



Reino de Bélgica
Universidad de Amberes
Facultad de Derecho



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**CULTURAL HERITAGE IN CUBA: ELEMENTS AND MECHANISMS OF LEGAL
PROTECTION**

**THESIS IN OPTION TO THE SCIENTIFIC DEGREE OF DOCTOR OF JURIDICAL
SCIENCES**

Author: Epg. Rosa Julliet González Ruiz (Auxiliary Professor)

**Santiago de Cuba
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January 19, 2024**

ACKNOWLEDGEMENTS

To my mother Mary, who covers me with her mantle and intercedes for me
unceasingly.

To my son, who with his unconditional support and help, allowed me to
complete this process.

To my mother, for her spiritual and emotional support.

To Freider, for his timely collaboration.

To my sister Yailín, and all her support team for the scientific-research
activity.

To Maria, Odalys, Carlitos, César, Melquiades, Xiomara, Yunaisis and Isabel,
Carolina, Epili, Marta and Juana, my material and spiritual rearguard.

To my tutors and their beautiful families, for their welcome, great ideas,
contributions and dedication in the conformation of the research.

To Britt and Bart, dear friends, for their humility, depth, peace and brotherly
love.

To Liuba and Celia, for their valuable collaboration and expertise in reviewing
and shaping this report.

To Annia Clavel and the architect Omar López, for their attention and
collaboration in understanding the dynamics of the activity.

To Grettchen, my Güinche, for her understanding like no other.

To Ramón, a demanding beacon of progress and accurate suggestions.

To Dr. Roberto de Jesús Rodríguez Coquet, for his understanding.

To the members of the VLIR-UOS Project, who contributed very important
criteria to the practical contribution and transcendence of this project.

To the professors of Antwerp's University, for his warm welcome and support,
specially their Dean, Frederick Swennen, Patricia Popelier and Stéphanie De
Sommer and the researchers of the IP Law and Governance Project: Devanshi
Saxena, Sander Nysten, Ayse Irem Kirac, Christine Frison, Arina Gorbatyuk,
Chiara Salatti, Ulkü Tanrıvedi, Seun Lari-Williams.

To my colleagues in the Department and in the Faculty, for each of their words
and contribution to the success of the study that I now present.

DEDICATION

TO YOU

SUMMARY

The inadequacies in the theoretical and normative conception of the elements and mechanisms of the legal protection of Cuban cultural heritage, which adversely affect the fulfilment of its social function for present and future generations, is the scientific problem that encourages this research.

Its object of study is the protection of cultural heritage from the legal perspective, approached from the elements and mechanisms of the legal system for the preservation of cultural heritage, in which its field of action is established.

Consequently, its general objective is to establish theoretical guidelines of the elements and mechanisms of legal protection of cultural heritage in Cuba, from a historical, doctrinal, and comparative study, which favors its theoretical and normative conception contributing to fulfilling its social function for present and future generations.

Among its main results are: historical systematization of the foundations of the legal protection of cultural heritage as a support for the fulfilment of its social function for present and future generations; identification of the elements and mechanisms used to guarantee the protection of cultural heritage in the countries studied and in international legal instruments, and: diagnosis of the principal insufficiencies of the Cuban legal framework in force, which attempt against the fulfilment of the social function of cultural heritage.

INDEX

INTRODUCTION	1
CHAPTER I. IN SEARCH OF FOUNDATIONS FOR THE REDESIGN OF THE LEGAL SYSTEM FOR THE PROTECTION OF CULTURAL HERITAGE. VIEWS FROM ITS ELEMENTS	15
1.1. Towards a Characterization of the Cultural Heritage Legal System	15
1.1.1. Relevant definitions for the characterization of the cultural heritage legal system	16
1.1.2. Values and principles that inform the legal regime for the protection of cultural heritage	25
1.1.3. Institutions and other actors involved in the protection of cultural heritage	32
1.1.4. The normative structuring of the legal system for the protection of cultural heritage	34
1.2. Functions of the cultural heritage and its control from the administrative sanctioning regime	48
CHAPTER II. THE LEGAL MECHANISMS FOR THE PROTECTION OF CULTURAL HERITAGE. TOWARDS AN INTEGRAL PROPOSAL FOR ITS DETERMINATION	60
2.1. The identification and validation of the status of cultural property.	60
2.1.1. Mechanisms for the identification of cultural property	60
2.1.2. The patrimonialization of cultural properties	64
2.2. Mechanisms for the Control of Cultural Property	68
2.2.1. Mechanisms for the Preservation of Heritage Properties	71
2.2.2. Mechanisms for the Control of the mobility of heritage properties	80
2.3. Safeguarding of cultural heritage as a Mechanism of legal protection	85
2.3.1. Mechanisms for heritage management	90
2.4. Mechanisms that ensure the enhancement of the cultural heritage	96
2.5. Theoretical guidelines of the elements and mechanisms for the improvement of the legal protection of cultural heritage	103
CHAPTER III. THE ELEMENTS AND LEGAL MECHANISMS FOR THE PROTECTION OF CULTURAL HERITAGE IN CUBA. TOWARDS ITS IMPROVEMENT	112
3.1. Past and present of the legal regime for the protection of cultural heritage in Cuba	112
3.1.1. Values, definitions, and principles of the regime for the protection of heritage assets in Cuba	119
3.1.2. Of the entities and normative structure of the legal regime for the protection of cultural heritage in Cuba	123
3.2. The mechanisms of protection of the cultural heritage conceived in the Cuban legal system	130
3.3. Towards the improvement of the Cuban legal framework for the protection of cultural heritage	148
Conclusions	159
Recommendations	163
Bibliography	165
Annexs	194

INTRODUCTION

The study of cultural heritage has become imperative nowadays since despite the profusion of ideas, arguments, and strategies designed for its preservation, the problems associated with its permanence, transmission, and enhancement persist. Cultural heritage is usually subjected to destruction, deterioration, vandalism, and illicit trafficking, which leads to the loss of collective memory. It is not uncommon to observe a monument, with significant characteristics that had importance for the citizens, being replaced or modified in its purpose.

Protecting heritage is a symbol of resistance and commitment to preserving identity¹. The deepening and specialization through scientific research on cultural heritage and the variables associated with its protection, due to the values it represents and converges in it, a symbol of national or regional identity, in the face of the process of cultural homogenization derived from cultural globalization, is especially important.

Cultural heritage comprises places and objects of a cultural and natural nature, as well as the values associated with their materiality, components, spaces, and processes of creation and recreation. It reflects the experiences of the past and many of its values survive thanks to public and private efforts to preserve it.

A broad definition of cultural heritage has been chosen, based on the provisions of the UNESCO Conventions of 1972 and 2003, and the Mexico Declaration on Cultural Policies of 1982², as they coincide in that it is made up of assets of artistic, historical, traditional and archaeological value, in short, tangible and intangible cultural heritage, including the categories of cultural landscape, industrial heritage, underwater heritage and itineraries.

From cultural heritage as a legal category that encompasses cultural property of different natures, there is a tendency to associate it with the universal value embodied in the legal postulates emanating from international conventional instruments, especially the UNESCO Conventions of 1972 and 2003. The legal

¹ KRUSE, B. C., The importance of preserving cultural heritage: a case study in the city of Ponta Grossa, province of Paraná, Brazil, available at www.observatorigeograficodeamericalatina.org.mx (accessed November 20, 2022) 1.

² *Vid.* Articles 1 and 2 of the Convention for the Protection of the World Cultural and Natural Heritage, November 21, 1972, UNESCO; Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage, November 17, 2003, UNESCO; paragraph 23 of the Declaration on Cultural Policies, August 6, 1982, Mexico.

definition of cultural heritage offered by these legal instruments comprises two groups of cultural property based on the physical features of which it is composed: tangible and intangible cultural heritage.

Based on these international legal instruments, national policies and legal regimes are usually conceived that divide the protection of both types of cultural property. In them, emphasis has been placed on conceiving protective measures for the materiality of cultural heritage, without associating it with its immaterial context³. An intermediate space has been generated, between materiality and immateriality, in which the mechanisms conceived are inadequate due to the lack of a unitary and integral approach to the tangible and intangible values of cultural heritage⁴. All this has an impact on the treatment to be given to heritage manifestations, the unity of the legal system for the protection of cultural heritage, and does not effectively counteract the processes that affect and alter it⁵.

The present research project attempts to overcome this gap and to align the extra-legal criteria of a historical-artistic-technical nature with the legal ones, taking into account the economic-social sphere. The administrative recognition of cultural heritage derives from this economic-social sphere and justifies the application of protection mechanisms. Therefore, the analysis of the legal framework is also essential.

Cultural heritage has been analyzed by different sciences, which attribute different meanings, interpretations, and theories to it: historical, architectural, sociological, psychological, geographical, ecological, biological, geological, and art history. However, considering that the research carried out is not completely exhausted, was the idea that prompted the realization of this research. Especially, when it is corroborated through the initial bibliographic review, that its study from the legal perspective is insufficient and attractive. This last affirmation, particularly in the absence of a holistic approach, encompasses

³ RUBIO, R., "Estado del Arte del patrimonio cultural inmaterial- Colombia", Estado del Arte sobre Patrimonio Cultural Inmaterial, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, and Peru, Cusco, CRESPIAL, 2008, 151.

⁴ CLAROS, F., "Estado del Arte del patrimonio cultural inmaterial- Bolivia", Estado del Arte sobre Patrimonio Cultural Inmaterial, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, and Peru, Cusco, CRESPIAL, 2008, 77.

⁵ VEGA-CENTENO, I., "Estado del arte del patrimonio cultural inmaterial-Perú", Estado del Arte del patrimonio cultural inmaterial, Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador y Perú, Cusco, CRESPIAL, 2008, 300.

criteria derived from other disciplines so that the legal system for the protection of heritage assets takes into consideration the interests of the various actors involved in their preservation and revaluation.

The incursion into the dissimilar doctrinal criteria made it possible to establish a conceptual framework, a reference for the research. Cultural heritage law has been examined mainly from the perspective of international law⁶. This is reflected in the works of O'KEEFE, T., and FELDMAN, A.; UPJHON, I.; SAUDERS, R.; GERSTENBLITH, P.; PERLOFF-GILES, A.; MACMILLAN, F.; ZHOU, L.; SVEC, L.; BALCELLS, M. and DRAZEWSKA, B. Some of them, define and study cultural heritage focusing on the role of the State in the protection, safeguarding, and custody of heritage assets. These works ignore the role of the social actors, communities, and cultural groups involved in its creation and transmission, and do not consider mechanisms that promote its revaluation and safeguarding.

From the perspective of human rights, Criminal Law and Intellectual Property Law, the studies on cultural heritage by authors such as: ALEGRE, J.M.; PÉREZ, O.A.; FREDERIKSSON, M.; HILTY, R.; UBERTAZZI, B. and COVARRUBIA, P.⁷.

⁶ O'KEEFE, T, and FELDMAN, A., Placing voices, voicing places, heritage councilie, 2008; PERLOFF-GILES, A., "Rebuilding Haiti: legal measures and ongoing efforts concerning the protection of Haitian cultural heritage", *Art, Antiquity & Law*, (2017) 131-138; UPJHON, I., "The protection of iraqi cultural heritage in Australian domestic Law", *Art antiquity and Law*, (2006); SAUDERS, R., "Between paralysis and practice: theorizing the political liminality of palestinian cultural heritage", *Archaeologies* (2008) 471-494; GERSTENBLITH, P., "2009 Cultural Heritage Legal Summary", *Journal of Field Archeology* (2010) 237-243; MACMILLAN, F., "Cultural heritage and the unseen community", in WHATLEY, S., WAEDELDE, C., BROWN, A. and HARMON, S., (Editors), *Dance, Disability and the Law: Invisible Difference*, Intellect Books, 2016, 1-13; ZHOU, L., *International principles and local practice of cultural heritage conservation*, Conference Proceedings, Beijing 2014; SVEC, L., "Cultural Heritage training in the US military", *Springer Plus* (2014), 1-10; BALCELLS, M., "Art crime as white collar crime", in KILA, J. and BALCELLS, M. (Editors), *Cultural Property Crime. An Overview and Analysis of Contemporary Perspectives and Trends*, Brill, 2014, 96-110; DRAZEWSKA, B., "The human dimension of the protection of the Cultural Heritage from destruction during armed conflicts", *International Journal Cultural property*, (2015) 205-228.

⁷ ALEGRE, J. M., "El ordenamiento estatal del Patrimonio Histórico Español: principios y base de su régimen jurídico", *REAL* (1992) 599- 604; PÉREZ, O. A., "Desafíos de la protección jurídica y de la gestión del patrimonio cultural ecuatoriano", *Revista Lasallista de Investigación*, 15 (2018) 194- 209; FREDERIKSSON, M., "Between Intellectual and Cultural Property: Myths of authorship and common heritage in the protection of traditional cultural expressions", *Cultural Analysis*, (2019); HILTY, R.M., "Rationales for the legal protection of intangible goods and cultural heritage", *Max Planck Institute for Intellectual Property, Competition and Tax Law Research Paper* (2019) 1-25; UBERTAZZI, B., "EU Geographical Indications and intangible cultural heritage", *International Review of Intellectual Property and competition Law* (2017) 1-23; COVARRUBIA, P., "Geographical indications of traditional handicrafts: a cultural element

On the other hand, studies of cultural heritage from the administrative law perspective are scarce. In addition, in general, research tends to focus specifically on certain types of heritage assets and does not develop in an integrated and coherent manner. This is exemplified by the development achieved in areas of research related, for example, to the international protection regime of cultural property in wartime, tangible immovable heritage, and intangible heritage studied by authors such as FRANCIANI, F.; LOSTAL, M. and CUNLIFFE, E.; LIXINSKI, L.; GIGOT, M. and FERRAZI, S.⁸. In the same sense, it can be stated that archaeological, underwater, and landscape cultural heritage has been little studied from a legal point of view.

It is also noted that few studies systematize heritage from a national and regional legal perspective and those that do address specific aspects such as its definition and concept, classification, and the treatment of cultural heritage in international legal instruments. In this sense, GARCÍA, N., GALLI, N., BLAKE, J., CORNU, M., VAIVADE, A., MARTINET, L. and HANCE, C.; LIXINSKI, L.; WANG, CH.; GABARDÓN DE LA BANDA, J. F.⁹ stand out. These do not offer an integral study that allows identifying the main elements for the

in a predominantly economic activity", *International review of Intellectual property and Competition Law* (2019) 1-23.

⁸ LIXINSKI, L., "Between orthodoxy and heterodoxy: the troubled relationships between heritage studies and heritage law", *International Journal of Heritage Studies* (2015) 203-214; FRANCIANI, F., *Public and private in the international protection of global cultural goods*, United Kingdom: Oxford University Press, 2012; LOSTAL, M. and CUNLIFFE, E., "The aftermath of the destruction of cultural heritage: factoring in cultural rights in post-conflict recovery processes", *UN Human Rights Office of the High Commissioner Submission to Study on Intentional Destruction of Cultural Heritage*, 2018; FERRAZI, S., "The notion of cultural heritage in the international field: behind origin and evolution of a concept", *International Journal for the Semiotics of Law* (2021) 743- 768; GIGOT, M., "The shapes of law in central cultural-heritage spaces: territorialization and effectiveness of heritage law", *Annales de Géographie* (2020) 112-137.

⁹ GARCÍA, N., "Los usos sociales del Patrimonio cultural", in FLORESCANO, E.(Comp.), *El patrimonio cultural de México*, E. C. E., México, 1993; LIXINSKI, L., *Intangible cultural heritage in International Law*, Oxford University Press, 2013; WANG, CH., "Heritage formation and cultural governance: the production of Bopiliao Historic District, Taipei", *International Journal of Heritage studies*, (2013) 676- 691; GABARDÓN DE LA BANDA, J.F., "La tutela del patrimonio cultural inmaterial en España: la ley para la salvaguardia del patrimonio cultural inmaterial", *Anuario jurídico y económico escorialense*, (2016) 275- 292; GALLI, N., "Concepto del patrimonio cultural, sus aspectos jurídicos", in. www.adaciudad.com.ar, (accessed October 14, 2019) 1-11; BLAKE, J., *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration*, UNESCO, Paris, 2001; CORNU, M., VAIVADE, A., MARTINET, L. and HANCE, C., *Intangible Cultural Heritage under national and International Law. Going beyond the 2003 UNESCO Convention*, Edward Elgar Publishing, 2020.

conceptualization of the administrative legal order in matters of protection and safeguarding of cultural heritage.

This bibliographic corpus outlines the doctrinal scope of Cultural Heritage Law and some of the elements that constitute it: its purpose and scope of application, institutions, specific rules, and relevant doctrine¹⁰.

