine (eds.), *Pensare in rete, pensare la rete per la ricerca, la tutela e la valorizzazione del patrimonio archeologico. Atti del IV Convegno di Studi SITAR* (Roma, 14 ottobre 2015), *Archeologia e Calcolatori*, no. 9, 2017.

[290] See G. Severini, "Artt. 1-2", in M. A. Sandulli (ed.), *Codice dei beni culturali*, Milan, 2012, 28.

[291] "Immateriality does not involve ignoring matter or discarding a means of knowledge that, as physical beings, is essential to us; rather, it lies in the instrumentality of matter, which serves as the foundation for something that surpasses and transcends it [...]", M. Are, cit., 252, talking about the character of transcendence in the intangible goods.

rendering the intangible good accessible to human senses in a form faithful to its nature.

The second, and more significant, challenge concerns preserving the intrinsic essence of digital goods, particularly as it engages with their inherent diffusion and non-rivalrous nature. Clearly, a different line of reasoning applies depending on whether the product is the result of digitization – implying the existence of an original[292] – or if it is a born-digital asset; however, once its status as a good is recognized, the issue of authenticity is surpassed, as it is inherently bound to the very nature of its form[293].

It will be worth reasoning, instead, about ubiquity as a defining trait of digital goods, in their being available across time and space and subverting the original paradigms of ownership and protection. Indeed, this widespread accessibility fuels a different framework where the emphasis shifts from the need to ensure enjoyment to things of recognized cultural value to a posthumous, "political" decision regarding whether and to what extent regulate this wide availability. In this respect, the very recognition of public interest in certain digital acts as a form of constraint and as an initial mechanism of protection. It sets boundaries on the otherwise limitless potential for replication and reuse, offering a guarantee of certainty by the State[294]. This serves as the public actor's response to the public interest in knowing, thus *accessing* digital cultural assets, effectively "compelling" them into a defined legal structure.

Nevertheless, a central challenge remains. Once digital productions are acknowledged as goods in their own right, and their enjoyment is naturally assured, it becomes crucial to assess the extent to which the public actor would be willing (or be able) to regulate this widespread

[292] As P. Forte notes, "every digitization also involves reproduction, producing at least one image, and its dissemination online constitutes a form of disclosure", cit., 268.
[293] See in this regard R. Di Meo, "La riproduzione digitale delle opere museali fra valorizzazione culturale ed economica", in *Il diritto dell'informazione e dell'informatica*, no. 3, 2019, 387: "The traits of pervasiveness, the immediacy of dissemination, and the substantial potential for creative elaboration of visual space distinctly set digitization apart from the plagiaristic activities that regulations have traditionally sought to discourage and penalize."
[294] Concerning the specific context of digitizing cultural property as a phenomenon that creates autonomous legal goods, P. Forte emphasizes the "need to counteract the spread of misleading knowledge that is falsely associated with the cultural good or its reciprocity. This is essential to prevent the knowledge provided by the cultural good from being unjustly appropriated in an excessively exclusive manner, thereby diverting it from its constitutional legal purpose of universal enjoyment."

access, as well as how to govern reusability, which in these cases is embedded in a context of boundless interactions. As digital productions increasingly dominate our social landscape, the urgency of anticipating future legal challenges intensifies.

In this respect, it would be interesting to reconsider the very process of "certification" of cultural significance. These procedures not only establish certainty regarding their value as testimony of civilization, but may also embody in themselves the modalities and potential limitations associated with their public domain status. This aligns with the commitments made in the 2019 Declaration on Cooperation on Advancing Digitization of Cultural Heritage, where EU member states agreed to enhance efforts in developing interoperability standards and frameworks for digitization initiatives.

Without deviating significantly from the current restrictions outlined in the Code, the "Guidelines for the acquisition, circulation, and reuse of reproductions of cultural property in the digital environment"[295] offer a promising starting point. Although designed for the digitization of physical assets, they introduce concepts that could inform future models. The discussion revolves around forms of labeling inspired by the "NoC-OKLR: No Copyright-Other Known Legal Restrictions" framework proposed by the RightsStatements.org consortium[296]. This label entails that the product's use is not limited by copyright and/or related rights, but acknowledges that other laws besides copyright, such as those found in the Code, may impose restrictions on its use.

In the Italian context, the so-called "MiC Standard (BY NC)," (where "MiC" stands for Ministry of Culture) adopts a similar approach. Rather than constituting a license or altering copyright, it summarizes existing legal provisions governing the reproduction of public cultural property[297]. Building on this model, independent digital labeling systems for digital cultural property could be developed, establishing general and/or specific usage forms devised by single cultural institutions. These systems could establish different levels of circulation within a structured framework, facilitating cultural, personal, and commercial uses or economic exploitation of digital cultural assets.

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[295] *Linee guida per l'acquisizione, la circolazione e il riuso delle riproduzioni dei bei culturali in ambiente digitale*, available at https://docs.italia.it/italia/icdp/icdp-pnd-circolazione-riuso-docs/it/consultazione/index.html (accessed 25 September 2024).

[296] https://rightsstatements.org/page/NoC-OKLR/1.0/?language=it (accessed 25 September 2024)

[297] See the Guidelines, para 5.3.

5. Chapter conclusions

In Chapter 2, we shifted our investigative focus from a well-established dimension of immateriality – Intangible Cultural Heritage as defined by UNESCO and incorporated into domestic legal frameworks – to an exploration of *other dimensions* of it. Within this analytical transition, cultural property was selected as the foundational concept, as it constitutes the central axis of the regulatory framework established by the Italian Code of Cultural and Landscape Heritage. This conceptual approach proved more appropriate than a direct reference to heritage, aligning with the perspective shift outlined in Section 1.

The investigation sought to understand how additional immaterial dimensions evolve in relation to the physical manifestation of the asset, and to assess what implications, if any, they generate from the perspective of public regulatory oversight. A preliminary review of relevant academic literature, as discussed in Section 2, suggested a dual theoretical framework for understanding immateriality – distinguishing between *intrinsic* and *extrinsic* dimensions. The fundamental distinction, we noted, lies in whether alignment with a material structure is considered essential. From the first perspective, such alignment is indeed necessary, as immateriality reflects the legal designation of public-cultural value attributed to the object. In contrast, the extrinsic perspective allows for the possibility that the inherent immateriality of cultural property (also) extends beyond physical structures, maintaining independent legal significance in its external interactions. This second view, grounded in established methodological approaches, emerged from an analysis of social, economic, technological, and cultural advancements that support a broader understanding of immateriality beyond material confines.

Within this interpretive framework, Section 3 examined two investigative trajectories designed to identify potential extrinsic immaterial dimensions of interest. The analysis was informed by a preliminary review of cases studies and emerging trends in the Italian legal context, including regulatory provisions, administrative practices, and judicial interpretations.

The first trajectory involved a theoretical shift of intrinsic immateriality from (only) within the asset to (also) an external dimension, effectively "detaching" from the physical object. Under this light, we examined the conditions under which such a shift occurs and how legal frameworks navigate these complex interactions. In the Italian context, this was

explored through the concept of *decorum*, a recurring standard in legal discourse aimed at preserving cultural values in their external expressions.

The second trajectory took an inward approach, questioning the very concept of intrinsic immateriality by exploring its possible extension beyond identification with the cultural asset to encompass additional forms of immateriality – still inherent in, yet distinct from, physical boundaries. Within this framework, cultural property's *use* became the central focus of analysis.

Section 4 introduced a "contrasting line of reasoning," further advancing the discussion on the immateriality of cultural property by questioning whether *entirely* immaterial cultural assets can exist within public law frameworks.

While leaving further observations for Chapter 4, we can conclude from this chapter's analysis that the rigid link between material structure, cultural value, and external image of cultural property is no longer applicable in any of the analytical contexts examined. In fact, this perspective confines legal discourse to an overly fragmented understanding of cultural goods. To foster a more nuanced approach to the evolving dynamics of their immaterialities, cultural property law should consider the broader interplay between cultural assets and their *context*. This includes the physical and spatial relationship with their surroundings, the commercial and non-commercial circulation of their image and value, the diverse uses occurring in or around them, and the increasing influence of digital engagement, reproduction, and (re)creation.

Developed for analytical purposes, the intrinsic versus extrinsic immateriality framework has proven valuable in examining the cultural good's diverse trajectories across multiple environments, as well as its evolving relationships – with other goods, uses, activities, economic and social forces, and diverse stakeholders navigating competing needs.

However, this theoretical lens alone is inadequate for effective protection and management solutions. Rather, it must be complemented by a more substantive perspective: one that sees cultural good not merely as an object to be preserved but as a dynamic resource for development, in line

with internationally recognized definitions[298]. The value it embodies (the intrinsic immateriality we have described) is embedded in ever-evolving dynamics and relationships. In the interplay between the "force" generated by the cultural good and the force exerted by its context, a legal approach should emerge that mediates this tension without allowing either side to prevail.

Recognizing the extrinsic immaterialities of cultural goods, then, means acknowledging their inherent role as drivers of social progress (what makes them a social *resource*) while also embracing their receptiveness to external influences. Rather than being passively received as immutable vector of culturality, cultural property gains new meaning through interaction – with other goods, the uses shaping their identity, and emerging forms of engagement. These extrinsic immaterialities, in turn, reintegrate into the good itself, transforming its evolving significance.

Accordingly, the development of regulatory models that recognize and integrate multiple legal dimensions was highlighted as a pressing concern. This included the interplay with instruments and regulations governing landscapes and natural elements, *sui generis* intellectual property protections for specific operational methods tied to particular uses of the property, but also public law provisions for safeguarding and enhancing physical assets within broader stakeholder contexts, and international legal principles that support immateriality and bottom-up approaches to cultural definitions. Achieving such integration requires challenging the entrenched assumption that legal relevance is tied solely to material existence. Breaking from this postulate would allow for more nuanced regulatory frameworks that better capture the multifaceted nature of these assets.

Another key insight was the need to reassess the framework governing administrative powers and related technical discretion in evaluating cultural value and controlling external "projections." This entails balancing cultural value with competing interests and addressing new, emerging concerns. Indeed, the topic proved particularly relevant in physical contexts, where extending property values to surrounding areas requires careful weighing of cultural functions against competing interests. However, the challenge even intensifies in non-physical dimensions, where traditional spatial boundaries no longer offer sufficient parameters for regulating external immaterialities.

[298] The reference is to the well-known Faro Convention. "Cultural heritage is a group of resources [...]" and should be "wisely used as a resource for sustainable development and quality of life in a constantly evolving society."

In this respect, a particularly rigid approach persists. Regulatory and judicial interpretations appear to remain anchored to the asset's core cultural value, extending even to a purported 'right to image' of cultural property. Albeit framed within standards of proportionality and reasonableness, these approaches still excessively control the asset's (already limited) circulation, failing to respond to the evolving social needs of cultural development. As a result, the analysis calls for a thorough reconsideration of participatory procedures that can better adapt to such moving social, cultural, and technological contexts. These insights lay the groundwork for the upcoming chapters, which will delve deeper into the interplay between immateriality and subjectivity, ultimately proposing an alternative framework for defining cultural interest.

Chapter 3 – IMMATERIALITY AND THE SUBJECTIVE COMPONENT

1. The relationship between immateriality and subjectivity

The intersection of legal discourse with value-construction processes has been extensively examined in previous chapters. Indeed, discussing the immateriality of cultural heritage requires conducting a dual-perspective analysis. From an objective standpoint, the investigation of the asset's immaterial dimensions – which already highlights the need for a different approach by public actors in its protection. This was the key focus of Chapters 1 and 2. From a subjective perspective, the role of these immaterial aspects calls for a reconsideration of the power dynamics entailed in the identification process itself. This shifts the discussion beyond merely understanding how to safeguard immateriality in heritage assets to a critical examination of the actors involved and their influence in protection decisions.

This differentiation was also authoritatively highlighted by Blake, noting that:

> "[...] the distinction between 'intangible' and 'tangible' heritage is, to a large degree, an instrumental one that does not necessarily describe *a fact about heritage* but rather *a fact about how we can protect and/or safeguard* it. Hence, we understand that when we focus on ICH – the intangible aspect of heritage – the difference may not be found in what we are safeguarding but rather in how we understand its significance and for whom this significance is primary. This does affect the measures we may take for its safeguarding [...] and who we involve directly in the process."[1]

Research into a more nuanced landscape of intangible dimensions of cultural heritage from the perspective of the *object* has clearly emphasized how these dimensions frequently step outside the scope of formal recognition procedures, revealing significant challenges in administrative execution also from the perspective of the *subjects* involved.

This issue was central in Chapter 1's examination of UNESCO's conceptualization of ICH, where three key challenges emerged.

[1] J. Blake, "Participation in Safeguarding Intangible Cultural Heritage Viewed as a Human Rights Imperative", cit., 317-318.

First, the legal definition of "communities, groups, or individuals" (CGIs) – the expression employed by the Convention to designate the essential stakeholders that ultimately *determine* the values that transform an asset into recognized cultural heritage. Although the Convention succeeded in expanding the poles of heritage recognition procedures, the CGIs concept's boundaries remain fluid. CGIs evolve over time in response to economic, political, and technological factors, potentially spanning various configurations across time and space[2], while remaining contingent on the governing regulatory structures in place. This definitional fluidity led to the second challenge identified: implementing legally robust mechanisms that effectively balance community participation *vis-à-vis* states' sovereignty. The variable nature of community identification and composition has complicated efforts to establish concrete legal frameworks that incorporate meaningful CGIs involvement while respecting traditional State prerogatives. Finally, the third challenge manifests in the integration of these principles into national legal systems, where predetermined cultural interests and technical-discretionary authority have often proved resistant to this intended reorientation.

But the question also extended to *other* immaterial dimensions identified in the context of "traditional" cultural property, as Chapter 2 discussed. The paradigm of intrinsic immateriality – understood as an inseparable aspect of the object that justifies public protection – has undergone critical reexamination. Research exploring forms of *extrinsic* immateriality suggests that projecting a property's inherent value outward can offer new legal perspectives that go beyond the traditional objective of protecting and elevating the 'heritage of the *Nation*'[3].

Moreover, the emergence of "non-physical" cultural assets within digital spaces further complicated this theoretical landscape. Their existence was emphasized for the potential to include (additional) virtual communities forming around cultural productions in novel, transient

[2] The necessity of "defining the social and spatial frameworks of heritage" is emphasized in G. Dolff-Bonekämper, "The social and spatial frameworks of heritage – What is new in the Faro Convention?", in *Heritage and Beyond*, Strasbourg, 2009. The article, in turn, references M. Halbwachs, *On collective memory*, Chicago, 1992.

[3] According to Article 9 of the Italian Constitution, landscape and historical and artistic heritage are "of the Nation". The overlap between cultural heritage's public value and the interest of the Nation is clearly illustrated in R. Cavallo Perin, "Il diritto al bene culturale", in *Dir. amm,* no. 4, 2016, 499: "Cultural heritage has been recognized as holding public value, understood as the Nation's reputation, which in turn is seen as the cultural capacity of a people organized under national sovereignty."

environments, adding complexity to the establishment of suitable negotiation spaces[4].

This reveals the necessity of redirecting our inquiry, in the present chapter, to explore what we called the 'subjective component' that emerges from investigating intangibility within cultural heritage legal paradigms. Specifically, this reorientation calls for a theoretical consideration of how expanding our conception of intangible dimensions interacts with and impacts an increasingly diverse range of stakeholders.

Most Western legal frameworks – Italy's system being the primary reference here – conceptualize heritage through a binary relationship between public authorities (mainly the State) and private property owners, with civil society relegated to a "passive role" as mere beneficiaries, or recipients, of the right to enjoy it[5]. Within Italian administrative law, this approach manifests through the dual administrative functions of protection and enhancement, both designed to guarantee the public fruition of the immaterial cultural value embedded within all cultural property. Yet these functions – protection, enhancement, and even public enjoyment – simultaneously operate within an institutional framework that positions the public primarily as cultural "consumers"[6].

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[4] Refer specifically to Chapter 2, entire Section 4.

[5] F. Benvenuti, in *Disegno dell'amministrazione Italiana. Linee e prospettive*, Padova, 1996, 52, wrote that "the principle of active liberty entails a profound transformation in the conception of the relationship between the citizen and authority, which characterises any organized society. As a result, administrative activity should no longer regard citizens as mere recipients, but rather as genuine co-administrators."

[6] Speaks about cultural consumers, and instead highlights a shift toward cultural *producers*, the report of the European Commission: Directorate-General for Education, Youth, Sport and Culture, *Participatory governance of cultural heritage – Report of the OMC (Open Method of Coordination) working group of Member States' experts*, Publications Office of the European Union, 2018. Available at https://op.europa.eu/en/publication-detail/-/publication/b8837a15-437c-11e8-a9f4-01aa75ed71a1 (accessed 28 October 2024). In this respect, also P. Sacco, G. Ferilli, and G. Blessi, who delineate a model of so-called 'Culture 3.0,' whereby it is "it increasingly difficult to draw a meaningful distinction between cultural producers and users themselves. Producers and users are now interchanging roles in a spectrum of possibilities [...]", in "From Culture 1.0 to Culture 3.0: Three Socio-Technical Regimes of Social and Economic Value Creation through Culture, and Their Impact on European Cohesion Policies", in *Sustainability*, no. 10, 2018. In this respect also J. Holden, "Learning at the heart of culture: implications for the heritage sector", in J*ournal of Education in Museums*, GEM, vol. 29, 2008, observing how "Culture is becoming less of a sphere that is professionally determined and expert-defined, with the public as a passive audience and more one where collaboration between experts and the public is the predominant characteristic".

Under this paradigm, individuals are viewed either as visitors entitled to experience and benefit from heritage, or as members of a broader (yet single) collective entity, whether at the national or global level.

The core issue lies in the seemingly "forced" alignment – i.e., one that is legally established but not necessarily reflective of reality – between the entity *asserting* the interest and the authority responsible for *defining* and managing it. The established tripartite relationship between the State, private owners, and civil society operates within a framework where the first assumes the role of 'exponential entity'[7] of the latter, managing and representing its interest in cultural heritage enjoyment against the one of private stakeholders. This paradigm grants the State the authority to designate and *elevate* national cultural heritage through the official recognition of its public value.

The question arises however, whether these public protection mechanisms fully capture the complexity of cultural heritage dynamics when considered within the multifaceted dimensions of immateriality we are highlighting. The argument will be further developed later in this study, yet it is essential to note from the outset that the automatic conflation of civil society, public interest, and the State may unduly constrain the associated legal discourse in certain contexts. The examination of intangible dimensions of cultural heritage provides a valuable lens through which to explore more expansive interpretations of such relationships.

Indeed, the study of immateriality from the perspective of the *object* illuminated a denser landscape of subjects involved, where a growing tension exists between the elevation of public-universal value and the enhancement of private-local ones.

The inherent complexity of cultural assets, as explored in previous chapters, reveals a web of intersecting interests, ranging from universal

[7] Administrative case law established that the *ente esponenziale* is "the legal construct developed by the courts to allow for the justiciability of so-called 'diffuse interests' – that is, interests that are homogeneous and undifferentiated among members of a given category. It is through the establishment of the *ente esponenziale* that the collective interest, previously without a legal subject and undifferentiated, becomes individualized and distinct, thereby attaining the status of a legitimate interest worthy of judicial protection." (Council of State, Special Commission, Opinion no. 3014 of 26 June 2013). Accordingly, the collective interest "does not (and cannot) constitute subjective legal position attributable to individuals. Rather, it arises as a substantive legal position only in relation to the *ente esponenziale*, thus becoming an exclusive prerogative of that entity. It is a 'derivation' of the diffuse interest, which by its nature lacks an individual legal subject [...]" (Council of State, Section IV, ruling no. 36 of 9 January 2014).

to localized concerns, each presenting distinct challenges for regulatory frameworks. This complexity gives rise to an ongoing tension between two competing forces: the expansion of cultural value for the benefit of an increasingly global community – reflected in international law's shift from a property-centric to a heritage-centric discourse – and the local interests of those with direct ties to cultural heritage's life. As some scholars have observed, this latter dynamic often correlates with a renewed emphasis on property-based conceptualizations, particularly within domestic legal systems[8].

This tension sheds light on two critical insights.

First, defining a community whose interest is being represented by its "exponential entity" has become an increasingly complex task, often leading to incompleteness in understanding what 'protection' truly means. Communities' interests may not necessarily align with an expanding conception of 'public value.' These challenges are particularly evident in the context of ICH and UNESCO's broader initiatives to elevate heritage to global significance. As it was argued, while UNESCO's emphasis on universal values and the promotion of globally shared heritage responsibility represents a laudable objective, this approach has occasionally fallen short in accommodating local communities' specific interests in claiming *their* distinctive heritage and a specific role in local development[9].

Second, the intersection of immateriality and subjectivity manifests in a reconceptualization of the "defining moment" in heritage processes, challenging traditional assumptions about its objective, immutable, and preexisting value. Indeed, the topic appears to have garnered only partial attention in legal scholarship, with the issue of the subjective component generally being addressed only *after* heritage has been defined. This approach stems from two primary factors. On the one hand, the overlapping between interest management and State authority is fundamentally predicated on presumed exclusive access to technical

[8] L. Lixinski, in "Definitions: From Cultural Property to Cultural Heritage (and Back?)", in *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford, 2019 argues in this regard that "[...] the move from cultural property to heritage, while it enhanced many of the values of cultural heritage, and particularly its connection to intangible cultural processes rather than tangible buildings, monuments, and artefacts, has also had the (unintended) consequence of disassociating communities from heritage they live with or around, and for whose survival they are necessary. As a result, a return to a specific way of conceptualizing property may be needed, at least in some respects."
[9] Id., "A Third Way of Thinking about Cultural Property", cit. 581.

expertise necessary for cultural value determination[10], operating within established administrative law principles of proportionality and reasonableness. On the other, heritage recognition is predominantly viewed as a declaratory process, whereby authorities uncover and protect an existing set of values (typically originating from the past) and act as "guardians"[11] to ensure public accessibility.

This interpretive framework – prominently featured also in non-legal scholarship, as evidenced by Smith's 'Authorized Heritage Discourse'[12] and Tainter and Lucas' 'significance concept'[13] – yields implications that span objective and subjective domains. Indeed, by characterizing the value of cultural artifacts as inherently *objective* (even when expanded beyond aesthetic criteria to include historical significance[14]), only *prescribed* subjective stances are allowed for heritage stakeholders.

In Italy, the issue was addressed by the Council of State already in 2000, noting that opportunities for participation "lost" during the protection phase (*tutela*) – reflecting the State's exclusive authority in the matter – are then "restored" during the stages of planning and executing the use or transformation of cultural property, where substantial civil participation can be foreseen[15].

In this chapter, instead, it is precisely this definitional moment that we aim to explore. Ultimately, our goal is to demonstrate that if the immateriality of the object points to the existence of a (more complex)

[10] "[...] the proper care of heritage, and its associated values, lies with the experts, as it is only they who have the abilities, knowledge and understanding to identify the innate value and knowledge contained at and within historically important sites and places.", L. Smith, cit., 29. On the topic see also J. Schofield, "Being autocentric: Towards symmetry in heritage management practices", in L. Gibson and J. Pendlebury (eds.), *Valuing historic environments*, Surry and Burlington, 2009.

[11] In these terms T. Ireland, J. Schofield, "The Ethics of Cultural Heritage", in Id. (eds.) *The Ethics of Cultural Heritage*, Ethical Archaeologies: The Politics of Social Justice, vol 4, New York, 2015.

[12] L. Smith, cit., 29 ff.

[13] Already referenced in Chapter 2, J.A. Tainter and G.J. Lucas, "Epistemology of the significance concept", in *American Antiquity*, vol. 48, 4, 1983. The authors propose an idea of significance that stems from the object rather than the person-observer (712), hence it is immutable and self-evident over time. See also in this regard B. Kirshenblatt-Gimblett, "Theorizing Heritage", in *Ecomusicology*, vol. 39, 33, 1995, esp. 370: "[...] heritage is not lost and found, stolen and reclaimed. It is a mode of cultural production in the present that has recourse to the past". The issue is also widely discussed in the context of domestic law, as evidenced by the doctrinal references provided below.

[14] On the author's theory of "historicity" of cultural property, see the extensive analysis in Chapter 2, Section 2.1.

[15] Council of State, Section VI, 8 February 2000, no. 677.

subject, it is because the subject itself should be viewed as a starting point of consideration. From there, we can construct the definition of what holds legal relevance and establish the criteria and competencies necessary for that definition.

Moreover, this critical examination allows us to transcend the concept of mere 'valuableness' as an objective trait of cultural heritage and instead explore the possibility that heritage can challenge this *positive* connotation, which is typically attributed to a recording function. This perspective acknowledges that the human relationship with cultural objects may lead to value transformation or even loss, reflecting heritage's evolving character and enabling more meaningful engagement with contemporary communities[16]. It may even be the case that the value identified by experts is found to no longer be objectively present, yet assets retain significant subjective importance for stakeholders, generating new cultural narratives.

The specific context of immateriality introduces additional complexity to this framework. Indeed, the traditional dichotomy between authoritative experts who define heritage and civil society as beneficiary overlooks a crucial dynamic: communities often actively create or engage with elements that later, only *subsequently*, receive heritage designation. Scholars have noted, particularly regarding ICH, that formal recognition can fundamentally alter cultural practices for their original practitioners, potentially alienating them from their traditional context. Hence, the act of heritage designation itself may create an alienation from the original context[17]. This identification process, anchored in the preservation of

[16] L. Smith, *ibid.*, precisely notes that "One of the other ways the AHD maps out the authority of expertise is through the idea of 'inheritance' and patrimony. The current generation, best represented by 'experts', are seen as stewards or caretakers of the past, thus working to *disengage* [emphasis added] the present (or at least certain social actors in the present) from an active use of heritage. Heritage, according to the AHD, is inevitably saved 'for future generations' a rhetoric that undermines the ability of the present, unless under the professional guidance of heritage professionals, to alter or change the meaning and value of heritage sites or places. In disempowering the present from actively rewriting the meaning of the past, the use of the past to challenge and rewrite cultural and social meaning in the present becomes more difficult."

[17] A. Skounti, "The Authentic Illusion: Humanity's Intangible Cultural Heritage, the Moroccan Experience", in L. Smith, N. Akagawa (eds.), *Intangible Heritage*, cit., 74: "[...] the production of an intangible cultural heritage inevitably requires sacrificing something, that very thing that turns cultural facts into heritage; these facts can no longer be the same, they become other, especially for those who own or perform them [... hence] The acquisition of intangible heritage status introduces a distortion between the heritage and the locality and the society that gave birth to it."

values coming from the past, risks "inventing tradition"[18] by imposing authenticity criteria on practices that previously existed outside the heritage framework and had, until their designation, operated independently of preservation imperatives and standardized production requirements, hence evolved in more uncontrolled manners. The disconnect between the contemporary, changing values of the community "owning" (intangible) heritage, its universal value when formally recognized, and the process of heritagization – often aligning with preservation efforts – is striking.

This engagement gives rise to interests that transcend mere enjoyment and instead re-establish connection with a notion of 'ownership'[19]. The latter, however, differs from both traditional cultural heritage law's understanding – which focuses on administrative processes for protecting public-cultural value in privately owned assets, highlighting the social function of property – and civil law's vision of absolute and exclusive rights. Instead, the concept is more accurately understood as one formed by the *collective perception* of heritage within a community, and includes the corresponding duty of everyone, alone or collectively, to respect that heritage – whether it is "their own," that of others, or a transboundary one. Within the social and institutional dynamics among the parties involved, our interest also lies in understanding the role and legal stance of such collectivity: its identity, dimensions, and the legal claims it may assert, along with the legitimacy to take action.

From this perspective, the administrative discourse surrounding protection methods grows exponentially more complex. At a closer look, such complexity can give rise to problematic pan-culturalist, nihilistic, or anti-system tendencies, which is why the argument presented here should not be taken to its extremes. Instead, we argue that these issues arise precisely when a rigid dichotomy is drawn between institutional and non-institutional, state and non-state, experts and non-experts. Accordingly, discussions result narrowly focused on broadening the range of actors who can participate in the recognition process. Framing the issue in the binaries of participation alone, however, may prove to be not sufficient, as it implicitly reiterates existing heritage recognition

[18] The expression is reported by A. Skounti, cit., as a quotation from the book of E. Hobsbawm, T. Ranger (eds.), *The Invention of Tradition*, Cambridge, 2012.

[19] In this regard, L. Lixinski, "A Third Way of Thinking about Cultural Property," cit. On the topic, despite the more focused look at the Belgian national scene, also M.-S. De Clippele, "La dimension collective du patrimoine culturel : la nature et les prérogatives des acteurs du collectif – Perspectives de droit belge,"in R*evue de droit de l'Université de Sherbrooke*, vol. 50(1-2-3).

paradigms. Just as only expanding the definition of heritage to encompass the values of an increasingly broad (yet homogeneous) community is insufficient, attempting to reconnect heritage with its recipients through forms of participation that fit within an unchanged authoritative pattern may be only marginally effective. Instead, as put by Lixinski and Wells, "a dynamic, adaptive regulatory framework must engage most stakeholders as equals with conventional experts in a way that can effectively collect and act upon these meanings and values."[20]

A more thorough examination is thus required to assess whether the traditional legal construct can effectively accommodate the increasingly intricate relationships between cultural assets, cultural values, owners, custodians, and the communities they serve. The inquiry becomes pertinent precisely as we acknowledge the growing importance of intangible dimensions in cultural heritage identification.

The topic is quite expansive and needs to be divided into two main areas of inquiry.

The first, covering this entire chapter, examines the issue from a positive law perspective. The focus is on examining existing mechanisms within the Italian legal system, the primary field of study, that could facilitate a different construction of the definitional paradigm. Additionally, the analysis may extend beyond national borders to identify gaps through comparative research. Overall, the objective is to understand (i) how the process of defining cultural value is carried out, including its scope and the expertise involved; (ii) the potential avenues that positive law offers to expand this process (both explored in Section 2); (iii) their normative weight – that is, their legal efficacy in practical application through the case studies analysis (Section 3).

Research methodology proceeds along two main trajectories. First, whether this reasoning can be grounded in the assertion of a genuine right to cultural heritage, which might legitimize negotiative stances in

[20] J.C. Wells and L. Lixinski, "Heritage Values and Legal Rules: Identification and Treatment of the Historic Environment Via and Adaptive Regulatory Framework" - Part 1, in J*ournal of Cultural Heritage Management and Sustainable Development*, vol. 6, no. 3, 2016, 27. As indicated then, we return to this framework now, given its particular significance for the questions we are trying to disentangle. The key insight from Lixinski and Wells lies in their characterization of orthodox heritage as object-centric, in contrast to heterodox heritage, which prioritizes human engagement and relational dynamics established in cultural artifacts definitions. Heterodox heritage theory, they argue, "because it is based on contemporary socio-cultural meanings, demands an adaptive regulatory tool to implement rules that direct the conservation of the historic environment, because these meanings are dynamic in every sense of the word." Part 2 of the study is published *ivi*, vol 7, 3, 2017.

relevant heritage process (Sections 2.1 and 3.1). In a second step, we will consider the scope of the various interests at play and how they are addressed by public authorities and, potentially, by civil society in the first place (Sections 2.2 and 3.2)

Ultimately, the analysis will serve as an indicator of whether, and to what extent, cultural heritage is "tied to society's cultural perceptions and public opinion at a particular historical moment,"[21] and how much it reflects diverse social groups within the broader "national community."

The second area of inquiry is a corollary to the analyses presented above and will explore the consequences of the growing trend toward alternative identification processes in relation to the traditional paradigms of reference, drawing together the key conclusions of this study along with some *de iure condendo* perspectives. For this reason, its discussion is reserved for the next, concluding chapter of this research.

Specifically, it will address the implications in this context (i) in relation to the notion of ownership at a time when more interests – and thus more legal positions – are involved in the process of defining cultural legal assets; (ii) with regard to the administrative function of protection and the underlying construction of cultural interest. The aim is to explore potential extensions that include participation in associated procedures from the perspective of so-called horizontal subsidiarity, questioning to what extent and in what manner "*stake-holders*" are defined, and how they can engage in such procedures. To do so, the discussion will broaden to encompass contexts related to or adjacent to the topic of cultural heritage – primarily, the environment and the landscape. For this reason, those reflections will remain distinct from the one developed in this chapter, which, instead, will remain firmly anchored in a cultural context.

[21] In these terms T.A.R. Lombardia, Section II, ruling of 19 December 2011, no. 3239.

2. Rethinking the paradigm in cultural heritage definition processes

Are there regulatory mechanisms capable of enabling the paradigm shift outlined above in the way cultural heritage is defined? Do current legal frameworks provide sufficient flexibility to accommodate a more nuanced understanding of the subjective dimensions inherent in the forms of immateriality identified in this study?

As previously observed, exploring the scope of a 'subjective component' compels a reassessment of civil society's role – the "national community" that the State represents in its heritage protection function, and yet appears to be excluded from active participation in identification procedures. Within this framework, the mere acknowledgment of a general collective proves inadequate. Indeed, positioning the latter as a "third pole" alongside authorities and experts is one level of analysis; delving into the complexities and dynamics within it, with its inherent diversity and indeterminacy, is another[22]. The former invites a focus on how institutional actors engage with civil society, considering alternative methods of interest representation through additional 'exponential entities.' The latter requires exploring the diverse interests and subjective claims that emerge within this tripartite relationship.

Such a transition carries significant legal implications. First, it requires thorough examination of concepts like of access, enjoyment, and participation, along with the mechanisms that ensure their effective enforcement. Moreover, it demands recognition of group subjectivity in heritage matters, which may give rise to competing claims and perspectives, thus possibly expanding the debate beyond traditional public protection frameworks[23].

The analysis presented here, through a positivist approach, investigates whether existing regulatory frameworks can accommodate alternative interpretations to foster equitable dialogue in heritage-related

[22] In terms of an orthodox vs. heterodox framework, as Wells and Lixinski propose (see above), it could be argued that "community participation in orthodox practice has increased, but [...] it is often a "box ticking" process that overemphasizes "political imperatives that celebrate[s] the value of community without ever examining its definition or content." See in this regard also S. Watson & E. Waterton, "Heritage and community engagement", in *International Journal of Heritage Studies*, vol. 16, no. 1-2, 2010.

[23] The same theoretical and research classification is discussed by J.-M- Leniaud, "Heritage, Public Authorities, Societies", in *Heritage and beyond*, cit., 138. Similarly, J. Blake, in "Participation in Safeguarding Intangible Cultural Heritage Viewed as a Human Rights Imperative", in *Volkskunde*, no. 3, 2020, spec. 315.

procedures. Within this framework, both the broader national community, i.e., the collectivity typically referenced in cultural heritage law, and the smaller, more localized groups within it[24] will be considered legitimate actors in defining what constitutes cultural heritage, reflecting an expanded range of viewpoints.

With this in mind, two distinct scenarios warrant examination, each framed within different regulatory perspectives. Indeed, the diverse forms of immateriality *of the object* explored in previous chapters now call for an analytical approach capable of fluidly navigating between international and domestic legal frameworks. From this a broader standpoint, the first step will be to examine the right to cultural heritage as a legal foundation for establishing a corresponding right to participate in its very conceptualization. The interpretative approach moves beyond basic access provisions to encompass a fundamental right to *active engagement* with heritage, including interaction with cultural assets and participation in defining their meaning and value.

Turning to a national administrative law perspective, the analysis will shift from the concept of a genuine subjective *right* to cultural heritage toward a more "mitigated," yet perhaps more ramified, form of participation. The interpretative approach emphasizes the potential for dialogue with administrative authorities to shape alternative *interests* within heritage processes, enabling the recognition of a diverse range of perspectives from both institutional and civil sides.

The Italian administrative framework serves as a particularly relevant case study in this regard. Specifically, to key elements warrant attention: on one hand, the general principles governing administrative action in cultural asset declaration procedures, and on the other, the role of administrative decentralization on stakeholder participation in heritage definition processes. These elements will be assessed in terms of their capacity to either enable or constrain engagement.

Finally, the practical enforceability of these participatory mechanisms will be examined in Section 3, evaluating their effectiveness in promoting meaningful participation in heritage definition processes.

[24] On the opposition between 'national' and 'local' see M. Gravari-Barbas, "Le patrimoine territorial. Construction patrimonial, construction territoriale: vers une gouvernance patrimoniale?", in *Eso*, 18, 2002, 87: The emergence of "new heritages" is no longer solely the expression of the Nation but that of groups living and creating *heritages* within the national territory. In a certain sense, it represents a true awakening of the local, claiming heritage status for elements that represent only a limited group. Translation by the author.

2.1. The right to cultural heritage as a subjective entitlement. Reflections starting from the Faro Convention

We have already discussed, in this study, how the principle of public enjoyment is inherent in all cultural property, which, following Giannini's doctrine, are "meant to be enjoyed." This principle intersects with a broader legal development that has emerged since the mid-twentieth century, progressively establishing the existence of a fundamental human right to *culture*[25].

Its foundation rests upon widely known "pillars" – i.e., Article 27 of the Universal Declaration of Human Rights[26], Article 15 of the International Covenant on Economic, Social and Cultural Rights[27], and the numerous references across coeval documents[28]. Within international law, the human right to culture holds a distinctive position at the intersection of several fundamental rights, including those related to expression, education, identity, and development. It affirms the basic right of individuals, whether alone or collectively, to access, participate in, and benefit from cultural *life* – a concept that involves multiple dimensions and associated actions. Indeed, the Committee on Economic, Social and

[25] On the intersection between cultural rights and right of enjoyment ("*fruizione*") in Italy see M. Carcione, "Dal riconoscimento dei diritti culturali nell'ordinamento italiano alla fruizione del patrimonio culturale come diritto fondamentale", in *Aedon*, no. 2, 2013. Also, R. Cavallo Perin, "Il diritto al bene culturale", cit., 498, observing that "The enjoyment of cultural property constitutes a distinct subjective right, setting it apart from ownership or other *in rem* rights over the asset. This right remains relevant even when the cultural property is under someone else's ownership and applies regardless of whether it is publicly or privately owned." Translation by the author.

[26] UN General Assembly resolution 217 A (III) of 10 December 1948. Especially para 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."

[27] UN General Assembly resolution 2200A (XXI) of 16 December 1966. Especially para 1(a): "The states parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; [...]"

[28] To name a few, illustrating how the necessity of safeguarding access to culture surfaces in documents addressing various social groups and within the affirmation of other human rights: the International Covenant on Civil and Political Rights, Arts. 17, 18, 19, 21 and 22; the UN Declaration on the Rights of Indigenous Peoples; the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5(e); the Convention on the Elimination of All Forms of Discrimination against Women, Art. 13(c); the Convention on the Rights of the Child, Art. 31(2); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 43, para. 1(g); the Convention on the Rights of Persons with Disabilities, Art. 30, para. 1; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. On the topic, see also the essay of M. Bidault, "Ce que declarer des droits culturels veut dire", in *Droits fondamentaux*, no. 7, 2008-2009.

Cultural Rights, through General Comment No. 21, has delineated four specific areas within this right[29]: (i) the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1(b)); (ii) the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author (art. 15, para. 1(c)); (iii) the right to freedom indispensable for scientific research and creative activity (art. 15, para. 3); (iv) in broader terms, the right to education.

As leading scholarship notes[30], a right to cultural *heritage* seems not explicitly envisioned; rather, "cultural life" addresses issues of identity, cultural diversity, and democracy in a broad sense. The evolution from a cultural right to a right extended to cultural *heritage* was not straightforward and only emerged subsequently, particularly in connection with the transition from passive to active forms of engagement. Consider, for instance, the late references found in Articles 3 and 23 of the Final Statement in the 1993 European Round Table on Human Rights and Cultural Policies[31], or the so-called Fribourg Draft Protocol, later merged into the 2007 Fribourg Declaration, Article 3. Similarly, the 1998 ICOMOS Declaration Marking the 50th Anniversary of the Universal Declaration of Human Rights[32], which explicitly recognized the right to cultural heritage as an integral part of human rights.

Upon closer examination, it was not until 2005, with the adoption of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society – so-called Faro Convention[33] – that a dedicated document formally outlined a right to cultural heritage. As Article 1 now

[29] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21 December 2009, https://www.refworld.org/legal/general/cescr/2009/en/83710 (accessed 6 November 2024).

[30] L.V. Prott, "Cultural Rights and Peoples' Rights in International Law" in J. Crawford *The Rights of Peoples*, Oxford, 1988; J. Blake, "On Defining the Cultural Heritage", in *International and Comparative Law Quarterly*, vol. 49, no. 1, 2000; more broadly, Y. Donders, 'The legal framework of the right to take part in cultural life', in: Y. Donders and V. Volodin, (eds.), *Human Rights in Education, Science and Culture – Legal developments and Challenges*. Paris, 2007.

