Environmental constitutionalism in the Amazon: a comparison focusing intangible cultural heritage protection

by Thiago Burckhart[1]

Abstract: *Il costituzionalismo ambientale in Amazzonia: una comparazione incentrata sulla tutela del patrimonio culturale immateriale* – Taking into consideration the reciprocal symbiosis between environmental constitutional law and the constitutional protection of cultural heritage, this article aims to comparatively analyze the protection of intangible cultural heritage (ICH) in the Amazon countries, under the prism of environmental constitutionalism. The hypotheses state that: 1) the development of environmental constitutionalism in the region is intertwined with the constitutional protection of ICH; and 2) the protection of the intangible elements of the Amazon cultures is a fundamental element for the effectiveness of environmental constitutional law in the region. It evidences the trends faced by regional contemporary democratic constitutionalism.

Keywords: environmental constitutionalism; Amazon; intangible cultural heritage; democratic constitutionalism; culture.

1. Introduction

Since the enactment of the 1988 Brazilian Constitution, currently in force, environmental constitutionalism in the Amazon has witnessed significant developments. Ever since, the constitutional protection of the environment has become a pivotal issue for the Amazon countries, being progressively enriched by new constitutions, especially the most recent ones, as it is the case of Ecuador (2008) and Bolivia (2009). This process was partly driven by the growing international concern over the protection of the Amazon Rainforest itself – and other South American biomes –, and also by the need of the nine States that compose its territory to establish legal and constitutional mechanisms for its protection.

Likewise, the protection of *cultural rights* has also been fostered as a "constitutional issue" in the region and internationally, following UNESCO's international legal instruments and political actions. This stimulated the design of constitutions – and the constitutionalism as well – that may be considered *multicultural* or *intercultural* in the region, concerned with the cognitive and epistemological opening towards the protection of

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cultural diversity and *culture* in its varied manifestations. In this context, the renewal of cultural heritage's legal concept by the recognition of its *intangible* dimension, in constitutional and international fields, had a remarkable effect on the protection of several cultural elements, especially indigenous ones, that directly impact on the conservation of the Amazon Rainforest.

This allows to state the reciprocal symbiosis between *environmental constitutional law* and the *constitutional protection of intangible cultural heritage*, inferred as complementary fields and in considerable synergy. Indeed, it is notable that culture is boosted not only as a key element of environmental protection, but also – and from a "comparative law" standpoint – as a properly "cultural formant" that focuses either *top-bottom*, but especially in a *bottom-up* movement. In this sense, the constitutional protection of the Amazon's intangible cultural heritage directly or indirectly reinforces the protection of the regional environmental elements, giving consistency to the consolidation of environmental constitutionalism in the region.

Thus, the aim of this article is to comparatively analyze the protection of intangible cultural heritage in the Amazon countries, under the prism of environmental constitutionalism. The hypotheses state that: 1) the development of environmental constitutionalism in the region is intertwined with the constitutional protection of intangible cultural heritage; and 2) the protection of the intangible elements of the Amazon cultures is a fundamental element for the effectiveness of environmental constitutional law in the region. The article is grounded on the field of comparative constitutional law, in a perspective that comprises law in the dynamics of "constitutional policies"[2], in a structural-functionalist perspective focusing on the legislative-constitutional formant, and is divided into three parts, concerning: environmental constitutionalism in the Amazon (topic 2); the constitutional protection of the intangible cultural heritage in the Amazon (topic 3); between intangible cultural heritage and environmental protection: a critical analysis (topic 4).

2. Environmental Constitutionalism in the Amazon

"*L'Amazonie n'existe pas*", states the French geographer Jean-Michel Le Tourneau. This sentence makes reference to the *mythical* or *mythological* dimension that very often prevails over the geographical one in the Amazon – which is also related to its own name, that refers to an Ancient Greek myth. With this sentence, Le Tourneau also points towards the misunderstanding that Europeans instilled in the Amazonian reality, understanding it either as a "*green hell*", hostile to men, or even as a pure and untouched "*virgin forest*", that should be preserved as it is. The reproduction of these concepts, even

[2] The term "constitutional policies" is here understood following the authors such as Gustavo Zagrebelsky, Milena Petters Melo and Michele Carducci, who indicate with it the sum of actions carried out by several actors – social, political, and also the third sector – to implement the constitution. For further analysis, see: G. Zagrebelsky, *Il diritto mitte: legge, diritti, giustizia*, Torino, Einaudi, 1992; M.P. Melo; M. Carducci; R. Sparemberger, *Politicas constitucionais e sociedade*: direitos humanos, bioética, produção do conhecimento e diversidades, Curitiba, Prismas, 2016.

among the Amazon countries, rebounded in decades of inadequate environmental management models in the region, which points to the need to overcome it[3].

In this context, the emergence of "environmental constitutionalism" may be read as a *turning point* in the regional environmental governance. Indeed, the third cycle of Latin American democratic constitutionalism[4], from the 1980s onwards, is characterized by a cognitive openness of the Constitutions towards the "environmental issue". Driven by the international debates over "sustainable development", environmental constitutionalism brings into question, through the recognition of a "right to a balanced environment", the development frameworks in a wide outlook – such as economic, social, political and cultural development, for example. It fosters the need to invest efforts and resources towards socio-environmental sustainability, in order to build alternatives for a "common" future: environmentally sustainable, socially fair and culturally rich.

