RIVISTA GIURIDICA DELL' AMBIENTE

diretta da

FAUSTO CAPELLI
STEFANO NESPOR
TULLIO SCOVAZZI

4-2021

[Estratto]

Editoriale Scientifica
NAPOLI

In Copertina: Macaco (*Macaca*)
da Figuier, *I mammiferi*, Milano, 1892

A comparative study on how Brazil and Italy safeguard intangible cultural heritage: commonalities, symmetries and asymmetries*

HUMBERTO CUNHA FILHO*

1. *Introduction*

The presence of Italy in the life of Brazil was felt even before the unification of the European country, consolidated in the second half of the 19th century[1], and even the independence of the South American country, which formally occurred on September 7, 1822[2]. This assertion begins to be evident from the official language, Portuguese, poetically called "the last flower of Latium"[3], a verse that makes an atavistic reference to the presence of the Roman Empire and, consequently, of its

* Professor of Cultural Law, University of Fortaleza (UNIFOR), Brazil. This article is the result of research developed at the University of Milano-Bicocca (UNIMIB), under the supervision of Professor Tullio Scovazzi.

[1] L. Riall, *Il Risorgimento: storia e interpretazioni*, Roma, 2007.

[2] C. G. Mota and A. Lopez, *A História do Brasil: uma interpretação***,** São Paulo, 2016.

[3] O. Bilac, *Poesias*, São Paulo, 2001, p. 127.

language, Latin, in the Iberian Peninsula, from where it was projected, with cultural adaptations, to the overseas.

In many other fields, coexistence between Brazilians and Italians is also intense and long lasting. In order not to fall into the monotony of a kilometer long list, it is enough to cite infrastructural examples in the fields of religion, law and politics: Brazil is still, in spite of an increasingly accelerated change in this reality, the largest Roman Catholic apostolic country of the world[4], which corresponds to an influence originating from the Papal States, of which the Vatican is a great reminiscence. The legal system prevailing today is the Roman-Germanic[5], best understood, operated and updated from the lessons of many peninsular scholars and the comparative studies of jurisprudence. The last empress of Brazil, Dona Teresa Cristina de Bourbon, recognized for culturally bringing together what today are Brazil and Italy, was Neapolitan[6]. The basis of the Tupiniquim[7] trade union movement stems in large part from the *Oriundi*'s fierce fighting spirit[8], but has diverse historical influences, such as that of the anarchists[9] and the hero and heroine of both worlds, Giuseppe and Anita Garibaldi[10]. In the Brazilian daily life, the Italian gastronomic influence is also clear, substantial and growing, with dishes as pizzas, spaghetti and risotto[11].

As far as the subject of this research is concerned, cultural heritage, the whole of Italy can be considered, in a metaphor already worn, but permanently valid, an open-air *museum*; and if the etymology of the outstanding noun is observed, a true temple of the most inspiring muses[12],

[4] T. De Azevedo, *O Catolicismo no Brasil: um campo para a pesquisa social***,** Salvador, 2002.

[5] R. David, *Os grandes sistemas do direito contemporâneo*, São Paulo, 2002, p. 77.

[6] A. A. Avella, *Teresa Cristina de Bourbon: uma imperatriz napolitana nos trópicos, 1843-1889*, Rio de Janeiro, 2014.

[7] Other designation for Brazilian.

[8] Máquina de Notícias, *Siamo Tutti Oriundi!*, São Paulo, 1996.

[9] Z. Gattai, *Anarquistas graças a Deus*, São Paulo, 2009.

[10] M. Oliveira, *Garibaldi: herói dos dois mundos*, São Paulo, 2013; L. Frescura and M. Tomatis, *Anita Garibaldi: heroína de dois mundos*, Curitiba, 2012.

[11] P. L. Petrillo and G. Scepi, *La dimensione culturale della dieta mediterranea patrimonio imateriale dell'umanità*, in G. M. Golinelli (ed.), *Patrimonio culturale e creazione di valore - Verso nuovi percorsi***,** Padova, 2012.

[12] R. Ménard, *Mitologia Greco-Romana*, São Paulo, 1991, p. 54.

considering that a good part of the great artistic and cultural expressions, according to UNESCO criteria, are found in its territory.

With such a qualified collection, which must be representative "of artistic, historical, archaeological, ethno-anthropological, archival and bibliographic interest as well as the other things identified by law or according to the law as testimonies of civilization value*"[13], for the purpose of protecting it, Italy has developed, as often happens, a leading legal technology, today condensed in the "Code of Cultural Goods and Landscape*" (Legislative Decree 22 January 2004, No. 42), an extensive norm with approximately two hundred articles, plus attachments.

It turns out that all this normative apparatus was historically built and applied in favor of corporeal, movable or immovable cultural goods, a situation that matches the two countries especially when they make use of what the Italians call "*dichiarazione*" and the Brazilians call "*tombamento*", instruments with many similarities, one of which is to enable State controls on the integrity of the collection submitted to them.

However, in a facet that cannot be confused with what Bauman identifies as the liquid standards that characterize his thought[14], the world has awakened to the *anima* of cultural heritage, that is, what is immaterial or intangible, but constitutes the justifying motivation for safeguarding such goods. And it went further, with the perception that there are practices, gestures, bodily acts, vocalizations, creations, experience, techniques, languages, accents, regionalisms and other things like these whose materialization is secondary, artificialized or rather ephemeral, that even disappear simultaneously with the actual performance of the act, such as the step of a dance, a gesture by an artist on stage or the intonation of a song. There is also that heritage that resembles the situation of Sisyphus, but in an inverted sense, as it is a blessing of the days, seasons or other vital cycles, which are made to be consumed (food and drinks) and/or performed (parties) and redone periodically and uninterruptedly, only with the inexorable changes of the new vital realities.

Humanity has decided to safeguard this new niche of cultural goods, from which several questions have arisen, starting with this very decision,

[13] Henceforth, the * sign will indicate that the text which is referred to is the result of a translation made by the author of this article.