[31] Human Rights and Cultural Policies in a Changing Europe: the Right to Participate in Cultural Life-Final Statement, the European Round Table on Human Rights and Cultural Policies, Helsinki 30 Apr.-2 May 1993.

[32] ICOMOS, Stockholm, 11 September 1998.

[33] Council of Europe Treaty Series - No. 199, 27 October 2005. Here sometimes referred to as 'Faro.'

establishes, this right is embedded within the human right to participate in cultural life, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

Indeed, the Faro Convention marks a pivotal milestone in the evolution of how cultural heritage is defined. By establishing the right to cultural heritage as a human right, it aligned with broader trends of those years aimed at reshaping the prevailing paradigm in legal discourse[34].

Notably, the Convention's most significant contribution lies in the reconceptualization of cultural heritage stewardship, particularly through its emphasis on people. The Convention's title itself reinforces this stance: cultural value, in fact, is *vested in society*. Hence the necessity of involving "everyone in society in the ongoing process of *defining* cultural heritage," the latter understood as a reflection and expression of ever-evolving values, beliefs, knowledge, and traditions. Thus, it is people that identify heritage it in the first place, regardless of ownership structures (Article 2(a)). The idea is further elaborated through the establishment of the concept of 'heritage communities,' entitled to recognize and preserve specific aspects of cultural heritage for future generations within the framework of public action (Article 2(b)). This implies a vision of shared responsibility, which is both individual *and* collective (Article 1(b) and whole Section III), and arises from an expanded right to enjoyment that entails a duty to contribute toward its enrichment (Article 4(a)).

Hence, a notion of *access* with heightened legal significance. Article 12 explicitly defines it as encompassing participation in both "the process of *identification*, study, interpretation, protection, conservation, and presentation of the cultural heritage" and "public reflection and debate on the opportunities and challenges which the cultural heritage represents." That is to say, not only in the "constructive," positive aspect of heritage definition, but also in its functionality and even potential "destructive" aspect in response to evolving societal values.

Indeed, "there are no real boundaries to heritage, which can begin as recently as yesterday and there is even an appearing concept of future heritage as a way to inject quality and legibility into new

[34] On the new paradigm being established in international law see, among others, H. Silverman, D.F. Ruggles, *Intangible Heritage Embodied,* New York, 2009; D.W. Morgan, "Heritage Valuation: Paradigm Shifts", in C. Smith (ed.) *Encyclopedia of Global Archaeology*, New York, 2014.

developments"[35]. This temporal flexibility fundamentally recalibrates the traditional preservation paradigm, and introduces a "paradoxical temporality."[36] Although it is considered "inherited from the past," heritage persists only to the extent it retains value and significance for contemporary meanings[37]. This represents a significant departure from conventional preservation frameworks, which typically employ fixed temporal thresholds to determine the transition to public heritage status, from which duties of conservation arise – that "valuableness" mentioned in the introductory section. This is because, as with ICH, the emphasis shifts toward an instrumental and forward-looking function, addressing societal issues related to the future[38]. In this context, the focus is on values and their significance for society today, as well as their role for future generations.

Faro's framework, instead, conceptualizes heritage as a dynamic *societal resource*.

'Societal,', as this subjective construction enables heritage elements to be adapted to the evolving needs of society, while remaining unbounded by traditional temporal constraints. 'Resource,' because of the emphasis on heritage's functionality across environmental, economic, and digital dimensions[39]. As the Preamble states, if "wisely used", cultural heritage can become a "resource for sustainable development and quality of life in a constantly evolving society."

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[35] D. Thérond, "The Council of Europe conventions in the field of cultural heritage and landscape: trends and prospects", in M. Guštin and T. Nypan (eds.) *Cultural heritage and legal aspects in Europe*, Koper, 2010, 27.

[36] C. Bortolotto, Will heritage save us? Intangible Cultural Heritage and the Sustainable Development Turn, Cambridge, 2025, 23.

[37] Temporality is crucial to the principles of the Faro Convention, which depart from strict chronological limits of value. While cultural production does not require past boundaries to gain value, the Convention also speaks about resources "inherited from the past" that acquire relevance in the present through identification. On such an idea of legacy of the past, interesting insights are present in G. Fairclough, "New heritage frontiers", in *Heritage and Beyond*, cit., 29 ff.

[38] B. Kirshenblatt-Gimblett talks about a form of "anticipatory heritage" in "Anticipatory Heritage," in *Journal of American Folklore*, vol. 137, no. 543, 2024.

[39] As early as 1996, J. Tunbridge and G. Ashworth discussed heritage as a resource in three distinct senses. First, in a cultural sense, they described it as "regarded [...] suitable for assembly, preservation, and transmission to future generations as inheritance." Second, in a political sense, heritage plays a role "in the creation or support of states at various spatial jurisdictional scales and the legitimation of their governments and governing ideologies." Third, it serves as an "economic resource supporting economic activities, either directly as an industry in itself or indirectly as a contributor to the locational preferences of other economic activities." See J. Tunbridge and G. Ashworth, *Dissonant Heritage: The Management of the Past as a Resource in Conflict*, Chichester, 1996, 34-35.

Upon closer inspection, the nexus between a right to development (as already established in the UN 1986 Declaration[40]) and a right to cultural heritage has progressively gained traction within a political and legal discourse positioning the individual – whether alone or collectively – at the heart of integrated participatory processes. The 2019 Report of the Special Rapporteur on the right to development substantively reinforced this interpretation, addressing the integration of these complementary rights within participatory governance structures[41]:

> "Ensuring participation for the sake of realizing the right to development involves more than merely consulting individuals and communities; it implies meaningfully placing rights holders at the centre of decision-making affecting their own economic, social, *cultural* and political development. Thus, the view that development is only an economic outcome is incomplete since it is possible for the development priorities of a population to remain unfulfilled despite economic growth. [...] Truly implementing the right to development of individuals and communities means financing the development priorities expressed by the recipients."

From this perspective, it follows that the principle of access to cultural heritage, inherent in the broader right to cultural heritage, operates as a complementary mechanism to traditional protection and safeguarding measures, fundamentally underpinning both the right of people(s) *to* and the right of people *on* the cultural production[42]. The progressive development of international legal frameworks has effectively woven together the rights of access, enjoyment, and participation in cultural heritage into a cohesive fundamental right. This consolidated entitlement encompasses a spectrum of engagement, ranging from passive consumption to active participation and even conflation with identity formation in the legal designation and definition of heritage elements, thereby establishing a comprehensive individual right to cultural engagement.

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[40] UN General Assembly resolution 41/128, 4 December 1986, Declaration on the right to development.

[41] UN Document, A/HRC/42/38. 2 July 2019. Esp. para 8 to 11.

[42] "[...] cultural rights may include a set of rights of people (or a people) to the cultural heritage, a corollary to the rights of the cultural heritage to protection and preservation generally provided for by cultural heritage texts. In other words, the traditional approach towards protecting the physical elements that represent cultural heritage expresses the right of those elements (the cultural heritage) to protection. This new generation of (cultural) rights would relate rather to the rights of people (or a people) to their cultural heritage, a right which includes the protection of that heritage but much broader issues", J. Blake, "On Defining the Cultural Heritage", cit., 77.

The point finds authoritative roots also in a 2011 Report of the independent expert in the field of cultural rights, Farida Shaheed[43]. Shaheed's analysis specifically emphasized how the concept of access transcends traditional beneficiary status, encompassing an active participatory role for individuals in determining both the contemporary scope and the future evolution of heritage recognition: (emphasis is added)

> "Individuals and communities cannot be seen as mere beneficiaries or users of cultural heritage. Access and enjoyment also imply *contributing to the identification, interpretation and development* of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes. Effective *participation in decision-making* processes relating to cultural heritage is a key element of these concepts."

However – anticipating some of the arguments presented in Section 3 – formal recognition of a right to access proves insufficient for meaningful enforcement of participatory structures. The actualization of these rights requires two additional components: (i) the establishment of concrete procedural mechanisms and consultative frameworks able to operationalize these theoretical rights; and (ii), the acknowledgment that civil society engagement will vary in intensity, interest, and participation. This brings us back to the previous point: while the formal establishment of a "third pole" in dialogue with heritage-defining authorities is one achievement, the meaningful recognition of its inherent heterogeneity is a distinct (and more complex) challenge.

In this context, the independent expert references those "concentric circles" of community involvement we discussed in Chapter 1[44]: the inner circle of creators and producers, followed by those who interact with heritage without creating it, and finally, the general public[45].

The subjective right to cultural heritage would therefore manifest as an access right to decision-making processes, structured through mechanisms that proportionally reflect individuals' and groups' degree of connection to the heritage in question. In contrast, the dominant approach in cultural heritage legislation usually follows the opposite trajectory – limiting direct access based on evaluations of the *object*'s cultural significance, relegating public engagement to a mere

[43] UN Doc., A/HRC/17/38, report submitted in accordance with Human Rights Council resolution 10/23. Quotations are from the same document.
[44] Chapter 1, Section 3.
[45] UN Doc., A/HRC/17/38, 16-17.

consumptive enjoyment. Borrowing Casini's words, this approach reflects the fundamental position that

> "Preservation necessarily takes logical precedence over enjoyment: if a heritage asset is not properly preserved and protected, there will be nothing left to enjoy or enhance. This explains why, at many sites [...] entry is restricted to small, scheduled groups of visitors, or why certain ancient books cannot be freely accessed or handled."[46]

In the discourse on immateriality, however, this automatic correlation does not consistently apply. This holds not only from an objective-ontological perspective – where the "logical precedence" of preservation is challenged by a form of access that unfolds across multiple, potentially simultaneous dimensions, as cultural heritage can be entirely intangible[47] – but also from a subjective standpoint. Indeed, if intangible dimensions illuminate the centrality of a "subjective component," this enhanced subjectivity cannot be adequately addressed through traditional identification models, where subjective engagement is restricted to enjoyment following institutional determinations of heritage accessibility. Instead, this limitation calls for a more balanced approach that directly incorporates subjective perspectives into protection and preservation processes, thereby influencing both the identification of cultural heritage and the subsequent decision on how (and if) the latter should be protected.

A final examination of the Italian legal framework provides empirical support for the theoretical framework thus outlined.

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[46] L. Casini, "Patrimonio culturale e diritti di fruizione", in *Riv. trim. dir. pub.*, no. 3, 2022, 661. Taken to the extreme by J. Carman when observing that "As any review of practices concerned with State-controlled heritage can show, the act of preservation "for the nation" frequently involves the total exclusion of individuals from contact with the resource. Here, the State acts in the same manner as private owners concerned to keep their own property exclusively to themselves" - J. Carman, "Discourses of Heritage: Issues of value and ownership", in *CAS Sofia Working Paper Series*, vol. 14, no. 4, 2024, 44.

[47] The legal relevance of (also) intangible forms of heritage can generally be derived from the broad definition of Article 2 of the Faro Convention. At a closer look, the Convention shares many points of contact with the UNESCO ICH domain. Adopted only two years after the 2003 UNESCO Convention, it was undoubtedly influenced by the latter. According to the Explanatory Report, the Faro Convention was initially envisioned as an additional protocol to existing Council of Europe conventions (i.e., the Conventions on Architectural Heritage, Granada, 1985, and Archaeological Heritage, Valletta, 1992). However, "early consultations led to the conclusion that such protocols could not provide a sufficiently broad basis to pursue these objectives. Even when taken together, these Conventions do not deal with all aspects of the cultural heritage as it is now defined, *particularly its intangible aspects*".

Article 9 of the Constitution assigns the Republic the responsibility of promoting the development of culture as a means to ensure social advancement, alongside protecting the landscape and the artistic and historical heritage of the Nation as its principal[48] (tangible) manifestations. Italian legal scholarship has consistently interpreted this provision as establishing a genuine *right to culture*, specifically in the form of access to cultural heritage (albeit only in a passive sense).

This right, "understood as a claim to receive certain benefits and enjoy specific goods," appears to fall within the category of social rights.

> "Its realization depends primarily on legislative action and, subsequently, on administrative measures designating cultural assets for public use. Such social rights [...] extend beyond the mere claim to the preservation of cultural heritage in its entirety. They align more concretely with the intellectual development of individuals through an educational process [...]."[49]

The recognition of preservation as a function corollary to the principles of development of culture and individual intellectual formation – emphasizing the existence of both a subjective right and an administrative duty to fulfill a so-called 'cultural function' – was subsequently bolstered through ordinary legislation[50]. Specifically, the functions of protection, enhancement, and enjoyment of cultural heritage were explicitly recognized within the 'essential levels of services' pertaining to civil and social rights, as outlined in Article 117(2)(m) of the

[48] Italian doctrine has gradually embraced the idea that the concept of culture in the first paragraph of Article 9 of the Constitution does not entirely overlap, in an exclusive sense, with the protection of cultural heritage and landscape of the second paragraph. See, explicitly in this sense, A. Gualdani," I beni culturali immateriali: una categoria in cerca di autonomia", in *Aedon*, no. 1, 2019. Less recent, and in more general terms, also G. Rolla, "Beni culturali e funzione sociale," in *Le Regioni*, 1987, esp. 62 ff.; G. Volpe, "Tutela del patrimonio storico-artistico nella problematica della definizione delle materie regionali", in *Riv. trim. dir. pub.*, 19715; F. Merusi, "Sub art. 9", in G. Branca (ed.) *Commentario della Costituzione*, Bologna, 1975; G. Severini, "Commento agli artt. 1 e 2", in M.A. Sandulli (ed.) *Codice dei beni culturali e del paesaggio*, Milan, 2011, esp. 20. The constitutionalization of a so-called cultural function and the instrumental relationship between the two paragraphs imply that no strict limitation is imposed on the semantic scope of 'culture' concerning the protection of the Nation's historical and artistic heritage.

[49] S. Foà, *La gestione dei beni culturali*, Turin, 2001, 146 ff. Likewise, M. Ainis, *Cultura e politica*, cit., 125, and F. Sgrò, "La duplice natura dei diritti culturali", in P. Bilancia (ed.), *Diritti culturali e nuovi modelli di sviluppo*, Naples, 2016, spec. 63.

[50] Specifically, through Decree-Law No. 146 of 20 September 2015, converted into Law No. 182 on November 12, 2015, titled "Urgent measures for the enjoyment of the Nation's historical and artistic heritage".

Constitution[51]. This created a concrete administrative responsibility, requiring public authorities to establish conditions conducive to active cultural participation. Theoretically, this framework establishes a justiciable right of access to cultural services, empowering citizens to seek legal remedies when denied such access[52]. However, the practical efficacy of this "normative pathway" warrants careful examination. Critical questions emerge, to which the subsequent analysis will seek to provide answers: can this interpretation be integrated into a broader perspective that connects the right to cultural heritage with more substantial engagement in its definition? And how can this framework's enforceability contribute to developing alternative approaches to mediate diverse positions in the legal construction of cultural heritage?

2.2. The varying intensity of interests. Reflections starting from administrative decentralization in Italy

Building on the analysis of Article 9 of the Italian Constitution in the preceding section, an additional layer of inquiry can be introduced into the institutional structures responsible for cultural heritage protection.

The constitutional mandate to promote the development of culture raises important interpretive questions, particularly regarding which entities bear this responsibility. Legal doctrine suggests that the term 'Republic' should be interpreted within a "State-ordering" framework, encompassing the diverse institutional levels through which the State's "operational pluralism"[53] is realized.

This perspective allows us to transition from the framework of the right to cultural heritage to examining how cultural interests function within the domestic law system. Indeed, interests multiply and become increasingly more complex depending on the actors who assert them, the legal effects they entail, and their scope – whether local, regional, national, or even universal. They also span diverse domains subject to varying legal hierarchies. In this respect, the placement of culture within the Constitution's fundamental principles provides essential context for

[51] Although such perspectives existed, for part of the doctrine, even prior to the translation into ordinary legialsation, as evidenced by works like R. Togni, A. Rossari, *Verso una gestione dei beni culturali come servizio pubblico*, Milan, 1978.
[52] See G. Repetto, *Il diritto alla cultura, relazione al Convegno annuale del Gruppo di Pisa*, 2016, available at www.gruppodipisa.it (accessed 26 November 2024), which underscores the "weak typification, which demands further concretization" of this provision.
[53] F. Merusi, "Significato e portata dell'art. 9 della Costituzione", in *Scritti in onore di Costantino Mortati*, Milan, 1977, vol. III, 456.

understanding how these diverse interests are balanced. This positioning, combined with analysis of centralized vs. decentralized administrative models, illuminates the critical relationship between representative institutions and the community(ies) they serve.

Ultimately, the addition of intangible dimensions to heritage *objective* assessment adds further complexity to this relationship between *subjects*, requiring careful consideration of the administrative framework in place.

A fundamental question arises in this respect: Can administrative decentralization effectively integrate perspectives beyond traditional 'State' and 'Nation' paradigm? How can it accommodate the representation of more localized or potentially divergent interests in the State's approach to cultural heritage? In conjunction with Section 3's enforceability assessment, this investigation aims to determine whether the current institutional structure provides viable pathways for questioning and potentially reformulating pre-established cultural interests.

At a theoretical level, the constitutional architecture supports a decentralized model of administrative governance, where multiple levels of government collaborate to advance social progress.

Article 5 establishes the foundation for local autonomy and comprehensive administrative decentralization, creating operational mechanisms to fulfill Article 9's promotional mandate[54].

This structure gains further significance when considered alongside Article 2's principle of social pluralism[55], positioning the Republic as "the highest social formation, enabling all individuals within the system to express their unique identities."[56] Under this vision, territorial autonomies emerge as "fundamental components of the republican order," equipped to address the diverse cultural manifestations across

[54] "The Republic, one and indivisible, recognizes and promotes local autonomy; it implements in services dependent on the State the most extensive administrative decentralization; it adapts the principles and methods of its legislation to the requirements of autonomy and decentralization."
[55] "The Republic recognizes and guarantees the inviolable rights of men and women, both as individuals and in the social formations where their personality takes place, and requires the fulfillment of the inalienable duties of political, economic and social solidarity."
[56] See F. Benvenuti, *L'ordinamento repubblicano*, Venice, 1975, 57.

different geographical areas[57]. In the cultural domain, this polycentric distribution of powers translates into a guarantee of consistency and substantive equality among different cultural expressions, while also protecting less prominent, decentralized cultural manifestations that may otherwise be overlooked by central administration[58].

Further reinforcement comes from Articles 116 and 118. Article 116(3) allows for greater autonomy in cultural heritage protection (*tutela*), notably in the context of Article 117(2)(s), which generally reserves exclusive legislative authority over cultural property to the State[59]. Article 118, on the other hand, enacts the principle of subsidiarity through coordinated protection mechanisms, i.e., "forms of agreement and coordination in the protection of cultural heritage," among different levels of government. Importantly, it extends also to private initiatives, fostering both individual and collective participation in activities considered to serve the general interest[60]. This further supports the

[57] D. Nardella, "I beni culturali tra Stato e regioni e la riforma del Titolo V della Costituzione", in *Dir. Pubbl.*, no, 2, 2002, 675: "The realm of cultural property and activities is characterized by such complexity that it requires a variety of organizational forms and participation procedures, tailored to different levels of territorial interaction with the cultural entities of civil society. The constitutional model that seeks a fair balance between the center and the periphery is the only one realistically equipped to address the many dimensions of cultural phenomena, providing protection and support to the diverse expressions that emerge from them." Translation by the author.

[58] Among Italian jurists, reference can be made to, among others, M. Ainis, *Cultura e politica. Il modello costituzionale*, cit., spec. 220 ff, but the theme of decentralization as an instrument of "cultural democratization" fostered by a so-called "decolonization of mentalities" is also felt in the neighboring French system, beginning with the report written by H. Giordan, *Démocratie culturelle et droit à la différence: rapport présenté à Jack Lang, ministre de la Culture*, Paris, 1982.

[59] Article 116(3): "Additional special forms and conditions of autonomy, concerning the matters referred to [...] second paragraph of the Article 117 in subparagraphs (l), limited to the organization of justice of the peace, (n) and (s), may be attributed to other regions, by law of the State, on the initiative of the region concerned, after consulting the local authorities, in compliance with the principles referred to in Article 119. The law shall be approved by the Chambers by an absolute majority of its members, on the basis of agreement between the State and the Region concerned."

[60] This constitutional foundation finds reaffirmation at the ordinary level through Article 5(f) of the Code of the Third Sector (Legislative Decree No. 117 of 3 July 2017) which explicitly classifies cultural property protection – including the process of legal recognition – as an activity of general interest. But this is evident from its very conceptual foundation – an administrative function encompassing various activities aimed at serving a public utility, i.e., the identification and conservation of the heritage of the Nation.

argument for a constitutional impetus to normatively advance mechanisms that encourage private participation[61].

Under this light, Article 9's broad promotional objective would indeed suggest a specific interpretation of the concept of protection. The necessity for collaboration among various territorial autonomies in fostering the development of culture contradicts the narrow interpretation of this function as merely a "'safeguard clause' favoring the State in the allocation of responsibilities for protecting the *Nation*'s historical and artistic heritage"[62] [emphasis added]. Instead, this framework supports expanded institutional participation, enabling various levels of government *representing* smaller territories to engage meaningfully in heritage definition processes.

This position is also widely accepted at the judicial level, as the Council of State recognized that "In the system of the Code of Cultural and Landscape Heritage, the role of territorial entities (regions, municipalities, metropolitan cities, and provinces) is defined by their participation, albeit with varying degrees of obligation, in the public duties concerning cultural heritage."[63]

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[61] T. E. Frosini describes the relationship between public authority and social groups as based on the principle of integration, thereby achieving a fundamental *unity* between those who govern and those who are governed. See Id., "Sussidiarietà (principio di) (diritto costituzionale)", in *Enc. Dir.*, vol. II, Milan, 2008, esp. 1138. More recently, S. Mabellini observing that "in light of the principle of subsidiarity [...] it can hardly be convincingly argued that public ownership is justified in itself, regardless of its concrete and current benefit to the community, nor that participatory management models for public assets can be arbitrarily disregarded, ignoring the involvement of the relevant social communities." In S. Mabellini, "La proprietà conformata dei beni culturali come archetipo per lo status dei "beni comuni"?, in *Rivista di diritti comparati*, Special Issue II, 2020, 30.

[62] In these terms F. S. Marini, *Lo statuto costituzionale del beni culturali*, Milan, 2002, 246. The Constitutional court also emphasized, as early as 2000, that "constitutional 'protection' constitutes the task of the entire apparatus of the Republic, in its various articulations and in the first place of the State," see ruling no. 378 of 27 July 2000. The thesis was then reiterated in 2004, acknowledging that the pursuit of the development of culture, which corresponds to purposes of general interest, "is the responsibility of the Republic in all its articulations, even beyond the division of competencies by subject matter between the State and the Regions under Article 117 of the Constitution" (ruling no. 307/2004) and that the effectiveness of protection relies on "the extent to which all institutional entities to which the Constitution assigns legislative and administrative powers are required to participate in balancing the various values at play" (ruling no. 196/2004). Similarly, the concept of culture in the usual declinations of art and science has been recognized as a value "that holds significance regardless of strictly defined areas of competence" (ruling no. 31/2005).

[63] Council of State, Section VI, 7 May 2015, no. 2302.

The key question, then, is how these participatory mechanisms function and how they relate to the heightened subjective contexts highlighted by the immaterial dimensions of cultural property previously identified.

In this regard, it is important to acknowledge the pivotal role played by regions in addressing and filling national "regulatory gaps" related to the integration of intangible dimensions[64].

Besides constitutional mandates, regions can identify and support so-called 'minor' or 'alternative' cultural property – those deeply connected to local identities but overlooked in conventional processes. In Section 3, we will explore in practical terms how this decentralized administrative setting facilitates closer engagement between governing bodies and civil society, particularly in how regions leverage their legislative and supportive functions to emphasize aspects of immateriality.

But the implications of a decentralized setting extend beyond regional legislative authority. While regions can identify 'minor' assets and establish "different and additional safeguards"[65], it is also crucial to examine the role of other local authorities, especially at the municipal level, and their duties within programmatic, rather than legislative, competencies. Specifically, we are interested in determining whether organizational and geographic proximity leads to meaningful policy activation. Does this proximity facilitate the development of alternative protection tools that define cultural interest in a more localized and context-sensitive manner, enriched by the diverse subjective perspectives that emerge through close interaction with the administrative sector?

Ultimately, the analysis requires a complementary examination of civic participation opportunities and the inclusion of diverse stakeholder perspectives.

The Constitutional court has recently articulated an expanded model of 'shared administration,'[66] offering a comprehensive framework for analysis. This model originates from Article 118(4) of the Constitution, previously identified as a key foundation for private participation across all levels of administration. Article 118 explicitly endorses the

[64] For a detailed exploration of this topic, we refer to Chapter 1 of this study, Section 4.1.
[65] Constitutional court, ruling no. 194/2013, further examined in the following section.
[66] For further exploration of the topic, we refer to G. Arena's works: "Introduzione all'amministrazione condivisa", in *Studi parlamentari e di politica costituzionale*, nos. 117-118, 1997, 29-65; and *I custodi della bellezza. Prendersi cura dei beni comuni. Un patto per l'Italia fra cittadini e istituzioni*, Milan, 2020.

"autonomous initiative of citizens, whether individually or collectively, in pursuing activities of general interest" – a formula under which the protection and identification of cultural property have already been acknowledged to fall.

In ruling no. 131 of 2020, the Court further emphasized that:

> "In the aforementioned constitutional provision, emphasizing the inherent social nature of humanity, the intention was to move beyond the idea that only the actions of the public system are inherently suited to carrying out activities of general interest. Instead, it was recognized that such activities can also be effectively pursued through the "autonomous initiative of citizens," which, in continuity with expressions of a cohesive society, remains deeply rooted in the communal fabric of our country." [67]

However, significant challenges persist in this respect.

According to established legal doctrine, both the initial identification of culturally significant elements and the subsequent implementation of protective measures fall within the competence of bodies representing a *national* community, to which heritage's identity value is ascribed[68]. This, as noted, creates a notable disconnect between the entity that manifests the cultural interest, and the entity charged with its preservation.

So far, however, debates on the scope of such 'national interest' have centered on external boundaries rather than internal composition issues. Specifically, the interpretative focus has been on determining the extent to which a nation's cultural heritage may encompass artifacts linked to so-called *foreign* civilizations[69].

A second argument in this context focuses on the nature of the administrative act. The longstanding debate over the latter's purely declaratory or constitutive function has shaped, over time, doctrinal and jurisprudential stances that restrict private individuals (whether acting

[67] Constitutional court, ruling no. 131 of 26 June 2020.

[68] We refer to R. Cavallo Perin, "Il diritto al bene culturale", cit., for further comments on the overlapping concepts of "Nation," "identity," and "sovereignty." At the jurisprudential level, this point was recently reaffirmed in the civil judgment of the Florence Court, Section II, 20 April 2023, no. 1207. The decision (discussed in Chapter 2 in relation to the contemporary understanding of a so-called "right to the image" held by cultural property) states that the public interest safeguarded by Article 9 of the Constitution "is associated to the collective identity of citizens. This identity arises from their shared recognition of belonging to the same nation, reinforced by the Nation's artistic and cultural heritage." Translation by the author.

[69] See T.A.R. Lazio, Rome, Section II quater, ruling of 22 March 2011, no. 2540.

alone or collectively) from actively participating in related heritage processes. It is glaring, indeed, that when such acts are regarded as merely acknowledging preexisting and inherent qualities of the asset, minimal space can be afforded for different subjective positions. That is, "the restrictions on private cultural property are *intrinsic* to the assets themselves, which essentially come into existence *already constrained* in terms of their potential use, rendering the issue of compensation irrelevant."[70]

The bifurcation between identification and protection phases on one hand, and management and valorization on the other also warrants careful scrutiny. As the heritage definition process is a technical-discretionary procedure – albeit within the boundaries of proportionality and reasonableness principles – "the balancing of interests is required [only] in the subsequent phase, where specific measures for the protection and preservation of the identified assets are determined."[71] But precisely because of Italy's decentralized administrative structure, this protective function remains distinct, if not entirely polarized, from other property-related responsibilities, which instead fall under the shared competence of smaller public agencies. This structural separation, whereby additional interests pertaining to the property are considered only *after* its formal recognition as cultural heritage, raises substantial concerns regarding administrative efficiency, transparency, and effectiveness. The "delayed" consideration of stakeholder interests and the fragmentation of administrative responsibilities create a procedural framework that may inadequately serve both preservation objectives and the broader public interest in cultural heritage management.

As a matter of fact, even the most recent advances reflected in the 2025 Guidelines for Administrative and Technical-Scientific Action on Demo-Ethno-Anthropological and Intangible Cultural Heritage – which specifically recommend that administrative officials give greater consideration to dialogue with the communities involved during administrative constraint procedures – ultimately remain rooted in a perspective that adheres to the traditional top-down framework. Here, the expert continues to occupy a central role, tasked with illuminating the intangible dimension through her technical expertise. Although the

[70] Which reflects the well-established theory of the conformative function of cultural constraints. The reference is taken from T.A.R. Veneto, Venezia, Section II, ruling of 19 January 2023, no, 84. The point introduces another dichotomy – one between the public sphere, representing cultural interest, and the private sphere, where individual interests for a physically defined object conflict. This issue will be revisited in Chapter 4.
[71] Again T.A.R. Veneto, Venezia, no. 84/2023 cited above.

necessity of *consultation* is formally acknowledged (a term that already emerged in the previous section) and supported by participatory approaches rooted in ethnographic methodology[72], genuine participation in decision-making remains largely unrealized. It continues to fall short of a truly nuanced and negotiated process. In practice, it is often reduced to contributing descriptive elements about local and memorial processes within the *technical*, expert's report attached to the administrative act, with actual participatory measures deferred to the phase following the constraint. Mediation remains firmly within the bounds of technical discretion and, in practice, takes the form of what the guidelines describe as "the desirable possibility of intervening in phases *following* the imposition of constraints, through the development of specific memoranda of understanding, agreements, or conventions negotiated with the interested parties, aimed at optimizing and streamlining administrative processes in order to reconcile the protection of the property with the safeguarding of the practices and uses (including maintenance) that ensure its vitality."

On these bases, the key question is whether mechanisms exist that enable specific positions to enter those very proceedings that authoritatively define what qualifies as cultural-national heritage. To address this, we must first review some general principles of Italian administrative law, with a more detailed analysis of their scope reserved for the following section.

This involves examining Chapter III of Law 241/1990 on administrative procedure[73] (devoted to participation) and its compatibility with the provisions of Legislative Decree 42/2004 (the 'Code') on cultural heritage declaration and verification processes.

From various doctrinal perspectives, the administrative act that recognizes cultural qualification is regarded as predominantly *unilateral*, the public administration being "an independent entity within society,

[72] The guidelines specifically highlight that field research – conducted through in-depth qualitative interviews, participant observation, and the sharing of everyday life with members of communities of practice, with particular attention to culturally intimate dimensions, meanings, logics, and local perspectives – constitutes the methodological foundation of ethno-anthropological disciplines. This approach is presented as the primary tool for identifying and interpreting the intangible, relational, and intersubjective elements (i.e., collective memories and identity constructions) that allow for the recognition of ethno-anthropological cultural significance in cultural assets.

[73] Law 7 August 1990, no. 241, titled *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi* (New rules on administrative procedure and the right of access to administrative documents).

self-legitimized in its capacity to unilaterally evaluate interests"[74]. Within this framework, private parties' cognitive contributions in how they represent factual circumstances[75] is allowed only in specific circumstances. In the case of cultural property, this applies only to declaration proceedings under Article 13 of the Code, which determine the existence of a cultural interest in private goods[76]. Indeed, as recalled above, the legal framework governing cultural heritage in Italy operates within a dynamic between public-national interest and private property rights, with administrative efforts to protect cultural value navigating this tension.

From this it follows that the general regulation governing participation in administrative proceedings (pursuant to Articles 7 and following of Law 241/1990[77]) is limited to specific circumstances, explicitly targeting only "the owner, possessor, or holder in any capacity of the property that is the subject of the proceedings" (Article 14 of the Code)[78]. In essence, it addresses situations where the tension lies between private property rights and their "social function," which limits their full exercise[79].

A critical interpretive challenge then emerges. Does the term "holder in any capacity" allow enough flexibility to include substantive cultural interests? As discussed in previous chapters, the immaterial dimensions of cultural property would suggest a model of "nuanced" ownership – distinct from the civil law notion of exclusive availability and use – where limitations are justified by the recognition of public cultural value.

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[74] R. Villata, G. Sala, "Procedimento amministrativo" (*ad vocem*), in *Dig. disc. pubbl.*, vol. XI, Turin, 1996, 602.

[75] P. Marzaro Gamba, "La (misura della) partecipazione nei procedimenti di tutela del patrimonio culturale", in *Rivista Giuridica Urbanistica*, 2008, no. 1-2, 40. On the collaborative contribution of participation in enriching the informational base available to the public authority, see also, less recently, S. Cognetti, *La tutela delle situazioni soggettive tra procedimento e processo*, Naples, 1987.

[76] The public interest that justifies the sacrifice imposed on the private owner's rights is typically characterized as "particularly important" or "exceptional" by Article 10.

[77] Stipulating that the initiation of the procedure must be communicated to individuals directly affected by the final administrative measure, those legally obligated to participate, and any identified or easily identifiable individuals, other than its direct recipients, who may be adversely affected by the measure.

[78] Also reiterated by administrative jurisprudence even before the introduction of the Code, under the former Law no. 1089/1939: see Council of State, Section VI, 4 April 2003, no. 1751; T.A.R. Tuscany, Florence, Section I, 27 November 2006, no. 6030; T.A.R. Campania Salerno, Section I, 26 March 2012, no. 562. An essential reference in doctrine is P. Marzaro Gamba, cit., esp. 28 ff.

[79] See extensively Chapter 2, Section 3.2 of this study.

This idea is reinforced at the administrative level by the 2025 Guidelines for Administrative and Technical-Scientific Action on Demo-Ethno-Anthropological and Intangible Cultural Heritage (mentioned in Chapter 1) which explicitly recommend that, during the course of administrative investigations, an ethnographic survey be conducted to identify and document the practices, memory processes, and values of the communities involved. Notably, the guidelines emphasize that the subsequent initiation of such procedures should also include representatives of diffuse interests (such as associations or committees) who may not necessarily coincide with the broader heritage community consulted during the preliminary investigative phase to determine the cultural significance of the asset in question. In this sense, one can discern a tentative shift away from the conventional categories of ownership.

However, a recent ruling by the Council of State[80] concerning a community of artists and workers residing in a small, abandoned Ligurian village sheds partial light on this issue, revealing the seemingly insurmountable boundaries of the question. While a full account of the case is beyond the scope of this chapter, it is important to note that the plaintiff artists emphasized their long-term engagement with the site – an involvement that shaped its character and contributed to its preservation and cultural enrichment. Known as the *Villaggio internazionale degli Artisti di Bussana* (International Village of Artists of Bussana) the site was officially recognized as a cultural public asset in 2000.

The Court's reasoning, however, focused on a different conflict regarding legitimate participation in the subsequent valorization program – a phase that, as we know, occurs only after the cultural value has been officially identified. The state's ownership of the village was uncontested, and the plaintiffs' argument – that long-term engagement could justify ownership through prescription – was rejected. The core issue, here, lies more in administrative law instruments that facilitate deeper discussions on the (public) value of cultural property, rather than in civil law rules governing modes of acquiring ownership. Such a deep, sustained, and localized connection to the site does not seem to fit within any legal framework granting access to decision-making or stakeholder negotiations.

The public nature of the property further complicates matters. In fact, a persistent issue in current legal frameworks is that the obligation to

[80] Council of State, Section VII, ruling of 17 June 2024, no. 5408.

disclose information and allow participation in administrative procedures typically applies only to private property, while public property is often overlooked, with only the broad *national* community interest being recognized. In such cases – as the one at hand – conflicting interests may arise during verification procedures, yet they remain often unresolved due to the absence of corresponding communication requirements. In these instances, cultural designation serves merely a declaratory function, offering no procedural mechanism for direct local engagement. Yet it is clear that the community of artists, in the case at hand, cannot be fully identified with the broader national community for whom the property's enjoyment is intended. Still, they have no meaningful means of participating in the process.

Moreover, limited stakeholder participation also restricts the scope of judicial review. Currently, given the technical nature of administrative decisions, review focuses narrowly on standard issues such as flawed reasoning and factual errors. Allowing broader stakeholder involvement during the initial cultural assessment phase would diversify factual inputs and perspectives, enriching the basis for potential judicial scrutiny. While the State would retain its evaluative role, it would no longer exercise exclusive control over determining which facts are considered relevant[81]. Introducing more comprehensive evaluation criteria would clearly strengthen the overall process of administrative evaluation. This expanded framework, moreover, would enhance the quality of discretionary decision-making, promote meaningful dialogue between stakeholders, ensure greater transparency, and provide a more robust foundation for potential judicial review.

In the next steps of this study, we will further examine these issues, exploring the potential of moving heritage-related negotiations outside the conventional authoritative recognition. We will also reflect on the broader implications of the public/private and State/national civil community dichotomies, envisioning "a new legal framework where the traditional state-citizen relationship is supplemented and interwoven with a more complex network of interactions, involving a broader range of actors and relying less on oppositional dynamics"[82].

[81] See in this regard C. Videtta, "La partecipazione nei procedimenti caratterizzati da discrezionalità tecnica", in A. Crosetti, F. Fracchia (eds.), *Procedimento amministrativo e partecipazione*, Milan, 2002, esp. 204. See also the monoraphic work of De Pretis, *Valutazione amministrativa e discrezionalità tecnica,* Padova, 1995, observing at 411 that "the freedom from external review is primarily aimed at ensuring that it selects not just any reliable option, but the one that, based on the values presented to it, appears to be the optimal solution."
[82] S. Cassese, "L'arena pubblica", in *Riv. trim. dir. pubbl.*, no. 3, 2001, 608.

3. The level of enforceability

Having outlined the regulatory "footholds" that ground this analysis, we now turn to examining their normative weight. This entails assessing the relevant standard through two identified parameters: first, the range of actors involved in decision-making – that is, their diversity and depth of engagement, potentially broadening approaches to heritage definition; and second, the legal prerogatives these actors can exercise in heritage-related matters.

This section builds on the observation[83] that civil engagement in cultural heritage processes is a foundational element across nearly all regulatory frameworks[84]. The critical issue, however, is drawing a sharper and more conscious boundary between a "hollow" model, where the parameters of interaction are fixed in a formalized and predetermined process, and a "full," or better, "*filled*" model enriched with the significance that communities themselves seek to contribute.

This distinction invites analysis along both vertical and horizontal dimensions.

Vertically, the "fullness" of participation can be assessed through degrees of civic involvement, notably drawing on Arnstein's "ladder of citizen participation."[85] In Arnstein's model, participation progresses from stages of so-called manipulation toward "citizen power," based on the idea that, at each level of involvement, a shifting balance of power influences how meaning is constructed and implemented.

Horizontally, the analysis considers how participation is distributed across different functions and legal orders at play[86]. As previously noted, in the Italian context civic participation is largely restricted to the enhancement and management phases, confining participants – already framed within a monolithic national identity – to operate within

[83] Authoritatively supported: just consider S. Watson, E. Waterton, cit; M. Turnpenny, "Cultural heritage, an ill-defined concept? A call for joined-up policy, in *International Journal of Heritage Studies*, vol. 10, no. 3, 2004. Also, J. C. Wells and Lixinski, cit.

[84] As ironically put, "the idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you," as the principle informs the very idea of democracy. S. R. Arnstein, "A Ladder of Citizen Participation", in *Journal of the American Institute of Planners*, vol. 35, no. 4, 1969.

[85] S. R. Arnstein, *ibid*., then taken up and revised by D. Wilcox, *The guide to effective participation*, Brighton, 1994.

[86] Central in this sense is the contribution of Francioni, "Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law", cit.

established boundaries, with little or no flexibility to influence the definition of heritage. By contrast, this research seeks to move beyond a singular, predefined process toward embracing a plurality of regulatory sources capable of fostering alternative approaches to the legal recognition of cultural value.

3.1. The right to cultural heritage as a subjective entitlement. Navigating the tension between universality and specificity

In Section 2.1, the right to cultural heritage was introduced as a theoretical framework for establishing legal grounds to engage with public authorities in heritage definition processes.