The influxes and convergences of constitutionalism towards international law – typified by processes of "internationalization of constitutional law" and "constitutionalization of international law"[5] – paved the way for the constitutionalization of the environment. The comprehension of the "Anthropocene"[6], that points to a geological era of environmental destruction caused by human action, along with the theoretical and normative evolution of sustainable development as a paramount concept, were the epistemological frameworks for constitutional environmental protection worldwide. To date, as Domenico Amirante underlines, a third of the world's constitutions bring up references regarding environmental protection[7], setting apart a gradual process of "ecologization of law" [*ecologizzazione del diritto*][8].

[3] "The Amazon does not exist", in: F.M. Le Tourneau, *L'Amazonie*: histoire, géographie, environment, Paris, CNRS Éditions, 2019.

[4] See: R. Gargarella, *Latin American constitutionalism*, 1810-2010: the engine room of the Constitution, Oxford, Oxford University Press, 2013, p. 34-53.

[5] See: A. Peters; J. Klabbers; G. Ulfstein, *The Constitutionalization of International Law*, Oxford, Oxford University Press, 2011. In this sense, as Valerio Onida points out, constitutionalism ceases to contain movements of an essentially "national" character, rooted in the respective national contexts, to raise itself as a foundation of value that tends to be universal: V. Onida, *La Costituzioni ieri ed oggi*, Bologna, Il Mulino, 2008.

[6] "The anthropocene could arguably fulfil a similar analytical function. It has the potential to raise new questions, and to identify new issues, emerging priorities, new relationships and, more importantly, new interventionist regulatory strategies that are couched in global environmental constitutionalism terms", cfr. L.J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene*, London, Hart Publishing 2016, p. 17. See also: L.J. Kotzé, *The Conceptual Contours of Environmental Constitutionalism*, in *Widener Law Review*, n. 189, 2015.

[7] See: D. Amirante, *Del Estado de derecho ambiental al Estado del antropoceno: una mirada a la historia del constitucionalismo medioambiental*, in *Revista General de Derecho Público Comparado*, 1, 2020.

[8] As Domenico Amirante highlights, "[...] over the last 25-30 years in particular, there has been a progressive 'greening' of both political life and the productive world, and of scientific disciplines" (my translation), cfr. D. Amirante, *Diritto Ambientale e Costituzione: esperienze europee*, Milano, FrancoAngeli, 2003. Also in this sense and for further analysis, see. J.R.M. Leite. *A Ecologização do Direito Ambiental Vigente: Rupturas Necessárias*, Rio de Janeiro, Lumen Juris, 2020.

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In this sense, environmental constitutionalism seeks to offer a viable answer to great civilizational complex issues. It is an essentially interdisciplinary field, that perceives in the constitutional dimension a scope of "internormativity" radiation, in an overlapping approach[9]. It can be said that "the constitutional right to live in a healthy environment represents a tangible embodiment of hope, an aspiration that the destructive pulling ways of the past can be replaced by cleaner, greener societies in the future" [10]. The constitutionalization of the environment in different countries and in different levels – in a *multilevel* perspective – reflects what David Boyd calls "the revolution of environmental rights" [11], by which he offers a theoretical arsenal for consolidating the understanding of the need to protect the environment for current and future generations, along with the enrichment of fundamental rights' theory.

As Constitutions are the main legal instrumental norm of the Rule of Law [*Stato Costituzionale Democratico*], the constitutionalization of any new subject assign a higher level of legal and political importance, superior to other elements of the legal system. As Kristian Ekeli highlights, focusing on the Anglo-Saxon debate, the birth of a "green constitutionalism" implies on the rearrangement of political and legal institutions, as well as the attribution of an important role to the Constitutional Courts and Judicial Power in general[12]. Indeed, the constitutionalization of environment enables to categorize the world constitutions into three large groups: 1) *environmental constitutions in strict sense*, which are those that provide for explicit reference regarding environmental protection since their own enactment, as it is the case of Brazil, for example; 2) *revised environmental constitutions*, which are those that introduced amendments to contemplate the environmental protection, as occurred in French Guyana (France) by the enactment of the *Charte de l'Environnement* [Environmental Charter] in 2004; and, 3) the *silenced constitutions*, that have no explicit reference to environmental protection[13].

Hence, the recognition of the constitutional right to the environment, whether as a *subjective right* and/or *obligation of the State and society*, currently places the Amazon region in a context marked by a "high degree of constitutional protection". The current Amazonian constitutions, in

[9] "Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide", J.R. May and E. Daly, *Global Environmental Constitutionalism*, Cambridge, Cambridge University Press, 2014, p. 02. See also: J.R. May, E. Daly, *Global Constitutional Environmental Rights*, in S. Alam et. al. (Eds.), *Routledge Handbook of International Environmental Law*, London, Routledge, 2012.

[10] D.R. Boyd, *The Effectiveness of Constitutional Environmental Rights*, in *Yale UNITAR Workshop*, 2013, p. 23-24.

[11] D.R. Boyd, *The Environmental Rights Revolution: a study of Constitutions, Human Rights and Environment*, Vancouver, UBC Press, 2012.

[12] See: K.S. Ekeli, *Green Constitutionalism: the constitutional protection of future generations*, in *Ratio Juris*, 20, 3, 2007.

[13] See: D. Amirante, *Environmental Constitutionalism through the Lens of Comparative Law: New Perspectives for the Anthropocene*, in D. Amirante and S. Bagni (eds), *Environmental Constitutionalism in the Anthropocene*, London, Routledge 2022.

chronological order, are: Suriname (1967), Brazil (1988), Colombia (1991), Peru (1993), Venezuela (1999), Guyana (2003 reform), Ecuador (2008) and Bolivia (2009). Apart from it, considering that French Guiana is a French overseas territory, one should consider the 2004 *Charte de l'Environnement*, which is part of the country's "*bloc de constitutionnalité*" and is enforced in this territory, also as part of the regional South American constitutionalism, in order to create a fruitful dialogue among all the constitutional cultures of the region.