The inquiries carried out show a reduced number of articles, essays, and research regarding the content and scope of the legal protection and the mechanisms of protection of the cultural heritage that deepen the legal protection of the Cuban cultural heritage in terms of evolution and evaluation of the legal system. They come from studies associated with heritage buildings, monuments, urban centers, and actions carried out by Historians and/or Urban Conservators. They mean GÓMEZ, L. and PÉREZ, K.; AGUILA, M.; BARRETO, G.; FERNÁNDEZ, R. and LEVRAND, N.E.; BELLO, L., MUÑOZ, M., SOTO, M. and MORCATE, F.; RODRÍGUEZ, P., FORNET, P., LEÓN, I. and ZAMORA, R.¹¹.

Likewise, in the homeland, accountability reports related to cultural heritage have been drafted for international organizations and agencies¹². These reports do not address aspects of the Cuban legal system that should be improved or updated.

These documents expose the fundamental problems presented by Cuban heritage assets and the challenges of the agents responsible for their

¹⁰ MESINAS, M. A., "Cultural heritage law. Analysis from the perspective of human rights and its application by the National Institute of Anthropology and History (INAH)", *Intervention*, (2016) 71-81.

¹¹ AGUILA, M., *Los Bienes declarados Patrimonio Cultural de La Humanidad en Cuba: ¿Es Efectiva Su Protección Jurídica*, Diploma Paper, Universidad Central "Marta Abreu" de Las Villas, Facultad de Derecho, 2012; BARRETO, G., *Tres edificios camagüeyanos narran una historia del Derecho*, en *América*, Ariccia, Italia: Aracne editrice, 2015; FERNÁNDEZ, R., *La protección del patrimonio cultural: un estudio comparativo de la normativa de Cuba y de la Comunidad Valenciana (España)*, Aricci, Italia: Aracne editrice, 2015; GÓMEZ, L. y PÉREZ, K., "Reflexiones sobre patrimonio cultural. Lo inmaterial del centro histórico de Camagüey, patrimonio mundial, Apuntes", *Revista de Estudios sobre Patrimonio Cultural - Journal of Cultural Heritage Studies*, (2011) 260- 275; LEVRAND, N. E., *Derechos fundamentales y gobernanza en el centro histórico La Habana Vieja*. Aricci, Italy: Aracne editrice, 2015; ELLO, L., MUÑOZ, M., SOTO, M. and MORCATE, F., "Actualidad del patrimonio en cuba, reflexiones sobre desarrollo sostenible y conservación preventiva", *ESTOA* (2018), 61-69; RODRÍGUEZ, P., FORNET, P., LEÓN, I. and ZAMORA, R., *Luces y Simientes. Territorio y Gestión en Cinco Centros Históricos cubanos*, Ediciones Boloña (2012).

¹² Such as UN, Joint Inspection Unit: 1982; UN, Independent Expert in the field of cultural rights: 2010; ICCROM, ICOMOS, IUCN, The Advisory Body "Our Common Dignity Initiative" on Rights-based approaches in World Heritage: Balance and perspectives: 2016.

preservation and transmission. Among others: the introduction of new dynamics and constructive typologies in the development of historic cities and urban centres; the intense economic crisis generated by the fall of the Socialist Bloc which, together with the intensification of the embargo measures imposed by the United States, caused a decrease in investments and opportunities for development and cultural exchange, and the increase in the deterioration or substitution of elements of the urban landscape and national heritage assets; insufficient development of the local economy, which generates a lack of experience in participative processes and scarce articulation of instruments for the management of the resources and heritage assets of the territory; the successive dispositions in the internal and foreign policy of the country, which promote the trade of real estate, services and the appearance of small private companies, which can generate processes of mercantilization of heritage values, altering the integrity and identity of the assets that make up the national and local heritage¹³.

In the current Cuban context, the State's priority is the protection, conservation, and sustainable use of heritage. In this effort, legal science is called upon to contribute to transcending the negative situations that affect social development and to improve the management of heritage resources and values from the legal and institutional framework. The Bases of the National Economic and Social Development Plan until 2030, in its strategic axis dedicated to human development, equity, and social justice, objectives 20 and 21, propose to reach effective levels of participation of the population in all orders of economic, political and social life, as well as in the mechanisms of evaluation, control, feedback, and adjustment of the process of social transformation.

The Cuban revolutionary legal basis that has governed the protection of cultural heritage for at least 30 years, consisted mainly of Laws 1 and 2 of 1977 on movable and immovable property, and Law 106 of 2009, on the National Museum System. These regulations with the rank of law limited the actions of decision-makers, officials, legal operators, and the general public, to achieve

¹³ BELLO, L., MUÑOZ, M., SOTO, M. and MORCATE, F., "Actualidad del patrimonio en cuba, reflexiones sobre desarrollo sostenible y conservación preventiva", ESTOA (2018), 61, 63-65; RODRÍGUEZ, P., FORNET, P., LEÓN, I. and ZAMORA, R., *Luces y Simientes. Territorio y Gestión en Cinco Centros Históricos cubanos*, Ediciones Boloña, 2012, 85, 104, 106, 107, 115, 167, 190, 190, 241, 261, 311, 333, 377, 399.

the protection of cultural heritage. In addition, there was a need to incorporate provisions that would offer treatment to underwater heritage manifestations -of which Cuba is the depositary of a considerable potential of assets that need to be protected-, immaterial ones -of which it has some with international recognition by UNESCO¹⁴-, the expression of the sanctioning power of the Administration in this matter, as well as updating the principles, actors, and protection mechanisms in the light of the international instruments to which Cuba is a signatory.

This background, together with the constitutional mandates of 2019, related to the state's responsibility to protect the Cuban natural, historical, and cultural heritage, the foundations of the educational, scientific, and cultural policy, among which is to defend the identity, safeguard the patrimonial wealth and protect the remarkable places and properties of Cuba, and the duty of Cuban citizens to protect their cultural heritage¹⁵; caused a new General Law for the Protection of Cultural Heritage and Natural Heritage, which was proposed and approved in the National Assembly¹⁶. The draft of this normative provision was analyzed since the process of publication in the Official Gazette of the Republic has not yet been completed. The proposed Regulations of this Law were also examined in the context of this research.

From all of the above, the theoretical interest of the object under study is evident due to the legal problems it poses, a complexity that is increased by the multidisciplinary analysis that distinguishes the subject matter, since its study and understanding goes beyond the limits of Administrative Law, resulting in the application of concepts, mechanisms and categories of International Public Law, Constitutional Law, Intellectual Property Law, Criminal Law, Civil Law and other disciplines. All this can generate problems of competition, ambiguities, and overlapping of mechanisms, processes, and structures that damage or divert the sense of protection. To avoid them, it is vital to establish the contributions of each legal discipline and identify the strengths and elements

¹⁴ La Tumba Francesa (2008); La Rumba Cubana, mezcla festiva de baile y música, y todas las prácticas culturales inherentes (2016); El Punto cubano (2017), Las Parrandas de la región central de Cuba (2018), Los saberes de los maestros del ron ligero (2022).

¹⁵ *Vid.* Articles 13 h), 32 l) and k) and 90 k) of the Cuban Constitution of 2019.

¹⁶ Agreement IX-140 by the National Assembly of the People's Power of the Republic of Cuba, Official Gazette of the Republic of Cuba Ordinary 58, dated June 8, 2022.

that can be beneficial through their harmonization to preserve cultural heritage. For this reason, and reasons of efficiency, the study has focused on the internal administrative regime for the protection of cultural heritage.

This research is inserted in the international Institutional Project VLIR-UOS of the University of Oriente of Santiago de Cuba and several universities of Belgium, in its second phase, sub- project 4 dedicated to the research of cultural heritage and new technologies. It is another of the motivations that together with what has been described in this introductory part, led to the writing of this report. Hence, to contribute to the achievement of the proposed goals, the following methodological design is established:

Scientific problem of this research: the inadequacies in the theoretical and normative conception of the elements and mechanisms of the legal protection of the Cuban cultural heritage, adversely affect the fulfillment of its social function for present and future generations.

It is **hypothesized** that: the configuration of theoretical guidelines of the elements and mechanisms of the legal protection of the cultural heritage will favor the solution of the insufficiencies detected in the Cuban legal regime and the fulfillment of its social function for present and future generations.

The object of study is the protection of cultural heritage from a legal perspective and the elements and mechanisms of the legal system for the protection of cultural heritage are specified as the field of action. Accordingly, the following objectives are stated:

General: to base theoretical guidelines of the elements and mechanisms of the legal protection of cultural heritage in Cuba, from a historical, doctrinal, and comparative study, which favors its theoretical and normative conception contributing to the fulfillment of its social function for present and future generations.

Specific:

1. Identify, from a historical, theoretical, and normative comparative analysis of the elements of the legal system for the protection of cultural heritage, the foundations that enable its improvement to fulfill its social function.
2. Systematize, based on historical, theoretical, and comparative normative analysis, the legal mechanisms used in the legal protection of cultural heritage.

3. To diagnose, based on the historical, theoretical, and comparative normative foundations of the elements of the legal regime of protection of cultural heritage, and on the legal mechanisms used in its protection, the inadequacies of the Cuban legal framework in this matter.

4. To configure theoretical guidelines of the elements and mechanisms of the legal protection of the cultural heritage, tending to its improvement, and responding to the detected insufficiencies of the Cuban legal framework.

From the methodological point of view, according to its scope, the research is descriptive, explanatory, and comparative. As part of the design, the following stages were planned: a) delimitation of the object of research and its objectives; b) bibliographic review and exploratory work with the sources of information related to the topic; c) elaboration of the methodological design; d) execution of the research; e) preparation of the final research report.

The methodology followed was based on the following methods:

Analysis - synthesis, induction, and deduction, useful in the realization of the historical and theoretical legal study, to characterize the institution and appreciate the state of science, the identification of regularities and trends in the doctrine and to provide an overview of the current legal framework and the problems identified when contrasted with the doctrine. It has made it possible to establish the basis for the diagnosis of the Cuban legal framework and to obtain the conclusions of the research.

The historical-legal analysis has made it possible to know and evaluate the evolutionary course of the protection of cultural heritage, linked to the current legal framework; to identify its origin, changes, regularities, and trends in its evolution, especially in terms of requirements, objectives, denomination, effects, scope of application.

Hermeneutic: to specify in the norms of protection of cultural heritage, the object, functions, and obligations of the structures involved in the patrimonial protection, evaluating the correspondence between them and the normative statements of International Law. Also in the appreciation of the constitutional values and principles reflected in the special legislation for the protection of heritage assets. Likewise, for the understanding of certain functions of the values and principles aimed at preserving and revaluing cultural heritage in the

international, constitutional, and administrative order, according to the historical, political, economic, and socio-cultural contexts.

The systemic-structural-functional method made it possible to examine the legal protection of cultural heritage through theoretical and doctrinal analysis, which facilitated the determination of its components, structures, functions, interconnections, and hierarchy. It has been useful in the configuration of the theoretical guidelines proposed in the research as a solution to the problems diagnosed.

The comparative legal method was developed considering the legal and historical factors in the European normative systems¹⁷ (Germany, Belgium, Spain, France, Italy, and Portugal) and Latin American¹⁸ (Argentina, Bolivia, Colombia, Ecuador, Peru, and Venezuela), in their Constitutions and their special legal regime of protection of cultural heritage, which allowed to

¹⁷ The following countries have been chosen for comparison in the European legal framework: Belgium, because the city of Bruges was the inspiration for the adoption of the Resolutions on the Conservation of Small Towns, ICOMOS, 1975. Another reason is Belgium's role in the European political and legal context, the place it occupies in the structure that encompasses the interests of the 27 nations of the European Union, all of which has led the Belgian legislator, in his experience, to have views open to the inclusion and adoption of appropriate variants to raise the standard of living of its citizens, and for the experience of this government in the person of the Department of Culture with social projects of heritage management. I acknowledge that in Belgium strict divisions of competences exist in terms of the legislative powers between the federal and regional levels. However, for reasons of simplifying the presentation of the comparative findings in the text of the thesis I refer to "Belgium" next to other countries in the comparative analysis while specifying in the footnotes precisely the governance level at which the legislation has been adopted; also, together with France, for the considerable number of cultural manifestations that have universal declaration as heritage properties. France also, for its formidable experience in their management, especially in the field of tourism and from the point of view of the Sustainable Development Goals. The legal system of Italy has been chosen for its important number of cultural events, with formidable experiences in tourism management; and Spain, because since 1985 the Law of Cultural Heritage has been in force, widely valued by jurists not only from the normative point of view, but also for its social legal efficacy. Germany has been chosen because of the experience acquired in the protection and safeguarding of heritage by organizations that have influenced not only within the German territory but also in the entire European framework, such as EUROPA NOSTRA, the German Cultural Heritage Committee (DNK) and the Prussian Cultural Heritage Foundation (SPK).

¹⁸ The following countries have been chosen for comparison: Argentina, for being considered as one of the countries of America with a remarkable experience in legal production in terms of the completeness of its norms; Colombia, for the dissimilar cultural manifestations that are protected in this territory, and for the Caribbean identity that links it with Cuba; Peru, for preserving valuable traditions, among the oldest in the Latin American region and this country is located the Regional Center for the safeguarding of intangible heritage under the sponsorship of UNESCO. Bolivia and Ecuador have also been chosen because of the recent constitutional processes that have taken place in those countries, which have forced the legislator to rethink the legal system in all countries, and of course, this includes the heritage protection system.

appreciate the law in force in these countries, to identify the regularities and tendencies in protecting cultural heritage and to formulate the theoretical guidelines proposed in the thesis. They were chosen for the following criteria: 1) to be integrated into the Roman-French legal system, except Germany; 2) to be exponents of different visions regarding the regulation of the protection of cultural heritage; 3) to have satisfactory experiences in the protection of tangible and intangible cultural manifestations declared cultural heritage.

The following were defined as criteria for comparison: constitutional regulation of values and principles useful in the protection of cultural heritage. In the selected special legislation: the regulation of values, principles, definitions, the content of the right of ownership over property declared cultural heritage; entities and structures specialized in the guardianship, their functions and obligations, obligations of the State, and the inclusion of other agents in the protection; definition and identification of the measures and effects derived from the protection dispensed to heritage property and those located in the environment, object and purposes of the legal order, main relations and dynamics; position occupied by the sanctioning regime in the normative framework, principles, procedures, infringements, and consequences of the administrative sanctioning regime.

In addition, it was evaluated in the recognition mechanisms, the regulation of the name of the instruments used, the inventory action, the principles of action of the Registries, the Lists of Endangered Heritage and the Representative List of Intangible Heritage, phases, and effects of patrimonialization, legal presumptions that recognize the property as part of the cultural heritage and the regulation of the process of revocation of the status previously granted; the statements aimed at controlling the use and enjoyment and the right of visitation; the modalities of preservation, its measures, instruments, and requirements for its execution, the special measures on archaeological, aquatic, immaterial, ruins, serial and transboundary properties, the limitations established to the dominical owners of heritage properties in favor of its preservation, the mechanisms of citizen participation in the actions of intervention, the causes and effects of the finding.

Regarding the control of the legal disposition of patrimonial assets: the States Parties to the 1970 Convention and the 1995 UNIDROIT Convention, the

European States that have implemented in regional regimes, Directive 60 of May 15, 2014, of the European Parliament and Council, the States that have implemented the 1979 Convention of the Organization of American States; the regulation of measures and instruments to control mobility, the duty to communicate, the real rights of preferential acquisition in favor of the State and the legal transactions transferring ownership of patrimonial assets.

Regarding safeguarding, the parameters to be compared were: the regulation of its measures and instruments, the nuclei, axes, and elements of management, and the determination of the sources of financial resources.

About the administrative promotion that favors the enhancement of the heritage, a comparison was made concerning the regulation of its definition and the economic, advisory, financial, and aid measures, honorary, general educational, and dissemination measures, as well as their main instruments.

On the other hand, the exegetical method made it possible to diagnose the current state of the Cuban legal regulations in force regarding cultural heritage. Cuban legal regulations were analyzed from the grammatical, systematic, logical, and historical dimensions, which made it possible to determine their successes, achievements, and relevant insufficiencies and, consequently, to propose their improvement.

The bibliographic review, through the filing and triangulation of sources, made it possible to have essential and updated information on the needs of the scientific research and the evaluation of the research background.

Content analysis has been essential for the understanding and management of the protection of heritage assets from a legal point of view. Reality has been observed through the unit of analysis consisting of the existence or not of the phrases or groups of words observed. For this purpose, the phrases or groups of words referring to cultural heritage, cultural property, environment, protection or guardianship, and protection mechanisms linked to the identification, recognition, conservation, safeguarding, management, and enhancement of heritage property, all related to the legal sphere, have been determined as the unit of record. The unit of context has been the texts of authors and international or regional legal dispositions coming from entities specialized in the matter or not, containing imperative norms, and rules of hard or soft law that affect the

domestic conception of protecting cultural heritage¹⁹. The national legal regulations of Argentina, Belgium, Bolivia, Colombia, France, Ecuador, Germany, Italy, Portugal, Peru, Spain, Colombia, Peru, and Venezuela were also analyzed.

