

# Safeguarding the intangible cultural heritage in the Brazilian federalism: impacts of national and international legislations on the subnational entities<sup>1</sup>

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**Abstract:** Salvaguardia del patrimonio culturale immateriale nel federalismo Brasiliano: impatti delle legislazioni nazionali e internazionali sugli enti subnazionali - This study analyzes the effects on Brazilian federal legislation (Decree 3551/2000) resulting from the UNESCO Convention on Intangible Cultural Heritage (2003) and the Paris Recommendation (1989) and, consequently, on subnational entities in the Northeast region of Brazil, the one with the largest number of goods listed. It should be noted that the safeguard of the PCI in Brazil has the additional challenge of cooperative federalism, which is to correctly and effectively execute the concurrent and common competences attributed to the entities of the federation. In order to achieve the stated objective, the following are preliminarily studied: conceptual aspects, the Brazilian federative structure and the legislation on the subject.

**Keywords:** Intangible cultural heritage. Brazilian federalism. Living human treasures. Northeast Region of Brazil. UNESCO.

1747

## 1. Introduction

The cultural heritage in Brazil is officially built in the 1930s on the foundations of the material dimension of cultural assets, whether movable or immovable. The recording, main instrument for protecting the material cultural heritage, is regulated in this decade by Brazilian Decree-Law No. 25, of 1937. The predominance of the material dimension of cultural goods in the cultural heritage preservation policy is only shaken, in the normative

<sup>1</sup> The first version of this text was published in Portuguese in a collective work entitled *Intangible Heritage and Public Policies in Brazil: trajectories and challenges*, whose purpose was to celebrate 20 (twenty) years of the Brazilian Decree No. 3.551, 2000 and of the policy for safeguarding the Intangible Cultural Heritage in Brazil.

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plan, with the promulgation of the 1988 Brazilian Constitution (Art. 216), which makes express reference to the immaterial nature of cultural goods, besides their material nature.

The regulation of the safeguard of the intangible cultural heritage occurs, at the federal level, with the publication of Brazilian Decree No. 3551, 2000, which institutes the Registration of intangible cultural goods in one of the four books it discriminates. This precedes the regulation at international level by UNESCO, since the Convention that deals with this safeguard was adopted in Paris, in October 2003, and incorporated into the Brazilian legal system only in 2006, after its text was approved by the National Congress (Brazilian Legislative Decree No. 22, 2006) and promulgated by the President of the Republic (Brazilian Decree No. 5.753, of 2006).

The adoption by the Brazilian State of the federative form decisively influences the system of protection of the cultural heritage, since it is necessary to establish dialogues among the political entities - Union, States, Federal District and Towns - in order to coordinate the competencies attributed by the Constitution in a common form - administrative jurisdiction foreseen in Article 23, III, of the Brazilian Constitution - to all of them for the protection of the cultural heritage, as well as the concurrent jurisdiction - legislative jurisdiction foreseen in Article 24, VII, of the Brazilian Constitution - to institute, by law, policies and instruments for the protection of cultural assets, such as recording (material heritage) and registration (immaterial heritage).

Therefore, the present study aims at analyzing the reflexes of Brazilian Decree 3.551, of 2000, of the UNESCO Convention, of 2003, and of the Recommendation of Paris, of 1989, which deals with Living Human Treasures, in the legislation of some subnational entities (selecting, for this purpose, the Member States of Brazil's federation located in the Northeast region of the country). For this purpose, the conceptual aspects that gravitate around intangible cultural heritage, the federative structure of the Brazilian State, as well as the federal legislation related to intangible cultural heritage are studied in order to compare it to the international guidelines for the protection of cultural goods and to the legislation of the States that make up the Northeastern region of Brazil.

To achieve these objectives, the theme is approached in an analytical and critical way, through a bibliographic review, analysis of federal and state legislation, a study of international documents - hard law and soft law - as well as a survey of data related to the application of this legislation by the respective federated entities - the Union and States - in Northeastern Brazil.

The study is divided into three topics, the first of which is dedicated to the theoretical analysis of intangible cultural heritage, addressing its definition and essential characteristics. The second, focused on understanding the Brazilian federative structure and its impacts on the protection of cultural heritage. The third one evaluates the influence of federal legislation and international documents on the legislation of subnational entities in the Northeast region regarding the protection of intangible cultural heritage.

As a result of the research, it is expected to verify if the hypothesis that there are morphological similarities between the federal and state

legislations is true, but that in the scope of the States, there is a predominant focus on the protection of intangible cultural heritage through the protection of the individuals that hold the knowledge and cultural practices recognized as masters of popular culture or living treasures of popular culture, which goes back to the UNESCO programs that preceded the edition of the 2003 Convention and that emerged with the 1989 Paris Recommendation: of Living Human Treasures and that of Masterpieces of the Oral and Intangible Heritage of Humanity.

## 2. Intangible Cultural Heritage

The Brazilian Decree n° 3.551, from 2000, has already surpassed twenty years of effectiveness and implementation, in Brazil, of a cultural policy directed to the protection of the intangible cultural heritage; it instituted the Register of intangible assets as a safeguarding instrument. However, the concern with the protection of this aspect of cultural heritage has older roots, with emphasis on the bill of Mário de Andrade, of 1936.

This bill deals with the creation of the National Artistic Heritage Service and the protection of cultural heritage.<sup>4</sup> In this period, Mário de Andrade already showed concern with the immaterial aspect of heritage when he listed as protectable goods the Amerindian folklore, illustrated by its vocabulary, songs, legends, magic, medicine, cuisine; and the folklore, linked to popular art, exemplified by music, tales, legends, superstitions, proverbs.<sup>5</sup>

For Rodrigo Vieira Costa, the Andradian notion of cultural heritage is based on an integrated perspective of material and immaterial cultural goods,<sup>6</sup> a vision that is still below the one present in the text of the Brazilian Constitution of 1988, but that presents this modernist's concern with the elements of popular culture, which brings this bill closer to popular groups, since it inserts the cultural practices of these groups in the spectrum of state protection, thus assuming an avant-garde posture, but one that did not prosper in this period marked by authoritarianism and state paternalism.

The substitution operated by SPHAN - currently IPHAN - of the conception of historic and artistic heritage by that of cultural assets, led by Aloísio Magalhães at the head of the mentioned organ/public entity is another antecedent in Brazil in the construction of intangible heritage. With this, the defense of a new and comprehensive conceptualization of cultural goods is formulated, beyond those ironically designated as "stone and lime",

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<sup>4</sup> In the core of Mário de Andrade's bill, the term "national artistic heritage" is used and in the scope of Decree-Law no. 25, of 1937, the expression "national historic and artistic heritage", both with a more restricted meaning than that attributed to the term "cultural heritage".

<sup>5</sup> Y. D. S. de Campos, *Fontes documentais e a lei de tombamento: (ante)projetos coligidos*. Belo Horizonte, 2020, 33-34.

<sup>6</sup> R. V. Costa, *O Registro do patrimônio cultural imaterial como mecanismo de reconhecimento de direitos intelectuais coletivos de povos e comunidades tradicionais: os efeitos do instrumento sob a ótica dos direitos culturais*, Doctoral Thesis – Universidade Federal de Santa Catarina, Centro de Ciências Jurídicas, Programa de Pós-Graduação em Direito, Florianópolis, 2017, 187, <https://core.ac.uk/download/pdf/94928185.pdf> (Accessed on: 26 Apr. 2021).

to contemplate the popular making present in the "living dynamics of everyday life", and therefore difficult to perceive its cultural value.<sup>7</sup>

Furthermore, according to Maria Laura Viveiros de Castro Cavalcanti, the recognition, in 1985, of Serra da Barriga, in the state of Alagoas,<sup>8</sup> as a protected area, and the declaration of the *Terreiro da Casa Branca*, in the state of Bahia, in 1986, as integral assets of the Brazilian cultural heritage, paved the way for the Brazilian Constitution of 1988 to expressly contemplate intangible cultural heritage in article 216. With this, there is a constitutional opening for the development of a cultural democracy<sup>9</sup> that "[...] challenges cultural heritage to be less a contribution to the legitimacy of power and more an instrument of community autonomy."<sup>10</sup>

To this end, it is necessary to understand the change unleashed in the execution of heritage policies and the roles of the community and the public power. For the public power there is no longer any certainty, nor a single path to be followed to overcome the notion of a paternalistic and guardian State. And the community ceases to be a mere recipient of state actions to become an active participant in cultural life, collaborating with the public authorities in protecting the cultural heritage.<sup>11</sup>

The 1948 Universal Declaration of Human Rights, which assures everyone the "right to participate in the cultural life of the community" is indicative of an important goal of cultural rights: that of "endowing every person with the ability to enjoy, discuss, and even propose changes in the ways he or she creates, does, and lives, in all areas of collective interest and deliberation." And in the legal-cultural field, in particular, identified with the legal relations that concern the expressions of the arts, collective memory, and flows of knowledge, there must be a reflection on the compatibility of human potentialities with the values of equal dignity, development, and peace.<sup>12</sup>

<sup>7</sup> A. Magalhães, *Bens culturais: instrumento para um desenvolvimento harmonioso*, in J. Leite de Souza (ed.), *Bens culturais do Brasil: um desenho projetivo para a nação*, Rio de Janeiro, 2017, 156.

<sup>8</sup> M. L. Cavalcanti Viveiros de Castro, *The legal protection of the intangible cultural heritage in Brazil*, in P. L. Petrillo (ed.) *The legal protection of the intangible cultural heritage*, Cham, 2019, 21.