[14] Z. BAUMAN, *Modernidade líquida*, São Paulo, 2001.

considering the argument that the so-called ways of creating, making and living must correspond to the lively deliberations of each community in its time of existence and regency in the socio-political scene or, in a more legal language, the "right to freely participate in the cultural life of the community"[15]. However, this doubt is seen as resolved, at least for the moment, given the adoption in 2003, by the United Nations Educational, Scientific and Cultural Organization (UNESCO), of the Convention for the Safeguarding of the Intangible Cultural Heritage, which from now can be referred to only by the Convention or by the acronym CSICH.

The great concern that remains aims at knowing how to contribute to this safeguarding, given the legal-political complexity in which it is inserted, which can be summarized as follows : there is an international convention that is projected on the States parties, which in their actions and according to their internal political organization can concentrate or share the protective tasks with subnational political entities, making the operation even more difficult, but, at the same time, more feasible to comply with the principle of participation of those directly interested in the safeguarding acts, given the proximity to citizenship.

In this tangled juridic situation are Brazil and Italy, two complex States, the first adopting a federative form, and the other a peculiar regional State form. In normative terms, on this structural aspect, the Brazilian Constitution of October 5, 1988, prescribes, in its Art. 18, that "the political and administrative organization of the Federative Republic of Brazil comprises the Union, the States, the Federal District and the Municipalities, all autonomous, under the terms" therein specified. As for Italy, the Constitution of 1947, which came into force on January 1, 1948, in its Art. 114, defines that "the Republic is constituted by the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State. The Municipalities, Provinces, Metropolitan Cities, and Regions are autonomous entities with their own statutes, powers and functions according to the principles established by the Constitution*".

Political organizations of this nature often, as is the case in both countries, imply the sharing of competences, both legislative and executive, which shows the interest in comparatively knowing how Brazil and Italy

[15] M. Ferri, *Dalla Partecipazione all'identità - L'evoluzione della tutela internazionale dei diritti culturali*, Milano, 2015.

proceed in this regard, in order to abstractly find out to what extent their constitutional legislation gives competence, in the matter of intangible cultural heritage, respectively, to the Brazilian Union and Member States and to the Italian State and Regions; and, from a concrete point of view, to observe how such legislation generates benefits for communities that hold cultural goods, based on the hypothesis that Brazil is part of the international vanguard in this specific legal field, and uses it as a form of social insertion; for its part, Italy, in addition to valuing its culture, makes better use of the economic results of the protection of such heritage.

Aiming to fulfill these goals, the research which will mainly be based on a bibliographic and deductive method, will be structured, as regards its substantive development, in a syllogistic structure, from which initially the common law, now understood as the Convention, will be taken in consideration, and subsequently the constitutional and legal treatment of the issue in Brazil and Italy.

2. *Intangible cultural heritage: common elements from the UNESCO Convention*

The decision to establish an international policy for the safeguarding of intangible cultural heritage was taken in the first decade of the twenty-first century. Albeit belatedly, it came backed by substantive documents, resulting from the experience that countries acquired treating the tangible cultural heritage and balancing, in addition, the issues of territorial sovereignty and the common interests in this area[16].

Certainly, the most important treaty on the matter is the Convention for the Safeguarding of the Intangible Cultural Heritage, integrated within the legal systems of Brazil and Italy, respectively in 2006 and 2007, whose substantive content needs to be known, as it is the common reference for both countries (and, obviously, the other States party) in providing the regulation of the matter.

[16] B. Ubertazzi, *Territorial and Universal Protection of Intangible Cultural Heritage from Misappropriation*, in T. Scovazzi, B. Ubertazzi and L. Zagato (eds.), *Il patrimonio cultural intangible nelle sue diverse dimensioni*, Milano, 2012, p. 130.

2.1. The enigmatic conventional definition

In deciding to address the safeguarding of intangible cultural heritage, the General Conference of UNESCO starts from the following assumptions: the referred heritage is a source of cultural diversity and a guarantee of sustainable development; it has a profound interdependence with the cultural and natural tangible heritage; it is subject to serious risks of deterioration, disappearance and destruction due in particular to the lack of means to safeguard it, but, in return, there is also a universal will and a common concern to safeguard it; furthermore, the General Conference highlights that said heritage is produced, protected, maintained and recreated by communities, especially indigenous communities, groups and, in some cases, individuals; finally, that it fulfills an invaluable function as a factor of approximation, exchange and understanding between human beings.

To attempt to be more precise, the CSICH states that "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".

In order to offer an even more concrete vision, it mentions that such manifestations must correspond to oral traditions and expressions, including language as a vehicle of intangible cultural heritage; artistic expressions; social practices, rituals and festive acts; knowledge and practices related to nature and the universe; and traditional handicraft techniques that form "a list that appears to be exhaustive*"[17], certainly because it is hard to imagine any manifestation that does not meet the broad spectrum that each topic offers.

However, these abstract characteristics and concrete examples are still insufficient to know which intangible cultural heritage deserves to be safeguarded, because, by UNESCO criteria, it must also show the quality of being transmissible from generation to generation, as well as offering the possibility of being constantly recreated by communities and groups in relation to their environment, their interaction with nature and their history.

[17] T. Scovazzi, *La definizione di patrimonio culturale intangibile*, in G. M. Golinelli, *Patrimonio culturale e creazone di valore*, Padova, 2012, p. 156.

In teleological terms, it should generate feelings of identity and continuity, and contribute to promoting respect for cultural diversity and human creativity, be compatible with international instruments of existing human rights and with the requirements of mutual respect among communities, groups and individuals, and sustainable development. After all, the reciprocal is true, at least with regard to human rights, which are also used to protect intangible cultural heritage[18].