The research report is divided into three chapters. The first identifies the elements of the legal regime for the protection of cultural heritage, the historical, theoretical-doctrinal, methodological, institutional, and comparative law foundations associated with its legal protection. The second systematizes the main mechanisms, tools, and instruments for the recognition, control, safeguarding, and promotion of cultural heritage, and proposes the theoretical guidelines that contribute to their evaluation and improvement. The third one, characterizes the current state of the subject in Cuba, from the use of these guidelines in diagnosing its legal statements, and in correspondence with the detected insufficiencies, its redesign is suggested through the extension of intentional guidelines for Cuba.

The main results are as follows:

- Historical systematization of the foundations of the legal protection of cultural heritage as a support for the fulfilment of its social function for present and future generations.
- Identification of the elements and mechanisms used to guarantee the protection of cultural heritage in the countries studied and in international legal instruments.
- Diagnosis of the main shortcomings of the current Cuban legal framework, which limits the fulfilment of the social function of cultural heritage.

¹⁹ Cultural heritage has been the object of direct and indirect regulation in international provisions of different natures, such as Treaties, Conventions, and Recommendations arising from the normative work of international organizations specialized in the field, in those oriented towards the protection of human rights and the environment. This international legal corpus contains peremptory norms, which according to article 53 of the 1969 Vienna Convention on the Law of Treaties, are constituted by provisions accepted and recognized by the international community of States as a whole, as norms that do not admit contrary agreement and that can only be modified by a subsequent norm of general international law having the same character. Likewise, they contain rules specifying general instruments or practices of a binding nature, the non-compliance with which may be enforced by institutional means of conflict resolution and lead to the international responsibility of the State. These are called Hard Laws.

On the other hand, this legal corpus contains norms, provisions, declarations, and agreements that are not binding but may nevertheless have practical effects. These statements make up the Soft Law. To visualize the latter, we refer that soft law instruments would be: resolutions, recommendations, and decisions of international organizations and non-normative agreements (Non-binding international legal agreement).

- Theoretical guidelines to evaluate and improve the legal system for the protection of cultural heritage.
- Theoretical guidelines aimed at improving and redesigning the legal system for the protection of cultural heritage in Cuba.
- Updated bibliographic material on the subject in correspondence with current trends at the theoretical and comparative level of the legal protection of cultural heritage, especially in the field of Cuban law.

**CHAPTER I. IN SEARCH OF FOUNDATIONS FOR THE IMPROVEMENT OF
THE LEGAL SYSTEM FOR THE PROTECTION OF CULTURAL HERITAGE.
VIEWS FROM ITS ELEMENTS**

CHAPTER I. IN SEARCH OF FOUNDATIONS FOR THE IMPROVEMENT OF THE LEGAL SYSTEM FOR THE PROTECTION OF CULTURAL HERITAGE. VIEWS FROM ITS ELEMENTS

This chapter is aimed at identifying, based on a historical, theoretical, and comparative normative analysis of the elements of the legal system for the protection of cultural heritage, the foundations that make it possible to redesign it to fulfill its social function.

The identification will be based on determining the elements of the legal system for the protection of cultural heritage: definitions, values, principles, institutions involved, and normative structuring. Regarding the institutions, in their structural aspect, the functions, obligations, and entities linked to the legal protection will be specified. Regarding its norms, the scope and content of protection, purposes, object of regulation, main social relations, dynamics, procedures, and legal mechanisms that endorse the legal system will be determined.

It has been useful to use the following research methods: analysis-synthesis, induction, deduction, historical, hermeneutic, exegetic, and comparative legal, with the support of the documentary review technique of an extensive bibliography.

1.1. Towards a characterization of the legal system of cultural heritage

From the examination of the theoretical postulates of AGUILÓ, FERNÁNDEZ, PRIETO and POLO²⁰, it can be affirmed that the following constitute elements of the legal order: values, principles, definitions, institutions, and norms. These elements are at the center of the historical, theoretical, and comparative systematization that is carried out in this chapter, from the corresponding contextualization to cultural heritage, whose ordering can be understood as the set of legal statements containing the values, principles, definitions, institutions, and rules of public law relating to the protection of cultural heritage in a given spatial and temporal scope, conducive to the fulfilment of its social function.

²⁰ AGUILÓ, J., "Sobre "Definiciones y normas", *Doxa Cuadernos de Filosofía del Derecho* (1990), 278; FERNÁNDEZ, J., *Teoría del Estado y del Derecho*, volume II, Editorial Félix Varela, Havana, 2001, 234; POLO, E., *Un sistema tributario cubano, de la realidad a la aspiración*, Thesis presented in option to the scientific degree of Doctor in Juridical Sciences, Faculty of Law, Universidad de Oriente, Santiago de Cuba, 2010, 19; PRIETO, M., "El ordenamiento jurídico cubano", in MATILLA, A., *Introducción al estudio del Derecho*, Editorial Félix Varela, La Habana, (125) 125 and 126.

Among these legal statements, there is internal coherence, unity, and systematicity²¹. For this purpose, it should be made clear what each of these elements consists of²².

1.1.1 Definitions relevant to the characterization of the legal framework for cultural heritage

With the recognition of the role of definitions based on their typology²³, it is necessary, at first, to refer to the concept of cultural heritage, whose definition has not been unanimously accepted; however, the bibliographic review shows the inclusion of terms such as the heritage of movable and immovable, tangible and intangible cultural assets that are transcendent to the identity and values of a community, people, region or nation (See Annex 1).

It is also a historically constructed definition²⁴, in which converge notions elaborated from different fields of the humanistic sciences, but from which the essential points that define the object of study of this work can be extracted; whose definition is relevant, because it constitutes a normative element with transcendence to legal protection.

²¹ PRIETO, M., *supra* n. 19, 130.

²² Values represent the social and political interests and purposes that the normative set enshrines and defends. Principles, in turn, are assumed as those basic statements recognized or not in the law, but whose role extends to its interpretation and application. Definitions are the grammatical constructions that give meaning to a matter in the legal order and express the object, insofar as they specify its limits, characters, and nature. Institutions, meanwhile, are considered an organizational entity, which forms the structure with its legal personality for the achievement of the purposes of the legal system. The norms, on the other hand, are the rules of conduct protected by state coercion, conceptualized and formalized by the State through its competent organs, confirming the regime of protection of the cultural heritage and revealing the relations, measures, and mechanisms that protect it.

²³ Definitions exercise the dogmatic function of determining statements for the interpretation and understanding of regulations, by establishing the meaning and scope of terms and eliminating ambiguities and vagueness. AGUILÓ, J., *supra* n. 19, 278; FERNÁNDEZ, J., *supra* n. 19, 234; POLO, E., *supra* n. 19, 19. Their coherence allows conceptual unity in any matter. A lexicographic definition provides information on the meaning of the term in cases where it is not known or has more than one meaning. A clarifying definition specifies the term to include or exclude certain cases and visualizes the limits of its applicability. A theoretical definition, on the other hand, characterizes the object to which it is to be applied. AGUILÓ, J., *supra* n. 19, 255. The latter type may undergo variations due to the appearance of other arguments that update it. It is therefore recommended to reflect them in an annex to the law to refine them if necessary. The lexicographical and clarifying definitions remain unchanged, so that they may form part of the normative text in the order provided for this purpose.

²⁴ SVETAZ, M. A. and GROSSO, B. M., "Marco teórico", in RODRÍGUEZ, R., *La técnica legislativa en Centroamérica y República Dominicana*, Inter-American Institute of Human Rights, San José, Costa Rica, 2001, 12 and 13.

As DÍAZ, M.C. points out, cultural heritage is a multidisciplinary and systematic category²⁵. In its interpretation, preservation, and enhancement, a series of disciplines converge, especially those linked to History, Architecture, Engineering, and Natural Sciences disciplines, among others. In its preservation, a series of planned and coordinated actions and procedures must be developed to obtain the expected results: the survival of its materiality and the values it represents for present and future generations.

The historical, doctrinal, and normative study made it possible to establish the evolution experienced by the definition of cultural heritage²⁶, from incorporating tangible and singular goods to the conception of sets of cultural goods, intangible heritage goods, and processes associated with them. Thus, at first, cultural heritage is defined from a historical perspective, which is linked to monuments, cities, sites, and groups of properties that reflect the memory of a nation or collectivity. This collective ownership implies the obligation to conserve this type of property.

According to GARCÍA, M. P.²⁷, this conception is reflected in the *Bull Cum Almam Nostram Urbem* of 1262 issued by Pope Pius II Piccolomini, which sets out the reasons for the obligation to conserve monuments: to bequeath them to future generations and to recall the fragility of human values; the rules to promote the restoration and conservation of old buildings and the creation of the *Magister Viarium*, measures adopted by Pope Martin V.

Following the aforementioned author, with the birth of historical sciences and archaeology in the 18th century, the study and classification of cultural manifestations began. Aubin-Louis Millin determines the concept of the monument in his work called *Antiquités nationales* in 1790. In this context, the conservationist and anti-demolitionist movements appeared as a result of the

²⁵ DÍAZ, M.C., *Criteria and concepts on cultural heritage in the 21st century*, UBP Publications, (2010) 4.

²⁶ Declaration of Mexico, UNESCO, 1982; PRATS, LI., *Antropología y Patrimonio*, Barcelona (1997); GARCÍA, I.M., "Legislar para preservar el patrimonio documental mexicano: un reto para el nuevo milenio", *Investigación Bibliotecológica*, (2000) 10; PALMA, J.M., "El patrimonio cultural, bibliográfico y documental de la humanidad", *Cuicuilco* 58, (2013) 35; AZPEITÍA, A., "Patrimonio y cultura. El concepto de patrimonio cultural en la normativa vasca", *Revista de la Facultad de Ciencias Sociales y Jurídicas de Elche* (2016) 371.

²⁷ GARCÍA, M. P., *El patrimonio cultural. Conceptos básicos*, Prensa Universitaria, Universidad Zaragoza, Spain, 2011, 21.

French Revolution. With the new idea of the State promoted by this revolutionary movement, cultural heritage is considered a common good.

In the 19th century, according to GARCÍA, M. P., the notion of identity is shaped, by the idea of considering monuments and their historical and artistic values as a common good of the people, whose protection is assumed by the State, is consolidated. National museums are generalized as public entities where expropriated and acquired goods are deposited and exhibited. Among the main exponents of this line of thought is Viollet-Le-Duc (1814-1879)²⁸, Alois Rigel (1858-1905)²⁹, and John Ruskin (1819-1900)³⁰.

The 20th century brought to the field of heritage definition the notion of integrality, by encompassing the different levels of expansion of artistic, historical, archaeological, ethnological, and other elements in the qualifier of culture. This idea is reflected in the conclusions of the Franceschini Commission³¹, which proposes as a definition: "All assets that refer to the history of civilization belong to the cultural heritage of the Nation". This quality converges the set of ways of thinking, feeling, and living of the different social groups in time and space³².

This notion has had as detractors CAVALLO, B. and GARCÍA DE ENTERRÍA, E.³³, since they affirm that the understanding of the cultural reality is rich and

²⁸ He put into practice a systematic treatment of the ways to restore. He is the great defender of the restoration in a style that lasted in Europe until the middle of the last century.

²⁹ Recognizes the existence of use value in heritage assets and the need for reuse in cases where the original use is not possible. Establishes how to intervene in the monument considering the use value by appealing to memory, especially the values of antiquity and history. VIERA, N., "Los espacios públicos en el Centro Histórico de Salvador de Bahía", in LÓPEZ, F. J. and VIDARGAS, F., (eds.), Encuentro Internacional Usos del Patrimonio: nuevos escenarios, Mexico, 2015, 107.

³⁰ "Conserve rather than restore", because when the latter is done "a step of history is destroyed. These arguments inspired theories concerning ruins and conservation with varied approaches.

³¹ Directed by M. S. Giannini, in Italy in 1964, to investigate the protection and valorization of things of historical, archaeological, artistic, and landscape interest. This commission elaborates on 84 Declarations, among them it expresses its notion of definition of cultural heritage and cultural property, the measures to be adopted by the State to regulate the public use of public and private cultural property. FERNÁNDEZ, M., Legal protection of heritage and tourism as a dynamizing agent: the case of Lucena (Córdoba), Master's Thesis University of Córdoba, Spain, 2016, 15.

³² HERNÁNDEZ, F., "La conservación integral del patrimonio", Complutunt Extra, 6(U), (1996), 257.

³³ CAVALLO, B., La nozione di bene culturale tra mito e realtà: rilettura critica della prima dichiarazione della Commissione Franceschini, Scritti in onore di A'fassimo Severo Giannini, II, (1998) 121; GARCÍA DE ENTERRÍA, E., "Consideraciones sobre una nueva legislación del Patrimonio Artístico, Histórico y Cultural", Revista de Derecho Administrativo 39 (1983) 581.

diverse, all of which hinders the proposed unitary classification, which transcends the conservation and enjoyment of heritage assets. Such arguments are relevant to the legal regulation since they must reflect the diversity of valuation criteria of this rich heritage reality.

However, given the usefulness of the term cultural, which includes all levels of planetary development, including natural and "transformed" heritage, together with the arguments of BENAVIDES, J., PRIETO DE PEDRO, J. and BENÍTEZ DE LUGO, F.³⁴, it is recommended to transcend the terms historical and artistic, as insufficient, partial and misleading, and to use the term cultural in the normative definitions.

After World War II, cultural heritage became a supranational issue, as evidenced by the conferences, meetings, and normative activity deployed by international and regional organizations. This activity has had repercussions on national policies and legal regimes for the protection of cultural heritage, containing its definition and composition.

It highlights the instrumental definition adopted in the UNESCO Conventions of 1954, 1970, and 1972, which consider cultural heritage as the set of tangible cultural assets that a society has received as an inheritance and that constitute significant elements of its identity as a people.

This definition, according to the 2003 UNESCO Convention text³⁵, is diversified to include all movable and immovable property, tangible and intangible, owned by individuals or by public or semi-public institutions or organizations, which are of exceptional value from the point of view of history, art, science, economic, social and cultural life, and are worthy of preservation³⁶.

The concept of cultural heritage throughout the twentieth century has been enriched by new contributions of thought. It has been further expanded to include assets or manifestations from the industrial, mining, geological, paleontological, technological, ethnological, anthropological, and

³⁴ BENAVIDES, J., "Siete enunciados sobre la teoría del patrimonio cultural", Boletín Informativo IAPH, Spain (1995) 33 and 34.

³⁵ PÉREZ, Y., "La protección del patrimonio cultural. Una aproximación al régimen jurídico venezolano en el marco de la codificación internacional", in Revista de la Facultad de Derecho, Universidad Central de Venezuela, (2011) 227.

³⁶ CAMPS, N., La protección internacional del patrimonio cultural, Tesis Doctoral, Universitat de Lleida, Spain, 2000, 79; PÉREZ, O. A., *supra* n.7, 198.

anthropological fields³⁷. These conceptions are valuable because they reflect the context and identity of the social groups or regions that own and preserve them.

Special treatment is given to heritage assets in series³⁸ and/or transboundary³⁹, as an abstract notion that unifies assets based on historical and complementary processes or events, which are located in the same territory or different countries, and which are not necessarily physically united. By the principle of cooperation, the aim is to harmonize the actions of the Administrations involved in their preservation and safeguarding.

In the comparative legal research on the regulation of an instrument that brings together the wills and actions of the holders of transboundary assets in the selected orders, it can be seen that such a tool has not been conceived. One could think of incorporating into such regulations, the drafting of Covenants, Agreements, or strategies that would allow to control the evolution of their agreements. As a consequence of this oversight, the necessary procedures for their substantiation are not determined, nor are those responsible for possible non-compliance, thus affecting citizens' awareness of their participation in the protection of heritage manifestations.

Special attention should be paid to patrimonial assets whose authors are still living. Through the legal comparison of their regulation, it can be seen that the legal systems of Germany, Spain, Italy, and Portugal offer a differentiated treatment to these assets⁴⁰. In this respect, two different formulations are found to exist. The Italian formula agrees to recognize them as cultural heritage as

³⁷ This concept encompasses not only the original regulation of properties recognized in International Law by the UNESCO Conventions of 1954, 1972 and 2001, related to their materiality and legal nature - movable and immovable - not only based on antiquity, but also incorporates the intangible cultural manifestations that underlie the materiality of the property or that are manifested from this characteristic, and that is produced in contemporaneity, as the UNESCO Convention of 2003 regulates.

³⁸ Goods in series, obeys to a plurality of patrimonial manifestations which in many cases, there is no physical continuity. The links of these assets: start from a set, landscape, or site; complementarity; uniqueness-duality; historically complemented; united by a process or historical fact; work of an author, architectural or technological movement; historical itineraries. ROJAS, A., "Bienes en serie: un patrimonio compartido", in *Hereditas*, (2011) 7. Transboundary assets are a type of heritage shared in ownership due to their location in different territories.

³⁹ GARCÍA, A., "Patrimonio cultural: diferentes perspectivas", *Arqueoweb* 9(2), (2008) 5.

