

NEW FRONTIERS OF HUMAN RIGHTS: CULTURAL HERITAGE, CULTURAL RIGHTS AND MULTILEVEL CONSTITUTIONALISM

NOVAS FRONTEIRAS DOS DIREITOS HUMANOS: PATRIMÔNIO CULTURAL, DIREITOS CULTURAIS E CONSTITUCIONALISMO MULTINÍVEL

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Abstract: Cultural rights are currently assuming a new facet in human rights law and theory. Cultural heritage is entrenched at the center of this phenomena, spanning from the tangible dimension to others emerging in the last decades. It implies the recognition of a new right in a multilevel perspective: the right to cultural heritage, that encompasses justiciability, citizen participation and access to cultural heritage, complexifying the institutional symbolic negotiation over cultural heritage nowadays. This article aims to analyze the emergence of the right to cultural heritage as a human and fundamental right, in multilevel legal dynamics. To this end, it will focus on the developments within international law and the Brazilian case, which is paradigmatic in comparative studies on the subject, especially when it comes to constitutional protection of cultural rights. The article is methodologically grounded in the fields of legal and constitutional theory, as well as human and fundamental rights theory, in an interdisciplinary outlook and hypothetical-deductive approach. It was verified that cultural rights and cultural heritage are new frontiers in human and fundamental rights law. Indeed, the recognition of a “right” to cultural heritage requires the elaboration of new theoretical and empirical approaches as well as new legal methods in order to guarantee justiciability, participation and access to it. The Brazilian case is paradigmatic in this regard, as it constitutionally provides for judicial mechanisms and the provision for participation, enshrining a “heritage-rights approach”, in a multilevel dialogue.

Keywords: Human rights law, cultural heritage, cultural rights, fundamental rights.

Resumo: Os direitos humanos estão atualmente assumindo um novo lugar na teoria e prática dos direitos humanos. O patrimônio cultural encontra-se na centralidade desse fenômeno, que abrange a sua dimensão material além de outras emergentes na última década. Isso implica no reconhecimento de um novo direito numa perspectiva multinível: o direito ao patrimônio cultural, que engloba a justiciabilidade, a participação cidadã e o acesso ao patrimônio cultural, complexificando a negociação

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simbólica institucional no que toca ao patrimônio cultural hodiernamente. Este artigo tem como objetivo analisar a emergência do direito ao patrimônio cultural como um direito humano e fundamental, na dinâmica jurídica multinível. Para tanto, focará nos desenvolvimentos no âmbito do direito internacional e no caso brasileiro, que é paradigmático nos estudos comparados sobre o tema, especialmente no que toca à proteção constitucional dos direitos culturais. O artigo fundamenta-se metodologicamente nos campos da teoria jurídica e constitucional, bem como da teoria dos direitos humanos e dos direitos fundamentais, numa perspectiva interdisciplinar e numa abordagem hipotético-dedutivo. constatou-se que os direitos culturais e o patrimônio cultural são novas fronteiras para os direitos humanos e fundamentais. Em efeito, o reconhecimento de um “direito” ao patrimônio cultural requer a elaboração de novas abordagens teóricas e empíricas, bem como de novos métodos jurídicos, a fim de garantir a justiciabilidade, participação e acesso ao bem tutelado. O caso brasileiro é paradigmático nesse sentido, pois prevê constitucionalmente mecanismos judiciais e de participação cidadã, consagrando uma “abordagem de direitos” em um diálogo multinível.

Palavras-chave: Direitos humanos, patrimônio cultural, direitos culturais, direitos fundamentais.

1 INTRODUCTION

In recent decades, cultural rights have assumed an increasingly relevant role in legal and political sciences. In fact, they are no longer considered “the Cinderella of human rights”, the “poor cousins of human rights”, or even mere expressions of political and moral intentions, to be recognized as “*true rights*”, and triggered at the heart of the current theoretical and practical legal discussions, both in international and national levels. This process was actually marked by the enactment of new International Treaties and Conventions, which emphasized this particular topic – especially within the scope of UNESCO –, as well as in several recent constitutions worldwide, and respective local and regional legislations of various states.

The protection of *cultural heritage* is a central issue to this phenomenon. Indeed, this is a concern that emerged in law and policy with the consolidation of modernity after the French Revolution, as an issue essentially linked to the construction of the *nation* and its representation by the people and politicians, rooted – at first – in the “*monumental*” perspective, that is, to “tangible heritage”. In recent decades, however, there has been a broad expansion of the conceptual meaning of cultural heritage to comprise other new dimensions: *natural*, *intangible*, *underwater*, and *global* heritage, for instance, which has fostered the recognition of the *subjective* feature of this right – beyond its merely “objective” one.

The change in the understanding of the “*right to cultural heritage*”, which is entrenched in a *multilevel* perspective, has numerous impacts and practical implications, at different levels. Firstly, regarding its *justiciability* – that is, the possibility of claiming the protection of this

right in court; secondly, in guaranteeing the possibility of *citizen participation* in the political-institutional decision-making processes relating to its enforcement; and, thirdly, the guarantee of *access to cultural heritage* for everyone. It therefore indicates a shift in the political and legal decision-making axis with respect to the *institutional symbolic negotiation* on cultural heritage, historically attributed exclusively to the state.

Taking this into consideration, this article sheds light in the emergence of the right to cultural heritage as a human and fundamental right, in multilevel legal dynamics. To this end, it will focus on the developments within international law and the Brazilian case, which is paradigmatic in comparative studies on the subject, especially when it comes to constitutional protection of cultural rights. The hypothesis states that the right to cultural heritage, particularly with regard to its new dimensions, stands as one of the new frontiers of contemporary human rights law. The article is methodologically grounded in the fields of legal and constitutional theory, as well as human and fundamental rights theory, in an interdisciplinary outlook and hypothetical-deductive path, and is divided into three parts: II – The new dawn of cultural rights; III – Cultural heritage as a cultural human right; IV – Cultural heritage as a fundamental right: the Brazilian case in multilevel perspective.