It can be seen that the values and characteristics of a given cultural manifestation are multiple to be recognized and protected as intangible cultural heritage and can be synthesized in the understanding that, as a rule, they represent collective practices, which preserve identity elements, transmissible over generations, which can add their contribution to such practices; at the same time, the practices contribute to achieving high values, such as sustainable development, environmental balance, respect for human rights, cultural diversity and the behaviors that result from their adoption.

Consequently, in order to be recognized and protected as intangible or immaterial cultural heritage, it is not enough for the cultural goods to have formal characteristics or to fit the standards of the CSICH; they must also be in conjunction with the announced values. It is, therefore, an enigmatic definition and of little legal precision, certainly because the UNESCO, when formulating it, was under strong anthropological influence[19].

Therefore, it is under this descriptive, conceptual and axiological framework common to Brazil and Italy that we will investigate how these two countries, in their specific normative universes, concretize it, in order to know to what extent they converge and how much they diverge from the international normative standard.

[18] L. Lixisnki, *Intangible Cultural Heritage in International Law*, Oxford, 2013, p. 152; A. Vigorito, *Pour un droit à la différance culturelle - Un plaidoyer à double tranchant?*, in M. C. Foblets and N. Yassari, *Approches juridique de la diversité culturelle - Legal Approaches to Cultural Diversity*, Leiden - Boston, 2013, p. 257.

[19] M. L. Ciminelli, *Salvaguardia del patrimonio culturale immateriale e possibili effeti collaterali: etnomimesi ed etnogenesi*, in L. Zagato and S. Pinton, *Le identità culturali nei recenti instrumenti UNESCO - Un approccio nuovo alla costruzione della pace?*, Padova, 2008, p. 99.

2.2. Common State responsibilities

Safeguarding the intangible cultural heritage must correspond to measures aiming at ensuring its viability, such as the identification, documentation, research, preservation, protection, promotion, enhancement, transmission – primarily through formal and non-formal education – and revitalization of this heritage in its various aspects. Such measures are the direct responsibility of the States, but they must be carried out with the participation of the relevant communities, groups and non-governmental organizations and, when appropriate, of the individuals who create, maintain and transmit this heritage and who are actively associated with its management. For them, and especially for communities and non-governmental organizations, Toshiyuki Kono[20] and Valentina Lapiccirella Zingari[21], advocate more participation, because the first are actually responsible for intangible cultural heritage, and the latter for the promotion of activities and demands in the face of the constituted authorities. Janet Blake adds, regarding the Convention, that communities are still in the "childlike" stage[22], reinforcing the need to increase their participation and assuming that they will thus acquire maturity to exercise their role in safeguarding activities.

In addition, international cooperation and assistance for the exchange of information and experiences, the development of common initiatives and the creation of mechanisms can be activated, to support the States that, based on their national rules, as written in legislation or resulting from customary practices, recognize that the safeguarding of intangible cultural heritage is a matter of general interest to humanity and, as a consequence, agree to cooperate on a bilateral, sub-regional, regional and international level, in the aforementioned area.

Being more specific about what should be done, the CSICH, within a range that covers many other possibilities of safeguarding at the in-

[20] T. Kono, *Convention for the Safeguarding of Intangible Cultural Heritage - Unresolved Issues and Unanswered Questions*, in T. Kono, *Intangible Cultural Heritage and Intellectual Property*, Antwerp - Oxford - Portland, 2009, p. 30.

[21] V. Lapiccirella Zingari, *Ascoltare i territori e le comunità - Le voci delle associazioni non governative (ONG)*, in M. L. Picchio Forlati (ed.), *Il patrimonio culturale immateriale - Venezia e il Veneto come patrimonio europeo*,Venezia, 2014, p. 71.

[22] J. Blake, *International Cultural Heritage Law,* Oxford, 2015, p. 185.

ternational level[23], specifies some instruments, activities and behaviors, aiming at multiple purposes, ranging from knowledge to promotion, but, whenever possible, with the participation of the interested parties and granting respect to their practices.

Thus, to ensure the identification, it is mandatory to create regularly updated inventories, instruments that, in fact, go beyond mere census; actually, the fact that an intangible cultural element appears on the list of inventories as having a differentiated cultural value, represents more than knowledge and is configured as recognition, besides increasing the feeling of importance for those directly interested, for the community to which it belongs and for the other communities with which it has relations.

Aiming to ensure the preservation, development and enhancement of intangible cultural heritage, the States, which can eventually count on international assistance through the Convention, also committed themselves to: adopt a planned policy integrated in the whole of the public policies; create or designate specific organism(s) to deal with the matter; foster scientific, technical and artistic studies, as well as research methodologies on the subject; adopt appropriate legal, technical, administrative and financial measures to, in addition to instrumentalizing the aforementioned actions, increase transmission and guarantee access to the heritage in question, including the natural spaces and places of memory essential to it, respecting, always when possible, the customs that are peculiar to it. About such actions they shall submit regular reports to be analyzed by the organism designed in the Convention, namely, the Committee and, based its report, the General Assembly.

However, the Convention allows us to perceive the insufficiency of the measures grounded in law, economy and technology for such an important and delicate purpose, by vindicating values such as education, awareness and capacity strengthening (capacitation), emphasizing the need for specific programs, including by non-formal means, aimed at young people, the interested communities and groups.

Furthermore, the parties to the Convention understand that the feeling of co-responsibility of the entire social group must be developed, by

[23] F. Mucci, *La diversità del patrimonio e delle espressioni culturali nell'ordinamento internazionale - da 'ratio' implicita a oggetto diretto di protezione*, Napoli, 2012, p. 167.

emphasizing the obligation to keep the public informed of the threats that affect the heritage and, in a preventive or remedial reaction to them, of the activities carried out to protect it.