Clearly, when discussing fundamental rights, the corresponding subjective position must apply to all individuals – a right to cultural heritage must inherently be universal[87]. Yet it holds true, as independent expert Shaheed highlights[88], that recognizing a right is one thing, ensuring its enforceability is another. While universality is acknowledged, it risks becoming a dead letter unless accompanied by mechanisms that address differing levels of cultural engagement – a challenge rendered even more complex when the immaterial dimensions of heritage are considered. The evolution of this principle frequently encounters a critical hurdle: converting the obligation inherent in a programmatic duty to guarantee the right to heritage (articulated differently across regulatory frameworks) into an actionable right to positive intervention – one that becomes justiciable upon infringement.

Ultimately, the issue is not really (or not solely) about which individuals are "made visible" by the existence of a right to cultural heritage – the answer is, in principle, everyone. Rather, it concerns whether, once a specific immaterial dimension of the object is acknowledged, this recognition can establish specific legal positions that can be exercised *through* the fundamental right to cultural heritage, effectively creating subjective entitlements that grant access to heritage definition processes.

From this perspective, the most compelling area of investigation lies in the first dimension of immateriality identified, the most recognized and well-established conceptualization of an intangible aspect in cultural heritage – UNESCO ICH. In this respect, we should consider whether the

[87] Instead, challenges may arise concerning their design in terms of collective exercisability, as will be discussed.
[88] See previous Section 2.1.

recognition of intangible cultural heritage has facilitated the creation of enforceable subjective legal positions concerning a right to its safeguarding.

Indeed, the UNESCO 2003 Convention is particularly noteworthy for the significant progress achieved in explicitly linking the safeguarding of heritage to the sphere of human rights[89]. As previously discussed, this advancement occurred within a context where establishing a right to cultural *heritage* based on the international recognition of the human right to participate in cultural *life* was anything but straightforward.

Beyond formal recognition, the connection with human rights is embedded in the very conceptualization of ICH, as communities, groups, and individuals are granted the *subjective authority* to assign value to cultural expressions that reflect their identity. Through this process, they simultaneously affirm their existence and advance the principles of human dignity and cultural diversity – key priorities on the international political agenda when the 2003 Convention entered into force[90]. Upon closer examination, the legal safeguarding of ICH inherently relies on the preservation of biocultural diversity, with cultural variety serving as an essential component of this broader diversity framework[91]. Conversely, it was argued, "in regions where assimilationist policies dominate – aiming to suppress community diversity in favor of a unified (often contrived) *national* identity – there is no space for intangible cultural heritage."[92]

Hence, safeguarding ICH *is* a "human rights issue and objective, founded on the right to participate in cultural life and the fundamental human

[89] As enshrined in the first paragraph of the Preamble, which references "existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966".

[90] Notably, the formal connection between human rights and the protection of cultural heritage under UNESCO's auspices was first established in 2001, precisely with the UNESCO Universal Declaration on Cultural Diversity.

[91] The UN Convention on Biological Diversity, signed by 150 government leaders at the 1992 Rio Earth Summit, acknowledges in its first recital "the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, *cultural*, recreational and aesthetic values of biological diversity and its components."

[92] P. Petrillo, "La protezione giuridica del patrimonio culturale immateriale e i diritti di proprietà intellettuale. Profili comparati", in *Il Diritto Industriale*, no. 2, 2022.

rights imperative of protecting human dignity"[93]. However, this principle fails to establish an enforceable subjective right that guarantees individuals (or groups) a concrete entitlement to participate in heritage definitional processes – processes that, in any case, should be ensured by the preliminary conceptualization of ICH in regulatory frameworks. The core issue, once again, lies at the porous boundary between access – which is ensured by the State's obligation to respect – and direct participation in heritage matters, which requires procedural frameworks that facilitate engagement and confer varying degrees of entitlement.

The complexity of unraveling the boundaries of the 'communities, groups, and individuals' formula was already highlighted in Chapter 1. This fundamental challenge persists, we said, because the authority to transform abstract principles of subjectivity into legally operative terms remains with the State. Yet, in a context where heritage relies, by definition, in identification and bottom-up recognition driven by principles of participation and consensus among non-State actors, a regulatory and procedural challenge arises. Alongside the emergence of prerogatives for communities and individuals, States also bear positive obligations to involve them in decision-making, consistent with the canonical tripartition of duties: to respect, fulfill, and promote.

If the 2003 Convention and Operational Directives only partially fulfill this task[94], even a cursory examination of General Comment No. 21 on Article 15(1)(a) of the Covenant on Economic, Social and Cultural Rights reveals that among the "necessary conditions for the full realization of the right of every individual to take part in cultural life on the basis of equality and non-discrimination" only a principle of *acceptability* is mentioned (sub-paragraph c). That is to say, "laws, policies, strategies, programs, and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities concerned. In this regard, *consultations* should be held with affected individuals and

[93] J. Blake, "Participation in Safeguarding Intangible Cultural Heritage Viewed as a Human Rights Imperative", cit., 318. In this regard also T. Ireland, J. Schofield, "The Ethics of Cultural Heritage. In The Ethics of Cultural Heritage", in Id. (eds.), E*thical Archaeologies: The Politics of Social Justice*, vol 4, New York, 2015. In the same vein also F. Lenzerini, "Intangible Cultural Heritage: The Living Culture of Peoples" cit., 118: " [...] as long as ICH (as an element of cultural identity) represents an essential condition for the realization of human rights, the obligation to protect the latter inherently extends to ICH safeguarding, for the reason that, if this heritage is not properly safeguarded, the human rights the realization of which depends on ICH would lack effectiveness."

[94] Refer to the discussion made in Chapter 1.

communities to ensure that measures to protect cultural diversity are acceptable to them." It is clear, however, that acceptability functions as an ex-post control mechanism, achieved through consultation, and applies to activities that do not inherently involve participation in their development.

The limited enforceability of the right to cultural heritage, beyond the recognition of a general right of access, is also evident in judicial interpretation. Within the European regional framework[95], the European Court of Human Rights has made clear that the consolidation of a "European and international consensus[96] on the need to protect the right of access to cultural heritage" does not automatically imply the validation of a *subjective* right to heritage[97].

In a 2010 ruling, the Court affirmed that a right of access to cultural heritage – in that case, access to a "European literary heritage"[98] – was conceivable and could outweigh an individual state's *marge d'appréciation* over cultural, historical, and religious specificities. In other words, the Court recognized a direct effect in granting *unhindered* access to cultural heritage, in accordance with principles of equality and non-discrimination[99]. However, it found no clear tendency in either the international legal order or among Member States toward recognizing cultural heritage as a subjective, enforceable right. At a closer look, even from a regulatory perspective, the Faro Convention itself aligns with such 'tendency, 'as it acknowledges a right to cultural heritage but lacks direct enforceability, hence cannot establish a genuine subjective right without additional normative support.

[95] Indeed, the rulings of the Inter-American Court of Human Rights exhibit specific differences in the conceptualization of the right of access and the right to cultural heritage which remain outside the scope of this research.
[96] ECHR doctrine of grounding interpretive issues on the "practice of European States reflecting their common values", as well as on the European and international legal order, as outlined in *Demir and Bayakara v. Turkey*, No. 34503/97, ECHR § 85, 12 November 2009.
[97] *Ahunbay and others v. Turkey*, No. 6080/06, para 25, 29 January 2019.
[98] *Akdaş v. Turkey*, No. 41056/04, para 30, 16 February 2010. The case involved a Turkish-language translation of the erotic novel *Les onze mille verges* by French author Guillaume Apollinaire, which was claimed to violate moral norms specific to the national context.
[99] "[...] it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture", in these terms *Beyeler v. Italy*, Application No. 33202/96.

But the ECtHR took it a step further. Reinforcing a well-established stance[100], the Court explicitly tied the "need to protect the right of access to cultural heritage" to *specific* situations rather than recognizing a general right of access to heritage *as such*. In particular, it consistently referred to cases concerning "the right of minorities to freely enjoy their culture, as well as the right of indigenous peoples to preserve, control, and protect their cultural heritage." Thus, the Court overlaid the right of access to cultural heritage onto issues of identity and minority rights – a stance already taken when affirming that, although it has at times recognized ethnic identity as an aspect of Article 8 rights, it has never held that Article 8 creates a general right to the protection of cultural heritage[101].

And in fact, the connection between the right to cultural heritage and the identity of ethnic minorities and Indigenous peoples is also explicitly addressed within the broader international legal order: Article 27 of the International Covenant on Civil and Political Rights[102] provides that a right to "enjoy culture" should be guaranteed "in those States in which ethnic, religious or linguistic minorities exist", for "persons belonging to such minorities"; Article 8 of the UN Declaration on the Rights of Indigenous People[103] establishes the right of Indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their culture, whereas Article 11 recognizes the right to practice and revitalize cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures; ultimately, Article 31 recognizes their right to maintain, control, protect, and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

From these observations, several conclusions can be drawn.

First, concerning the research question of which subjects might benefit from the enforcement of a right to cultural heritage, ethnic minorities and Indigenous peoples are undoubtedly the primary and most immediate response. This is completely logical when considering the context and prerogatives of the international framework from which the 2003

[100] To name a few cases, *Chapman v. the United Kingdom*, no. 27238/95, § 76 and 93-96, 18 January 2001, also revisited below; *Yordanova and others v. Bulgaria*, No. 25446/06, 24 February 2012; *Winterstein and others v. France*, No. 27013/07, 17 October 2013.
[101] Syllogos Ton Athinaion v. the United Kingdom, No 48259/15, 31 May 2016.
[102] UN General Assembly Resolution 2200A (XXI), New York, 16 December 1966.
[103] UN General Assembly Resolution A/RES/61/29, New York, 13 September 2007.

UNESCO Convention emerged[104]. In historical and political contexts where the social dialogue between the state and Indigenous or ethnic minorities is an ongoing issue, recognizing a cultural practice as ICH can serve as a starting point for bringing up demands about the community's bargaining power in relation to the state authority[105]. This, in turn, could expand the dynamics at play in the specific context of heritage processes.

It should be noted, however, that during the drafting of the 2015 Ethical Principles for Safeguarding Intangible Cultural Heritage[106], the inclusion of specific references to minorities was debated within the Intergovernmental Committee. Ultimately, the decision was made to remove such references, particularly to Indigenous peoples, to maintain consistency with the Convention's broader terminology of 'communities, groups, and individuals.' This suggests that focusing on identity-related issues overlooks the more complex question of "concentric circles" previously discussed, which would allow other actors to assert a right to heritage through different forms of engagement[107].

This underscores why enforcing a subjective right to participate in heritage processes, rooted in the right to cultural heritage, continues to be so challenging[108]. Claims for recognition of intangible cultural heritage often intersect with identity politics, making it challenging to establish an actionable, subjective right – particularly in its collective form[109]. In

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[104] See extensively Chapter 1 of this research and bibliographical references proposed therein.

[105] See, for instance, besides the case of *Chapman v. the United Kingdom* mentioned above, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, also examined in C. Hance, "The judicialization of the tensions between the cultural identity of states and intangible cultural heritage", in M. Cornu et al., *Intangible Cultural Heritage Under National and International Law. Going Beyond the 2003 UNESCO Convention*, cit.), 171-172.

[106] UNESCO Doc, ITH/15/10.COM/Decisions, of 4 December 2015, 76–78, Decision 10.COM 15.a.

[107] On this topic, extensively, A. Vaivade, "ICH as a source of identity: international law and deontology", in C. Waelde, C. Cummings, M. Pavis and H. Enright (eds.), *Research Handbook on Contemporary Intangible Cultural Heritage. Law and Heritage*, Cheltenham, UK and Northampton, 2018, esp. 165 ff.

[108] The OSMOSE research, already referenced in Chapter 1 of this study (M. Cornu et al., *Intangible Cultural Heritage*, cit.) specifically emphasized the general lack of national legal provisions recognizing the safeguarding of ICH as a human right, based on a survey conducted across several countries.

[109] On the antinomy between individual and groups rights as a preliminary introduction to the reasons for the elusiveness and underdeveloped status of cultural rights in international law, F. Francioni, "Culture, Heritage, and Human Rights: An Introduction", in F. Francioni, M. Scheninin (eds.), *Cultural human rights*, Leiden, 2008, 4. In the context of ICH see,

many Western legal systems, cultural claims by specific groups are often viewed with suspicion, seen as precursors to demands for more serious political autonomy[110]. On another note, it has also been observed that the very "legal discourse about rights immediately places social negotiation within a straitjacket"[111], as the focus centers on a binary question of whether one possesses a particular right or not, framed unilaterally and often confrontationally, rather than fostering a negotiated or collaborative approach.

To this should be added that the association between heritage and identity, particularly political existence for ethnic and social minorities, is also complicated by the fluid, evolving nature of 'community' itself. Falling outside conventional categories and established legal frameworks, this concept struggles to gain enforceable standing in asserting any right to define heritage value. On what basis would this relationship with heritage be recognized, and under what legal framing?

Hence the conclusion that, while the recognition of an intangible dimension of heritage may shed light on the subjectivity of its very conceptualization, as well as on its tight connection with human rights issues, assuming that subjective entitlements follow from this recognition clashes with existing legal systems (both international and domestic) that are not designed to support such claims. The interplay between the universal right to participate in cultural life – which imply a corresponding right to cultural heritage – and the intangible nature of heritage – which invites subjective interpretations – creates an unresolved tension between universality and specificity that existing legal mechanisms and categories fail to address.

At a closer look, however, even in the context of identity claims of minorities, where the assertion of the right to heritage is embedded, a clear distinction arise between access to the public value of heritage – which is to be protected by public institutions and ultimately viewed

specifically, J. Blake, "Further reflections on community involvement in safeguarding intangible cultural heritage", in N. Akagawa, L. Smith (eds.), *Safeguarding Intangible Heritage. Practices and Politics*, 2018, esp. 27.

[110] See R. Albro, J. Bauer, "Introduction", in Id. (ed.), *Human Rights Dialogue (1994–2005)*, Series 2 no. 12 (Spring 2005), 2-3. L. Lixinski observes in this regard that "groups, far more than individuals, can pose an actual challenge to state sovereignty. [...] their position vis-à-vis states is usually assumed to be one of opposition, rather than cooperation, which creates difficulties in even admitting a conversation about community rights in international law.", in Id., "A Third Way of Thinking About Cultural Property", cit., 602.

[111] I. Hodder, "Cultural Heritage Rights: From Ownership and Descent to Justice and Well-Being", in *Anthropological Quarterly*, vol. 83, no. 4, 2010, 865.

through a conservative lens focused on preserving its current, purported "shared" state – and the right claimed, seen as a challenge to this perspective. The latter is typically framed within a broader vision that emphasizes the functional dimension of heritage, hence a particular interpretation of it. Indeed, previous chapters have shown that the 'use' dimension of heritage – often overlooked – is central to its immaterial dimensions. In many cases, asserting a right to heritage is not merely about requesting access, but rather about securing the ability to engage with it in a meaningful way, reflecting its subjective significance, identity-forming role, and, ultimately, its functional contribution to development and quality of life.

The case of *Chapman v. the United Kingdom*[112] illustrates this tension under the framework of Article 8 of the ECHR[113]. The conflict centered on the right to maintain a traditional way of life – an essential component of the cultural identity of an ethnic minority, in this case, a Roma claimant – versus the state's legitimate interference in denying this right by invoking the exception of "necessity in a democratic society" due to the land's designation as an environmentally protected area. At its core, the case involved a tension between the use of the site for caravan settlement and the "rights of the local community to environmental protection," with the Court emphasizing that the former would have "significantly diminished the peaceful rural character" of an area situated within both a green belt and a landscape of significant value, which was deemed to serve the *broader* public interest.

In upholding the exception, the case highlights a core issue central to this study: the conceptualization of cultural value is heavily influenced by the asset's prior legal classification (here, a landscape, though the parallel with cultural heritage is evident). When broader immaterial considerations – such as use, perception, and function – are taken into account, it becomes clear that multiple stakeholders and interpretations are involved. Reducing the right to heritage to mere access and conservation policies, focused solely on preserving a fixed status, oversimplifies the aspects connected to how heritage is perceived, used, and reinterpreted.

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[112] See note no. 98.

[113] Concerning the right of everyone to respect for his private and family life, his home and his correspondence. And the exception of interference by a public authority with its exercise "in accordance with the law and [when] is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This observation – we can add in this context – applies not only to ethnic and indigenous minorities but also to the "local community" itself, a concept referenced in the text that remains too broad and cannot be equated outright with a public interest that the State so readily claims to safeguard.

It becomes evident, therefore, that the right to cultural heritage has limited effectiveness in establishing a claimable title within heritage definition processes, as shown by the absence of administrative procedures in regulatory frameworks and reinforced by judicial interpretation. Even where cultural identity and the right to life of minorities are invoked, the right to heritage is still largely conflated with a right of access, rather than recognized as a right to actively shape its meaning through broader and more complex perspectives on its value.

The point was already addressed when discussing the Faro Convention, which redefines the prevailing paradigms in heritage legal discourse both objectively – heritage is also intangible as it encompasses all aspects of life – and subjectively – heritage is defined through *people*'s perspectives. To which Faro adds: it is also evaluated (i.e., conceptualized) based on the resulting benefit to sustainable development and quality of life. Yet even under this angle, enforcing a subjective right to heritage remains difficult in legal systems that have yet to recognize the "functional" nature of cultural manifestations. The recognition of a character of functionality in cultural heritage, and the actions of *people* involved (who "contribute toward its enrichment", Article 4 states) would shift the focus from subjectivity rooted in identity issues to subjectivity based on the capacity to contribute, in some way, to the production of well-being and quality of life. Currently, however, the mechanisms through which Faro might operate do not appear to be based on the implementation of a subjective right to heritage.

Within Italian legal scholarship, significant concerns have emerged regarding these developing trends[114]. Critics argue that ratifying the Faro Convention could fragment and "contractualize" cultural heritage law, weakening the public function of protection[115]. They warn that fostering

[114] Following the ratification of the Faro Convention with law no. 133 of October 1, 2020. In reality, the Convention was signed (but not ratified) already in in 2013 – a lengthy process that underscores the doctrinal dilemmas over its adoption and translation in the domestic regulatory framework.

[115] See especially P. Carpentieri, G. Severini, "La ratifica della Convenzione di Faro «sul valore del patrimonio culturale per la società»: politically correct vs. tutela dei beni

a subjective right to heritage risks privatizing heritage protection, replacing the safeguarding of general public interest with a proliferation of individual and group rights defended through sporadic, ad hoc litigation.

A major part of the criticism stems from what is seen as a procedural misstep: the translation of Faro's cultural heritage into *patrimonio culturale* within Italian law[116]. Some scholars argue that this choice is not merely linguistic but conceptual, forcing Faro's flexible notion of heritage into Italy's already well-defined legal framework of '*patrimonio*,' thereby diluting its intended meaning. A similar risk could have arisen with the integration of UNESCO's ICH, but this was addressed through the introduction of Article 7-bis, which strategically adapted it to align with national definitions.

While these concerns merit careful attention, several compelling counterarguments emerge[117]. Rather than dwelling on the inherent polysemy of cultural heritage – a concept already defined through multiple "variable geometry" frameworks that parallel the challenges of incorporating intangible cultural heritage into domestic law – we should focus here on the Convention's (explicit[118]) programmatic nature. As said, the Convention lacks direct prescriptive force and requires domestic legislative action for rights to become enforceable. Far from being a weakness, this gap invites a constructive focus: designing procedural mechanisms for participation and consultation that are

culturali?", cit., spec. 257-258. The following quotes are from the same authors. Also by P. Carpentieri, "La Convenzione di Faro sul valore dell'eredità culturale per la società (da un punto di vista logico)", *ivi*, no. 4, 2017. For further reference on the topic, see L. Zagato, "The Notion of "Heritage Community" in the Council of Europe's Faro Convention. Its Impact on the European Legal Framework", in B*etween Imagined Communities of Practice: Participation, Territory and the Making of Heritage*, Göttingen, 2015.

[116] There is, in fact, an Unofficial Italian translation included in the Official Gazette (S.G., No. 263, Oct. 23/2020).

[117] As discussed in greater detail in an article preceding this thesis. Please refer to A. Mussatti, "La Convenzione di Faro e le espressioni di cultura immateriale in Italia: il caso dell'ecomuseo", in *Nuove Autonomie*, no. 3, 2022. Some of the arguments from that article are reflected in this section.

[118] See Article 6(c): "No provision of this Convention shall be interpreted so as to create enforceable rights", and, likewise, the Explanatory Report, Preliminary Note: "This is a Framework Convention. It sets out principles and broad areas for action which have been agreed between states Party. No provision of this Convention is capable of conveying rights to individuals solely through national ratification without legislative action by individual States Party". On the peculiar legal nature of this Convention see also P.J. O'Keefe, L.V. Prott, *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries*, Crickadarn UK, 2011.

effective, efficient, economical, and equitable[119]. The feared drift toward fragmentation and erosion of the public value of protection only materializes if such subjectification remains conceptualized within the current authoritative paradigm, where the state-civil society relationship mostly follows a supply-fruition model. Conversely, if this subjective right – intended by the Convention to be "filled" with legal meaning – gains effectiveness within the process of defining heritage itself (through varying degrees of action: information, consultation, participation, autonomous initiatives), the issue shifts toward rebalancing power dynamics in heritage matters. Again, this is not about identifying who, in an abstract manner, could exercise the right to cultural heritage, but rather about providing concrete ways to articulate the exercise of this right in relation to the level of engagement with the cultural heritage concerned.

Moreover, there remains an untapped potential – at least at the national level – to reconfigure the very role of experts. Rather than reducing their authority or expertise, this transformation would redirect their influence toward facilitating collaboration among community groups. In this framework, experts would leverage their knowledge to promote cross-disciplinary approaches that span historical, artistic, but also social, governance, and development fields.

Not to mention that rethinking the contemporary value of public protection *vis-à-vis* societal demands does not sound so out of place. As discussed in Chapter 2, emerging administrative case law on the "right to image" of cultural property shows how contemporary debates increasingly involve rights of access, expression, and use – highlighting the growing importance of the immaterial dimensions of heritage.

A final point to consider in this section relates to the immaterial dimension inherent in the digital "projections" of cultural property[120]. In Chapter 2, examining the existence of immateriality from the perspective of the *object*, we questioned whether new modes of access enabled by digitization should be considered essential or supplementary forms of enjoying cultural goods. This was complemented by the additional dilemma, explored in a separate section[121], concerning digital-native goods, where an ontological question arises even before an administrative one. Under this vision, it becomes imperative to

[119] In this regard also D. Manacorda, "Patrimonio culturale: un diritto collettivo", in R. Auriemma (ed.), *Democrazia della conoscenza*, Udine, 2017.
[120] Please refer to Section 4, Chapter 2 of this study.
[121] *Ivi*, Section 4.3.

understand whether the proliferation of products, modes of enjoyment, and modes of expression and interpretation generates new forms of engagement with this immaterial dimension, thereby expanding the range of legitimate subjective claims that can be enforced. This would encompass both engagement in the sense of "passive" fruition and, potentially, also active engagement in how that heritage is conceptualized, valued, and perceived, as well as how it contributes to the well-being of society.

The question gains momentum at the national level, in light of the 2015 legislative provision[122] that classified activities related to the protection, enhancement, and enjoyment of cultural heritage as so-called 'essential levels of services' pertaining to civil and social rights, as per Article 117(2)(m) of the Italian Constitution. Under this law – which Italian legal scholars interpret as a stronger affirmation of a constitutionally guaranteed right to access cultural heritage – the establishment and fulfillment of essential levels, both as a legal obligation and an administrative duty (i.e., defining the quality, quantity, and type of services to be provided) would create enforceable legal positions, making it possible to seek judicial remedies when these levels are not met. Indeed, "the fundamental right of access must always be accompanied by an instrumental claim, grounded in a legitimate interest, that relies on the administrative activity that supports this right."[123] This means that, unlike the usual rules of domestic administrative law, the actionable claim is "strengthened" because the relevant administrative action is aimed at fulfilling a fundamental right to culture. As a result, the latter should be assessed not only in terms of discretion, but also in terms of 'merit,' with considerable implications for the type of judicial review. That is to say, the judge[124], when evaluating the attainment of an essential level of performance, could review not only the formal aspects of the administrative decision, but also its substance.

In this context, it has been suggested that the administration would assume a sort of "welfare function"[125] while ensuring the essential levels

[122] Law no. 182 of 12 November 2015, as commented in the previous section.
[123] G. Biasutti, "Brevi note intorno alla nozione di servizio pubblico culturale. Nomina sunt consequentia rerum?," in *Aedon*, no. 3, 2021.
[124] For a reflection on the dilemmas concerning the type of jurisdiction involved, see G. Biasutti, *ibid*.
[125] See A. Mitrotti, "Il riparto di competenze in materia di beni culturali alla luce del felice coniugio tra redditività del patrimonio culturale e diritto di accesso ai beni culturali", in *Rivista AIC*, no. 4, 2018, 28, citing G. Napolitano, "Le funzioni del benessere", in S. Cassese (ed.) *Istituzioni di Diritto amministrativo*, Milan, 2012.

of protection and enjoyment of cultural heritage. A reference to well-being that ties back to earlier considerations on the functionality of cultural heritage, which is no longer (only) objectively appreciable, but also valuable in terms of human, social, and, to some extent, economic development. In the particular context of the digital realm addressed here, this would result in a much deeper and more nuanced exploration of how these forms of immateriality are conceptualized in legal discourse. While we can only make predictions about the broader evolution of digital cultural production in the near future, it is worth noting, in conclusion, that Italy's Digital Administration Code[126] already recommends, under Article 9, that public administration "encourage the adoption of new technologies to enhance citizen participation in the democratic process, including for those residing abroad, facilitate the exercise of political and civil rights, and improve the quality of their acts, including through the use [...] of telematic methods for prior consultation on draft measures to be adopted."

It would be remiss not to recognize in this foothold a significant opportunity to expand digital participation in protection and enhancement of cultural heritage as "essential levels of services pertaining to civil and social rights", potentially paving the way for participation in the very definition of cultural content in the future, as part of a subjective right to heritage. As noted, the boundaries between administration and users, as well as between creators and consumers of cultural content, is expected to gradually fade over time. This shift will open new avenues for generating social and economic value through participation. The citizen-user, equipped with a "social right to the enjoyment" of cultural heritage, could thus become an active contributor – even if only digitally – to shaping the future of cultural processes[127].

3.2. The varying intensity of interests. On the internal and external limits of cultural interest

Having explored the potential for subjective rights, we now turn to whether existing positive law offers frameworks capable of accommodating a broader spectrum of interests within the administrative process of cultural identification.

[126] Legislative Decree no. 82 of 7 March 2005 (and subsequent edits).
[127] See S.A. Bruno, "L'approccio partecipato dei piani di gestione UNESCO e dei piani strategici di sviluppo culturale", in *Il Diritto Amministrativo*, 2019, available online at https://www.ildirittoamministrativo.it//stu422 (accessed 21 November 2024). Also, P. L. Sacco, G. Ferilli, G. Tavano Blessi, "From Culture 1.0 to Culture 3.0", cit.

Section 2.2 outlined the main features of the Italian administrative system, where we identified possible footholds for enhancing the participation of private individuals and groups based on subjective positions of interest. In particular, we examined the potential to leverage the principles of subsidiarity and administrative decentralization for this purpose, alongside a reconsideration of the general rules governing administrative procedures to create openings for citizens' intervention. By distinguishing between an institutional and a civil "side", we sought to illuminate the converging forces – emanating from both territorial agencies and civil society alike – that drive the broader objective: achieving a more nuanced and comprehensive understanding of the subjects and interests involved, particularly in relation to newly emerging or previously overlooked intangible dimensions of cultural heritage.

Nonetheless, several fixed points remain fundamental to our framework: (i) the State's exclusive competence in processes of *tutela*, (ii) the primacy of the cultural interest[128] (iii) the conception of cultural recognition as a conformative function of property, coupled with the perceived dichotomy between ownership rights and the public nature of cultural value, and (iv) the technical discretion of administrative activity, with judicial review limited to assessing compliance with technical standards. Within this structured vision, is there still room for accommodating distinct definitional perspectives?

This question will be addressed through the examination of two key issues. First, we will explore the capacity to articulate a distinct cultural-historical interest that engages with memorial perception, reasoning on the internal limits of cultural interest regulation (Section 3.2.1). Second, we will examine land governance as a context of external interaction with cultural interest, considering the dimension of territory as "a space of action for the community that inhabits it – re-politicized and continuously reshaped and reimagined through such actions"[129] (Section 3.2.2).

[128] Despite some recent interpretations explored in more detail in Chapter 2, to which we refer.

[129] G. Rigobello, "Gli ecomusei, strumenti di un nuovo approccio per il patrimonio culturale. Le esperienze di Italia e Spagna", in federalismi.it, no. 10, 2024.

3.2.1. Assessing historical significance: the intangible dimension of memory

A detailed examination of Article 10(3)(d) of the Italian Code in Chapter 2 highlighted its frequent application in identifying an object's extrinsic immateriality or in extending domestic legal protection to forms of ICH[130]. The application of this article carries significant implications for the subjectivity inherent in the construction of cultural value, closely tied to the dimension of immateriality consistently attributed to it through prevailing interpretations.

To properly address this issue, we should begin with a textual analysis of Article 10, as it provides the legal framework for examination and aligns with the positive approach taken throughout this chapter.

In Article 10, 'reference to history' undergoes a dual specification: it spans a wide range of domains, including "political, military, literary, artistic, scientific, technological, industrial, and broadly cultural" histories, and is associated with specific potential "holders" – it is the history "of public, collective, or religious institutions."

Regarding the scope of such historical dimension, Italian courts have already recognized that it can legitimately include references to "minor" or "local" history[131]. In line with the reflection we are developing, this judicial interpretation would support the use of Article 10(3)(d) to justify the identification of cultural property based on local and community-based narratives alongside the national one. This assumption is further reinforced by the methodological guidance issued in 2019 by the General Directorate of Archaeology, Fine Arts, and Landscape of the Ministry of Culture. In Circular no. 20/2019, aimed at promoting an integrated approach to the protection of national cultural heritage, the Directorate emphasized the "need to identify, within the procedures for the verification and declaration of cultural interest, the values and elements

[130] For the reader's convenience, the Article provides that "Cultural property, once declared, encompasses immovable and movable objects, regardless of ownership, that hold particular important interest due to their *reference to* political, military, literary, artistic, scientific, technological, industrial, or general cultural history, or as representations of the identity and history of public, collective, or religious institutions. If such objects also possess testimonial value or convey an identity or civic connection of exceptionally distinctive importance, their declaration, upon the initiative of one or more municipalities or the region, can design them as a national monument."

[131] This was discussed in Chapter 2 through the examples of *Cinema Americ*a and the restaurant *Il Vero Alfredo*, as referenced in the judgments of the Council of State, Section VI, no. 2920/2017, and Plenary Assembly of the Council of State, no. 5/2023.

of identity, collective memory, and historical testimony expressed by tangible movable and immovable assets for *specific social groups and cultural contexts* (Art. 10, para. 3, letter d) of Legislative Decree 42/2004), alongside their historical-artistic, architectural, and archaeological significance."

The second specification, however, appears to be more problematic. At first glance, the article's reference to "public, collective, or religious institutions" raises a fundamental question about whether historical significance can be derived also from smaller social groups and organizations. Some legal scholars have answered affirmatively, arguing that this approach "expands the declaratory procedure's reach to include testimonies of the identity and history of public, collective, or religious institutions," thereby allowing for the consideration of requests originating from intermediate bodies or groups of individuals, already safeguarded at the constitutional level through the combined provisions of Articles 2, 18, 19, and 20 of the Constitution[132].

In contrast, administrative courts have consistently rejected this interpretative approach, drawing a clear distinction between 'institutional' and 'community' dimensions under the law.

This stance was further upheld in a recent ruling, where the Umbria Regional Administrative Court was called to resolve a dispute over the symbolic value of a partially disused industrial complex. Despite its actual state, the complex was said to represent an important phase in the industrial and urban development of *its territory*[133]. The case thus centered on whether the complex could be legitimately recognized for its historical interest "by reference," under Article 10(3)(d), based on its significance as a tangible testimony to the collective identity of the city's community within local historical development.

However, the Court adopted a different reading: it framed Article 10 not as an opening to minor local narratives but as a legislative safeguard to

[132] This view is endorsed by A. Piazzai, "Note minime sui "nuovi" procedimenti di individuazione dei beni della cultura", in *Federalismi.it,* no. 23, 2023, and S. Mabellini, *La tutela dei beni culturali nel costituzionalismo multilivello,* Turin, 2021, 98.

[133] T.A.R. Umbria, Section I, ruling no. 621 of 28 August 2024. According to a note from the local Superintendency (dated 6 June 2023), "The complex can be regarded as a key element of both the industrial and urban development of the city, continuing to serve as a symbol of the latter's identity. It is situated in an urban area historically known for its productive-industrial character, also marked by the presence of other large historical production structures, such as the one in question, which significantly shapes the urban context with their distinctive skyline."

provide stronger justification for administrative intervention, especially considering its potential to restrict private property rights if a declaration of cultural interest is upheld. Accordingly, the proposed designation was found insufficient, since the historical value attributed to the complex was not linked to any institution – whether public, collective, or religious – through which it could be formally contextualized within historical narrative or representation of identity. Ultimately, the Court reaffirmed that the 'history of *institutions*' does not equate to the 'history of the *community*,' and that a mere reference to community memory is not enough to establish historical interest for cultural designation.

The Court's conclusion must be interpreted within the broader rationale underlying the whole regulatory framework. Indeed, it is important to remember that the primary interest of this section lies in understanding how (and whether) the recognition of the potential to amplify a minor historical narrative can be rendered actionable and ultimately sustained. Can this objective be achieved through Article 10(3)(d)? And to what extent can localized historical narratives challenge or even coexist in a dialectical relationship with the national one?

Within the framework of an administrative activity characterized by technical discretion, the challenge lies in integrating locally rooted perspectives into the interest assessment procedure. Hence, within the context of such investigations, the question could be reframed as follows: can this particular construction of cultural interest uncover an immaterial dimension of the property that enriches its objective conceptualization through an evaluation process "from below," beginning with subjective local interests?

When examining the general principles of administrative law governing cultural property, one cannot avoid observing that the potential of local narratives to shape cultural interests' construction appears inherently constrained. This limitation is particularly apparent within the procedural context, where participation is confined to the notification of the initiation of a declaration procedure, which is explicitly restricted to privately owned property. As noted in previous sections, such notification is addressed only to specific individuals holding a recognized ownership or possession right over the private property in question. From this it follows that in the dichotomy between private property and the overarching cultural value not only are alternative interests marginalized, but perspectives that do not conform to property-based logics are also overlooked. This was explicitly highlighted by the T.A.R. Umbria above, emphasizing that regulatory safeguards linked to

the reference to "institutions" are specifically designed to serve this very purpose – that is, to enforce stricter controls on the determination of cultural interest due potential limitations on property rights.

Engaging with these reflections places our analysis at a methodological crossroads: either proceeding by critically interrogating the foundational concept of property itself – an endeavor we will undertake in the next chapter – or by operating within the established legal boundaries, examining the interpretive tools at our disposal.

In this regard, the remaining portion of letter (d) of the article under consideration provides additional details worth examining. It states: "If the items also possess testimonial value or represent an identity or civic connection of exceptional distinctive significance, the declaration measure may include the designation of a national monument, even at the request of one or more municipalities or the region." This provision works in conjunction with Article 14, which allows for the initiation of declaration procedures "also upon a reasoned request by the region or any other relevant territorial entity."

Thus, while the authority for protection remains exclusively with the state, the preliminary identification and proposal phases would be significantly expanded. Legal scholars suggest[134] this broader interpretation could strengthen the "propulsive thrust" in the relevant procedures, enabling even smaller territorial entities to initiate such proceedings as representatives of the associated smaller territorial interests.

This procedural expansion is further reinforced by some regional practices that have developed legal frameworks for classifying so-called 'minor cultural property.' These practices[135] have been examined by administrative and constitutional jurisprudence and have garnered considerable attention from legal scholars. Their scope, however, remains limited to examine, as it ties in with the fundamental division of authority in cultural property law, assigning exclusive power over property identification to the State, while responsibilities for (subsequent) enhancement is shared with the regions.

In 2003, the Constitutional Court supported the idea that regions could identify "*other* cultural property," but strictly limited their authority to

[134] See particularly S. Mabellini, La tutela dei beni culturali nel costituzionalismo multilivello, cit.
[135] On which also references in Chapter 2., esp. Section 3.2.1 and Chapter 1, Section 3.1.2.4.

enhancement purposes, placing its reasoning outside the framework of protection and relying, instead, on what can be characterized as an "external" analytical approach[136].

The Court subsequently refined its position in 2013, further constraining regional authority. The ruling explicitly positioned regional activities "outside the protection/enhancement framework," the latter requiring unified action. Instead, it emphasized the possibility of a "*different* and *additional* safeguard"[137] for cultural assets. The Court's reasoning centered on distinguishing between two types of cultural memory: the "particular" regional memory, which reflects local characteristics and histories specific to regional populations, and the "the memory of the entire national community," that forms the basis for recognizing formal cultural property. This interpretation effectively established a two-tier system: one for cultural property of national importance, governed exclusively by State authority, and another for regional cultural assets that merit preservation through different legal mechanisms. It was argued in this regard that:

> "The fact [...] that a specific item is not 'classified' by the State as being of "artistic, historical, archaeological, or ethno-anthropological interest," and thus is not considered a 'cultural property,' does not preclude the possibility that it may, nonetheless, hold some 'cultural' interest for a particular *territorial community* [emphasis added]. This interest may be rooted in an inalienable heritage of identity, ideals, experiences, or even symbols unique to that specific community."

The reaffirmed separation, or perhaps even estrangement, between cultural property and *other goods*, and between the functions of protection and enhancement and an "alternative and distinct safeguard," has notable implications for the realm of immateriality. The 2003 constitutional ruling referenced above specifically addressed a regional law intended to enhance "historical premises"[138] – a category that inherently involves immaterial dimensions like use and function, as discussed in previous analyses. But the issue could be extended beyond this specific context to all regional legislation that addresses intangible cultural elements within the constrained framework of "distinct safeguard" and "enhancement"[139].

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[136] Constitutional Court, ruling of 28 March 2003, no. 94

[137] Constitutional Court's ruling of 17 July 17 2013, no. 194. Interestingly, both rulings refer to laws enacted by the Lazio Region.

[138] Lazio Region's Law of December 6, 2001, no. 31, "Protection and enhancement of historic premises."

[139] We discussed this extensively in Chapter 1, Section 4.1.

From this analytical perspective, it can be inferred that a greater emphasis on the intangible dimension of cultural heritage illuminates the existence of distinct, specific, and local interests. These interests demand integration into a cultural discourse able to acknowledge their specificity, in contrast to what a *national memory*[140] appears normatively equipped to encompass – confined as it is to the "authentic" (and primarily material) cultural heritage it represents.

Building upon this conclusion, it becomes apparent that the Code's established framework for historical interest is in conflict with cultural prerogatives that lie beyond three critical boundaries: (i) the defined scope of a 'national memory,' (ii) the oversight of central authorities, and (iii) the established procedural mechanisms and categories of cultural property.

It holds true, however, that the judge did recognize the existence of *alternative* interests. If these 'alternative forms' do exist, we return to the core question of this section: what legal standing is conferred upon entities that represent a "particular memory" (as the Court defined it) and "territorial communities," and to what extent can this distinction be preserved outside of, rather than incorporated into, the usual frameworks for constructing cultural interests?

The relationship between heritage interpretation and memorial perception presents a significant challenge in cultural studies. At its theoretical foundation lies a fundamental tension that scholars from various disciplines have characterized as a conflict between history and memory, and which has sparked the ongoing debate on so-called dissonant heritage[141]. This academic discourse reflects the complex ways in which communities engage with and sometimes contest the meaning of their cultural heritage.

It is beyond the scope of this research to provide a complete account of the legal ramifications surrounding these conceptual tensions, which

[140] As Constitutional court as well as Article 1(2) of the Code define it –"The protection and enhancement of cultural heritage contribute to preserving the *memory of the national community and its territory* and promoting the development of culture".

[141] Without claiming exhaustiveness, we can refer to a vast body of literature, starting from J. E. Tunbridge, G. J. Ashworth, *Dissonant heritage: The management of the past as a resource in conflict*, New York, 1996; L. Smith, *Uses of heritage*, cit.; H. Silverman, *Contested Cultural Heritage. Religion, Nationalism, Erasure, and Exclusion in a Global World*, New York, 2011; V. Kisić, *Governing heritage dissonance: Promises and realities of selected cultural policies*, Amsterdam, 2013 (available at https://www.europanostra.org/wp-content/uploads/2017/01/Governing_Heritage_Dissonance.pdf – accessed 1 December 2024).

merit their own thorough examination. The focus of our inquiry stays on how cultural interest is constructed, particularly when it emerges from an object's intangible dimension, as exemplified in our study of historic reference. Ultimately, the goal is to reveal an additional immaterial dimension, one that introduces a projected value *external* to the inherent qualities of the object, and that connects to its subjective perception.