⁴⁰ *Vid.* Portuguese Law 107 of 2001, Article 56; German Law on the Protection of Cultural Property of 31 July 2016, Section 7 of Chapter 2.

long as the property has been created more than 50 years ago⁴¹. The Spanish formulation, on the other hand, denies the possibility of recognizing the heritage status, based on the requirement of chronological criteria, which grant the required age to the property to be part of the national heritage.

The fixing of the time of antiquity is a requirement to consider the assets as cultural heritage⁴², is an enlightening determination for the Administration and the subjects involved in the process of patrimonialization. This is the case with Spanish and Italian legislation. It should be noted that, although Spanish legislation denies recognition to assets that are less than 100 years old, it regulates two exceptions: by express authorization of the owner or by the acquisition by the State of an asset that does not meet this condition.

The study of the typologies of regulated definitions and the method followed to define cultural heritage, its typologies, and other relevant definitions, allowed us to know that:

-Theoretical definitions prevail in the normative regulation of cultural property, cultural heritage, and its different meanings or typologies;

The lexicographical and clarifying definitions are aimed at specifying the categories of protection, safeguarding, heritage management, enhancement, declaration, and intervention⁴³. Their scope from a theoretical and comparative normative point of view will be analyzed in the second chapter of this research;

-That there is no uniformity in the juridical notion of patrimonial goods. Its legal determination is conceived from the following positions⁴⁴: the cultural manifestations that compose it are described through its enumeration⁴⁵; they

⁴¹ This is the case of the Italian legal system, in Article 11.1.d) about Article 65.4 of Decree 42 of 2004.

⁴² *Vid.* Law of Historical Heritage in Spain, article 40.1; Organic Law of Culture of December 27, 2016, and its Regulation of May 23, 2017, of Ecuador, article 80; Peru, Law 28296, General of the Cultural Heritage of the Nation, July 21, 2004, article 3.

⁴³ *Vid.* Law 397 of 1997 of Colombia, as amended by Law 1185 of March 12, 2008, article 11.2; Legislative Decree 42 of January 22, 2004, of Italy, article 29.1.

⁴⁴ *Vid.* Spanish Historical Heritage Law, Article 5.2, which sets it at 100 years. In Italy, in Decree 42 of 2004, article 65.3.a) sets the age at 50 years for all types of property, and article 67.2, sets the age at 75 years for means of transport.

⁴⁵ CAMPS, N., The term cultural property is used for the first time in the 1954 Convention, article 1. *Vid.* From the Wallon Code of land management, urban planning and Heritage, sanctioned by the Belgian Government, April 1, 1999, Decree on the Conservation and Protection of Heritage: articles 185, 20 and 232.1; Organic Law of Culture of December 27, 2016, and its Regulation of May 23, 2017: article 50; Spanish Historical Heritage Law of 1985: articles 9.1, 14, 26.1 and 40. For cultural property belonging to the Catholic Church: Agreement between the Kingdom of Spain and the Vatican of January 3, 1979, on teaching and cultural affairs; in

are classified when granting legal protection to particular properties, through the adoption of a specific decision of the competent authority, and categorized as a set of properties that encompass a large number of objects⁴⁶;

- There is a tendency to group assets, taking into consideration common physical and legal qualities, forming the types of cultural heritage into tangible or tangible heritage, which includes cultural, natural⁴⁷ and mixed heritage; intangible, oral or immaterial heritage⁴⁸, and heritage at risk⁴⁹;

- There is a classification of cultural heritage, taking into account the assets that compose it. The most relevant are archaeological heritage, which includes those vestiges resulting from human activity and those organic and inorganic remains that make it possible to reconstruct and make known the origins and past socio-cultural trajectories⁵⁰; underwater heritage: movable and immovable property and surrounding areas, testimony of human presence, possessing artistic, historical and scientific value, submerged in whole or in part in an underwater, waterlogged or humid environment⁵¹ and industrial heritage, consisting of all movable and immovable property that is part of the technical-productive part of the social and economic history of a country, which facilitates understanding its technological history⁵²;

Italy, Decree 42 of January 22, 2004: articles 2.1, 9, 10 and 134; in Peru, Law 28296, General Law of the Cultural Heritage of the Nation of July 21, 2004: articles 1.1, 1.1.2, 1.2, 5 and 8; Administrative Ruling 12 of June 30, 2005, which regulates the General Registry of Venezuelan Cultural Heritage and the management of the assets that comprise it: articles 8, 9 to 15 and 18 to 20.

⁴⁶ *Vid.* 1970 UNESCO Convention, article 1.

⁴⁷ They are those natural sites or landscapes which, based on their scientific and aesthetic importance, deserve legal protection. DE RUEDA, F. J., "La protección internacional del patrimonio cultural en caso de conflicto armado", *LOCVS AMCENVS* 4 (1998- 1999) 257.

⁴⁸ *Vid.* UNESCO Convention, article 2.1; Law 397 of 1997 of Colombia, amended by Law 1185 of March 12, 2008, article 11-1; Law 10 of May 26, 2015, for the safeguarding of the Intangible Cultural Heritage of Spain, article 2.

⁴⁹ Cultural assets that are part of the cultural heritage, but present a situation of deterioration or risk that indicates its imminent loss of values and therefore, the cessation of the declaration that was granted one day recognizing its qualities. BAJO, J. F., *The Odiel area as a cultural landscape. Strategic actions for its heritage management and territorial development*, Doctoral Thesis, Escuela Técnica Superior de Sevilla, University of Seville, Spain, 2017, 10.

⁵⁰ *Vid.* Law 397 of 1997 of Colombia, modified by Law 1185 of March 12, 2008, article 6 and Decree-Law 130 of June 15, 2009, Regulation of the Cultural Heritage Law, article 43.

⁵¹ Decree-Law 169 of June 27, 1997, modified by Law 19 of August 10, 2000, Law of Underwater Cultural Heritage of Colombia, Article 1.

⁵² The protection of the industrial heritage is carried out by two ways: the individualized and by the conjunction with the archaeological or ethnographic or ethnological heritage. In Spain it is done individually in article 3 of Law 3 of March 10, 1999, of the Aragonese Cultural Heritage; articles 76- 78 of Law 1 of March 6, 2001, of the Cultural Heritage of the Autonomous Community of the Principality of Asturias; Foral Law 14 of November 22, 2005, of the Cultural

- Other definitions included in international or national standards are:

Environment: the first enunciation of its attributes was consigned in the Nairobi Recommendation of 1976⁵³, when it regulates that

The "medium" of historical ensembles is considered to be the natural or constructed framework that influences the static or dynamic perception of these ensembles or is linked to them immediately in space or by social, economic, or cultural ties.

The Xi'an Declaration of 2005, in paragraph 1, defines it as follows:

... characteristic environment, whether small or extensive in nature, which forms part of - or contributes to - its significance and distinctive character. Beyond the physical and visual aspects, the setting implies interaction with the natural environment; past or present social or spiritual practices, customs, traditional knowledge, uses or activities, and other aspects of intangible cultural heritage, which created and shaped the space, as well as the current and dynamic cultural, social and economic context.

From this definition are derived those of Protection Zone and Buffer Zone. The former has been noted in the Colombian regime. The other regimes analyzed do not refer to this definition but only regulate the measures to be taken for the properties located in the surrounding area.

Protection zone: spatial demarcation that associates the property with values to be recognized as cultural heritage with the surrounding or nearby environmental and landscape context, delimited and temporarily governed by measures aimed at preserving the property and its setting while the selection process takes place⁵⁴.

Heritage of Navarre, and; in conjunction in the Spanish Historical Heritage Law, *vid.* Articles 334.5- 334.10; article 3.2 of Law 11 of October 13, 1998, of the Law of Cultural Heritage of Cantabria; article 1.3 of Law 10 of July 9, 1998, of the Historical Heritage of the Community of Madrid; articles 1.2 and 62.2 of Law 12 of July 11, 2002 of the Cultural Heritage of Castilla y León, and; articles 1.2, 68 and 69 of Law 12 of December 21, 1998 of the Historical Heritage of the Balearic Islands. MARTÍNEZ, C., *El patrimonio cultural: nuevos valores, tipos, finalidades y formas de organización*, Doctoral Thesis, University of Granada, Spain, 2006, 1006, 1007, 1023, 1024, 1049, 1051 and 1053.

⁵³ I. DEFINITIONS 1. For this Recommendation: b).

⁵⁴ *Vid.* Decree 763 of March 29, 2009, of Colombia, Partial Regulation of Law 814 of 2003 and Law 397 of 1997 of Colombia, modified by Law 1185 of March 12, 2008, article 19.

Buffer zone: spatial contour that associates the heritage property with its environmental and/or landscape context, subject to specific regulations to preserve the heritage property and its surroundings⁵⁵.

Another relevant definition regarding the protection of heritage assets is that of community. In this regard, it should be noted that the 2003 UNESCO Convention defines it, linking it to the history of the territory where it is located, and to the aspects that identify it or differentiate it from other population settlements. The 2005 Faro Convention, for its part, incorporates performative features to this definition, based on the extension of the administrative resolution that recognizes it as heritage⁵⁶.

According to QUINTERO, these visions contain aspects that bias the scope of this category⁵⁷. For this reason, he argues that to define it integrally, it is necessary to take into account the existence of a social group, bearer of certain knowledge, skills, or set of knowledge acquired as a result of the productive, political, social, and symbolic processes linked to a locality.

This category has been regulated in the Colombian legal order associating the definition of the 2003 Convention and the referred theoretical argument. So Community: collectivity, social group carrier, and the creator associated with them, who consider a cultural manifestation as their own and part of their cultural referents⁵⁸.

⁵⁵ The denomination with which it appears in international documents: scope, context, setting, environment. Vid. Athens Charter; Venice Charter; the Franceschini Commission of 1967, the Quito Charter of 1967, the Unesco Convention on World Heritage of 1972, the European Charter of Architectural Heritage of 1975 of the Council of Europe, the Nairobi Recommendation of 1976, the Third European Symposium of Munich of 1978, the Granada Convention of 1985, the Krakow Charter of 2000, the Florence Convention or the Xi'an Declaration of 2005. AYÚS, M., Régimen jurídico de los entornos de protección de los bienes culturales, Doctoral Thesis, University of Alicante, Department of State Legal Studies, Spain, 2012, 54; BARBEITO, J. V. and BUSTELO, J., "Los entornos de protección en la Ley 5/2016 y en el Plan básico Autonómico", Revista Galega de Administración Pública, xullo-diciembre (2020) 446 and 447.

⁵⁶ QUINTERO, V., "La participación en patrimonio y sus protagonistas: límites, contradicciones y oportunidades", Revista PH, Instituto Andaluz del Patrimonio Histórico (2020) 135 and 136.

⁵⁷ The first, because it forgets the other actors that influence the development of the heritage manifestation, and the second because it includes all the agents and actors that intervene in the patrimonialization, whether or not they have relevant knowledge related to the manifestation, and takes power away from the depositaries of the knowledge. QUINTERO, V., *supra* n. 55, 137.

⁵⁸ Vid. Partial Regulation of Law 397 of 1997 as amended by Law 1185 of 2008 of Colombia, Article 3.

1.1.2. Values and principles that inform the legal regime for the protection of cultural heritage

The theoretical study revealed the role and functions of values in the legal system. The theory has analyzed this category from general approaches related to Constitutional Law and in the conception of due process, attributing different meanings to them in that normative field, both in foreign doctrine⁵⁹ and in Cuban doctrine⁶⁰. All this results in the absence of a general theory regarding its functions and determination in relation to the protection of cultural heritage. Thus, in congruence with GALBÁN, in the legal system for the protection of cultural heritage, values fulfill the functions of argumentation of actions; they guide the decision-making of public authorities and individuals; they inspire the legislator to conceive the legal protection regime; they make up for the lack of a legal provision; they determine the definition of the concrete or specific principles of the legal system, providing the regime with coherence, unity, stability, and systematicity, and contribute to the solution of cases on their own, or in conjunction with other norms⁶¹.

⁵⁹ MASON, A., "Rights, values and legal institutions: reshaping Australian institutions", *Australian International Law Journal*, 1997; ROBERT, A., "Sistema jurídico, principios jurídicos y razón práctica", *DOXA*, 1998; CALDERÓN, M. R., "Los Valores en la Constitución Argentina", *Revista Telemática de Filosofía del Derecho*, 2000; MONCHO, I. y PASCUAL, J. R., *Teoría de los valores superiores*, Campgráfico Editors, S.L, Valencia, Spain, 2003; ALCALDE, E., "Relación entre valores y principios generales de derecho en la interpretación constitucional de los derechos fundamentales en Chile", *Revista Chilena de Derecho*, September-December, 2008; ARLICKI, L., "Constitutional Values and the Strasbourg Court", *Acta Societatis Martensis*, 2010; LONG, J. R., "State Constitutions as interactive expressions of Fundamental Values", *Albany Law Review*, 2011; DÍAZ, F. J., "Sobre los valores en la Filosofía Jurídica y en el Derecho Constitucional", *Revista Brasileira de Direito Constitucional*, 2012.

⁶⁰ MARIÑO, A., MÉNDEZ, J. and CUTIÉ, D., "Los valores superiores del ordenamiento jurídico, pilar básico del texto constitucional", *Revista Barco de Papel*, *Memorias de la IV Conferencia Científica sobre Derecho*, Facultad de Derecho de la Universidad de Oriente Cuba-Facultad de Derecho Eugenio María de Hostos, Mayagüez de Puerto Rico, October 6-8, 1997; FABELO, J. R., *Los valores y sus desafíos actuales*, Editorial José Martí, Havana, 2003; GALBÁN, L., VÁZQUEZ, Á. J., "Reflexiones en torno a los valores supremos. El ejemplo de Cuba", *Revista Ciencia en su PC*, 2010; GALBÁN, L., RODRÍGUEZ, N., "Perspectivas filosóficas de los valores superiores. Un intento de redefinición como identidad y patrimonio de los pueblos", *Revista DIXI*, 2017; GALBÁN, L., MARCHECO, B. N., "Los valores supremos como fundamento de las decisiones judiciales en Cuba: problemas sociales", *Revista Santiago*, Special Issue VLIR, 2016; GALBÁN, L. and MARCHECO, B. N., "El valor supremo de la Justicia como fundamento axiológico para un debido proceso en Cuba", *Actas Oficiales del II Congreso Internacional Virtual El Derecho en Latinoamérica y Filipinas: Concordancias y Peculiaridades*, Málaga, 2017.

⁶¹ GALBÁN, L., *Las funciones de los valores constitucionales en la argumentación de las sentencias en un debido proceso civil*, Bogotá, Colombia, Leyers Editors, 2019, 198, 199, 221, 223, 235 and 239.

The following determination has been obtained from the theoretical arguments referred to by GARCÍA, GONZÁLEZ, MARTÍN and MARTÍNEZ⁶². They point out that the main values that the administrative legislation will promote will be:

-Universality, capacity of perception, and apprehension of individuals of the values contained in heritage properties located in any part of the planet. Linked to the State's duty to protect cultural property located anywhere in the world, by the commitments arising from international conventions;

-Identity, is a way of recognizing and identifying the cultural heritage relevant to the people who recognize themselves in it and for whom it constitutes a link with their origins. It is a value emanating from the sovereignty of the State over all the wealth that it possesses in its territories, and which stands as a duty of the State to conserve heritage assets because they express its cultural, social, geographical, and climatic characteristics;

-Memory, the heritage assets reflect the collective values of a given territory and connect us with our past or origin and with the current context in which we live. It is useful to the States since it motivates the implementation of mechanisms for citizen participation in the identification, recognition, use, enjoyment, management, and preservation of heritage;

-Veracity, determined by the authenticity and integrity of the cultural property. It supposes that the legal mechanisms and instruments guarantee that each or collective heritage property is authentic and maintains its integrity;

-Authenticity, reflects the correspondence between the material object and its meaning. It is a value that is instrumented as a requirement in preservation actions and the use, enjoyment, management, and promotion. In this last dynamic, with special reference to the tourism industry and communications⁶³.

⁶² GARCÍA, M. P., *supra* n.79, 70; GONZÁLEZ, R.J., "Valores y principios del ordenamiento jurídico de protección del patrimonio cultural", Revista Santiago, Cuba, (2022); MARTÍN, M., "Autenticidad", Boletín de Interpretación número 9, Spain (2003) 24; MARTÍNEZ, C., *supra* n. 51, 40, 43, 45, 46, 765, 769 and 808.

⁶³ Closely linked to the materials, techniques, and building traditions; and should be applied taking into account both the materiality and intangible values of the property; the use of the property, especially in tourism, and; the category of cultural landscapes. ICOMOS Brazil, Charter of Brasilia, Southern Cone Regional Document on authenticity, in V Regional Meeting ICOMOS Brazil, December 8, 1995. Other international instruments related to this value are the Venice Charter of 1964; the Declaration of San Antonio at the Inter-American Symposium on Authenticity in Management and Conservation of 1995; the Riga Charter of 2000, which governs the countries of Eastern Europe; the Krakow Charter for the Conservation and Restoration of Built Heritage of 2000. MARTÍN, M., *supra* n. 61, 24, and 25.

