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Brazilian cultural safeguard instruments for intangible goods

Instrumentos de salvaguarda cultural brasileira para bens imateriais

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Abstract: This work emphasizes the existence of instruments for the protection of intangible cultural heritage with primacy at federal level, both in administrative and jurisdictional terms, considering the participation in the National Program of Intangible Heritage, which was documented from the analysis of the legislation in force and the doctrine pertinent to the subject, contained in books and scientific publications. Thus, the method used for the research was the monographic one, whose research techniques consisted in the documentary analysis of normative instruments of several norms.

Keywords: Cultural heritage. Brazilian cultural safeguard instruments. Intangible goods. Inventory. Registration.

Resumo: Este trabalho enfatiza a existência de instrumentos para a proteção do patrimônio cultural imaterial, com primazia em nível federal, tanto em termos administrativos como jurisdicionais, considerando a participação no Programa Nacional do Patrimônio Imaterial, documentada a partir da análise da legislação vigente e da doutrina pertinente ao assunto, contida em livros e publicações científicas. Assim, o método utilizado para a pesquisa foi o monográfico, cujas técnicas de pesquisa consistiram na análise documental de instrumentos normativos de diversas normas.

Palavras-chave: Patrimônio cultural. Instrumentos de salvaguarda cultural brasileira. Bens intangíveis. Inventário. Registro.

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1 Introduction

In Brazil, the right to an environmentally balanced environment is guaranteed to all without distinction at the international, federal, state and municipal levels, and is made up of physical, biological and socioeconomic assets, among which are cultural assets and the latter is considered presupposition for the exercise of full citizenship and fundamental social right. And it is the duty of federated entities to provide the means of access to culture and to protect cultural heritage, which refers to the identity, action and memory of the different formative groups of Brazilian society, composed of goods of a material and immaterial nature and characterized as a diffuse fundamental right.

This work emphasizes the existence of instruments for the protection of intangible cultural heritage at international, national, state and municipal levels, with primacy at federal level, both in administrative and jurisdictional terms. The method used for the research was the monographic one, whose research techniques consisted in the documentary analysis of normative instruments of several norms.

2 The right to culture

Among the many epistemological analyzes about the meaning of “culture”, we take as a reference the definition adopted by Chauí,¹ where, “Humanity or culture is the realm of free purpose, of voluntary and rational choices, of the distinction between good and evil, true and false, just and unjust, sacred and profane, beautiful and ugly”. Chauí² further adds:

Culture is, therefore, the way in which humans humanize themselves and, through labor, they denature nature through practices that create social, economic, political, religious, intellectual and artistic existence. Work, religion, cooking, clothing, furniture, forms of housing, habits at the table, ceremonies, how to relate to the older and the younger, to animals and to the land, the tools, the techniques, the social institutions (like the family) and political (like the state), customs before death, war, sciences, philosophy, arts, games, parties, sexual relations, and sexual and ethnic differences, all this constitutes culture as the invention

¹ CHAÚÍ, M. *Cidadania cultural: o direito à cultura*. São Paulo: Fundação Perseu Abramo, 2002. p. 107.

² CHAÚÍ, M. *Cidadania cultural: o direito à cultura*. São Paulo: Fundação Perseu Abramo, 2002. p. 113-114.

of the relation to the Other – nature, gods, aliens, ethnicities, social classes, ancestors, enemies and friends.

Culture will then be that it is a system of symbolic significations of its own, externalized by the action of man, which attributes usefulness and meaning to the material world in the relations and transformations that it establishes with itself and with the social whole in which it exists, so that it can be known and understood by other men. Complementing the above, for Weber (*apud* Cohn),³ “culture is a finite segment of the senseless infinity of events in the world conceived from the point of view of man as meaning and meaning”, in this sense, we seek the understanding of Geertz,⁴ where, “Believing, like Max Weber, that man is an animal tied to the webs of meanings that he himself wove, I assume culture as these webs and their analysis” (1989, p. 15).

An internationally adopted concept of culture, taken from the Recommendation of the Decade of Cultural Development,⁵ which resulted from the 1982 Mexico Conference where, culture: It is the set of distinctive spiritual, material, intellectual and affective traits that characterize a society and a social group. It encompasses, in addition to arts and letters, ways of life, fundamental human rights, value systems, traditions and beliefs. It also agrees that culture gives man the ability to reflect on himself. It is what makes us specifically human beings, rational, critical and ethically committed. Through it we discern values, we make choices. Through it man expresses himself, becomes aware of himself, recognizes himself as an unfinished project, calls into question his own achievements, seeks new meanings untiringly, and creates works that transcend him. This position, based on the understanding of Hannah Arendt, cited by Celso Laffer,⁶ that citizenship is “the right to have rights” and recalling the words of Bobbio⁷ the subjects become citizens when they are recognized some fundamental rights. This invoke the term cultural citizenship, which is expressed in the words of Chauí⁸ as “[...] culture as a right of citizens, without confusing them with the figures of the consumer and the taxpayer” and later, using the speech he gave during his visit to the São Paulo Municipal Secretariat of Culture in January 1989, conceiving culture from the point of view of cultural citizenship, [...] culture as a right of the citizen and, in particular, as a right to the creation of this right by all those who have been systematically and deliberately excluded from

³ COHN, G. *Crítica e resignação: fundamentos da sociologia de Max Weber*. São Paulo: T.A. Queiroz, 1979. p. 98.

⁴ GEERTZ, C. *A interpretação das culturas*. Rio de Janeiro: Guanabara Koogan, 1989.

⁵ UNESCO. *Recommendation of the Decade of Cultural Development*. Mexico Conference 1982.

⁶ LAFFER, C. *A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt*. São Paulo: Companhia das Letras, 1988. p. 165.

⁷ BOBBIO, N. *A era dos direitos*. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1999.

⁸ CHAÚÍ, M. *Cidadania cultural: o direito à cultura*. São Paulo: Fundação Perseu Abramo, 2002. p. 60-70.

the right to culture in that country: workers, considered to be socially incompetent, subject to the condition of recipients of ideas, orders, norms, values and practices whose origin, whose meaning and purpose escape them.

Subsequently, there is inclusion in the Charter of the United Nations, ratified by Brazil on September 21, 1945, which provided in its article 1, item 3, the resolution of “international problems of an economic, social, cultural or humanitarian nature”. In article 13, it provided for the promotion of studies and recommendations by the General Assembly with a view to promoting international cooperation in the economic, social, cultural, educational and health fields, guaranteeing the fundamental rights and freedoms of all peoples. In Article 22 of the Universal Declaration of Human Rights,⁹ we find that every person can legitimately demand the satisfaction of the indispensable cultural rights, and in article 27 of the same document,¹⁰ states that “everyone has the right freely to participate in cultural life, community, to enjoy the arts and to participate in scientific progress and enjoy its benefits”. Arising here cultural rights as the social rights of man, formators of the dignity of the human person and the free development of his personality, according to Silva.¹¹ In order to reinforce the idea of the indispensability of culture, we refer to the 1969 American Convention on Human Rights, known as the Pact of San Jose of Costa Rica, incorporated into the Brazilian legal system in 1992, we have in its preamble that “ideal of the free human being, free of fear and misery, if conditions are created that allow each person to enjoy his economic, social and cultural rights, as well as his civil and political rights” and in article 16 of the additional protocol pact, where the “foresight of the rights to the benefits of culture” prevails.