2 THE NEW DAWN OF CULTURAL RIGHTS

The Swiss philosopher Patrice Meyer-Bisch begins one of his collections, published in the 1990's stating that "cultural rights" are "an underdeveloped category of human rights"¹. According to the author, "while they appeared in Europe at the same time as civil and political rights, cultural rights have remained the least defined in Western democracies"². Indeed, his statement is not the only one in the field of cultural rights theory, given that several authors point to the precarious attention attributed to this category of rights through the history of human rights' affirmation³, especially after the Second World War. In the same sight, Janusz Symonides highlights that cultural rights are "a neglected category of human rights"⁴, even being called the "cinderella of the human rights Family"⁵.

In recent years and decades, however, this reality has been gradually changing, as theoretical, normative and political outcomes in the field of cultural rights have considerably intensified. Driven by the broader process of "cultural globalization"⁶ and the emergence of the *paradigm of cultural diversity*⁷, culture – in general – and cultural rights – in specific – are currently taking a stand "at the heart of regional and local development processes"⁸. In the

1 MEYER-BISCH, Peter. *Thème du Colloque*. In: MEYER-BISCH, Peter (org.). *Les droits culturels, une catégorie sous développé de droits de l'homme*. Fribourg : Editions Universitaires, 1993, p. 11 (my translation).

2 MEYER-BISCH, Peter. *Thème du Colloque*, p. 11 (my translation).

3 For more details, see the collection organized by: NIEĆ, Halina. *A favor o contra los derechos culturales?* Paris : Ediciones UNESCO, 2001.

4 SYMONIDES, Janusz. "Cultural rights: a neglected category of Human Rights". *International Social Science Journal*, n. 50, v. 158, 1998.

5 SYMONIDES, Janusz. "Cultural rights: a neglected category of Human Rights", p. 122.

6 MATTELLARD, Armand. *Diversité Culturelle et Mondialisation*. Paris : La Découverte, 2009.

7 TOURAINE Alain. *Un nouveau paradigme: pour comprendre le monde d'aujourd'hui*. Paris : Fayard, 2005.

8 ROMAINVILLE, Céline. *Neuf essentiels pour comprendre les "Droits Culturels" et de droit de participer à la vie culturelle*. Bruxelles : Culture & Démocratie, 2013 (my translation).

wake of this process, the implicit or explicit right to the *enjoyment* of cultural heritage achieve notoriety, conceived as a *fundamental right* in different constitutional systems and as a cultural right *par excellence*.

Therefore, despite cultural rights were first officially recognized by international law in 1966⁹, by the adoption of the two International Covenants¹⁰, it is remarkable that in recent decades cultural rights undergone a *new dawn*. Since the 1990s, the intensification of intercultural relations worldwide, both in central and peripheral countries, characterized by the a) “fragmentation of societies” into multifaceted social and cultural groups, b) the “crisis of internal consensus”, and c) the “reshaping of citizenship ideal” – especially driven by the increasing international migrations flows and the politicization of culture –, increased significant differences within societies and fostered the theoretical and normative revival of cultural rights¹¹.

This follows in the wake of a broader process, described by Danilo Zolo as the emergence of “*new rights*”¹². In this perspective, four phenomena which directly contributed to this process can be mentioned: 1) the improvement and strengthening of UNESCO; 2) the *Mexico City Declaration on Cultural Policies*; 3) international normative development carried out by the UN; and, 4) the increasing interest of the academy, especially the legal academy, on several issues concerning cultural rights enforcement.

Regarding the first topic, it should be noted that UNESCO¹³ played a fundamental role in the normative establishment of cultural rights across the globe, especially for having developed the field of *International Cultural Heritage Law*¹⁴. The enactment of the *UNESCO Convention on the World Natural and Cultural Heritage*, in 1972, triggered UNESCO to become an international reference in the field of cultural heritage in general, fostering the development of academic production in the subjects.

The second point concerns the remarkable *Mexico City Declaration on Cultural Policies*, enacted during the *World Conference on Cultural Policies* (Mondiacult), which took place in 1982 in Mexico City. This Declaration played an important role in the international statement – as a *soft power* instrument – of an “anthropological” notion of culture¹⁵, considering culture in its

9 “Again, like the right to self-determination, cultural rights were officially acknowledged for the first time in 1966. Thanks to decolonization, it would seem, the moment had finally come both for self-determination and for cultural rights”. STAMATOPOULOU, Elsa; ROBBINS, Bruce. “Reflections on Culture and Cultural Rights”. *The South Atlantic Quarterly*, vol. 103, n. 2/3, Spring/Summer 2004, p. 427. Likewise, see: DONDEERS, Ivonne. “Towards a right to cultural identity? Yes, indeed!”. *Diritti Umani e Diritto Internazionale*, vol. 12, n. 3, 2018.

10 The *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*.

11 LUCAS Javier de. “La sociedad multicultural: democracia y derechos”. *Revista Mexicana de Ciencias Políticas y Sociales*, v. 41, n. 167, 1997.

12 Such as the “right to the environment”, rights related to new technologies, among others. It can be said, however, that the process of asserting cultural rights accompanies the gradual historical affirmation of *environmental law*, which gradually developed from the Stockholm Conference in 1972. See: ZOLO, Danilo. *Nuovi diritti e globalizzazione*. Roma : Enciclopedia Treccani, 2009.

13 The UNESCO Constitution states that the purposes of the Organization are “Article I – Purposes and functions 1. The purpose of the Organization is to contribute to peace and security by promoting collaboration among nations through education, science and culture, to strengthen universal respect for justice, the rule of law, and for human rights and fundamental freedoms, which are affirmed for the peoples of the world by the Charter of the United Nations, without distinction as to race, sex, language or religion”. UNESCO. *Constitution of the United Nations Educational, Scientific and Cultural Organization*, London, 1945.

14 See: BLAKE, Janet. *International Cultural Heritage Law*. Oxford : Oxford University Press, 2015.

15 “Therefore, expressing trust in the ultimate convergence of the cultural and spiritual goals of mankind, the Conference agrees:

spiritual, material, intellectual and affective attributes. Likewise, it also points to the principles that should guide the elaboration and implementation of cultural policies in national contexts.