The limits of this value have changed concerning its initial conception, based on intangible heritage assets, by the statements contained in the 2004 Yamamoto Report on the integrated approach to heritage protection. Taking into account the requirements for an intangible manifestation to be recognized as heritage, especially the fact that it is constantly recreated and that its existence does not always depend on certain spaces or tangible assets, the change of conception is justified. Therefore, authenticity in terms of intangible cultural heritage reflects the correspondence between its current recreation and the interaction between the communities and the possessor groups;

-Integrity, refers to the nature and context of the heritage property in a physical, metaphorical, and critical sense. It requires treating the cultural property with all the respect and rigor it deserves during preservation actions, preserving the interdependence that exists between its tangible and intangible components;

Respect for cultural diversity⁶⁴, which confirms the importance of establishing in cultural and social practices, an inter-cultural dialogue, a guarantor of peace, that avoids any segregationist and fundamentalist temptation that detracts from the message of the Universal Declaration of Human Rights. It is dimensioned in the legal sphere through the establishment of mechanisms that encourage citizen participation in heritage dynamics to ensure the survival of humanity;

-Productive use of cultural heritage, an aspiration to be achieved by conceiving the use, enjoyment, promotion, and management of heritage in favor of sustainable economic and social development;

-Solidarity, is a value to be promoted through the design of procedures that encourage cooperative action with other States, citizens, and public and private entities in the protection of cultural heritage.

The legal comparison showed that the normative precepts are far from the theoretical ones mentioned above since values in general are not regulated in the regimes studied. It is also observed that the values indirectly recognized in the comparative regulations with the greatest presence are: integrity, authenticity, and truthfulness. They are followed by identity and respect for

⁶⁴ An ethical imperative derived from respect for the dignity of the person, based on the idea that the world's cultural wealth resides in its dialogic diversity. This criterion is derived from the UNESCO Declaration on Cultural Diversity of 2001 and the Convention of that same international organization on the protection and promotion of cultural expressions and cultural diversity of October 21, 2005.

cultural diversity. The value of universality is not regulated in the analyzed systems (see Annex 2).

On the other hand, the principles enunciate a reason that orders the aspects of the legal experience about cultural property⁶⁵, they stand as paradigms that transversalize the universe concerning the protection of cultural heritage⁶⁶.

They fulfill an informative, interpretative, integrating, argumentative, extensive, or limiting function⁶⁷. They are the foundation that informs the legal organization of the nation about the treatment of cultural property, they are historically conditioned and in constant development⁶⁸. They endow the legal system with a profound ethical content, which disarms egoism, patrimonialism, and individualism⁶⁹.

We have taken into account the theoretical arguments of BARTH and SUÁREZ-RODRÍGUEZ who classify the principles into: express or explicit, extra-systematic, and the principles of a specific legal system, as follows⁷⁰. The first comes from international law and is the source of the national legal order, also

⁶⁵ Their characteristics refer to their hierarchical rank, -because of their fundamental nature, although not all of them are fundamental to the same extent-; to their function, -as secondary norms that play a role in the legal system, generally in its interpretation and application-, and; to their morphological structure, -in allusion to the linguistic formula that general phenomena assume-, and; to their morphological structure, -in allusion to the linguistic formula that general phenomena assume-. BARTH, J.F., "Principios y normas en la concepción del Derecho de Dworkin (comentarios a las observaciones críticas de Luis prieto Sanchís)", *Revista de Ciencias Jurídicas* (2005) 190; FERNÁNDEZ, J., *supra* n.19, 134, and; SUÁREZ-RODRÍGUEZ, J. J., "El argumento de los principios en la teoría contemporánea del derecho: un alegato antipositivista", in *Civilizar* 12 (22), (2012) 67.

⁶⁶ Optimization mandates can be applied to different degrees according to real and legal possibilities. RUIZ, R., "La distinción entre reglas y principios y sus implicaciones en la aplicación del derecho", *Derecho y Realidad* (2012) 156 and SUÁREZ- RODRÍGUEZ, J. J., *supra* n. 64, 71.

⁶⁷ The first, insofar as they give meaning to a legal provision. In their interpretative function, they serve to avoid antinomies and to select the relevant rule for the case. They have an integrating function when they discipline a certain factual situation. They have an argumentative function since they contribute to interpreting and explaining in a reasoned manner when invoking them. They have an extensive or limiting function when they generalize the application of a regulation to a factual situation that lacks it in the first case, and in the second, they limit the application of a rule considered exceptional. BARTH, J. F., *supra* n. 64, 193.

⁶⁸ FERNÁNDEZ, J., *supra* n. 19, 234.

⁶⁹ *Id.*, at 236 and SUÁREZ- RODRÍGUEZ, J. J., *supra* n. 64, 72.

⁷⁰ They come from international law, which serves as a source for national legal systems for the protection of cultural heritage. They are included in the norm fundamentally in the constitutional texts, they constitute the meaning of the norm and act as a limit to the judicial power. The second is the fruit of a political or moral argumentation that underlies the legal system, to which the jurist can resort in the solution of a given case, these principles are not part of the law, and they are only valid if the precedent is recognized in the system of law as a source of normative creation. Third parties, valid for a specific system, are dependent on their normative and binding force on the system from which they are deduced. BARTH, J. F., *supra* n. 64, 192 and SUÁREZ- RODRÍGUEZ, J. J., *supra* n. 64, 60.

referred to by CAMPS as guiding principles⁷¹. The second one comes from political and moral arguments that underlie the legal system. The third ones, on the other hand, are valid and determining for a given normative system.

The guiding principles for the protection of cultural heritage, supported by international normative provisions and methodological instruments, are as follows (See Annex 3):

- Respect for cultural heritage, which is expressed by the recognition of the obligation to prohibit, prevent and stop any act that implies the deterioration or destruction of cultural property;
- Publicity, related to the creation of inventories and the adoption of control measures on heritage assets, which enables access and information for citizens regarding the safeguarding of and respect for cultural assets;
- Free circulation⁷², implies the possibility of controlled international and national transportation and exchange to facilitate access, contemplation, and enjoyment of cultural property;
- Effective financing⁷³, for which a contribution system is adopted that allows the adoption of measures aimed at restoring, protecting, and conserving the cultural heritage;
- International cooperation is based on the value of solidarity, through which actions are planned and carried out to promote the safeguarding of cultural assets at the international and regional levels.

The analysis of international legal and methodological instruments reflects the following extra-systematic principles that limit the exercise of state sovereignty over cultural property by its traditional meaning⁷⁴ (See Annex 4):

- Respect for the sovereignty of States requires that each State gives its consent for a given cultural property to be introduced under the protection of the international regime, based on the application of the principles of cooperation and solidarity. It extends to countries with a federal system, in which sovereignty is shared between state and federal structures by the internal

⁷¹ CAMPS, N., *supra* n.35, 137.

⁷² *Id.* at 125.

⁷³ *Vid.* UNESCO Convention, 1970, articles 2.6 and 2.10; UNESCO Convention, 2003, articles 6 to 10 and 12 to 15.

⁷⁴ CAMPS, N., *supra* n. 35, 160. The author points them out as correctors.

structure of each state and the functions that each structure fulfills within its legal system;

□ *In situ* conservation implies the protection of the cultural property in the territory where it is located. From it derives a system of actions to control research and excavations on such cultural property.

□ Subsidiarity, by which functions are distributed among the different levels of public power to favor citizen participation in the safeguarding of cultural heritage. This arrangement is designed based on developing the activity from the political level closest to the people, promoting maximum participation and social effectiveness in the actions of protection and safeguarding.

The extra-systematic principles are regulated in the constitutional texts. This affirmation is based on how they are included in the constitutional orders of Germany, Belgium, Colombia, Ecuador, Spain, France, Peru, Portugal, and Venezuela; evidenced in these texts as follows:

1. The principle of respect for the sovereignty of the State is evident from a reading of the roles played by the State in the protection of cultural property and the environment in Belgium, Ecuador, France, Germany, Peru, Portugal, Spain, and Venezuela⁷⁵;
2. In all the Constitutions analyzed⁷⁶, the principle of subsidiarity is glimpsed when determining the contributions that each state structure will offer to contribute to the purposes of cultural life. Subjectively, this principle is projected in the recognition of the right and the mechanisms that will allow citizens to access the cultural life of the nation and participate in the decision-making process regarding heritage assets;
3. The principle of *in situ* conservation is not protected by constitutional norms.

⁷⁵ *Vid.* Constitution of Germany, articles 15 and 20 c), 29 and 32, 74.15, 74.24, 74.26, 15.28; Belgium: articles 23.4 and 23.5; Colombia: articles 79, 80 and 95; Ecuador: articles 10, 14, 28, 71 to 74, 83.3 and 83.6 and 317; Spain: articles 45, 132.2 and 149.23; France: articles 6, 2 and 70; Peru: articles 2.22, 66 to 69; Portugal, articles 66 (c) and (h), 73.4, 74.2 (f), 2nd part, 81 and 90, 78.2 (e), and; Venezuela: articles 120, 127, 156.32.

⁷⁶ *Vid.* in the Constitutions of Germany: Article 72.3; Argentina: Article 5; Belgium: Articles 127.1.1 and 130.1.4; Colombia: Articles 226 and 313.9; Ecuador: Articles 1, 57.13 and 264.8; Spain: Articles 44, 48, 103 and 148. 12, .14, .15, .16, .17, .18 and .22; France: articles 34, third paragraph, second and fourth paragraphs and 132.1; Italy: articles 5, 28, 117 (s), second paragraph and 118; Peru: articles 188 and 195.8; Portugal: articles 66.2 (e) and 225; Venezuela: articles 128 and 178.1.

As a trend, it became evident that in Germany, Bolivia, Colombia, Ecuador, Spain (Law 10 of 2015), Italy, Portugal, and Venezuela, the following principles are specified as the specific principles of the regime being established (See Annex 5):

□Unity of the legal regime for the protection of patrimonial property, which establishes the basis for comprehensive legal protection, common to all types of cultural property. It includes the obligation of the legislator to establish a legal discipline that solves the generality of the cases that in this matter arise, but that also offers a channel of the solution to those assumptions that the norm does not contemplate, for which it has to articulate the categories that contribute to its discretionary solution;

□Public protection of cultural property involves the determination of the fundamental objectives of legal protection, the state mechanisms to recognize, conserve, and enhance the value of cultural property, the causes for cessation of the application of the regime, and the restrictions established on certain individual and collective rights. It also regulates the linkage with other related orders: urban planning, intellectual property, education, tourism, and environment;

□Cooperation, through the establishment of relations between collaborators, the State and State institutions in charge of safeguarding cultural property, as well as through the establishment of a system of measures, control mechanisms, and evaluation of their execution. It also involves determining the areas in which cooperation is requested and accepted;

□Citizen participation, including mechanisms and procedures for action and promotion of the communities that own the cultural property, non-governmental organizations, state entities, and even tourists or visitors who enjoy the cultural property;

□Sustainable management implies the modeling of a system that ensures an adequate pattern of valorization of the cultural property, entailing benefits for the owners, the State, and the users;

□Exhaustive control of the cultural property, for which legal mechanisms and procedures are specified to carry out the review and evaluation of all activities carried out on the heritage property in the social reality.

Meanwhile, in Argentina, Peru, and France, the following principles can be glimpsed from the content of their regulations: protection against infringements, based on determining the conducts and actions that affect the integrity and existence of the cultural property, and their consequent sanctioning framework; public protection of the cultural property and cooperation (See Annex 5).

1.1.3. Institutions and other actors involved in the protection of cultural heritage

The legal system for the protection of cultural heritage is based on institutional regulation from an organizational and categorical point of view. The main categories are revealed throughout this research report, especially in the section dedicated to the definitions and description of the procedures, mechanisms, and instruments that protect heritage assets. In this section, the main aspects related to institutions as public entities that fulfill or have the function of preserving cultural heritage will be presented.

In the first place, it should be noted that in the normative order, the public entities that will carry out and control the functions of the protection of cultural heritage are determined or created. The creation of the registry entities in charge of the identification of the cultural manifestations that compose it stands out. In this regard, Argentina, Bolivia, Colombia, France, Germany, Italy, Peru, Spain, Bolivia, and Venezuela stand out (See Annex 6).

Regarding the creation of administrative registries, Argentina highlights that Article 5 of Law 25,743 on the archaeological and paleontological heritage of June 26, 2003, provides for the existence of a Registry of Offenders and Repeat Offenders. It is a means of control related to the subjects and harmful facts caused to the cultural heritage, conceived in the function of the fulfilment of the legal order and defense of the pieces and patrimonial manifestations.

From the normative comparison, it is also observed that, concerning the entities linked to patrimonial protection -the State and the Government- their functions and obligations are regulated (See Annexes 7 and 8).

The protagonist dynamic of the State, as the main actor in the implementation and control of the legal system, is given to it, fundamentally, by the commitments acquired in the international arena. According to CAMPS, the State has obligations of respect and protection, which limit its actions. The

former imposes on the State not to act or refrain from actions that may endanger cultural property⁷⁷.

The latter, on the other hand, consists of the obligation to adopt material and legal measures that contribute to its preservation⁷⁸. The material measures are aimed at avoiding its deterioration, fragmentation, and dispersion; while the legal measures are aimed at limiting, fundamentally, the exercise of the dispositive faculties emanating from the real rights over the cultural heritage.

A comparison of the types of State obligations regulated in the special regimes shows that protection obligations are more frequent (Annexes 7 and 8). Other obligations related to protection stand out in the regulations of Germany, Ecuador, Spain, France, Italy, and Venezuela, especially those related to the control of exports and imports. There are also obligations to control the power of disposal.

There is a tendency in the legal systems studied to provide for coordination between the State, the public entities responsible for heritage protection, and the regional, provincial, and municipal entities to achieve synergies that allow greater degrees of protection of cultural property. To this end, the functions of the different levels and structures directed to the public entities that collaborate to this end are delimited. Thus, the States of Argentina, Bolivia, Colombia, Spain, Italy, Peru, Portugal, and Venezuela, conceive institutional cooperation to receive and grant support and advice on heritage policy and planning; as well as to defend, preserve, safeguard, and manage heritage assets and harmonize revaluation actions.

This trend is a reference to the fact described theoretically by CLAROS that the State has lost its management capacity in the national sphere, so it is proposed to coordinate this proposal with the prefectures, municipalities, and cultural managers⁷⁹. The objective is that everyone works in coordination, with a unified vision and defined projection in favor of cultural heritage.

⁷⁷ *Vid.* UNESCO Convention of 1954, article 4; UNESCO Convention of 1972, article 6. CAMPS, N., *supra* n.35, 239 and 240.

⁷⁸ *Vid.* 1970 UNESCO Convention, articles 5, 6, 7, 9, 13, 14, and 17; 1972 UNESCO Convention, articles 5 and 6; 2001 UNESCO Convention, articles 2.2, 2.4, 2.6, 2.10, 6.1, 6.2, 7.1, 8-12, 14, 17, 18 and 22; 2003 UNESCO Convention, articles 11- 13.

⁷⁹ CLAROS, F., *supra* n.4, 90.

As the leading institution in the field, the State has undergone an evolution in the projection of its functions: from a strongly institutionalized system to a participatory system. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and, in European regional law, the Convention on the Value of Cultural Heritage for Society, Faro, 2005, have contributed to this. These norms especially advocate that individual or collective heritage owners be protagonists in the protection and application of the legal order that protects them.

This new vision transforms the notion of considering legitimate subjects to intervene in heritage protection not only the experts or personnel who research and deepen the values and methods of preservation⁸⁰, but also includes the agents involved in the cultural processes linked to the existence of the heritage manifestation.

However, there is no tendency, according to the analysis of comparative norms, to define the collective holders (groups or communities) of patrimonial patrimony as intervening subjects in the dynamics of protection. Typically, rules are formulated recognizing that all persons, citizens, and public and private entities must defend the national patrimony. This is reflected in the legislation of Germany, Bolivia, Spain, and Peru.

1.1.4. The normative structuring of the legal system for the protection of cultural heritage

The rules that make up the legal system for the protection of cultural heritage have an imperative nature, imposing their compliance on the subjects of what they establish, without the possibility of modifying them or avoiding their consequences⁸¹. This type includes those that prohibit or limit the performance of certain acts or omissions.

On the other hand, it has been observed that there are also rules that lack legal consequences for non-compliance. They are blank rules, which project the action to be taken or conduct to be followed. This characteristic is more evident

⁸⁰ QUINTERO, V., *supra* n. 55, 138, and 141.

⁸¹ CÁNOVAS, D., "Article 3", in PÉREZ, L. B. (Director), *Comentarios al Código Civil cubano*, Tomo I Disposiciones Preliminares, Libro Primero Relación Jurídica, Volume I (Articles 1 to 37), Editorial Félix Varela, (2013) 35.

in the normative sections dedicated to the dimensioning of the sanctioning power in the matter.