The rise of culture to fundamental right is evident before the Universal Declaration on Cultural Diversity in 2001, in which, “Cultural Rights are integral parts of Human Rights”. Therefore, we conclude that such rights, like the others, deserve protection and applicability so that they can be exercised freely and effectively.

Cultural rights are second-generation human rights, taking into account Bobbio's¹² classification of social rights pertaining to this category. For Bonavides,¹³ second generation rights protect what fully human existential values provide, “the social”. Motta¹⁴ says that in this second generation are the social, cultural and economic rights, and these demand of the State a more active posture through concrete actions triggered to favor the individuals, also remembers that they are derived from the rights of (life, liberty, equality, property and security). Thus, among

⁹ UN GENERAL ASSEMBLY. *Universal Declaration of Human Rights*. Paris, 1948.

¹⁰ UN GENERAL ASSEMBLY. *Universal Declaration of Human Rights*. Paris, 1948.

¹¹ SILVA, J. A. da. *Curso de direito constitucional positivo*. 19. ed. São Paulo: Malheiros, 2001. p. 168.

¹² BOBBIO, N. *A era dos direitos*. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1999. p. 9.

¹³ BONAVIDES, P. *Curso de Direito Constitucional*. 21. ed. São Paulo: Malheiros, 2007. p. 565.

¹⁴ MOTTA, S. *Direito Constitucional*. 17. ed. Elsevier, 2005. (Série Impetus Provas e Concursos). p. 68.

the set of duties of the State provided by the Brazilian Constitution, is to provide the means of access to culture, education and science (art. 23-V).¹⁵

However, there is a characterization of the rights related to culture and cultural heritage as third generation rights, Bonavides,¹⁶ understands that this generation of rights is endowed with a very high content of humanism and universality, since they are not specifically intended to protect the interests of an individual, a group or a particular state, but human genus. According to Motta,¹⁷ they are related to the protection of the environment, the search for its balance, the self-determination of the peoples and the consolidation of world peace, contributing to the emergence of a group legal consciousness, being known as homogeneous, metaindividual or diffuse transindividual rights.

It is also worth bearing in mind that all peoples have the right to self-determination and that by virtue of this right they freely determine their political status and seek their economic, social and cultural development. Faced with this, social groups of diverse dimensions have their own cultural expressions and that these must be protected from interests that distort their integrity. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions,¹⁸ adopted at the 33rd General Conference of Unesco on 20 October 2005, recognizing the importance of traditional knowledge and culture for all, and especially the people belonging to it minorities and indigenous peoples (natural of a given region), whose promotion must be done in a conscious and responsible way, under the principle of dignity and respect for all cultures.

Mendonça¹⁹ reports that culture is included in Brazilian constitutional texts in 1934. However, Milaré²⁰ points out that at that time the Constitution was limited to declaring protected goods of value historical, artistic, archaeological and landscape, without defining the scope of these concepts. The Federal Constitution of 1988²¹ reserves the subject of articles 215 and 216 of Title VIII, dedicated to the social order, when the concept of Brazilian cultural heritage is expanded by including, in addition to the materiality of the cultural goods, other intangible nature, which will be studied in specific moment in this work.

¹⁵ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

¹⁶ BONAVIDES, P. *Curso de Direito Constitucional*. 21. ed. São Paulo: Malheiros, 2007. p. 569.

¹⁷ MOTTA, S. *Direito Constitucional*. 17. ed. Elsevier, 2005. (Série Impetus Provas e Concursos). p. 69.

¹⁸ UNESCO. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Paris, 2005.

¹⁹ MENDONÇA, G. M. *Meio ambiente cultural: aspectos jurídicos da salvaguarda ao patrimônio cultural brasileiro*. 2006. 190 f. Dissertação (Mestrado em Direito) – Centro de Ciências Jurídicas e Sociais, Pontifícia Universidade Católica do Paraná, Curitiba, 2006. p. 70.

²⁰ MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 400.

²¹ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

Article 215²² ensures the exercise of the right to culture and access to the sources of national culture, such as support, protection and dissemination of cultural events, including the creation of incentives for those interested in the production and knowledge of cultural assets and values is done through public policies and tax incentives, among others.

Article 215,²³ contain the following words:

Art. 215. The State shall guarantee to all the full exercise of cultural rights and access to the sources of national culture, and shall support and encourage the promotion and dissemination of cultural expressions. Paragraph 1 – The State shall protect the manifestations of popular, indigenous and Afro-Brazilian cultures, and those of other groups participating in the national civilizing process. Paragraph 2 – The law shall provide for the establishment of commemorative dates of high significance for the different national ethnic segments. Paragraph 3. The law shall establish a National Plan for Culture, of a multi-year duration, aiming at the cultural development of the Country and the integration of the actions of the public power that lead to: I defense and valorization of Brazilian cultural heritage; II production, promotion and diffusion of cultural goods; III training of qualified personnel for the management of culture in its multiple dimensions; IV democratization of access to cultural goods; V appreciation of ethnic and regional diversity. It should be remembered that §3 and its clauses were added to the constitutional text by Amendment number 48, dated August 10, 2005.

The idea of culture as a human right is in the words of the Universal Declaration on Cultural Diversity²⁴ in 2001, where “Cultural Rights are integral parts of Human Rights”. Therefore, we conclude that such rights, like other human rights, deserve protection and applicability so that they can be exercised freely and effectively by all, since they are constitutive of the dignity of the human person and of citizenship.

3 Cultural identity

The term “cultural identity” is found in the Declaration on the Safeguarding of Traditional and Popular Culture.²⁵ This document defines traditional and popular culture as “the set of creations that emanate from a cultural community, based on

²² CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

²³ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

²⁴ UNESCO. *Universal Declaration on Cultural Diversity*. Paris, 2001.

²⁵ UNESCO. *Recommendation on the Safeguarding of Traditional Culture and Folklore*. Paris, 1989.

tradition, expressed by a group or individuals, and that respond to the expectations of communities as an expression of their cultural and social identity”.

Also in the Convention on the Rights of the Child,²⁶ at the United Nations General Assembly in 1989, ratified by Brazil in the same year, respect for, and promotion of, the right to free participation in cultural and artistic life, Article 31, “Cultural identity” as guidance in the education of children by States Parties (Article 29).

In this sense are contained norms and values that are transmitted orally, language, literature, music, dance, games and games, mythology, rites, customs, crafts, architecture and other arts. This document recommends the investigation and registration of these demonstrations in order to ensure the knowledge, access and diffusion of popular traditions. Safeguarding these practices not only within collectives that express them, but also outside them.

Rifkin²⁷ points out that Unesco is constantly concerned about the risk that the global market can bring to local and regional cultures (and here we mean cultural identities) in the context of one of the 1998 reports of that institution, where cultural values that identify and connect local, regional or national communities seem to be at risk of being overcome by the tireless forces of the global marketplace. In these circumstances, he questions how societies can manage the impacts of globalization so that local or national cultures, and the creativity that sustains them. Thus, he says that globalization implies a movement away from the classical sociological idea of ‘society’ as a well-delimited system and its substitution by a perspective that focuses on how social life is ordered over time and space.