It should be noted that the Art. 35 of Convention specifically provides how it should be applied to the "federal or non-unitary constitutional regimes". This is of particular interest for the comparative research conducted here, given the political characteristics of Brazil (federation) and Italy (regionalism). For these States, it has been established that for the provisions of the Convention whose application falls within the competence of the federal or central legislative power, the obligations of the federal or central government will be identical to those of States Parties that are not federal States; and with respect to the provisions whose application is under the competence of each of the constituent States, countries, provinces or cantons, which, by virtue of the constitutional regime of the federation, are not obliged to take legislative measures, the federal government will communicate them, with a favorable opinion, to the competent authorities of States, countries, provinces or cantons, with its recommendation to these entities to approve them.

In more accessible words, in complex (non-unitary) States, the Convention establishes two types of competence for the central power, depending on whether the matter of the protection of intangible cultural heritage is in the competence of the central entity or the constituent entities; being in the competence of the former, it responds to the international community as if it were a unitary state; if it is in the competence of the latter, the entity that congregates and represents the Union will internally encourage compliance with the Convention. The Convention does not make it clear what obligation applies in the case of shared competences (concurrent and common), but it easy to infer that, in this case, the central power has both functions, insofar as the Constitution distributes the attributions.

From these understandings, it is possible to investigate how Brazil and Italy, two of the parties to the CSICH, are legally structured, through their central governments and subnational entities, to safeguard their intangible cultural heritage, which will be done starting from two essential steps, the first of which is to investigate the rules governing the matter and the other to consider the policies actually carried out.

3. *The constitutional ballasts of the protection of intangible cultural heritage*

2018 was the seventy-year celebration of the Constitution of the Italian Republic (CIR) and thirty years since the Constitution of the Federative Republic of Brazil (CFRB) was enacted; there is, therefore, a difference of four decades from one to the other. As already implied in the Introduction, the younger constitution reveals influences of the older. However, some of them are only nominal, considering that the basic political structures are very different. For instance, Brazil adopts the so-called pure presidentialism and Italy the parliamentary system, what should always be taken in consideration in the comparison made throughout this work, to avoid errors of a supposed symmetry that does not actually exist in many aspects.

It is sensible to point out that the two Constitutions oppose each other in the method of regulating matters. While the Italian adopts more closely the rule of synthetic texts, the Brazilian falls into the analytical classification and often enters into rules that tradition points as fit to be included in the infra-constitutional legislation. These profiles can be verified with regard to the constitutional regime on cultural rights[24] and, among them, more specifically, those relating to the protection of cultural heritage in each of the constitutions.

3.1. In Italy

In structural terms, it has been recalled that Art. 114 of the Italian Constitution, besides defining that Rome is the capital, establishes that the Republic is constituted of the Municipalities (communes), the Provinces, the metropolitan Cities, the Regions and the State, emphasizing that the first four are autonomous entities with own statutes, powers and functions according to the principles set out in the Constitution.

Specifically with regard to the Regions, which are the subjects of this comparative study, they are political entities that are very close to the member States of Brazil, due to the fact that Art. 117 of the CIR ensures

[24] H. Cunha Filho, *Teoria dos direitos culturais: fundamentos e finalidades*, São Paulo, 2018.

that "the legislative power is exercised by the State and the Regions in accordance with the Constitution, as well as the restrictions resulting from [European] Community law and international obligations*". With regard to administrative functions, Art. 118 attributes them to all the entities, including the Regions, "based on the principles of subsidiarity, differentiation and adequacy*".

The constitutional text of the European country literally mentions, in Art. 131, the Italian Regions in an order that comes close to the observation of its geographic chart in a clockwise direction and, afterwards, from north to south, namely: Piemonte; Valle d'Aosta; Lombardy; Trentino-Alto Adige; Veneto; Friuli-Venezia Giulia; Liguria; Emilia-Romagna; Tuscany; Umbria; Marche; Latium; Abruzzi; Molise; Campania; Puglia; Basilicata; Calabria; Sicily; and Sardinia. It happens that in the boot-shaped country, the asymmetry of prerogatives for some regions is admitted by Art. 116 of the Constitution, more precisely for Friuli-Venezia Giulia, Sardinia, Trentino-Alto Adige (Südtirol) and Valle d'Aosta, that "have particular forms and conditions of autonomy, according to the respective special statutes adopted as constitutional law*".

In relation to the studied subject, when dealing with the fundamental principles, the Italian Constitution, in its Art. 9, states that "the Republic promotes the development of culture and scientific and technical research*". It adds, in more precise terms, that in that aforementioned field "it safeguards the landscape and the historical and artistic heritage of the nation*". On these passages Paola Bilancia emphasizes that the original understanding of the Italian constituent was effectively linked to tangible goods; it was only much later that there was a hermeneutical shelter for intangible heritage[25].

Regulating the distribution of competences, a matter considered by Stafania Mirabellini to be a "tortuous path"[26], again in Art. 117, the CIR establishes that the State legislates exclusively on several matters, among which, in what is directly related to cultural heritage, the "protection of the environment, the ecosystem and cultural goods*". However, the

[25] P. Bilancia, *Diritto alla cultura - Un osservatorio sulla sostenabilità culturale*, in P. Bilancia, *Diritti culturali e nuovi modelli di sviluppo - La nascita dell'osservatorio sulla sostenibilità culturale***.** Napoli, 2016, p. 216.

[26] S. Mirabellini, *La tutela dei beni culturali nel costituzionalismo multilivello*, Torino, 2016, p. 209.

same Constitution states that among the "matters of concurrent legislation*", understood as those in which "the legislative powers are the responsibility of the Regions, except in determining the fundamental principles, reserved to the legislation of the State*", is "the valorization of the cultural and environmental goods and the promotion and organization of cultural activities*".

It is worth highlighting the residual ormativee competence, as defined in the provision according to which "the legislative power in relation to any matter not expressly reserved to the State's legislation belongs to the Regions*". In addition, it is also worth noting the possibility for the State to delegate regulatory powers to the Regions in matters in which it legislates exclusively.