The third point refers to the several legal instruments that have been created since then, enacted by the UN, within the scope of the global system for the protection of human rights or even within the sphere of Regional Systems. Examples include: *International Convention on the Elimination of All Forms of Racial Discrimination* (UN, 1965); *International Convention on the Elimination of All Forms of Discrimination against Women* (UN, 1979); *International Convention on the Rights of the Child* (UN, 1989); *International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families* (UN, 1990); *Convention on the Rights of Persons with Disabilities* (UN, 2006). In the Inter-American System, the most significant conventions are: *Protocol of San Salvador* (Organization of American States, OAS, 1988); *Inter-American Convention to Prevent, Punish and Eradicate Violence against Women* (Convention of Belém do Pará, OAS, 1994); *Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities* (OAS, 2005); and, *Inter-American Convention against Racism, Racial Discrimination and Related Intolerance* (OAS, 2013). Within the scope of the European System for the Protection of Human Rights, the following instruments are significant: *European Charter for Regional Minority Languages* (Council of Europe, EC, 1992); *Council of Europe Convention for the Protection of National Minorities* (EC, 1995); *Council of Europe Convention on preventing and combating violence against women and domestic violence* (EC, 2011); *Council of Europe Framework Convention on the Value of Cultural Heritage for Society* (Faro Convention, EC, 2005). These documents demonstrate the political and legal relevance that cultural rights have come to assume in recent times.

The fourth point lies on the “increasing interest in cultural rights in academia”¹⁶. Actually, after the publication of the collection “*Cultural Rights as Human Rights*”¹⁷, by UNESCO in 1970, there was a gradual increase in the legal literature, both in international and national contexts on the subject. As Donders emphasizes, “the increased attention and elaboration of cultural rights has given cultural rights a much more prominent place in international human rights law. Cultural rights are by now recognized as protecting and promoting cultures and cultural identities as crucial aspects of human life and human dignity”¹⁸. In this regard, “cultural rights are seen as real human rights that have the same value as other human rights of a civil, economic, political or social nature”¹⁹.

that in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs; that it is culture that gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations”. ICOMOS. *Mexico City Declaration on Cultural Policies*, World Conference on Cultural Policies, Mexico, 1992.

16 As highlights DONDERS, Yvonne. “Cultural Rights in International Human Rights Law: from controversy to celebration”, *Amsterdam Law School Research Paper*, Amsterdam Center for International Law, n. 2015-23, 2015, p. 82.

17 UNESCO, *Cultural Rights as Human Rights*, Paris, Istituto Grafico Casagrande, 1970. As is pointed out, this “publication results from a meeting on ‘Cultural Rights as Human Rights’ held at Unesco Headquarters from 8 to 13 July 1968, attended by experts invited by the Director-General to participate in their personal capacity and not as representatives of their respective governments”.

18 DONDERS, Yvonne. “Cultural Rights in International Human Rights Law: from controversy to celebration”, p. 83.

19 “This does, however, not mean that cultural rights are fully understood and guaranteed. Important challenges for both

Hence, from the 1990s and early 2000s onwards, law itself has been directly affected by the transformations surrounding culture and cultural rights. At the international level, UNESCO has enacted several declarations²⁰ and International Conventions²¹ asserting cultural rights. In the national field, States have gradually developed rich legislation related to cultural rights and the protection of cultural diversity, insofar as the changes within minority issues approach has brought with it, in some cases, the explicit *codification* of the multicultural principle. And even within Constitutional Law, cultural rights have gradually gained ground and established as “fundamental rights”, especially with regard to the *right to access cultural life*²².

In this regard, Elsa Stamatopolomou exposes three reasons that explain the opening of legal rationale towards cultural rights. The first of them is the adoption of the *Universal Declaration of the Indigenous Peoples’ Rights* by the UN in 2007. This document is considered by the author as “the most advanced instrument in terms of boldly recognizing cultural rights, as international legal norms, both as individual and especially as group rights”²³. Stamatopolomou also underlines that this is “the boldest recognition of ethnicity in International Law and the most cultural rights-rich international instrument we have – an instrument that can shed light on cultural rights of other parts of society”²⁴. The second reason refers to a recent creation of the *UN Special Rapporteur in the field of Cultural Rights*, “whose main aim is the supervision of the implementation by States of cultural rights, bringing forth good examples and obstacles, and studying the relation between cultural rights and cultural diversity”²⁵. The first Special Rapporteur, elected in 2009, was Farida Shaheed, originally from Pakistan; the second, elected in 2016, is Karima Bennouna, originally from the United States of America, and the third one and currently in work, is Alexandra Xanthaki, from Greece.

The third reason is related to *General Comment n. 21* (2009), of the UN Committee on Economic, Social and Cultural Rights, on the “right of everyone to take part in cultural life” – established in art. 15 of the International Covenant on Economic, Social and Cultural Rights. This is a key document as it has institutionalized a broad understanding of culture within the scope of the global system for the protection of human rights²⁶. The Committee thus characterizes culture as comprising all the human activities through which people and communities “express their humanity and the meaning they give to their existence and build their world view”.

aspects remain”, DONDERS, Yvonne. “Cultural Rights in International Human Rights Law: from controversy to celebration”, p. 83.

20 Such as: “*Declaration of Principles of International Cultural Co-operation*” (1966); “*Declaration on Race and Racial Prejudice*” (1978); “*Declaration of Principles on Tolerance*” (1995); e, “*UNESCO Declaration of Cultural Diversity*” (2001).

21 Such as: “*Convention concerning the protection of the World Cultural and Natural Heritage*” (1972); “*Convention on the Protection of the Underwater Cultural Heritage*” (2001); “*Convention for the Safeguarding of the Intangible Cultural Heritage*” (2003); “*Convention on the Protection and Promotion of the Diversity of Cultural Expressions*” (2005).

22 For further analysis, see: ROMANVILLE, Céline. *Le droit à la culture: une réalité juridique*. Bruxelles, Bruylant, 2012.