<sup>9</sup> It is important not to confuse the notion of cultural democracy with that of democratization of culture, the first one, which, according to Philippe Urfalino (P. Urfalino, *A invenção da política cultural*, Trad. Fernando Kolleritz, São Paulo, 2015, 181) aims to bring culture to everyone, not by cultural education, but by "the physical presentation of art - works and artists - to audiences who were not in the habit of such an encounter." This strategy of expanding the supply of cultural access did not reduce cultural inequalities in France, according to the author. On the contrary, it was seen as pernicious, since it was understood as a policy of imposition of a specific culture that aims to be universal and self-legitimizing. This attempt is translated by Philippe Urfalino (P. Urfalino, *A invenção da política cultural*, Trad. Fernando Kolleritz, São Paulo, 2015, 185) as "a naive but not innocent illusion."

<sup>10</sup> A. C. Magalhães Moreira, *Patrimônio cultural, democracia e federalismo: comunidade e poder público na seleção dos bens culturais*, Belo Horizonte, 2020, 33.

<sup>11</sup> I. Botelho, *Dimensões da cultura: políticas culturais e seus desafios*, São Paulo, 2016, 45.

<sup>12</sup> F. H. Cunha Filho, *Como Brasil/Ceará e Itália/Lombardia salvaguardam o patrimônio cultural imaterial*, in *Salvaguarda do patrimônio cultural imaterial: uma análise comparativa entre Brasil e Itália*, F. H. Cunha Filho, T. Scovazzi (eds.) Salvador 2020, 150. Check

In this same sense, Nestor Garcia Canclini advocates the need to build material and symbolic conditions that enable collective and democratic appropriation so that everyone can share and establish the meaning of their own cultural heritage.<sup>13</sup> The desire to achieve this appropriation is translated in the Brazilian Constitution of 1988 in Article 216 by the idea of cultural references, which views heritage as a set of cultural goods that bear witness to daily life and are integrated into the life of the community.

The notion of cultural reference is the key concept for the formulation and implementation of public policies in Brazil related to cultural heritage, in which its adoption presupposes a partnership between public authorities and the community in attributing cultural value to the respective heritage. It is, according to Maria Cecília Londres Fonseca,<sup>14</sup> It is, according to Maria Cecília Londres Fonseca, a policy that needs to understand the resemantization performed by social groups on their cultural assets that build representative systems in which the subjects that experience this heritage are its interpreters, and, therefore, its protagonists. Thus, the policies for safeguarding intangible cultural heritage presuppose, at the federal level, the interaction between different social groups and IPHAN specialists for the production of knowledge about cultural practices that can make their Registration feasible.<sup>15</sup>

Cultural heritage is formed by material - tangible - and immaterial - intangible dimensions. The material dimension refers to the things produced by man and that have a concrete existence. The immaterial aspect comprises the goods of the same origin, however, without the possibility of being touched, but not being grasped.<sup>16</sup> Illustrating the material and immaterial dimensions of cultural heritage, Sandra Pelegrini and Pedro Funari state that "[...] we can touch musical instruments, people and clothes, but a popular dance cannot, as a set of representation, be 'touched'. Therein lies the immateriality, but it is greater than the sums of these materialities."<sup>17</sup>

Because of this connection, according to Tullio Scovazzi,<sup>18</sup> it is difficult to find manifestations of intangible cultural heritage that are not associated with some object, certainly influenced by the legislation of his country, Italy, whose Art. 7-bis of the Italian Code of Cultural Goods and Landscape determines that the expressions of collective cultural identity contemplated

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also: ONU, *Declaração universal dos direitos humanos*, 1948, <http://www.onu.org.br/img/2014/09/DUDH.pdf> (Accessed on: 26 Apr. 2021).

<sup>13</sup> N. G. Canclini, *Los usos sociales del patrimonio cultural*, in Encarnación Aguilar Criado (ed.), *Patrimonio Etnológico. Nuevas Perspectivas de Estudio*, Sevilla, 1999, 22.

<sup>14</sup> M. C. Fonseca Londres, *Referências culturais: base para novas políticas de patrimônio*, in IPHAN. *Patrimônio imaterial: o registro do patrimônio imaterial: dossiê final das atividades da comissão e do grupo de trabalho patrimônio imaterial*. 4. ed. Brasília, 2006, 89.

<sup>15</sup> M. L. Cavalcanti Viveiros de Castro, *The legal protection of the intangible cultural heritage in Brazil*, in P. L. Petrillo (ed.) *The legal protection of the intangible cultural heritage*, Cham, 26.

<sup>16</sup> S. C. A. Pelegrini, P. P. A. Funari, *O que é patrimônio cultural imaterial*, São Paulo, 2013, 27.

<sup>17</sup> S. C. A. Pelegrini, P. P. A. Funari, *O que é patrimônio cultural imaterial*, São Paulo, 2013, 27.

<sup>18</sup> T. Scovazzi, *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. General Remarks*, P. L. Petrillo (ed.) *The legal protection of the intangible cultural heritage*, Cham, 2019, 7.



in the UNESCO Conventions for the Safeguarding of the Intangible Cultural Heritage (2003) and for the Protection and Promotion of Cultural Diversity (2005) are subject to the provisions of the mentioned Code "even if they are represented by material testimonies",<sup>19</sup> which in Ferretti's opinion represents, in Europe, "the lonely Italian position".<sup>20</sup>

The 2003 UNESCO Convention makes this association clear when it understands intangible cultural heritage as "[...] the practices, representations, expressions, knowledge and techniques - together with the instruments, objects, artifacts and cultural places associated with them."<sup>21</sup> This association, however, is considered by Toshiyuki Kono to be a source of confusion when it protects tangible goods as intangible ones,<sup>22</sup> which he says does not occur in Japanese law, which clearly distinguishes between them.

In a thought very close to the Italian national legislation, the notion of intangible heritage is considered by José Reginaldo Santos Gonçalves "curious", for it includes in this category "goods as tangible as places, festivals, shows, and food",<sup>23</sup> but he highlights that such classification is due to the modern notion of anthropology that gives greater emphasis to social and symbolic relations. With this, the author argues that "heritage has always been and is 'material'", but he emphasizes:

[...] that it was necessary, in contemporary discourses, to create the category of the "immaterial" or the "intangible" to designate those modalities of heritage that would escape a conventional definition limited to monuments, buildings, urban spaces, objects, etc. [...] But what is important to consider is that it is an ambiguous category [heritage] that actually transits between the material and the immaterial, gathering in itself both dimensions.<sup>24</sup>

Despite the precision of the exposed thought, the fact is that there is an inseparability between tangible and intangible cultural heritage, which reveals a debatable dichotomy between them,<sup>25</sup> since both dimensions

<sup>19</sup> Translation: "if represented by material evidence". See the full text of the mentioned provision at: Gazzetta Ufficiale. Decreto Legislativo 22 gennaio 2004, n. 42., <https://www.gazzettaufficiale.it/dettaglio/codici/beniCulturali> (Accessed on 26 Apr. 2021).

<sup>20</sup> A. Ferretti, *Il Codice dei Beni Culturali e del Paesaggio*, Napoli, 2010, 38-40.

<sup>21</sup> UNESCO, *Convenção para a Salvaguarda do Patrimônio Imaterial* Paris, 2003, <http://unesdoc.unesco.org/images/0013/001325/132540por.pdf> (Accessed on: 26 Apr. 2021).

<sup>22</sup> T. Kono, *The legal protection of the intangible cultural heritage in Japan*, in P. L. Petrillo (ed.) *The legal protection of the intangible cultural heritage*, Cham, 2019, 63.

<sup>23</sup> J. R. S. Gonçalves, *Ressonância, materialidade e subjetividade: as culturas como patrimônios*, in *Horizontes Antropológicos*, Porto Alegre, ano 11, n. 23, jan./jun. 2005, 27.

<sup>24</sup> J. R. S. Gonçalves, *Ressonância, materialidade e subjetividade: as culturas como patrimônios*, in *Horizontes Antropológicos*, Porto Alegre, ano 11, n. 23, jan./jun. 2005, 21.

<sup>25</sup> F. H. Cunha Filho, *A proteção do patrimônio cultural brasileiro no governo Lula*, in *VII Congreso Internacional de la Unión Latina de Economía Política de la Información, la comunicación y la Cultura (ULEPICC)*, v. 1. 2009. Madrid, 2009, 202; M. Sant'anna, *Relatório final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, in IPHAN, *Patrimônio imaterial: o registro do patrimônio imaterial: dossiê final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, Brasília, 4. ed. 2006, 17,

coexist. However, in the legal sense, the difference helps to define the safeguard instrument to be adopted by the public authorities; it is also useful to give visibility to intangible cultural assets that suffered from a lack of action, protection, and cultural policy until the advent of Brazilian Decree No. 3,551, 2000.

### 3. Safeguarding intangible cultural heritage: the 2003 UNESCO Convention and Brazilian Decree No. 3.551, 2000

Brazil, in federal scope, adopts distinct normative diplomas to discipline the protection of the tangible and intangible cultural heritage that are respectively Brazilian Decree-Law n° 25, of 1937, and Decree n° 3.551, of 2000. This same system of splitting the normative protection diplomas is adopted internationally by UNESCO with the World Cultural and Natural Heritage Convention, of 1972, and with the Intangible Cultural Heritage Convention, of 2003. The Brazilian State regulated, even before UNESCO, the protection of intangible heritage, but the domestic and international concern with intangible assets goes back to a previous moment.