Still in Hall,²⁸ space-time understanding is the “acceleration of global spaces so that one feels the world is smaller and shorter distances, that events in one place have an immediate impact on people and places situated at a great distance”. However, the author raises the hypothesis that there is, along with the impact of the “global”, a new interest in the place and that in modernity globalization goes in parallel to a reinforcement of local identities.

The Portuguese sociologist Boaventura Souza Santos says that: “I have the right to be different every time that equality makes us homogenous. I have the right to be equal every time difference makes us inferior”.²⁹

²⁶ UN. *United Nations Convention on the Rights of the Child*. New York, 1990.

²⁷ RIFKIN, J. *La era del acceso: la revolución de la nueva economía*. Barcelona: Paidós, 2004.

²⁸ HALL, S. A identidade cultural na pós-modernidade – “the questions of cultural identity”. In: HALL, S.; HELD, D.; MCGREW, T. *Modernity and its futures*. Rio de Janeiro: D P e A, 2001. (Cambridge: Polity Press in association with the Open University, 1992). p. 67.

²⁹ RIBEIRO FILHO, J. B. Cultura e gestão democrática em São Luís do Maranhão. In: *Polis, estudos, formação e assessoria em políticas culturais. Desenvolvimento cultural e planos de governo*. São Paulo: Polis, 2000.

Cultural identities in Castells,³⁰ “[...] are constructed through collective action and preserved by collective memory, are specific sources of identities, these identities nevertheless consist of defensive reactions against the conditions imposed by global disorder and uncontrollable and fast-paced transformations”.

In addition to these analyzes, Brant³¹ poses the problem for the rapidity and aggressiveness of globalization, imposing on the peripheral countries the “remoteness of their cultural references, disrespecting the singularity of expression of each people and leading to the distribution of their genuine cultures. And that peoples, countries and citizens have the right to freedom of expression”. It also concludes that it is indispensable to implement cultural policies that convert culture into the most effective vehicle for social inclusion, through actions that are based on respect for diversity and difference.

This work focuses on the understanding of cultural policies as public policies focused on culture. For this, it is necessary to make the concept of public policy, which for Lima³² is the set of governmental actions or state intervention, articulated to collective interests and geared towards meeting social demands and guaranteeing the exercise of political power, forming a public commitment that aims to account for social and political issues in several areas. It is a political process where there is negotiation of institutional actors and different political subjects, in different moments and circumstances.

In this context, some examples of the participation of civil society in the implementation of cultural policies were identified, such as the creation of seminars, forums and management councils in various social spheres. It seems to us that these policies should be based on human development, citizenship and the environment, according to the words of João Batista Ribeiro Filho³³ in studies for “Cultural Development and Government Plans” (2000, p. 32), for whom “nature to be commanded must first be obeyed”. At this point, one of the concerns of Celso Furtado Monteiro³⁴ is to emphasize the preservation of Brazilian cultural identity, in the search for space for the flourishing of the creative activity of our people, which in his words reveals “The central question is whether we have the possibility of preserving our cultural identity. Without this we will be reduced to the role of passive consumers of cultural goods conceived by other peoples”.

³⁰ CASTELLS, M. *O poder da identidade*. São Paulo: Paz e Terra, 1999. p. 84.

³¹ BRANT, L. *Mercado cultural*. São Paulo: Escrituras editora, 2001. (Original: 1969). p. 9.

³² LIMA, T. M. *Políticas públicas e os diferentes enfoques de gênero*. Texto Preliminar, 2007.

³³ RIBEIRO FILHO, J. B. Cultura e gestão democrática em São Luís do Maranhão. In: *Polis, estudos, formação e assessoria em políticas culturais. Desenvolvimento cultural e planos de governo*. São Paulo: Polis, 2000.

³⁴ MONTEIRO, C. F. Raízes do Brasil e a transição para a sociedade de massas. In: *Raízes e perspectivas do Brasil*. Campinas: Papyrus Editora da UNICAMP, 1985. p. 16.

In this way, the perpetuation of cultural expressions is indispensable in the proposal of cultural resistance and full freedom of expression of social cultural identity, based on an effective protection of cultural diversity as a social force of collective interest. Here the imperative of equal access to culture for individuals in general is included through the promotion of cultural forms of all social groups and incentives to popular participation in the process of cultural creation. Like this, culture acts as a structure of cultural identity, essential for the achievement of social inclusion and the adequate quality of life.

4 Cultural heritage as an environmental protection focus

As Canclini³⁵ notes, “cultural heritage is the least suspect resource to guarantee social complicity”, everything assumes that the same is the basis for the cultural identity of a given society, thus deserving of effective mechanisms protectors.

The definitions of cultural heritage are contained in articles 1 and 2 of the 1972 Convention on the Protection of World Cultural and Natural Heritage,³⁶ held in Paris and promulgated in our order by Decree No. 80.978 of December 12, 1977.³⁷

This convention provides international assistance to identify and preserve this patrimony, adding national protection to international protection. This section of the Convention basically includes figures with exceptional values from an artistic, historical, aesthetic, ethnological or anthropological point of view, as follows:³⁸

Art. For the purposes of this Convention, the following shall be considered as “cultural heritage”: - monuments: monumental architectural, sculpture or painting works, archaeological elements or structures, inscriptions, caves and groups of elements having an exceptional universal value of point of view of history, art or science; - ensembles: a group of isolated or assembled constructions which, by reason of their architecture, unity or integration in the landscape, have an exceptional universal value from the point of view of history, art or science; - notable places: man-made works or man-made and natural works, including archaeological sites, which have an exceptional universal value from a historical, aesthetic, ethnological or anthropological point of view. Art. 2^o For the purposes of this Convention, “natural heritage” shall mean: - natural monuments consisting of physical and biological formations or groups of such formations which have an exceptional universal value from an aesthetic or scientific point of view; - geological and physiographic formations

³⁵ CANCLINI, N. G. *Culturas híbridas: estratégias para entrar e sair da modernidade*. 3. ed. São Paulo: Universidade de São Paulo, 2000. (Ensaio Latino Americano, 1). p. 160.

³⁶ UNESCO. *Convention Concerning the Protection of the World's Cultural and Natural Heritage*. Paris, 1972.

³⁷ BRASIL. Decree No. 80.978 of December 12, 1977.

³⁸ BRASIL. Decree No. 80.978 of December 12, 1977.

and clearly delimited areas constituting the “habitat” of threatened animal and plant species of exceptional universal value from the point of view of science or conservation; - natural prominent places or clearly delimited natural areas of exceptional universal value from the point of view of science, conservation or natural beauty.