3.2. In Brazil

The first articulated sentence of the current Constitution of Brazil states that the country is a democratic and federalist republic formed "by the indissoluble union of the States and Municipalities and the Federal District" (Art. 1), which, in what concerns the political-administrative organization, also includes the Union, all of them being autonomous, under the constitutionally specified terms (Art. 18). In more didactic words, the Union represents, even at the international level, the unity of the nation; the States are the largest domestic political subdivisions; each of them congregates several municipalities; there is also the Federal District – where the capital of country, Brasilia is located – a small territorial area for Brazilian dimensions, and which in terms of political organization keeps a miscellany of features of a Municipality and a State. These elements lead the constitutionalist doctrine to understand Brazil as a *sui generis* federation.

Focusing on the States, which form the subject of this comparative analysis, according to Art. 25 of the CFRB, they "are organized and governed by the Constitutions and laws they adopt", observing the principles of the Federal Constitution. In addition, the States are entitled to a seemingly wide residual array of powers, since they possess those which are not prohibited by the Constitution. It happens that one of the forms of prohibition is indirect and consists in attributing competences on given subjects exclusively to other entities. This is effectively manifested in

the set of legislative and material competences explicitly attributed to the Union and to a lesser extent to the municipalities, leaving the Brazilian States in a situation that is legally so difficult that it leads the doctrine to ironically say that they have normatively, in respect to the Federal Constitution, two options: to repeat it or to violate it[27].

Unlike what happens in Italy, the Constitution of Brazil does not list the political entities that compose the country. This is because, according to Art. 18, para. 3, "States can be incorporated among themselves, subdivide or dismember themselves to attach themselves to others, or form new States or Federal Territories, with the approval of the directly interested population, through a plebiscite, and the National Congress, by complementary law". In over thirty years of validity of the constitutional text this never happened. Thus, Brazil conserves, since October 5, 1988, the twenty-six founding States of its federation.

The twenty-six States and also the Federal District are linked to one of the five geographic regions of the country, namely: in *the North Region* are the States of Acre, Amapá, Amazonas, Pará, Rondônia, Roraima and Tocantins; in *the Northeast Region* are the States of Alagoas, Bahia, Ceará, Maranhão, Paraíba, Pernambuco, Piauí, Rio Grande do Norte and Sergipe; in the *Midwest* Region are the Federal District and the States of Goiás, Mato Grosso and Mato Grosso do Sul; in *the Southeast Region,* the States of Espírito Santo, Minas Gerais, Rio de Janeiro and São Paulo; and, finally, in the *South Region*, the States of Paraná, Santa Catarina and Rio Grande do Sul.

At this point an important explanation is necessary to avoid an error of comparison due to the word "Region", which has different meanings in Italy and Brazil; in the European country, it is an autonomous political entity under domestic law, as seen in the previous topic; in the South American country, according to Art. 43 of the Brazilian Constitution, it is only a "geoeconomic and social complex", in regard to which the Union will be able to articulate its action, "aiming at its development and the reduction of regional inequalities". It is devoid, therefore, of legal personality and of its own powers and authority.

Regarding the specific subject of this research, the Constitution follows the aforementioned line of being meticulous and prolix, to the point

[27] S. Ferrari, *Constituição Estadual e Federação*, Rio de Janeiro, 2003.

that it receives the name of "cultural constitution", for taking care of the subject very much, even dedicating a proper section to it. For the time being, in order to maintain the comparative balance, it should be noted that the safeguarding of collective memory assumes great importance in the Brazilian Constitution (Art. 5, LXXIII), with a fundamental legal status, so much so that historical and cultural heritage can be defended by any citizen, through popular action.

In terms of the distribution of competences in the matter, with regard to the creation of norms, Art. 24 of the CFRB, in two of its items (VII and VIII), establishes that "it is incumbent upon the Union, the States and the Federal District to concurrently legislate on: protection of historical, cultural, artistic, touristic and landscape heritage; and liability for damage to the environment, the consumer, goods and rights of artistic, aesthetic, historical, tourist and landscape value". It is important to remember that these concurrent legislative competences must be exercised as follows: the "Union will limit itself to establishing general rules" and the States can exercise "supplementary competence"; however, if the Union fails to establish general rules, "they will exercise full legislative competence, in order to meet their peculiarities"; in this case, "the supervenience of the federal law on general rules suspends the effectiveness of State law, in what would be contrary to the first" (Art. 24, paras. 1 to 4).

Regarding the administrative area, from items III, IV and V of Art. 23 of the Constitution, it can be inferred that "it is the common competence of the Union, the States, the Federal District and the Municipalities to: protect documents, works and other goods of historical, artistic and cultural value, monuments, remarkable natural landscapes and archaeological sites; prevent the evasion, destruction and mischaracterization of works of art and other goods of historical, artistic or cultural value; and provide the means of access to culture, education, science, technology, research and innovation". This framework of co-responsibility of the public entities is expanded to the heart of society by para. 1 of Art. 216, providing that "the Public Power, with the collaboration of the community, will promote and protect Brazilian cultural heritage, through inventories, records, surveillance, registration and expropriation, and other forms of caution and preservation".

It is important to emphasize the supplementary role of the Member States in view of the activities carried out by the Union in this field and

add the paradigmatic value they have in relation to the municipalities that comprise them, since, according to Art. 30, IX, of the Constitution of Brazil, it is in the competence of the municipalities "to promote the protection of the local historical-cultural heritage, complying with the federal and State legislations and supervisory actions".

This role of participatory equidistance between the geographically larger political entity and the smaller ones is another element approaching the Brazilian States to the Italian Regions, thus also justifying the need for the ongoing comparison.

4. *National legislation to safeguard intangible cultural heritage*

It has been seen so far that both Brazilian States and Italian Regions are endowed with legislative and material competences to safeguard cultural heritage as a whole, which includes, of course, the one of intangible nature. However, these competences are not full, in the sense that the central power is the one that has the competence to establish general norms on the issue, leaving the role of the subnational entities to the sphere of supplementing them.