The 1972 World Heritage Convention, considered one of UNESCO's most successful instruments in the cultural field, is insufficient to provide protection to intangible properties. This fact was pointed out by the Permanent Commission of Bolivia to UNESCO in 1973, leading to a better understanding of the intangible aspects of heritage and the gaps in the Convention.<sup>26</sup> In this case, the criteria of authenticity required by the 1972 Convention, which considers with this characteristic only the cultural good that preserves its external aspects unchanged over time,<sup>27</sup> does not include intangible cultural heritage, since it is dynamic and constantly recreated by its holders, in a continuous process of adaptation.<sup>28</sup>

Thus, the insufficiency of the 1972 World Heritage Convention to protect intangible heritage revealed a need to modify the said Convention or even to make a new one to deal specifically with intangible heritage. In this context, the Paris Recommendation was issued in 1989, which supported two international programs: the Living Human Treasures and the Masterpieces of the Oral and Intangible Heritage of Humanity.

The 1989 Paris Recommendation, however, did not achieve the expected success because it replicates the basic structure of the World Heritage Convention, which, as we have seen, is insufficient for the protection of intangible heritage,<sup>29</sup> but also because it does not indicate the

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<sup>26</sup> C. B. Cabral, *Patrimônio cultural imaterial: convenção da Unesco e seus contextos*, Lisboa, 2014, 72.

<sup>27</sup> F. Silva Fernandes da, *As cidades brasileiras e o patrimônio cultural da humanidade*, 2. ed. São Paulo, 2012, 98.

<sup>28</sup> M. C. Fonseca Londres, *O patrimônio imaterial em processo: uma leitura dos bens inscritos nos livros de registro do Iphan*, in I. V. Soares Prado, M. Pragmácio (eds.), *Tutela jurídica e política de preservação do patrimônio cultural imaterial*, Salvador, 2018, 85.

<sup>29</sup> L. Arizpe, *Los debates internacionales en torno al patrimonio cultural inmaterial*, in *Cuicuilco*, México, v. 13, n° 38, 2006, 24, <https://www.redalyc.org/pdf/351/35BARACHO103802.pdf> (Accessed on: 26 Apr. 2021).

addressees and purposes of the protection of traditional and popular culture.<sup>30</sup> Thus, in a conference held by UNESCO in 1999 to evaluate the results achieved by the mentioned Recommendation, it was concluded that a new legal instrument was needed to adjust the terminology, especially the use of the term folklore<sup>31</sup> - target of critics - and to give more emphasis to the holders of intangible cultural assets, and not to the experts in culture and cultural heritage.<sup>32</sup>

The UNESCO Convention for the Safeguarding of the Intangible Heritage<sup>33</sup> was published in 2003 and has as its objectives the safeguarding and respect of the heritage of communities, groups, and individuals; the raising of awareness about and reciprocal recognition of the importance of intangible heritage at the local, national, and international levels; and international cooperation and assistance.

The 2003 UNESCO Convention formulates a definition for intangible cultural heritage,<sup>34</sup> as well as pointing out as characteristics its transmission between generations and its constant process of re-creation by communities and groups due to their environment, their interaction with nature, and their history, "[...] generating a sense of identity and continuity [...]" that contributes to "[...] respect for cultural diversity and human creativity."<sup>35</sup> In order to make intangible heritage more perceptible, the fields in which it manifests itself in particular are specified, such as: oral traditions and expressions, artistic expressions, social practices, rituals, and festive acts.<sup>36</sup>

For Tullio Scovazzi, there are three fundamental components in this definition of intangible cultural heritage: the objective component indicated

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<sup>30</sup> C. B. Cabral, *Patrimônio cultural imaterial: convenção da Unesco e seus contextos*, Lisboa, 2014, 77.

<sup>31</sup> "One of the objections to the use of the term folklore was founded on its identification with the cultural and ideological construction of nations and nationalist identities." Cf.: C. B. Cabral, *Patrimônio cultural imaterial: convenção da Unesco e seus contextos*, Lisboa, 2014, 78. Check also: UNESCO, *The international conference: a global assessment of the 1989 recommendation on the safeguarding of tradition culture and folklore: local empowerment and international cooperation. Final Conference Report*, Washington, 1999, <https://ich.unesco.org/doc/src/00111-EN.pdf> (Accessed on: 26 Apr. 2021).

<sup>32</sup> C. B. Cabral, *Patrimônio cultural imaterial: convenção da Unesco e seus contextos*, Lisboa, 2014, 77.

<sup>33</sup> This international document has the force of law due to its incorporation into the Brazilian legal system through Legislative Decree no. 22, of 2006, and Decree no. 5.753, of 2006.

<sup>34</sup> "Intangible cultural heritage" means the practices, representations, expressions, knowledge and techniques - together with the instruments, objects, artifacts and cultural places associated with them - that communities, groups and, in some cases, individuals recognize as an integral part of their cultural heritage. Cf.: UNESCO, *Convenção para a Salvaguarda do Patrimônio Imaterial* Paris, 2003, <http://unesdoc.unesco.org/images/0013/001325/132540por.pdf> (Accessed on: 26 Apr. 2021).

<sup>35</sup> UNESCO, *Convenção para a Salvaguarda do Patrimônio Imaterial* Paris, 2003, <http://unesdoc.unesco.org/images/0013/001325/132540por.pdf> (Accessed on: 26 Apr. 2021).

<sup>36</sup> UNESCO, *Convenção para a Salvaguarda do Patrimônio Imaterial* Paris, 2003, <http://unesdoc.unesco.org/images/0013/001325/132540por.pdf> (Accessed on: 26 Apr. 2021).



by cultural practices that have five instances of domain;<sup>37</sup> the subjective component represented by the community, groups, and individuals who transmit the intangible heritage from generation to generation; and the geographic component, since intangible assets are tightly linked to the natural and historical context in which they are created and developed.

Thus, the Intangible Heritage Convention points to the existence of a common interest of humanity in intangible cultural goods and makes it possible for countless countries, especially developing countries which did not have protection for their cultural goods in the World Heritage Convention, to have international recognition of their traditional practices, which are their main forms of cultural expression.<sup>38</sup> With this, it is the interest in protecting local cultures and the respective intangible heritage associated with them that is the object of safeguarding. The international interest, therefore, is instrumental and not substantial.<sup>39</sup>

The 2003 UNESCO Convention is also designed not to rival the 1972 Convention as it prohibits any interpretation of intangible cultural heritage elements associated with material cultural properties declared as World Heritage that would alter the status or lower the level of protection of these properties. The Convention also precludes interpretations that affect the rights and obligations of States Parties under other international instruments dealing with intellectual property and the use of biological and ecological resources. This is a notion of regime complementarity that, according to Lucas Lixinski,<sup>40</sup> implies that States Parties benefit from adopting an integrated approach to these regimes.

Brazilian Decree n° 3.551, from 2000, which regulates the Registration of intangible cultural assets at the federal level is the result of the Fortaleza Charter, a document elaborated during the Seminar Intangible Heritage: Strategies and Ways of Protection, which took place in 1997, when IPHAN was celebrating its 60th anniversary.<sup>41</sup> This document led to the creation of a Commission by the Minister of Culture, with the objective of proposing criteria, rules, and ways to protect the intangible cultural heritage.

The Commission, at the end of its work, proposed the edition of a

<sup>37</sup> T. Scovazzi, *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. General Remarks*, P. L. Petrillo (ed.) *The legal protection of the intangible cultural heritage*, Cham, 2019, 6.

<sup>38</sup> T. Scovazzi, *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. General Remarks*, P. L. Petrillo (ed.) *The legal protection of the intangible cultural heritage*, Cham, 2019, 4.

<sup>39</sup> L. Lixinski, *Instrumentos regionais e internacionais sobre patrimônio cultural imaterial: multiculturalismo entre tradição e modernidade, cultura alta e baixa*, in I. V. Soares Prado, M. Pragmácio (eds.), *Tutela jurídica e política de preservação do patrimônio cultural imaterial*, Salvador, 2018, 56.

<sup>40</sup> L. Lixinski, *Instrumentos regionais e internacionais sobre patrimônio cultural imaterial: multiculturalismo entre tradição e modernidade, cultura alta e baixa*, in I. V. Soares Prado, M. Pragmácio (eds.), *Tutela jurídica e política de preservação do patrimônio cultural imaterial*, Salvador, 2018, 59.

<sup>41</sup> IPHAN; MINC. Carta de Fortaleza, in *Patrimônio imaterial: o registro do patrimônio imaterial: dossiê final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, 4 ed. Brasília 2006, 49, [http://portal.iphan.gov.br/uploads/publicacao/PatImaDiv\\_ORegistroPatrimonioImaterial\\_1Edicao\\_m.pdf](http://portal.iphan.gov.br/uploads/publicacao/PatImaDiv_ORegistroPatrimonioImaterial_1Edicao_m.pdf) (Accessed on: 26 Apr. 2021).

Decree by the President of the Republic to regulate the Registration, as it considered it an adequate normative species, because it aimed to regulate a constitutional clause that does not restrict or limit the right to property, and the obligations it created are directed only to the Brazilian Ministry of Culture.<sup>42</sup> In this same sense, Rodrigo Vieira Costa sustains that Decree n° 3.551, of 2000 draws its validity basis directly from the Constitution and that the right to cultural heritage has fundamental status, besides immediate applicability.<sup>43</sup>

The Brazilian Decree n° 3.551, from 2000, does not contain a definition of intangible cultural heritage, but is concerned with establishing the procedures for the Registry. This is an option with the purpose of constructing a concept based on the recognition and valuation practices carried out by IPHAN. The delimitation of intangible cultural goods, however, is done by indicating the content of the Registration Books<sup>44</sup>, and is rejected, according to Francisco Weffor,<sup>45</sup> Minister of Culture at the time, "rigid and imprisoning conceptualizations", prioritizing a "constructed knowledge" and not a "given knowledge".