According to Mendonça,³⁹ the first movements to protect culture at the international level date from the mid-twentieth century, when the bombing of places reserved for cults, arts and sciences in the interstate wars was prohibited. It is worth recalling the Charter of Athens which was intended to safeguard historical constructions. It is important to mention the 1935 Roerich Pact for the Protection of Scientific and Artistic Institutions and Historical Monuments.⁴⁰ Also the Geneva Convention of 1949,⁴¹ concerning the protection of civilians and their belongings in times of war, with a Protocol issued in 1977⁴² referring to the term “cultural goods” and the 1964 Venice Charter⁴³ where principles for conservation and restoration were established of the monumental works that are part of the common heritage to be left for future generations. Also worthy of mention is the Venice Intergovernmental Conference, 1970,⁴⁴ which discusses “cultural development” and “cultural dimension of development”. Still according to Mendonça,^{45 46} in order to obtain the title of world heritage, there is a need for approval in plenary of a technical report on the good by the World Heritage Committee, established in the aforementioned Convention Concerning the Protection of World Cultural and Natural Heritage.⁴⁷ By obligatorily

³⁹ MENDONÇA, G. M. *Meio ambiente cultural: aspectos jurídicos da salvaguarda ao patrimônio cultural brasileiro*. 2006. 190 f. Dissertação (Mestrado em Direito) – Centro de Ciências Jurídicas e Sociais, Pontifícia Universidade Católica do Paraná, Curitiba, 2006. p. 77.

⁴⁰ ICRC. *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact)*. Washington, 15 April, 1935.

⁴¹ ICC. *Geneva Convention of 1949*.

⁴² ICC. *Geneva Convention Protocol of 1949*.

⁴³ ICOMOS. *The Second International Congress of Architects and Technicians of Historical Monuments*. Venice, 1964.

⁴⁴ UNESCO. *Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies*. Venice, 1970.

⁴⁵ MENDONÇA, G. M. *Meio ambiente cultural: aspectos jurídicos da salvaguarda ao patrimônio cultural brasileiro*. 2006. 190 f. Dissertação (Mestrado em Direito) – Centro de Ciências Jurídicas e Sociais, Pontifícia Universidade Católica do Paraná, Curitiba, 2006. p. 79.

⁴⁶ Brazil currently has nineteen cultural and natural monuments included in the World Heritage List, being: Fernando de Noronha-PE Archipelago (2001); Atol das Rocas-RN (2001); Historic Center of Diamantina-MG (1999); Historic Center of the City of Goiás-GO; Historical Center of Olinda-PE (1982); Historical Center of Salvador-BA (1985); Historical Center of São Luís-MA (1997); Conjunto Arquitetônico e Urbanístico de Ouro Preto-MG (1980); Urban, Architectural and Landscape Set of Brasília-DF (1987); Protected Areas Complex of the Pantanal Matogrossense-MT/MS (1999); Set of 25 areas of the Atlantic Forest on the border of São Paulo and Paraná (1999); Costa do Descobrimento in southern Bahia and northern Espírito Santo (1999); National Parks of Chapada dos Veadeiros and Emas-GO (2001); Iguaçu National Park-PR (1986); Jaú-AM National Park (2000); Remnants of the Church of São Miguel of the Jesuit Missions of the Guaranis-RS (1983); Sanctuary of Bom Jesus de Matozinhos-MG (1985); Archaeological sites of São Raimundo Nonato, in the Serra da Capivara-PI National Park (1991).

⁴⁷ UNESCO. *Convention Concerning the Protection of the World's Cultural and Natural Heritage*. Paris, 1972.

identifying, protecting, conserving, valuing and transmitting by Member States their national assets. It is opportune, at this moment, for the fact that it is the executor of these activities, the insertion of considerations regarding the National Historical and Artistic Heritage Institute (IPHAN), which was created on January 13, 1937 by Law No. 378,⁴⁸ under the government of Getulio Vargas. Already in 1936, the then Minister of Education and Health, Gustavo Capanema, concerned with the preservation of the Brazilian cultural heritage, asked Mário de Andrade to draft a draft law to safeguard these assets.

He then entrusted Rodrigo Melo Franco de Andrade with the task of implementing the Patrimony Service. Subsequently, on November 30, 1937, Decree-Law number 25⁴⁹ was promulgated, which organizes the “protection of the national historical and artistic patrimony”. At the time, there was no Ministry specifically related to culture, and was created in 1985 by Decree No. 91.144,⁵⁰ the Ministry of Culture, which is the body of the executive branch responsible for the application of cultural rights, with the purpose of establishing conditions for the development of the creation, diffusion and preservation of the national culture. It has competence to deal with the national policy of culture and protection of historical cultural heritage, according to article 14, section VI, paragraphs a and b of Law No. 9.649/98⁵¹ (which provides for the organization of the Presidency of the Republic and Ministries), is composed of collegial bodies and secretariats distributed in order to better apply the cultural policies. In addition, it has several entities of the indirect administration directly related to it, among which is the IPHAN. Today, after the establishment of Decree No. 5.520 of August 24, 1995,⁵² which provides for the Federal Culture System, it is the responsibility of the Ministry of Culture to carry out the same, a matter that will be further elaborated in this work.

IPHAN is an autarchy and as seen, is linked to the Ministry of Culture and has the mission to identify, document and promote Brazilian cultural heritage and currently has an organizational structure consisting of superintendencies, sub-regional bodies and technical offices. It acts through a national plan of action to be elaborated one year before its execution, and each unit has its own action plan, as a way to involve the state and municipal administrations, as well as the communities interested in the protection of the cultural heritage through pedagogical actions that lead to the recognition of the importance of the cultural heritage.

⁴⁸ BRASIL. Law No. 378 of 1937.

⁴⁹ BRASIL. Decree-Law No. 25 of 1937.

⁵⁰ BRASIL. Decree No. 91.144 of 1985.

⁵¹ BRASIL. Law No. 9.649 of 1998.

⁵² BRASIL. Decree No. 5.520 of 1995.

According to Decree No. 5.040, dated April 7, 2004,⁵³

The Regional Superintendences are responsible for carrying out actions for the identification, inventory, protection, conservation and promotion of cultural heritage within their respective jurisdictions, as well as: analyzing and approving intervention projects in protected areas or assets; to exercise the supervision, to determine the embargo of actions that contravene the current legislation and to apply legal sanctions, as well as proceed with the liberation of cultural goods, except those protected; participate, with the Departments, in the elaboration of criteria and technical standards for conservation and intervention in cultural heritage; and to instruct proposals for the registration of cultural property of a material nature and, possibly, for the registration of cultural objects of an intangible nature.

Cultural heritage has a content that is not valued monetarily and deals with two fundamental aspects: quality of life and a conception of equality seen as a right to integration, based on participatory aspects in the various spheres of social life. It is an important reminder that Silva⁵⁴ states that it is the right and duty of the state to form the Brazilian cultural heritage and to protect cultural goods, which are thus recognized as being a form of property of public interest.

The Federal Constitution of 1988⁵⁵ qualifies the national cultural heritage as follows:

Art. 216. The assets of a material and immaterial nature, taken individually or jointly, bear a reference to the identity, action, and memory of the different formative groups of Brazilian society, which include: I – forms of expression; II – the ways of creating, doing and living; III – scientific, artistic and technological creations; IV – works, objects, documents, buildings and other spaces intended for artistic and cultural events; V – urban complexes and sites of historical, landscape, artistic, archaeological, paleontological, ecological and scientific value. Paragraph 1 – The Public Power, with the collaboration of the community, shall promote and protect the Brazilian cultural heritage, through inventories, records, surveillance, registration and expropriation, and other forms of precaution and preservation. Paragraph 2 – The public administration, in accordance with the law, is responsible for the management of governmental documentation and the arrangements for franking its consultation to those who need it. Paragraph 3 – The law

⁵³ BRASIL. Decree No. 5.040 of 2004.