Given the observed limited applicability of the domestic context in relation to this objective, and to clearly illustrate the complex dialectic between a *general* historical interest and a *specific* memorial perception, this analysis adopts a comparative approach. The investigation reveals a fundamental tension operating, even within legal analysis, between a broad, institutionally defined interest and the more localized, experiential interests of the community with direct connections to the historical sites and contexts under review.

This tension is clearly exemplified in a 2002 French legal case concerning the *Butte des Zouaves*, an elevated plot of land in northern France. The site was registered in the Supplementary inventory of historical monuments (*Inventaire supplémentaire des monuments historiques*)[142] in 2002, based on its dual significance as both a "historically charged site" (*lieu chargé d'histoire*) and a "site of memory" (*lieu de mémoire*). The protection was justified by the site's connection to significant events during both World Wars, establishing its historical importance, hence deserving *remembrance*.

The French administrative terminology in this case is especially noteworthy, particularly the concept of *lieu de mémoire*, which derives from Pierre Nora's influential theoretical framework and has become ingrained in French administrative practice[143]. The case illustrates the fundamental duality between historical documentation and memorial construction that often emerges in heritage protection decisions. This duality forms the central legal concern in this case, directly reflecting Nora's theoretical insights into collective memory and historical preservation:

> "Memory is a perpetually actual phenomenon, a bond tying us to the eternal present; history is a representation of the past. [...] there are as many memories as there are groups, that memory is by nature multiple and yet specific; collective, plural, and yet individual. History, on the

[142] Regime introduced by the law of 23 July 1927, which modified the law of 31 December 1913, in force until 2005. The current version of this regulation is article L. 621-25 of the French *Code du patrimoine*.
[143] As evidenced in Chapter 2, Section 3.2 during the analysis of *Fouquet's* case.

> other hand, belongs to everyone and to no one, whence its claim to universal authority."[144]

These two inherent dimensions of heritage articulate a dual epistemological approach: one historiographical, which frames the past as a systematically organized sequence of scientifically validated events, and the other memorial, which emphasizes the processes of collective identity formation. The latter fosters an active engagement of the community's emotional and symbolic connection to the site and its surrounding territory.

In the case at hand, the potential expansion of a household waste storage center within the area of the *Butte* prompted two civil associations to advocate for heritage protection[145], ultimately resulting in the issuance of the 2002 decree of inscription in the above *Inventaire*.

The landowners and operators of the storage center appealed to the Amiens administrative court, challenging both the heritage protection designation and the prefect's refusal to revoke it[146]. Their main argument relied on a commissioned historical study[147] that revealed a significant discrepancy between the historical *reality* and the memorial *narrative* supporting the site's protection. The analysis demonstrated that the current topographical features of the *Butte des Zouaves* only developed after the events in question and that these events spanned a much larger area than the protected site. Based on these findings, the petitioners argued that the heritage designation was unlawful, as it relied on a memorial interpretation that did not align with the documented historical record.

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[144] P. Nora, "Entre mémoire et histoire : la problématique des lieux", in Id. (ed.), *Les Lieux de mémoire, tome 1 : La République*, Paris, 1984, esp. 23-43. Here in English as P. Nora, "Between Memory and History: Les Lieux de Mémoire", in *Representations*, no. 26, 1989, 8-9, translated by M. Roudebush. Highly significant in this regard are the studies of M. Halbwachs, *Les cadres sociaux de la mémoire*, Paris, 1925 and *La mémoire collective*, Paris, 1950, as well as P. Ricoeur, L*a Mémoire, l'histoire, l'oubli*, Paris, 2000.

[145] *Soissonnais 1914-1918* and *Le Souvenir français*. Already at this point we could pause and highlight the distinctive characteristic of the French context, wherein civil associations do play a role in initiating the process of recognizing the public cultural (historical, in this instance) value of the property in question. A fact that, in turn, position the whole reasoning on a different perspective, as it is already, at the outset, based on the possibility of incorporating social "sentiment" into the legal discourse on heritage recognition. More on these aspects and comparisons on methods outside Italian positive law in Chapter 4 of this study.

[146] Culminated in Tribunal administratif d'Amiens, 4th Chamber, 18 May 2009, no. 0601499.

[147] Information retrieved (with the study fully available), at the Médiathèque du patrimoine et de la photographie, Paris – *Dossiers des édifices de l'Oise protégés au titre des Monuments historiques*, no. D/1/60/39-3.

A fundamental paradox thus emerges. Although the site lacked historical significance under strict scientific criteria, it has nevertheless transformed into a symbolic space of collective memory, nurturing a lasting and dynamic memorial tradition. Within this interpretative terrain, the judge was confronted with a peculiar dilemma: whether the site's cultural value should be assessed through the lens of its contested historiographical authenticity, or through its memorial dimension – a domain characterized by the symbolic and subjectively mediated projections of the *territorial community*.

Interestingly, the Douai Administrative Court of Appeal held in 2023 that cultural interest *can* be legitimately grounded in the "memory of past events" and, by extension, in the "gradual establishment of the site as a place of remembrance."[148] In so doing, it upheld the legality of the administrative protection measure not by grounding it on the historical fact, whose scientific validity it did not dispute, but rather on the gradual development of a memorial perception and tradition *associated* with the site[149]. The Court's reasoning centered on the latter's dual nature as both a *lieu chargé d'histoire* (place steeped in history) and a *lieu de mémoire* (place of remembrance). This decision marks a significant development in heritage protection law, establishing that an immaterial dimension of the asset – specifically, how a local community remembers and values it – can justify legal protection independently of strict historical accuracy. In essence, memory was anchored to a physical element, embodying its *subjective* intangible dimension, where the material significance is not derived from a universally acknowledged, empirical, and integral historical narrative, but from the elevation of a memorial *perception* into heritage status.

Reflecting on the conclusion of this case, it becomes apparent that memorial significance, compared to historical value, is found more in the temporal "interstices" that connect a historical event to its present-day *function*, rather than in the exact temporal or scientific placement of the past in history. Its value is shaped by contemporary use and the perceptions of those who engage with or inhabit that space[150]. In the

[148] CAA Douai, 3rd Chamber, 6 April 2023, *Ministre de la culture,* no. 22DA00568.
[149] "en raison du souvenir d'évènements de la première et de la seconde guerre mondiale et de la consécration progressive du site comme lieu de mémoire", ivi, para 29.
[150] See in this respect B. Graham, G. Ashworth, J. Tunbridge, *A Geography of Heritage*, London, 2000 (1st ed.): heritage is "that part of the past that we select in the present for contemporary purposes, be they economic, cultural, political or social." In the same vein,

context of this research, one might question whether, once it is established that the intangible dimensions of cultural heritage expose a broader spectrum of interests than those defined by technically assessed historical facts, memory itself can emerge as an additional immaterial dimension, connecting the object to the subject and ultimately revealing their inherent interconnectedness and mutual impact.

A 2018 decision by the Administrative Tribunal of Besançon provides further insight on this point, elaborating on how the so-called "sufficient interest in art or history" – the criterion within the French system that justifies a site's inscription as a historical monument – should be interpreted in administrative practice and assessed in court.

The Court established that such an interest cannot be solely based on an objective-materialistic vision of history. On the contrary, it encouraged the administration to valorize the *contemporary perception* of the asset's value as a testament to the past, worthy of being preserved as a historical narrative that reflects the spirit of a community for future generations:

> "The administration cannot simply focus on seeking the material evidence of the use made of the structure but must also take into account the perception that those who live the site – whether inhabitants, historical witnesses, or mere visitors – may have of its significance in past events and the memorial trace that it is desirable to preserve."[151]

The core challenge remains, however, about how such engagement with the asset in its current function can be initiated. Also, how can the administration effectively balance the material value of the object and its intrinsic immateriality – its inherent values – with the intangible narratives attached to it, which are extrinsic and embedded within the community that claims *ownership* or connection to the asset?

As a matter of fact, these are not novel considerations. The entire discourse on UNESCO ICH and the gradual inclusion of immateriality into tangible heritage discussions – including the work done by ICOMOS

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see also T. Loulanski, "Revising the Concept for Cultural Heritage: The Argument for a Functional Approach," in *International Journal of Cultural Property*, vol. 13, no. 2, 2006, 211: " [...] it is this dominant and persistent, constantly updated, contemporary link in the modern perceptions of heritage that has defined it first as a product of the present with an unbounded capacity to grow and expand; and it further complicates attempts for a clearer and comprehensive conceptualization of heritage. Rather, it presumes the continuous and ongoing evolution in the heritage conceptual development."

[151] TA Besançon, 15 November 2018, no. 1701626, para 2.

over the years[152] – has centered on this very perspective. The opposition between objectivity-materiality and subjectivity-immateriality, though polarized and thus incomplete, brings us back to discussions on the empirical-positivist approach in historic preservation frameworks studied by Tainter and Lucas[153], then developed by Smith[154] (limiting the review to authors already mentioned in this study[155]).

The way in which legal discourse conveys this view has faced criticism for its tendency to only *record* values presumed to exist *objectively*. This objectivity, in turn, is understood as manifesting in two senses: first, as cultural values are only recognized in relation to a tangible object – the thing and its fabric[156] – and second, as they are assessed through a predetermined, scientifically formulated process (referred to in Italy as technical discretion)[157]. This perspective, widely prevalent and deeply embedded in most Western positive legal traditions, presents significant complexity in how objective and subjective dimensions are intertwined. The entrenchment of this vision implies that even in cases where forms of participation and subjectivity are formally integrated into the evaluation system, it is difficult to unhinge from those dynamics[158].

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[152] Starting from ICOMOS 14th General Assembly "Place - Memory - Meaning: Preserving Intangible values in Monuments and Sites", held in Victoria Falls, Zimbabwe, in 2003. More on this growing tendency in Chapter 2, Section 2.3.

[153] The cultural value is "present in a cultural property, rather than in the mind of the observer" was argued by J.A. Tainter, G J. Lucas, "Epistemology of the Significance Concept", in *American Antiquity* 48, no. 4, 1983. This approach was cited in Chapter 2, Section 2.1, where additional references can be found.

[154] L. Smith, *Uses of Heritage*, cit., 106 highlighting that "[...] those values and meanings that are situated outside the dominant discourse are sidelined. [...] The maintenance of these values is assured due to the prominence given in the document to fabric, and the need to 'respect' it, combined with the underlying assumption that cultural significance is innate and embodied in the fabric itself, and thus immutable."

[155] This research also referenced the studies of S. Muñoz Viñas, *Contemporary theory of conservation*, Amsterdam, 2005 and J. C. Wells, Valuing Historic Places: Traditional and Contemporary Approaches, 2010 (retrieved from https://docs.rwu.edu/saahp_fp/22).

[156] J.C. Wells, *ivi*, 2-3, explores the significance of materiality, particularly the balance between the "new" and the "original" fabrics in conservation policies, noting that "historical events from the past are considered to be imprinted into the fabric itself, somehow becoming part of the permanent physical makeup of older building and landscape materials."

[157] For an anthropological discussion on the difference between object-centrism and functionalism, reference can be made to M. Müller, "Cultural heritage protection: legitimacy, property, and functionalism", in *International Journal of Cultural Property*, no. 2, 1998.

[158] As exemplified by the U.S. National Register of Historic Places, which incorporates participatory elements through a bottom-up approach by delegating responsibility for the

The need for historical correspondence between the *physical* place and the *event* occurred to assess the resulting cultural significance implies, as has noted, that "only fabric that experienced past events or people is 'real' or 'genuine'"[159], and reflects what has been termed as a "material fetish"[160] – a perspective that, paradoxically, creates an *intangible* distinction between original and replica, despite the absence of meaningful physical differences between them. That 'truth' that characterizes cultural property as discussed in Merryman's renowned elaborations[161] ultimately aligns with the same intangible dimension we aim to address by expanding the scope of relevant subjective perspectives.

This very characteristic is what made the *Butte des Zouaves* unsuitable from a scientific-objective perspective, as the historical events underpinning its value were determined to have taken place over a much broader area. In that case, however, the Court notably shifted the legitimacy of the decision from "historical integrity" to (precisely) memorial perception.

This raises fundamental questions about the role of historical objectivity in cultural heritage legislation. How can the concept of integrity – both in terms of historical facts and physical materials – be integrated and assessed with the notion of cultural significance within legal frameworks? Ultimately, who is responsible for determining this resulting cultural significance? We must consider, in this respect, whether legal discourse should continue to rely on a dichotomy between

identification, initial evaluation, nomination, and treatment of historic resources to private individuals, state and federal historic preservation offices, local governments, and Indian tribes, and then qualifies concrete assessments as stemming from physical, objective and expert-driven features. Refer to the "Technical information on the National Register of Historic Places: survey, evaluation, registration, and preservation of cultural resources – How to Apply the National Register Criteria for Evaluation", available at https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf#page=13.07 (accessed 25 November 2025). For a more specific discussion of opportunities for participation in the US context – especially so-called Section 106 process – see J.C. Wells and L. Lixinski, "Heritage Values and Legal Rules: Identification and Treatment of the Historic Environment Via and Adaptive Regulatory Framework", Part. 1 and 2, cit. See also L. Gibson,"Cultural landscapes and identity", in Id. and J. Pendlebury (eds.), *Valuing historic environments*, Surry and Burlington, 2009; H. L. Green, "The Social Construction of Historical Significance", in M. A. Tomlan (ed.) *Preservation of What, for Whom? A Critical Look at Historical Significance*, Ithaca, NY, 1998, 85 ff.

[159] J.C. Wells and L. Lixinski, "Heritage Values and Legal Rules", cit., 12, quoting S. Muñoz Viñas, *Contemporary theory of conservation*, cit.

[160] Ivi.

[161] J. H. Merryman, "The Public Interest in Cultural Property", cit.

objective, historical, and material elements on one hand, and subjective, memorial, and immaterial elements on the other. An alternative perspective suggests that elements of "falsehood" might actually be necessary for heritage to function effectively[162].

Legal frameworks governing cultural property protection frequently include directives to "avoid a false sense of history."[163] As noted, the notion of avoiding historical falsehood effectively mandates that heritage objects conform to a "preferred state" defined by conventional values, as exemplified by the concept of historical integrity being tied to direct experience of the past. But the past is a foreign country, Lowenthal said[164], meaning that restricting the legal-cultural value of an asset to its objective and verifiable connection to a past event is a useless, even impossible task, because only "*active involvement*" is what "distinguishes heritage from history"[165].

Clearly, the legal translation of these dynamics entails a demand for certainty, besides reasonableness and proportionality, often achieved precisely by adhering to fixed and expert-driven standards – this approach ensuring the reliability of the legal classification at hand.

In this regard, a parallel can be drawn with the discussion addressed in Chapter 1 concerning ICH listing[166]. The latter, which is by its very nature inherently immaterial, still presents significant challenges in the way the legal discourse frames it. As highlighted in that context, although the listing method employed by UNESCO fulfills the purpose of ensuring certainty, it fails to offer the continuous monitoring and essential tools required to maintain its viability, capture changes within the community that recognizes its value (and thus the memorial narrative itself), and consider the ontological evolution of the practice. In other words, it lacks that very 'active involvement' needed to ensure that the element remains 'intangible cultural heritage' as the 2003 Convention defines it.

Nonetheless, even in domestic frameworks, current assessments of cultural interest still hinge on the *fact* understood as an *event* of the past to which objects bear witness. Returning to the Italian context, this is precisely where the emphasis lies, as historical interest is considered inherently tied to "specific facts, clearly identified as such," in relation to

[162] S. Muñoz Viñas, cit., 27.
[163] J.C. Wells and L. Lixinski, "Heritage Values and Legal Rules", cit., *ivi*.
[164] D. Lowenthal, *The Past is a Foreign Country*, Cambridge, 1985.
[165] Id., Possessed by the Past. The Heritage Crusade and the Spoils of History, New York, 1996, 125.
[166] See Chapter 1, Section 2.3 and the whole Section 3.

particular events and circumstances, rather than to vague "memorial narratives."[167]

But is this type of administrative restraint truly sufficient? The American historian Carl L. Becker had perceptively distinguished between the "the persisting historical fact" and the "the ephemeral actual event." The latter makes the difference "because it is, and so far as it is, in human minds"[168]. From a legal perspective, what would an expanded interpretation of memorial perception, in addition to traditional historical interest, entail? Here, we specifically refer to a more flexible perception, encompassing underlying memorial narratives, dissent, falsehoods, and reconceptualizations – all elements within the "human mind's perception of historical fact."

We thus return to the foundational categories of this research: *intrinsic* immateriality, which is inherent to the object and objectively identifiable, and *extrinsic* immateriality, which represents the cultural value that extends beyond the object, engages with people, and is shaped by external subjectivity and interests that go beyond merely uncovering pre-existing value. Again, borrowing Becker's words "the actual past is gone; and the world of history is an *intangible* world, re-created imaginatively, and present in our minds"[169].

Clearly, such an inquiry should include both an exploration of how governance models can enable this multidimensional approach to enforcing cultural interests, and a guarantee that broadening negotiations to include local and divergent narratives does not result in new imbalances. That is to say, rather than framing the transition from objectivity to subjectivity as a conflict where one interest must inevitably prevail, consider reasoning in terms of "inter-subjectivism"[170]. The critical challenge lies in maintaining an active, dynamic dialogue around cultural heritage, carefully navigating this delicate terrain to prevent any drift towards political or ideological appropriation – a persistent and subtle risk inherent in such a complex topic.

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[167] See Council of State, Section VI, 14 June 2017, no. 2920, concerning the *Cinema America* case discussed in Chapter 2 of this study.
[168] C. L. Becker, "What Are Historical Facts?", in *The Western Political Quarterly*, vol. 8, no. 3, 1955, 332.
[169] *Ivi*, 333.
[170] S. Muñoz Viñas, Contemporary theory of conservation, cit., 30.

3.2.2. Land governance and cultural protection: whose public interest?

The previous chapters have repeatedly emphasized the importance of context as a crucial analytical framework for understanding a fundamental aspect of the immateriality of cultural heritage (or property). In the context of this chapter's analysis, what insights emerge when we adopt a subjective perspective? Specifically, what additional interests – even beyond strictly cultural considerations – become apparent when examining the immateriality of heritage assets and their relationship to the surrounding context? Which governing bodies are best suited to oversee these interests, and how does their relationship to them affect their effectiveness?

These analytical questions become particularly salient at the intersection of cultural heritage and land governance frameworks[171].

A natural corollary of the discussions so far is the recognition that cultural heritage is increasingly regarded as an integral component of the land[172]. And conversely, that the land imparts not only a physical but also a cultural imprint on its inhabitants[173]. This reciprocal relationship reflects an evolving understanding of 'territory,' now conceived as a dynamic entity shaped by cultural, social, and economic forces. The inhabitants of these spaces act as primary agents of change, continuously reshaping their environment through activities and interactions. This ongoing transformation, in turn, calls for a closer examination of how these expanding interpretations are accommodated within legal frameworks.

The Council of Europe's European Landscape Convention (Florence, 2000)[174] has significantly shaped this evolving understanding, promoting a broader conception of land governance that extends beyond traditional concerns of land use and infrastructure. While normative frameworks

[171] Referred to in its Italian translation as the so-called *governo del territorio* – a matter assigned by the Constitution (Article 117) to the concurrent legislative authority of State and Regions.
[172] In these terms A. Bartolini, "Patrimonio culturale e urbanistica", in P. Stella Richter (ed.), *Governo del territorio e patrimonio culturale*, Milan, 2017, 1.
[173] E. Tosato, "Stato (dir. cost.)", in *Enc. del dir.*, Milan, XLIII, 758 ff.
[174] The Convention (ratified in Italy through Law no. 14 of 9 January 2006) proposes a concept of landscape as part of the land, and as perceived by local people or visitors, evolving through time as a result of being acted upon by natural forces and human beings. Full text available at https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=176 (accessed 15 December 2024).

still primarily link these matters to urban planning and construction regulations, constitutional jurisprudence has considerably expanded their scope to include both "the set of rules that allow for identification and prioritization of interests to regulate permissible land uses"[175], and "the artistic, historical, documentary, and other cultural values in the diverse meanings of the term."

Administrative case law has further reinforced these expanded interpretations, highlighting the existence of a complex interplay between urban planning, land use and management, and the community inhabiting the territory. This judicial perspective underscores the necessity of pursuing economic development and land use strategies that *also* enhance local historical heritage, traditions, and the area's cultural potential. Hence, it advocates for an integrated approach that weaves cultural considerations into territorial planning processes. This comprehensive vision was notably articulated by the Council of State's Fourth Section in a significant 2012 ruling:

> Urban planning, along with the exercise of planning authority, cannot be legally understood solely as the coordination of building potential linked to property rights. It must instead be reinterpreted as an intervention by public authorities on their territory, aimed at its overall and harmonious development. This development must consider not only the land's building potential in relation to the actual housing needs of the community and the specific characteristics of the area but also environmental and landscape values, public health protection, and the economic and social needs of the community rooted in the territory. Ultimately, it should reflect the development model intended for the area, taking into account its history, traditions, location, and a vision for its future, shaped through self-representation and self-determination by the community itself, with decisions made by its elected bodies and, initially, with citizen participation in the planning process.[176]

What underpins these evolving lines of interpretation? Taking a step back to examine the regulatory framework governing the interplay between these two domains reveals a distinct hierarchical structure, with heritage preservation (naturally) holding priority over local land governance decisions. This framework rests on the principle that the identification of cultural assets is entrusted to administrative instruments managed by sub-state authorities: the master plan (*piano*

[175] See M. Mengozzi, "Il "Governo del territorio" e la sua intersezione strutturale con la "tutela dell'ambiente": linee di continuità e di evoluzione", in *Federalismi.it*, no. 15, 2017, 9-10.
[176] Council of State, Section IV, ruling no. 2710 of 10 May 2012.

regolatore) primarily serves to recognize and reinforce pre-existing cultural constraints, constituting its "heteronomous content."[177]

The influence of this hierarchical framework extends beyond operational matters, shaping both administrative structures and procedures. It restricts formal participation to state institutions alone, excluding other actors from meaningful decision-making roles and concentrating primary authority in central government bodies, deemed uniquely equipped with the technical expertise required to assess cultural significance according to established standards. This centralized model is reflected in the administrative structure through a form of "bureaucratic decentralization," whereby the ministry maintains control through specialized peripheral offices – i.e., the Superintendencies – organized as distinct entities based on the predefined taxonomy of cultural property types[178]. From this polarized perspective, the balance clearly tilts toward a strong State–cultural preservation nexus, creating a sharp operational divide from the territorial governance functions assigned to local authorities.

And yet, as partially anticipated, limiting our analysis to such a rigid dichotomy would be inadequate. While a substitution of power is not contemplated, given the necessity for unified oversight and technical expertise, judicial interpretations have progressively broadened this framework, integrating an additional layer of protection that views land and cultural heritage as interconnected and mutually reinforcing dimensions.

Jurisprudence has long affirmed the principle that local administrative authorities, acting as representatives of their communities, may impose heritage-related constraints through their planning powers[179]. This is because such actions neither overlap with, nor encroach upon state authority, as the distinguishing factor lies in the different "teleological element." That is to say, land-use plans may legitimately include binding provisions "when the intent is not the preservation of the building *per se*, but rather the fulfillment of urban needs. The latter are identified

[177] P. Urbani, e S. Civitarese Matteucci, *Diritto urbanistico*, Turin, last ed. 2023. At the regulatory level, Article 7, Law no. 1150 of 17 August 1942 (Land use Law).
[178] In these terms C. Barbati, "Governo del territorio, beni culturali e autonomie", in *Aedon*, no. 2, 2009.
[179] Already in 1990, the Council of State, Section IV, ruling no. 78 of 14 February 1990, held that "The general land-use plan, in outlining the restrictions applicable to construction within areas of historical, environmental, and landscape significance, may impose conservation constraints *independently* of those established by the designated commissions tasked with preserving objects of historical, artistic, or environmental interest."

through the distinctive role the building plays within the wider territorial *context*"[180].

Such an additional layer of protection runs along a dual trajectory: one acknowledging *other* properties, "provided they form part of a territory with its own distinct conformation and history"[181], the other focusing on the *modalities* of protection. Through urban planning instruments – it is argued – municipalities may autonomously impose stricter or supplementary constraints, even concerning assets already subject to protection for cultural and environmental purposes, in response to specific local needs[182].

Drawing from Italian legal scholarship, we can conclude that administrative decentralization, combined with a contextualized understanding of cultural heritage, result in the recognition of what are termed 'urban cultural property' (*beni culturali urbanistici*)[183]. These assets represent interests that extend beyond national cultural significance, and instead encompass the distinct identity of communities referenced in the master planning documents. The latter embody a so-called "petrified memory," as they are "grounded in a different philosophy of 'non-excellence,' yet more attuned to the value of context"[184]. These assets' evaluation is described as transitioning from a technical, state-driven process to one rooted in "social judgment":

> [...] a social judgment, which repeats itself every day, rather than being outlined by an administrative act, which governs how to preserve them: so much so that their research, preservation, and enhancement occur spontaneously, carried out by private individuals and their structures:

[180] Council of State, Section V, ruling no. 2265 of 24 April 2013. Consequently bolstered by Council of State, Section IV , ruling no. 519 of 9 February 2016, and 29 February 2016, no. 844.
[181] Constitutional court, ruling nos. 26/2004 and 232/2005.
[182] Constitutional court, ruling no. 478/2022. With reference to landscape, also Council of State, Section IV, ruling no. 3864 of 18 May 2021.
[183] A. Bartolini critiques this definition, highlighting its limitation to "testimonies of civilization" (cultural property) while excluding "identity-landscape" assets. Using examples such as historic centers or rural villages, which were also discussed in Chapter 2 of this study, the author suggests referring to them as urban cultural *heritage*. Alternatively, he argues, as outlined by the Constitutional court in ruling no. 130/2020, this could be considered also as "common heritage." See A. Bartolini, "Patrimonio culturale e limitazioni urbanistiche", in Dir. Amm., no. 4, 2022, 1005.
[184] F. Salvia, "La tutela trasversale dei beni culturali. I beni culturali urbanistici", in *Studi in onore di G. Berti,* Naples, 2005, esp. 2273 ff. Of the same author, see also "Beni culturali: le ragioni di una maggiore tutela", in *Nuove autonomie*, 2004, 463 ff; and "Spunti di riflessione per una teoria sui beni culturali urbanistici, in *Studi in memoria di A. Romano Tassone*, Naples, 2017.

> foundations, businesses, associations, etc. Therefore, for this type of cultural heritage, as well as for the preservation of their supports, it is appropriate that public intervention – conforming to the principle of subsidiarity – takes place at a lower level, focused on support rather than removal: a light and low-regime intervention, centered on the administration of services rather than on direction, meaning more support than limitation or conditioning.[185]

A distinct process of heritage definition thus takes shape – one that, by its very nature, involves different responsible authorities, a broader focus on land, and a connection to the local community through "particular memory." This alternative understanding of cultural property contributes to the more nuanced perspective sought here, recognizing the object's additional immaterial dimensions.

The topic, moreover, opens several additional lines of inquiry, allowing for a deeper exploration of the role of territorial entities in influencing heritage designation processes[186].

Indeed, connecting our current chapter's exploration of how heritage interests can be expanded (both vertically and horizontally[187]) – hence how the *types* of heritage can be widened through a more nuanced process attentive to stakeholder dynamics – with our earlier discussion in Chapter 2 on the intangible dimensions of the object, we uncover a natural convergence of theoretical frameworks. This convergence highlights how shifting focus from the intrinsic cultural significance of individual items to their broader, extrinsic dimensions reveals regulatory approaches that transcend the traditional dichotomy of overriding cultural protection and exclusive state authority.

Accordingly, two opposing perspectives will guide the next stage of this analysis.

From a positive standpoint, we can examine how local land governance authorities can contribute to cultural property identification through

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[185] G. Severini," I beni culturali "minori" o extracodicistici", in M.A. Sandulli (ed.), *Codice dei beni culturali e del paesaggio*, Milan, 2012, 30.

[186] Giving rise to what has been defined "subsidiarity taken seriously," as referred to by I. M. G. Impasato in its essay, "La sussidiarietà presa sul serio: il caso dei beni culturali urbanistici tra tutela parallela e sistema multipolare integrato", in *Diritto e società*, no. 3, 2008. More broadly on this point D. De Pretis commenting on the Constitutional court ruling of March 10, 1994, no. 79, in *Le Regioni*, 1995, 159: "L'autonomia comunale in materia urbanistica di fronte agli "interessi differenziati" di attribuzione regionale"; more recently, also the contribution of A. Crosetti, "Governo del territorio e tutela del patrimonio culturale: un difficile percorso di integrazione", in *Riv. giur. ed.*, no. 2, 2018.

[187] See the distinction made in Section 2.2 of the present chapter.

alternative processes of definition that result from a deeper consideration of heritage's intangible dimensions, both from an objective and a subjective perspective. This approach reflects the evolution of urban planning as earlier described (noted in Council of State, Sec. IV, no. 2710/2012, which references an expansion "beyond the land's building potential"). But in turn, this development mirrors the specular evolution of cultural heritage concepts toward new forms of immateriality.

From a negative perspective, instead, we can explore how contextual interpretations of heritage, combined with the need to balance multiple land governance interests, might shift priorities and potentially subordinate cultural preservation to more immediate concerns. If the evaluation of these cultural interests no longer falls within standard State assessments, and no longer relies on a technical determination of its primacy, how is it to be reconciled with the broader context in which it is situated?

In the upcoming reflections, the analysis will focus on two territorial contexts where elements of immateriality are particularly evident: (i) culturally significant cities and their historic centers – where the dimensions of image, use, decorum, and identity are prominent; and (ii) ecomuseums – extensive territories where elements of ICH are integral to their very identity, with immateriality also extending to the dimension of local identity, the activities conducted, and the "particular memory" of communities involved. Our primary interest lies in examining the scope of territorial entities' powers in these contexts: can they legally acknowledge their existence? Can they identify "internal" cultural elements? Do they have authority to regulate their viability? Can they shape their development trajectory?

Before proceeding, let us ultimately highlight the emerging observation in legal scholarship that alongside the structured organization of competences and the hierarchy of interests, a new interpretive approach increasingly frames these matters in terms of *values*. Within an integrated spatial planning system aimed at protecting shared values through more localized oversight, these can be understood as cross-cutting objectives of action, arising from regulations or institutional bodies that extend beyond those traditionally responsible for specific, identified areas[188].

Urban spaces and historic centers

[188] A. Crosetti, "Governo del territorio e tutela del patrimonio culturale: un difficile percorso di integrazione", cit., 109.

In Chapter 2, we examined how cultural and commercial activities might represent key components of tangible cultural property, exploring the ministerial authority's ability to define these activities as extrinsic immaterial dimensions contributing to the asset's cultural significance. In that discussion, we also addressed the complementary role of local administrations under cultural heritage legislation – particularly as outlined in Article 52 of the Code[189]. Accordingly, a distinction was drawn between use as a criterion for protecting individual properties and use as a crucial element in preserving the broader context, where territorial entities may take an active role. Building on this perspective, we now seek to highlight how the recognition of such the immaterial dimensions of property enhances local authorities' capacity to regulate and plan territorial use. The analysis is specifically situated within the study of historic centers.

The interplay of different governmental levels and the delegation of contextual management to local authorities, as mandated by Article 52, reflects a fundamental principle: the authority closest to the community is best positioned to manage the environment surrounding cultural assets. In 2015, a Constitutional court ruling[190] addressed this issue and notably observed the existence of overlapping areas of responsibility (i.e., a "competition of competences") among various domains – such as cultural heritage protection and enhancement, and commercial and artisanal activities. Interestingly, the Court determined it was *unable* to establish a clear hierarchy among the competing interests, marking a significant departure from the traditional approach giving precedence to cultural heritage protection (*tutela*)[191]. The failure to resolve such an overlap between state and regional competences through the principle of prevalence warranted the application of a different framework – the principle of loyal cooperation. The latter, it was argued, "must in any

[189] For the reader's convenience, the article is titled "Conducting business in areas of cultural value and in traditional historic premises" and provides that municipalities can, in collaboration with the ministry or superintendency, (i) prohibit or impose special conditions on commercial activities in public areas designated for their archaeological, historical, artistic, or landscape value; (ii) safeguard and support historic premises where traditional crafts and other traditional commercial activities are conducted, based on the internal definition ICH; (iii) restrict uses considered incompatible with the requirements of protection and enhancement, in order to preserve the decorum of monumental complexes and other cultural properties impacted by significant tourist traffic, as well as surrounding areas.

[190] Constitutional court, ruling no. 140/2015.

[191] In this regard, and criticizing the ruling, C.P. Santacroce, "Aree di interesse culturale e limitazioni all'esercizio del commercio," in P. Stella Richter (ed.), *Governo del territorio e patrimonio culturale*, 2017, particularly 332

case serve as the foundation governing relationships between the State and the system of autonomies."

In 2017, the Regional Administrative Court of Rome provided a concrete application of this principle. The lack of collaboration, the ruling held, – and by extension the exclusion of the administrative body closest to the community – implicitly silences the perspective of the *concerned private individual*. Hence, territorial interests can only be adequately protected, even when they conflict with the (dominant) cultural value, through meaningful collaboration among administrations responsible for managing the diverse and potentially competing priorities within the same territory.

Specifically, the case centered on a ministerial decree regarding the so-called "*Tridente* of the Historic Center" of Rome, a heavily trafficked urban complex, both declaring the area as culturally significant and imposing a complete ban on commercial use of the public space[192]. In examining the act, the Court's analysis focused on the principle of proportionality and found procedural deficiencies in how the Ministry established this cultural constraint. While acknowledging that commercial restrictions generally fall within the legitimate scope of protecting cultural heritage and maintaining urban decorum standards, it emphasized a crucial procedural requirement: restrictions must be developed through *collaborative engagement* with both regional and municipal authorities. In this respect, the ministerial decree was found to (i) exceeded its jurisdictional authority by implementing measures that encroached upon both regional competencies and municipal powers over commercial activities; and (ii) impose unlawful and disproportionate restrictions in its blanket prohibition of commercial activities, leading to its annulment. The Court required a reconstitution of the procedure, mandating coordinated action among relevant administrative bodies in line with Article 52's framework for *competing interests*, according to each authority's designated competencies.

An "objective assessment," conducted in collaboration with all relevant administrative authorities, was therefore necessary to determine

[192] Ministerial Decree of September 17, 2013, declaring artistic and historical interest under Article 10, paragraph 4, letter f) of the Code and imposing the blanket prohibition in accordance with ministerial directive of 10 October 2012, so-called *Ornaghi* directive. The decree was challenged by a company whose state concession to operate food and beverage services, as a result, had been revoked and its removal had been ordered. On the question ruled the Lazio Regional Administrative Court, Rome, Section II quater, judgment no. 1822, February 3, 2017.

whether particular uses of public land inherently conflicted with the historic-artistic character and decorum of the area, or whether certain uses could be permitted without compromising the visual integrity and perception of monuments and buildings.

Additionally, the power to designate areas "of particular archaeological, historical, artistic, and landscape value" where the exercise of certain activities can be prohibited or subject to authorization is also provided outside the formal cultural regulation, within Legislative Decree no. 222 of November 25, 2016. The provision clarifies that – precisely for the purposes of Article 52 above – municipalities have the authority to define such zones in agreement with the region and after consulting the relevant trade associations and the competent superintendent. This reinforces the cooperative framework between government levels while entrusting ordinary administrative functions to municipalities, within the bounds of constitutional provisions. Activities are classified by type or category of merchandise, provided they do not undermine cultural heritage protection and enhancement. In this sense, the provision expands municipal protection powers to cover a wider range of economic activities and service provisions. It also incorporates new stakeholders in the decision-making process, such as engaging with relevant trade associations, with the goal of strengthening efforts toward a more holistic balance.

Numerous examples across Italy illustrate this trend, particularly in the protection of historic centers and *borghi*[193]. These cases are especially relevant given their still-ambiguous legal classification, which makes them "more a verbal construct than a cohesive legal concept."[194] This ambiguity arises from the "multiplicity of values and heterogeneous interests encompassed within the notion, as cultural value – still distinctively characterizing these centers – coexists with various urban, socio-economic, health, and demographic interests, each governed by separate regulatory frameworks." Historic centers thus warrant particular attention, as they shed light on a significant departure from the traditional paradigm of cultural value supremacy by engaging with administrative competencies that are (possibly) more closely connected to local contexts. Once again, the process of defining heritage becomes

[193] The (challenging) legal definition of which is addressed in Chapter 2 of this study, Section 3.2.2.

[194] In these terms (and this also applies for the following quotation), A. Crosetti, "I centri storici tra recupero e riqualificazione come beni comuni", in G. Bottino, M. Cafagno, F. Minazzi (eds.), *Contributi e riflessioni sui beni comuni*, Milan, 2016, 173.

more intricate as its objective characteristics are broadened to include additional intangible dimensions.

Interestingly enough, most regional legislation on the topic addresses cultural interest only indirectly, focusing primarily on the economic exploitation and revitalization of these historic places. Such measures tend to produce polarized yet converging outcomes – either fostering intense commercialization of their attractive potential, or promoting extreme preservation, known as "musealization," ultimately stripping these areas of their human and local essence. To this end, regional laws have introduced concepts like "*albergo diffuso*," (scattered hotel) defined as "a publicly accessible accommodation facility with unified management, situated in historic villages and smaller heritage centers that have gradually experienced depopulation or partial abandonment by their original residents over time." For these facilities, exceptions to standard urban planning and building regulations (such as surface area and height limits) may be authorized to achieve the strategic goal of revitalizing the surrounding social and urban fabric, prioritizing the principles of conservative restoration and the faithful preservation of traditional historical housing styles[195]. Thus, the "prevailing principle of conservative restoration" and the supposed revival of historical identity can easily be utilized to pursue commercial and tourist-driven revitalization.

Conversely, some regional initiatives prioritize enhancing the "human dimension," seeking to restore livability and functionality even at the expense of preserving the "cultural essence" of those centers. Measures supporting the regeneration of built heritage, for example, may allow the volumetric expansion of residential buildings within historic centers to improve livability, energy efficiency, or accessibility by eliminating architectural barriers[196].

In either case, the tension between repopulation and economic revitalization, on one hand, and the pressures of mass tourism, on the other, remains a persistent and widely acknowledged concern. In this context, the close collaboration between regions and municipalities to protect Italy's cultural centers against the unchecked expansion of businesses, often driven by the demand to cater to a growing inflow of tourists, has also raised concerns about the compatibility between such restrictions and the principle of liberalization of trade. The issue has been

[195] Abruzzo Regional Law, 9 August 2013, no. 22, Articles 2-3.
[196] Molise Regional Law, 14 April 2015, no. 7, Article 3.

debated both within the domestic constitutional framework and at the European level – particularly in light of Directive 2006/123/EC of December 12, 2006 on services in the internal market[197]. Generally, both national and European courts have upheld the legitimacy of such restrictions, recognizing the protection of the "urban environment"[198] – including town and country planning – as an "overriding reason relating to the public interest." On the other hand, it has also been acknowledged that these limitations are subject to particularly strict conditions[199] – a situation that results in a general reduction of public control over the economy in its preventive role, shifting toward a more nuanced balancing of interests, rather than upholding the cultural value as the sole prevailing interest.

On another note, it should be observed that the regulatory power exercised in this sphere can also yield the opposite outcome: reinforcing cultural value definitions through the introduction of alternative evaluation criteria. A notable example in this regard is provided by a 2018 ruling by the Fourth Section of the Council of State[200]. The case concerned a building subject to two urban planning instruments: (i) a 1993 general land-use plan that identified the property as part of the "premises in the historic center retaining their current urban designation"; and (ii) a 2009 intervention plan that, as part of the efforts to protect the historic center, classified the property as a "typical premise," thereby restricting the ground floor of the plaintiffs' building to a "café-bar" designation and limiting the scope of permitted economic activities within the surrounding area. The Court upheld the legitimacy of the constraint, recognizing its alignment with those "overriding reasons of public interest" among which is included the protection of cultural heritage and the urban environment, as explicitly referenced in European and national regulations. In that instance, the municipality's approach was deemed proportionate to the objectives pursued.