The incorporation of the UNESCO Convention of 2003 into the Brazilian legal system makes it inevitable, however, the use of the definition given by the Convention to the intangible heritage. It is possible, however, to diagram the legal elements of the Registration Decree<sup>46</sup>, which enable the deduction of data for the elaboration of a definition of Intangible Cultural Heritage for the Brazilian law reproduced below:

Table 1 - Species and Characteristics of the Brazilian Intangible Cultural Heritage

<sup>42</sup> M. Sant'anna, *Relatório final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, in IPHAN, *Patrimônio imaterial: o registro do patrimônio imaterial: dossiê final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, Brasília, 4. ed. 2006, 20, [http://portal.iphan.gov.br/uploads/publicacao/PatImaDiv\\_ORegistroPatrimonioImaterial\\_1Edicao\\_m.pdf](http://portal.iphan.gov.br/uploads/publicacao/PatImaDiv_ORegistroPatrimonioImaterial_1Edicao_m.pdf) (Accessed on: 26 Apr. 2021).

<sup>43</sup> R. V. Costa, *O Registro do patrimônio cultural imaterial como mecanismo de reconhecimento de direitos intelectuais coletivos de povos e comunidades tradicionais: os efeitos do instrumento sob a ótica dos direitos culturais*, Doctoral Thesis – Universidade Federal de Santa Catarina, Centro de Ciências Jurídicas, Programa de Pós-Graduação em Direito, Florianópolis, 2017, 55, <https://core.ac.uk/download/pdf/94928185.pdf> (Accessed on: 26 Apr. 2021).

<sup>44</sup> Brazilian Federal Decree No. 3.551, of 2000, in clauses of § 1o of Art. 1o the following: "I - Registration Book of Knowledge, where knowledge and ways of doing rooted in the daily life of communities will be registered; II - Registration Book of Celebrations, where rituals and festivals that mark the collective experience of work, religiosity, entertainment and other practices of social life will be registered; III - Registration Book of the Forms of Expression, where literary, musical, plastic, scenic and ludic manifestations will be registered; IV - Registration Book of Places, where markets, fairs, sanctuaries, squares and other spaces where collective cultural practices are concentrated and reproduced will be registered.

<sup>45</sup> F. Weffor, *Exposição de motivos do Decreto n° 3.551, de 2000*, in IPHAN. *Patrimônio imaterial: o registro do patrimônio imaterial: dossiê final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, Brasília, 4. ed. 2006, 26.

<sup>46</sup> F. H. Cunha Filho, *Como Brasil/Ceará e Itália/Lombardia salvaguardam o patrimônio cultural imaterial*, in F. H. Cunha Filho, T. Scovazzi (eds.), *Salvaguarda do patrimônio cultural imaterial: uma análise comparativa entre Brasil e Itália*, Salvador, 2020, 81.

ASSET	GENERAL FEATURES	SPECIFIC FEATURES
KNOWLEDGE (Know-how and ways of doing)	(a) historical continuity (b) national relevance to the memory, identity, and formation of Brazilian society.	(a) the embedding in the daily life of the communities
CELEBRATIONS (Rituals and festivals)		(a) the collective experience of work, religiosity, entertainment, and other practices of social life.
WAYS OF EXPRESSION (Literary, musical, visual, scenic and ludic manifestations)		
PLACES (Markets, fairs, shrines, squares and other spaces where collective cultural practices are concentrated and reproduced).		(a) the concentration and reproduction of collective cultural practices.
OTHERS (That do not fit in the other books)		(a) the non- fitting in the other books (b) any other requirements established when creating the new book

Source: F. H. Cunha Filho, *Como Brasil/Ceará e Itália/Lombardia salvaguardam o patrimônio cultural imaterial*, in F. H. Cunha Filho, T. Scovazzi (eds.), *Salvaguarda do patrimônio cultural imaterial: uma análise comparativa entre Brasil e Itália*, Salvador, 2020, 81.

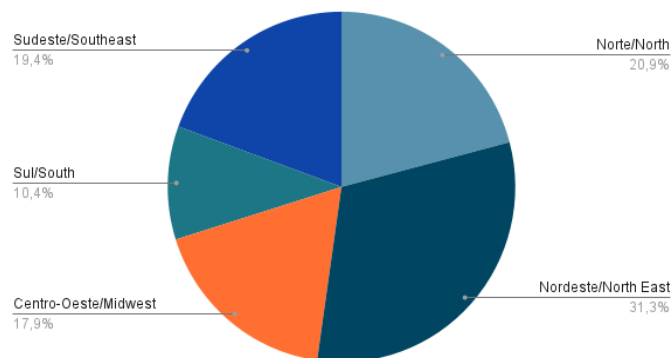
The first registers of intangible cultural heritage with legal support in the Brazilian Decree n° 3.551, of 2000, occurred in December 2002 and consisted of the *Ofício das Paneleiras de Goiabeiras*, in the State of Espírito Santo, registered in the Book of Knowledge and, on the same date, the registration of the *Arte Kusiwa - Pintura Corporal e Arte Gráfica Wajápi*, in the State of Amapá, registered in the Book of Expression Forms. Since then, except for the year 2003, every year intangible assets have been registered at the federal level by IPHAN, adding up to a total of 49 registered intangible assets by May 2021.<sup>47</sup>

<sup>47</sup> To see the complete list of intangible assets registered by IPHAN and that integrate the Brazilian cultural heritage, consult the website: Instituto Do Patrimônio E Artístico

The States ( subnational entities) of the Northeast region of Brazil together possess 21 registered intangible cultural assets in accordance with the Brazilian Federal Decree n° 3. 551/2000, three of them being of national relevance<sup>48</sup>, belonging, therefore, to all the States of the federation, and two others with regional relevance<sup>49</sup>, linked to some of the States of the Region, which shows the importance given to it by IPHAN's heritage policy and justifies the delimitation of this study to the region, which also shows itself to be pioneer in the legislative treatment of intangible heritage by its state rules, since even before the advent of federal regulation, State Law n° 4. 515, of 1992, of the State of Piauí, establishes the Declaration of Relevant Cultural Interest to cover the assets of cultural interest that by their nature are not susceptible to protection by recording.<sup>50</sup>

Chart 1 -  
Intangible Cultural  
Heritage registered  
according to  
Federal Decree  
3.551/2000 per  
Brazilian regions

Regiões-PCI/ICH Regions



Source:  
elaborated by the  
authors with data  
from IPHAN's website<sup>51</sup>.

In this sense, the expressiveness of the Northeastern States in the protection of the intangible cultural heritage in Brazil justifies the spatial selection of this study that, given the distribution of competencies defined by the Brazilian Constitution of 1988, makes it necessary to approach this theme focusing on the cultural heritage. Thus, the following topic deals with the relationship between the federal state and the constitutional distribution

Nacional, *Recognition* of *Cultural* *Property*,  
<http://portal.iphan.gov.br/pagina/detalhes/606> (Accessed on: 23 June 2022).

<sup>48</sup> *Ofício das Baianas de Acarajé*: Book of Knowledge Register, 14/01/2005; *Ofício dos Mestres de Capoeira*: Book of Knowledge Register, 10/21/2008 and *Roda de Capoeira*: Book of Expression Forms Register, 10/21/2008. Cf.: IPHAN, 2019.

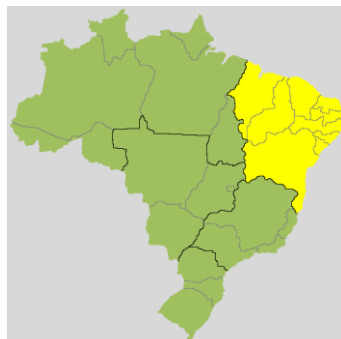
<sup>49</sup> Northeast Popular Puppet Theater: Registration Book of the Forms of Expression, 03/04/2015. Cordel Literature: Registration Book of the Forms of Expression: 19/09/2018. Cf.: IPHAN, *Lista. Bens imateriais registrados nos Estados*, 2019, <http://portal.iphan.gov.br/pagina/detalhes/606> (Accessed on: 26 Apr. 2021).

<sup>50</sup> Art. 29.

<sup>51</sup> Brazil has 49 (forty-nine) intangible cultural assets registered based on Presidential Decree n° 3.551, of 2000, and of these 3 (three) have national coverage, reaching all 5 (five) Brazilian regions, this is why they were computed in the graph three times for each of the regions. And there are 7 (seven) registered assets with regional coverage, belonging to more than one subnational entity, which in some cases do not belong to the same region, such as Cordel Literature, which covers entities in the Northeast and Southeast, which is why it was computed in the chart once for each of these regions.

of competencies in the cultural field aimed at the protection of intangible cultural heritage by the Registration.

Image 1 - Map of Brazil with the Northeast region highlighted in yellow



Source: Google

#### 4. The Federal State and the Protection of Intangible Cultural Heritage

According to Lúcio Levi, the term federalism has two meanings: one related to the theory of the federal state and the other to a global vision of society.<sup>52</sup> In this study, the term federalism is used in relation to the first object, which is based on a constitutional and institutional model linked to the structure and functioning of the State, since this research aims to understand the structure of the Brazilian State and the distribution of competencies among the federative entities<sup>53</sup> – the Union and the States – in the protection of intangible cultural heritage.