⁵⁴ SILVA, J. A. da. *Curso de direito constitucional positivo*. 19. ed. São Paulo: Malheiros, 2001. p. 316.

⁵⁵ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

shall establish incentives for the production and knowledge of cultural assets and values. §4 – The damages and threats to cultural heritage will be punished, according to the law. Paragraph 5 – All documents and sites reminiscent of historical remnants of the former quilombos are registered. Paragraph 6 – The States and the Federal District may be bound by a state development fund to cultivate up to five tenths of their net tax revenue for the financing of cultural programs and projects, expenses with personnel and social charges; II – debt service; III – any other current expense not directly linked to the investments or shares supported.

To insert cultural heritage as a component of the environment, we need to consider the concept of the environment as the set of naturalistic aspects and factors that condition human life and its development in relation to the ecosystem to which it belongs.

For Milaré⁵⁶ the most recent conception considers it a system in which physical, biological and socioeconomic factors interact. Thus, we have that the environment no longer boils down to the merely naturalistic aspect, but it has a holistic connotation that encompasses everything that surrounds and conditions man in his existence, in his development in relation to the community to which he is inserted and his ecosystem.

The Law that defines the National Environmental Policy, 6.938 of August 31, 1981,⁵⁷ in its article 2, I, considers environment, public property to be secured and protected, in view of the collective use, brings in its art. 3, item I, the legal concept of the Environment as “the set of conditions, laws, influences, and interactions of a physical, chemical and biological order that allows, shelters and rules life in all its forms.

This integration assumes a unitary conception of the environment, comprehensive of natural and cultural resources and thus we can affirm the clear understanding of the absorption of cultural heritage as a component of the environment. In this way, the cultural environment is composed of historical, artistic, landscape, archaeological, speleological (relative to the topography and morphology of underground caves), fossiliferous, tourist, scientific and cultural syntheses that integrate the universe of social practices of the relations of exchange between man and nature over time, receiving protection from Articles 215, 216 and 225 of the 1988 FC.⁵⁸

⁵⁶ MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005.

⁵⁷ BRASIL. Law 6.938 of 1981: 1.087.

⁵⁸ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

5 Protection instruments to intangible goods

Miranda⁵⁹ notes that when a property is individuated and recognized as part of the Brazilian cultural heritage, it is governed by a special legal regime that differentiates it from other assets. Regardless of whether it is a public or private good, cultural goods are considered goods of public interest, because of the relevance of their preservation to the enjoyment of present and future generations.

The following principles rest on these goods: Principle of Protection, which guarantees the same to the patrimony; Principle of the Sociocultural Function of Property, since the goods are of public interest; Principle of Collective Fruition, because it is everyone's guarantee; Principle of Harm Prevention, since threats and damages must be punished according to the law; Principle of Accountability, in relation to the violator of the norms of protection to the cultural environment, with integral reparation and objective responsibility; Principle of Equilibrium, for sustainable development; Principle of Popular Participation, since the Constitution⁶⁰ in Article 216 prescribes the cooperation between State and collectivity the preservation of the cultural environment; Principle of the Binding of Cultural Goods, which links the goods to the country, with exceptions to the temporary exits abroad for the purpose of scientific or cultural exchange; Principle of Patrimonial Education, so that all are aware of their rights and duties in relation to cultural heritage; Intergenerational Solidarity Principle, because this right transcends the present time, and should extend to future generations; Principle of International Cooperation, regarding international solidarity policies.

Still according to Miranda,⁶¹ the act of individualization and recognition of the cultural asset can be of an administrative nature (inventory, registration, registration, etc.), legal (zoning law, legislative tipping, etc.) and judicial of cultural value, e.g.). As a direct effect of the act of recognition then emerges the legal certainty of the nature of the good of cultural value and as reflex effect the act imposes the submission of the thing to the legal regime that is assigned to it. Milaré⁶² points out that the identification of these assets depends on the community's performance, since it is a legitimate producer and beneficiary of the same and must participate in the preservation of cultural heritage together with the Public Power, as required by the Brazilian Constitution,⁶³ for the author, the best solution adopted, since previously

⁵⁹ MIRANDA, M. P. de S. *Tutela do patrimônio cultural brasileiro: doutrina, jurisprudência e legislação*. Belo Horizonte: Del Rey, 2006. p. 53.

⁶⁰ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁶¹ MIRANDA, M. P. de S. *Tutela do patrimônio cultural brasileiro: doutrina, jurisprudência e legislação*. Belo Horizonte: Del Rey, 2006.

⁶² MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 401.

⁶³ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

the responsibility was relegated to the specialists on the subject under the state tutelage (century XIX), who were usually full of erudition, however, empty of sensitivity. The means of promotion and protection mentioned in §1 of article 216 are the inventory, registration, surveillance, tipping and expropriation applied by the public power (Union, States, Federal District and Municipalities), it must be remembered that the first two will again be addressed in specific occasion in this work. For the moment, it is worth mentioning that to topple and register a particular good means to protect, preserve and recognize its cultural importance for the region that hosts it or for Brazil, for its historical, artistic, archaeological, ethnographic, landscape and/or bibliographic value. The tipping focuses on movable property (archaeological collections, museum collections, documentary, archival, bibliographic, videographic, photographic and cinematographic) or real estate (urban centers, natural monuments, archaeological and landscape sites and individual goods).

The registration covers cultural goods of immaterial nature (popular festivals, customs, songs, plays and knowledge). These assets need identification, recognition, ethnographic registration, periodic monitoring, dissemination and support, in order to preserve its essential characteristics.

The inventory is a research methodology that aims to produce knowledge about the domains of social life to which are attributed meanings and values and which, therefore, constitute landmarks and references of identity for a given social group. It includes, in addition to the categories established in the Registry, buildings associated with certain uses, historical significance and urban images, regardless of their architectural or artistic quality. Surveillance is the power of police exercise, carried out with the inspection of said assets. In relation to expropriation, it is the responsibility of the public administration and shall be made in accordance with the law, by necessity or public utility of the property in question and prior and fair compensation, given the supremacy of the public interest over the private.

Given the recognition of a cultural asset, the consequences of such actions include the imprescriptibility of actions aimed at redressing collective environmental damages, the possibility of defending cultural heritage through the use of effective procedural instruments such as Popular Action and Action Civil Public, among others, of which we will deal next and the intervention of the Public Prosecutor's Office as *custus legis*, in the civil actions that involve the defense of this legal good, given the public interest evidenced by the nature of the deal, which is regulated by Articles 127 Federal Constitution⁶⁴ and the Brazilian Civil Procedure Code.⁶⁵

⁶⁴ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁶⁵ BRASIL. Law No. 13.655 of 2018.