Therefore, it is only possible to properly understand the legislation of a State (in Brazil) or a Region (in Italy) regarding intangible cultural heritage if one knows the legislation of the respective country on the matter, since it supposedly contains the general rules that set boundaries to their actions. This is the next endeavour of the current study.

4.1. In Brazil: the inscription decree

Considering that the Convention for the Safeguarding of Intangible Cultural Heritage was adopted on October 17, 2003, and subsequently signed on November 3, Brazilian law, for that purpose, precedes it, because the legal discipline of registration for said goods is defined in Decree No. 3,551, of August 4, 2000, which created the National Program for Intangible Heritage.

This anticipation has historical, economic and social justifications that, in order to be properly understood, it is necessary to remember: the legal protection of Brazilian cultural heritage began systematically

in 1937, in the early days of the Vargas dictatorship[28], in the late and extended period of the "prime of Statism"[29], when Decree-Law No. 25 was published on November 30 of that year. It provided for the *tombamento* (inscription in the cultural heritage), for many years the main normative instrument for the aforementioned matter.

Historically and legally, the inscription lends itself to the protection of tangible cultural heritage, usually represented by churches, large constructions and monuments, typical of the owners of tangible property. It happens that the country is mainly composed of people of African and indigenous origin, who have almost no such tangible goods, but are part of a cultural universe very rich in manifestations and symbols. To safeguard this intangible cultural heritage, the aforementioned Presidential Decree No. 3.551/2000 was enacted.

The signing authority of this enactment, the President, understood, then, that the legitimacy to use this kind of norms is based on Art. 84, item IV, of the Federal Constitution ("it is the President of the Republic's exclusive responsibility: [...] to sanction, promulgate and publish the laws, as well as to issue decrees and regulations for their faithful execution"), and on art. 14 of Law No. 9.649 of 27 May 1998. This Law referred to the organization of the Presidency and the ministries; regarding the Ministry of Culture, it imposed the following responsibilities: "a) national policy on culture; b) protection of historical and cultural heritage; c) to approve the delimitation of the lands of the remaining *quilombo* [maroon] communities, as well as to determine their demarcations, which will be ratified by decree".

The inscription here considered is not to be confused with that of copyright, since, unlike the latter, it does not purely and simply aim at precising the authorship of a cultural work, for the purpose of protecting moral or patrimonial rights and preventing not authorized persons from using protected creations. The essence of the inscription of intangible goods has an iconographic nature, in the sense of specifying as much as possible the description of the ways of creating, making and living in

[28] A. de Castro Gomes, *Capanema - O ministro e seu ministério*, Rio de Janeiro, 2000.

[29] T. Scovazzi and M. Arcari, *Corso di diritto internazionale. Vol. I: Caratteri fondamentali ed evoluzione storica del diritto internazionale. Il mantenimento della pace e l'uso della forza*, Milano, 2014, p. 56.

order to make them public, offering parameters to those who want to reproduce them faithfully and respecting the other elements that were considered at the time of recognition.

The aforementioned characterization takes place by inscribing the good in specific books, namely: *Knowledge*: for the forms of knowledge and the ways of doing rooted in the daily lives of the communities; *Celebrations*: for the rituals and festivities that mark the collective experience of work, religiosity, entertainment and other social life practices; *Forms of Expression*: for literary, musical, plastic, scenic and ludic manifestations; *Places*: for markets, fairs, sanctuaries, squares and other spaces where collective cultural practices are concentrated and reproduced[30]. In addition to these books, the Cultural Heritage Advisory Council may determine the opening of other registration books for the inscription of cultural goods of an intangible nature that constitute Brazilian cultural heritage and that do not fit into the books expressly mentioned.

The description that accompanies each book reveals the characteristics that the cultural object must have to live up to the record that formalizes their status as integrant of the Brazilian cultural heritage, according to the category in which it fits. However, for all of them, the norm requires two constant characteristics: historical continuity and national relevance for the memory, identity and formation of Brazilian society.

Thus, for a good to obtain registration, it must be demonstrated that it has the general characteristics of the elements of the intangible cultural heritage and, as a rule (with the exception of the norm regarding the forms of expression), the specific characteristics of its segment, as can be seen in the following table:

[30] Some examples are: forms of knowledge: the way of making Karajá Dolls; celebrations: Círio de Nazaré in Belém do Pará; forms of expression: string literature; and places: the Feira de Caruaru.

GOOD	GENERAL CHARACTERISTICS	SPECIFIC CHARACTERISTICS
KNOWLEDGE (Forms of knowledge and ways of doing)		(a) rooting in the daily lives of communities
CELEBRATIONS (Rituals and festivities)		(a) marking the collective experience of work, religiosity, entertainment and other social life practices.
FORMS OF EXPRESSION (literary, musical, plastic, scenic and ludic demonstrations)	(a) historical continuity (b) national relevance for the memory, identity and formation of Brazilian society.	
PLACES (Markets, fairs, sanctuaries, squares and other spaces where collective cultural practices are concentrated and reproduced).		(a) concentration and reproduction of collective cultural practices.
OTHERS (Which do not fit in the other books)		(a) failure to fit into the other books (b) any other requirements established when the new book was created

From an operational point of view, the inscription has its own administrative procedure, composed of the following phases: initiative; instruction; deliberation.

The initiative, which consists of the power to provoke the initiation of the inscription process, was entrusted to the following persons and bodies: the Minister of State for Culture; institutions connected to the Ministry of Culture; State, Municipal and Federal District Secretariats; civil societies or associations.

Proposals for inscription must be addressed to the President of the National Historical and Artistic Heritage Institute (IPHAN). Whoever submits the request must, in principle, prove the cultural value of the property, accompanying the request with the relevant technical documentation. The norm makes it possible to know what must be understood by technical documentation, by establishing that there must be a detailed description of the element to be registered, with due proof, in addition to mentioning all the elements that are culturally relevant to it.