23 STAMATOPOLOU, Elsa. *International framework of Cultural Rights*. Ciudad de México, Comisión Nacional de los Derechos Humanos, Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura, 2018 p. 64.

24 STAMATOPOLOU, Elsa. *International framework of Cultural Rights*, p. 64.

25 STAMATOPOLOU, Elsa. *International framework of Cultural Rights*, p. 64.

26 “The reflection matured over the years on the issue of cultural rights has influenced the content of the Comment, not only as regards the definition of culture accepted by the Committee, but also in relation to the link, which it recognizes, between culture and the formation of the identity of the person” (my translation). FERRI, Marcella. “L’evoluzione del diritto di partecipare alla vita culturale e del concetto di diritti culturali nel Diritto Internazionale”. *La Comunità Internazionale*, Fasc. 2/2014, pp. 226.

These elements contributed to the development of a broader understanding of cultural rights, their content and scope, in the most diverse forms – especially the normative and doctrinal facets. In this light, Yvonne Donders emphasizes that cultural rights have moved, in recent decades, from a context marked by “*controversies*” to another characterized by “*celebration*”. This is due to the fact that “cultural rights are by now recognized as protecting and promoting cultures and cultural identities as crucial aspects of human life and human dignity”²⁷, that is, cultural rights are nowadays conceived as *true* human rights, with an important role on national and regional development policies.

3 CULTURAL HERITAGE AS A CULTURAL HUMAN RIGHT

The recent evolution of cultural heritage in International Law and its assimilation by several domestic laws has driven its gradual recognition as a human right and, evidently, as a “cultural right”. Indeed, from an academic point of view, the concepts of “*cultural heritage*”, “*human rights*” and “*cultural diversity*”, “have tended to be studied separately, with the various disciplines focusing more on one concept than the others, whereas, in fact, the concepts developed alongside each other and are inextricably linked”²⁸. The *linkages* among these concepts have been gradually developed in the international field – and also within some States’ doctrines –, especially in the scope of the agendas, speeches and actions of the UN and other International Organizations, such as UNESCO, so that currently is becoming even more evident, also for academic literature, the direct relation that these concepts lay down among them, propelling the recognition of a specific *human right to cultural heritage*.

This process reshaped not only international law, but also international relations²⁹, through which it was possible to further *dynamic intercultural relations*, either with traditional subjects of rights, or with new actors who, since the 1990s – with the reshaping of the world-system due to the fall of the Berlin wall – are also *protagonists* or *partners* in the implementation of international law – as is the case of non-governmental organizations. In this context, *international cooperation for culture* between several actors assumed particular relevance, contributing to the application of international law principles and enabling all people to have access to knowledge³⁰. This *new* concept of culture also spurred another substantial change, “a change not only in the use of terms and in the meanings, we attach to the word ‘culture,’ but also in the way we think about the world”³¹.

This recognition strengthens the relationship between culture, cultural heritage and development – especially with the concept of “sustainable development”. Indeed, the concern over development of different cultural identities and with the identity of groups, in the same way as the protection of their respective tangible or intangible cultural heritage, implies on the enforcement of a policy concerned with local and regional development dynamics. In this

27 DONDERS, Yvonne. “Cultural Rights in International Human Rights Law: from controversy to celebration”, p. 83.

28 REEVES, Julie. “Introduction”. In: REEVES, Julie. *Culture and International Relations: narratives, natives and tourists*. London : Routledge, 2004, p. 1.

29 REEVES, Julie. “Introduction”, p. 1.

30 Recalling the principles of international cultural cooperation, as determined by the *Universal Declaration of Principles of International Cultural Cooperation*, promulgated by UNESCO in 1966.

31 REEVES, Julie. “Introduction”, p. 3.

perspective, cultural rights can both promote and be promoters of this form of development, playing a relevant role in the policies of each country or region. Indeed, “in the world of policy, culture is increasingly being viewed as a commonplace, malleable fact of life that matters as much as economics or politics to the process of development”³².

However, the recent recognition of cultural rights has not been sufficient to completely resolve all controversies related to these rights, nor does it even prevent many States from still adopting a cautious perspective regarding their protection³³. Indeed, a significant number of States still question the substance of cultural rights and their array as human rights, tending to conceive them as political aspirations rather than true rights³⁴. Some doubts still remain regarding cultural rights’ framework, that is, which rights can effectively be considered as “cultural rights” and what are their scope. This is one of the issues that doctrine and civil society organizations have been concerned about recently. Even so, it should be noted that there are no precise definitions yet.

Yvonne Donders evinces that “cultural rights” are composed of different human rights, among them: the right to create and enjoy cultural products, the right to access and participate in cultural life, the right to freedom of association, expression, religion and the right to education³⁵. Elsa Stamatopoulou, indicates that cultural rights are the ones as follows: the right to education, the right to participate in cultural life, the right to enjoy the benefits of scientific progress and its application, the right to benefit from the protection of copyright, and freedom of creative activity and research³⁶. Civil society organizations have also launched some proposals to define the content of these rights, as is the case of the *Friborg Group*, coordinated by Prof. Patrice Meyer-Bisch. In the “*Déclaration de Fribourg sur les Droits Culturels*”, six cultural rights are listed: the right to identity and cultural heritage; right of reference to cultural communities; right of access and participation in cultural life; right to education and training; right to information and communication; and the right to cultural cooperation³⁷.

32 RAO, Vijayendra; WALTON, Michael. *Culture and Public Action*. Stanford : Stanford University Press, 2004, p. 3.

33 “For instance, the general acknowledgment of the importance of cultural rights has not completely resolved all controversies and the cautious attitude of certain States towards these rights”. DONDERS, Yvonne. “Cultural Rights in International Human Rights Law: from controversy to celebration”, p. 83.

34 “A significant number of States still doubt that cultural rights are substantive, enforceable human rights and instead see them more as policy-oriented rights that do not impose direct, definite legal obligations”, DONDERS, Yvonne. “Cultural Rights in International Human Rights Law: from controversy to celebration”, p. 84.