The evolution of environmental protection in these constitutions took place progressively. The 1987 Suriname Constitution, although it was the first "environmental constitution" in the region, did not establish a "subjective right" to the environment, but only the duty of "collective responsibility" towards its protection, which can be considered as a *moderate* constitutional protection. Therefore, it was the 1988 Brazilian Constitution that put in place a new constitutional cycle in the subcontinent and expressly provides for the *right to an ecologically balanced environment*. It can be said, therefore, that the 1988 Brazilian Constitution is a pioneer by establishing two important innovations: 1) the notion of an *ecologically balanced environment*; and, 2) the notion of *intergenerational justice* as a central element of environmental constitutional protection[14].

The following Constitutions also established the right to the environment. The Constitution of Colombia (1991) recognizes the right to a healthy environment, and the State has the duty to protect and conserve its diversity and integrity (art. 79). The Constitution of Peru (1993) also established the fundamental right to a balanced environment for the adequate development of life (art. 22). The Constitution of Venezuela (1999) highlights the right and duty of each generation to protect and maintain the environment for the benefit of current and future generations (art. 127). Likewise, 1980 Guyana's Constitution passed a constitutional reform in 2003 in which it recognizes everyone's right to a healthy environment (art. 149J).

In this chronological scenario, the most recent constitutions of Ecuador (2008) and Bolivia (2009) are the ones that carried out the most significant transformations regarding environmental protection. Along with recognizing the right to an ecologically balanced environment – art. 14 in Ecuador and art. 33 in Bolivia – these constitutions are deeply rooted in indigenous cosmovisions and in the notion of "*buen-vivir*" [well-being], which is fostered as a constitutional principle – *Sumak Kawsay*, in Ecuador and *Suma Qamana*, in Bolivia. Actually, these constitutions inscribe a "biocentric turn" in contemporary environmental constitutionalism[15], innovating by providing a specific Jurisdictions for environmental issues and recognizing, in the Ecuadorian case, the *rights of nature* (art. 71 et seq.). Bolivia, on the other hand, undertakes a detailed constitutionalization of the

[14] Since its promulgation, the Brazilian Constitution has been called as a "*Green Constitution*".

[15] For further analysis, see: D.R. Boyd, *The Rights of Nature*: a legal revolution that could save the world, Toronto, ECW Press, 2017; J.T. Martínez (Ed.), *Voces de la Amazonía: el presente y el futuro de los derechos humanos y de los derechos de la naturaleza*, Bogotá, Universidad Externado de Colombia, 2021.

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Amazon, considering it as a strategic space of special protection for the integral development of the country due to its high environmental sensitivity, existing biodiversity, water resources and eco-regions (art. 390).

It is worth mentioning the *Charte de l'Environnement*, which is enforced in French Guyana. This document, enacted in 2004, also recognized the right to a livable and balanced environment that respects health, as well as everyone's duty to preserve it (art. 1 and 2). Indeed, all these countries also have national policies aimed at protecting the environment, as seen in Brazil *Politica Nacional do Meio Ambiente (Lei 6.938/1981)* [National Policy for the Environment]; Bolivia: *Ley del Medio Ambiente de 27 de marzo de 1992* [Law for the Environment]; Peru: *Politica Nacional del Ambiente al 2030* (more recent policy, approved by the Supreme Decree n. 023-2021-MINAM) [National Policy for the Environment]; Ecuador: *Ley de Gestión Ambiental, 418 de 10 setembro 2004* [Environmental Governance Law]; Colombia: *Ley 99 de 1993* [Law n. 99/1993]; Venezuela: *Ley Organica del Ambiente, Ley 5.833 de 2006* [General Law for the Environment]; Suriname: *Environmental Framework Act n. 97/2020*; Guyana: *Environmental Protection Act n. 11/1996*; French Guyana (France): *Loi portant engegement national pour l'environment* (Loi n. 2010-788) [Law of Engagement Towards the Environment].

Actually, the high level of environmental constitutional protection in all Amazon countries, excepting Suriname, endorses the fact that Latin America, and especially South America, is at the *avant-garde* when it comes to environmental constitutionalism[16]. As Domenico Amirante points out, "Latin America appears the area in which the development of environmental constitutionalism is more widespread and homogeneous"[17], which leads Eduardo Rozo Acuna to underline that Latin America is the geopolitical area more prone to build a "*Socio-Environmental State*", placing environment as a central issue, structural for the State actions, and, consequently, for national policies and polity[18].

The constitutional models developed in the region served as inspiration for several other constitutional systems, either to carry out the constitutionalization of environment as a fundamental right, or even to recognize it by the means of constitutional justice. This recognition furthered a certain degree of political and legal integration in the Amazon, through the *Amazon Cooperation Treaty* (1978), and the *Amazon Cooperation Treaty Organization*, created in 1995[19] – despite the fact that French Guyana (France) do not compose it. However, given the "limitations of international

[16] "There is little doubt that the leading American nations in the area of environmental constitutionalism are those of Latin America", L. Collins, *Environmental Constitutionalism in the Americas*, in: L. Kotze et al. (Eds.), *New Frontiers of Environmental Constitutionalism*, Nairobi, United Nations Environmental Programme, 2017.