Of particular relevance to our discussion, the judge distinguished between the urban planning authority used to shape a market, which

[197] Enacted domestically by legislative decree 26 March 2010, no. 59.
[198] Precisely in these terms the cited Directive, Recital 40, CJEU's judgment (Grand Chamber) of 30 January 2018, joined cases C-360/15 and C-31/16 X and Visser, ECLI:EU:C:2018:44; domestically, Constitutional court, judgment no. 239/2016 and Council of State, Section IV, 28 August 2018, no. 5029.
[199] See Article 15 of legislative decree 26 March 2010, no. 59, cited above. See in this regard M.T.P. Caputi Jambrenghi, "Cultura e attività commerciali", in *Governo del territorio e patrimonio culturale*, cit.
[200] Council of State, Section IV, no. 5029/2018, cit.

indeed could conflict with European liberalization provisions, and the regulatory power directed at preserving a site's distinctive historical and identity-related characteristics. In this regard, it further emphasized that it is entirely possible that an asset, even if it lacks *inherent* cultural value, "may possess objective significance as a central element of a city's identity, viewed by its residents (and the relevant municipal authorities) as a fitting representation of its past and a tangible link to its history." It is, in other words, from the emergence of an immaterial dimension associated with the use of a property (the designated purpose of the premises and the regulation of activities in the surrounding buildings) that an additional sphere of authority arises, beyond state control over cultural property's protection. This urban administrative power operates *alongside* traditional cultural protection measures, incorporating the local community's "particular memory" and collective interests as represented by local government officials.

Alongside the predominantly "analog" perspective – focused on regulating physical business activities within tangible spaces – recent developments compel us to consider a distinct, increasingly relevant dimension: the digital sphere. In the broader context of regulating commerce to shape the cultural identity of urban areas, and particularly within the dynamics of tourism flows, it becomes essential to acknowledge the substantial spillover effects of digital activities on the physical world.

First, the growing impact of commercial digital activities, driven by online platforms offering short-term rentals, has sparked contentious debates and prompted several initiatives at the municipal level across major European cities[201]. The capacity of local authorities to regulate not

[201] Just consider the most recent example of Barcelona, where major Jaume announced to prohibit tourist-oriented short-term rentals by the end of 2028. See, from the news, J. Wilson, "Barcelona wants to get rid of short-term rental units. Will other tourist destinations do the same?", in *Associated Press News*, July 28, 2024 https://apnews.com/article/barcelona-spain-tourist-apartments-154cf293078aa14c299e3539d90e9350 (accessed 29 December 2024). The issue goes back as far as the previous administration: see also Paige McClanahan, "Barcelona Takes on Airbnb", in *N.Y. Time*s, September 22, 2021, https://www.nytimes.com/2021/09/22/travel/barcelona-Airbnb.html (accessed 29 December 2024). More broadly on the issue, among academic publications, the monographic work of S. Gainsforth, *Airbnb città merce*, Rome 2019, and the contributions of F. Fracchia, P. Pantalone, "Salvaguardia delle identità locali, corretto uso del territorio ed esigenze di mercato: delle locazioni brevi ai tempi della sharing economy", in P. Vipiana, A. Giuffrida, M. Timo (eds.), *La legislazione per i centri storici* (Conference proceedings),

only activities occurring physically within historic centers but also those mediated digitally carries profound implications. Indeed, the power to regulate, limit, or influence such activities greatly affects the city's *image*. It influences the aesthetic and cultural presentation of urban spaces, while also affecting how people form meaningful connections with these environments, giving rise to a "sense of place" that "creates and consciously transforms the city, shaping and transmitting peoples' own personality to it"[202]. In this context, short-term rental restrictions emerge as a form of "proactive," and indirect heritage preservation, cultivating cultural value through broader regulatory interventions.

Moreover, the proliferation of short-term rental platforms is closely intertwined with the digital representation of cities themselves. This dynamic connects back to earlier discussions regarding the digital projection of cultural property images for purposes of enhancement and promotion, ultimately shaping how urban contexts – encompassing multiple heritage assets – are perceived externally. This phenomenon, previously examined as an extrinsic and intangible expression of heritage, underscores the direct relationship between legal competences in enhancement efforts and the regulation of urban land use, commerce, construction, and rental activities. The importance of coordinating the related competences should not be overlooked.

In Italy, the case of Venice – a city notoriously impacted by overwhelming tourism flux that poses long-term challenges to livability[203] – is particularly pertinent.

As previously discussed in Chapter 2, Decree-Law No. 103 of July 20, 2021[204], empowered state administrative authorities to strengthen cultural protection by imposing restrictions on the passage of identified types of naval vessels. In that instance, the focus was on demonstrating how the immaterial dimension of the asset, from an objective

Consulta on line, no. 1, 2022; also L. B. Fontenot, "Heritagizing housing: solution for overtouristed cities or wishful thinking?", in *Tulane Journal of International and Comparative Law*, no. 31(1), 2023, esp. 182 ff.

[202] I. Diaz-Parra, J. Jover, "Overtourism, Place Alienation and the Right to the City: Insights from the Historic Centre of Seville, Spain", in *Journal of Sustainable Tourism,* no. 29, 2021, 158.

[203] Already in 1970 H. Lefebvre, in *Du rural a\l'urbain*, Paris, noted that "Venice, with 200,000 tourists, is not Venice anymore. The object vanishes with the activity by which it is used [...] tourists become their own spectacle." See also the data reported in F. Celata, A. Romano, "Overtourism and online short-term rental platforms in Italian cities", in *Journal of Sustainable Tourism*, no. 4, 2020.

[204] See Section 3.1.1.

perspective, can extend to the surrounding context and be shaped by the competent administration. Here, instead, our interest shifts to examining how additional legal instruments, though not explicitly aimed at cultural value identification, nonetheless influence heritage preservation when the asset is situated within broader contexts. Specifically, Article 37-bis of Decree-Law No. 50/2022[205], authorizes the Municipality of Venice to amend its urban planning instruments to encourage long-term residential rentals in the historic center and to protect the historical, artistic, and environmental heritage of Venice and its lagoon – assets recognized as matters of paramount national interest by specific legislation[206]. Interestingly enough, the law is not solely focused on protecting Venice's cultural heritage – its primary objective, in fact, is to promote long-term rentals. This, instead, is just *one* of its purposes, and while the protection of Venice is deemed a matter of "paramount national interest," the responsibility for its implementation rests with the municipality, giving rise to a "specialized and enhanced municipal planning instrument."[207] Ultimately, the latter holds significant power in defining the cultural value of the asset "city of Venice." And it does so by taking into account principles of viability and sustainable development, which, alongside other urban planning considerations, *also* integrate cultural concerns.

This brings us to the final point that any consideration of local administrative authority in this domain must also acknowledge that, by its very nature, this power more directly reflects the needs of the community it represents. We must always keep in mind, in fact, the misalignment highlighted at the outset between those who *hold* and those who *manage* the cultural interest. This creates an important dynamic between global-national perspectives and local interests, where the community plays a vital role in establishing an authentic 'sense of place.' It is evident, in fact, that the need to maintain the livability of historic centers through urban measures is a concern most strongly expressed by the local population.

In this respect, the case of a citizens' initiative bill developed in 2022 in collaboration with the Municipality of Florence can be viewed under this light. The initiative sought to establish common guiding principles for

[205] Converted with amendments by Law No. 91 of 15 July 2022.
[206] Law no. 171/1093. Specifically, with regard to Decree-law no. 50/2022, the municipality has the power to define sizes of residential properties intended for tourist rentals and the obligation to change the use of those properties rented for more than 120 days per year.
[207] S. Amorosino, "La valenza materiale ed immateriale dei paesaggi urbani di rilievo storico", in *Urbanistica e appalti*, no.1, 2023.

regulating historic centers in all their urban, cultural, and economic dimensions[208] – i.e., by defining time and quantity restrictions for short-term rentals, limitations on property's use, controlled settlement in designated areas, and the integration of trade and crafts within cultural and landscape protection frameworks. The law would enable, on the one hand, consistent intervention across similar urban environments, providing a clear regulatory framework; but at the same time, it would preserve local autonomy and enable municipalities to create detailed regulations suited to their specific contexts and more closely aligned with the local needs – at least in theoretical terms.

An intriguing perspective that adds depth to the present analysis is also the suggestion, in the bill proposal, to make those actions mandatory for municipalities "home to properties listed on the UNESCO World Heritage List."

It is true, in fact, that the (frequent) presence of a UNESCO designation across Italy's historic centers and urban spaces adds another dimension to their cultural classification, distinct to standard protection measures. This principle was reinforced by a Constitutional court's ruling in 2016[209], which established that UNESCO sites do not automatically receive protection in their own right. Instead, given their diverse typological characteristics, they can benefit from various and specialized forms of protection tailored to singe cultural or landscape assets[210], based on their specific characteristics. Hence, their protection does not automatically impose internal restrictions or limitations on private property. Rather, such constraints remain at the discretion of legislative bodies to evaluate and implement as deemed appropriate. This creates a complex regulatory environment where these territories find themselves at the intersection of multiple legal frameworks: standard state-imposed cultural constraints (primarily affecting individual assets), urban planning regulations from municipal and regional authorities, UNESCO

[208] "Proposta di legge per la salvaguardia del decoro, della vivibilità e dell'identità dei centri storici", available at https://www.comune.fi.it/system/files/2022-06/SlidesCentriStorici.pdf (accessed 20 December 2024).
[209] Ruling of 11 February 2016, no. 22
[210] This discussion excludes the topic of landscape assets, which is partly revisited in the following chapter regarding the "replicable" potential in the field of landscape. However, it is important to note here that in the interaction between different regulatory frameworks and heritages, Article 135(4)(d) of the Code mandates that so-called Landscape Plans – primarily under regional authority – must "establish appropriate guidelines and projections aimed at identifying urban and building development patterns in line with the various recognized and protected landscape values, with particular attention to the preservation of rural landscapes and sites listed on the UNESCO World Heritage List."

designations, and the accompanying (mandatory[211]) management plan – the latter also configurable as political-administrative acts of strategic planning. This is because the global legal order does not merely function as an additional layer above the national one. It would therefore be inaccurate to conceptualize governance as divided between these two isolated levels. Instead, "inequalities and fragmentation are substantial, States are no longer the only actors – they interact with other entities and lose their cohesion, and no single layer of government can sustain exclusive control over its relationships with its constituent parts."[212]

Accordingly, this interwoven regulatory framework, structured as a "network" of parallel and competing protection systems, must be examined to assess its positive or negative impact on the processes of heritage definition.

Extending beyond Italy's major cultural centers, the city of Ivrea offers a compelling example of this regulatory interplay. The city received UNESCO World Heritage status in 2018 as an "industrial city of the 20th century."[213] Its master plan (dating 2024[214]) illustrates how different levels of cultural protection can effectively complement each other. Given the city's smaller size compared to the more prominent examples above, it offers a lens to more easily explore that tension between universality and locality referenced above – that is, between cultural assets reflecting local identities significant to a specific territorial community, and the acknowledgement of outstanding universal value for the global one.

In line with what administrative jurisprudence recognizes as falling within the authority of the general land-use plan – granting municipalities the power to designate specific *zones* rather than imposing isolated constraints – Ivrea's land-use plan incorporates the listing of existing, ordinary cultural constraints as well as "the accomplishments

[211] See in this regard what is noted in Chapter 1, Section 3.1.2.
[212] The quotation, which broadly addresses the phenomenon of legal globalization, is sourced from S. Cassese's *"Globalization of Law"* in the *Enciclopedia Treccani*, 2009, available online at https://www.treccani.it/enciclopedia/globalizzazione-del-diritto_(XXI-Secolo)/ (accessed 20 December 2024).
[213] "Ivrea, industrial city of the 20th century," see the UNESCO webpage https://whc.unesco.org/en/list/1538/ (accessed 20 December 2024).
[214] City Council Resolution no. 44 of 24 June 2024 published in Regional Official Bulletin no. 34 of 22 August 2024. See https://drive.google.com/drive/folders/114qiNWNcVpXFEjxtTXIUvUyLpx4ztuYi for further information (accessed 20 December 2024)

of Adriano Olivetti's industrial and socio-cultural vision[215], including a collection of buildings designed by some of the most renowned Italian architects and urban planners of the twentieth century." The complex, the plan reads, "is distinguished by its cohesive urban-scale design and features several structures of particular significance". Significantly, what the plan does is to map *additional* buildings of architectural and cultural-historical significance to the "particular memory" of the place, going beyond the existing standard constraints. It happens, moreover, that the boundaries of this complex delineate the "UNESCO core zone" (also referred to as the "nominated property" in the UNESCO management plan), thus subjecting the territory to an additional cultural designation, this time of a supranational character.

Ultimately, the plan aims to survey, document, and recognize the historical and cultural significance of these assets, setting guidelines and limitations for their construction and management practices. What the plan *also* does, concretely, is to provide substance to interacting designations. Although the different levels of designation and protection remain separate – that is, UNESCO protection does not automatically trigger domestic protective measures, and domestic protective measures do not hinder municipalities to make additional designation – the practical effect of the plan is to give substance to constraints that, by their very nature, may prove to be insufficient or lack particularly strong enforcement mechanisms. Thus, it addresses legislative gaps by incorporating the distinct influence of local values while lending greater weight to designations that are primarily international.

At this juncture, a final, critical question arises: amid the convergence of cultural designations – and the tension between local, national, and global recognitions – what is the appropriate scale for evaluating and balancing competing interests? Put differently, does this convergence create the potential for conflict and, therefore, for the "negative process" of heritage-making previously discussed as a valid option? More specifically, can the local authority shape the *absence* of cultural interest by prioritizing other concerns? This question becomes particularly pertinent when examining how local governments navigate between

[215] The history of the city of Ivrea is marked by the work of Adriano Olivetti, entrepreneur, politician, and engineer who, in the early 20th century, initiated groundbreaking industrial projects grounded in the belief that corporate profits should be reinvested for the benefit of the community. Ivrea's designation as industrial city, as outlined in the UNESCO nomination, serves as a recent affirmation of this status. For further historical details, refer to the nomination materials, available at https://www.ivreacittaindustriale.it/ (accessed 20 December 2024).

preserving cultural heritage and addressing immediate community needs. The tension between global heritage designation and local priorities often plays out in concrete policy decisions, where theoretical frameworks meet the realities of governance challenges. To better understand these dynamics and their implications for cultural heritage definition, we finally turn to a case study beyond Italy's borders.

Liverpool was granted UNESCO World Heritage status in 2004 for its significance as a maritime commercial hub that shaped global trade in the 18th and 19th centuries. However, it was added to the World Heritage in Danger List in 2012 and ultimately lost its designation in 2021[216].

The site's in-danger status and eventual delisting were consequences of the "Liverpool Waters" development project, approved by the City Council in 2011. Intended to promote urban regeneration, the project planned a new district within the site's buffer zone but largely detached from the inhabited area. Although initial phases emphasized heritage preservation[217] – restoring and opening historic spaces – UNESCO concluded that the project's scale, particularly the introduction of dense, tall skyscrapers, would compromise the site's Outstanding Universal Value (OUV) and authenticity. UNESCO demanded the project's abandonment and corrective measures as conditions for retaining the designation. Crucially, the concern centered less on regeneration itself and more on how new architectural typologies would disrupt Liverpool's historic visual and spatial context. This presents an intriguing interplay between visual and material elements, as well as with the broader contextual image of the city, and aspects tied to its use and revitalization – dimensions acknowledged as intangible throughout the various developments of this thesis. What kind of discourse emerges from these dynamics, and how are the hierarchy of interests and the corresponding authorities practically established?

Between the site's placement on the endangered list and its ultimate delisting in 2021, a series of significant evaluation processes took place.

[216] The UNESCO sheet is available at https://whc.unesco.org/en/list/1150/ (accessed 2 January 2024). Among relevant documents: Dec. 36 COM 7B.93 and Dec. 44 COM 7A.34, UNESCO World Heritage Committee.

[217] See Z. M. Jones, "Large-scale urban regeneration threatening historic urban landscapes. The Liverpool Waters development and the loss of a UNESCO World Heritage Site", in *Tafter Journal*, no. 121, 2023.

Multiple organizations conducted heritage impact assessments[218], all yielding varied outcomes, often grounded in divergent evaluation criteria, and ultimately casting the situation as a polarized debate between heritage preservation and urban development and regeneration, opposing and incompatible interpretations of land governance duties. Mayor Andersen's statements have been quite revealing, suggesting that UNESCO status was merely a "certificate on the wall in the Town Hall," portraying Liverpool as a city stuck in the past, forfeiting jobs and redevelopment.[219]

The fundamental source of conflict appeared to stem from ineffective management of Liverpool's World Heritage status[220]. The municipality failed to effectively communicate and integrate the site's cultural value into local consciousness, resulting in limited appreciation and promotion of its World Heritage designation[221]. *Engage Liverpool*, a community-driven social enterprise, initiated a dialogue-based approach to address these challenges. Their participatory meetings brought together local residents, UNESCO representatives, academics, property developers, and officials from other World Heritage cities to explore whether heritage preservation and urban development could coexist, and why development had been prioritized despite UNESCO warnings[222]. The lack of transparency and engagement highlighted broader governance failures.

Despite the submission of a 'Desired State of Conservation Report' to UNESCO promising improved civil society engagement, the municipality's actions continued along the path of development. In 2021, with approval of a new stadium within the protected area, UNESCO officially delisted Liverpool, citing "serious deterioration and

[218] Including Liverpool City Council, the development company Peel Group, and English Heritage, a charitable organization focused on historic preservation.
[219] "Liverpool Council Leader Joe Anderson says City Would Sacrifice World Heritage Status for Liverpool Waters Scheme in New Year report", in *Liverpool Echo*, 2012.
[220] T. West, "Liverpool's European Capital of Culture legacy narrative: a selective heritage?" in E*uropean Planning Studies*, vol. 30, no. 3, 2022.
[221] As found in a 2014 report by the Institute of Cultural Capital, "Heritage, Pride and Place. Exploring the contribution of World Heritage Site status to Liverpool's sense of place and future development." Available at https://studylib.net/doc/6668847/heritage--pride-and-place (accessed 3 January 2025).
[222] See the 2017 and 2018 seminars' introduction, titled "A Status Worth Fighting For", at https://www.engageliverpool.com/projects/engage-with-the-unesco-whs/ (accessed 3 January 2025). The public's response are available at https://www.engageliverpool.com/seminar/unesco-whs-cities-of-inspiration-2018/ (accessed 3 January 2025).

irreversible loss" of the attributes conveying the site's OUV due to inadequate governance mechanisms[223]

The case raises two major points.

First, it illustrates an inversion of the usual tension between local and global interests. Here, UNESCO's global heritage framework was seen as a local constraint[224], while positioning Liverpool within global markets became the overriding international priority. Heritage was valued primarily as a tool for development, investment, and global visibility – leading to a trade-off between UNESCO membership's benefits and the city's autonomy over urban planning.

Hence, an additional tension takes shape between UNESCO membership's advantages and influence, particularly in terms of increased visibility and access to international assistance, weighed against the diminished autonomy of local authorities in urban planning and development, which would frame heritage under different perspectives[225]. Not to mention that cultural recognition shaped at UNESCO level often fails to address pressing issues, such as the previously mentioned challenge of short-term rentals – a major concern in cities suffering from overtourism. UNESCO status does not automatically address such questions, pushing responsibility back onto local governments to balance restrictions on short-term rentals through alternative measures and preservation in line with UNESCO's stringent standards[226].

As a second point, it is also essential to acknowledge that while this dynamic redefinition – or even deletion – of heritage might align with the evolving interests of stakeholders, the Liverpool case demonstrates a crucial failure: the lack of civil society involvement.

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[223] UNESCO Doc., Dec. 44 COM 7A.34, cit.

[224] See the article of M. Parkinson, "I've Been Chronicling Liverpool's Renaissance for 40 Years-Here's Why the City's UNESCO Status Should Not Have Been Removed", in *The Conversation*, July 21, 2021. Available at https://theconversation.com/ive-been-chronicling-liverpools-renaissance-for-40-years-heres-why-the-citys-unesco-status-should-not-have-been-removed-164719 (accessed 3 January 2025).

[225] Z. M. Jones, cit., 200, notes in this respect that "The language used in Article 6 [of the World Heritage Convention,] is in tension with UNESCO's treatment of State Parties when it issues decisions and demands that warn cities."

[226] Up until the extreme case of "The Architectural Work of Le Corbusier", UNESCO World Heritage site since 2016, where visitors can book a stay in one of the apartments in Marseille's *Cité Radieuse* through Airbnb.

Notably, the view of heritage as a means for development aligns with the principles outlined in the Faro Convention, as discussed earlier in this chapter. However, the approach at stake fails to align with a fundamental principle established by Faro – the importance of civil society's acknowledgment of cultural value. This crucial aspect is evidently absent in the Liverpool case. The lack of communication regarding UNESCO's values and the limited engagement of local communities, unaware of the reasoning behind the decision to proceed with delisting, clearly highlights this issue. Following Faro's principles, the cultural environment should inform all aspects of development – economic, social, political, and cultural – and local communities should be actively empowered to define, protect, and manage it.

Ecomuseums

The analysis of ecomuseums – a theoretical construct born from the *Nouvelle Muséologie* movement[227] – builds upon the latter reflection on Faro's principles[228] and examines how the concept has entered the legal discourse in ways that warrant closer examination.

There is no universally accepted definition of ecomuseum, partly due to its localized evolution that, as we will soon observe, also influences its legal interpretation. Most definitions characterize it as a community-driven practice focused on preserving, enhancing, and managing local heritage within a defined environmental and cultural space, with residents working in partnership with institutions. Its conceptualization also varies depending on how closely it aligns with traditional museum frameworks. Compared to the latter, ecomuseums generally exhibit local heritage, including its intangible aspects, within the actual territory where these cultural elements evolved and continue to exist. Unlike museums, moreover, where visitors are often viewed as "outside observers" exercising their right to access, they embrace the local community as both creator and custodian of the heritage being

[227] Originating in the 1970s in France, with prominent figures such as Hugues de Varine and Georges-Henri Rivière. See H. de Varine, *Les racines du futur. Le patrimoine au service du développement local*, Chalon-sur-Saône, 2002. Some accounts also trace ecomuseum's roots to the work of Swedish philologist Artur Hazelius, creator of so-called *Skansen*, the first open-air museum, in the late 1800s.

[228] Although a similar parallel could also be drawn with the principles of Council of Europe's 2000 European Landscape Convention or with UNESCO's 2003 Convention on the safeguarding of ICH.

preserved. This transforms ecomuseums from "a place to visit" into "a place to be experienced."[229]

Nonetheless, a broad range of definitional possibilities persists. At one end of the spectrum, ecomuseums are regarded as formal institutions managing, studying, and interpreting a community's heritage – both natural and cultural – for scientific, educational, and cultural purposes. At the other end, they are more broadly understood as collaborative instruments, jointly developed and operated by local governments and communities.

These different interpretations are mirrored in their legal frameworks. An analysis of legal definitions highlights a clear division in classification: either as 'cultural institutions' and 'museum forms,'[230] or as 'places' and 'territories'[231]. For our purposes, the second proves more relevant, given its implications for attributing legal significance directly to territory – "Ecomuseums are *territories* characterized by distinct historical-cultural, landscape, and environmental features, designed to initiate a dynamic process of conservation, interpretation, and promotion of the natural and cultural heritage of society through the engagement of local communities."

This broad conceptual framework, founded on the tripartite relationship between heritage, territory, and population[232], compels a redefinition of the resulting physical and theoretical space. There, a new balance arises that both challenges and enriches traditional distinctions in domestic law between heritage, territory, and the role of institutional and civic actors. This complexity arises from the fact that an ecomuseum is neither limited

[229] A. Piazzai, "Gli ecomusei del Lazio e la valorizzazione delle culture "minori"", in *Aedon*, no. 2, 2023, citing in turn De Varine's work.
[230] As in the case of Regional Laws of Sardegna, no. 14/2006; Tuscany, no. 21/2010; Sicily, no. 16/2014; Friuli-Venezia Giulia, no. 23/2015.
[231] As in the case of Regional Laws of Umbria, no. 34/2007; Lazio, no. 24/2019. This dichotomy is also emphasized in the 2017 State of Landscape Policy Report (*Rapporto sullo Stato delle Politiche del Paesaggio*), drafted by the National Observatory for Landscape Quality, established under Article 133 of the Cultural Heritage and Landscape Code and active since 2015. The report identifies two distinct trends: "one that views it as essentially a territorial *museum* serving the population, and the other that sees it as a *community process* initiated by the population and working for its development." *Rapporto sullo Stato delle politiche del Paesaggio*, 475. Available at https://www.certifico.com/component/attachments/download/6661#page=481.06 (accessed 9 January 2025).
[232] H. de Varine, cit.; on the point also C. Da Re, "La comunità e il suo paesaggio: l'azione degli ecomusei per lo sviluppo sostenibile. Le iniziative per la salvaguardia del paesaggio biellese", in L. Zagato, M. Vecco (eds.), *Citizen of Europe. Culture e diritti*, Venice, 2015.

to a "collection of objects of cultural value," nor solely defined by cultural or environmental heritage. Instead, it encompasses complex relationships among subjects and objects of diverse natures, rendering its legal framework – intended to *define* these interactions – particularly intricate. This is further compounded by the fact that many ecomuseum experiences result from the merging of subgroups representative of single cultural traditions and expressions in a given territory, both material and immaterial[233]. These groups embody the diverse knowledge, techniques, and expertise that have shaped the local history and industrial development of the area, and find themselves included in a *context* that receives substantive, theoretical, and also legal qualification.

This is why the ecomuseum model serves as a valuable case study in this context. Not only does it illustrate the intricate dynamics of heritage definition and the governance of the "context," where various assets and related interests intersect, but also offers three additional insights.

The first pertains to the incorporation, in Italy, of ecomuseums regulation into regional legislative frameworks. This raises substantive questions about existing power structures and regional authorities' capacity to influence processes of heritage definition.

The second stems from the scope of heritage protection. Nearly all regional laws surveyed have incorporated ICH as a fundamental component of ecomuseums. This stands in contrast to national legislation, which has shown significant limitations in addressing this topic[234].

The third lies in legal conceptualization. Regional laws define ecomuseums through a recognition-based approach, formally acknowledging pre-existing territorial configurations for which local communities are responsible. This final aspect is pivotal to our current analysis, steering us toward a more in-depth examination of the issues at stake.

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[233] Often referred to as "cells" or "antennas." See the case of the *Ecomuseo del biellese*, in Piedmont, on which C. Da Re, *ivi*, or the *Ecomuseo del Sale e del Mare di Cervia*, in Emilia-Romagna.

[234] As detailed in Chapter 1, Section 3.1 for the Italian legal framework and Section 3.2 for a comparative perspective on the French legal system. For further discussion of the relationship between intangible cultural heritage, the Faro Convention, and ecomuseums, please refer to the author's previous work: A. Mussatti, "La Convenzione di Faro e le espressioni di cultura immateriale in Italia: il caso dell'ecomuseo", in *Nuove Autonomie*, no. 3, 2022.

Indeed, the principle of recognition, rather than creation, has been fundamental in shaping the theoretical frameworks regarding ecomuseums. In 2007, the *Carta di Catania* – the first academic and programmatic document on the subject – explicitly emphasized the role of Regions and Autonomous Provinces in *recognizing*, not *establishing*, ecomuseums[235]. The distinction is significant: while recognition validates an existing, community-driven reality, creation implies top-down administrative control over the definition of heritage and territory concerned. This marks a crucial paradigm shift: although, theoretically, the approach aligns with the traditional view that cultural value is intrinsic and only requires official recognition to be legally acknowledged, it transitions from recognizing the value of objects, to acknowledging the *act of valuing* of people. In line with the principles of Faro Convention, UNESCO's ICH, and the European Landscape Convention – all of which address aspects encompassed in the broad idea of ecomuseum – this territorial approach fosters a dynamic perception shaped by subjective interpretations. It also highlights the inherently mutability of the "asset ecomuseum," marking a significant departure from a fixed standard of protection, and leading to a more nuanced and collective assessment that extends beyond cultural value to also embrace natural elements, memorial perceptions, sustainable growth, and economic development.

From a conservation theory perspective, this resonates with the so-called theory of negotiative conservation[236], conveying the idea that "it is the subjects, and not the objects, for whom any conservation process is carried out." It thus nurtures theoretical strands grounded in

[235] Drafted at the end of the national academic meeting "Towards a National Coordination of Ecomuseums: A Process to be Shared," as part of the Ecomuseum Days Conference – Towards a New Cultural Offer for the Sustainable Development of the Territory. The Charter is available online at http://www.bda.unict.it/Public/Uploads/article/Carta%20di%20Catania.pdf (accessed 3 January 2025). It was followed by the "Strategic Manifesto of Italian Ecomuseums" (*Manifesto strategico degli ecomusei italiani*) of 2015, defining ecomuseums as "participatory processes for the recognition, preservation, and management of local cultural heritage, to promote sustainable social, environmental, and economic development;"and and the Milan Cooperation Charter "Ecomuseums and Cultural Landscapes" (*Ecomusei e paesaggi culturali*) of 2016, drafted within the framework of the ICOM Ecomuseums and Community Museums Forum.

[236] S. Staniforth, "Conservation: Significance, Relevance and Sustainability", in *Bulletin 2000(6)*, IIC, 2000. See also S. Muñoz Viñas, *Contemporary theory of conservation*, cit., from which the following quotation was taken.

intersubjectivism[237], moving away from the conventional objective vs. subjective dichotomy in heritage definition processes. Ultimately, this leads to understanding ecomuseums as "pacts, wherein the community pledges to take responsibility for the *stewardship* of a specific territory[238].

From a legal standpoint, this compels us to reflect on the parties and roles involved in sustaining such a pact. Indeed, a covenant framework implies (at least) a bilateral relationship between distinct parties. It is noteworthy in this respect that the institution through which the pact is established is the regions, rather than the state. Far from being provided by explicit legislative provision, this is the result of the finding that, in Italy, legislation on this matter has evolved only at the regional level, after unsuccessful attempts at the central one[239]. In accordance with the constitutionally established framework, ecomuseums should be classified under the domain of "enhancement of cultural property and promotion of cultural activities," rather than under protection, which is the sole authority for identifying cultural value. As a result, their regulation would not qualify as proper cultural heritage identification, nor as landscape assets[240]. Instead, they would be included under forms of enhancement for *other* properties classified as cultural or landscape heritage. In fact, any characterization of ecomuseums in their "broadest sense" – not simply as an organizational model for the enjoyment of cultural and landscape assets, but as a true form of protection for the relationships established between physical assets, territory, and the

[237] Already referenced in note 167 above. This theory rejects the dichotomy between objectivity and subjectivity in conservation criteria, emphasizing instead a disciplinary approach shaped by individuals within "communalities of intersubjectivity" which are most impacted by the changes imposed on the object through the process of cultural definition. For further insights, and besides S. Muñoz Viñas, see K. Walsh, *The Representation of the Past*, London, 1992; N. Stanley-Price, "Conservation after Bamiyan", in *Bulletin 2002(2)*, IIC, 2002, esp. 32.

[238] In these terms M. Maggi, *Ecomusei. Guida Europea*, Torino, 2002, 9. See also V. Caputi Jambrenghi, "Interventi sul territorio extraurbano. Ecomusei, paesaggi e periferie", in *Giustamm.it*, no. 11, 2019.

[239] The progress of national bill proposals has been repeatedly stalled. Among these, noteworthy are the *disegno di legge* no. 902, titled "Provisions on the Establishment of Ecomuseums for the Enhancement of Local Culture and Traditions," submitted to the Senate in 2008; *proposte di legge* no. 2804, titled "Framework Law on Ecomuseums" and no. 2646, titled "Provisions on the Establishment of Ecomuseums for the Enhancement of Local Culture and Traditions," submitted to the Chamber of Deputies in 2009 and 2014, respectively.

[240] See in this regard the reflections of G. Rigobello, "Gli ecomusei, strumenti di un nuovo approccio per il patrimonio culturale. Le esperienze di Italia e Spagna", cit. Also, G. Pidello, "Ecomuseum and landscape. A fruitful contamination", in R. Riva (ed.), *Ecomuseums and cultural landscape. State of the art and future prospects*, Sant'Arcangelo di Romagna, 2017.

community – would complicate placing them within the scope of regional powers[241]. In practice, however, regional laws often go further in providing detailed characterization of those territories, also in terms of *defining* cultural elements – with the associated and already observed implications that "alternative designations" entail.

On the other side – and most importantly – the community assumes a central role under the covenant vision, bearing enhanced and more substantial responsibility in these heritage definition dynamics. This aligns with our broader investigation into how cultural interests are formed and sustained within contemporary legal frameworks, where bottom-up approaches in cultural protection are increasingly emerging.

Delving further into this topic, a more intriguing question emerges regarding communities' legal rights over their territories, particularly in relation to the nuanced distinction in legal discourse between 'custodianship' and 'ownership'. While the present chapter focuses on analyzing existing law, the argument extends into more fundamental legal theory, whose comprehensive analysis will be revisited in the concluding chapter of this study[242].

Staying for the moment within the scope of positive law, regional legislation reveals an external, reconnaissance-oriented posture in most cases examined, as referenced in point three above. In other words, it reflects an institutional stance that respects the prior identification of values (both cultural and otherwise) and commits to participating in their management. A notable example is the Piedmont Region, the first to legislate on this subject. Initially, Regional Law No. 31 of March 14, 1995 tasked the Region with "promoting the establishment of ecomuseums within its territory" and required annual proposals to the Regional Council for new ecomuseum establishments. This was later replaced by Regional Law No. 13 of August 3, 2018, which repealed the earlier law and now states at Article 3 that the Regional Council only *recognizes* ecomuseums – whether existing or proposed – through its own resolution, based on documented evidence of at least three years of operational experience in the relevant territory.

[241] One option could be to include ecomuseums under the "further special forms and conditions of autonomy" outlined in Article 116 of the Constitution, which specifically addresses the protection of cultural property. These powers can be granted to regions through state legislation, approved by an absolute majority in both houses of Parliament, based on an agreement between the state and the region in question, and initiated by the region following consultations with local authorities.
[242] See especially Chapter 4, Section 2.3.1.

Eventually, connecting these two spheres of action (regions on one side, communities on the other) is also a network of private and public associative opportunities. These include purpose-built associations and foundations established and managed by community members, alongside the involvement of local authorities, such as municipal governments, or even "other public or private entities specifically created for this purpose,"[243] all converging on initiatives that serve local interests. This collaborative approach, rooted in principles of vertical and horizontal subsidiarity and reflected in major international agreements, has several key effects: it promotes dialogue between different groups, expands their influence, and helps shift cultural definition processes away from centralized control toward grassroots empowerment.

The regional legislation reviewed mirrors this perspective. Referenced Piedmont law allows the recognition of ecomuseums by regional authorities upon the request of entities explicitly described as "expressions of the territory represented by the ecomuseum." These include local authorities, whether individually or in association, as well as associations, cultural and environmental foundations, other nonprofit organizations, and management bodies of protected natural areas. Similarly, the Umbrian law allows recognition by local authorities (individually or in association) or by public/private associations operating within the ecomuseum's territory, provided they submit a shared feasibility project approved by the relevant local authorities[244].

In this context, the representation of interests becomes more directly aligned with those expressing them, addressing the primary concern of the earlier discussion: the disconnect between community interests and institutional representation.

This ultimately positions the ecomuseum case as an ideal example of the how the land, in its entirety, serves as the essential endpoint for most human activities, including heritage and culture-related ones. It also underscores how, by the end of this chapter, the boundary between immaterial and material, objective and subjective components in heritage discourses, have effectively dissolved. Ecomuseums incorporate intangible elements that extend beyond the confines of ICH, such as practices, uses, collective memories, activities, and contextual appearance. This is because the approach stems from initiating cultural

[243] In these terms Regional Law of Veneto, no. 30/2012.

[244] Only in two specific instances the involvement of a local authority is strictly required: these are the cases of Regional Law of Sardinia, no. 11/2006 and of the Autonomous Province of Trento, no. 15/2007.

definition through a deeper exploration of immaterial dimensions, then followed by engaging the diverse stakeholders at play. Ultimately, this process leads to a more holistic understanding of the heritage asset, circling back to the earlier discussion on the many layers of intangibility inherent in heritage concepts.

This discourse uncovers an underlying and ongoing reflection on alternative approaches to heritage definition, prompting reconsideration of the parameters assumed thus far, particularly concerning existing law. In the next chapter, which concludes this study, some *de iure condendo* considerations will guide us in establishing the frameworks for future reflections, essential for ensuring the long-term sustainability of cultural heritage and its legal translations.

4. Chapter conclusion

The third chapter of this thesis functioned both as a corollary and as an analytical counterpart to previous investigations. Building on the established conclusion that multiple immaterialities can be identified within the object under consideration, the chapter delved into the additional layers of complexity these dimensions bring to our analysis. The central research question followed logically: Does this multidimensional immateriality of cultural heritage also transform the configuration of interests at stake and reshape the associated subjective positions?

Indeed, by refocusing the investigation on the subjective component, the analysis completed its examination of a necessary counterpart and revealed a fundamental insight: that immateriality entails a distinct mode of engagement with subjectivity. This, in turn, calls into question several traditional legal paradigms: the expression of public interest and the role of the representative entity tasked with its protection; the enforceable limits on private interests; the process through which cultural interest is declared – and thereby defined, first normatively and then administratively – in terms of participation; and the criteria for legal standing in related judicial proceedings. These issues required a critical reassessment of the legal frameworks that structure the key points of interaction, along with the prerogatives, duties, and institutional arrangements that underlie the *negotiation* of heritage value.

From this perspective, the chapter was dedicated to analyzing existing legal instruments capable of acknowledging and supporting such a growing presence of diverse subjectivities, interests, and prerogatives within a heritage discourse that is inevitably shaped by increasing tensions and divergent outlooks.

The research methodology was structured around two main investigative domains and two complementary analytical approaches. Indeed, we deemed essential to establish a dual level of research that accounted for both the implications of transnational concepts in international law (first and foremost, the concept of ICH), and the national regulatory environment with its distinct administrative mechanisms.

Accordingly, the first phase of analysis (Section 2) investigated two key questions.

(i) Whether the right to cultural heritage provides a legal foundation for establishing legal standing in heritage recognition processes.

(ii) Whether, from a purely domestic perspective, the concept of cultural interest could be further developed to support a more nuanced understanding of the public value of heritage, in light of the various immaterial dimensions identified.

Having established the theoretical potential of these two legal frameworks, Section 3 was devoted to their practical implementation feasibility in accommodating the complexity of heritage definition processes. This assessment focused on two specific research indicators: stakeholders' diversity and the level of integration, and the prerogatives exercisable within these legal mechanisms.

Regarding the first field of inquiry, the following reflections can be drawn.

The right to cultural heritage emerges as a potential avenue for enhancing dialogue in heritage-defining processes, particularly within internationally developed frameworks that link heritage to broader development goals.

In the international context, this right features prominently in discussions on ICH and in extensive conceptions of heritage, such as those outlined in the Faro Convention. These approaches share a key understanding: heritage derives its significance from its connection to identity, development, and the enhancement of quality of life. It is thus seen not as a static entity, but as one that exists through its dynamic relationship with subjective human experience. As a result, asserting a right to heritage becomes a means of affirming subjective positions and actively engage in this evolving conceptualization.

However, it appears that within existing legal frameworks and judicial interpretation the recognition of a right to cultural heritage remains largely confined to access in terms of enjoyment, rarely extending to active participation in heritage identification processes. This limitation reflects concerns that emphasizing subjective identity claims could fragment cultural value and challenge State unity, as it can lead to the assertion of political identities that may conflict with broader national cohesion. Although the direct link between human rights and the conceptualization of heritage is now widely acknowledged in most international conventions and documents, significant misalignments persist – both procedurally and in the legal avenues available for

asserting claims in court. As observed[245], this issue arises precisely from the inability to acknowledge the nuances within a concept of community that is treated as monolithic, thereby demanding an expression of a singular and unified interest. This approach rejects plurality and, as a result, compels the claim of a right that resembles an individual claim rather than a collective one, aligning more closely with the dynamics of human rights assertions. These discrepancies contribute to the limitations outlined above, creating an enforcement gap that confines the right to cultural heritage to mere enjoyment or preservation of a predetermined status, rather than ensuring a substantive ability to seek justice and assert meaningful claims in heritage-related processes.

At the national level, where these principles and concepts are also transposed, they engage with a distinctive social fabric, political history and legal framework. Here, the assertion of specific identities through heritage claims and the call for recognizing heritage's role in fostering diversity and social development are understood differently than in international frameworks, which must accommodate the diverse cultural, political, and economic traditions of different countries. Thus, the assertion of a right to cultural heritage appears to have even limited relevance within the Italian domestic context, not least because the legal system significantly downplays the significance of immaterial aspects in heritage conceptualization. If immateriality is connected with a more pronounced subjective dimension, the domestic legal framework remains largely anchored to a model centered on materiality and authoritative recognition of public value, as we argued several times. This makes it difficult to shift the paradigm toward recognizing an individually or collectively enforceable right of any groups or individual to participate in definitional processes.