35 “[...] the category of cultural rights includes many different human rights. Cultural rights are the rights to create and enjoy cultural products and the rights to have access to and participate in cultural life, as well as the rights to freedom of association, expression, religion and the right to education. Cultural rights may also refer to the cultural dimension of human rights, such as the rights to private life, family life and health.”, DONDERS, Yvonne. “Cultural Rights in International Human Rights Law: from controversy to celebration”, p. 83.

36 STAMATOPOLOU, Elsa. *International framework of Cultural Rights*, p. 65. STAMATOPOLOU, Elsa. *Cultural rights in International Law*.

37 “*Declaration de Fribourg sur les Droits Culturels*”. Neste sentido, os direitos culturais podem ser definidos, nas palavras de Patrice Meyer-Bisch, como “droits, libertés et responsabilités pour une personne, seule ou en commun, avec et pour autrui, de choisir et d’exprimer son identité, et d’accéder aux références culturelles, comme autant de ressources qui sont nécessaires à son processus d’identification”, ou seja, “les capacités de lier le sujet à d’autres grâce aux savoirs portés par des personnes et déposés dans des œuvres (choses et institutions) au sein de milieux dans lesquels il évolue”. Ces droits doivent permettre à chacun de “développer ses capacités d’identification, de communication et de création”. BISCH, Patrice Meyer. *Le droit de participer à la vie culturelle: contenu et importance pour la réalisation de tous les droits de l’homme*. Comité des droits économiques, sociaux et culturels. Discussion générale sur le droit de participer à la vie culturelle, 9 mai 2008, Documents Nations Unies n° E/C.12/40/9, p. 5. See also: BISCH, Patrice Meyer; BIDAULT, Milène. *Déclarer les droits culturels: commentaire de la Déclaration de Fribourg*. Bruylant : Schutless, 2010. For further analysis, see: ROMAINVILLE,

More recently, the Human Rights Council of the United Nations, when establishing the mandate of the “independent expert in the field of Cultural Rights”³⁸, settled apart that one of its objectives was precisely to seek a definition of the content that makes up this category of right³⁹. Farida Shaheed, the first independent expert, pointed out in its first Report that:

“[...] cultural rights protect the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. They may also be considered as protecting access to cultural heritage and resources that allow such identification and development processes to take place”⁴⁰.

In this sense, the list of cultural rights comprises several rights, ranging from “expression and creation, including in diverse material and non-material forms of art; information and communication; language; identity and belonging to multiple, diverse and changing communities”, until the “development of specific world visions and the pursuit of specific ways of life; education and training; access, contribution and participation in cultural life; the conduct of cultural practices and access to tangible and intangible cultural heritage”⁴¹.

There is, therefore, a strong tendency to consider *cultural heritage* as part of the set of cultural rights and, therefore, as part of human rights family as well, conceived as a right that is, then, inscribed in the Global System for the Protection of Human Rights. This approach provides elements to overcome the historical difficulties and obstacles in reconciling the relationship between human rights, protection of cultural heritage and the promotion and valorization of cultural diversity. This relationship is further detailed more clearly in later Reports by independent experts in the field of cultural rights.

In 2011, the Report n. A/HRC/17/38 explores the relationship between cultural rights and cultural heritage, highlighting the human rights issues related to cultural heritage. Based

Céline. *Neuf essentiels pour comprendre les “Droits Culturels” et de droit de participer à la vie culturelle*. Bruxelles, Culture & Démocratie, 2013.

38 Established by the Human Rights Council, through the Resolution n. 10/23/2009.

39 In Resolution No. 10/23/2009, the Human Rights Council established a new procedure, entitled “Independent Expert in the Field of Cultural Rights”, for a period of three years. As determined in item 9 of said Resolution, the expert is charged to: (a) to identify best practices in the promotion and protection of cultural rights at the local, national, regional and international levels; (b) to identify possible obstacles to the promotion and protection of cultural rights, and to submit proposals and/or recommendations to the Council on possible actions in that regard; (c) to work in cooperation with States in order to foster the adoption of measures at the local, national, regional and international levels aimed at the promotion and protection of cultural rights through concrete proposals enhancing subregional, regional and international cooperation in that regard; (d) to study the relationship between cultural rights and cultural diversity, in close collaboration with States and other relevant actors, including in particular the United Nations Educational, Scientific and Cultural Organization (UNESCO), with the aim of further promoting cultural rights; (e) to integrate a gender and disabilities perspective into his and her work; and (f) to work in close coordination, while avoiding unnecessary duplication, with intergovernmental and non-governmental organizations, other special procedures of the Council, the Committee on Economic, Social and Cultural Rights and UNESCO, as well as with other relevant actors representing the broadest possible range of interests and experiences, within their respective mandates, including by attending and following up on relevant international conferences and events.”

40 UNITED NATIONS. *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council. A/HRC/14/36*. Human Rights Council, 2010, p. 4.

41 UNITED NATIONS. *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council. A/HRC/14/36*, p. 5.

on the importance that cultural heritage assumes for several societies and civilizations, Shaheed underlines that “human rights issues related to cultural heritage are numerous”, including “questions regarding who defines what cultural heritage is and its significance; which cultural heritage deserves protection; the extent to which individuals and communities participate in the interpretation, preservation/safeguarding of cultural heritage, have access to and enjoy it; how to resolve conflicts and competing interests over cultural heritage; and what the possible limitations to a right to cultural heritage are”⁴².