[17] D. Amirante, *Environmental Constitutionalism through the Lens of Comparative Law: New Perspectives for the Anthropocene*, cit., p. 160.

[18] E. Rozo Acuna, *Lo Stato di diritto ambientale con speciale riferimento al costituzionalismo latino-americano*, in E. Rozo Acuna (ed), *Profi li di diritto ambientale da Rio De Janeiro a Johannesburg. Saggi di diritto internazionale, pubblico comparato, penale ed amministrativo*, Torino, Giappichelli, 2004, p. 151.

[19] For further analysis, see: J.R. May and E. Daly, *Global Environmental Constitutionalism*, cit.

law"[20], it is evident that the constitutionalization of environment give rise to more effective results regarding environmental protection – that internationalization of environment –, especially in the contexts of global periphery, as it is the case of the Amazon region.

3. The constitutional protection of the intangible cultural heritage in the Amazon

Whilst environmental constitutionalism gradually strengthened in the region, the constitutional protection of culture also made ground as a constitutional subject – or even, in the countries that already had tradition in constitutionally protecting culture, it was bolstered as such. Historically marked by theoretical and normative underdevelopment[21], *cultural rights* have since gained relevance from a political point of view and constitutional projection as fundamental rights[22]. Boosted by the "new social movements" that have been organized in South American public sphere since the 1970s, particularly by the intensification of the "politicization of culture"[23] – in which indigenous peoples have had a protagonist role –, along with the engagement of major institutions and International Organizations, the recognition of cultural rights is actually a historic innovation for contemporary democratic constitutionalism in regional and global terms.

Following the cognitive openness of post-Second World War's constitutionalism towards the constitutionalization of culture[24] in a broad sense – and the constitutionalization of "cultural heritage" in *stricto sensu* –, new aspects of culture were established within the Constitutions, such as Intangible Cultural Heritage (ICH). Soon after the enactment of the *UNESCO Convention for the Protection of the World Cultural and Natural Heritage*, in 1972, the international and national spheres of certain countries evoked the discussion on the need to protect the intangible features of different cultures, that have not been contemplated by the aforementioned

[20] See: M. Delmas-Marty, *De la grande accélération à la grande métamorphose: vers un ordre juridique planétaire*, Paris, Polis Academie 2017; F. Capra and U. Mattei, *The ecology of law: towards a legal system in tune with nature and community*, Oackland, Berrett-Koehler Publishers, 2015.

[21] P. Meyer-Bisch, *Les droits culturels: une catégorie sous développé de droits de l'homme*, Fribourg, Editions universitaires, 1993; J. Symonides, *Cultural rights: a neglected category of human rights*, in *International Social Sciences Journal*, v. 50, issue 150, 1998, J. Luther, *La cultura de los derechos culturales*, in P. Häberle et al (eds) *Derechos fundamentales, desarrollo y crisis del constitucionalismo multinivel: libro homenaje a Jörg Luther*, Toronto, Thomson Reuters, 2020.

[22] See: F.H. Cunha Filho, *Teoria dos direitos culturais: fundamentos e finalidades*, São Paulo, Edições Sesc, 2018.

[23] S. Benhabib, *Las reivindicaciones de la cultura: igualdad y diversidad en la era global*, Buenos Aires, Katz Editores, 2006; A. Mattelart, *Diversité culturelle et mondialisation*, Paris, Le Decouverte, 2007.

[24] In this sense, see: G. Cavaggion, *Diritti culturali e modello costituzionale di integrazione*, Torino, Giappichelli, 2018; J. Luther, *Le frontiere dei diritti culturali in Europa*, in G. Zagrebelsky (Ed.), *Diritti e Costituzione nell'Unione Europea*, Roma-Bari, Laterza, 2003.

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Convention[25] – inscribed in an approach linked to the preservation of "tangible" cultural heritage.

It spurred the revision of legislations and constitutions worldwide to accommodate the protection of intangible dimension of cultural heritage. This impetus stemmed internationally in the promulgation of the *UNESCO Convention for the Safeguarding of Intangible Cultural Heritage*, in 2003, that played an important role in the development of national public policies for its safeguarding. The Convention provides for the need of each States to establish a "national inventory" (art. 12) and, through it, to structure a public policy focused on safeguarding assets recognized as intangible cultural heritage. The recognition of ICH at the national level is one of the requirements for the inclusion of a specific ICH in one of the UNESCO Representative Lists, also disciplined by the aforementioned Convention[26].

Indeed, in the Amazon region, the Brazilian case is of special relevance, given that the concern over the ICH dates back to the 1930s[27]. At that moment, it was acted out the first public policies aimed at protecting the "built heritage" and the IPHAN (*Instituto do Patrimônio Histórico e Artístico Nacional*) was created. Despite the fact that at that time it was not possible to carry out the development of a public policy for ICH, and to inscribe it in the legislation, it was with the 1988 Brazilian Constitution that for the first time the protection of cultural heritage in its both dimensions – "tangible" and "intangible" – was recognized (art. 216). Since then, the country is placed in the *avant-garde*, in addition to other countries in the world[28], in what relates to the constitutional protection of ICH.