The regime for the protection of cultural heritage is also characterized by the high degree of regulation of the content and scope of the protection of heritage assets in the legal sphere. It also determines the object of regulation and the purposes of the legal regime, together with the mechanisms, instruments, and procedures of application, as will be explained below.

The historical study revealed the evolution of legal protection based on theoretical-normative references that allude to its purposes, object, scope, principles, and measures. Thus, it is noted that in the Roman Law of the High Empire, limitations were imposed on the disposition of property, based on artistic or aesthetic considerations.

We agree with the criterion of HERNANDEZ, E. when considering that the protection of heritage as it is understood today does not take place until the arrival of the enlightened ideas in the 18th century and that the creation of the Academies⁸² contributed to it. To these institutions were attributed functions of supervision, authorization, inspection, and intervention on public works, chapels, and altars⁸³, discoveries, and findings⁸⁴, which implies the adoption of regulatory bodies in this regard.

In the 19th century, private property was protected as sacred and inviolable. This conception, born of the French Revolution and embodied in Napoleon's

⁸² The Italians tended to group in Academies from the 15th century, the French created their official Academy in 1635, and in Spain, King Philip V founded the Academies: The Royal Spanish Academy in 1714; Spanish Academy of History, founded in 1738; Royal Academy of Fine Arts of San Fernando, which was created in Madrid in 1752. HERNANDEZ, E., *Patrimonio histórico y Registro de la Propiedad*, Editorial REUS, 2018, 22.

⁸³ Royal Orders of October 11, 1779, July 23, 1789, December 20, 1798, and August 7, 1846, all of them already under the reign of Charles IV. HERNANDEZ, E., *supra* n.81, 25.

⁸⁴ Resolution of March 26, 1802, and Royal Decree of June 6, 1803, containing the Instruction on how to collect and preserve ancient monuments discovered in the Kingdom, under the inspection of the Royal Academy of History. It establishes that if the discoveries occur on private lands, they will be the property of the discoverer; the Royal Academy has the right of first refusal on all these goods (article 2) and the authorities and/or Magistrates, Archbishops, Cabildos, Abbots have the obligation to cooperate in everything necessary for the protection of these monuments (article 3); it regulates the possibility of creating registers of the goods of historical heritage that are geographically located, (article 4); the possibility of the Academy expropriating those assets at risk of deterioration is included (article 5) and the obligation is imposed to respond before the justice of whoever destroys or mistreats the monuments discovered, as well as the old buildings, whose demolition is prohibited; it prohibits their materials from being manipulated or modified under any circumstances and, in case of imminent ruin, the owners or possessors are obliged to inform the Academy (article 7). HERNANDEZ, E., *supra* n.81, 25.

Civil Code, extended to all European Civil Laws of the time. All this has a bearing on the fact that part of the regulations of this century was aimed at public property and the property of the Church⁸⁵. Under the principles of free availability and goodwill of the owners over their property, the protective cultural policy of the State has limited⁸⁶. In the above context, there is evidence pointing to the extension of regulations limiting intervention on the facades, aesthetics, and exterior ornaments of buildings⁸⁷.

In addition to this situation, the State accumulated a set of goods, recognized as common goods, which belonged to the Crown and nobles, and which were deposited in the Museums, which the State is responsible for preserving⁸⁸. In this way, the activity of these institutions as depositories of the cultural and artistic wealth of the nations was shaped and organized.

The twentieth century, on the other hand, was marked by the gradual limitation and intervention of the State in private patrimonial property. This is largely due to the abandonment of the absolute ideas that prevailed in the field of private property, in which the arguments of the theory of the social function outlined by Leon Duguit, which have had subsequent repercussions in the civil and administrative systems, have had an impact.

In Spain, a normative reference in this sense, this situation is verified by the adoption of the Laws of archaeological excavations, ruins, and Antiquities of July 7, 1911, and the Law of Monuments of March 4, 1915⁸⁹. In them, the State

⁸⁵ Circular of November 25, 1777, by means of which Archbishops, Bishops, Councils, and Prelates are required to consult the Academy before executing any type of work; Royal Order of June 23, 1851, which indicates that in the interior of chapels or churches open to worship, even if they are privately owned, effigies, statues or bas-reliefs should not be placed without the authorization of the Academy; Royal Order of April 10, 1866, which prohibits the Church from disposing of artistic or archaeological objects without the authorization of this institution. HERNANDEZ, E., *supra* n.81, 32.

⁸⁶ Circular of the Royal Council of September 19, 1827, on the conservation of antiquities, through which it is warned that those who "would be careful to prove their vigilance in the matter" would be "appreciated and distinguished", while those who neglected these goods would be severely punished. HERNANDEZ, E., *supra* n.81, 31.

⁸⁷ Royal Order of 1850, which states that any abuse against the rules of good taste in facades and open places brings discredit to the nation that consents to them; Royal Order of June 23, 1851, which subjects to the control of the Academy, the interventions carried out in privately owned properties that are open to the public. HERNANDEZ, E., *supra* n.81, 33.

⁸⁸ Royal Decree of April 20, 1864, entrusted the inspection of public museums to the Academy of San Fernando and issued provisions to prevent the destruction of public buildings that, because of their historical merit or artistic value, should be considered monuments. HERNANDEZ, E., *supra* n.81, 31.

⁸⁹ HERNANDEZ, E., *supra* n. 81, 35-40.

determines rules and cases of exceptional action on private heritage assets such as the carrying out of excavations and research to deepen the knowledge provided by the heritage assets; the possibility of acquiring properties by the criterion of public utility and with fair compensation; the regulation of the exercise of real rights of preferential acquisition before onerous disposal of property; the declaration of fortuitous finds as State property; the establishment of a procedure for the treatment of ruins.

Another aspect of the protection of cultural heritage is to encourage the preservation, the fulfillment of the legal duties of heritage owners, and the revaluation of property whose authors are no longer alive. This trend is reflected in the adoption of the Spanish Law of May 13, 1933, on the defense, conservation, and enhancement of the National Historical and Artistic Heritage. Its text was motivated by the constitutional mandate of 1931, which placed the country's artistic and historical wealth under the safeguard and protection of the State, whomever its owner might be⁹⁰.

The international norms, mainly from UNESCO, are a reference for national regimes in terms of the purpose, scope, principles, and measures for the legal protection of cultural heritage (See Annex 9). The notion of protection offered by these documents is global, in that it is intended to cover both the material and legal aspects related to heritage assets⁹¹.

It is worth noting the text of the 1954 Convention for the suppositions of national and international warlike conflicts, which established principles⁹², measures, and obligations of the States⁹³ involved to safeguard heritage property in their respective territories and that of the enemy forces. It defines tangible cultural property in three groups: movable property, buildings of cultural significance, and depositories of heritage property.

The protection it models includes safeguarding and respect. Among the measures conceived for this purpose is identification through the use of specific signage, preventive actions to be taken in peacetime to avoid destruction and

⁹⁰ *Vid.* Article 45 of the Spanish Republican Constitution of 1931.

⁹¹ CAMPS, N., *supra* n. 35, 241.

⁹² UNESCO Convention, 1954, fourth paragraph of the Preamble.

⁹³ *Vid.* UNESCO Convention, 1954, articles 2 to 11.

deterioration, and actions aimed at cooperating to preserve the artistic wealth of the nations involved in the conflict⁹⁴.

The 1970 Convention on the illicit traffic of cultural property addresses the mechanisms of protection against the illegal global market of cultural manifestations, limiting the power of disposal of the holders and proposing a treatment to the circulation and other assumptions of mobility of cultural property. Of note are the control mechanisms to identify goods whose export would constitute an impoverishment of the nation, establish the process to verify the legality of cultural property acquisitions, adopt measures to control the disposition of heritage property, and the extension of certification to authorize the export of cultural property⁹⁵.

The 1972 Convention concerning the Protection of the World Cultural and Natural Heritage proposes, on the other hand, the preservation of tangible heritage properties of exceptional interest for their authenticity. To this end, it establishes the World Heritage category as a unit, based on the universal interest of natural and cultural properties. Among its main measures are the creation of Lists, the establishment of legal and financial means at the national and international levels⁹⁶, and technical assistance to safeguard heritage properties from the risks that affect them.

The aforementioned international norms establish protection on the basis of establishing inventories and drawing up public lists of material cultural manifestations. However, the author agrees with RUDOLFF, B.⁹⁷, that these provisions do not foresee consequences for those who attempt or commit acts against the system they establish, beyond the revocation of the *status* granted by the inscription on the Representative List.

On the other hand, among the regional norms, the Charter of European Architectural Heritage of 1975 advocates the integrated conservation of the architectural heritage and its surroundings, based on the principles of considering both assets as the common property of the European continent and

⁹⁴ *Vid.* Articles 1- 10, 16 and 17.

⁹⁵ *Vid.* Articles 5-10, 13 and 14.

⁹⁶ *Vid.* UNESCO Convention, 1972, articles 5 d) and 11.

⁹⁷ *Vid.* UNESCO Convention, 1972, article 11.4. RUDOLFF, B., *Intangible and tangible heritage. A topology of context of faith*, Doctoral Thesis Institute of Geography, Faculty for Chemistry, Pharmacy and Geo-sciences, Johannes Gutenberg-University of Mainz, Germany, 2006, 24.

the need for cooperation and citizen participation. To this end, it recommended to the States the modification of the regulations that protect the architectural heritage that was not in tune with this approach. It also insisted on supporting these actions with specialized administrative staff and the training of personnel with technical skills to promote conservation, as well as devising financial aid and tax incentives⁹⁸.

The study of international norms shows that legal protection has been extended to new types of cultural property with the adoption of the 2001 Convention, which protects heritage property partially or totally submerged for at least one hundred years. The treaty regulates the principle of *in situ* intervention and encourages international cooperation for their protection. However, it does not foresee the treatment to be given to properties located between land and sea, and those located in coastal areas⁹⁹.

The object of protection was further extended with the adoption of the 2003 Convention to cultural manifestations of an intangible nature. This body of law also has an impact on the understanding of protection that had been regulated until then, as it stipulates the safeguarding of intangible elements and values and the tangible property associated or linked to them and the cultural process from which they result¹⁰⁰. To this end, it envisages the implementation of direct and indirect actions. The former is aimed at the survival of the intangible heritage manifestation and its material components. The latter refers to the assurance of the processes of conception, creation, recreation, research, education, and dissemination of heritage manifestations¹⁰¹.

The catalog of measures to be implemented is also expanded. It highlights the importance of identifying intangible manifestations and their processes and the safeguarding and management plans to ensure their viability and transmission to future generations. The participation of the communities and social groups

⁹⁸ *Vid.* Numbers 7 to 10.

⁹⁹ KHAKZAD, S., *Integrated approach in management of coastal culture heritage*, Doctoral Thesis, KU Leuven, Belgium, 2015, 36.

¹⁰⁰ LEZÉ, F., "Protección jurídica del patrimonio cultural inmaterial", in *Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM*, 2013, available at <http://biblio.juridicas.unam.mx>, (accessed 12 February 2021) 176.

¹⁰¹ Operational Directives, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 2008.

that own the intangible manifestations in the application and development of the safeguarding measures is specified.

Also noteworthy is the proposal to conceive the safeguarding of tangible and intangible cultural heritage with an integrated approach, embodied in the 2004 Yamamoto Declaration. To this end, it recognizes the situation to be transcended: a model of guardianship that protects cultural heritage and safeguarding, and the existence of tangible assets associated with intangible manifestations that are interdependent in nature and are not objects of protection because they are not considered intangible heritage. It raises the principle of establishing an integrated safeguarding with the communities and groups that are bearers of cultural heritage, in favor of heritage viability and economic benefits¹⁰².

The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, on the other hand, calls on States to develop policies that integrate culture into sustainable development strategies. As a result, States shall, at the domestic level, develop policies in favor of the protection and promotion of the diversity of cultural expressions; encourage the free exchange and dissemination of ideas, expressions, and cultural activities, goods, and services; adopt measures to promote effective access to the means of production, dissemination, and distribution of cultural industries; encourage financial assistance and support artists and others involved in cultural industries¹⁰³.

Although UNESCO's work related to the 1972 and 2003 Conventions led to the formal and legal separation of the definitions and treatment to be given to cultural, natural, and intangible heritage, the provisions emanating from them, as RUDOLFF explains, show the handling of the same problem from different angles¹⁰⁴. This makes it difficult to achieve unitary and integral legal protection, which is necessary to harmonize the criteria, procedures, and mechanisms proposed by both.

¹⁰² *Vid.* Paragraphs 4, 10, 11, 12 and 16.

¹⁰³ *Vid.* Articles 6-12.

¹⁰⁴ RUDOLFF, B., *supra* n. 96, 14.

It is worth emphasizing that they focus on three ways of offering protection to heritage properties: selection, categorization, and evaluation¹⁰⁵. In addition, they have in common the recognition of values (of an intangible nature) in cultural manifestations, as a point of reference to articulate protection and safeguarding measures and protect the cultural property of individuals, public and private entities¹⁰⁶.

These links between materiality and immateriality can be observed in international practice by recognizing and protecting cultural landscapes and routes, categories that allude to intangibility, under the rules of the 1972 Convention¹⁰⁷. *On the other hand*, the safeguarding measures of the 2003 Convention have been extended to protect the tangible elements associated with the intangible values of monuments, objects, and cultural spaces¹⁰⁸.

In another order of things, focusing the analysis on national legislations, it is noted that the legislations of Germany, Argentina, Belgium, Spain, Portugal, and Venezuela regulate in independent norms a system of protection for tangible heritage and another for intangible heritage¹⁰⁹. The same happens with the norms dedicated to regulating the sanctioning regime, the functions of the state structures involved in heritage protection, participatory heritage governance, and crimes against cultural heritage¹¹⁰. All this makes their study and interpretation difficult, is a source of gaps, lack of coordination, and confusion in concepts and procedures, and hinders their application.

Currently, Belgium, Spain, and Venezuela are governed by norms that have not been updated according to the reasoning of the international conventional

¹⁰⁵ *Id.*, 1, 2 and 13.

¹⁰⁶ *Id.*, 16 and 56.

¹⁰⁷ Just to mention: Archaeological Zone of Peru in 1994 and Jongmyo Shrine in Korea in 1995.

¹⁰⁸ RUDOLFF, B., *supra* n. 96, 28.

¹⁰⁹ *Vid.* Germany: Law for the Protection of Cultural Property of July 31, 2016; Spain: Law 16 of 1985 on Historical Heritage and Law 10 of May 26, 2015, for the Safeguarding of Intangible Cultural Heritage; Portugal, Law 107 of September 8, 2001, of Bases of policy and regime of protection and valorization of cultural heritage, Decree-Law 309 of October 23, 2009, of Immovable Cultural Heritage, Decree-Law 139 of June 15, 2009, Legal Regime for the Safeguarding of Intangible Heritage; Venezuela.

¹¹⁰ Just to illustrate, Colombia: Decree 1080 of 2015, on Regulatory Unico del Sector Cultura, article 2.3.1.1; Spain: Organic Law 10 of November 23, 1993, Penal Code, articles 321- 328, and from 338 to 340; Peru, Penal Code of July 2, 2005, articles 226-228 and Directorial Resolution 5 of April 18, 2016, Reglamento de Sanciones Administrativas por Infracciones en contra del Patrimonio Cultural de la Nación; Portugal: Decree Law 115 of May 25, 2012 on Dirección General de Patrimonio Cultural.

framework¹¹¹. However, it can be seen that in Belgium, Spain, Colombia, and Portugal new norms have been issued in order to contextualize the legal frameworks, but they maintain a model of protection divided by the material nature on which the classifications of cultural manifestations are based¹¹².

On the other hand, it is observed that in Italy, Bolivia, Ecuador, Peru, and France at the beginning of the present century, norms have been adopted that regulate the Bases of the protection regime in an integrated manner¹¹³. These are territories that advance towards an integral approach in the protection of cultural heritage since the unification of a subject matter in a regulatory text contributes to a better interpretation and application in pursuit of the safeguarding of cultural heritage.

Following the integrated conception of protecting not only the material aspect but also the immateriality present in heritage properties, it is considered that the properties located in heritage environments, also referred to in theory as scope, setting, context, and environment, must also be protected.

The theoretical foundations for protecting environments are derived from: the relationship between the physical, material, and immaterial support that the assets located in the environment have with the heritage property or ensemble; the need for its protection, because it contributes to sustaining the values of the cultural heritage, and; because it is the space where human relationships develop that energize society and revalue the cultural assets¹¹⁴.

The methodological foundations of the environment as a category to be protected are based, first of all, on the suggestions contained in the 1976 Nairobi Recommendation. This document conceives that the heritage ensembles and their setting should be safeguarded by establishing unitary

¹¹¹ *Vid.* Belgium, Law of August 7, 1931, for the Conservation of Monuments and Sites, Decree of March 3, 1976, Regulation of the Law; Spain: Law 16 of 1985 on Historical Heritage; Venezuela: Law for the Protection and Defense of Heritage of October 3, 1993; Cuba: Laws 1 and 2 of 1977.