In order to facilitate and ensure the regularity of this task, the legislation provides that the instruction of the inscription processes will be supervised by the IPHAN. However, it is possible to infer that when is impossible for the proponent to present their application, it can be done by other persons, just as the Decree allows that other organs of the Ministry of Culture (or the structure that represent it), the IPHAN units, or public or private entities that have specific knowledge on the matter, under the terms of the regulation to be issued by the Cultural Heritage Consultative Council, can also present it.

Upon completion of the instruction, the IPHAN will issue an opinion on the inscription proposal. The referred opinion will be published in the *Diário Oficial da União*, in order to register, within 30 days counted from its publication, eventual manifestations on the process. After this period has elapsed, the existing manifestations, if any, will be assessed and, with or without them, the process will be taken to the decision of the Cultural Heritage Consultative Council. With the inscription, the following legal, political and social effects take place: inscription in the corresponding book; designation with the title of "Cultural Heritage of Brazil"; documentation by all accepted technical means; conservation of the data with the material produced during the instruction of the process; wide dissemination and promotion; application of the policies resulting from the National Program of Intangible Heritage (*Programa Nacional do Patrimônio Imaterial*, PNPI), instituted by the Governing Decree, whose guidelines for support and promotion policies "provide for the promotion of social inclusion and the improvement of the living conditions of producers and holders of immaterial cultural heritage, and measures that expand the participation of the groups".

Hermano Queiroz emphasizes other effects, among which the opening of markets, being eloquent the case of the *acarajé* (traditional food

of the State of Bahia) that, after having been recognized as intangible cultural heritage of Brazil, managed to break the monopoly of the exclusive contract between the International Football Federation (FIFA) and multinationals in the food and beverage industry, obtaining a decision that ensured that it was sold at the soccer stadium in the city of Salvador, which hosted matches for the 2014 World Cup[31]. This instance is ideal to remember François-Xavier Freland's fear of certain undesired effects such as those resulting from mass tourism that can follow heritage recognition[32].

It is important to note that the condition of "Cultural Heritage of Brazil", for the analyzed goods, is not forever. The law requires for the IPHAN to reevaluate registered cultural elements, at least every ten years, and forward its decision to the Advisory Cultural Heritage Council to decide on the revalidation of the title. If the revalidation were to be denied, only the record will be kept, as a cultural reference of its duration.

4.2. In Italy: the code of cultural goods and landscapes

If in Brazil the normative discipline for safeguarding intangible cultural heritage predates the 2003 Convention by approximately three years, in Italy, it takes place *a posteriori* of the CSICH by almost five years, considering that the Legislative Decree of March 26, 2008, inserted only from that date, in the Code of Cultural Goods and Landscapes, Art. 7bis, with the following wording: "Expressions of collective cultural identity - 1. The expressions of collective cultural identity contemplated by the UNESCO Conventions for the Protection of Intangible Cultural Heritage and the Protection and Promotion of Cultural Diversity adopted in Paris, on November 3, 2003, and October 20, 2005, respectively, are subject to the provisions of this Code, as long as they are represented by material evidence and raise the assumptions and conditions for the applicability of Art. 10*".

Thus, according to the Italian legislation, it is important to highlight, before a further and more detailed analysis, that there are three norma-

[31] *Revista do IPAC*, 2016.

[32] F. X. Freland, *Capturing the Intangible: Perspectives on the Living Heritage*, Paris, 2009, p. 23.

tive requirements for safeguarding intangible cultural heritage: be subject to the provisions of the Code of Cultural Goods and Landscapes (CCGL); be represented by material evidence; and raise the assumptions and conditions for the applicability of art. 10 of the said Code.

Prima facie, these requirements may reveal the still little maturity of the European country in dealing with the safeguarding of intangible cultural heritage, beginning with the vagueness of the expressions that are used in the norm, which mentally raise many clarification requests, such as: to which provisions of the CCGL are intangible goods subject to, since the aforementioned legislation was tailored and tested for tangible cultural heritage? Is it reasonable to demand "material evidence" for a type of good that, from the designation, reveals itself and can be totally immaterial? What are the assumptions and conditions of applicability, given that only Art. 10 of the CCGL is considered?

The answers are not easy, but one can infer that the in submitting intangible goods to the provisions of the Code of Cultural Goods and Landscapes the expression "in what fits" is implied.

As a consequence of the requirement of material evidence, understood by Diego Vaiano as part "of the inherence of a *res* that makes it concretely protectable*"[33], if there is no interpretation that creates a normativity amplifying fiction, the range of intangible goods to be protected can remain significantly reduced, because one can consider the possibility of manifestations, such as an accent or the sound of a set of bells, which does not offer any materiality[34], but only the possibility of materialization by human and/or technological phonation, such as audio and video recording. In this regard, Jean-Louis Tornatore, when perceiving something not very clear in the opposition between tangible and intangible, highlights, for example, that music demands instruments, scores and concert halls, to conclude that "the most immaterial of references needs matter to circulate*"[35].

In order to know the assumptions and conditions existing in Art. 10

[33] D. Vaiano, *La valorizzazione dei beni culturali*, Torino, 2011.

[34] D. Galliani, and A. Papa, *Le basi del dirito della cultura*, Roma, 2010, p. 137.

[35] J. L. Tornatore, *Du patrimoine éthnologique au patrimoine culturel immatériel: suivre la voie politique de l'immatérialité culturelle*, in C. Bartolotto, A. Arnaud and S. Grenet (eds.), *Le patrimoine culturel immatériel - Enjeux d'une nouvelle catégorie*, Paris, 2011, p. 211.

of the CCGL, paradigmatic for the immaterial cultural goods to be safeguarded, it is convenient to know, at least panoramically, this important provision composed of five paragraphs, which deal with the following contents: para. 1 identifies movable and immovable cultural goods belonging to public, ecclesiastical and private non-profit entities; para. 2 deals with goods intended specifically for cultural purposes, belonging to public entities, such as document collections, archives and literary collections; para. 3 refers to residual cultural heritage, regardless of who the owner or possessor is; para. 4 deals with cases of *sui generis* nature complementary of the previous items; and para. 5 regulates exceptions for goods that could be protected by the rules of the other items, but which are exempt from them for other legal reasons, such as intellectual property rights.