Taking the Brazilian case as a paradigmatic model of constitutional protection for the ICH, it can be pointed out that other Constitutions in the region also recognize a strong level of constitutional protection for the ICH. This is the case of the most recent constitutions of Venezuela (1999, arts. 99 and 100), Ecuador (2008, arts. 379 and 380) and Bolivia (2009, arts. 100 and 101), which expressly recognize the ICH as an element of the national cultural heritage, imposing on the State the need to implement public policies in this area. Likewise, one can categorize some countries with a *weak* level of constitutional protection towards intangible cultural heritage, as is the case of Colombia (1991, art. 72), Peru (2003, art. 21.7), Guyana (2003 Constitutional Reform, art. 149G) and Suriname (1987, art. 47), for recognizing only the "tangible" dimension of cultural heritage or for referring to the cultural heritage of a specific ethnic group – as is the case of Indigenous Peoples in Suriname.

Also, it is worth mentioning the case of French Guiana, in which the French Constitution does not expressly recognize cultural heritage as a

[25] See: J. Blake, *International Cultural Heritage Law*, Oxford, Oxford University Press, 2015; L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford, Oxford University Press, 2013.

[26] As established the "*Operational Directives for the Implementation of the Convention for the Safeguarding of Intangible Cultural Heritage*", disponible in: https://ich.unesco.org/en/directives

[27] For more information, see: A.A.C. Rubim, *Políticas Culturais no Brasil: Tristes Tradições, Enormes Desafios*, in A.A.C. Rubim; A. Barbalho (Eds.), *Políticas Culturais no Brasil*, Salvador, Editora da UFBA - EDUFBA, 2007, p. 11-36.

[28] As it is the case of Japan and South Korea, for instance.

fundamental right, despite the fact that the *bloc de constitutionnalité* recognized the *right to access culture* (Preamble to the 1946 French Constitution). However, in the latter case, a reference should be made to the fact that France has ratified the UNESCO 2003 Convention and this document has a supra-legal character in its legal system. This Convention was also ratified by the Amazon countries, with the exception of Guyana and Suriname – two countries that have a different legal tradition from the others. Based on the current comprehension of multi-level constitutionalism, it can be stated that the 2003 UNESCO Convention plays an important role in strengthening the "constitutionalism of culture"[29] [*el constitucionalismo cultural*] in the region and across the globe.

Even so, the constitutionalization of ICH came about in different moments of national cultural policies' consolidation in general and heritage policies in specific, in these nine countries. Occasionally, the inclusion of ICH in the constitutions collide with a political history marked by a lack of tradition in the protection of "built" cultural heritage, which can give rise to deep asymmetries between the content inscribed in the constitution and its context. In the case of the Amazon countries, Brazil is the unique country that has a "tradition" in this area, with previous and solid experience, in addition to an institutional framework that dates back to the first part of the 20th Century. French Guyana could also be considered in this same perspective, because it is a part of France – a country with strong tradition in this field. However, it must be highlighted that French Guyana was, as a colony, the periphery of French territory, and it still lingers as such even after its conversion into a French region. So, it is difficult and precarious to define it as a territory with tradition in the protection of cultural heritage, due to the inequalities that this territory still faces. Other amazon countries, namely Ecuador, Colombia, Venezuela, Peru, Bolivia – and so French Guyana must be categorized here – do not have a consolidated tradition as Brazil, but have recently enacted legislations to the protection of ICH[30].

From an institutional point of view, all countries, excepting Brazil – that in 2019 had its Ministry of Culture extinct – have specific Ministries for Culture[31]. Likewise, Bolivia, Peru, Ecuador, Colombia, Venezuela, French Guiana (France) and Brazil have established an agency or institute aiming at protecting cultural heritage in general[32]. Within the framework of the latter public bodies, Bolivia, Peru, Colombia, Venezuela and Brazil have also institutional arrangements with the aim of protecting specifically the

[29] See: C.R. Miguel, *El Constitucionalismo Cultural*, in *Cuestiones Constitucionales*, n. 9, 2003.
[30] R.P. Teves, *Introducción*, in R.P. Teves, *Experiencias y politicas de salvaguardia del patrimonio cultural inmaterial en América Latina*, Cusco, CRESPIAL/UNESCO, 2010.
[31] Bolívia: *Ministério de Culturas, Descolonización y Despatriarcalización*; Peru: *Ministrério de Cultura*; Equador: *Ministério de Cultura y Patrimonio*; Colombia: *Ministério de Cultura*; Venezuela: *Ministério del Poder Popular para la Cultura*; Guiana: *Ministry of Culture, Youth and Sport*; Suriname: *Ministerie van Onderwijs Wetenschap en Cultuur*; Guiana Francesa: *Ministère de la Culture.*
[32] Bolivia: *Dirección General del Patrimonio Cultural*; Peru: *Dirección General del Patrimonio Cultural*; Equador: *Instituto Nacional del Patrimonio Cultural*; Colombia: *Dirección del Patrimonio*; Venezuela: *Comisión del Patrimonio Cultural*; Guiana Francesa: *Direction du Patrimoine*; Brasil: *IPHAN.*

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ICH[33]. Finally, it is worth mentioning that Bolivia, Peru, Ecuador, Colombia, Venezuela and Brazil have general laws providing for the protection of culture, in which include provisions on tangible and intangible cultural heritage[34]. Guyana and Suriname, however, do not have so far institutions for the protection of intangible cultural heritage, nor do they even have specific legislations or public policies on the subject.