Federalism, in its traditional model, has as its main features<sup>54</sup> subsidiarity, decentralization, and autonomy that guide the Constituent Legislator at the decisive moment of its implementation. At this point, it is important to remember that, according to Gilberto Bercovici,<sup>55</sup> there is no ideal federalism, pure and abstract, but rather a State organized based on concrete decisions that vary in time and space.

The subsidiarity that characterizes the federal state finds important acceptance in the social doctrine of the Catholic Church, which seeks to build a median point between liberalism and totalitarian regimes, defending the

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<sup>52</sup> L. Levi, *Federalismo*, in N. Bobbio *et al.* (ed) *Dicionário de Política*, Brasília, 13 ed., vol I., 2007, 475.

<sup>53</sup> The Brazilian Constitution of 1988 innovatively inserts the Municipality as an entity of the federation (Article 1), however the present approach is limited to the study of the distribution of competences between the Union and the Member States, focusing on the States that make up the Northeast region.

<sup>54</sup> On the subject, see: G. Bercovici, *Dilemas do estado federal*, Porto Alegre, 2004; J. A. Baracho de Oliveira, *O princípio de subsidiariedade: conceito e revolução*, in *Revista de Direito Administrativo*, Rio de Janeiro, v. 200, 1995, 21-54, <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/46525/46567> (Accessed on: 26 Apr. 2021); J. A. Baracho de Oliveira, *Teoria geral do federalismo*, Rio de Janeiro, 1986; J. Messner, *Ética social: o direito natural no mundo moderno*, Trad. Alípio Maia de Castro, São Paulo, 1970; S. Torres Faber, *O princípio da subsidiariedade no direito público contemporâneo*. Rio de Janeiro, 2001.

<sup>55</sup> G. Botelho, *Dilemas do estado federal*, Porto Alegre, 2004, 9.



autonomy of individuals and the plurality of social life.<sup>56</sup> It is, therefore, a way of regulating life in society according to the formula: "as much freedom as possible, as much state as necessary" or "as much self-responsibility as possible, as much state intervention as necessary".<sup>57</sup> Therefore, the principle of subsidiarity does not tolerate centralization and the excessive and unreasonable presence of the state in social life.

Political decentralization operates a distribution of state competencies on a constitutional level among the federative entities, making them constitutionally limited, with each possessing a set of private competencies that are inaccessible to the others. And autonomy is precisely the attribution of these competencies by the Constitution to their own governments. In the case of the Brazilian Constitution of 1988, the Federative Pact is protected as a immutable rule clause,<sup>58</sup> which prevents constitutional reform from suppressing autonomy and political decentralization, as well as stifling subsidiarity.

## 5. Cooperative federalism and the common and concurrent competence in the protection of cultural heritage in Brazil

The Brazilian Constitution of 1988 adopts the so-called cooperative model of federalism, which Gilberto Bercovici conceives as a coherent model for implementing public policies in an interventionist State that needs to be treated uniformly on a national level.<sup>59</sup> Thus, this cooperative model is established in Brazil with the establishment of common administrative competencies and concurrent legislative competencies.

In the field of concurrent jurisdiction,<sup>60</sup> it is up to the Union to issue general rules and to the States and the Federal District<sup>61</sup> to supplement this legislation in matters such as the protection of the historical, cultural, artistic, tourist and landscape heritage. And within the scope of common jurisdiction, it is up to all the federal entities<sup>62</sup> to adopt administrative actions, such as the protection of documents, works, and other assets of historical, artistic, and cultural value; the protection of monuments, outstanding natural landscapes, and archeological sites; and also to provide the means for access to culture.

The current text of the sole paragraph of Article 23 of the Brazilian Constitution of 1988, granted by Constitutional Amendment no. 53, of 2006, places the expression "Complementary Law shall establish" in the plural - "Complementary Laws shall establish" -, because in order to account for the countless common duties listed, a single Complementary Law would not be

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<sup>56</sup> R. Hermany, *Município na Constituição: poder local no constitucionalismo luso-brasileiro*, Curitiba, 2012, 21.

<sup>57</sup> J. Messner, *Ética social: o direito natural no mundo moderno*, Trad. Alípio Maia de Castro, São Paulo, 1970, 287.

<sup>58</sup> Art. 60, § 4º, Inc. I.

<sup>59</sup> G. Bercovici, *Dilemas do estado federal*, Porto Alegre, 2004, 56.

<sup>60</sup> Art. 24 from the Brazilian Federal Constitution.

<sup>61</sup> Subnational entity that houses the federal capital and accumulates the competencies that are attributed by the Brazilian Constitution of 1988 to the States and to the Municipalities.

<sup>62</sup> Art. 23 from the Brazilian Constitution.

enough for all of them, but as many as are necessary and sufficient to achieve the constitutional purpose in the ambit of cooperative federalism.<sup>63</sup>

However, Article 216-A of the Brazilian Constitution, included in it by Constitutional Amendment No. 71 of 2012, which establishes the National System of Culture "organized on a collaborative, decentralized and participatory basis," whose democratic management process is agreed upon among the entities of the federation and society, creates this system of cooperation in the cultural field among the entities of the federation. At this point, it doesn't seem unreasonable to consider that there was a constitutionalization of the normative discipline related to the referred cooperation for the materialization of public policies in the cultural field with the enactment of the referred amendment.

In this way, instead of using the competence foreseen in the sole paragraph of Art. 23 of the Brazilian Constitution of 1988, with respect to the cultural field, the legislator decided to constitutionally institute such cooperation with the insertion of Art. 216-A in the Brazilian Constitution, which has as its objective the promotion of "human, social and economic development with the full exercise of cultural rights.

Thus, the exercise of cultural rights is the means of promoting development, and cooperation among the federation entities is carried out through the National Cultural System, which is based on the national cultural policy and on the guidelines established in the National Plan for Culture. The Constitutional Amendment No. 71 of 2012 creates and establishes the foundations of this System when it outlines its governing principles and defines its structure.

Besides this, it is established in § 3º of Art. 216-A of the Brazilian Constitution of 1988 that the regulation of the National System of Culture will be by means of federal law - Ordinary Law, therefore, and not Complementary Law<sup>64</sup> as foreseen in the sole paragraph of Art. 23 of the Brazilian Constitution, making an exception for the cultural field - which will also regulate the articulation of this system with other national systems and sectorial policies.

And as for the States, Federal District and Municipalities, it attributes to them the competence to organize by their own laws their culture systems.<sup>65</sup> These legislations, however, cannot ignore the System's guiding principles, among which are autonomy, cooperation, integration, and interaction in the execution of public policies in the relations maintained by the federated entities.

With this, the Brazilian Constitution of 1988 possesses the legal power<sup>66</sup> for the immediate implementation of the National System of Culture

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<sup>63</sup> A. C. Magalhães Moreira, *Patrimônio cultural, democracia e federalismo: comunidade e poder público na seleção dos bens culturais*, Belo Horizonte, 2020, 149.

<sup>64</sup> The supplementary law is the normative type used to regulate matters expressly elected by the Brazilian Constitution of 1988, the approval of which requires a quorum of an absolute majority. Outside these cases, the legislative matters are, as a rule, conveyed by ordinary law, whose approval requires a simple majority quorum.

<sup>65</sup> § 4º do Art. 216-A from the Brazilian Federal Constitution.

<sup>66</sup> For Konrad Hesse (K. Hesse, *A força normativa da Constituição*. Trad. G. Ferreira Mendes, Porto Alegre, 1991, 19) the normative force of the Constitution "[...] does not reside, merely, in the intelligent adaptation of a given reality. The legal Constitution is

based on the principles and framework constitutionally defined. And the regulation of this system is attributed to ordinary legislation, whose absence is not in itself an impediment to its implementation, the ineffectiveness being more a result of the lack of an articulation of federative policy, than of the inexistence of a legal norm to provide support for this cooperation.

## 6. The weakness of the general rule attribute of Brazilian Decree 3.551/2000 and the general rule character of the 2003 UNESCO Convention

The field of concurrent legislative competence foreseen in Article 24 of the Brazilian Constitution of 1988 contains intriguing aspects in relation to the protection of intangible cultural heritage, because according to the paragraphs of this article, the competence of the Union in the field of concurrent legislation is to establish the general rules. The States and the Federal District have complementary competence, elaborating specific laws according to the peculiarities of each federated entity.

In the case of intangible cultural heritage there is a peculiarity, because the governing rule is not a Law in the formal sense: discussed, voted and approved by the National Congress. It is, however, a Presidential Decree.<sup>67</sup> Thus, the normative system for the protection of intangible cultural heritage is based on a norm of infra-legal hierarchical stature, which makes its capacity to function as a general norm in the field of concurrent legislative competence questionable.

The present study turns to the analysis of the reflexes of both, the Brazilian Decree n° 3.551, of 2000 and the UNESCO Convention, of 2003, in the legislation of the States of the Northeast region. It is necessary to define if the Decree acts as a general rule of the Union in the exercise of concurrent legislative competence<sup>68</sup> and, therefore, if it binds the Member States whose own legislation is only to supplement the provisions contained in the Decree, or if the Convention performs this role of general rule, considering its incorporation in the Brazilian legal system. Besides these options, it is also possible that the subnational entities have full legislative competence (§ 3° of Art. 24 of the Brazilian Constitution of 1988), if none of these norms (Decree and Convention) are considered as federal law in the formal sense of the word regulating the Registration.