Instead, the topic was approached from another angle: the transition of cultural heritage and productions into digital spaces. Indeed, within Italy's current framework of cultural property, important questions emerge when these assets become enriched or even entirely transformed by digital dimensions. In these scenarios, the recognition of a right to heritage as a fundamental right of access to an asset in its new intangible form – already a concept fraught with implications – is further expanded by the potential for active participation. Digital environments inherently redefine citizens' role from passive recipients to engaged users – a

[245] L. Lixinski, A Third Way of Thinking about Cultural Property", cit., 603: "Bringing communities to the international table forces a realization of pluralism and intersectionality that is likely to be deeply destabilizing."

transformation driven by the digital realm's capacity for circulation, reuse, and multiplication in ways far more fluid and dynamic than physical contexts allow. In this sense, the right to heritage should be viewed as an increasingly relevant framework for addressing the intangible evolution of cultural property.

On the other hand, with regard to the expansive potential of assessing cultural interest through a more consistent integration of immaterial dimensions within the concept of cultural property in domestic law, two key outcomes emerge, corresponding to the two analytical trajectories employed.

The first focused on the ordinary process for identifying cultural interest, for which we observed that shifting justification from objective-material assessment criteria to subjective-immaterial considerations continues to pose significant legal challenges.

As noted throughout the chapter, private participation in declaration procedures operates within narrowly defined parameters of legitimate intervention, specifically through recognized forms of property possession. The latter, however, fail to encompass the multidimensional relationships and forms of engagement that local groups maintain with cultural assets. These relationships – characterized by "particular memory," emotional connections, and present engagement patterns – exist outside established legal boundaries, creating a fundamental disconnect between formal declaration processes and actual community interactions with cultural properties.

Hence the challenge of recognizing locally situated claims of cultural relevance – distinct from an objective, value-based assessment of the object – as a valid basis for justifying administrative constraints, as we observed occurring in foreign legal frameworks. The issue was specifically examined through the analytical framework of historical interest, which enabled us to draw a clear parallel with distinct memorial perception. This, in turn, led us to conclude that memorial perception itself could serve as the foundation for an additional immaterial dimension of the object, shaped by the specific determination of the subject. Ultimately, it became clear that a broader integration of the subjective dimension both *stems from* and *contributes to* the creation of an additional form of immateriality. In other words, the shift in focus to perception and particular memory transforms the objective conceptualization itself, enriching it through a reciprocal process that introduces an additional immaterial dimension rooted in this very subjectivity.

The discussion thus circles back to earlier findings on heritage (or property) association to functionality and development value. Ultimately, the integration of immaterial dimensions into heritage frameworks suggests, from the perspective of the subjects involved, a necessary recalibration of evaluation criteria in ordinary administrative procedures. This shift would move assessment priorities toward alternative value considerations that emphasize present significance, development potential, and human connection rather than traditional preservation metrics.

The second finding, on the other hand, lies outside the ordinary procedure of cultural identification and emphasizes the existence of alternative recognition processes. The decentralized administrative structure was used as lens to explore whether institutional proximity could foster more localized representations of the interests involved. Indeed, this approach proved to be an effective mechanism for developing more nuanced assessments of cultural significance. Localized institutional approaches serve as a robust vehicle for adding necessary complexity to heritage definition processes, bringing decision-making closer to the communities where cultural assets originate and reside.

Moreover, decentralization was found to play a key role in capturing the several intangible dimensions of heritage, broadening the scope of cultural value recognition. Building on the analyses conducted in Chapter 2, the discussion examined how local administrative authorities contribute to this expansion. Despite operating within a seemingly rigid hierarchy of interests, their competence in different matters, as land governance and urban planning, offer a broader perspective on cultural interest construction. The intersection of cultural and territorial governance thus becomes a key space for recognizing immaterial dimensions, with decentralized entities better positioned to accommodate nuanced interplays and "potentially address gaps that still lack adequate procedures for formalized community engagement"[246]. As we have seen, this also covers cases of conflicts or "negative" perceptions regarding the existence or continuation of recognized cultural values in the territory at stake.

Accordingly, this analysis supports the emergence of an "integrated spatial planning system" that protects shared values through more

[246] E. Boscolo, "Nuove dimensioni della pianificazione comunale", in F. Di Lascio - F. Giglioli (eds), L*a rigenerazione di beni e spazi urbani. Contributo al diritto delle città*, Bologna, 2017, 162, although the author refers specifically to the gaps in landscape legislation.

granular oversight of local interests. Rather than being treated in isolation or confined to a hierarchical allocation of competencies and subject matters, these interests function as cross-cutting *objectives*. They stem from regulations or institutional frameworks that extend beyond traditional authorities responsible for specific, predefined areas of competence and function at a distinct level of interaction – one in which immateriality is undeniably integral to the discourse.

It is important to highlight, however, that this rapprochement between local administrations and situated interests largely unfolds outside traditional heritage processes, often framed as alternative safeguarding modalities for alternative cultural property. In this sense, they still fail to engage with (and thus influence) the conventional conceptualization of cultural property. Instead, the development of parallel protection mechanisms reflects an evolving understanding of cultural heritage, allowing for greater inclusion without disrupting established protection processes.

Chapter 4 – CONCLUSIONS. THE ITALIAN SCENARIO AND EMERGING AREAS FOR FUTURE RESEARCH

1. The first dimension of immateriality

The first chapter of this research identified intangible cultural heritage as the most prominent and widely recognized form of immateriality in the conceptualization of cultural heritage. With a view to developing a methodological framework for comparative research, this provided a strong foundation, allowing us to draw on a rich ground of legal and scholarly discourses.

The analysis proceeded along two lines of investigation: one directed at determining ICH's scope at the international level, establishing its foundational principles and operational framework, and the other investigating how these international principles have been interpreted and implemented within domestic regulatory systems.

Accordingly, the structural framework underpinning the legal concept of ICH was mapped out, beginning with its theoretical foundations and the rationale for international protection. As a matter of fact, 'intangible cultural heritage' is the term international law has assigned to a phenomenon that long predates its formal recognition on the global stage. As such, it was essential to trace its local origins, particularly within national legal frameworks primarily based on copyright restrictions, which have often resulted in state ownership and control regimes over popular cultural expressions. This trajectory revealed the complex interplay between domestic legal approaches and the broader international efforts toward safeguarding, underscoring the ongoing challenges of balancing cultural preservation goals with community ownership and intellectual property concerns. We will return to this issue in later sections.

In summary, ICH is currently understood as the set of practices, representations, expressions, knowledge, and skills that communities, groups and, in some cases, individuals recognize as part of their cultural heritage (Article 2, UNESCO 2003 Convention). ICH, therefore, (i) refers to non-physical cultural expressions, although it may encompass related artifacts, tools, and cultural spaces; (ii) is inherently subjective, as its recognition relies on criteria established by its bearers and practitioners rather than objective standards of excellence – making it dynamic and adaptable over time; and (iii) it holds significance for humanity in that it

necessitates efforts to ensure its *safeguarding* – that is to say, to guarantee its continuity, transmission, and evolution, supported by documentation, dissemination, and research that acknowledge and preserve its value. To this end, a listing system has been established – a representative list of ICH, a list of ICH in need of urgent safeguarding, and a register of good practices – each with specific inscription mechanisms. However, these are not closed or exclusive repositories; rather, they function as instruments of recognition and neither they overlap with all ICH existing, nor they confine safeguarding responsibilities of states solely to the elements inscribed. Instead, they reinforce the broader duty to protect *all* ICH within a State's territory, with elements serving as examples.

Throughout the examination of both the international framework and its national implementations, two fundamental legal issues have emerged prominently:

(i) the inherent complexities involved in protecting non-physical manifestations;

(ii) the challenge of properly acknowledging their inherent subjectivity, especially the profound connection between a practice and the community that creates, sustains, or regards it as an integral component of its heritage.

These two interconnected issues remained central throughout this initial investigation. As indicated by the title of Section 2, Chapter 1, the core challenge was to determine *what* exactly should be safeguarded and *how* to best achieve it. In other words, the point was to understand (i) how something that lacks a fixed material form can be protected without relying on conservationist models, nor on ownership-based relationship with its creator(s); (ii) how legal frameworks can accommodate something that is intangible, ever-evolving, and inherently dependent on subjective recognition for its very existence.

The historical and political dominance of a Western perspective – rooted in tangibility, objectivity, and standards of excellence – was repeatedly emphasized. This was evident both internationally, where ICH was said to derive in many was from the 1972 UNESCO World Heritage Convention, and even more so within national frameworks.

Terminology also played a key role: what was initially labeled as 'folklore' became a matter of academic and institutional debate. Discussions fluctuated between highlighting its oral dimension – ultimately deemed insufficient – and framing it as traditional, which

risked neglecting its dynamism and relevance in the contemporary word. 'ICH' eventually gained recognition within UNESCO's administrative logic precisely because it stood in contrast to tangible heritage[1]. Still, its intangible nature has consistently posed legal challenges, as illustrated by the Italian legal framework, where it has been reframed as 'expression of collective cultural identity.' The difficulty in defining this concept was a significant indicator of the broader legal complexities surrounding the mechanisms of safeguarding.

Consequently, at the operational level, the core issue has centered on the relationship between the State and the holding community – specifically, how to balance the former's duty to safeguard with the community's right to be participate, to give consent, and to benefit from its own cultural practices. The weak normativity surrounding this right required closer examination, particularly regarding how participation is ensured in listing processes, as well as in documentation and dissemination efforts.

This, in turn, resonated with the core tensions identified at the outset of the whole discussion on ICH, particularly during its adoption: should its private significance for communities take precedence, or its public value as part of the heritage of humanity? Indeed, elevating ICH as part of the heritage of humanity – in other words, considering it worthy of protection through documentation, dissemination, and the identification of its representative elements – often risks obscuring the enduring bond between the community and *its* heritage. As we shall see, this issue ultimately resurfaces at the national level – the very context in which ICH first arose, and where safeguarding efforts merit closer examination.

1.1. ICH into national legal grids

At the heart this analysis lied the adaptation of the UNESCO framework for ICH within Italy's distinctive legal system. Italy lent itself as an ideal investigative ground for this research, ultimately seeking to establish a methodology for investigating immateriality in the legal discourses around cultural heritage.

[1] L. Lixinski, "Regional and International Treaties on Intangible Cultural Heritage: Between Tradition and Contemporary Culture" in C. Waelde et al (eds.), *Research Handbook on Contemporary Intangible Cultural Heritage*, Cheltenham, 2018, 17.

A dominant presence on the World Heritage List lists and global reference point for cultural heritage, Italy exemplifies a solid (Western) tradition centered on the materiality, objectivity, exceptionality, and distinctiveness of cultural property – all of which contrast sharply with the principles underpinning ICH.

To address the complexities of this transposition, the research was structured around two key questions.

(i) Does a legal concept of intangible cultural heritage exist within Italian domestic law, and if so, how is it defined?

(ii) Are administrative structures and public policies equipped to safeguard ICH effectively?

The answers (explored in Sections 4.1.1 and 4.1.2) revealed several critical insights.

The Italian Code of Cultural and Landscape Heritage presents notable limitations: it lacks a formal definition of ICH and makes no direct reference to it within its provisions. The legal incorporation of ICH only occurs through Article 7-bis, which refers to 'expressions of collective cultural identity.' This terminological divergence – reflecting the earlier challenge of naming what cannot be effectively protected – highlights the restrictive criteria applied to recognition. Indeed, these expressions must be associated with a tangible object, which itself must already qualify as cultural property.

The fragmented and largely retrospective references in other ordinary laws have proven to be of limited usefulness, as they typically recognize the existence of an alleged intangible cultural heritage without providing a clear definition or legal framework. Regional legislation, on the other hand, while frequently invoking the ICH concept and implementing various preservation policies, remains constitutionally limited to the sole *enhancement* of cultural assets, with no authority over their identification or protection. This implies that unless ICH is treated – as it typically is in practice – as merely a supplement to tangible heritage, serving solely to enhance it, regional legislative authority in this area remains significantly constrained.

Compounding the challenges already discussed is the still-ambiguous reference to concurrent legislative competence in so-called promotion of cultural activities. This category remains difficult to define, as efforts to establish a dedicated legal framework have so far been unsuccessful. The first attempt, in 2002, failed entirely. A second effort is still ongoing,

following multiple extensions of a legislative delegation granted in 2017[2] for the "revision and reorganization of existing regulations in the fields of theater, music, dance, traveling performances, circus activities, historical carnivals, and historical reenactments for the creation of a unified regulatory framework known as the *Codice dello spettacolo* [Performing arts Code]." The goal was to provide the sector with a more structured and effective system, aligning with principles of administrative simplification and budget optimization while enhancing artistic and cultural quality, fostering production and innovation, and promoting accessibility for the public. Notably, the 2017 law explicitly cites the 2003 UNESCO Convention as a guiding reference[3], thus establishing a direct link between the two sectors. This connection offers an opportunity to overcome the rigid dichotomy between ICH s a legacy of the past and cultural activities as present or future-oriented, enabling the inclusion of contemporary forms such as theater, dance, and the performing arts at the national level. The issue will be explored in greater depth in the following section.

Added to the above considerations is the very recent adoption of law no. 152 of October 7, 2024, which introduces significant innovations on the subject. In addition to Chapter I of the law establishing "Provisions on historical reenactment events," Chapter II notably grants the government authority to implement regulations for safeguarding intangible cultural heritage, in order "to enhance the safeguarding of this heritage". Throughout Chapter 1 of this thesis, the key structural innovations have been subject to thorough analysis, with particular attention paid to the legislature's pivotal decision to create a separate legislative framework for ICH, along with the special emphasis placed on "fostering the broadest possible participation of the practicing communities" (Article 11). The anticipation surrounding future enforcement is considerable, as the law introduces significant departure from existing norms – particularly in its reconceptualization of the subjective role of CGIs and related heritage processes.

The second research question focused on the administration's capacity to engage with this (first) dimension of immateriality. Findings were

[2] Law no. 175 of 22 November 2017, titled Regulations on performing arts and delegation of authority to the government for the subject's reorganization.

[3] Article 1, law no. 175/2017: "In accordance with Articles 9, 21, 33, and 36 of the Constitution and within the framework of the principles set forth [...] by the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, adopted in Paris on October 17, 2003, the Republic promotes and supports the performing arts in their diverse expressions [...]".

structured through a cross-analysis: on one side, the three key safeguarding duties of states outlined in Part III of the 2003 Convention, and on the other, Italy's framework of domestic administrative functions. The analysis revealed that:

(i) The absence of a clear definition of ICH and the restrictive framing of 'expressions of collective cultural identity' under the Code contribute to stagnation at the operational level.

(ii) As a result, public policies aimed at protecting and promoting intangible heritage remain constrained by this narrow interpretation. One example is the regulation of historic premises under Article 52 of the relevant Code.

(iii) As of today, no national inventory of ICH exists in Italy, as required by the Convention at Article 12. Instead, references to ICH are scattered across various cataloging systems, many of which are not publicly accessible. That said, documentation and cataloging techniques appear to be particularly advanced, hence likely well-equipped to undertake targeted cataloging in this area. In this regard, Article 11(g) of Law 152/2024 introduces the creation of a national inventory of ICH – an initiative that has generated considerable interest for its potential to reshape the existing framework. The implementation of this national list is highly anticipated for its transformative implications.

(iv) Extensive planning efforts have already been undertaken, supported by funding from Law 77/2006 – although this law's conceptual integration of ICH elements remains partial. Numerous safeguarding plans been co-developed by holding communities in collaboration with expert institutions and under ministerial oversight. Compared to international practice, this model stands out: such planning programs are often absent or not broadly shared elsewhere. Drawing on the author's direct experience, safeguarding plans were analyzed both through a broad comparative review with the mandatory management plans for World Heritage sites, and through a more detailed assessment of their influence on administrative tools and the local context in which the heritage element is situated. Notably, the analysis highlighted their crucial role in maintaining the viability of the practice following its inscription.

To enhance the comparative dimension of the analysis, a focused examination of the French legal system was undertaken (Chapter 1, Section 4.2). France was selected as a relevant benchmark due to its shared foundations with Italy in administrative law and cultural

heritage legislation, while also standing out for a key distinction: the formal integration of intangible cultural heritage into its legal definition of cultural heritage (Section 4.2.1). This conceptual formalization produced notable operational effects: by becoming a legally defined category, ICH also became a subject of public policy (Section 4.2.2). Three findings were found particularly significant in this respect:

(i) The existence of a well-structured network of stakeholders, despite France's robust administrative centralization. The collaboration between the ministry and specialized research and civic organizations across the country has been recognized as particularly effective in promoting the visibility, study, and safeguarding of related practices.

(ii) The establishment of a specific ICH inventory and the development of innovative digital applications, which, in their most recent iterations, are open to community collaboration (e.g., the *PCILab* case).

(iii) The use of labeling as an effective tool for both raising awareness of ICH and fostering the associated development networks. For further discussion on this aspect, we refer to the following section.

1.2. Beyond the UNESCO ICH notion?

The analysis of Chapter 1 reveals that intangible cultural heritage, more or less integrated into national contexts, inherently holds a potential for expansion. Its international configuration – the result of a cultural, geo-political and social substratum we have thoroughly examined – has only partially fulfilled this potential. Given the overarching aim of this research – i.e., establishing a comprehensive methodological framework for the various facets of cultural heritage immateriality – this aspect takes on primary importance. It could be argued that ICH, as the most recognized form of immateriality, serves as a gateway to broader interpretations that gradually bridge the gaps with other dimensions of immateriality, as subsequently discussed in Chapter 2 of this research.

In this regard, two key areas emerge for further investigation:

(i) ICH's further evolution toward contemporaneity;

(ii) ICH's further exploration of subjectivity.

1.2.1. ICH's further evolution toward contemporaneity

The very nature of ICH as something transmitted across generations and continually re-created has historically existed in a subtle tension between a deep-rooted historical-traditional imprint and a perspective anchored in the contemporaneity of its expression. This tension is inherent as ICH is, by definition, continuously practiced and reshaped by the communities that sustain it. And in fact, the issue with contemporaneity is not about its living dimension – i.e., whether a cultural practice is actively performed in present time – but rather about its historical depth.

This is clearly reflected in Italy's law no. 152/2024, which combines the reorganization of ICH-related legislation with a comprehensive framework for so-called historical reenactment events. Bound by the inclusion under the same law, which solidifies their connection, these events pertain evidently to the past and must possess historical depth. Accordingly, the law requires a form of continuity for protection to apply[4].

Nevertheless, "emphasis on historical depth is never past-oriented but is instead viewed as a source of evolution", although this shift has yet to become fully mainstream[5]. The temporal focus of ICH is the present – and, in a broader sense, the future.

As MacMillian notes, however, the problem with more recent cultural practices and related communities is that they often possess less consolidated identities and may struggle to meet the criteria for ICH recognition. These newer formations typically lack the reflective tools to understand and articulate how their heritage emerges through processes of identity formation, collective memory, and cultural contemplation[6]. The question relates, then, to communities' internal reflections and negotiations on which practices should be perpetuated in contemporary contexts.

Yet, as the conceptualization of ICH expands, its scope increasingly intersects with practices that are often more grounded in the present

[4] Article 2(2), "These are events that have been held with continuity for at least five years."
[5] C. Bortolotto, Will heritage save us? Intangible Cultural Heritage and the Sustainable Development Turn, cit., 41.
[6] F. Macmillan, "Contemporary intangible cultural heritage: between community and market", cit., esp. 42. Likewise, M. Pavis, "ICH and safeguarding: uncovering the cultural heritage discourse of copyright", *ivi*, 296, defines contemporary ICH as "recent forms of intangible creative expressions, so recent in some cases that they are yet to be recognised by their communities as being part of their heritage."

than in long-standing tradition. Although the past serves to anchor a sense of historicity, recurrence, continuity, and community around a practice over time, in some cases it remains *in the process* of being defined. Upon closer inspection, it may be the very discussion on its conceptualization as ICH that plays a key role in shaping this definition[7].

As a matter of fact, there have been several recent inclusions, particularly in national inventories, of more contemporary cultural practices, where the focus is less on their traditionality or historicity passed down through generations, and more on their role in shaping *today's* society (or a very modern one), as a symbol embedded in widespread cultural practices[8]. Notable examples include Berlin's techno culture (Germany's National Inventory of Intangible Cultural Heritage, 2024)[9] or the Pride Amsterdam festival (Dutch inventory, 2019)[10].

While the legal weight of such registrations at the national level, as we have seen, currently holds little normative force, they nevertheless maintain significant policy value. On one hand, they foster social and community cohesion around specific practices; on the other, they encourage innovation, creativity, and sustainable development.

It should also be recalled, in this context, that ICH is *fundamentally* constituted by the process itself – the social and cultural conditions, along with the resulting practices – than by discrete or isolated products. ICH is inherently dynamic and forward-looking, representing not only a living practice but also a conceptual shift from the established frameworks of international law that govern tangible heritage, as outlined in Chapter 1.

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[7] S. Elpers, S. Verburg, and F. Sousa describe this as an "ongoing metacultural process" in "Digital Inventories: Structure, Usefulness, and Participation", in the report coordinated by F. Sousa *Inventories & Intangible Cultural Heritage Survey - Data report and reflections on the results*, 2021.

[8] In alignment with the definition provided in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which refers to expressions "with cultural content that arise from the creativity of individuals, groups, and societies" (Article 4(3)).

[9] See https://www.unesco.de/staette/technokultur-in-berlin/ (accessed 10 February 2025), where we read that techno in Berlin "is not just a specific style of music, but also a living alternative to classic practices of listening to music. [...] established in Germany in the mid-1980s, techno, which had emerged in previous years, became the soundtrack of the spirit of optimism after reunification. The resulting free spaces helped to establish the techno and club scene that is so present in Berlin. Sound and sound productions are closely linked to the city and developed their special character in the context of German reunification."

[10] See https://www.immaterieelerfgoed.nl/en/prideamsterdam (accessed 10 February 2025).

In this respect, the full potential of ICH remains to be entirely realized, posing complex legal challenges concerning how to conceptualize (and therefore how to protect or support) the processes through which value and identity are constructed, along with the intentions and authority of the communities engaged in these evolving, often conflictual, cultural practices. The emphasis on the 'evolution toward the contemporaneity' of ICH offers a valuable avenue for further exploration, as it goes beyond the already recognized need to translate the international legal category through appropriate taxonomies and suitable internal mechanisms. Instead, it calls for a deeper integration of the paradigm embodied by ICH, encouraging critical reflection on public and cultural policies designed to promote social cohesion, creativity, and development.

From this perspective, two possible horizons emerge.

The first concerns a shift in perspective that has been the subject of substantial scholarly inquiry and institutional discourse, including within UNESCO's internal assessments[11]: a transition from an emphasis on the objects of safeguarding to a focus on the actors involved and, most importantly, the modalities through which safeguarding is implemented. In other words, the focus should move toward the very communities, groups, and individuals at the core of ICH, along with the safeguarding measures they decide to undertake. As Lixinski observes:

> "[...] instead of seeking an entry into these systems through the definitions, the best that can possibly be hoped for is to rely on their embracing of safeguarding practices as a means to bring the contemporary into the fold of ICH, even if only indirectly. To have a safeguarding practice recognized and listed does not seem to require the same threshold of cross-generation use; to the contrary, a safeguarding practice is meant to be contemporary, even if it can rely on elements from the past."[12]

In this light, the trend toward the contemporary takes on a deeper meaning: that of completing the shift that the 2003 Convention began more than 20 years ago toward a real paradigm shift in heritage protection. With the additional input of other international instruments

[11] In Chapter 1, we discussed the efforts undertaken through the Global Reflection process on the listing mechanisms of the 2003 Convention (Decision 13.COM 10), carried out between 2017 and 2022. This was followed by subsequent work on the broader implementation of Article 18 between 2021 and 2024, and, more recently, by discussions on related topics in panel sessions at the 2025 Naples Conference on Cultural Heritage in the 21st Century.

[12] L. Lixinski, "Regional and International Treaties on Intangible Cultural Heritage: Between Tradition and Contemporary Culture," cit., 33.

– above all, the Faro Convention[13] – a more (useful) focus on people and practices could be envisaged. Such a framework would place less emphasis on the element in itself, which may change over time (or originate in a relatively recent period), and more on the way it is *approached* – moving the focus toward providing legal tools to these contemporary movements.

Consequently, the consideration (and indeed the creation) of spaces dedicated to identifying, documenting, and reflecting on safeguarding practices, ongoing processes, and tools for sustainable development, as well as the actors involved, brings renewed attention to a discussion already introduced in Chapter 1: the range of instruments available to institutional actors to promote and support these evolving dynamics. As previously noted, reflecting on the temporality of ICH requires a reversal of perspective, one that embraces the ongoing processes of creation, internal negotiation, and evolving narratives attached to cultural heritage. From this viewpoint, policies that encourage creativity, development, transmission, and awareness-raising emerge as promising avenues to explore.

To this should be added that, when addressing living practices, the complex interplay of innovation, creativity, and change frequently intersects with economic considerations. Although these economic aspects fall outside the core principles of the 2003 UNESCO Convention, they remain a significant dimension that should not be overlooked.

In this respect, this thesis has consistently highlighted how national labeling and certification initiatives have responded to the dual need of offering recognition to heritage holders – thereby validating their contributions and encouraging continued engagement[14] – and raising awareness of ICH – echoing the words of the French Senate's *Rapport d'information* presented by the Committee on Culture, Education and

[13] As highlighted in Chapter 1, Section 4.1.2, the cataloging system developed by the Council of Europe regarding heritage issues places a much stronger emphasis on safeguarding practices and associated "people," rather than on specific heritage items, beginning with Strategy 21 and the Herein system.

[14] *Rapport d'information* no. 601 (2020-2021), 19 May 2021, 35: "Même si l'Unesco n'encourage pas les signes de distinction ou d'excellence en matière de PCI, c'est une manière de répondre aux désirs légitimes de reconnaissance des détenteurs de pratiques culturelles immatérielles [...]"

Communication[15]. These policies strategically leverage the temporal dimension of the present to pursue goals that are not only cultural (focused on safeguarding representative and fragile practices) but also oriented toward economic development. Clearly, they imply a reconceptualization of knowledge, expertise, techniques, and distinctive artistic attributes as *assets* of a given territory. As such, they are incorporated into broader economic development strategies designed to generate positive outcomes such as job creation, entrepreneurial growth, enhanced visibility, improved living standards for practitioners, and the reinforcement of shared identity values. Nonetheless, this dynamic also carries the risk of fostering processes of commodification, decontextualization, and consumption of knowledge and practices, which stand in marked contrast to UNESCO's vision and guiding principles.

This tension remains evident and underscores the need for careful balancing – both in the promotion of the element, considered as a "product" or "resource," and in the recognition or support of its bearer(s). Overemphasizing one at the expense of the other can obscure the inherently subjective dimensions that give heritage its meaning, recognition, and continuity. The principles and recommendations set out in the Convention's *Basic Texts* consistently stress the importance of ensuring that communities retain *control* – which means constantly assessing the value of their ICH, managing change, and identifying the potential threats[16]. In this respect, while fostering creativity can be valuable in showcasing community know-how, overly strong incentives from external actors may distort these dynamics of agency. Conversely, as we said above, placing too much emphasis on the element itself can undermine the community's authority over its evolution and transformation[17].

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[15] *Rapport d'information*, cit. The report assesses the situation of ICH safeguarding in France and makes some recommendations for its improvement. It is available at https://www.senat.fr/rap/r20-601/r20-601.html (accessed 10 February 2025). See also the references made in Chapter 1, Section 4.2.

[16] This is explicitly provided for in the Ethical Principles, especially in numbers 1, 4, 6, and 10, which specifically address consent, the primary role of communities in safeguarding, and the determination of value and threats. The Operational Directives also address this concern by seeking to prevent decontextualization and misappropriation (see in particular paragraphs 102, 117, and 120).

[17] For example, the Consultative Body established in 2013 by the Intergovernmental Committee expressed concern that in several cases, efforts to ensure the survival of ICH relied on measures *external* to the community, often linked to commercialization, which might preserve the practice in some form, but not the sense of belonging and identity it provides to the community. See UNESCO Doc. ITH/13/8.COM/7, especially para 40.

The nuanced divergence between economic and cultural factors in the appropriate safeguarding of ICH has garnered heightened attention from UNESCO's governing bodies. Starting from the 2010 amendments to the Operational Directives[18], through to the 2015 Ethical Principles, in 2019 the fourteenth session of the Intergovernmental Committee, held in Bogotá, Colombia, reiterated under Decision 14.COM 10, para 13 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 labeling of a product*" (emphasis added). In response, the Secretariat was mandated to develop a guidance note for communities and states parties, aimed at identifying "safeguarding measures and good practices that address the risk of decontextualization and over-commercialization of elements" (para 14). Such a guidance note was presented at the Committee's eighteenth session (2023, Kasane, Botswana) [19], following an expert meeting convened to examine how best to integrate economic dimensions into safeguarding practices[20]. Broad in scope, the note discusses mechanisms for collaboration among non-institutional stakeholders and outlines policy frameworks and protocols that States can adopt to ensure alignment with UNESCO's overarching standards.

Amid these complex considerations – and while differing perspectives indeed remain – there is increasing evidence that strategies for economic development are becoming closely integrated with efforts to safeguard (intangible) cultural heritage, especially at the national level[21].

The challenge, therefore, lies in reflecting on this still largely untapped potential. ICH and its underlying cultural principles – such as community-centered approaches, the principle of prior and informed consent, equitable benefit-sharing, capacity-building, and the empowerment of collectivities – inevitably produce spillover effects that extend into the economic sphere, particularly in terms of protection and

[18] Third session of the General Assembly of the States Parties, 22-24 June 2010, (3.GA)
[19] UNESCO Doc., LHE/23/18.COM/12 Rev.
[20] UNESCO Doc. LHE/23/EXP THEMA-ECO/1 and followings. See the whole page at https://ich.unesco.org/en/expert-meeting-on-economic-dimensions-01316 (accessed 2 February 2024).
[21] The document Normative Framework for Economic Aspects in the Safeguarding of Intangible Cultural Heritage and Sustainable Development cites several summary reports and internal institutional documents that highlight the growing use of policies related to economic development. See UNESCO Doc. LHE/23/EXP THEMA-ECO/3, especially 22 ff.

fair compensation, rather than solely focusing on public access and valorization. These principles offer the potential to serve as a foundation for development and shared values, provided that the cultural and economic dimensions are recognized as inherently interconnected and addressed through integrated legal and administrative frameworks capable of mutually influencing and balancing one another.

Bringing the discussion full circle, we return to the question of what should be included in the relevant lists. Focusing on safeguarding practices rather than the elements themselves indeed represents a strategy worth further exploration, as it shifts attention to the frameworks that sustain the element's viability in the present. Consider, for instance, the safeguarding plans discussed in Chapter 1, Section 4.1.2 of this thesis. A more meaningful implementation of these plans would allow intellectual, financial, and human resources to be allocated to the broader context in which ICH exists – encompassing the people, their organizations, the practices, the modes of transmission, and, consequently, also the associated economic activities.

1.2.2.ICH's further exploration of subjectivity

Following this anticipated completion of the paradigm shift, particular attention must be directed toward the implications that most directly concern the subjective dimension to which ICH is inextricably connected. From a legal perspective, this raises the question of identifying the necessary measures to confer authority and practical effectiveness to this relationship.

As discussed at length during the examination of the Convention's process of adoption (Chapter 1, Section 2), a persistent tension between cultural and copyright-based approaches has significantly shaped the conceptualization of ICH, from both a terminological and an operational perspective. Until the final stages of adoption, debate continued over the implications of recognizing ICH as a living, dynamic, and collective expression, and whether it should be valued primarily for its private significance (i.e., as "community intellectual property") or the public value it entails (i.e., as part of the heritage of all humanity).

This foundational tension continues to inform the legal treatment of ICH today, particularly when questions of creativity and authorship intersect with communal practices and traditions. Several unresolved issues persist: the transience of the IPRs framework versus the permanence of cultural recognition; the collective, open nature of heritage versus the

proprietary, exclusive logic of IP regimes; the non-physical nature of such cultural forms *vis-à-vis* the focus on material fixation in most copyright legislation. Notably, moreover, IP regimes also primarily focus on *products* of human creativity, often overlooking those aspects related to practices and ongoing processes of transformation just discussed in the preceding section.

Although UNESCO's mandate to establish an international standard-setting instrument was ultimately considered more urgent[22] – emphasizing ICH's status as heritage that requires safeguarding for the universal benefit of humanity – the underlying debate has never been fully resolved, even institutionally. Indeed, the *private* protection of ICH – through the allocation of copyright or similar intellectual property rights, including *sui generis* protections – remains a concrete reality, playing out differently across national systems[23].

To some extent, the very establishment of mechanisms of labeling for individuals, groups and industries with specialized cultural expertise and *savoir-faire* can be understood within this broad regulatory landscape.

IPRs, moreover, retain their usefulness in curbing misappropriation, over-commercialization, and unauthorized exploitation, while also enabling controlled access to sensitive heritage expressions[24]. The key question lies in how these mechanisms of protection – rooted in an economic perspective focused mainly on the *present*, thereby emphasizing that link with contemporaneity – genuinely serve to recognize and encourage communities' relationships with the acknowledgment, practice, and valuation of their ICH.

This opens a broader question: what is the law's role in relation to ICH? Which public mechanisms can safeguard cultural practices, and how might private rights offer communities both protection and recognition of their unique connection with heritage? Between these two poles, a spectrum of intermediate tools is emerging, varying in legal force, that

[22] See Chapter 1, Section 2.1 for further insights.
[23] Specific insights are provided in this regard as part of the OSMOSE research (M. Cornu et al., *Intangible Cultural Heritage Under National and International Law. Going Beyond the 2003 UNESCO Convention*, cit. On this topic, specifically, see L. Martinet, "The Interactions Between Intangible Cultural Heritage and Intellectual Property Law", *ivi*. See also M. Pavis, "ICH and safeguarding: uncovering the cultural heritage discourse of copyright", cit.
[24] As provided expressly by the ICH Committee in its tenth session, 30 November - 4 December 2015, Windhoek, Namibia. UNESCO Doc, ITH/15/10.COM.

challenges the traditional universal vs. local, and public vs. private dichotomy.

Notably, UNESCO itself has not ignored the potential of IPRs and derived mechanisms. In fact, some of these tools are already being used to help practitioners retain agency over their ICH practices in the face of economic pressures. The most glaring endorsement appears in the Convention's Operational Directives (OD), where their application is explicitly tied to instances where ICH functions as a *resource* – whether integrated into sustainable development strategies or utilized in commercial activities. Paragraph 104 of the OD calls on state parties to "ensure, *in particular through the application of intellectual property rights*, privacy rights and any other appropriate form of legal protection" that communities' rights are respected when awareness-raising or commercial activities occur. Similarly, paragraph 173(b) encourages states parties adopt legal and administrative measures, in particular through the application of IPRs, to protect ICH as a strategic resource within sustainable development. In other words, the Convention has organically developed, throughout its life of practical implementation, additional protective mechanisms to compensate for its lack of prescriptive measures. Especially where heritage intersects with the market, ICH is increasingly treated not just as a form of heritage to be preserved, but as a living, economically relevant practice. Thus, the convergence with IPR-like mechanisms becomes not only apparent but necessary, revealing how cultural safeguarding and intellectual property already operate together within contemporary heritage governance and sustainable development principles.

Under the same perspective should be also interpreted Ethical Principle no. 7, emphasizing the necessity for CGIs to benefit from the protection of both the moral and material interests derived from their heritage[25], particularly in relation to its use, research, documentation, promotion, or adaptation by themselves or others. While this principle draws from established precedents[26], the UN Committee on Economic, Social and Cultural Rights has emphasized its distinct nature in relation to

[25] I.e., acknowledgement as creators and practitioners, preventing misuse, and equitable benefit sharing when ICH is exploited. In this regard, see B. Saul, D. Kinley, J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Material*s, Oxford, no. 1, 2014.

[26] Especially Article 15(1) of the International Covenant on Economic, Social and Cultural Rights, and Article 27(2) of the Universal Declaration of Human Rights.

intellectual property frameworks[27]. This right to moral and material interests is recognized as a fundamental human right – described as a "timeless expression of fundamental entitlements of the human person" – intended to encourage creators' active contributions to the arts, sciences, and the overall progress of society. In contrast, IPRs – it is argued – are limited in both time and scope and have a distinct focus on economic exploitation. And yet, the need to acknowledge this subjective link with ICH remains latent even at this juncture.

The argument is further compounded by the 'Overall Results Framework for the 2003 Convention' (Resolution 7.GA 9, 2018), which includes as an evaluation criterion the existence of "legal protection, *such as intellectual property rights and privacy rights*, to ICH practitioners, bearers, and their communities when their ICH is exploited by others for commercial or other purposes."[28] This ties into a broader core indicator assessing how well national policies and measures respect customary rights and practices, particularly in relation to the practice and transmission of ICH.

UNESCO's Internal Oversight Service (IOS) has also stressed the relevance of IPRs and the need for more structured engagement with WIPO. The 2021 Evaluation of UNESCO's action in the framework of the 2003 Convention[29] specifically highlighted staff's interest in more structured opportunities for knowledge-sharing on cross-cutting issues, including intellectual property and commercialization.

To address these needs, the Recommendation no. 3 urged the Living Heritage Entity to establish working groups on priority areas needing multi-Convention responses, with IP specifically highlighted. Paragraph 176 of the report confirmed this need, citing interviews that pointed to IP as a topic deserving greater attention and cooperation with WIPO.

At the practical and domestic application level, several cases exists where specific types of IPRs are used, or extensive references are made to forms of IP protection in the application file – even though the impossibility of establishing IPRs through enrollment in one of the ICH

[27] UN CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), Geneva, 2005. Doc. E/C.12/GC/17.
[28] See Resolution 7.GA (Paris, 2018), Annex, Table 2: "Core Indicators and Assessment Factors, arranged by Thematic Areas."
[29] UNESCO Doc, IOS/EVS/PI/200.

lists was reiterated several times[30]. Typically, these involve forms of IP that align more easily with ICH values: collective and certification marks[31], geographical indications[32], and other frameworks that do not require authorship, originality, or material fixation, and can often be renewed indefinitely. Nonetheless, there are also reported instances of copyright use in the ICH domain, notably for the protection of inscribed elements[33].

It appears, then, that the original caveat of Article 3(b) of the Convention, intended to avoid overlapping distinct domains[34], is only partially upheld in practice. In reality, national and regional approaches increasingly demonstrate mutual interaction between ICH safeguarding and IPRs, revealing a more nuanced and interlinked relationship than initially envisioned.

The recent adoption of the 2024 WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge[35] represents a significant milestone in this regard, marking the culmination of over two decades of discussions within the Intergovernmental Committee on

[30] See para 249 of the IOS' Evaluation of UNESCO's Standard-setting Work of the Culture Sector of 2013, prepared by B. Torggler, E. Sediakina-Rivière, and J. Blake. UNESCO Doc, IOS/EVS/PI/129 REV. The topic was extensively discussed in B. Ubertazzi, *Intangible Cultural Heritage, Sustainable Development and Intellectual Property*, cit.

[31] Collective trademarks are signs distinguishing the goods or services of members of the association which is the proprietor of the mark from those of other undertakings; certification marks indicate "that the goods and services in connection with which are used are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics".

[32] WIPO defines a GI as "a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place."

[33] Ubertazzi, cit., 190, mentions the ICH elements Dikopelo folk music of Bakgatla ba Kgafela in Kgatleng District, Sega Tambour of Rodrigues Island, and Medimurska popevka, a folksong from Medimurje. Please refer to the Author's work for other valuable examples.

[34] "Nothing in this Convention may be interpreted as affecting the rights and obligations of states parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties." As also recently remarked by the UNESCO IOS Evaluation of 2021 mentioned above: see "Management Response", XI.

[35] Adopted during the WIPO Diplomatic Conference on Genetic Resources and Associated Traditional Knowledge, May 13-24, 2024, GRATK/DC/7. Negotiators were selected among official delegates of WIPO's 193 Member States and actively supported a wide array of observers, including Indigenous Peoples as well as local communities, non-governmental organizations, intergovernmental organizations, and industry representatives.

Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC). Established in 2000 after collaborative efforts with UNESCO were set aside, the IGC was tasked with conducting textual negotiations to develop an international legal instrument aimed at protecting traditional knowledge, traditional cultural expressions, and genetic resources[36].