¹¹² *Vid.* Belgium: the Law of 1931 was amended in 1993, and the Decree was amended in 1992, 1995, 1998, 1999, and 2001. On April 4, 2014, a Law for the Protection of Underwater Heritage was enacted; Colombia, Law 1185 of March 12, 2008, which amends the General Law of Culture of 1997 with regard to Cultural Heritage; Spain, Law 10 of 2015 for the Safeguarding of the Intangible Cultural Heritage of 2015; Portugal, Law 107 of September 8, 2001, of Bases of policy and regime for the protection and enhancement of cultural heritage.

¹¹³ Landscape Code of Italy, of 2004; Code of Ecuador of the same year; Law 530, of May 23, 2014, Bolivian Cultural Heritage Law; Law 28296 of 2004, General of the Cultural Heritage of the Nation of Peru; French Heritage Code Law 925 of 2003.

¹¹⁴ AYÚS, M., *supra* n.54, 85.

protection. To this end, it defines in Article 1, paragraph c), the content of safeguarding: identification, protection, conservation, restoration, rehabilitation, maintenance, and revitalization.

The Declaration on the Conservation of the Environment of Heritage Structures, Sites and Areas, Xi'an, 2005, refines the content of the unitary protection of these properties, by regulating in paragraphs 5 to 8, the instruments aimed at protecting the environment: Integrated Conservation and Management Plan or System, control of changes in the environment, assessment of the environmental impact of any project on the complex and the environment.

Notwithstanding the provisions of both instruments, and following the reasoning of AYÚS, in order to protect the heritage environment it is necessary to evaluate the spatial areas that influence the static and dynamic perception of the ensemble. To this end, the spatial elements located in the immediate vicinity of the heritage complex must be identified, and the areas that are related without spatial proximity must be specified¹¹⁵. These operations must be determined by the legislator in the legal framework in order to favor their application.

The comparative study of their definition, delimitation, and identification, and the measures and effects derived from the protection afforded to the properties located in the area showed that (See Annex 10):

1. The designation of the environment is not uniform. They stand out by including the terms Areas of Influence (Bolivia); Conservation Zones (France); Area protected by Law (Italy); Protection and Context Zones (Portugal);
2. The French regulation, which establishes a radius of five hundred meters around the heritage property¹¹⁶, and the Italian regulation, which establishes precise measures to delimit each type of area, including maritime, river, forest, and park areas¹¹⁷, stand out in terms of delimitation.
3. With the exception of Germany, Belgium, Ecuador, and Colombia, the legal protection afforded to the properties located in the environment restricts the powers related to modification, transformation, and abandonment, making them subject to obtaining authorization from the authorized authority. These measures are far from what is understood as internationally recommended

¹¹⁵ *Id.*, 87.

¹¹⁶ Code du Patrimoine of 2004, article L621.2.

¹¹⁷ *Vid.* 2004 Cultural Heritage and Landscape Code, article 142.

unitary protection, as they do not recognize the measures aimed at identifying the properties that compose it, monitoring and control of changes in such areas. Regarding the object of regulation and following VALDÉS¹¹⁸, it is observed that it is constituted by the set of social relations regulated by a sector of the legal system, taking into account its values, principles, and institutions of the matter. It is understood then, together with the comparative legal study that the object of regulation of the legal regime under investigation, that the object of regulation of this legal order is closely linked to the social functions that the cultural heritage fulfills and to the values that it will propitiate to develop and consolidate.

The determination of the object of regulation of the legal system for the protection of cultural heritage makes it possible to establish the main relationships and dynamics relevant to achieving the proposed goals: to preserve, transmit and revalue heritage assets. This aspect is reflected in the legislation studied as a trend (See Annex 11):

- The object of regulation of the legal order is dissimilar;
- The explicit topics it generally covers are: the protection, preservation, and restoration of heritage assets; the export and restitution of heritage assets; the use and/or enhancement of cultural heritage; the management of its identification, safeguarding, management, research, and dissemination (See Annex 12);
- In the wording of the articles that make up the Preliminary Provisions of the special regime of Germany, Argentina, Bolivia, Spain, Peru, Portugal, and Venezuela, the object of regulation and the purposes of the rule are mixed;
- The regulations of Colombia and France do not expressly mention the object of regulation and its purposes (Annex 13). The points that coincide between these regulations are: the definition of cultural heritage and the properties included in it; the procedure for the declaration and inventory; the provisions related to the transfer of heritage properties, preservation, management, and promotion of heritage, and the provisions on sanctions;

¹¹⁸ VALDÉS, C. C., "Article 1", in PÉREZ, L. B. (Director), *Comentarios al Código Civil Cubano, Tomo I Disposiciones Preliminares, Libro Primero Relación Jurídica*, Volumen I, Editorial Universitaria Félix Varela, La Habana, Cuba, 2014, (1) 6.

- It is worth highlighting the statement made by the Spanish law, insofar as it proposes, in its object of regulation, the transmission of cultural heritage to future generations¹¹⁹. Portuguese legislation, on the other hand, refers to the interest in democratizing culture¹²⁰. The Ecuadorian legislation is inclined to promote dialogue and cultural diversity and to strengthen the articulation of the cultural sector with other related sectors¹²¹.

Finally, after the preceding characterization of the legal system of cultural heritage, from its elements, it could be summarized on its main sources:

a) Formal and in hierarchical order:

- Bilateral and multilateral international treaties¹²², from which are derived the main and incidental assumptions of legal organization in this area¹²³. The most relevant of these are listed below:

The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. Its purpose is to prevent armed conflicts from damaging or destroying movable and immovable artistic and historic property, or from being as little affected as possible by the consequences of war. It establishes a reinforced system of protection, whose main issues addressed are: the requirements for special protection, the mechanisms for controlling its application, and the military necessity clause, as a fundamental reasoning for protecting cultural property. It also regulates a set of principles¹²⁴ of action, measures, and obligations¹²⁵ that each State involved in a war must adopt in relation to heritage property.

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 14 November 1970, which establishes a legal regime for the protection of cultural property against illicit practices that threaten it in peacetime. It calls upon States to strictly control the export and import, to prevent illicit transfers of ownership of cultural

¹¹⁹ *Vid.* Law 16 of 1985 of the Spanish Historical Heritage, article 1.

¹²⁰ *Vid.* Portuguese Law of Bases, article 1.

¹²¹ *Vid.* Organic Law of Culture of Ecuador, article 3 a) and f).

¹²² CAMPS, N., *supra* n. 35, 150.

¹²³ *Vid.* General Agreement on Tariffs and Trade of relevance for the development of the postulates derived from the 1970 Convention on illicit traffic of cultural property, and the United Nations Convention on the Rights of the Sea related to underwater heritage.

¹²⁴ *Vid.* fourth paragraph of the Preamble of the 1954 UNESCO Convention.

¹²⁵ *Vid.* articles 2 to 11 of the 1954 UNESCO Convention.

property, and to return illicitly imported or exported property to its country of origin.

The Convention of November 16, 1972, on the Protection of the World Cultural and Natural Heritage proposes the preservation of tangible heritage properties of exceptional interest for their authenticity. It created a framework for the protection of cultural and natural properties. It envisages the creation of Lists and the establishment of legal and financial means at the national and international levels¹²⁶.

The 2001 Convention for the Protection of the Submerged Cultural Heritage provides protection for heritage properties partially or totally submerged for at least 100 years. It lays down the principles for the treatment and research of these properties and encourages international cooperation for their protection.

The 2001 UNESCO Universal Declaration on Cultural Diversity recognizes that cultural diversity constitutes the common heritage of humanity, as well as a factor of development and a human right. It conceives cultural heritage as a source of creativity and a commodity distinct from all others.

The Convention for the Safeguarding of the Intangible Cultural Heritage, of November 17, 2003, impacts the conception of conservation regulated until then, as it stipulates the safeguarding of intangible elements and values and of the cultural process from which it results¹²⁷. It introduces the definition of intangible cultural heritage and the measures included in safeguarding: identification, documentation, research, preservation, protection, promotion, valorization, transmission - through formal and non-formal education - and revitalization of this heritage in its different aspects. It highlights the importance of safeguarding and management plans to ensure their viability and transmission to future generations.

The 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions aims to avoid the cultural homogenization of the world. It approaches the specificity of cultural goods and services (cultural industries and expressions) from a dual stance: the mercantilist one, which

¹²⁶ *Vid.* Articles 5 d) and 11 of the 1972 Convention.

¹²⁷ LEZÉ, F., *supra* n.99, 176.

reduces them to mere entertainment, and the argument, which considers them as goods that carry values, ideas, and meaning.

Other regulations that constitute formal sources are the Resolutions of international and regional organizations; the Declarations and Reservations of the States Parties on the adoption of the Treaties in this area¹²⁸.

- The Constitution, insofar as it regulates human rights related to patrimonial protection, -cultural human rights and those of collective incidence, linked to environmental and cultural matters- and their guarantees, the functions of the State, the role of peoples and/or certain social sectors in patrimonial protection, the establishment of values and principles, the declaration of the sources of Law, as well as the mechanisms and actions of protection before the occurrence of damages that affect society.

- The Law, which models legal protection, orders the functions of certain institutions and/or subjects in heritage protection and the procedures for the recognition of assets with heritage values, protection, and safeguarding measures.

- The Regulation, which establishes the procedural rules to regulate the activity of the administrative authority.

- Provisions of the Administration containing procedures for the recognition of rights, and of an organizational nature for the development of asset protection measures and their governance.

- Custom in two of its variants¹²⁹: as a customary rule¹³⁰ and custom *secundum legem*. In socio-legal practice, the second variant is implicit in the application of the protection regime by the Administration, the holders of cultural property, and third parties intervening in the legal patrimonial relationship, basically in the faculties derived from the use and management of the patrimonial property¹³¹.

¹²⁸ Collective opinion and the normal instrument to serve the purposes of international organizations. They usually announce a subsequent Convention following the acquisition of experience among States in applying it. CAMPS, N., *supra* n.35, 129.

¹²⁹ *Vid. Sources of Law*, available at <http://www.juridicas.wolterkluwers.es>, (accessed May 12, 2020).

¹³⁰ The duty of restitution of cultural property derived from armed conflicts according to the postulates of the 1954 Convention and the international obligation of return in the case of illicit export of cultural property.

¹³¹ By means of the inventory action, evidence of this behavior is left as good practices or actions to be followed in order to safeguard the patrimonial property.

- The Principles, if they acquire validity by themselves as a legal regulation within the legal system.

b) Knowledge: related to the recognized and consolidated principles in matters of heritage conservation and safeguarding, by serving as a basis for their positive endorsement; the relevant doctrinal conceptions in heritage matters; the influence of certain notable legal bodies in international heritage protection¹³² and the jurisprudence or judicial precedent to the extent of its regularity, reiteration, and significance¹³³.

c) Materials: from the socio-economic context and historical and social conditioning. In this sense, UNESCO, as the international organization in charge of this activity, has called upon States to sustainably raise the levels of social economic development and to establish State policies in relation to the environment, sustainable development, and culture.

Following this approach, emphasis should be placed on the functions of cultural heritage as a socio-legal category and on the role of legal norms, particularly that of administrative sanctioning law, in its enforcement.

1.2. Functions of the cultural heritage and its Control from the administrative sanctioning regime

The bibliographic review made it possible to identify the points of agreement that the theoretical field reflects on the functions of cultural heritage: as a support for memory, identity, and historical, artistic, archaeological, and pedagogical values; as an instrument of social cohesion and, last but not least, as a resource for development (see Annex 14).

The first of these functions refers to the capacity of cultural heritage to connect us with the way of life, thoughts, and expression of our ancestors. It allows us to contextualize ourselves with the society and time they represent. All this

¹³² International Recommendations, which are a category of Resolutions. Acts are recognized as such by the majority of States, international organizations, and authors. Their value is of a political and moral nature, they have no binding force for the States. CAMPS, N., *supra* n.35, 129.

¹³³ Example of this: Colombian Constitutional Court and its Rulings C- 479 of 1995 and C- 743 of 1998, and, the Spanish case, of the Constitutional Court, Ruling 17 of January 31, 1991; Ruling 109 of July 13, 1996; Ruling 181 of September 17, 1998, just to mention a few. GARCÍA, J. "The accommodation of the PH to the Autonomous State. Normativa, jurisprudencia constitucional y doctrina (1978- 2004)", in *Debate e investigación*, April 2004, 46 and 47; CARRILLOS J. M., "Del patrimonio público una aproximación al concepto y su contenido" in *Prolegómenos. Derechos y Valores*, January-June, 2006, 27.

produces a desire to understand the motivations and essences of the authors, holders, or possessors of heritage and, consequently, to study and deepen the process of its emergence. This thinking develops based on identifications of similarities and differences with the current social context.

The second function points to the symbolic value that heritage assets represent for peoples or nations, who become their owners and are obliged to preserve them in the present for future generations. As an instrument of social cohesion, it refers to the capacity to create a collective conscience around the values that contain the patrimonial goods, activating them in the holders and possessors, as well as in those that accede to their enjoyment. It makes it possible to capture and assimilate new values and their subsequent development.

As a resource for development, cultural heritage is associated with the economic content of the sustainable development paradigm. In this regard, UNESCO has established Culture for Development Indicators, which visualize heritage as a product and a process, offering a wealth of resources that benefit present generations and are transmitted to the future. By virtue of these Indicators, it is proposed that States establish public policies of collaboration between the public and private sectors, which prioritize economic aspects such as employment generation, especially among specialists in heritage preservation and research; principles for regulating the real estate market in heritage areas, and obtaining benefits mainly from tourism and commercial activity¹³⁴.

The UNESCO Conventions and the methodological tools analyzed (see Annex 15) recognize a fourth function of cultural heritage: to be a means of recognizing diversity, fostering tolerance, and integrating differences. This function is associated with the sensitization produced by admiring the values and essences contained in heritage properties, a process that broadens the capacity for analysis, favors inter-cultural dialogue, and encourages the solution of current problems in light of the experiences and meanings represented by heritage properties.

¹³⁴ ZENDRI, L., "Economic dimension of cultural heritage: the need for adequate preservationist policies", *ANALES* 41, (2011) 409.

The comparative legal method made it possible to determine that the symbolic and knowledge-creating function that the theoretical field recognizes, and the function emanating from the 2005 UNESCO Convention on Cultural Diversity, can be glimpsed from the regulation of their purposes in the Ecuadorian, Italian, and Portuguese legal systems. They recognize the desire to comply with the law; to collaborate with the development of the cultural process and respect cultural diversity, and the understanding and construction of cultural identity, respectively¹³⁵. The legal systems of Spain, Germany, Argentina, Venezuela, Belgium, France, Colombia, and Peru do not expressly or indirectly regulate their functions.

Another of the peculiarities of the normative structuring of the protection of cultural heritage is the regulation of the administrative sanctioning regime of the matter, which of course contributes to the fulfillment of the functions of cultural heritage.

In the norms analyzed, the rules are grouped after the organizational and procedural provisions, which set out the functions, obligations, and responsibilities to be fulfilled. This facilitates their understanding and effectiveness.

The sanctioning regime is designed to adjust the actions of the Administration, owners, and users in general in accordance with certain principles, when verifying illicit human behaviour on cultural heritage, or when suspecting its existence, in order to avoid and repress it, in accordance with the projected sanctioning scheme.

The general theoretical postulates related to administrative infractions are the foundations for conceiving the legal administrative sanctioning regime in the field of cultural heritage. These have been based on the analysis of the works of VARGAS, SÁNCHEZ, and LÓPEZ who pay attention to the fundamental elements of the sanctioning regime: principles; outline of the sanctioning procedure; infractions, and sanctions. These elements will be discussed below.

¹³⁵ *Vid.* Ecuadorian Organic Law of Culture of 2016, articles 3, a), 4, and 16 a); Italian Cultural Heritage and Landscape Code of 2004, article 1.2; Portuguese Law of Bases, article 1 respectively.

The principles of the sanctioning regime in matters of patrimonial protection are as follows: The principle of legality, which implies that the administrative action must comply with the normative postulates in order to avoid arbitrary actions; the principle of typicity, materialized through the establishment of the infringements and their legal consequences; liability, required of the offenders through the verification of non-compliance with the legal obligations imposed by law and of their acting in good faith as related subjects of Administrative Law in financial matters, and *non bis in idem*, which prohibits sanctioning the same person twice for the same act when there is identity in the subject, in the act and in the basis¹³⁶.

In the Argentine and Italian legal systems, the principle of typicity is identified, when the administrative offences that transgress the interests or the administrative order and their consequences are specified, and some of them even constitute regulatory chapters in this matter¹³⁷.

The administrative legal procedure guarantees the enjoyment of a series of human rights linked to the sanctioning regime: the right to legal certainty and those derived from due process¹³⁸.