Actually, Shaheed points out that in recent years and decades there has been a transformation in the field of cultural heritage protection, especially at the international level, but also at the national one, by gradually overcoming an approach to preservation / conservation / safeguarding of cultural heritage based on the notion of *outstanding universal value* for a preservation / conservation / safeguarding approach concerned with its crucial value to individuals and communities, especially as it relates to their cultural identity⁴³. In this light, Shaheed mentions that although the “right to cultural heritage” is not expressly recognized in international instruments as such, there are several references that have been enshrined in international human rights law and, similarly, have steered its recognition and projection in international law and in the national legal regimes of several States. As Shaheed highlights:

In parallel, although the right to cultural heritage does not appear per se, references to cultural heritage have emerged in international human rights instruments and in the practice of monitoring bodies. The link between cultural heritage, cultural diversity and cultural rights has been strengthened. There is a better understanding today that, in order to respect and protect cultural identity, tangible cultural heritage should be preserved with a view to maintaining its authenticity and integrity, intangible cultural heritage should be safeguarded to ensure viability and continuity, and rights of access to and enjoyment of cultural heritage should be guaranteed.⁴⁴

In this scenario, the ensuing international expert, Karima Bennouna, again emphasized the relationship between *cultural rights* and *cultural heritage* in a Special Report published in 2016. In the latter, Bennouna reaffirms that the right to access and enjoy cultural heritage is an integral part of international human rights law, further recognizing that in recent years and decades, cultural rights have significantly acquired legitimacy, and their enforcement is considered key to universal human rights law⁴⁵. In this sense, taking into consideration the acquisitive evolutions in the academic and institutional fields – as well as in a more precise definition of cultural rights –, it remains evident that the right to cultural heritage, in its three dimensions – a) access; b)

42 UNITED NATIONS. *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, A/HRC/17/38*. Human Rights Council, 2011, p. 5.

43 “[...] in recent years, a shift has taken place from the preservation/safeguard of cultural heritage as such, based on its outstanding value for humanity, to the protection of cultural heritage as being of crucial value for individuals and communities in relation to their cultural identity”, UNITED NATIONS, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, A/HRC/17/38*, Op. Cit., p. 7.

44 UNITED NATIONS. *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, A/HRC/17/38*, p. 8.

45 “Over the past six years, cultural rights have gained significantly in legitimacy and standing. Their realization is now recognized as key to the overall implementation of universal human rights. [...] The Special Rapporteur concurs with her predecessor that the right of access to and enjoyment of cultural heritage forms part of international human rights law. Cultural heritage is linked to human dignity and identity”. UNITED NATIONS. *Report of the independent expert in the field of cultural rights, A/HRC/31/59*. Human Rights Council, 2016, p. 19-20.

usufruct; and c) participation – can be considered as an integral part of the global system for the protection of human rights, and is also one of the rights that compose the list of cultural rights.

4 CULTURAL HERITAGE AS A FUNDAMENTAL RIGHT: THE BRAZILIAN CASE IN A MULTILEVEL PERSPECTIVE

Besides being a recognized human right within international law, cultural heritage is also a “fundamental right” in several constitutional systems. The Brazilian case is of particular relevance in this fields, as it provides for the protection of “cultural rights” and “cultural heritage” through the 1988 Constitution. It is also one remarkable case within the “constitutionalism of rights” [*costituzionalismo dei diritti*]⁴⁶, as it established a long list of fundamental rights and legal guarantees in order to enforce them. This normativity is reinforced by international norms, as well as by the strong *municipalism* – or “regionalism” – that the same Constitution has settled down, in a multilevel perspective⁴⁷ – as municipalities are endowed with a strong level of autonomy in the country.

This recognition takes effects in different areas, such as: a) justiciability, which is the possibility of claiming the effectiveness of this right in the judiciary; b) the guarantee of the possibility for *individual* and *community-based participation* during the processes of formulation and decision over political and institutional aspects related to the enforcement of this right, as well as during the very “definition” of what could be considered “cultural heritage”; and, c) the guarantee of access to cultural heritage for all. Indeed, it implies a displacement of the *symbolic institutional negotiation* over cultural heritage, that was historically attributed solely to the State.

The 1988 Constitution carried out a broad and detailed process of constitutionalization of cultural rights and cultural heritage in Brazil. As a result of the wide engagement of cultural sectors, ethnic and cultural minorities and the claim of several groups – especially those historically marginalized – in Brazilian society, cultural rights were fostered as a true “constitutional category”⁴⁸. Although the Constitution does not clearly defines the content and scope of this concept⁴⁹ – which requires a dialogue with the international dimension of the cultural rights protection –, its inclusion symbolizes a significant advance in the Brazilian constitutional history and a driving element for the development of the country’s cultural institutions, especially

46 PINO, Giorgio. *Il costituzionalismo dei diritti: struttura e limiti del costituzionalismo contemporaneo*. Bologna : Il Mulino, 2017.

47 The multilevel protection is conceived within Ingolf Pernice’s theory, which comprises that constitutionalism and constitutional topics can have several normative levels: PERNICE, Ingolf. “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?” *CMLRev*, v. 36, 1999; PERNICE, Ingolf. “Multilevel Constitutionalism in the European Union”. *European Law Review*, v. 27, 2002.

48 In this light, see: RUIZ MIGUEL, Carlos. “El constitucionalismo cultural”. *Cuestiones Constitucionales – Revista Mexicana de Derecho Constitucional*, n. 9, 2003.

49 For Francisco Humberto Cunha Filho, “[...] os direitos culturais são aqueles afetos às artes, à memória coletiva e ao repasse de saberes, que asseguram aos seus titulares o conhecimento e uso do passado, interferência ativa no presente e possibilidade de previsão e decisão de opções referentes ao futuro, visando sempre a dignidade da pessoa humana”. CUNHA FILHO, Francisco Humberto. *Os direitos culturais como direitos fundamentais no ordenamento jurídico brasileiro*. Brasília : Brasília Jurídica, 2000, p. 34. [Cultural rights are those related to the arts, collective memory and the transfer of knowledge, which ensure their holders the knowledge and use of the past, active interference in the present and the possibility of predicting and deciding on options for the future, always aiming at dignity of the human person], my translation.

regarding to the implementation of cultural policies aimed at enforcing the constitutionally and internationally recognized cultural rights.