A central provision of the Treaty is Article 3, which introduces a mandatory patent disclosure requirement. It obliges applicants to disclose the country of origin of genetic resources and/or the Indigenous Peoples or local communities from whom associated traditional knowledge was obtained – where such resources or knowledge form the basis of a claimed invention. This measure aims to prevent patents from being erroneously granted when an invention lacks novelty or inventiveness due to prior knowledge or use. Thus, it constitutes a direct defense tool which also contributes to the very cultural enhancement of ICH.

Furthermore, the Treaty suggests the establishment of information systems (such as databases) of genetic resources and associated TK, in consultation, where applicable, with Indigenous Peoples and local communities, and other stakeholders, taking into account their national circumstances (Article 6). These systems are to be made accessible to patent offices for the search and examination of patent applications, or, where applicable, subject to authorization.

Although primarily focused on transparency and procedural safeguards, the Treaty reflects a key principle also present in the UNESCO Convention: the recognition of communities' enduring relationships with traditional practices, even without conferring formal ownership rights. Like the Convention – which emphasizes safeguarding over legal entitlement – the WIPO Treaty offers a framework that acknowledges cultural and knowledge-based contributions while deferring more complex legal issues, including ownership and benefit-sharing, to future discussions[37]. Both instruments thus represent measured steps toward formalizing the protection of

[36] See especially WO/GA/26/6, para 13 and WO/GA/26/10, para 71.

[37] Specific discussions in this regard were held during the Webinar "What does the adoption of the WIPO Treaty on Intellectual Property Genetic Resources and Associated Traditional Knowledge mean for the Safeguarding of Intangible Cultural Heritage?", hosted by the ICH NGO Forum's Working Group on Legal and Policy Developments on November 26, 2024. Program available at https://www.ichgovernance.com/wp-content/uploads/2025/01/Webinar_announcement_26thNovember-3.pdf (accessed 22 February 2025).

traditional knowledge and cultural expressions, reinforcing community agency while navigating a still-evolving legal landscape.

Upon closer inspection, the development of an information system for traditional knowledge merits careful consideration, particularly in how it might align with existing ICH inventory systems. Despite their distinct purposes, there may be opportunities for synergy between these instruments, the States implementing them, and communities concerned. This alignment requires thoughtful examination of several critical aspects: the governance structure for these cataloging systems, including the level of participation granted to indigenous and local communities, access control mechanisms, and protocols for digital circulation.

Indeed, the digital dimension introduces additional complexities that warrant particular attention. Concerns are growing around how traditional practices are represented in digital formats, raising questions of misappropriation and how to ensure appropriate recognition for custodian and bearers' communities. At the same time, there is a growing interest – also among the communities concerned – in the digital and interactive transposition of heritage inventories[38].

For the time being, the Treaty acknowledges these emerging technological challenges in Article 8, which provides for a review of its scope and content four years after entry into force, specifically to consider "issues arising from new and emerging technologies." This clause underscores the long-standing and evolving debate on how best to protect intangible heritage in a rapidly digitizing world. As technological innovation accelerates, the need for integrated public and private protection frameworks becomes more urgent.

Digital tools are transforming not just how ICH is preserved and transmitted, but also how it is accessed, shared, and potentially exploited, necessitating renewed attention to mechanisms of control and ownership, as well as to those that facilitate and recognize the value inherent in processes of co-creation, re-creation, and collective practices fostered by this rapid transformation.

[38] Data from the surveys conducted in the study by S. Elpers, S. Verburg, and F. Sousa, "Digital Inventories: Structure, Usefulness, and Participation" (cit.), indicate that approximately 87% of respondents support making inventories available through online open access platforms. In this regard, see the considerations outlined in Chapter 1, Section 4.2.2 on digital inventories of ICH.

Re-centering the discourse on the relationship between people and ICH constitutes a crucial first step in ensuring the effectiveness of these developments and in supporting the creation of legal frameworks capable of addressing the multifaceted, contemporary, and evolving dimensions of ICH.

2. Other intangible dimensions

With Chapter 1, the possibility of fully addressing an investigation on the immateriality of cultural heritage within the confines of ICH was ultimately dismissed. Indeed, the analysis in Chapter 2 opened with a fundamental question: Is the framework of ICH the only viable lens through which to analyze immateriality in legal discourse on cultural heritage?

From this question, the investigation branched into an initial analysis we referred to as "object-focused," aimed at exploring additional forms of immateriality within, precisely, the *objects* of reference themselves – i.e., within cultural manifestations. This exploration followed the research's established methodological parameters: it focused primarily on the Italian legal framework and adopted a case-based approach. Consequently, the analysis shifted toward the concept of cultural *property* rather than staying on the broader notion of *heritage*, to align with the foundation of domestic cultural heritage legislation. It began with an examination of relevant cases, dynamics, and trends within legal discourse, including observation of regulatory approaches, administrative practices, and judicial interpretations on the point.

As Section 1 of Chapter 2 explained, this methodological shift involved two significant conceptual adjustments: (i) repositioning 'intangible' at the beginning of the investigation to expand the inquiry beyond established categories of immateriality; (ii) focusing on cultural 'property' rather than 'heritage' to remain consistent with the specificities of Italian law.

Although a comprehensive analysis of the investigation's conclusions is presented below (Section 3.1) it is worth noting here that the research uncovered evidence of other relevant dimensions of immateriality. This finding is particularly significant as it emerged within the framework of cultural property – a concept that remains fundamentally grounded in corporeality, particularly in Italian law. More broadly, the research sought to highlight that immateriality should not be understood merely as the absence of physicality, as this aspect is tied to perceptual capacities that may change and evolve over time. Instead, it should be seen as linked to the interactions and projections that heritage "objects" establish with their surroundings. Immateriality, therefore, is less about a shift toward de-materialized forms of culture, and more about the multiplication and circulation of material forms across contexts and centers of value, and the new relationships that arise from this process.

This insight prompted an additional question. When considered alongside Chapter 1's findings on ICH development and national transpositions, it became clear that reasoning on heritage immateriality highlights a stronger connection to the subjective component involved in its identification. In other words, the exploration of immaterialities of cultural heritage (and property) cannot solely rely to an objective analysis of the *item* under investigation. Rather, it requires an examination of the resulting complex and more meaningful dimension of subjectivity underpinning this discourse. This expanded analytical framework allowed for a more nuanced understanding of how immateriality functions within cultural heritage systems, particularly those traditionally anchored in materiality-based conceptualizations.

Chapter 3 precisely addressed this perspective by shifting to a 'subjective analysis' centered on identifying legal instruments within the existing framework that could enable and enforce this claim of subjectivity by the various stakeholders involved in processes of heritage definition.

Ultimately, the research reveals that exploring the intangible dimensions of cultural heritage requires a dual perspective: one that considers both the *objective* characteristics of cultural expressions and the *subjective* frameworks through which they are identified, valued, and protected. This comprehensive approach acknowledges that cultural significance exists not only within cultural objects and objective analysis but also in the perceptual, interpretive, and preservation processes applied by various stakeholders. Hence the need to develop concrete legal pathways for dialogue and engagement in the formation and subsequent projection of cultural values toward additional dimensions of immateriality.

2.1. The analysis of the object

In this first analytical context, the research primarily sought to assess whether immateriality represents:

(i) A mere lack or reduced presence of material expression – potentially warranting a distinct classificatory category, such as 'intangible cultural heritage' or 'intangible cultural property'; or

(ii) A pervasive, cross-cutting dimension that permeates multiple dimensions of property (and heritage), through its interactions with other real-world elements, necessitating a comprehensive reconsideration of existing legal structures.

The distinction mattered significantly: if immateriality constitutes a separate category, it permits discrete legal treatment without altering the existing conceptualization and regulation of cultural property. Conversely, if it represents an inherent quality across different situations in cultural property's life, it necessitates a more comprehensive reassessment of legal frameworks in place.

Upon thorough examination, this research mainly supports the second perspective. Immateriality is not merely characterized by the absence of materiality or the recognition of *distinct* cultural expressions, as discussed in Chapter 1 regarding ICH. And in this sense as well, we have seen how it is overly reductive to frame it merely as a question of alterity. Rather, immateriality functions as an inherent (yet autonomous) trait that extends from physical cultural properties, shaping their significance through interactions with diverse elements and contexts. This suggests that legal approaches centered solely on tangible attributes fail to fully capture their complex and multifaceted nature.

It should be noted, however, that a final analysis of recent digital advancements in Chapter 2 prompted us to explore the possible emergence of a category of *fully* immaterial cultural assets. This development potentially establishes a genuinely distinct conceptualization of cultural property – one that differs fundamentally from traditional notions of immateriality within physical objects and aligns with point (i) proposed above, requiring ad hoc legal reasoning for its separate regulation.

Ultimately, given this dual tendency, the key challenge is fostering a paradigm shift toward more adaptive legal frameworks that can embrace evolving contexts and contemporary developments while preserving the fundamental principles of protection, accessibility, and cultural promotion for broader social advancement.

From a methodological perspective, the investigation into the degree of 'pervasiveness' of immaterial components – challenging dichotomies that confine immateriality to specific categories of property and heritage – was built upon a preliminary review of relevant academic discourse. Through this analytical process, two interpretative perspectives have been identified, primarily emerging from legal doctrine, but also informed by interdisciplinary reflection. While these frameworks coexist and interact within broader scholarly discourse, they were deliberately separated for analytical clarity.

The first interpretative perspective was characterized as *intrinsic immateriality* (Section 2.1). This theoretical framework draws from Italian scholar Giannini and his seminal work (1976), arguing that immateriality constitutes an inherent trait of all cultural goods. Within this view, immateriality coincides with their legal classification in terms of public-cultural interest, making it distinct from – yet inseparably connected to – the underlying material object.

For logical consistency, the alternative interpretive framework to this "intrinsic view" was termed *extrinsic immateriality*. This perspective explored whether such an internal quality, present in all cultural property, could extend beyond the object's physical boundaries while retaining its own legal significance and influencing its interactions with the external world. The question emerged from considerations of social, economic, technological, and cultural advancements that might support such an extension beyond material boundaries.

With this interpretive framework in place, two potential scenarios were analyzed, grounded in a preliminary review of existing cases and emerging trends within the Italian context.

The first scenario (Section 3.1) explored the relationship between these two theoretical paradigms of immateriality. Specifically, the outward movement of intrinsic immateriality beyond the asset's physical confines. Of this extension process, the analysis examined: (i) the nature and characteristics of relationships that form when the cultural-legal value dissociates from the physical form; (ii) the specific conditions and circumstances that facilitate or prompt this dissociation; (iii) the adequacy and responsiveness of existing legal frameworks in addressing these complex value-object interactions.

Within the Italian context, this scenario was analyzed through the lens of *decorum*, examining how the notion was endowed with legal meaning. Following a casuistic approach, the research identified two key analytical dimensions: (i) decorum as a standard for examining the projection of the asset's outward expression within its physical contextual environment (Section 3.1.1); and (ii) decorum as a standard for analyzing the projection of the asset's outward expression in various enhancement and management operations, extending the focus beyond its physical location. This allowed us to clarify how legal discourse governs these forms of extrinsic immateriality – distinct from the asset itself yet inherently connected to it through the imperative of upholding a certain standard of decorum.

The second investigative scenario (Section 3.2) critically examined the concept of intrinsic immateriality by exploring its internal dynamics – specifically, how this immateriality can extend into *extrinsic* dimensions that remain physically contained within the object while transcending mere overlap with the cultural value. At its core, the inquiry revolved around a fundamental question: how should we interpret instances where an object's value is intrinsically linked to a specific *use* of it? When intrinsic immateriality manifests through activities *within* the object, effectively turning it into a "container" for those activities, how should it be classified within legal frameworks?

This raised significant theoretical questions for our analysis, particularly whether this use – representing the very cultural value of the object – should be seen as a form of extrinsic immateriality, conceptually distinct from the physical asset, or conflated with its intrinsic immateriality. Our analysis confirms that use is a key dimension of an object's immateriality, and a foundational element for research in cultural property law within this analytical framework.

Ultimately, this investigation was complemented by a reverse approach, examining how externally situated uses (various forms of 'extrinsic immaterialities') might, in turn, influence the intrinsic immateriality of the cultural property itself. Here, too, the inquiry centered on the pivotal role of the context – this time following a trajectory from the outside back to the inside of the asset, exploring how its legal and administrative treatment adapted in response. This further supported the initial idea that use is a particularly rich area for research, encompassing various situations that underscore the need for a thorough reassessment of the regulatory framework in place.

In an effort to draw conclusions applicable to both research scenarios, we can first emphasize that the analysis of these "trajectories" exposed a notable disconnect within the examined legal discourse – and more broadly, between this discourse and the practical realities surrounding cultural property. This inconsistency arises from an approach that, similar to our observations on the transposition of ICH within national borders, continues to view cultural property through an 'atomistic' lens.

Reviews of regulatory provisions revealed that the protection of cultural property is primarily centered on the physical attributes and intrinsic significance of individual assets. Consequently, administrative protection and enhancement measures operate within this narrow framework, focusing on the preservation of assets in isolation rather than as part of a larger interconnected system. This fragmented approach

overlooks the complex environments in which cultural properties exist, as the regulatory structure lacks effective tools to address their integration within geographical, physical, conceptual, economic, and technological contexts. As a result, despite occasional efforts to incorporate contextual considerations, the absence of suitable regulatory and interpretive frameworks creates significant gaps in protection and undermines overall effectiveness.

In this context, our investigation identified two complementary approaches to address these shortcomings.

The first involves expanding existing regulatory frameworks through administrative practice and judicial interpretation to encompass additional (immaterial) dimensions of the asset. We have seen this strategy manifest in debates about direct versus indirect protection of boundary areas and, more prominently, in cases involving historic restaurants and cinemas, particularly concerning the validity of extended use restrictions.

The second reveals a distinct layering of regulatory instruments applied to cultural landscapes. In some cases, such stratifications are already in place, although coordination challenges persist. Just consider the case of domestic cultural property designations functioning alongside UNESCO classifications, landscape protection, and regional enhancement initiatives. Our analysis indicated that implementing similar multilevel protections would significantly enhance preservation outcomes in other contexts where current safeguards remain inadequate.

For instance, we have examined the potential for developing alternative regulatory frameworks – including different legal instruments and categories – beyond the traditional cultural constraint model and the direct versus indirect protection dichotomy. This analysis included a comparative perspective with France[39]. Notably, this case demonstrated a peculiar interaction between landscape and heritage classification, forming the basis for public interest through an abstract notion of cultural property – specifically, a literary reference – rather than a physically existing asset. More significantly, the administrative assessment was able to extend beyond standard preservation criteria, considering community activities tied to the site's literary significance. In this context, maintaining the property's consistency and exterior appearance relied on elements that exist outside conventional legal frameworks.

[39] Conseil d'État, 6ème - 5ème chambres réunies, 4 October 2023, no. 464855

Another example concerns the issue of use restrictions – which exist in tension between economic freedom principles and preservation approaches that tend to musealization. In that case we suggested that a more nuanced consideration of its defining and subjective aspects, particularly in relation to specific modes of operation, could lead to the development of different protective instruments. This might include *sui generis* forms of intellectual property or a labeling system similar to those already implemented in regional contexts.

These intersections foster new connections and reach integrated networks of stakeholders, establishing overlapping domains of influence through distinct designations. Such convergence introduces a broader perspective on cultural property that extends beyond its original categorization as separate cultural assets, and prompts not only a different approach to protection, but, possibly, a true re-conceptualization of their legal paradigm. This precisely represents what we have identified as an additional dimension of immateriality *within* cultural property. As noted above, despite instances where administrative actions and subsequent judicial interpretations have navigated these conceptual boundaries – reflecting contemporary epistemological perspectives – even these progressive cases provide limited opportunity for meaningful paradigmatic evolution. The established regulatory frameworks, while occasionally stretched to accommodate emerging understandings, remain structurally constrained in their ability to fully embrace the interconnected nature of cultural assets and their multidimensional significance.

Hence the conclusion that a more substantive analysis of immaterial dimensions would ultimately facilitate contemporary and effective protection, as it would first entail a different procedure for *identification*. Moreover, this approach would align with the foundational goal of fostering the development of culture, ensuring that the enjoyment of these assets is grounded in their specific temporal and spatial contexts, while facilitating the formation of new relationships that reflect their evolving role in society.

In this context, decorum, as an indeterminate legal concept and a "breathing organ of law,"[40] has been analyzed for its potential role in preserving flexibility and adaptability within the system. That is to say, while its literal and traditional interpretation suggests adherence to

[40] The expression is taken from the monograph by M. Clarich and M. Ramajoli, *Diritto amministrativo e clausole generali: un dialogo*, cit.

aesthetic profiles that aligns poorly with the context-driven perspective we are advancing, this concept, to be filled with factual assessment, can be used precisely to expand beyond respect for the inherent immateriality of the asset. Indeed, it allows public authorities to consider these contextual aspects, thereby safeguarding (and enhancing), through this standard, the emerging relationships that are being established.

On the other hand, the potential of decorum came with another facet. Indeed, the flexibility inherent in such an indeterminate legal clause ultimately resides with an administrative authority whose power is rooted in the principle of technical discretion. Consequently, we argued that the issue lies in how administrative power is structured and the forms of control public administration can exercise to preserve cultural property's inherent value while upholding an appropriate standard of decorum.

This was relevant in physical contexts, as extending property values to surrounding areas creates an obligation to weigh competing, potentially conflicting interests against the cultural function the administration must fulfill under constitutional mandates (i.e., the case of environmental vs. cultural interest). But this becomes even more pronounced and challenging when dealing with non-physical dimensions, where traditional spatial boundaries no longer serve as clear demarcation points.

The issue of reproduction was particularly significant in this respect, as it must now be considered in light of digital advancements and the circulation of cultural assets in dematerialized, largely uncontrollable spaces. Analysis of the intersection of European and domestic regulations revealed a particularly strict and often contradictory framework, where reproduction is, in most cases, subject to authorization and concessions by relevant authorities. This has even led to the consolidation of a judicial trend affirming a so-called 'right to image' for cultural goods. The latter serves dual purposes: it allows public administrations to exercise economic control through profitable concession agreements, while also ensuring cultural oversight by preventing inappropriate uses that could undermine the property's significance or dignity. The economic dimension thus operates on two levels – generating revenue for public entities through licensing arrangements and preserving the property's cultural integrity by preventing associations that might (allegedly) devalue its cultural significance.

What we observed, however, is that the growing intangible projection of cultural assets, particularly in digital environments, challenges effective control mechanisms due to their dematerialized and non-rivalrous nature, even while offering significant potential benefits for cultural dissemination and creative development. Therefore, beyond questioning the efficacy of current control measures, the governance of these intangible dimensions must also be addressed. Current interpretations already acknowledge that the image of cultural property *is* an immaterial entity – distinct from its physical form, yet inherently tied to it. As it embodies a collective identity value meant for public enjoyment, it warrants enhanced protection, enforced by the administrative authority responsible for protecting the asset[41]. The central issue, then, is not the recognition of an additional dimension of immateriality – its existence seems largely undisputed. Rather, it lies in determining *who* has the authority to control it and *to what extent*. Additionally, it is crucial to consider how it is ensured that this "collective" truly identifies with the "identity value intended for public enjoyment."

At present, public administrations act as "value custodians" for the external representations of cultural assets, which leads us to suggest a critical examination of procedures underpinning this kind of control. Given the broader constitutional mandate to promote the development of culture for social advancement, we question whether this authority should continue to rest solely within the discretionary control of administration as it is currently structured, or be redefined within participatory frameworks that better align cultural governance with society's evolving needs and contemporary interpretations. Moving away from the authoritative, discretionary model of control, this form of immateriality – detached from the object – could foster dynamic exchange, ensuring the original cultural property remains accessible and protected in its core dimension, while also making its reproduction meaningful, usable, and responsive to living trends.

In broader terms, this discussion also intersects with the growing challenges posed by the digital landscape, which disrupts traditional administrative approaches to cultural property. As cultural goods increasingly move into virtual spaces – whether through digitized forms of access, enhancement initiatives, or as inherently digital creations – the boundaries of administrative authority must be reconsidered. The concluding Section 4, as we highlighted here at the outset, was devoted

[41] Court of Venice, ord. 24 October 2022.

to these reflections. It proposed a shift in the analysis of immateriality toward entirely intangible contexts, offering a framework that simultaneously endorses the physical asset's immaterialities and the potential existence of an entire intangible counterpart.

As a matter of fact, in the near future, administrative bodies will need to adapt preservation, control, and accessibility practices to address cultural assets that exist primarily or entirely within digital environments. This will require new regulatory frameworks in place capable of governing public access and protection in digital spaces, where traditional methods often fall short. In this respect, our analysis identified two key challenges in this evolving digital landscape.

First, a procedural-operational challenge emerged as the distinction between physical and digital access becomes increasingly fluid. This created administrative dilemmas regarding essential versus supplementary modes of access, requiring new frameworks to manage these shifting boundaries effectively.

Second, an ontological-conceptual challenge arose as we anticipated cultural assets increasingly transitioning into dematerialized contexts. As argued, the dimensions of immateriality we currently study in relation to physical objects can eventually turn into entirely immaterial goods. This evolution will redefine the relationship between physical and non-physical elements, presenting a fundamental normative issue that demands proactive regulatory consideration.

At the intersection of these perspectives – some already established and others suggested for future consideration – it was essential to complement the research with an exploration of the subjective side of the topic.

2.2. The analysis of the subjects

The examination of how immateriality and subjectivity interrelate, informed by enhanced understanding of the object's immaterial dimensions, requires a twofold approach to comprehensively grasp the implications of this relationship: an evaluative inquiry and a prospective analysis. Chapter 3 was dedicated to the former, with its key findings summarized below. The prospective analysis, presented in Section 3.3 of this chapter, will outline potential developments and directions for future research.

From this perspective, Chapter 3 analyzed potential legal mechanisms within existing regulatory frameworks to identify ways for the expanded range of stakeholders to meaningfully engage with the enhanced conceptualization of heritage. The goal was to assess whether it is possible to challenge – or add complexity to – the conventional authoritative model, which is primarily build around three pillars: the public authority, acting as the representative guarantor of the civil community's interests; the civil community, seen as a homogeneous entity passively entitlement to enjoyment; and property rights holders, whose prerogatives require regulation and balancing against this established public value.

Two areas of investigation have been identified for further exploration.

First, the conceptualization of cultural heritage as a human right, especially as outlined in international legal frameworks (notably, though not exclusively, the 2003 UNESCO Convention and the 2005 Faro Convention), underscoring the increasing acknowledgment of the intangible dimensions of heritage. This perspective positioned the fundamental right *to* cultural heritage as a possible avenue for asserting diverse and additional claims beyond the above tripartite framework. Particularly, the focus was on exploring whether this right could extend beyond mere entitlement to access, incorporating deeper forms of participation and engagement, and ultimately reflecting its strong connections to immateriality.

Second, the cultural interest designation process within the Italian administrative system. Analysis of procedural mechanisms and local authorities' power within decentralized structures revealed opportunities to broaden stakeholder involvement in processes of heritage definition.

This investigation, positioned at the intersection of global and national regulatory frameworks, has required a thorough examination of both jurisdictional levels. From the outset, analyses recognized the intricate interplay between supranational principles, hierarchical structures, domestic implementation, and internal functioning mechanisms. The conclusions drawn from this approach acknowledge this dual level perspective, yet highlight overarching trends that transcend jurisdictional boundaries.

Specifically, two aspects merit transversal attention: (i) the diversification of heritage engagement methods, and (ii) the redistribution of authority and centers of agency. Both call for a

fundamental reconsideration of the paradigms that govern heritage discourse. First, legal frameworks and procedures must be developed to accommodate forms of heritage interaction that move beyond traditional ownership models. In parallel, protection strategies should evolve from a narrow focus on conservation toward embracing contemporary uses of heritage, with a stronger emphasis on development.

These transformations demand more substantive engagement from affected stakeholders to ensure that public action evolves in a contextual, parallel, and integrated manner. The changing role of the State (and of *States* within global arenas) must be considered in light of this shift toward greater grassroots participation. Consequently, decentralization processes should be enhanced to distribute authority more appropriately while maintaining effective coordination mechanisms. In this regard, the prospect of global administrative frameworks could enhance existing, more "flattened" structures overlapping State and national community interests, steering relevant procedures toward greater sensitivity to issues that are now widely recognized.

Equally crosscutting is the observation that, from the perspective of this initial analysis of the potential for expansion within positive law, the structures and procedures for assigning legal and cultural value are consistent across both transnational and national frameworks, rooted in similar foundational principles. Overall, these frameworks reveal a persistent difficulty in adapting to emerging trends, even when they explicitly recognize the evolving discourse on internal diversity and competing claims related to the subjective identification of heritage, as observed in the international arena.

As highlighted above, this "conservative" scenario largely stems from the enduring dominance of ownership paradigms – specifically, the acknowledgement of a *single, exclusive* tension between public and private interests – which struggles to accommodate alternative forms of engagement and conceptualization of heritage. This limitation connects directly to the challenge of identifying (and naming) existing subjectivities. In fact, the enforceability of claims and the legal recognition of subjective positions can only occur when social diversity is formally acknowledged. This should be accomplished through (i) the establishment of appropriate legal categories to define it, and (ii) the creation of procedures and standards to legitimize action in both administrative and judicial contexts.

Lixinski interestingly noted, in this respect, that although the international context has softened the notion of property that emerged

from (Western) national frameworks in favor of a vision of heritage as a universal value, where the entire human community is the beneficiary-owner, the language of property and its systemic implications persist. Beyond remaining a "proxy for sovereignty" for States, the supranationally promoted model of protecting universal value ultimately ends up in a property-based framework in the implementation of international obligations and the national conceptualization of heritage. And here lie the implications for the multiple subjectivities central to our discussion:

> "[...] communities close to heritage, because they are not present on international fora, are left with domestic law that cannot capture the same values as the international legal system. At its best, this mismatch causes confusion and sends conflicting messages; at its worst, it has the effect of further divorcing communities from their heritage as it is understood and conceptualized internationally."[42]

This gap became particularly evident when considering the potential of the human right to cultural heritage as a subjective entitlement, allowing individuals to assert their positions in heritage-definition processes. Key international instruments increasingly recognize the nexus between human rights frameworks and cultural heritage protection. This recognition is particularly evident in provisions that acknowledge heritage's intangible dimensions and its profound connections to community and individual identity. This could suggest, then, that claiming a right to cultural heritage might serve as a meaningful legal tool, granting legitimate standing to take part in relevant decision-making. However, the enforceability of this right appears to be significantly constrained, hindered both by the absence of clear regulatory and procedural provisions and by restrictive interpretations in relevant case law.

The issue lies, precisely, in the unchanged general structure, which has resulted in the conflation of the right to cultural heritage with identity-related concerns, primarily associated with the claims of ethnic minorities and Indigenous communities within broader debates on rights to life, existence, development, and expression. This focus, however, tends to overlook the wider range of stakeholders and the different levels of engagement within which a right to heritage could be considered (those "concentric circles" referenced multiple times). As noted, this limitation stems from the failure to conceptualize and legally

[42] L. Lixinski, "Definitions: From Cultural Property to Cultural Heritage (and Back?)", cit., 25.

formalize alternative relationships within the heritage discourse. And in fact, even in identity claims, asserting a right to heritage within these broader affirmations is still considered as an expression of *otherness* or individual interest, contrasting with the presumed universal, unambiguous, and enduring public value of cultural heritage, expression of the general interest of society.

On closer inspection, this problem originates in the very structure and language of human rights, which "reinforces a public/private distinction that predicates the problem, and preempts possibilities for collective action."[43] This division is reflected in the prevailing heritage protection framework, which separates public and private interests, prioritizes conservation, and views access as a means to benefit from a unique and (pre)defined value[44].

The challenge, then, lies in re-defining (and re-articulating) the cultural value itself (i.e., the intrinsic immateriality of Chapter 2) and establishing transparent and effective administrative processes. These should grant negotiable standing and facilitate dialogue between differing positions from the outset of the heritage definition process – which would also highlight additional grounds for judicial scrutiny.

This is not a new proposition: in the Faro Convention, ratified in 2020, alongside its more "subversive" proposals that challenge the dominant paradigm of cultural interest recognition, advocates for recognizing heritage communities and affirming their right to heritage primarily *within the framework of public action* (Article 2(b)).

The practical implementation of public action, as it is now conceived, should be therefore the starting point for a crucial reconsideration of

[43] Id., "A Third Way of Thinking About Cultural Property", cit., 606, citing K. Bakker, "The 'Commons' versus the 'Commodity': Alter-Globalization, Anti-Privatization, and the Human Right to Water in the Global South", in Antipode, Vol. 39, Issue 3, 447: human rights "talk offers us an unimaginative language for thinking about new community economies, not least because [...] risks reinforcing the public/private binary upon which this confrontation is predicated, occluding possibilities for collective action beyond corporatist models of service provision."

[44] As noted by L. Lixinski," Definitions", cit., 30, "The most that seems possible is to get to the point of thinking of public interests with respect to culture as part of the bundle of property [...]. But that does not necessarily give marginalized communities the control over their culture that they might desire, as the public interest is usually translated into the conservation paradigm, which at best gives only conditional control to communities over their heritage, by not allowing radical transformation of the heritage, or even more fundamental challenges to the heritage narratives built into the heritage, which inevitably change over time."

more meaningful ways for existing subjectivities to engage in heritage-related decisions – this engagement grounded, as the Convention outlines, in the human right to cultural heritage and the right to participate in cultural life.

The Italian administrative framework offers a particularly compelling context for exploring more nuanced involvement in public action. Our examination of the processes for forming, verifying, and declaring cultural interest yielded some valuable insights worth summarizing before delving into the prospective approaches discussed in the next section.

The trend toward redistributing power and agency centers, noted at the outset, finds a potential response in Italy – or rather, it can be situated within existing *mechanisms* that, if more effectively utilized, could expand current *processes* for declaring cultural interest.

In terms of mechanisms, Italy's decentralized administrative structure plays a critical role. Examination of contexts where decentralization intersects with cultural issues reveals that institutional proximity effectively fosters a more diverse representation of localized interests. More significant, however, is how procedural frameworks are developed to concretely incorporate these localized perspectives into institutional heritage discourse.

It is in terms of processes, thus, that the most relevant observations emerge. The analysis suggests that while decentralization enables greater participation from specific subjectivities, this involvement typically occurs *outside* the standard procedure for cultural interest determination. What emerges, then, is a clear bifurcation.

On one side, there is a proliferation of channels through which cultural interests find expression – even when locally rooted and at odds with the general, national narrative. Notably, local government authorities, through competencies in spatial governance and urban planning, have proven instrumental in expanding the assessment of cultural value. Their actions capture the "contextual projections" of cultural property – encompassing physical, functional, commercial, and digital dimensions – highlighting intangible aspects often overlooked by traditional identification processes. This opens new avenues for incorporating immaterial dimensions into legal discourse, with decentralized offices acting as key mediators to navigate these complex interconnections and addressing gaps where formalized community engagement remains insufficient.

On the opposite side stands the rigidity of conventional procedures, rooted in regulatory approaches tied to classical categories. Even in most recent jurisprudential interpretations, there is little recognition of the complex, multidimensional relationships that communities form with heritage. Rather, the goal would be to recognize local claims of cultural significance as legitimate grounds for imposing administrative constraints, distinct from objective, value-based assessments of cultural objects. In Chapter 3, we explored this perspective through the lens of historical interest, which enabled us to establish a form of alterity, distinguishing the objectively defined value of past events relevant to an object's material and conceptual integrity from a so-called 'memorial perception.' The latter would ground cultural value on a subjectively determined basis, emphasizing a pivotal immaterial dimension of the object – its functional significance for contemporary society. This led us to reflect on how this subjective dimension is both shaped by the immaterial dimension of the object and, in turn, actively shapes its existence. This reciprocal dynamic highlights a crucial insight: these *dimensions*, subjective and intangible, are not external theoretical additions but rather intrinsic realities around which cultural property already revolves.

Yet, existing administrative processes remain confined to intervention mechanisms that frame the discussion strictly in terms of proprietary versus public-cultural interests. As previously discussed, however, relationships shaped by "particular memories," emotional connections, and contemporary patterns of engagement cannot be fully captured within a framework based on possession. Nor can they be subsumed into a (more complex) notion of general cultural interest, precisely because of their inherently particular and context-specific nature.

The central question, then, is which tools can better capture how and where cultural interest is formed, how alternative designation processes intersect with formal procedures, and, ultimately, whether the solution lies in expanding the standard administrative process or aligning alternative processes of cultural interest formation with existing ones.

Ultimately, an alternative path may lie in rethinking beyond conventional boundaries.

3. Beyond existing boundaries. Exploring future research directions

3.1. Possible impacts on ownership paradigms

One of the key conclusions of this study is the increasing complexity of relationships surrounding heritage, particularly as its intangible dimensions gain greater recognition. This complexity challenges both how heritage is conceptualized and how legal frameworks can account for its multidimensional nature, including the rights and claims that stakeholders can assert over it.

From a legal standpoint, this raises the issue of establishing an appropriate framework to regulate such relationships, as the current system relies on models that appear to neglect their existence, both formally and substantially.

The question lies at the crossroads of the concepts of 'control' and 'ownership.' At its core, it seeks to determine what forms of control can be exercised over the intangible dimensions of heritage, by whom, and to what extent. At its extreme, it inevitably invokes ownership models, which, however, struggle to accommodate the fluid and layered realities outlined in this thesis.

To move beyond this limitation, we must revisit and expand key categories at play: heritage, immateriality, public authorities, private owners, and collective actors. Only in this context we can call into question the dominant framework, which treats public value as a limit to private rights and relies on fixed categories of action. Instead, we can consider the possibility that private and public interests coexist within the same subject, allowing groups with specific ties to heritage dimensions to exercise recognized forms of *control* – such as shaping its use, meaning, and development – within an institutional and negotiative space that defines its broader legal significance – that is, its public value for society as a whole.

De Clippele effectively captured the complexity of the issue when she wrote that

> "The cultural interest of the collective is situated at the intersection of the public and private spheres. The emergence of a collective interest reshapes the 'social space,' traditionally structured around the dichotomy between the public sphere – representing the general interest – and the private sphere, where individual interests compete.

> Rather than forming a distinct third sphere, the collective positions itself precisely at the crossroads of these two domains, where interaction is most intense, and distinctions begin to blur. In this sense, it assumes a subversive role, fostering a dialectical relationship between public and private. Neither owner nor representative of public authority, the heritage collective actor operates through cultural interest, serving as a bridge between two complementary dynamics: on one hand, the "statization of society" (where the collective, as a user, publicizes the property) and the "civilization of the state" (where the collective, through participation, collectivizes or civilizes public cultural interest)."[45]

Building on this concept of "publicized property," described by others as "a version of property more aware of its public role,"[46] this section aims to lay the groundwork for this last analytical endeavor. It moves beyond existing legal mechanisms to explore the possibilities of an ownership-like relationship that also encompasses "non-owners and the property."[47]

This issue resonates in both national and international legal frameworks, underscoring its broad applicability and adaptability to various analytical perspectives for future research. As discussed in Chapter 3, while ownership regimes play a more prominent role in national contexts, international cultural heritage law also rests on similar foundations. Despite its conceptual shift from 'property' to 'heritage'[48], it ultimately remains entangled in property-based paradigms. This persistence can be attributed to two interrelated factors.

First, because it does not abandon these paradigms completely. As noted in the previous sections, their endurance reflects a broader tendency to prioritize stability and legal certainty[49], which, in turn, emerges from the necessary interplay between national legal traditions – from which the international legal framework originates and to which it ultimately

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[45] M.-S. De Clippele, "La dimension collective du patrimoine culturel : la nature et les prérogatives des acteurs du collectif – Perspectives de droit belge", in *Revue de droit de l'Université de Sherbrooke,* vol. 50, no. 1-2-3, 171. Translation by the author.
[46] L. Lixinski, "A Third Way of Thinking About Cultural Property", cit., 585.
[47] L. Lixinski, "Definitions: From Cultural Property to Cultural Heritage (and Back?)", cit. 23. In Italy, S. Pugliatti acknowledged that "collective property is [...] found at the confluence of private law and public law." See Id., *La proprietà nel nuovo diritto*, Milan, 1964.
[48] For further discussion, see Chapter 2, Section 1 – And from nationalism to internationalism, as reflected in J. H. Merryman's "Two ways of thinking about cultural property", in *The American Journal of International Law*, vol. 80, no. 4, 1986.
[49] On this point, extensively, A.J. van der Walt, *Property in the Margins,* Oxford, 2009. See also Lixinski, *ivi*, 583, connecting "the embrace of the term heritage in latter treaties" as a "victory of non-lawyers in the field," hence "less legal certainty."

returns – and supranational principles. Consequently, international law continues to address, create, coordinate, and manage property rights of individual States[50]. As a result, it remains grounded in a conservationist approach, framing heritage accessibility as a goal attained by restricting individual proprietary claims.

At the same time, however, the framework of international law is fundamentally grounded in the belief that universal and shared values *transcend* proprietary paradigms. During the drafting phase of the UNESCO 2003 Convention, concern was explicitly expressed that the relationship between people and their culture should not be framed as a form of 'property.'[51] By not "getting rid" of these paradigms completely on one side, yet endorsing principles that go into a completely different direction on the other, there is a tangible risk of lacking effective mechanisms to address complex or hybrid proprietary situations. This unresolved tension may result in the marginalization of essential aspects of the issue.

Indeed, the tension between public and private interest is not merely a point of conflict between the different aims of the asset, but rather a constitutive element of the same core of interests. Both national and international legal doctrine have consistently emphasized the essential and continuous interplay between public and private interests, as their relationship is anchored in a shared foundational principle: the overarching interest in protection itself, which acts as the 'inner limit' that shapes such interaction[52].

The "flattening" of public value into a singular interest representing the entire civil community, with the international arena (or the state, in

[50] John G. Sprankling, "The Emergence of International Property Law", in *North Carolina Law Review*, 461 (2012); then in the monography *The International Law of Property*, Oxford, 2014.

[51] Final report of the International Round Table on *Intangible Cultural Heritage – Working Definitions*, 14-17 March 2001, Turin, Italy, 5.

[52] In Italy, Salvatore Pugliatti is widely recognized for his influential analysis of property and the coexistence of multiple property regimes (see, for instance, *La proprietà nel nuovo diritto*, cited above). A comparable perspective is found at the international level in L. S. Underkuffler in *The Idea of Property: Its Meaning and Power* (Oxford, 2003), particularly at 75. This line of thought is further developed by Lixinski, cit., who notably observes that: "This mechanism does away with the presumptive power of property over competing public interests, as the core values underlying the defense of property are of the same kind as those in competition with it. In other words, ownership is the source of its own restrictions. Cultural heritage, in this view, is an integral part of property, and not set in opposition to it. But it is property with built-in limitations to accommodate public interests."

domestic contexts) acting as its guarantor, is a direct outcome of the above pursuit of stability. Yet this approach fails to account for the pluralism and contradictions inherent in these discourses, preventing a deeper exploration of how public value is, in reality, also a collective value – and entails, potentially, also private interests.

As a matter of fact, alternative mechanisms exist for engaging and assigning value to heritage – particularly through the assertion of rights akin to ownership (albeit in more nuanced forms). Although these frameworks prioritize private interests distinct from the more *indistinct* public value, they offer valuable tools for stakeholders. At present, however, they remain confined to a gray, underexplored space, trapped within a tension that remains largely polarized.

Some have raised the observation that "too much is asked of heritage. In the same breath we commend national patrimony, regional and ethnic legacies and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible."[53]

But is this incompatibility absolute? While current structures may struggle to reconcile these competing demands, could heritage – especially as its intangible dimensions gain legal recognition – bear the weight of these expectations, or even more?

This is precisely why, in this section, we find it necessary to propose further navigation within this inherent tension (or potential "harmony"[54]) between public and private interests and claims over multiple dimensions of heritage. Within the structure of this thesis, these brief reflections highlight one of the most pressing and compelling directions for future research.

A crucial step in this regard would be to delve deeper into the interpretation and evolution of public and private property, tenure, and the meaning of public cultural value as embedded within these categories.

In the Italian context – we explored in detail in Chapter 2 – the regime of cultural property, following the influential theory of Massimo Severo Giannini, is grounded in the principle that such property is deemed public not by virtue of ownership, but because it is intended for public

[53] D. Lowenthal, The Heritage Crusade and the Spoils of History, Cambridge, 1997, 227.
[54] The expression is directly drawn from S. Pugliatti, *ivi*, esp. 4.

enjoyment[55]. Underlying this fundamental principle, however, remains a proprietary logic that is evident in the way cultural property is framed, particularly in the different legal frameworks that are established depending on the specific conditions of ownership and possession.