As a dynamic confluence, the effective forecast of protection of the cultural heritage of the country is observed, as it is the right to enjoy an Ecologically Balanced Environment, as stated in the caput of article 225 of the Federal Constitution.⁶⁶

From what has been said, the linkage of cultural heritage to Environmental Law is unquestionable. The right to the preservation of this legally relevant asset has been made. It is important to emphasize Willian's (apud Milaré)⁶⁷ thinking, for whom this science is concerned with all natural, cultural, or historical environmental assets, seeing the conditions produced by man and affecting its existence on earth. So much so that Law No. 9.605 of 1998, Law on Environmental Crimes,⁶⁸ which contains section dealing specifically with crimes against urban planning and cultural heritage, going from article 62 to article 65, which have the following configuration:

Crimes against Urban Ordinance and Cultural Heritage: Art. 62. Destroying, rendering useless or deteriorating: I – especially protected by law, administrative act or judicial decision; II – file, registry, museum, library, gallery, scientific installation or similar protected by law, administrative act or judicial decision: and in – imprisonment, from one to three years, and fine. single paragraph. If the crime is guilty, the penalty and from six months to one year of detention, without prejudice to the fine. Art. 63. To change the aspect or structure of a building or place specially protected by law, administrative act or judicial decision, due to its landscape, ecological, tourist, artistic, historical, cultural, religious, archaeological, ethnographic or monumental value, without authorization of the competent authority or in disagreement with the one granted: Penalty – imprisonment, from one to three years, and fine. Art. 64. To promote construction on a non-buildable land or in its surroundings, considered as such because of its landscape, ecological, artistic, tourist, historical, cultural, religious, archaeological, ethnographic or monumental value, without the authorization of the competent authority or in disagreement with the one granted: Penalty – detention, from six months to one year, and fine. Art. 65. Spray graffiti or other means defile a building or urban monument: Penalty – detention, from three months to one year, and fine. Paragraph one. If the act is carried out in monument or thing listed by virtue of its artistic, archaeological or historical value, the penalty and from six months to a year of detention, and fine.

⁶⁶ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁶⁷ MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 105.

⁶⁸ BRASIL. Law No. 9.605 of 1998.

The crimes committed against the Brazilian cultural heritage are subject to unconditional criminal action, which is extracted from article 26 of Law No. 9.605.⁶⁹ And the reparatory suit filed by the public criminal action obeys the legal regime of subjective responsibility, since it presupposes, at least in theory, the existence of fraud or guilt *stricto sensu*⁷⁰ the claim that cultural heritage is a focus of environmental protection, and therefore a matter related to Environmental Law and being subject to suffering from damages, is justified by the principles that seek to facilitate a harmonious and balanced relationship between man and the environment (natural and created), with institutes such as those of prevention (prior to the act), reparation and repression (both subsequent to the damaging act), sanctioning laws applicable against any injury or threat to law.⁷¹ It is certain that the environmental repair occurs through the norms of civil responsibility, caused by action or omission, that has causal relation with the damaging event. Applied to integral risk theory, where the duty to repair is independent of the analysis of the agent's subjectivity and is based on the simple fact that there was activity from which the injury occurred, resulting in objective civil liability. Precepts Milaré⁷² that, if they are bearers of reference to identity, action, the memory of different groups forming nationality or Brazilian society, a good can be included in cultural heritage, erudite or popular, tangible or intangible.

According to Reisewitz,⁷³ cultural heritage receives administrative, political and therefore non-judicial protection, as well as by judicial means, she says:

For the first case, we can point to the existence of a cultural policy, a public cultural service, inventories, records, surveillance, land zoning, environmental impact assessment, etc. In the second case, in addition to the Public Civil Action and Popular Action, the Collective Security Mandate, the Motion of Injunction, among other actions that are available to the community.

The author reminds us that, regarding administrative instruments, tutelage is not exclusively state-owned, since there is participation of the collectivity in various procedures that will form some of the administrative acts, and cites as examples the submission of a proposal for registration and participation in public hearings.⁷⁴

⁶⁹ BRASIL. Law No. 9.605 of 1998.

⁷⁰ MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 417.

⁷¹ MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 157.

⁷² MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005.

⁷³ REISEWITZ, L. *Direito ambiental e patrimônio cultural: direito à preservação da memória, ação e identidade do povo brasileiro*. São Paulo: Juarez de Oliveira, 2004. p. 105.

⁷⁴ REISEWITZ, L. *Direito ambiental e patrimônio cultural: direito à preservação da memória, ação e identidade do povo brasileiro*. São Paulo: Juarez de Oliveira, 2004. p. 105.

Following the order of appearance of the jurisdictional instruments in the Federal Constitution,⁷⁵ we will begin to expose their appropriateness regarding the defense of cultural heritage, knowing that intangible heritage is included, obviously considering the analysis of the concrete case.

Having this patrimony as a right and deferring to article 5 of the Constitution, which in its paragraph XXXV states that “the law will not exclude from the appreciation of the judiciary injury or threat to law”, we can, and so agrees Reisewitz,⁷⁶ interpret it as a guarantee of the right of action for the preservation of the environment, susceptible of being raised by the collectivity, the Public Prosecutor’s Office, and entities of the public administration.

Considering this, still in analysis of article 5,⁷⁷ it is highlighted the item LXX, that disposes regarding the ones legitimized for impetration of the collective security order, being these “(a) political party with representation in the National Congress; b) union organization, class entity or association legally constituted and in operation for at least one year, in defense of the interests of its members or associates”. It is disciplined by Law No. 1.533/51,⁷⁸ in addition to other subsequent ones to it correspondents, and aims as in the individual security order (item LXIX of the FC),⁷⁹ the protection of net right and certain in the face of illegality or abuse of power where the person in charge is public authority or agent of legal entity in the exercise of powers of the Public Power. It is listed here by the fact that it can be activated by the legitimate ones in case there is a violation of net and certain law on the preservation of cultural heritage.

Another constitutional remedy that can be cited is a writ of injunction, present in item LXXI of article 5 of the 1988 FC,⁸⁰ which says, “an injunction will be granted whenever the lack of a regulatory norm makes it impossible to exercise the rights and freedoms constitutional rights and the prerogatives inherent in nationality, sovereignty and citizenship”. Since the right to the preservation of cultural heritage is a fundamental right, if there is a lack of regulation, one can then resort to the injunction.

⁷⁵ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁷⁶ REISEWITZ, L. *Direito ambiental e patrimônio cultural: direito à preservação da memória, ação e identidade do povo brasileiro*. São Paulo: Juarez de Oliveira, 2004. p. 108.

⁷⁷ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁷⁸ BRASIL. Law No. 1.533 of 1951.

⁷⁹ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁸⁰ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

A fundamental instrument is contained in section LXXIII, still of article 5,⁸¹ referring to Popular Action, where, Any citizen is a legitimate party to propose a public action that seeks to annul an act detrimental to the public patrimony or entity of which the State participates, to administrative morality, to the environment and to the historical and cultural patrimony, being the author, unless proven bad faith, free of legal costs and the burden of failure.