A relevant aspect in the analysis of the concurrent legislative competence is the definition of what is a general rule, in the sense in which

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itself converted into an active force, which is based on the singular nature of the present. Although the constitution cannot by itself accomplish anything, it can impose tasks. The Constitution becomes an active force if these tasks are effectively accomplished, if there is a will to guide one's own conduct according to the order established in it, if, despite all the questionings and reservations arising from judgments of convenience, the will to realize this order can be identified. In conclusion, it can be said that the Constitution will become an active force if the will to power (*Wille zur macht*), but also the will to Constitution (*Wille zur Verfassung*) have been made present in the general consciousness - particularly in the consciousness of those primarily responsible for the constitutional order."

<sup>67</sup> Decreto n° 3.551, de 2000.

<sup>68</sup> § 1° do Art. 24 da Constituição de 1988.

employed in the §§ of Art. 24 of the Brazilian Constitution of 1988. For Lúcia Valle Figueiredo<sup>69</sup> are those norms that "[...] condition, in the matter in which the competence exists, the ordinary legislation of the political person, also competent to legislate on the matter." In this sense, the author summarizes the main features of the general rules as follows:

[...] provide homogeneously for certain situations in order to guarantee security and legal certainty, establish guidelines for the fulfillment of express and implicit constitutional principles, without intruding into the scope of the specific competencies of the other federal entities.<sup>70</sup>

The very fundamentals pointed out by the Commission instituted by the Brazilian Ministry of Culture to propose the regulation of the Registry by means of the Presidential Decree already signal that they do not intend to create a general rule, since they indicate that the effects of the proposed legislation create obligations only to the said Ministry. In addition, the analysis of the articles of the Brazilian Decree 3.551, of 2000, does not reveal the presence of provisions with the characteristics of a general rule, as outlined above.

The exception could be the one contained in § 2º, from Art. 1 of the Brazilian Decree nº 3.551, from 2000, when it establishes that the inscription in one of the Register books must have as reference "[...] the historical continuity of the asset and its national relevance to the memory, identity and formation of the Brazilian society [...]", which can be understood as a guideline for the fulfillment of the Brazilian Constitution of 1988 regarding the protection of the Brazilian cultural heritage of intangible nature. Thus, from a material perspective, the mentioned Decree does not have the nature of a general rule, but has an paradigmatic force in relation to the other entities of the federation.

The Brazilian constitutional wording of Paragraphs 3 and 4 of Article 24, which uses the expression "federal law" or "national law" to refer to the full legislative competence of the States, in the absence of a general law established by the Union, and the suspension of the effectiveness of state legislation in the event of the supervening of such a law, demonstrates that only the Law, in the formal sense, now understood as the whole set of primary rules, has the ability to convey a general rule, and therefore condition the legislation of the Federation's States on the matter.

The difference between law and decree, for Celso Antônio Bandeira de Mello, is not only of origin - Legislative Branch and Executive Branch, respectively - and of hierarchy in the legal system, but, mainly, because only "[...] the law initially innovates in the legal system."<sup>71</sup> Thus, in order to impose a general legal regime on the States regarding the registration of

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<sup>69</sup> L. V. Figueiredo, *Competências administrativas dos Estados e Municípios*, in *Revista de Direito Administrativo*, n. 207, Rio de Janeiro, 1997, 7, <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/46934> (Accessed on: 26 Apr. 2021).

<sup>70</sup> L. V. Figueiredo, *Competências administrativas dos Estados e Municípios*, in *Revista de Direito Administrativo*, n. 207, Rio de Janeiro, 1997, 10, <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/46934> (Accessed on: 26 Apr. 2021).

<sup>71</sup> C. A. Mello Bandeira de, *Curso de direito administrativo*, 27. ed., São Paulo, 2010, 344.

intangible cultural assets, the legislative branch's lawmaking action is essential. However, even without formally exercising this link, the Brazilian Decree No. 3.551, of 2000, encourages the subnational entities to regulate the matter and also to promote the protection of intangible cultural heritage in their respective territories.

The UNESCO Convention, of 2003, after having its text approved by the Brazilian National Congress (Legislative Decree no. 22, of 2006) and promulgated by the President of the Brazilian Republic (Decree no. 5.753, of 2006), was internalized in the Brazilian legal system, acquiring the status of a supra-legal norm, which is attributed to the treaties and conventions whose content deals with matters related to human rights<sup>72</sup>, such as the one related to cultural heritage.

In this sense, the infra-constitutional rules of the national and subnational entities cannot ignore the content of the UNESCO Convention, and in relation to them it functions as a general rule that must be observed at the moment of the supplementation of the legislation, especially those that deal with the definition of Intangible Cultural Heritage, the principles and the forecast of participation and preference, in this sequence, to the communities, groups and individuals in the safeguard policies.

Therefore, the following topic analyzes the relationship of proximity and distance between the 2003 UNESCO Convention, the federal policy for protection of intangible cultural heritage, together with its legislation, and those adopted by the federation's Member States located in the Northeast region.

## 7. Norms of the subnational entities that regulate the protection of the Intangible Cultural Heritage and of the Living Human Treasures

The norms that regulate the protection of intangible cultural assets in the Member States of the Brazilian Federation, notably in the Northeast region, have an interesting aspect because they follow a different trend from that implemented at the federal level by IPHAN. The Brazilian Decree n° 3.551, from 2000, regulates the choice of the federal public power to concentrate the efforts of the Brazilian State in the "[...] identification, registration and recognition [...]" of the intangible cultural heritage throughout the national territory.<sup>73</sup>

With this, the programs developed by UNESCO with support from the 1989 Paris Charter, especially the Living Human Treasures program, based on the experiences of Eastern countries, did not find acceptance in Brazil at the federal level. The same cannot be said of the States of the

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<sup>72</sup> The status of a supra-legal norm can be found in a decision of the Brazilian Supreme Court in Extraordinary Appeal 466.343/SP, which analyzed the civil imprisonment of an unfaithful trustee based on the American Convention on Human Rights.

<sup>73</sup> M. Sant'anna, *Relatório final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, in IPHAN, *Patrimônio imaterial: o registro do patrimônio imaterial: dossiê final das atividades da comissão e do grupo de trabalho patrimônio imaterial*, Brasília, 4. ed. 2006, 18, [http://portal.iphan.gov.br/uploads/publicacao/PatImaDiv\\_ORegistroPatrimonioImaterial\\_1Edicao\\_m.pdf](http://portal.iphan.gov.br/uploads/publicacao/PatImaDiv_ORegistroPatrimonioImaterial_1Edicao_m.pdf) (Accessed on: 26 Apr. 2021).



Brazilian federation. In the Northeastern states, this system of protecting popular cultural manifestations with the granting of the title *Tesouro Humano Vivo* (Living Human Treasure), or similar expressions,<sup>74</sup> and financial aid to people, and in some Northeastern states to groups, precedes the actual safeguarding of intangible heritage by the Registration.

The object of immediate protection of the legislation that institutes the title of Living Human Treasure is the people or groups who hold the knowledge, whose purpose is to ensure the transmission of cultural knowledge and practices to future generations, which, in a mediate way, protects the intangible cultural heritage itself. The Registration, meanwhile, has as its immediate object of protection the intangible cultural heritage and the community itself, which preserves its identity by safeguarding it.

The first state in the Brazilian Northeast region to create its own legislation inspired by UNESCO's Living Human Treasures program was Pernambuco, with the enactment of State Law no. 12.196, of 2002, which provided for the granting of the title of *Patrimônio Vivo do Estado de Pernambuco* (Living Heritage of the State of Pernambuco), which can be granted to both individuals and groups. The granting of this title gives the beneficiaries the subjective right to use the title, but also to obtain financial assistance from the public authorities, called "incentive grants" in the mentioned state law.

The State of Ceará edited the State Law no. 13.351, of 2003, which instituted the title of *Mestres da Cultura* (Masters of Culture), but was revoked by the State Law no. 13.842, of 2006, which creates the title of *Tesouros Vivos da Cultura* (Living Treasure of Culture). This law assures the rights granted by the previous one and maintains the system of granting the title, now called *Tesouro Vivo* (Living Treasure), as well as the financial aid to individuals, in case they prove to be economically deprived. In that same year, 2003, the State of Bahia enacted State Law number 8.899 to grant the title of *Mestres dos Saberes e Fazeres da Cultura Tradicional Popular* (Masters of the Know-how and Doing of Traditional Popular Culture), and also a financial aid to those who were granted this recognition.

The State of Alagoas enacted Law no. 6,513, of 2004, to also grant the title of *Patrimônio Vivo* (Living Heritage) to natural people and an incentive grant as financial aid. Paraíba, in the same year, enacted Law no. 7.694, granting the title of *Mestres das Artes - Canhoto da Paraíba* (Masters of Art – Paraíba's Lefty) to natural people and financial aid. Rio Grande do Norte, with Law no. 9.032, of 2007, grants the title of Living Heritage to natural persons and groups, as well as, similarly to the legislation of the other states, a financial aid.

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<sup>74</sup> In Alagoas, the State Law no. 6.513, of 2004, calls it "Living Heritage"; in Bahia, the State Law no. 8.899, of 2003 calls it "Masters of the Knowledge and Doings of Traditional Popular Culture"; in Ceará, the revoked State Law no. 13.351, of 2003 called it "Masters of Culture", and the State Law no. 13.842, of 2006 currently calls it "Living Treasure of Culture"; In Maranhão, State Law No. 10.509, 2016 calls it "Master or Mistress of Popular Culture"; In Paraíba, State Law No. 7.694, 2004 called "Master of the Arts Canhoto of Paraíba"; In Pernambuco, State Law No. 12. 196, 2002, calls it "Living Heritage"; In Piauí no legislation with similar regulation was found; In Rio Grande do Norte, State Law n° 9.032, 2007 calls it "Living Heritage"; In Sergipe, also, no legislation with similar regulation was found.