Therefore, it is remarkable that there is a great diversity of realities related to the protection of the ICH in the region, whether with regard to constitutional protection or even within the political-institutional field. The region contains countries that have a consolidated tradition, as it is the case of Brazil, and, in the same way, also countries that do not even have institutions and legislation focused on this subject, and that did not ratify the 2003 UNESCO Convention, as it is the case of Suriname and Guyana. In this context, there is still a "distanza tra il diritto e il fatto, tra ciò che deve essere e ciò che è, tra le aspettative e la realtà", as highlights Gustavo Zagrebelsky[35]. It can be observed more explicitly when analyzing the political and institutional changes that have recently taken place in the region – whereby in some cases scholars point to the concept of "constitutional degradation"[36] or "democratic backsliding" –, or even when one observes that many of the institutions are actually recent and are still consolidating themselves.

However, in spite of the discrepancies between these countries, it is also clear that most of the analyzed countries have ICH safeguard policies that have made positive effects[37]. These outcomes are notable by the recognition of several ICH practices in the UNESCO Representative List, as it is the case of: *Expressões Orais e Gráficas dos Wajãpi*, in Brazil (2008); the *Legenda de los Yuruparí*, in Colombia (2011); *El patrimonio oral y las manifestaciones culturales del Pueblo Zápata* in Ecuador and Peru (2008); and, the *Danza de las Tijeras*, in Peru (2010), to name some examples. In this sense, there is the need for the States to get engaged more incisively with the international protection of ICH, especially by the international mechanisms of cooperation between two or more States – a practice still little explored in South America[38].

[33] Bolivia: *Unidad del Patrimonio Inmaterial*; Peru: *Dirección del Patrimonio Inmaterial*; Colombia: *Grupo del Patrimonio Cultural Inmaterial*; Venezuela: *Fundación Centro de la Diversidad Cultural*; Brasil: *Direção do Patrimônio Imaterial.*

[34] Bolivia: *Ley 530 del Patrimonio Cultural Boliviano*; Peru: *Ley 28298 – Ley General del Patrimonio Cultural*; Equador: *Ley Organica de Cultura, 2016*; Colombia: *Ley 397/1997 – Ley General de Cultura*; Venezuela: *Ley Organica de Cultura (2014)* and *Ley del Patrimonio Cultural de los Pueblos y Comunidades Indigenas (39.115)*; Brasil: *Decreto 3.551/2000.*

[35] "A distance between law and fact, between what should be and what really is, between expectations and realities", G. Zagrebelsky, *Diritti per forza*, Torino, Einaudi, 2017, p. 7.

[36] T. Burckhart, *Constitutional degradation in Brazil and the protection of cultural rights: deconstitutionalization and institutional deregulation*, in: T. Groppi (Ed.), *Framing and Diagnosing Constitutional Degradation*, Roma, Consulta Online, 2022.

[37] See R.P. Teves, *Introducción*, in R.P. Teves, *Experiencias y politicas de salvaguardia del patrimonio cultural inmaterial en América Latina*, cit.

[38] As established by the "*Operational Directives for the Implementation of the Convention for the Safeguarding of Intangible Cultural Heritage*", cit.

Additionally, one can point to the ICH as a new element of improvement towards a "constitutionalism of culture" in the Amazon region, that goes beyond the models of "multicultural" constitutions – grounded on a merely liberal axis influenced by Anglo-Saxon experiences[39] – marking an opening on the road to *interculturality*. Thus, it seems that the constitutional protection of ICH in the Amazon, unlike the "environmental constitutional protection" – that tends to inculcate a more homogeneous facet – is marked by a greater degree of diversity. This is partly due to the fact that "culture" is a particularly sensitive issue in different national contexts, which sometimes prevents more incisive actions for its improvement because of political and/or ideological disagreements linked to it.

Anyhow, it should be noted that the constitutional protection of ICH is triggered not only as a "legislative" or "constitutional" formant, but also as a "cultural formant" [40], insofar as the protection of the intangible elements of Amazon cultures is of relevant importance for the guarantee of effectiveness of regional environmental constitutional law. Thus, the constitutional protection of ICH breaks theoretical, methodological and epistemological boundaries, especially when analyzed through the prism of environmental constitutionalism.

4. Between intangible cultural heritage and environmental protection: a critical analysis

The constitutional comparison among the Amazon countries demands for more elements in order to build a possible interpretation, whether they are from *legal* or *extra-legal* nature. Starting by the last one, it must be highlighted that the Amazon remains an "unknown" geographical space, although it is at the center of contemporary debates over the environmental and climate crisis. Currently, more than 35 million people live in the Amazon, with population growth rates that surpass those of Brazil, in which about 9% of its population is composed of Indigenous Peoples[41]. It is the region with the greatest biodiversity on the planet, it has the largest hydrographic basin in the world – the Amazon River Basin – and still contains half of the remaining tropical forests across the globe[42].

Taking into consideration the legal elements inferred, it must be noted that notwithstanding the fact that South America is in the *avant-garde* of environmental constitutionalism, there is no truly *common protective language* regarding the constitutional protection of the ICH among the countries that make up the Amazon territory. This is because the ICH is not considered a

[39] For an analysis of the concept of "multicultural constitutionalism", see: D.B. Maldonado, *La Constitución Multicultural*, Bogotá, Universidad de los Andes, 2006.
[40] For a further analysis, see: L. Pegoraro, *Derecho constitucional comparado*: Itinerarios de Investigación, Universidad Libre, 2011, p. 50.
[41] See: https://wwf.panda.org/discover/knowledge_hub/where_we_work/amazon/about_the_amazon/
[42] See: https://wwf.panda.org/discover/knowledge_hub/where_we_work/amazon/about_the_amazon/

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"constitutional" issue in most of the analyzed constitutions, even though the 2003 UNESCO Convention is a basic legal instrument that must be considered for the elaboration and improvement of national policies regarding ICH – with the exception, as already mentioned, of Suriname and Guyana, which have not ratified it yet.