The Constitution has a specific section dealing with “*culture*” [*da cultura*] (articles 215, 216 and 216-A). In this realm, it establishes that Brazilian State must guarantee everyone the exercise of cultural rights and access to the sources of national culture and must also support and encourage the appreciation and dissemination of cultural manifestations (art. 215, caput). Brazilian State must also protect manifestations of popular, indigenous and Afro-Brazilian cultures, along with other groups belonging to the national civilizing process (art. 215, § 1). Through Constitutional Amendment n. 48/2005, the country was also constitutionally charged with establishing a *National Culture Plan* [Plano Nacional de Cultura], in order to assure the national cultural development and provide for the integration of actions by the Public Power in the various entities of the federation, which lead to: defense and appreciation of the Brazilian cultural heritage; production, promotion and diffusion of cultural goods; training qualified personnel to manage culture in its multiple dimensions; democratization of access to cultural goods; and, valuing ethnic and regional diversity (art. 215, § 3, I, II, III, IV and V).

Through Constitutional Amendment n. 71/2012, which adds art. 216-A, the Constitution has provided for the *National Culture System* [Sistema Nacional de Cultura, SNC] which is grounded on the National Culture Policy, with guidelines established in the National Culture Plan. This system seeks to promote human, social and economic development with the full exercise of cultural rights, establishing a collaboration regime, in a decentralized and participatory manner, for the institution and joint promotion of public policies of culture within the scope of the Federation – especially by the elaboration of *Culture Plans* [Planos de Cultura] at the level of States and Municipalities. In this sense, the SNC plays a fundamental role in coordinating cultural policies and strengthening cultural governance at the most diverse levels of the federation⁵⁰ in a decentralized bias⁵¹.

In an innovative way, the Constitution embeds the protection of cultural heritage in its “tangible” dimension – historically consolidated in Brazil and in most western countries – and also in its “intangible” dimension – a significant innovation of Brazilian constitutionalism (art. 216, caput). Thus, it is possible to state that 1988 Constitution provides not only the framework for the *cultural heritage law*, but also gave the elements for the *rights to cultural heritage* in national field in both tangible and intangible dimensions.

The constitutional concept of *cultural heritage* is settled in a broad perspective, counting on forms of expression; the ways of creating, doing and living; artistic, scientific and technological creations; works, objects, documents, buildings and other spaces intended for artistic and cultural manifestations; urban complexes and sites of historical, scenic, artistic, archaeological, paleontological, ecological and scientific value (art. 216, items I to V). This is a concept that is in line with – and goes even beyond – that one defined by UNESCO’s Conventions, both

50 For a critical analysis, see: CARVALHO, Cristina Almeida Pereira de (et al). “Sistema Nacional de Cultura: a tradução do dinâmico e do formal nos municípios da região Sul”. *Cadernos EBAPE*, vol. 17, n. 4, 2009.

51 On federal cooperation in matters of culture in Brazil, see: ALMEIDA GOMES, Diana Célia. *Federalismo Cultural Brasileiro: análise do Sistema Nacional de Cultura e do Plano Nacional de Cultura*. PhD Thesis in Society and Culture, Universitat de Barcelona, 2018.

from 1972 and 2003⁵². The Public Power is in charge of their effective protection, with the collaboration of the community, through new instruments established in by the Constitution, such as: *inventories, register, surveillance, listing and expropriation*, as well as “*other forms of precaution and preservation*” (art. 216, § 1)⁵³.

Hence, 1988 Constitution arrange a significant concern with *culture*, its multifaceted manifestation, as well as protection and promotion. Regarding the distribution of competences in the Brazilian federation, the Constitution establishes that: a) as *common administrative competences of the Union, the States, the Federal District and the Municipalities*: the protection of assets of artistic and cultural value, monuments, landscapes and sites are archaeological; the impediment to the destruction and mischaracterization of works of art and assets of historical and cultural value; and, provide means of access to culture (art. 23, III, IV and V). As, b) *concurrent legislative competence of the Union, States and Federal District*: the protection of historical and cultural heritage, in addition to culture in general (art. 24, VII and IX). And, c) it is administratively incumbent upon the *municipality* to promote the protection of the local historical and cultural heritage, in compliance with federal and state legislation (art. 30, IX).

In this context, the fact that cultural heritage was incorporated as a “constitutional issue” in Brazil, triggered the Federal Supreme Court [*Supremo Tribunal Federal*] – the highest instance of Brazilian Judiciary, equivalent to a “Constitutional Court” – to rule in several cases on its legal nature and scope. In a Court case which discussed the possibility of declaring the nullity on an administrative recognition of cultural heritage [*tombamento*] of a building in Manaus, North Brazil, the decision⁵⁴ outlines that the “Brazilian cultural heritage” is a *fundamental right of third generation*⁵⁵. This perspective is based on the theory of the Portuguese constitutionalist José Joaquim Gomes Canotilho⁵⁶, by which highlights the possibility of recognizing fundamental rights beyond the ordinary list of rights established in article 5 of the Constitution, emphasizing that not only the right to cultural heritage, but also cultural rights in general – a category that is not inscribed in the article 5° – compose fundamental rights.

The discussion about the fundamentality of the right to cultural heritage is also raised by Brazilian theorists in this field by arguing that it could be recognized due to the inclusion of item LXXIII in Article 5, which recognizes the legitimacy of any citizen to sue a *Popular Action* [Ação Popular] seeking to overrule a harmful act – of an administrative nature – to the public

52 For details on the Convention, see: BLAKE, Janet; LIXINSKI, Lucas. *The 2003 UNESCO Intangible Heritage Convention: a commentary*. Oxford : Oxford University Press, 2006.

53 On the new instruments, see: CUNHA FILHO, Francisco Humberto; STUDART, Vitor Melo. “As ‘outras formas de acautelamento e preservação’ do patrimônio cultural brasileiro”. *Revista de Direito da Cidade*, vol. 9, n. 2, 2017.