For private property, a protective regime is in place that, while aimed at ensuring the general interest, provides greater guarantees to the owner. This applies not only to the how identification and assessment of cultural interest are regulated but also to the owner's obligations concerning public access and enhancement[56].

For public goods, the issue manifests in its negative form – that is, in the absence of regulatory provisions allowing for the recognition of "property-like rights" over this good by civil communities (in the various forms of engagement we are considering here) that could be asserted within the administrative system. This is because publicly owned goods are fundamentally (already) designed to serve public destination[57].

A solution to this tension was proposed in the early 2000s with the theory of *beni comuni*[58]. In the Italian legal framework, this concept took shape within the category introduced by the so-called Rodotà Commission[59], tasked with drafting a delegated law to reform Civil Code provisions on

[55] For a discussion on the importance of the public purpose regardless of ownership regime, see, among others, the contributions in A. Police (ed.), *I beni pubblici: tutela, valorizzazione e gestione*, Milan, 2008, particularly M. Dugato, "Il regime dei beni pubblici: dall'appartenenza al fine," and A. L. Tarasco, "La gestione del patrimonio culturale: profili giuridici, economici e contabili."

[56] See in this respect G. Piperata, "La valorizzazione dei beni culturali di proprietà privata (art. 113)", in *Aedon*, no. 1, 2004; S. Mabellini, "La proprietà conformata dei beni culturali come archetipo per lo status dei "beni comuni"? in *Rivista di diritti comparati*, Special Issue II, 2020; L. Casini, "Patrimonio culturale e diritti di fruizione", in *Riv. trim. dir. pub*., no. 3, 2022.

[57] The literature on the subject is extensive. For example, among the encyclopedic entries: F. Santoro-Passarelli, "Proprietà", in *Enciclopedia del Novecento*, 1980, and V. Caputi Jambrenghi, "Beni pubblici", in *Enciclopedia giuridica*, vol. V, Rome, 1988. Among monographic references: S. Cassese, *I beni pubblici. Circolazione e tutela*, Milan, 1969. Among scholarly contributions: A. Police, "I beni di proprietà pubblica", in F.G. Scoca (ed.), *Diritto amministrativo*, Turin, 2008.

[58] See, in particular, the contribution of Nobel Prize winner Ostrom: C. Hess, E. Ostrom, *Understanding Knowledge as a Commons: From Theory to Practice*, Cambridge, Massachusetts, 2006.

[59] The Commission on Public Goods chaired by Stefano Rodotà and established by ministerial decree on June 21, 2007, under the Ministry of Justice.

public goods[60]. Under this perspective, commons represent a "third category" distinct from public goods, defined by diffuse ownership and potentially held by either public or private entities. These goods are acknowledged to face significant challenges, including scarcity, depletion, and a fundamental lack of legal protections. While they often pertain to natural resources, their scope extends more broadly to assets tied to social production and reproduction, such as labor, health, information, and culture[61]. The Commission defined commons as resources that serve essential functions for the exercise of fundamental rights and the free development of the individual, guided by the principle of intergenerational preservation. Accordingly, it called for a robust legal framework to elevate their status, strengthen protections, and guarantee their collective accessibility to all citizens while safeguarding them for future generations. As observed, this perspective reflected a shift toward the "elevation of access as distinct from ownership"[62], explicitly designed to enable judicial protection available to all, thereby partially addressing the dilemmas outlined in Chapter 3, Section 3 of this thesis.

Without achieving legislative approval (as the proposal was never enacted[63]), the issue continues to fuel a rich doctrinal debate.

Some scholars advocate for an "aspiration to *reclaim* the commons," which begins with the demand for community participation "in the management of material resources and the enjoyment of knowledge."

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[60] The official report of the proceedings is available on the Ministry of Justice's website at this link: https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?facetNode_1=3_1&facetNode_2=0_10&previsiousPage=mg_1_12&contentId=SPS47617# (accessed 17 March 2025). See also, among legal scholars: U. Mattei, E. Reviglio, S. Rodotà (eds.), *Invertire la rotta. Idee per una riforma della proprietà pubblica*, Bologna, 2007; Ii.dd.,, *I beni pubblici. Dal governo dell'economia alla riforma del Codice civile*, Rome, 2010.

[61] And indeed, "archaeological, cultural, and environmental assets, along with other protected landscape areas," are explicitly recognized as a category of common goods in the Rodotà Commission's draft proposal. The complete text is available for reference at https://www.giustizia.it/giustizia/page/it/pubblicazioni_studi_ricerche_testo_selezionato?contentId=SPS47624 (accessed 17 March 2025)

[62] L. di Cerbo, "Lo statuto proprietario del bene culturale nell'epoca della sua riproducibilità digitale", in *Aedon*, no. 3, 2024.

[63] The situation is different at the regional and local levels. In some cases, legislation explicitly recognizes the category of common goods, as seen in Emilia-Romagna Regional Law No. 19 of 2014, Lazio Regional Law No. 10 of 2019, and the Statute of the Tuscany Region (Regional Statutory Law No. 64 of 2018). Additionally, some municipalities have adopted similar frameworks, with the Municipality of Bologna serving as a key example. In 2014, it introduced the Collaboration Regulations between civic entities and the administration for the management of urban commons.

This, they argue, also entails restoring currently weakened or broken social bonds and forging new ones. According to some, moreover, this is grounded in the idea of an "original ownership of these goods by the community," which calls for genuine *recognition* by public authorities, rather than mere *concession*[64].

Upon closer inspection, a recalibration of the dynamics between public authorities and civil society is not only implicit in the very legal conception of both public and private property (the latter through the known limitation of the social function) but is also manifest in emerging practices of so-called shared administration and participatory enhancement. However, this aspect falls outside the scope of this research, which has clearly stated from the outset that its focus is not on the later stages of valorization and management of cultural assets (even within the framework of common goods), but rather on the initial stage of the process – i.e., on the *definition* of their cultural value and significance.

In this regard, the *theory* of commons – understood here as critical re-evaluation of the conceptual foundations of current practices – offers a valuable analytical lens. By proposing non-proprietary approaches to these resource management, it opens new avenues for understanding cultural engagement and reinterpreting the notions of ownership(s) and access.

This is particularly relevant in the digital domain, a rapidly expanding field that, as noted in Chapter 2, is poised to reshape future cultural policies. In this context, scholars have increasingly referred to 'digital cultural commons', their defining features being inclusivity and participatory forms of governance[65]. Indeed, the Europeana platform itself operates as a digital service infrastructure and, since 2011, it embodies a European vision of shared cultural space[66], seeking to apply the principles of commons to a restructured model of governance.

[64] The quotations are taken from M. R. Marella (ed.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Verona, 2012.
[65] M.S. de Clippele, "Are Digital Cultural Commons Culturally Diverse?", in I*nternational Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, vol. 36, no. 5, 2023, 2075.
[66] See the white paper *European Cultural Commons: Supporting the new Europeana Strategy 2015-2020*, available at https://pro.europeana.eu/files/Europeana_Professional/Projects/Project_list/Europeana_Version3/Milestones/Ev3%20MS20%20Cultural%20Commons%20White%20Paper.pdf (accessed 10 April 2025).

Notably, the platform includes initiatives aimed at directly involving users in the creation of content within the digital space.

As explored throughout this study, the digital projection of culture – whether natively digital or the result of digitization – raises significant administrative (as well as ontological) challenges. Particularly, these include fundamental questions about modes of access and ownership, as these cultural expressions tend to be non-rivalrous. In this context, addressing issues of access and appropriation entails moving beyond traditional legal boundaries to consider both mere availability and "passive" enjoyment and forms of engagement such as co-creation, modification, and reinterpretation that actively involve the public throughout the lifecycle of cultural works[67]. Within this framework, open access licenses and the legal recognition of user-generated content have emerged as significant developments. Equally noteworthy are developing models of so-called de-propriation[68], which combine use of intellectual property frameworks and access-based contracts aimed at ensuring both inclusivity and the shared enjoyment of rights over digital products. Eventually, the use of NFTs as forms of digital certification of ownership in the intangible realm – despite operating in the opposite direction by (re)introducing artificial scarcity within a non-rivalrous context – has frequently been employed to develop new models of value co-production and co-creation. This includes cases where artists have leveraged the technology to expand their reach and deepen public engagement[69].

Lastly, in more general terms, the above noted recognition of an expanded judicial remedy accessible to "anyone" offers a promising

[67] Reference can be made to the model proposed by E. Bertacchini and F. Morando, "The Future of Museums in the Digital Age: New Models for Access to and Use of Digital Collections," in *International Journal of Arts Management*, no. 15, 2013.
[68] In French literature: F. Ost, D. Misonne, M-S de Clippele "Propriété et biens communs", in B. Winiger et al. (ed.), La propriété et ses limites : Congrès de l'Association Suisse de Philosophie du Droit et de Philosophie Sociale, Archiv für Rechts- und Sozialphilosophie Beiheft, Stuttgart, 2017; A. Strowel. "Les communs numériques et les outils juridiques de la transition", in A. Bailleux (ed), Le droit en transition. Les clés juridiques d'une prospérité sans croissance, Bruxelles, 2020.
[69] A recent example is the case of artist JR's project *Valeriia*, 2022, featured on the cover of Time magazine, which involved unfurling a 45-meter image of a 5-year-old Ukrainian refugee in the center of Lviv, with the participation of local residents. The initiative thus involved people both in the creation of the work of art itself and aimed to raise awareness of the civilian impact of the war through the launch of two NFTs (of a video and a photograph), with all proceeds directed toward supporting refugees exiting Ukraine at different border crossings. See https://www.jr-art.net/news/valeriia (accessed 10 April 2025).

direction for future research. Such active standing would encourage the hoped-for shift from passive beneficiary to active participants in dialogue and negotiation within cultural discourse – an approach grounded in an "inter-subjectivist" vision of society[70], balancing diverse interests beyond the public-private tension. It would also frame heritage enjoyment as an (effective) right to personal development, in line with the principles outlined in Article 2 of the Italian Constitution – which brings us back to the discussions of Chapter 2 on the administrative typification of the standard of decorum and how contemporary, bottom-up interpretations often lack substantive foundations in current legal frameworks[71].

What the commons theory may be lacking, and thus requires further development, is a more critical revision of the emerging and complex relationships between heritage and community beyond the broader umbrella of "commonality." Indeed, while the theory of commons lays the foundation for an alternative societal model in terms of possible interactions[72], challenging the balance between public and private, it does not fully address the interest in legally defining the connection between *specific* subjectivities and *specific* heritages in their multifaceted intangible dimensions. In other words, there may be a need to "revert" to the framework of private interests within this commonality, shifting the discussion toward reconfiguring the ownership model for cultural property and evaluating its appropriateness, rather than indiscriminately expanding access to "anyone." As this thesis consistently highlighted through the discourse on immateriality and subjectivity, the tension between universality and specificity – arising from the complexity that diversity entails – remains challenging to resolve.

This dilemma echoes an international scholarly debate around the risks of reverting to the exclusive nature of ownership models versus the benefits of "natural, participatory, and free movement of culture."[73] Some argue that ownership restricts cultural exchange and, particularly in the case of intangible cultural forms, imposes obligations to *repatriate*

[70] Refer to the references made in Chapter 3.
[71] See Chapter 2, Section 3.1.
[72] S. Rodotà wrote in this regard that this does not represent another form of property, but rather the opposite of property (*Il valore dei beni comuni*, in acquabenecomune.org).
[73] N. Mezey, "The Paradoxes of Cultural Property", in *Columbia Law Review*, vol. 107, no. 8, 2007. See also, less recent, the monograph of M. F. Brown, *Who Owns Native Culture?*, Cambridge, 2003.

even images, ideas and experiences of cultural expressions[74]. This perspective stands in defense of the broadest interpretation of community as the rightful beneficiary of culture and its recognized public value. Others, instead, uphold its exploration as a "language of power and distribution,"[75] and even beyond traditional ownership frameworks, viewing it as a means to engage in public and institutional discourse. This latter view enriches and complicates the ways in which cultural governance can be conceptualized, beginning with the very process of cultural value attribution[76].

The search for alternative models of attribution – beyond the exclusive model, yet still tied to a framework of domination, as they extend active participation in the construction and disposition of property – underscores our continued reliance on the classical legal conception of property and proprietary acts. A compelling parallel to this idea can be found in the Italian legal concept of so-called collective domains, which "find themselves at the confluence of private and public law" and can establish "another way of owning."[77] A 2017 law governs the peculiar status of these domains, recognizing them as the "primary legal order of the original communities, [...] equipped with the capacity to manage natural, economic, and cultural heritage, based on the territorial foundation of collective ownership, regarded as an intergenerational co-ownership."[78] This is the legal translation of a situation where a portion of land, whether publicly or privately owned, is designated for the use and benefit of a specific community, typically for agricultural and rural activities. As has been observed, in such cases, "it is not the individual or a group of individuals who own the property; rather, *the property itself belongs to a community*, which both derives its benefits and bears the

[74] K. A. Appiah, Cosmopolitanism: Ethics in a world of strangers, New York, 2006, esp. 129.
[75] H. Dagan argued in this regard that "Property also concerns the efficient (or inefficient) allocation of resources, and is thus a matter of aggregate social welfare (or utility). Finally, because property allocates claims to various scarce resources in society, property must be about distribution, as well as about our conceptions of community and social responsibility." See Id., *Property: Values and Institutions*, Oxford, 2011, 3.
[76] Contributors to explorations of this perspective are, among others, K. A. Carpenter, S. K. Katyal, A. R. Riley, "In Defense of Property", in *The Yale Law Journal*, vol. 118, no. 6, 2009; F. Macmillan, "The protection of cultural heritage: common heritage of humankind, national cultural 'patrimony' or private property?", in *Northern Ireland Legal Quarterly*, vol. 64, no. 3, 2013.; L. Lixinski, "Definitions: From Cultural Property to Cultural Heritage (and Back?)", cit., and Id., "A Third Way of Thinking About Cultural Property", cit.
[77] The first quotation is taken from S. Pugliatti, as referenced above. The second is from P. Grossi, *Un altro modo di possedere: l'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Milan, latest edition, 2017.
[78] Law of 20 November 2017, no. 168.

responsibility for its management."[79] This unique relationship warrants further exploration, particularly in light of two considerations: (i) its territorial foundation reinforces this study's arguments on the contextual relationship of the intangible dimension of heritage with the land, as well as the deep connection binding the associated communities; and (ii) it redefines "community" both in terms of its "private" prerogatives and in its interaction with the outside world. In doing so, it resonates with the commons theory's emphasis on generalized sharing, while pushing toward more context-specific understandings of cultural affiliation.

This is precisely why we find ourselves oscillating between framing the matter within intra- and extra-proprietary approaches. To further investigate immateriality from this "subjective" perspective, we also suggest (re)examining theoretical concepts and paradigms related to cultural stewardship[80] and cognitive ownership[81], and various *sui generis* mechanisms that lie at the intersection of intellectual property rights, the right of access to the public value of cultural property, and evolving patrimonial structures[82].

At the core of this exploration lies a fundamental premise regarding how we conceptualize stakeholders in the cultural sphere. This necessitates a critical reassessment of the "poles" we have identified in previous chapters, moving beyond the binary distinction between state and non-state actors to embrace a more pluralistic perspective.

In this respect, another key methodological aspect we wish to highlight is the tendency, observed throughout this thesis, to conflate community communities demands with those of a single group – namely, ethnic minorities and Indigenous peoples. While the discourse on identity and access to resources is often framed through this lens, and has solid reasons to be, it fails to fully capture the scope of the present

[79] F. Mastroberti, "Comunità, usi civici e beni comuni dopo la legge n. 168 del 2017", in *Annali della Facoltà Giuridica dell'Università di Camerino*, no. 13, 2024, 7.
[80] On which, specifically, K. A. Carpenter, S. K. Katyal, A. R. Riley, "In Defense of Property", cit.
[81] W. E. Boyd, M. M. Cotter, J. Gardiner, and G. Taylor "'Rigidity and a Changing Order … Disorder, Degeneracy and Daemonic Repetition': Fluidity of Cultural Values and Cultural Heritage Management," in C. Mathers, T. Darvill, and B. J. Little (eds.), *Heritage of Value: Archaeology of Renown*, Gainesville, 2005; W. E. Boyd, "'A Frame to Hang Clouds On': Cognitive Ownership, Landscape, and Heritage Management," in R. Skeates, C. McDavid, J. Carman (eds.) *The Oxford Handbook of Public Archaeology*, Oxford, 2012).
[82] Lixinski, in "A Third Way of Thinking About Cultural Property", cit., 585, frames it as "a version of property more aware of its public role."

investigation. As discussed in Chapter 3, this is particularly relevant in the European context, where Indigenous presence is limited, hence this approach risks overlooking the equally pressing concerns of (other) local communities. This is especially relevant given the additional danger of reducing these groups to a singular, essentialized identity – one that, in turn, becomes easier to dismiss in the institutional discourse at both national and international level.

To provide context and greater weight to this aspect, it is noteworthy highlight the author's involvement in the Interreg Alpine Space project AlpTextyles[83]. Bringing together 12 partner entities from six Alpine countries (including the Lombardy Region in Italy), the project sought to develop collaborative strategies (e.g., toolkits, strategic policy recommendations, MOOC) for the sustainable, circular, and innovative relocation of Alpine textile value chains. By emphasizing heritage preservation and consumer awareness, the project aimed to optimize local natural resources while protecting the intangible cultural heritage of the regions involved. This heritage-sensitive approach respected community prerogatives and sought to mitigate the risk of cultural appropriation.

Within this framework, the author's role centered on exploring how to safeguard the traditional knowledge of local communities involved, bridging ICH strategies with the development of IP-like protection frameworks. Starting from a comparative legal analysis, the research evolved into direct engagement with communities. The core challenge lay in aligning heritage protection with sustainable development, ensuring that traditional practices were not only preserved but integrated into broader strategies for visibility and economic viability.

Following UNESCO and WIPO guidelines on community engagement[84], the fieldwork focused on developing solutions aligned with the *concrete* expectations of the local community, rather than imposing pre-established approaches. Through direct interaction and active listening, an interest emerged that effectively bears the imprint of ownership, yet not in the traditional sense of exclusive rights, but as the need to assert a

[83] https://www.alpine-space.eu/project/alptextyles/ (accessed 20 March 2025)

[84] See, for instance, UNESCO's Capacity-building materials repository (https://ich.unesco.org/en/capacity-building-materials - accessed 20 March 2025), and WIPO's publication *Documenting Traditional Knowledge, a Toolkit*, available at https://tind.wipo.int/record/29026?v=pdf (accessed 20 March 2025).

private stake in heritage definition and management[85]. This private interest exists as it entails specific expectations on the governance of a heritage that is simultaneously recognized as being of public (i.e., shared) significance. But as some scholars have already observed, "more than rights, communities are primarily interested in capacity-building and self-governance."[86]

In other words, proprietary language and IP frameworks are invoked not out of preference but necessity, filling the void left by the lack of alternative mechanisms for asserting *control* over certain forms of heritage (as the introduction of this section highlighted). It was repeatedly emphasized by the community during the AlpTextyles project that being part of a centuries-old lineage of transmission – one that, furthermore, extends into a broader chain encompassing the well-being of the entire territory and its natural resources – precludes thinking in terms of boundaries of exclusion or appropriation.

What surfaced, instead, was a clear articulation of *custodianship*: the responsibility of caring for a heritage whose duty of transmission is deeply felt. This, in turn, shapes a vested interest in taking a seat during the creation of value at the institutional level – an interest that would not benefit from simply being subsumed under a generalized public good narrative. Conversely, the key concern lies in establishing personal heritage values and uses as a recognized element within institutional dialogue, ensuring that specific meanings of belonging are taken into account in defining structures of public value.

Certainly, in the context of issues of commercialization of traditional knowledge, instances where communities have sought more conventional ownership frameworks as a means to combat cultural appropriation also exist[87] – an issue at the heart of Chapter 1's discussion.

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[85] As also observed by S. Jones, *Early Medieval Sculpture and the Production of Meaning, Value and Place*, Edinburgh, 2004, p. 50, reflecting on similar issues related to the creation of meaning versus classical ownership paradigms in heritage determination: "[...] far from being expressions of ownership in the sense of private property (which can be bought, sold, lent, given away), it can be argued that such statements must be understood in terms of the broader language of kinship and belonging that describes the relationship between the monument and the community."

[86] L. Lixinski, "A Third Way of Thinking About Cultural Property", cit., 606.

[87] Noteworthy, for instance, is the case – which once again highlights, however, how this issue is primarily addressed within the context of Indigenous communities' claims – of the development of an IP for generis framework, such as the Oma Traditional Textile Design Database: https://oma.traditionaldesigns.la/ (accessed 20 March 2025). More information

In the absence of formal mechanisms to address these situations within existing legal frameworks – but with the hope that the evolving nature of property can yield effective solutions, in line with the idea of "grasping the institution of property within the living historicity of our time"[88] – an alternative approach is needed. Prioritizing heritage engagement as a process of meaning-making, use, and sustainable development would offer a more effective way to address the complexities of "subjective immateriality." These gray areas, still inadequately defined, warrant deeper exploration both in national legal frameworks and at the global level.

3.2. Possible impacts on the administrative function

With a view to broadening the recognition of relevant subjective positions through a deeper engagement with the intangible dimensions of heritage, this study has also assessed the capacity of the current administrative framework to accommodate such expansion. In this regard, particular emphasis has been placed on mechanisms of decentralization and subsidiarity, as most recently addressed in Section 3.2 above.

As also noted in the previous section, this issue reflects a broader shift away from the paradigm that conceives public administration as the exclusive guardian of public interests on behalf of the civil collectivity. This model, previously analyzed through the lens of the public–private dichotomy, is increasingly being challenged by the complexity of contemporary governance. A corollary to these considerations is the emergence of new forms of balance that allow other actors and groups to participate (or willing to do so) in decision-making processes – an evolution many scholars interpret in terms of deliberative or participatory democracy[89]. In addition, as we shall see, this entails an expansion of standing in judicial review – aligning with the theory of

on the White Paper report *Documenting Traditional Cultural Expressions: Building a Model for Legal Protection Against Misappropriation and Misuse with the Oma Ethnic Group of Laos,* by M. Boța-Moisin and T. Gujadhur, 2021.

[88] U. Mattei, item "Proprietà privata (nuove forme di)", in *Enciclopedia del diritto. Annali V*, Milan, 2012. Reference is made, more broadly, to S. Pugliatti's well-known theory on the multiple forms of property, mentioned above (*La proprietà nel nuovo diritto*).

[89] See, for example, the encyclopedic entries by R. Bifulco, "Democrazia deliberativa," in *Enciclopedia del Diritto, Annali,* Milan, 2011, IV, and U. Allegretti, "Democrazia partecipativa," *ibid.* On this topic, reference should also be made to the work of F. Benvenuti, including *Il nuovo cittadino. Tra libertà garantita e libertà attiva*, Venice, 1994, and *Disegno dell'amministrazione italiana. Linee e prospettive*, Padua, 1996.

beni comuni referenced above. It has been observed, in this last regard, that "any citizen (or group of citizens) belonging to the relevant community – as (co-)holder of right – may issue the administrative court against any decision of the managing body (concerning, for instance, the regulation of use or protection of the asset), without the need to demonstrate a specific individual interest."[90]

While Chapter 3 focused on positive law within the cultural heritage field, this section outlines a prospective trajectory for future research. It builds on analogical reasoning derived from the environmental sector.

Throughout the study, the recognition of additional intangible dimensions of heritage has been shown to deepen the relationship with the land. This included considerations of sustainability and development in relation to heritage's functionality, the formulation of context-specific approaches to heritage protection, more active involvement of local communities, and the preservation of biodiversity.

While acknowledging that the concepts of environment and landscape may retain distinct spheres of application and are subject to different administrative competence and legal meaning[91] – as upheld by part of Italian legal doctrine[92] – this analysis adopts a perspective that views landscape as a qualified and essential component of the environment[93]. From this standpoint, the two form a 'unitary dyad'[94], as the protection

[90] V. Cerulli Irelli, L. De Lucia, "Beni comuni e diritti collettivi", in *Politica del diritto*, no. 1, 2014.

[91] Constitutional court's ruling no. 367/2007 established in this respect that "multiple public interests are vested in the territory: those concerning environmental and landscape conservation, which fall under the exclusive competence of the State, and those related to spatial planning and the enhancement of cultural and environmental assets (i.e., the use and enjoyment of the territory), which fall within the framework of shared competence between the State and the Regions. Environmental and landscape protection, as it pertains to a complex and unified asset regarded by constitutional jurisprudence as a primary and absolute value, falls within the State's exclusive competence."

[92] Already with M.S. Giannini, "Ambiente: saggio sui diversi suoi aspetti giuridici", in *Riv. Trim. Dir. Pub*, 1973; V. Cerulli Irelli, "Pianificazione urbanistica e interessi differenziati", *ivi* 1985; and later in numerous contributions by P. Carpentieri: "Paesaggio contro ambiente", in *Urb. e App.*, no. 8, 2005; "Principio di differenziazione e paesaggio" in *Riv. Giur. Ed.*, no. 3/2007; "Paesaggio e Corti europee"" in *GiustAmm.it*, 2013; "Relazioni e conflitti tra ambiente e paesaggio", in *Federalismi.it*, no. 13, 2023; and "Il concetto giuridico di 'paesaggio' tra governo del territorio e ambiente", University of Bologna, 5 April 2024.

[93] In these terms, Council of State, Section VI, ruling no. 1144 of 10 March 2014.

[94] As first referenced in Constitutional court, ruling no. 378/2000. P. Carpentieri, last cit., 100, quotes former President of the Constitutional Court Giovanni Maria Flick: "The Constitutional Court has worked intensively to reach an agreement on the division of

of cultural heritage, landscape, and environment is jointly contemplated in the constitutional text. This reflects a unified and fundamental principle concerning the territorial dimension in which human life unfolds. Hence, as already affirmed by Constitutional Court judgment no. 85 of 1998, these forms of protection constitute an inseparable and interrelated whole. As some commentators have suggested, dismantling the "artificial separation" between the concepts of environment, landscape, and territory would allow for a broader understanding where the latter is the material substratum of a plurality of public interests – often conflicting and varying in constitutional weight and significance – and its governance, falling under shared administrative competence, an integrated approach that considers the various (yet interconnected) elements involved[95].

Not to mention that – as is well known – landscape constitutes "the other component" of cultural heritage, as expressly stated in Article 2 of the 2004 Code, which, indeed, in full is the Code of cultural and landscape assets (*Codice dei beni culturali e del paesaggio*). The extended and integrated conception of landscape advanced here had already been anticipated by scholars who noted a parallel between the definition contained in the 2000 European Landscape Convention and the one set out in Article 131 of such Code. The Convention defines it as "an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors;" similarly, Article 131 recognizes the landscape as a territory expressive of identity, whose character likewise derives from the interaction of natural and human elements[96].

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competences between the State and other entities. It has concluded that loyal cooperation is necessary [...] because the three dimensions (territory, environment, and landscape) are nothing more than three ways of perceiving and thus defining a single reality. A wise interpretation of the Constitution [...] has fortunately read Article 9 in these terms, in a way that appears partially different from its literal formulation. It has subsumed environmental protection within the broader notion of landscape protection.

[95] In these terms C. P. Santacroce, "Il paesaggio è partecipazione, ma…", in M. Frank and M. Pilutti Namer (eds.), *La Convenzione Europea del Paesaggio vent'anni dopo (2000-2020) Ricezione, criticità, prospettive*, Venice 2021.

[96] See G. Sciullo, "Il paesaggio fra la Convenzione e il Codice" in *Aedon*, no. 3, 2008; P. Carpentieri, "Paesaggio e beni paesaggistici (tra Codice e Convezione europea), in *www.avvocatiamministrativisti.it*. On the other hand, some have distinguished the cultural perspective of the Code from the polysemic and dynamic view of the Convention, which also encompasses ecological and social dimensions. Unlike the Code, which is associated with a centralized model of competence, the Convention emphasizes the role of local authorities and their communities in landscape management. See G. F. Cartei, "Autonomia locale e pianficazione del paesaggio", in *Riv. Trim. Dir. Pubb.*, 2013; C. P. Santacroce, "Il paesaggio è partecipazione, ma…", cit.

But beyond formal intersections, what is proposed here is that a focus on the intangibility of heritage makes it inevitable to establish a closer connection between its functional dimension and the broader issues previously discussed – such as environmental protection, sustainable development, biodiversity, quality of life, and the participation of local communities in shaping (i.e., *defining*) the spaces they inhabit. As a matter of fact, even in the measures declaring landscape assets of considerable public interest pursuant to Article 136 of Legislative Decree 42/2004, an increasing attention is noted to symbolic and value-based aspects that reflect an integrated conception of landscape – one in these dimensions appear to play a more significant role[97].

Under this angle, it seems particularly relevant to consider how legal discourse (encompassing both regulatory provisions and case law interpretations) has evolved within the environmental domain, as it may offer valuable insights for future inquiry into the broader theme of the intangible dimensions of heritage – opening up avenues for integrating participatory practices that have already been discussed (and sometimes endorsed) in this context.

Environmental governance has long been a fertile ground for participatory innovation, not only due to the subject matter's complexity and the need for transparent and democratic decision-making[98] but also under the influence of supranational instruments. Since the adoption of the Aarhus Convention[99], signatory states have been expressly required to facilitate and promote public participation in environmental decision-making through forms of implementation tailored to their respective domestic legal systems.

And indeed, drawing on the principle of horizontal subsidiarity under Article 118 of the Constitution, the freedom of association guaranteed by Article 18, and the participatory principles embodied in Law No. 241/1990, the recognition of a power of initiative on the part of private entities – such as associations representing collective interests, or even individual citizens – has gradually gained traction in the context of environmental protection. Building on this foundation, further research

[97] As reported in the 2025 Guidelines for Administrative and Technical-Scientific Action on Demo-Ethno-Anthropological and Intangible Cultural Heritage (Circular no. 21/2025), spec. 46.
[98] See, for instance, M. Calabrò, "La prevenzione della cattiva amministrazione attraverso l'esercizio dei diritti di accesso e partecipazione: il caso dei procedimenti in materia di ambiente, in S. Tuccillo (ed.), *Semplificare e liberalizzare. Amministrazione e cittadino dopo la legge 124 del 2015*, Naples, 2016.
[99] Ratified by Italy with law no. 108 of 16 March 2001.

could begin by examining the potential extension of the automatic connection between the so-called *ente esponenziale* (exponential entity) and the *interesse diffuso* (diffuse interest) in cultural heritage protection, as outlined in the opening section of Chapter 3. This would include exploring the possibility of identifying *interessi collettivi* (collective interests), whose representation by entities other than the public authority might be formally integrated into the procedures for the identification and definition of heritage[100]. In essence, the goal would be to move beyond traditional procedural norms that restrict participation to property-based entitlements – hence the earlier discussion on broadening the very notion of such entitlement (see above, 3.3.1). The present reflection, instead, shifts the focus toward an expansion of the range of legal positions that may be activated in order to participate in the exercise (and review) of the administrative function.

A key area for further inquiry is the mechanism outlined in Article 138 of the Code of Cultural and Landscape Heritage, which governs the initiation of procedures for declaring the significant public interest of landscape assets, as well as subsequent provisions that, to some extent[101], introduce forms of openness and participation that extend beyond public authorities, allowing for the involvement of civic groups and other actors rooted in the community context.

Unlike the procedural regime for the declaration or verification of cultural property, the recognition of such interest in the landscape domain is initiated through a proposal submitted to the Region by

[100] It is worth noting that, as established by the Council of State, Section IV, ruling no. 36 of 9 January 2014, then bolstered by the Plenary Assembly no. 6 of 20 February 2020, the collective interest defines the legal position of an entity that involves participation identifiable in relation to a bond that, being connected to a territorial reality or to a consistent, non-occasional manifestation of social life, is concrete (with respect to its object) and temporally persistent (with respect to its duration). On the other hand, the definition of diffuse interests refers to latent interests within the legal system, which are without a specific patron, undifferentiated, and ontologically homogeneous, and whose selection (identification and subsequent assignment of protection) results from the recognition and safeguarding, constitutionally guaranteed, of essential values of the 'form of the State.' As a result, "standing, in order to exist, must relate to an interest that is originally diffuse – and therefore without a specific holder – which, insofar as it concerns assets intended for collective enjoyment, becomes "personalized" in a representative body possessing certain defining characteristics, thereby transforming into a legitimate interest of the body itself ."

[101] C. P. Santacroce, "Il paesaggio è partecipazione, ma…", cit., significantly downplays the practical application of such mechanisms, observing that, in practice, they remain largely unimplemented.

commissions appointed by the regional authority[102]. This procedural framework has recently come under judicial scrutiny, particularly with regard to the potential expansion of standing for private actors representing collective interests. In a 2022 ruling, the Regional Administrative Tribunal of Piedmont affirmed that landscape protection – enshrined as a constitutional principle under Article 9 – also constitutes a form of collective interest able to ground participatory standing in administrative procedures[103].

As has been observed, this interpretation reflects a shift toward recognizing a shared administration as the most appropriate model for achieving the objectives of landscape protection, in alignment with a conception of the latter "not as a mere static natural environment, but rather as the dynamic synthesis of natural elements, human presence, and their interrelations."[104] Within the framework of the dimensions of immateriality explored in this study, a parallel can be drawn by analogy to the scope of Article 10(3)(d) and the categories of actors entitled to contribute to a more nuanced initiation of the procedure of declaration of that 'particularly important interest' (see Chapter 3, Section 3.2.1).

A closer examination of this issue is provided by the 2023 appellate ruling of the Council of State[105], which subsequently narrowed the scope of this power of intervention by drawing a clear distinction between the formal initiation of administrative procedures and the preliminary solicitations made by private actors prior to the activation of the actual administrative function. According to this interpretation, the initiation

[102] As outlined in Article 137 of the Code, the commissions are composed of the regional director, the relevant superintendents for architectural, landscape, and archaeological heritage, and two regional officials specializing in landscape matters. Additional members, appointed by the Region, must possess documented expertise in landscape protection and be selected from shortlists proposed by regional universities, cultural heritage foundations, and associations representing diffuse interests, in accordance with current environmental legislation. Under Article 138, these commissions – acting on proposals from ministerial, regional, or local public entities – assess whether the properties or areas under review present significant public interest. After collecting relevant data and consulting municipalities and experts, they may recommend a formal declaration to the Region, citing the historical, cultural, natural, morphological, aesthetic, and identity values involved, along with suggested usage guidelines to safeguard them.

[103] Regional Administrative Tribunal of Piedmont, Turin, Section I, ruling no. 563 of 10 June 2022.

[104] See R. Stupazzini, "La sussidiarietà orizzontale nella tutela del paesaggio", in *Labus.it*, 10 November 2022, available at https://www.labsus.org/2022/11/la-sussidiarieta-orizzontale-nella-tutela-del-paesaggio/ (accessed 10 April 2025). See also Council of State, Section IV, ruling no. 624 of 28 January 2022.

[105] Council of State, Section VI, ruling no. 8271 of 12 September 2023.

of the procedure by the relevant commissions remains unchanged, whether triggered by individual members, other competent territorial public bodies, or *ex officio*. The involvement of civil society – through associations representing collective interests – is thus limited to informal encouragement, akin to what occurs in other administrative procedures. While such input may prompt action, it does not alter the legal requirements governing formal initiation.

The topic also intersects with the question of legal standing for environmental associations to challenge administrative decisions. This procedural legitimacy is grounded in explicit legislative recognition[106], further complemented by the jurisprudential theory of the so-called "double track,"[107] which allows for the extension of this provision upon the fulfillment of specific cumulative requirements, indicative of concrete representativeness[108]. From this perspective, it would be worthwhile to consider the potential extension of such legal standing to associations or entities representing custodial communities in the cultural heritage domain, prompting reflection on cases of collective appeals[109]. Doing so could help bridge the gap between lived community experiences and institutional recognition, especially in light of the conceptual overlap between environment and heritage.

In conclusion, the reasoning developed here around exponential associations and entities that transform originally diffuse interests into collective ones by virtue of their legal standing, could be elevated to a discussion on the broader range of actors (entities, organizations, and institutions) that may serve as facilitators in bridging specific subjective positions with the (often distant) processes of legal recognition and legitimation. This is a wide-ranging theme, touching upon the

[106] Specifically, Articles 13 and 18 of law no. 349 of 8 July 1986, establishing the Ministry of the Environment and introducing provisions on environmental damage.

[107] On which, among many, Council of State, Plenary Assembly of 20 February 2020, no. 6. More recently, Council of State, Section V, ruling no. 7954 of 25 August 2023; Section V, ruling no. 8208 of 14 October 2024.

[108] To qualify for standing, an entity must: (i) explicitly pursue the protection of the relevant interest in its statutory purposes; (ii) demonstrate adequate representativeness and stable organizational orientation toward that interest; and (iii) represent a community marked by a substantial degree of homogeneity (Council of State, Section VI, No. 530/2022). Additionally, environmental associations must pursue environmental goals continuously, possess organizational stability and representativeness, and operate within a territorial scope directly linked to the affected area (T.A.R. Friuli-Venezia Giulia, No. 208/2021; T.A.R. Emilia-Romagna, Parma, No. 277/2024).

[109] On this point, see the recent case concerning the collective appeal brought by a community of artists who, over time, have rebuilt, preserved, and enhanced an abandoned village in Liguria Region: Council of State, Section VII, ruling no. 5408 of 17 June 2024.

relationship between experts and communities, or museums and civil society, and contributes to an increasingly nuanced debate on the extension of subjectivities (and the singularities they embody) within the cultural heritage context[110].

[110] Some insights can be found in Janet Blake, "Participation in Safeguarding Intangible Cultural Heritage Viewed as a Human Rights Imperative," in *Volkskunde*, no. 3, 2020.

4. A methodological framework for comparative research

It is the author's sincere hope that this analytical effort, along with the methodology employed to examine the notion of immateriality in the context of cultural heritage, may serve as foundation and stimulus for further comparative research across different national legal systems. As the introduction emphasized, this objective is among the reasons why the thesis adopts an explanatory approach, intended to ensure accessibility for non-Italian readers and to encourage broader comparative engagement.

The topic under scrutiny engages both a framework of international law and, more significantly, a focused inquiry into the specific characteristics of the domestic constitutional and administrative system. Throughout its development, this research has maintained an ongoing comparative dialogue with the French legal system, introduced as a valuable point of reference due to its many structural similarities with the Italian context. Yet, despite these shared foundations, outcomes have often diverged in meaningful ways. The author's research stay in France enabled a more nuanced understanding of how the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage has been interpreted and implemented within that domestic legal system. It was in this context that the idea first emerged that the intangible dimensions of heritage extend well beyond the definitional boundaries of this Convention.

Occasional references to other national systems have further underscored the diversity of legal and cultural contexts in which the notion of immateriality may serve to reframe the governance of cultural heritage. In this regard, it is evident that immateriality has come to function, throughout this study, as a conceptual lens for reconsidering the evolving definition and treatment of heritage itself.

In attempting to broadly trace the investigative methodology adopted in this study – with the aim of deriving a working framework that may be applied in other contexts as well – the following considerations can be made. The investigation began with a basic observation: the absence, in the Italian legal system, of an adequate framework through which to articulate and accommodate the concept of immateriality. This initial finding had immediate implications for the domestic transposition of the UNESCO-based definition of ICH – a definition that is widely endorsed and applied, yet frequently subject to distortion. It quickly became apparent that any meaningful research on the subject would require moving beyond a narrow focus on the formal incorporation of that

definition. This necessity arose from several converging factors: the ongoing evolution of the concept of heritage itself, rapid technological change, and a shifting conception of social space and its equilibrium. As a result, the analysis naturally extended to the material dimension of heritage, prompting the question of whether it remains viable to speak solely in terms of a dichotomy between material and immaterial heritage. To explore this, two case contexts were selected, each particularly illuminating in revealing the layered complexity of cultural goods: their contextual expression and their functional use.

Ultimately, the conclusion is affirmative: it remains essential to recognize the prerogatives of the physical asset – particularly in light of the tangible (in the sense of concrete, but also in the sense of physically directed) threats posed by the global context, including armed conflict, environmental degradation, and climate change. These challenges underscore the ongoing relevance of safeguarding tangible heritage and assets. At the same time, sustained attention to the intangible dimension – the external expressions and social projections of their value, *integral* to their tangible existence – is no less critical. In certain contexts, it may warrant even greater urgency.

The central insight, and one that may guide future investigation, is that immateriality should not be understood merely as the absence of physical form, or as a matter of perceptibility. Rather, it should be approached in terms of the changeability, circulability, extensibility, and inherent subjectivity of cultural heritage. It is this latter dimension – its subjective and evolving character – that should serve as a constant compass for further research.

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