Despite most countries make part of the civil law tradition, there are countries in the region – such as Guyana – that make part of the common law tradition. And, in the same way, the peculiar case of French Guyana, the only non-independent territory of the subcontinent, also calls into question the possibility to infer over a protective common language, since it is not even subjected to the jurisdiction of the Inter-American Court of Human Rights[43], as its territory belongs to France and therefore is part of the European Union and a member of the Council of Europe.

In this context, the Amazon countries also have different models of State and government, ranging from the Federations – which is the case of Brazil and Venezuela – to the Unitary States – Peru, Colombia, Guyana, Suriname and French Guyana (France) –, and also passing through the Unitary States that recognize more expressively constitutional arrangements aiming at guaranteeing local and ethnic autonomy – as it is the case of Bolivia and Ecuador. Taking into considerations its political regimes, the countries range from strong Presidentialism – Brazil, Bolivia, Peru, Ecuador, Colombia and Venezuela –, Semi-Presidential regimes – in French Guyana (France) –, and Parliamentarism – Guyana and Suriname.

The aforementioned third cycle of Latin American constitutional had different repercussions in the Amazon countries. Actually, from the constitutional point of view Brazil, Bolivia, Peru, Ecuador, Colombia and Venezuela have common roots – although each country has peculiarities –, that are related to the Iberian colonization model, and left several significant marks in present-day constitutional systems. Suriname and Guyana, as they were colonies of Netherlands and United Kingdom respectively, have different constitutional systems, in which reproduce the legal standards of the former colonies and that have little dialogue with the other constitutional models of Amazon and Latin American countries.

In this perspective, French Guyana does not have a singular model, but reproduces the one established by France. These differences, therefore, should not be an obstacle to the dialogue between the constitutional systems, but, on the contrary, an incentive for doing so. The political and legal integration in the subcontinent, that had its upmost with the creation of UNASUR (Union of South American Nations) in 2008, was not able to establish the systematization of legal pluralism[44], nor even to strengthen legal and political dialogue in order to place regional policies and common legal frameworks[45] on the environment and cultural heritage, for example. Not even the OCTA was capable to provide the means to do so.

[43] Venezuela has also withdrawn from the Inter-American Human Rights System in 2013.

[44] See M. Delmas-Marty, *Le pluralisme ordonné*, Paris, Seuil, 2006.

[45] For further analysis, see P.H.F. Nunes, *A institucionalização da Pan-Amazônia*, Curitiba, Prismas, 2018.

With this in mind, it should be noted that ICH can be read as a *strategic element of integration and international cooperation* between these countries. Furthermore, the implementation of a national policy aimed at protecting ICH – and in dialogue with the international dimension represented by UNESCO – tends to bring up several benefits for these States: 1) the *preservation of the environment*: the safeguarding of cultural heritage and particularly intangible cultural heritage – the same can be related to "natural heritage" – has a direct relationship with environmental preservation in which it is reproduced, without which it would not be possible to guarantee its continuation as a "living" cultural practice, which triggers an "intercultural management of natural resources" [46]; 2) the *empowerment of communities* through their participation on ICH inventory and safeguarding processes, which is one of the requirements of 2003 UNESCO Convention, provided for in the art. 15; 3) *recognition and social justice*: the recognition of groups and communities' ICH by the States – sometimes excluded or marginalized from political and economic processes – drives the construction of a fruitful relationship between States and communities, along with their participation in shaping the sense of nation, which has historically been related to the political and economic *élites* of these countries, and can serve as an instrument to *prevent* or *mediate* cultural and ethnic conflicts within national contexts.

The multilevel constitutional protection of ICH – which includes the international normative dimension of 2003 UNESCO Convention – reveals several tensions that are constitutive of the current stage of contemporary democratic constitutionalism. The one that perhaps characterizes it the most is the tension that arises from the confrontation between *constitutional provisions vs. neoliberal rationale*, that tends to conceive culture and ICH as "commodities", instead of seeing it as a "*common good*". Although the ICH has an important economic dimension to be sustainably explored, while its subsumption to neoliberal rationale tends to privilege only cultural practices that bring over a higher and immediate financial and economic return. This is particularly sensitive when it comes to the Amazon reality, marked by marginalization in the most diverse national contexts, insofar as it is a region considered "exotic" and difficult to access by these countries, which can lead to concentrating recognition of the ICH in large cities and regional and provincial capitals, deepening the internal economic inequality dynamics.

Likewise, safeguarding the traditional knowledge of Amazon peoples on the rainforest through ICH instrument also directly contributes to environmental preservation[47]. This has the potential to provide subsidies to rethink and restructure Amazon's economy, overcoming the economic model based on environmental and cultural devastation, which affects much

[46] D. Amirante, S. Bagni, *Introduction*, in: D. Amirante, S. Bagni, E*nvironmental Constitutionalism in the Anthropocene*, cit., p. 9.

[47] See: M.C. da Cunha; A.G. Morim de Lima, *How Amazonian Indigenous Peoples enhance* Biodiversity, in: B. Baptiste, D. Pacheco, M.C. da Cunha and S. Diaz. (Eds.). *Knowing our Lands and Resources: Indigenous and Local Knowledge of Biodiversity and Ecosystem Services in the Americas*. Knowledges of Nature, Paris, Unesco, 2017, p. 1-22.