However, the question of the "assumptions and conditions for the applicability of Art. 10" needs to be faced and it is understood that it corresponds very much to the requirements that adjectivize cultural goods, such as the following: "present artistic, archaeological or ethno-anthropological interest ['particularly important']"; "Awake exceptional cultural interest"; "Represent the fullness of the nation's cultural heritage"; "Possess a rarity or merit characteristic" etc. It is noted, therefore, that the escape from the common is the most constant criterion that in Italy guides the protection of cultural heritage, including that of intangible nature.

With this normative infrastructure, the country of Virgil has, until now, protected some intangible goods, but with an additional tactic of having as main objective, until now quite successful, for them also to be recognized as cultural heritage of humanity, by UNESCO, which drives it symbolically, of course, but also from an economic point of view, as an effect of recognition, associating them with economic circuits, especially the touristic circuits[36]. In the Italian case, the need for inclusion in books stipulating characteristics is not required, suggesting that the important thing is the cultural good and not the norm.

[36] Examples are the Sicilian Puppet Opera and the tenor song of Sardinia, 2008; the Mediterranean diet, 2010: the know-how of the Cremona luthiers, 2012: the processions of the saints in Sassari, Viterbo, Nola and Palmi, 2013: the agricultural practices of the Pantelleria sapling vine, 2014: falconry, a living human heritage, 2016; and the art of Neapolitan pizzaioli, 2017.

5. *Conclusion*

In *ultima ratio*, the exciting purpose of this work was to compare the laws safeguarding the intangible cultural heritage of Brazil and Italy. For this being feasible, there was an initial need to understand the similarities and differences of the political organization of the two countries and their subnational entities.

Regarding the similarities, it was found that both have a complex political organization and that, in addition to adopting general norms, they distribute competences to the entities that compose them in various matters, including that which is the subject of this study, based on criteria such as residuality and appropriateness.

In terms of universally common parameters, it has to be observed that the two countries did adapt their legal framework to the Convention for the Safeguarding of the Intangible Cultural Heritage, dated 2003 and incorporated into the Brazilian and Italian legal systems in 2006 and 2007, respectively.

Regarding the Convention, Brazil anticipated itself in the normative provision of protecting such type of goods, first with the 1988 Constitution and then with Decree No. 3.551/2000. In contrast, Italy decided to legislate internally on intangible cultural heritage in a way subsequent to the incorporation of the Convention, and it did so based on a normative change in its Code of Cultural Goods and Landscapes, dated 2008.

The recollection of these facts and dates is done to support some inferences, starting with the analysis of what the normative anticipation promoted by Brazil represents, which has the power to reveal the yearning for the recognition of a type of cultural heritage that measures human wealth by parameters that are, *prima facie,* different from market figures; it is the State's response to a demand for social and human inclusion that is much more striking than in Italy, having already reached a higher level with regard to the recognition of values of equal dignity for all human beings.

If Italy lagged a bit, from the moment it decided to embrace the cause of the protection of intangible cultural heritage, it used more advanced legal technology that made it promptly recover the lost temporal fraction: it legislated understanding the systemic contexts of the cultural field and the interrelationships with international and subnational political entities.

Thus, on the one hand, the vanguard of Brazil in the domestic construction and international collaboration for building regulations relating to the safeguarding of immaterial cultural heritage, resulting from a strategy for social inclusion of communities, groups and individuals traditionally excluded from the cultural world is confirmed. On the other hand, it is remarked that Italy, despite having legislated on the subject a little later, enjoys better the results of this protection by entering the recognized items in the economic circuit, especially tourism, without neglecting their preponderantly cultural aspect.

Consequently, despite the differences between Brazil and Italy in position on the globe, in economic wealth, in cultural diversities, in the legal and political organization, mutual learning is at all possible. This evokes a paraphrase with a well-known pearl of Pascal's thought, remembering that even the wisest always has something to learn and the simplest always has something to teach.

Abstract

Intangible Cultural Heritage - Safeguarding
Comparative study - Brazil - Italy

Italy has a well-deserved reputation as an open-air museum and, as regards the protection of tangible cultural heritage, it has one of the most advanced legislation on the planet. However, when it comes to intangible cultural heritage (ICH), Brazil precedes it. Knowing that the ICH is almost always tied to local communities, it is important to know how countries with complex geopolitical organization safeguard intangible heritage. This study, starting from the UNESCO Convention for the safeguarding of the ICH, adopted by both countries, goes through the national legislation and administrative practices, and confirms the hypothesis that Brazil is part of the international avant-garde in this specific legal subject and preferably uses it as an instrument of social insertion; Italy, in turn, not only values its culture, but also enjoys the economic results of its protection.

Sommario

Patrimonio culturale intangibile - Salvaguardia
Studio comparative - Brasile - Italia

L'Italia ha una ben meritata reputazione di museo all'aria aperta e, per quanto riguarda la protezione del patrimonio cultural tangibile, ha una delle legislazioni più avanzate del pianeta. Tuttavia, in materia di patrimonio culturale intangibile (PCI), il Brasile la precede. Sapendo che il PCI è quasi sempre legato alle comunità locali, è importante conoscere come paesi con un'articolata organizzazione geopolitica proteggono tale patrimonio. Questo studio muove dalla Convenzione UNESCO per la salvaguardia del patrimonio culturale intangibile, di cui entrambi i paesi sono parti, e analizza la legislazione e le practiche amministrative nazionali. Esso conferma l'ipotesi che il Brasile è all'avanguardia internazionale in questo specifico soggetto giuridico e lo usa di preferenza come uno strumento di inclusione sociale; a sua volta, l'Italia non solo valorizza la sua cultura, ma anche trae beneficio dai risultati economici della sua protezione.