The State of Maranhão edited the State Law no. 10.509, of 2016, providing for the concession of the title of *Mestre* or *Mestra da Cultura Popular* (Master of Popular Culture) only to individuals, and the financial aid to be granted is done by means of an award provided for in an official announcement. The State of Piauí edited State Law n° 5816, of 2008, establishing the granting of the title of *Patrimônio Vivo do Piauí* (Living Heritage of the State of Piauí) to persons, individually or in groups, who possess knowledge or techniques to produce and preserve aspects of traditional or popular culture of a community in this State. The said State Law, however, was regulated by Decree No. 19.467 only in February 2021, when the first individual titles were granted to 27 natural persons and 3 groups.<sup>75</sup>

Regarding the State of Sergipe<sup>76</sup> the search conducted on the website of the Department of Culture and the Legislative Assembly of this state failed to identify state legislation ruling the granting of such honorific distinction and public policy, which leads to the conclusion that there is no such normative regulation, or if there is, it is not effectively publicized by the organs of culture.

Thus, if in the federal sphere the protection of intangible cultural heritage is carried out primarily by the Registration, in the sphere of the Northeastern States the intangible cultural assets are protected first by the holders of traditional knowledge that involves the cultural manifestation to be protected, and only at a later moment, as a rule, the legislation for the Registration of intangible cultural heritage and its application is developed, which has little or no direct influence from the UNESCO Convention of 2003, by comparative analysis of the text of these laws with that of the Convention, because they are more operational and praxis-oriented, as is the proposal of Brazilian Decree n. 3551, of 2000.

There are two factors that support this statement: one temporal and the other quantitative. The temporal factor concerns the moment of enactment of the state laws that regulate Living Treasures and those that regulate Intangible Cultural Heritage. In all the Northeastern States, with the exception of Sergipe, which did not have the legislation regulating Living Treasures located by this research, the referred legislation precedes the one dealing with Intangible Cultural Heritage.

The most emblematic case is Pernambuco, since the Living Treasures Law is from 2002 and the one regulating the protection of the Intangible Cultural Heritage is from 2018. Paraíba also stands out in this aspect, as its Living Treasures state law is from 2004, and no legislation regarding the Intangible Cultural Heritage was found in this state. In Bahia and Ceará both legislations are from 2003, and in Maranhão both are from 2016.

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<sup>75</sup> To see the relation of the registers of Piauí's Living Heritage: electronic site of the Secretary of State for Culture of Piauí: Secretaria De Estado Da Cultura, *Homologation*, <http://www.cultura.pi.gov.br/wp-content/uploads/2021/10/Ato-de-Homologac%C3%A7%C3%A3o-do-RF-do-Patrim%C3%B4nio-Vivo.pdf> (Accessed on: 26 May 2022).

<sup>76</sup> The City Hall of Laranjeiras in the state of Sergipe has edited the Municipal Law No. 909 of 2009 that institutes the register of the "Mestres dos Mestres da Cultura".

Table 2 – State Legislations

	State Law of Living Treasures	ICH Law
Alagoas	Law 6513, of 2004	Law 7285, of 2011
Bahia	Law 8899, of 2003	Law 8895, of 2003
Ceará	Law 13.351, of 2003 revoked by Law 13.842, of 2006	Law 13.427, of 2003
Maranhão	Law 10.509, of 2016	Law 10.514, of 2016
Paraíba	Law 7694, of 2004	----- <sup>77</sup>
Pernambuco	Law 12.196, of 2002	Law 16.426, of 2018
Piauí	Law 5.816, of 2008	Law 4515, of 1992
Rio Grande do Norte	Law 9032, of 2007	Bill of 2018
Sergipe	-----	-----

Source: Prepared by the authors.

However, the chronological factor is not enough to demonstrate the preference given by the Northeastern States to the Living Treasures in relation to the protection of the Intangible Cultural Heritage, despite being an important indication. Therefore, it is necessary to evaluate the effectiveness of these legislations in these states, which will be done quantitatively in relation to the total number of registrations of intangible assets and the number of titles of Living Treasures.

The State of Alagoas has 61 registrations of individuals as Living Heritage<sup>78</sup> based on State Law n° 6.513/2004, as amended by State Law n° 7.172/2010. Since 2005, a public notice is published every year for the registration of those interested in the respective Book. Regarding Intangible Cultural Heritage, the state has 5 registered assets<sup>79</sup> based on State Law No. 7.285, of 2011.

The State of Bahia has 19 assets registered as intangible cultural heritage<sup>80</sup> based on the State Law n° 8.895, of 2003. Regarding the State

<sup>77</sup> The research did not manage to identify a law regulating the registration of intangible cultural heritage, but it did manage to identify the state law 11.412, 2019 that declares the *Festa das Neves* as Historical, Cultural and Intangible Heritage of the State of Paraíba; the state law 11. 417, of 2019 that declares the Procession of Our Lady of Penha as a Historical, Cultural and Intangible Heritage of the State of Paraíba; state law 11.902, of 2021 that declares the *Pega de Boi no Mato* as Intangible Cultural Heritage and state law 12.003, of 2021 that declares the *Bordado Labirinto* as Intangible Cultural Heritage.

<sup>78</sup> To see the complete list of Alagoas' Living Heritage registers: Secretaria de Estado da Cultura de Alagoas' website: Secretaria De Estado Da Cultura, *Masters of RPV-AL by year of award*, <http://www.cultura.al.gov.br/politicas-e-acoas/patrimonio-vivo/cadastros-mestres-rpv-al> (Accessed on: 26 Apr. 2021).

<sup>79</sup> To see the complete list of Alagoas' Intangible Cultural Heritage registers: Alagoas' Culture State Department's website: Secretaria De Estado Da Cultura, *Lista de Bens Registrados*, <http://www.cultura.al.gov.br/politicas-e-acoas/patrimonio-cultural/principal/textos/lista-de-bens-imateriais-registrados> (Accessed on: 26 Apr. 2021).

<sup>80</sup> To see information about the Registration Books of the Immaterial Cultural Heritage of Bahia: IPAC website: Instituto Do Patrimônio Artístico E Cultural Da Bahia, <http://www.ipac.ba.gov.br/patrimonio-imaterial/bens-registrados> (Accessed on: 26 Apr. 2021).

Law n° 8.899, 2003, which deals with the Masters of the Knowings and Doings of Traditional Popular Culture, equivalent designation for that state to the Living Treasures, no field destined to contemplate the registers of these masters and mistresses was found on the electronic sites of the Department of Culture and of the Institute of Artistic and Cultural Heritage of Bahia, nor was the regulation of this law by the Executive Branch, which should have been done within 90 days after its publication.<sup>81</sup>

Therefore, this absence of information about the application of law No. 8.899, of 2003 is a strong indication that this cultural policy is not a priority in that state, and as the laws that deal with Intangible Cultural Heritage and the Masters of Knowledge and Doings are contemporary, the numbers of records indicate that in Bahia the priority was given to the protection of intangible assets, being forgotten - or at least not disclosed - by the public power the protection of these Masters.

The State of Ceará has 106 masters of culture, 13 groups, and 3 collectivities, all registered as Living Treasures<sup>82</sup> based on state law n° 13.842, of 2006. However, there is no mention on the State Department of Culture's website of the registration of assets that are part of the intangible cultural heritage, based on state law n° 13.427, of 2003. On this website, in the field dedicated to cultural heritage, there are spaces for festive cycles, recorded goods, meeting of the masters of the world, and living treasures. No reference is made to intangible cultural heritage, nor to the register books created by the referred law.

This absence of actions to protect intangible cultural heritage at the state level reveals that the State Department prioritizes cultural policies related to Living Treasures over intangible assets. This fact reinforces the thesis that in the Northeastern region's States, the priority of cultural public policies is the Living Treasures.

In Maranhão, the State Department of Culture, based on State Law No. 10.509 of 2016 (with changes made by State Law No. 11.145 of 2019) held two editions of the Masters of Popular Culture award, awarding 10 candidates in 2017.<sup>83</sup> In the 2019 edition, fifteen participants received the award.<sup>84</sup> And as for the Registration of the goods integrating the Intangible Cultural Heritage based on State Law no. 10.514, of 2016, the goods protected based on this law through the edition of State Decree no. 34.718, of 2019 that recognizes the *Roda de Capoeira*, the Craft of Capoeira Masters, the *Bumba-Meu-Boi* and the *Tambor de Crioula* as intangible heritage, consist of a simple overlapping of protection of goods already safeguarded at the

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<sup>81</sup> Art. 15.

<sup>82</sup> Too see the complete list of Ceará's Living Treasures: Ceará State Department of Culture's website: *Mapa Cultural Do Ceará. "Tesouros Vivos Da Cultura" Do Estado Do Ceará*, <https://mapacultural.secult.ce.gov.br/files/opportunity/1501/anexo-vii-listagem-dos-tesouros-vivos-da-cultura.pdf> (Accessed: 26 Apr. 2021).

<sup>83</sup> To see the list of those awarded with the title of Masters and Masters of Maranhão's Popular Culture in 2017 edition: website of the Maranhão State Department of Culture: [https://cultura.ma.gov.br/?p=5045#.Ylh48S\\_5T0o](https://cultura.ma.gov.br/?p=5045#.Ylh48S_5T0o)

<sup>84</sup> To see the list of those awarded the title of Mestres e Mestras da Cultura Popular Maranhense in the 2019 edition: website of the Maranhão State Department of Culture: <https://cultura.ma.gov.br/wp-content/uploads/2020/01/ERRATA-01-do-Edital-01-2019-PREMIO-MESTRES-DA-CULTURA.pdf>

federal level.