54 “1. A proteção jurídica do patrimônio cultural brasileiro, enquanto direito fundamental de terceira geração, é matéria expressamente prevista no texto constitucional (art. 216 da CRFB/1988). 2. A ordem constitucional vigente recepcionou o Decreto-Lei nº 25/1937, que, ao organizar a proteção do patrimônio histórico e artístico nacional, estabeleceu disciplina própria e específica ao instituto do tombamento, como meio de proteção de diversas dimensões do patrimônio cultural brasileiro”, SUPREMO TRIBUNAL FEDERAL. *Agravo Interno na Ação Cível Originária 1966*, Relator Luís Fux, 2017. [1. The legal protection of the Brazilian cultural heritage, as a fundamental right of the third generation, is a matter expressly provided for in the constitutional text (art. 216 of the Brazilian Constitution/1988); 2. The current constitutional order has welcomed the Decree-Law No. 25/1937, which, by organizing the protection of the national historical and artistic heritage, established its own and specific discipline to the institute of tipping, as a means of protecting various dimensions of the Brazilian cultural heritage], my translation.

55 Reference to Norberto Bobbio’s theory: BOBBIO, Norberto. *Letà dei diritti*. Torino : Einaudi 1990.

56 CANOTILHO, José Joaquim Gomes. *Direito Constitucional e Teoria da Constituição*, Coimbra, Almedina, 1998.

property in general and to the historical and cultural heritage, in particular⁵⁷. This is one of the main judicial mechanisms that can be used to protect cultural heritage – whether tangible or intangible. However, other constitutional instruments can also be used to protect historical and cultural heritage. In effect, the Public Civil Action [*Ação Civil Pública*]⁵⁸ may be sued, exclusively by the Brazilian Law Agency for Law Enforcement [*Ministério Público*] and other institutions, aiming at seeking responsibility for damages caused to cultural heritage and rights of artistic, aesthetic, historical and landscape value.

In this light, the 1988 Brazilian Constitution incisively protects cultural rights and cultural heritage both through *substantial* and *procedural* aspects, also establishing judicial ways to protect it. Over its more than thirty years of existence, the theoretical concern with its effectiveness boosted the design of a school of thought called “*effectiveness doctrine*” [*doutrina da efetividade*], providing theoretical and methodical support for the enforcement and affirmation of the constitution, in particular concerning fundamental rights⁵⁹. Indeed, the constitutional recognition of cultural rights and cultural heritage, in their tangible and intangible facets, drives and strengthens the cultural institutions as well as the legal mechanisms to guarantee its effectiveness, valorization and promotion – despite the limitations and adversities related to its effectiveness.

Brazil has also ratified several legal instruments from UNESCO, such as: The World Heritage Convention (1972), Convention for Underwater Heritage (2001), Convention for the Safeguarding of Intangible Cultural Heritage (2003), and the Convention for the Protection of the Diversity of Cultural Expressions (2005), as well as several International Declarations. This is the result of the diffusion and circulation of legal models throughout the world, which is integrated in Brazilian constitutional system in an “*aggregative*” way, as they *reinforce* the constitutional and infra-constitutional legal protection on the addressed topics.

In this regard, the Brazilian constitutional system, in a dynamic and fruitful dialogue with international law, has construed what can be defined as an “*heritage-rights approach*”. This implies highlighting that, despite the existing conflicts regarding the theoretical characterization and the effectiveness of the fundamental right to cultural heritage, the State and society are indeed responsible for its effectiveness – according to the dialectic between rights and duties. Likewise, this approach has favored the development of a rich and complex cultural institutions, which envisages the participation of individuals and the community, as well as a series of public policies for its implementation.

6 CONCLUSION

Cultural rights may be considered as one of the new frontiers of human rights law, insofar as their recognition as “true rights” requires the elaboration of new theoretical and empirical approaches, in addition to new legal methods, in order to promote their enforcement, expanding

57 Popular Action is regulated by the “*Lei n. 4.717, de 29 de junho de 1965*”.

58 Regulated by “*Lei n. 7.347 de 24 de julho de 1985*”.

59 In this light, see: BARROSO, Luis Roberto. *O Direito Constitucional e a Efetividade de suas Normas: limites e possibilidades da Constituição brasileira*. 7ª ed. Rio de Janeiro : Renovar, 2003.

the modern legal and political paradigm. In this context, the right to cultural heritage is one of the only rights for which there is no major controversies regarding its belonging to the group of “cultural rights”, as it provides a direct relationship with the production and reproduction of culture, and the tangible and intangible elements of people, along with to being directly linked to *cultural identity*.

The Brazilian case is paradigmatic in this sense because it constitutionally provides for judicial mechanisms to protect the right to cultural heritage – such as the “*ação popular*”, for example –, in addition to constitutionalizing its protection in two distinct dimensions, *tangible* and *intangible*. These elements enshrine what can be called a “*heritage-rights approach*”, in which there is a change in the axis of cultural heritage understanding: not only as a *duty of preservation and conservation* – cultural heritage law in the strict sense – but as *the right and duty to preserve, conserve and safeguard* – the right to cultural heritage –, based on the values of the communities associated with the heritage.

In this regard, the complexification of *symbolic institutional negotiation* takes place, through which the states have prevailed in modern times, to include the participation of *subjects* and *groups* directly interested in the governance of this right, as well as the possibility of defining what is or can be deemed “cultural heritage”. This implies redesigning the meaning of “nation” and “nationalism”, as the modern notion of cultural heritage emerged linked to this precise element. Likewise, it also implies giving new meaning to public policies that seek to implement this right.

Taking this into consideration, the hypothesis of this article is confirmed, as the recognition of the right to cultural heritage as a human and fundamental right denotes new challenges for human rights law in general. However, there are several theoretical and empirical questions that arise from this rapprochement between the right to cultural heritage and human and fundamental rights, such as: what are the limits for the recognition of cultural heritage? In what sense can the protection of cultural heritage be an instrument to reinforce the protection of other human and fundamental rights, especially cultural rights? And, to what extent can the configuration of the right to cultural heritage break – or *evolve* – human rights tradition, towards the recognition of their collective dimension?

These questions are central to legal theory and, in particular, to human and fundamental rights theory. In fact, the protection of cultural rights is an element that has the potential to foster significant acquisitive developments in this analytical field. This is an area that requires further development from theoretical and empirical point of view, going beyond the contemporary boundaries of human rights law.

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