According to Reisewitz⁸² the infraconstitutional Law that regulates the Popular Action, No. 4.717 of 1965,⁸³ does not find in article 1, constitutional protection, says the article “The proof of citizenship, for admission to court, will be made with the electoral title, or with the document that corresponds to it”. From what has already been said about what is meant by citizenship, we agree that Brazilians and foreigners living in the country have legitimacy, since the right to the preservation of cultural heritage is, as part of the right to a balanced environment, an extension of the right to life, and the latter is guaranteed by Article 5 of the Federal Constitution,⁸⁴ to Brazilians and residents of the country. This instrument seeks a constitutional provision that declares or renders null and void acts harmful to cultural heritage, as well as the conviction of those responsible for payment loss or damage or the restitution of goods or securities.⁸⁵

Following the sequence of the Major Charter and, in the case of regularity of the norms, we have the possibility of proposing Constitutionality Control Actions, which may have normative acts regarding the preservation of cultural heritage. Article 103 says that they can propose the Direct Action of Unconstitutionality and the Declaratory Action of Constitutionality: the President of the Republic; the Bureau of the Federal Senate; the Bureau of the Chamber of Deputies; the Bureau of the Legislative Assembly or the Legislative Chamber of the Federal District; Governor of State or Federal District; the Attorney General of the Republic; the Federal Council of the Brazilian Bar Association; political party with representation in the National Congress and; trade union confederation or national class entity.

An indispensable instrument for the preservation of the patrimony is mentioned among those necessary to fulfill the attributions of the Public Prosecution, is disposed in article 129,⁸⁶ in section III, which says that it is the function of the parquet “to promote civil inquiry and public civil action, for the protection of the

⁸¹ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁸² REISEWITZ, L. *Direito ambiental e patrimônio cultural: direito à preservação da memória, ação e identidade do povo brasileiro*. São Paulo: Juarez de Oliveira, 2004. p. 112.

⁸³ BRASIL. Law No. 4.717 of 1965.

⁸⁴ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁸⁵ MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 414.

⁸⁶ BRASIL. Law No. 4.717 of 1965.

public and social patrimony, of the environment and of other diffuse and collective interests”. According to Milaré,⁸⁷ in the category of public and social patrimony, cultural heritage is subsumed.

The public civil action is regulated by Law No. 7.347 of 1985⁸⁸ and dealing with the merit of liability for property and moral damages caused to assets of artistic, aesthetic, historical, tourist and landscape value, as well as any diffuse or collective interest (Article 1), deals, therefore, with intangible cultural heritage. It should be remembered that this law is rewritten in its article 5 (included by Law No. 11.448/07),⁸⁹ granting legitimacy also to the Public Defender’s Office, the Federal, State, Federal District and Municipalities, municipalities, public companies, foundations or companies of mixed economy and associations, constituted for at least 1 (one) year under the civil law, including among their institutional purposes, protection of the environment, consumer, economic order, free competition or artistic, aesthetic, historical, tourist and landscape to propose public civil action. It is convenient to include Article 6 of the Public Civil Action Act for inciting citizen participation, he says “Anyone can and the server should provoke the initiative of the Public Prosecutor’s Office, providing information on facts that are the subject of civil action and indicating, and to give him the elements of conviction”. The legal regime of civil liability for damages to cultural heritage is governed by the theory of objective liability, where only the harm is sufficient to provoke judicial protection, according to article 14 §1 of Law No. 6.938/81⁹⁰ (National Policy of the Environment) and 225, §3 of the Federal Constitution.^{91 92}

There is also the possibility of using the public civil action declaratory of cultural value. According to Miranda,⁹³ in the event of the omission of the public authority to ensure the integrity of cultural property, it is uncontroversial for the judiciary to speak of the cultural value of a particular property and to dictate rules of sense of its preservation before the omission of its owner or of the Public Power, independently of previous act of tipping or registration.

Regarding non-jurisdictional procedures, there is a means of identifying and protecting intangible assets in order to safeguard them, in line with the ratification of the Convention for the Safeguarding of the Intangible Heritage of 2003,⁹⁴ in this

⁸⁷ MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 415.

⁸⁸ BRASIL. Law No. 347 of 1985.

⁸⁹ BRASIL. Law No. 11.448 of 2007.

⁹⁰ BRASIL. Law No. 6.938 of 1981.

⁹¹ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL. 27. ed. São Paulo: Atlas, 2007. (Org.: Alexandre de Moraes).

⁹² MILARÉ, E. *Curso de Direito Ambiental Brasileiro*. 6. ed. São Paulo: Saraiva, 2005. p. 416.

⁹³ MIRANDA, M. P. de S. *Tutela do patrimônio cultural brasileiro: doutrina, jurisprudência e legislação*. Belo Horizonte: Del Rey, 2006. p. 175.

⁹⁴ UNESCO. *Convention for the Safeguarding of the Intangible Heritage*. Paris, 2003.

sense, Unesco's action in Brazil in a model based on cooperation, in which this international body, together with the national authorities, acts with the purpose of preserving the Brazilian cultural heritage, collaborating even in training activities, in the elaboration of cultural policies, in the areas of handicrafts, cultural tourism, among others. Three Brazilian immaterial goods were recognized by Unesco as important goods for humanity, added to the world cultural heritage, namely the Kusiwa – Cosmology and Graphic Language of the Wajãpi (indigenous people of Amapá), the Samba de Roda in the Bahia Recôncavo and the Office of the Paneleiras de Goiabeiras (neighborhood of Espírito Santo).

Brazil has the National Program of Intangible Heritage, instituted by Decree No. 3.551, of August 4, 2000,⁹⁵ which enables projects to identify, recognize, safeguard and promote the immaterial dimension of cultural heritage, seeking to establish partnerships with federal government institutions, state and municipal governments, universities, nongovernmental organizations, development agencies and private organizations linked to culture, research and financing.

This program has among its objectives, to contribute to the ethnic and cultural diversity of the country and to the dissemination of information on Brazilian cultural heritage to all segments of society, based on the guidelines for promoting social inclusion and improving the living conditions of the holders of immaterial cultural heritage, promoting support for the material conditions that favor its existence. Its lines of action are research, documentation and information, sustainability, promotion and training.

According to the Program,⁹⁶ safeguarding a cultural property of an intangible nature is to support its continuity in a sustainable way and to work towards the improvement of the social and material conditions of transmission and reproduction that enable its existence. And the knowledge generated during the processes of Inventory and Registration is what allows to identify the most appropriate forms of safeguard. The aid may be financial, to the holders of specific knowledge, with a view to its transmission.

The Inventory has the purpose of producing knowledge about the domains of social life to which are attributed meanings and values that constitute marks and references of identity for a particular social group. In addition to the categories established in the Registry, it includes buildings associated with certain uses, historical significance and urban images, regardless of their architectural or artistic quality. The National Program of Intangible Heritage⁹⁷ has already performed the Inventories of the Círio de Nossa Senhora de Nazaré – Belém/PA; of the Office of the

⁹⁵ BRASIL. Decree No. 3.551 of 2000.

⁹⁶ BRASIL. Decree No. 3.551 of 2000.

⁹⁷ BRASIL. Decree No. 3.551 of 2000.

Baianas of Acarajé – Salvador/BA; of Viola de Cocho – MS/MT; do Jongo – RJ/SP; of Cerâmica Candéal/MG; Bumba-My-Boi/MA; of the Open Museum of Discovery/BA and others.