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of its territory[48] in favor of an economic model based on the *knowledge of nature* [*economia do conhecimento da natureza*][49]. This is one of the greatest challenges that current politics and constitutional law must face, that is, to establish mechanisms that are capable of having a direct or indirect impact on the economic macrostructure, in order to make the Amazon economy effectively sustainable[50].

Despite the several difficulties regarding the protection of ICH, it can be stated that regional environmental constitutionalism fosters the protection of environment and cultural – in particular ICH – as a *trend within a context of epistemological openness*. To the extent that the public debate comprehends that culture is an issue of great relevance, whether politically or economically, it is evident that the interest in constitutionalizing its most varied aspects and realms, including ICH, is boosted as a trend of contemporary constitutionalism. This does not come about differently in the Amazon countries, which have a rich range of cultural practices that can be recognized as ICH and in which the benefits of the constitutionalization of an institute such as ICH are gradually recognized.

The region's constitutional literature tends to conceive the protection of tangible and intangible cultural heritage as belonging to the discipline of *environmental law* or *environmental constitutional law*, insofar as there is an interdependence between these areas. This synergy is evident either theoretically or even in terms of its *praxis*, given that the protection of the intangible elements of Amazon cultures directly implies on the protection of territory and physical space – through the institution of protected areas, indigenous lands, environmental reserves, among others instruments. As Gustavo Zagrebelsky points out, when referring to the environment as a "value to be preserved", one must not consider only the physical, historical or naturalistic space, but the void of consciousness must also be preserved[51].

In this way, other formants have also been of relevant importance for the enforcement of the ICH and environmental protection, especially in the jurisprudential field. Likewise, the *International Cultural Heritage Law*, specifically the 2003 UNESCO Convention, provides for several instruments for the deepening of international cooperation in this field, something that need to be taken into consideration by these States. Along with the improvement of national public policies related to the protection of the ICH, and its inclusion into the grammar of socio-environmental sustainability, international cooperation for the ICH also poses a challenge for present and future generations in the subcontinent.

5. Conclusion

[48] By reducing deforestation, illegal mining and land grabbing. See: R. Abramovay, *Amazônia: por uma economia do conhecimento da natureza*, São Paulo, Edições Terceira Via, 2019.

[49] See: R. Abramovay, *Amazônia: por uma economia do conhecimento da natureza*, cit.; B. Becker, *Geopolítica da Amazônia*, in *Estudos Avançados*, 19, 53, 2005.

[50] See K. Otsuki, *Sustainable Development in the Amazon: paradise in the making*, London, Routledge, 2013.

[51] G. Zagrebelsky, *Diritti per forza*, Torino, Einaudi, 2017, p. 123.

Latin American constitutionalism is historically marked by political-institutional instability that directly or indirectly impacts the effectiveness of its normative contents[52]. In this context, environmental constitutionalism is also marked by this characteristic, and is inscribed in several contradictions and challenges. Although this is an *avant-garde* constitutionalism in comparison to other constitutional systems worldwide, its effectiveness, not infrequently, is conditioned to the political-institutional and ideological changes that come about in the governmental field in different levels, especially in the national and/or federal ones. This is directly related to a history marked by *fragile* political tradition in these countries regarding the implementation of the Constitutions.

However, the clearest contradiction of this process is that the constitutionalization, whether of the natural environment or even of the intangible cultural heritage, guarantees, even if in a precarious way, a satisfactory level of protection of these commons [*beni comuni*]. Notwithstanding that the process of implementing the constitution is essentially complex, the fact that a subject is constitutionalized guarantees that certain institutions must add efforts to give life to the constitution, by the means of constitutional policies. In that wise, the constitutionalization of a certain subject or institute is an important step towards the construction and, in some cases, the deepening of a political-institutional tradition that takes seriously the normative force of the Constitution. The recent process described by several authors as "constitutional degradation" in different parts of the globe is a clear example of the challenge to overcome in Amazon countries.

Thinking on the hypotheses listed in the introduction, it can be seen that they are partially confirmed. This is because: 1) the development of environmental constitutionalism in the Amazon region is not completely intertwined with the constitutional protection of intangible cultural heritage, with the exception of Brazil, Venezuela, Ecuador and Bolivia. However, it is noted that there is a trend towards the constitutionalization of the ICH in the other countries. And, 2) the protection of the intangible elements of the Amazon cultures is a fundamental element for the enforcement of the environmental constitutional right in the region. This last conclusion, which confirms the pre-established hypothesis, is marked by the tension that is sometimes established between the constitutional protection of the ICH and the neoliberal rationale that imposes the commodification of commons.

Finally, there is also the need to strengthen constitutional protection through fruitful dialogue with international protection and with the mechanisms of international cooperation for the environment and ICH. In this scenario, the deepening of the Inter-Amazon legal and political dialogue through *Amazon Cooperation Treaty Organization* proves to be imperative. This can boost the overcoming of myths and mythologies related to the Amazon in general, along with inscribing the region in the grammar of socio-environmental sustainability, in synergy with the recent innovations of Latin American constitutionalism carried out, especially by the

[52] See. C. Hubner Mendes, R. Gargarella (Eds.), *The Oxford Handbook of Constitutional Law in Latin America*, Oxford, Oxford University Press, 2021.

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constitutions of Ecuador (2008) and Bolivia (2009). The ICH has the potentiality to be fostered as a *strategic element* of integration and international cooperation. Indeed, environmental constitutionalism in general and the constitutional protection of ICH can be read as an important way to go through in order to achieve this aim, which is not only a challenge for South American countries, but for all humanity.