The State of Paraíba has a total of 24 Master of Arts - Canhoto da Paraíba - registered<sup>85</sup> based on the law n° 7.694, of 2004. The absence of specific legislation in this State for the safeguarding of intangible cultural heritage is, in itself, a fact that reinforces the thesis of the prioritization in the Northeast of the cultural policy of the Living Treasures.

The State of Pernambuco has 57 registrations of people and/or groups recognized as Living Heritage based on state law No. 12.196 of 2002<sup>86</sup>. However, there are still no registrations of intangible cultural property in this state effected based on law No. 16.426 of 2018. This does not mean that there is no intangible cultural heritage protected, since the Caruaru Fair and Frevo are federally registered, and the last one is even an intangible heritage of humanity. Moreover, there are a number of assets protected as intangible cultural heritage due to the edition of state laws with concrete effects.<sup>87</sup>

The State of Piauí has 30 Living Treasure registers made only in 2021, when the State Law n° 5.816, of 2008 was regulated. The legal discipline of intangible cultural heritage shares space with the protection of tangible heritage,<sup>88</sup> having a residual nature, for when the protection by recording is not adequate, the cultural asset can be declared of relevant cultural interest. The search for intangible heritage registers or for assets declared of relevant cultural interest did not find any assets safeguarded based on the referred state legislation.

The State of Rio Grande do Norte has 13 Living Heritage registries, being 9 individuals and 4 groups.<sup>89</sup> In 2020, the Announcement of the III Public Contest of the Living Heritage Registry was published<sup>90</sup> with the

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<sup>85</sup> To see the complete list of the Masters of Arts: PARAIBA. Updated List of Masters of the Arts, <http://iphaep.pb.gov.br/secretarias/cultura/lei-canhoto-da-paraiba-2013-remota/lista-atualizada-dos-mestres-e-mestras-das-artes> (Accessed on: 26 Apr. 2021).

<sup>86</sup> To see the complete list of the Living Heritage of Pernambuco: M. A. Amorim, *Patrimônios vivos de Pernambuco*. 2 ed. Recife, 2014, [https://issuu.com/cultura.pe/docs/livro\\_patrim\\_nios\\_vivos\\_2\\_edicao](https://issuu.com/cultura.pe/docs/livro_patrim_nios_vivos_2_edicao) (Accessed on: 26 Apr. 2021).

<sup>87</sup> About the discussion on the Legislative Power's competence to issue laws of concrete effect to declare an asset as cultural heritage check (F. H. Cunha Filho, A. C. Magalhães Moreira, *O tombamento legislativo: a lei de efeitos concretos*, in *Revista Direito Ambiental e sociedade*, v. 8, n. 2, 2018, 181-200, <http://www.uces.br/etc/revistas/index.php/direitoambiental/article/view/5856>. Accessed on: 26 Apr. 2021). To see the list of goods protected as intangible cultural heritage by the Legislative Assembly of Pernambuco check: Fundarpe, *Patrimônios de Pernambuco: materiais e imateriais*, 3. ed. Recife, 2014, 132, [https://issuu.com/cultura.pe/docs/patrimonios\\_de\\_pernambuco\\_3\\_edicao](https://issuu.com/cultura.pe/docs/patrimonios_de_pernambuco_3_edicao) (Accessed on: 26 Apr. 2021).

<sup>88</sup> Lei n° 4.515, de 1992.

<sup>89</sup> M. Pereira das Graças Cavalcanti, *A trajetória da lei de registro do patrimônio vivo do RN – RPV (2007-2017): uma avaliação da implementação*, Doctoral Thesys – Universidade Federal do Rio Grande do Norte, Natal, 2018, 83, [https://repositorio.ufrn.br/jspui/bitstream/123456789/26215/1/Trajeto%3c3%b3rialeiregistro\\_Pereira\\_2018.pdf](https://repositorio.ufrn.br/jspui/bitstream/123456789/26215/1/Trajeto%3c3%b3rialeiregistro_Pereira_2018.pdf) (Accessed on: 26 Apr. 2021).

<sup>90</sup> To see the complete Announcement, visit the José Augusto Foundation's website: Fundação José Augusto. Registro do Patrimônio Vivo do Rio Grande do Norte. 21 fev. 2020. Available at: [http://adcon.rn.gov.br/ACERVO/secretaria\\_extraordinaria\\_de\\_cultura/Conteudo.as](http://adcon.rn.gov.br/ACERVO/secretaria_extraordinaria_de_cultura/Conteudo.as)



prediction of naming 4 new Living Heritage, being two natural persons and two groups. Regarding the safeguarding of intangible cultural heritage by the Registry, no legislation in force was found, but a Bill of 2018 still in progress.

The State of Sergipe, on the other hand, did not have located in the research the respective legislation for protection, neither of the intangible cultural heritage, nor of the Living Treasures, in such a way that its cultural assets are protected by the other federative instances, in special, the federal one that through IPHAN protects the *Reanda Irlandesa* (Irish Lace), Capoeira, and Cordel Literature.

Table 3 - Living Treasures and ICH Registers

	Amount of Live Treasures records	Amount of ICH registrations based on state laws
Alagoas	61	5
Bahia	Not found	19
Ceará	122	Not found
Maranhão	25	4
Paraíba	24	Not found
Pernambuco	57	Not found
Piauí	30	Not found
Rio Grande do Norte	13	Not found
Sergipe	Not found	Not found

Source: Prepared by the authors.

The chronological and quantitative criteria adopted in this research to investigate the hypothesis that in the Northeastern States the cultural policy of registering Living Treasures is more expressive than that of registering Intangible Cultural Heritage are flawed, since they are distinct legislations and procedures that have different purposes. However, the absence of registers of goods as intangible heritage, the long time lapse that in some states separate the referred legislations compensate these research flaws.

Thus, with the exception of the State of Bahia, which predominates the registers of assets as intangible cultural heritage, and the State of Sergipe that did not have any register located - neither of Living Treasures nor of Intangible Cultural Heritage -, the other States - Alagoas, Ceará, Maranhão, Paraíba, Pernambuco, Piauí and Rio Grande do Norte - predominate almost exclusively the registers of Living Treasures. Thus, these subnational entities have incorporated into their legislation and administrative practices the UNESCO's Living Human Treasures program, initiated in 1989 with the Paris Charter, even though it was abandoned years later by this international organization.

## 8. Conclusion

This study laid two research hypotheses that were confirmed in the course of the academic investigation, they are:

a) the existence of a relative identity between the federal (national) legislation and the legislation of the Northeastern States (subnational) that regulate the Registration of intangible cultural heritage;

b) the predominance in the Northeast region's States of the execution of cultural policies aimed at promoting and protecting the holders of cultural knowledge and know-how with the attribution of the title of Living Treasure or Master of Culture and a financial aid inspired by UNESCO's Living Human Treasures program.

c) the little influence of the UNESCO Convention, of 2003, in the construction of the legislations of the subnational entities, even though it acts as a general federal rule.

The research carried out a survey of state legislations that regulate both the Registration of intangible cultural heritage and those dealing with Living Treasures or Masters of Culture. In relation to the federal legislation the existing regulation is the Registration (Brazilian Federal Decree n° 3.551, of 2000) and the UNESCO Convention, of 2003, not existing in federal scope neither legislation nor cultural public policies directed to the concession of title and financial aid to the holders of cultural knowledge and doings.

The Brazilian Decree n° 3.551, of 2000, which regulates the Registration of intangible cultural assets at the federal level, even though it does not have the characteristics and nature of a general rule, plays an important role in stimulating the States of the Brazilian Federation to register intangible cultural goods, which is when the States do not expressly provide in their specific legislation the need for the register to observe the historical continuity of the asset and its relevance to memory and identity, they establish the need for revalidation of the register at intervals of five or ten years, which shows the recognition by these rules of the dynamic and procedural character of intangible cultural property.

The state legislations that regulate the register are not, however, mere reproductions of the federal decree, despite keeping important identity with it, especially in the regulation of the procedural aspects. The influence of UNESCO's Intangible Cultural Heritage Convention (2003) is also noticeable in the state legislations, especially regarding the establishment of a legal definition for Intangible Cultural Heritage.

However, if there is this identity between the federal legislation and the state laws in the Northeast region in the regulation of the Registration,<sup>91</sup> the execution of cultural policies in this area are distinct, because in the federal scope the protection of Living Treasures or Masters of Culture does not exist, due to a strategy clearly defined by IPHAN. But, in contrast to this definition at the federal level, the States of the Northeast region prioritize the regulatory legislations and the execution of cultural policies aimed at the promotion and protection of the Living Treasures or Masters of Culture.

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<sup>91</sup> Brazilian Federal Decree n° 3.551, de 2000.

In this aspect, the action of the public administration, even though the federative pact establishes a common administrative competence among all the entities of the federation for the protection of cultural heritage, indicates a division built in the concrete action, in which the Union concentrates its efforts in the Registration of intangible cultural heritage and the States of the Northeastern region in the protection of the holders of knowledge and know-how by granting the title of Living Treasure or Master of Culture, which, as a rule, also contemplates some kind of financial aid to the holder.

Comparing the actions of subnational entities with the concession of the title of Living Human Treasures and the one established by UNESCO, while the latter prioritized groups and collectivities, the States in the Northeast region prioritize individuals with the concession of financial aid, metamorphosing this cultural policy into an assistance policy along with countless other financial aids.

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