Decree No. 3.551 of August 4, 2000, establishes the Registration of Cultural Goods of Intangible Nature,⁹⁸ in addition to creating the National Program of Intangible Heritage. In article 1, the decree says that the Register will be made in books and the inscription in one of them will have as reference the historical continuity of the property, its national relevance to the memory, identity and formation of Brazilian culture (§2). The article lists four books (§1), they are the Book of Knowledge, which registers knowledge and ways of doing rooted in the daily life of the communities; the Book of Record of Celebrations, which inscribes rituals and celebrations that mark the collective experience of work, religiosity, entertainment and other practices of social life; the Book of Registration of Forms of Expression, where literary, musical, plastic, scenic and playful manifestations will be recorded; and the Book of Registration of Places, which registers markets, fairs, shrines, squares and other spaces where they concentrate and reproduce collective cultural practices. There is also the possibility of opening a new book if the good does not fit into any of the four defined ones (§3).

Article 2⁹⁹ establishes those entitled to initiate the registration process and here it is necessary to criticize the lack of cunning of the legislator by not taking advantage of the occasion to grant legitimacy to individuals, to the citizen, which would be perfectly acceptable in our legal system, since everyone is guaranteed the right to culture and that in the procedure of tipping this possibility exists. The standard in question included only the Minister of State for Culture, the institutions linked to the Ministry of Culture, the Secretaries of State, Municipality and Federal District and civil societies or associations.

The registration proposals must be sent to the President of Iphan, who will submit them to the Consultative Council of Cultural Heritage, must be accompanied by technical documentation. And, according to Resolution 001/2006¹⁰⁰ of that body, the requirements that must be fulfilled in the registration process are,

1 – Application of application, in original, dated and signed document, accompanied by the following information and documents: I. Identification of the proposer; II. Justification of the request; III. Name and description of the proposed property for registration, indicating the participation and / or performance of the social groups involved where it occurs or is located, the period and the way in which it occurs; IV. Basic historical

⁹⁸ BRASIL. Decree No. 3.551 of 2000.

⁹⁹ BRASIL. Decree No. 3.551 of 2000.

¹⁰⁰ IPHAN. Resolution 001/2006.

information about the good; V. Minimum documentation available, appropriate to the nature of the property, such as photographs, drawings, videos, films, sound recordings or films; SAW. Available documentary and bibliographical references; VII. Formal declaration of representative of the community producing the property, or its members, expressing the interest and consent with the establishment of the registration process. 2 – The technical instruction of the administrative registration process consists in the production and systematization of knowledge and documentation on the cultural object* and must necessarily cover: I. a detailed description of the good that allows the apprehension of its complexity and contemplates the identification of actors and meanings attributed to the good; processes of production, circulation and consumption; specific cultural context and other relevant information; references to the formation and historical continuity of the good, as well as the transformations that have occurred over time; III. relevant bibliographical references and documents IV. production of audiovisual records of ethnographic character that contemplate the culturally relevant aspects of the property, such as those mentioned in items I and II of this article; collection of publications, existing audiovisual records, information materials in different media and other products that complement the instruction and increase the knowledge about the good; assessment of the conditions under which the asset is located, with a description and analysis of potential and effective risks to its continuity VII. proposing actions to safeguard the good.

Returning to Article 3 of Decree No. 3.551, 2000,¹⁰¹ we have the technical process instruction is supervised by Iphan (§1) with good and detailed description of all the elements that are culturally relevant (§2) and may be made by others bodies of the Ministry of Culture, the Iphan units or by a public or private entity that has specific knowledge on the subject (§3). Iphan issue an opinion regarding the registration proposal and send it to the Advisory Council of Cultural Heritage for resolution (paragraph 4), this opinion shall be published in the Official Gazette, for possible comments on the record, which should be submitted to that council within thirty days of its publication (§5).¹⁰²

If the decision of the Council is favorable, the property will be entered in the corresponding book and will receive the title of “Cultural Heritage of Brazil”, according to article 5 of the norm in question. Once the cultural asset has been registered, the Ministry of Culture will be in charge of the documentation by all technical means admitted, and it will be up to Iphan to maintain a database with the material produced during the investigation of the process and the wide promotion and dissemination of

¹⁰¹ BRASIL. Decree No. 3.551 of 2000.

¹⁰² BRASIL. Decree No. 3.551 of 2000.

that good, 6 of the Decree.¹⁰³ The title will be reassessed at least every ten years by Iphan, and it will be up to the Cultural Heritage Advisory Council to revalidate it, if it is denied, only the record will be kept as a cultural reference of its time (article 7).^{104 105}

6 Conclusions

It is an inherent need of human beings, since they are capable of apprehending and transmitting ways of transforming the world in which they live, sharing the feeling of belonging to a culture, a way of life. So it is, the creation of works that transcend them, that last for the other generations. The concept of culture adopted in this work hinges on a set of distinctive, spiritual, material, intellectual and affective traits that characterize a society and a social group encompassing, ways of life, value systems, traditions and beliefs. Culture is, in the words of Sahlins,¹⁰⁶ “precisely the organization of the present situation in terms of the past”.

As seen, cultural well is one that manifests a set of distinctive features that characterize the cultural identity of a society or a social group, which should have repercussions on the social inclusion and quality of life of these individuals. Intangible cultural heritage is made up of goods of immaterial nature that are transmitted from generation to generation and are constantly recreated by communities and groups in function of their environment, their interaction with nature and their history, seeking the continuity of their identity.

The recognition of a cultural object generates consequently the imprescriptibly of actions that aim at the reparation of their damages, since this is the case with environmental damages, and the possibility of defending cultural heritage through the use of effective procedural instruments. As an effect of recognition, juridical certainty of the nature of the good of cultural value and the submission of the thing to the juridical regime that is attributed to it arises.

It is a right and a duty of the State and of society to identify the Brazilian cultural heritage and protect its assets, which, given the recognition, fall on protection, collective enjoyment, prevention of damages, accountability of the violator of the cultural protection standards, balance for sustainable development, international solidarity policies, education, so that everyone is aware of their rights and duties

¹⁰³ BRASIL. Decree No. 3.551 of 2000.

¹⁰⁴ BRASIL. Decree No. 3.551 of 2000.

¹⁰⁵ Have been recorded: the Office of Potters of Goiabeiras (ES), the language and graphic Wajãpi (AP), the Candle of Our Lady of Nazareth (PA), the Samba de Roda of Recôncavo (BA), the Make Modes Viola trough (Midwest), the Office of Baianas acarajé (BA) Jongo Southeast (Southeast), the waterfall Iauaretê (AM), the Fair Caruaru (PE), Frevo (EP) and the Criollo Drum of Maranhão (MA), among others.

¹⁰⁶ SAHLINS, M. *Ilhas de história*. Tradução de Bárbara Sette. Rio de Janeiro: Jorge Zahar Editor, 1990. p. 192.

in relation to cultural heritage and intergenerational linkage. In view of the concern about the risk that the global market may bring to local and regional cultures, so that we can preserve our cultural identity and thus avoid our reduction to the “role of consumer passions of cultural goods conceived by other peoples”, great concern of Celso Furtado Monteiro.¹⁰⁷

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¹⁰⁷ MONTEIRO, C. F. Raízes do Brasil e a transição para a sociedade de massas. In: *Raízes e perspectivas do Brasil*. Campinas: Papyrus Editora da UNICAMP, 1985.

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