The determination of the elements of the sanctioning procedure increases legal certainty, as it reduces the degree of administrative discretion in its application; it specifies the competent authorities and public bodies in charge of the investigation and qualification of the facts and formulates the criteria necessary for the exact quantification of the sanction.

There is a tendency in the regulatory projection of Ecuador, Spain, Colombia, and Peru to include the inspection of patrimonial assets; to regulate the

¹³⁶ VARGAS, K., "Principios del procedimiento administrativo sancionador", available at www.binasss.sa.cr, (accessed May 17, 2021), 60, 61, 62 and 68; SÁNCHEZ, A., *Fundamentos del Derecho Sancionador Tributario*, Tesis doctoral, Universidad Abat Oliba CEU, Doctoral Program in Humanities and Social Sciences, Department of Tax Law, 2017, 254- 294, 296-396, 413- 426; AMATE, M. L., "La potestad sancionadora y sus especialidades en materia de patrimonio histórico", *Revista PH* (2012) 38-41 and 42.

¹³⁷ *Vid.* Law 25.473 for the protection of the archaeological and paleontological heritage of Argentina of June 4, 2003, articles 39 to 44; Italian Decree 42 of 2004, articles 162, 163, 165-168.

¹³⁸ The right to legal certainty and those derived from the due process: the right of access to justice, presumption of innocence, right of the accused to be informed of the accusation, right to defense through the hearing and presentation of evidence, right not to self-incrimination and the right to legal assistance. LÓPEZ, F., "Principios del procedimiento sancionador", in *Documentación Administrativa*, available at www.core.ac.uk, accessed May 17, 2021, 165-192; VARGAS, K., *supra* n. 135, 64.

obligation to report, and deposited in citizens, public officials, and authorities¹³⁹; the initiation and terms of substantiation¹⁴⁰; precautionary measures¹⁴¹, preventive measures¹⁴² and the means of challenge¹⁴³, as an important measure to ensure that the sanctioning regime is effective.

The infringement, as the third element of the sanctioning regime, refers to the non-observance of the action or omission imposed by the rule to the citizens in general, or to certain subjects responsible for the protection of cultural heritage. According to SÁNCHEZ, infractions describe unlawful administrative conduct. In these, the subject voluntarily submits himself to a legal relationship with the Administration, as happens with civil servants, agents, and those responsible for assets. They also describe unlawful conduct of order, in which the subject does not act in accordance with what is stipulated by the Administration, such as in the case of users and other natural and legal persons linked to a patrimonial asset¹⁴⁴.

The provisions of the UNESCO Conventions on the protection of heritage properties at the international level are useful to Administrations for the purpose of specifying infringements in domestic legal systems¹⁴⁵.

In terms of criminalization, there are three groups of illicit conduct:

1. For failure to comply with legal obligations regarding the preservation of the integrity and safeguarding of heritage assets;

¹³⁹ *Vid.* Spanish Historical Heritage Law of 1985, article 4.

¹⁴⁰ *Vid.* General Regulations for the application of administrative measures for the infringement of the legal order of cultural heritage, Resolution 1405 of the National Director of December 23, 2004, articles 22, 24, and 25.

¹⁴¹ *Vid.* National Directorial Resolution 1405 of the National Institute of Culture of Peru, General Regulations for the application of administrative sanctions for infractions against the Cultural Heritage of the Nation of May 26, 2005, articles 30, 31, 32, 34, 35, and 37.

¹⁴² *Vid.* Colombian Law number 1185 of 2009 modifying Law 397 of 1997, article 15 and Colombian Decree number 763 of 2009, Partial Regulation of Law 397 of 1997, on material heritage and Cultural Heritage, articles 44 and 80 44; Royal Decree 111 of January 10, 1986, of partial development of Spanish Law 16 of 1985, article 57.2. bis; Law 28296, General of the Cultural Heritage of the Peruvian Nation, article 49 paragraph f); of the National Directorial Resolution 1405 of the National Institute of Culture of Peru, General Regulations for the application of administrative sanctions for infractions against the Cultural Heritage of the Nation of May 26, 2005, article 27.

¹⁴³ *Vid.* General Regulations for the application of administrative measures for the infraction of the legal order of the cultural heritage, Resolution 1405 of the National Director of December 23, 2004, article 26.

¹⁴⁴ SÁNCHEZ, A., *supra* n.135, 52.

¹⁴⁵ *Vid.* 1954 Convention, articles 4, 5, 7-15, 17 and 19; 1972 Convention, articles 4.5, 6.2, 6.3, 17 and 27; 2001 Convention, articles 2.5, 2.3, 2.6, 2.7, 2.9, 2.10, 5, 9-12, 14-18 and 20; 2003 Convention, articles 11-15, 17 and 24.3

2. For carrying out works, changes of use, gratuitous and onerous disposals of patrimonial property without the express authorization of the authorities;
3. For carrying out archaeological and other research activities on land and on the seabed without authorization, in violation of the obligation to report archaeological or underwater findings.

The Argentinian and Peruvian conception of creating a National Register of Offenders and Repeat Offenders, and another of Sanctions in matters of archaeological and paleontological heritage assets¹⁴⁶, as support instruments for the Administration to control this type of actions and avoid their repetition, breaking the cycle of occurrence of damage to national heritage, stand out from the normative comparison.

In the Spanish regime, there is an indirect typification or remission, whereby the description of the type arises from the conjunction of two norms: the one that commands or prohibits and the one that indicates that non-compliance is an infraction¹⁴⁷. The Colombian legal framework classifies infringements and their corresponding penalties as minor, serious, and very serious¹⁴⁸.

It should also be clarified that the Latin American legal systems studied, with the exception of those of Argentina and Ecuador, give special relevance to the subjective element in the definition of infringements¹⁴⁹: negligence, concealment, fraud, irresponsible intent, and fraudulent schemes.

One of the weaknesses of the administrative sanctioning regime in the field of the protection of cultural heritage lies in the fact that it does not regulate infractions that typify general cases of damage to intangible heritage and that it fails to take into account the category of non-heritage damage. This absence is

¹⁴⁶ *Vid.* Law 25.473 of June 4, 2003, for the protection of the archaeological and paleontological heritage of Argentina, articles 5, paragraph b) and 6, paragraphs c), g) and e); General Regulations for the application of administrative measures for the infringement of the legal order of cultural heritage, Resolution 1405 of the National Director of December 23, 2004, article 17.

¹⁴⁷ *Vid.* CANO, T., "Derecho Administrador Sancionador", in *Revista Española de Derecho Constitucional*, January-April (1995) 345.

¹⁴⁸ *Vid.* Colombian Law No. 1185 of 2009 amending Law 397 of 1997, Article 15.

¹⁴⁹ *Vid.* Colombian Law number 1675 of July 30, 2013, on submerged heritage, article 21, second paragraph; Regulations of the Ecuadorian Law, Executive Decree 2733 of July 16, 1984, article 79; Law 28296, General Law of the Cultural Heritage of the Peruvian Nation of July 21, 2004, articles 6.3 and 49.1, paragraph b); National Directorial Resolution 1405 of the Peruvian National Institute of Culture, General Regulations for the application of administrative sanctions for infractions against the Cultural Heritage of the Nation of May 26, 2005, articles 3 and 8; Law for the Protection and Defense of Cultural Heritage, Extraordinary GOR 4623 of October 3, 1993, article 45.

due to the fact that protection is divided in favor of the material element of heritage assets. The concept of non-pecuniary damage developed by the Inter-American Court of Human Rights¹⁵⁰, in relation to cultural heritage, includes suffering and afflictions, the loss of significant values, and alterations of a non-pecuniary nature of the victims, their family, community, or group and society in general. It is damage not only of a personal nature but also affects the social fabric.

Another weakness of the administrative sanctioning regime is that the infractions refer to properties declared or inventoried as cultural heritage, leaving exempt from recrimination those illicit actions that fall on cultural properties not recognized as heritage despite the values and significance they contribute to society and those located in the protection or buffer zone.

The last of the essential material elements of this regime is the sanction, defined as the negative retribution provided for by the Law imposed by the Public Administration for the commission of an administrative infraction¹⁵¹. Its purpose is to protect the legal system, prevent non-compliance and the occurrence of acts detrimental to the assets relevant to society. Usually, classification criteria for sanctions are referred to, which the legislator will take into account in the elaboration of the property sanctioning regime¹⁵², such as:

- Disciplinary sanctions, applicable to those persons who have a special subjection with the Administration;
- Sanctioning of demanial police, users of the public assets who are placed in a factual relationship with it;
- Rescissory sanctions of favorable administrative acts, which revoke an administrative aid or subsidy in matters of heritage conservation;
- Governmental sanctions, which obey the generic duties that every individual has towards the State with respect to patrimonial assets.

¹⁵⁰ CALDERÓN, J. F., "La reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano", available www.juridicas.unam.mx (accessed January 6, 2023) 160, 161 and 166.

¹⁵¹ BERMÚDEZ, J., "Elementos para definir las sanciones administrativas" in *Revista Chilena de Derecho*, Special Issue, (1998) 326.

¹⁵² SÁNCHEZ, A., *supra* n.135, 56 and 60.

Notwithstanding the above, the main sanction in matters of cultural heritage is fine, even though there are accessory measures¹⁵³ and others aimed at repairing the damage caused to the heritage assets¹⁵⁴. This last conception is followed by the Belgian legal system, which departs from the trend of attributing fines and provides for the measures of confiscation, seizure, and confiscation of heritage assets¹⁵⁵.

It is necessary that the criterion of attribution of the sanction is projected in the sanctioning procedures, in order to avoid injury to legal certainty and other human rights of the administered parties. In this regard, the general rules of adequacy provided for in the Spanish and Peruvian laws¹⁵⁶ stand out.

Other normative determinations of adequacy must be foreseen, as is the case of the sanctions to be imposed for continuous infringements, which deserve special treatment given their special nature. According to AMATE, the rule derived from the principle of non-retroactivity, of applying the law in force at the time of the last unlawful act committed, in conjunction with the postulate derived from the principle of *non bis in idem*, of attributing a single sanction in its maximum degree, is taken into account for its determination¹⁵⁷.

Another problem in this sense is the existence of blank sanctioning norms, which state the unlawful conduct and not the consequences; a task that should not be left to the discretion of the patrimonial officials. In comparative law, this

¹⁵³ *Vid.* in Colombia: Colombian Decree number 763 of 2009, Partial Regulation of Law 397 of 1997, on material heritage and Cultural Interest Property, articles 61 and 81; and Decree 1080 of May 25, 2015, Regulatory of the Culture Sector, articles 2.4.1.5.2, 2.6.2.22 and 2.6. 2.23; Organic Law of Culture of Ecuador of 2016, article 170; Law 28296, General of the Cultural Heritage of the Peruvian Nation, July 21, 2004, article 49 subparagraphs b), c) and d); General Regulations for the application of administrative measures for the infraction of the legal order of the cultural heritage, Resolution 1405 of the National Director of December 23, 2004, article 11. AMATE, M. L., *supra* n.135, 38.

¹⁵⁴ *Vid.* Law 25,473 on the protection of the archaeological and paleontological heritage of Argentina of June 4, 2003, Article 38; in Colombia: Decree number 763 of 2009, Partial Regulation of Law 397 of 1997, on material heritage and Property of Cultural Interest, Article 44 and of Law 1675 of July 30, 2013, on submerged heritage, Article 21.

¹⁵⁵ *Vid.* Law 4 April 2014, on the protection of underwater heritage, Article 18; Decree on the protection of movable property and intangible heritage of the French Community of 2002, amended in 2006, Article 33; Decree of 3 March 1976, amended in 2001, of the Flemish Community, regulating the protection of monuments, urban and rural sites, Article 15.

¹⁵⁶ *Vid.* Spanish Historical Heritage Law of 1985, articles 77 and 78; Law 28296 General of the Cultural Heritage of the Peruvian Nation of July 21, 2004, article 50.

¹⁵⁷ AMATE, M. L., *supra* n.135, 41 and 42.

situation is evident in the Venezuelan and Italian legal systems¹⁵⁸. Its eradication requires from the authorities a constant revision of the legal framework and the subsequent precision of the conduct to be followed.

The analysis of the regulations also shows that with the exception of the regulations of Italy and Peru, the rest (Germany, Argentina, Belgium, Ecuador, Spain, France, Colombia, Portugal, and Venezuela), do not provide for a minimum limit on the fines to be imposed. This may be negative, as there are actions with a minimum unlawful content, deserving, due to the circumstances involved, an economic sanction lower than the one established, and the Administration is unable to do so due to the legal imperative¹⁵⁹. In this respect, and in accordance with the proposals of YÁÑEZ, it would be convenient to eliminate this limit and determine the weight that the collaboration of the responsible party with the Administration and the possibility of extending Payment Agreements would have in the adequacy.

According to YÁÑEZ, the requirements to determine the specific amount of the penalty are the production of damages, and that these are susceptible to economic valuation. In the first requirement, the exposure to danger of the property must be weighed, therefore, the greater or lesser exposure to danger and the factual circumstances will be taken into account. The second requirement makes the weighting work more complex, due to the immaterial nature of the scientific knowledge, skills, social, spiritual, personal, and collective significance of the values of the heritage assets¹⁶⁰.

In the event that this last requirement cannot be met, the legal operator is guided by: the assessment of the circumstances of the case; the seriousness of the damage and the fault of the tortfeasor; the circumstances of the affected party or parties, as well as the consideration that the assets as a whole are of greater value than the individual pieces.

¹⁵⁸ *Vid.* Administrative Ruling 12 of June 30, 2005, which regulates the General Registry of Venezuelan Cultural Heritage and the management of the assets that comprise it, Article 24; Article 62 of Italian Decree 42 of 2004. AMATE, M. L., *supra* n.135, 38.

¹⁵⁹ *Vid.* Italian Code Decree 42 of 2004, articles 166 and 167; Law 28296, General of the Cultural Heritage of the Peruvian Nation, July 21, 2004, article 50; General Regulation for the application of administrative measures for the infraction of the legal order of the cultural heritage, Resolution 1405 of the National Director of December 23, 2004, article 13.

¹⁶⁰ YÁÑEZ, A., "Illegal activities against archaeological heritage: penal and administrative punitive systems", *CPAG 25* (2015) 22.

Likewise, it would be helpful to foresee other alternative measures aimed at repairing the non-patrimonial damage, which has not been provided for in the analyzed regimes. This situation is a consequence of conceiving cases of infringements that affect the intangible and non-patrimonial nature of cultural property.

The theoretical postulates of "Van Boven/Bassiouni", adopted by the United Nations General Assembly in 2005 and applied in the Inter-American Court of Human Rights¹⁶¹, have served as a model for proposing a series of restitution measures of non-pecuniary reparation. Likewise, they can be used in the improvement of the administrative sanctioning regime in the cultural heritage sector. Consequently, measures can be conceived:

Non-repetition is aimed at avoiding recurrence due to ignorance, ignorance, or negligence. These include education, training, awareness campaigns for the population, communication, and observance of norms and rules related to the use and enjoyment of heritage assets;

-Of satisfaction, to help guide their life, memory, and identity, among which the administrative sanctions described above stand out, as well as public apologies and commemorative acts related to heritage assets and their values; and

- Rehabilitation, aimed at the recovery of heritage assets as far as possible.

Conclusions of the Chapter

The following conclusions were drawn from this chapter:

1. The foundations for conceiving the legal protection of cultural heritage in the historical, methodological, legal, and extra-legal spheres are:

- The notion of legal protection, which covers cultural, natural, and intangible assets, as well as the assets included in the environment; its content is made up of technical, administrative, and legal measures related to heritage manifestations and their enhancement, and to the processes and dynamics that make their existence and transmission to future generations possible, in which the participation of communities, owner groups, and public and private entities plays a fundamental role;

¹⁶¹LÓPEZ, G. A., TORRES, K. and GÓMEZ, C.F., "El resarcimiento del daño inmaterial o extrapatrimonial en la jurisdicción contenciosa administrativa", *Revista Jurídica Piélagus* (2015) 174 and 175; CALDERÓN, J. F., *supra* n.149, 166, 167, 177 and 186.

- The extra-legal criteria coming from architecture, on conservation, preservation and restoration, respect for cultural diversity and participation, all of which are part of the normative regulation and allow the Administrations to coordinate and direct their joint dynamics with the citizenry;
- The social functions of heritage assets are to consolidate historical memory and territorial identity, to serve as a legacy for future generations, and to provide resources that contribute to the spiritual and material well-being of society;
- The adoption of the UNESCO Conventions of 1954, 1970, 1972, 2001, and 2003; the customary norms referring to the dynamics of recognition, protection, safeguarding, and revaluation, and the methodological guidelines issued by international and regional organizations specialized in protecting cultural heritage, which constitute the fundamental sources of the legal framework at the national level;

2. The elements of the legal system for the protection of cultural heritage, which start by regulating a system of values that support decision-making and actions on heritage assets in their preservation and safeguarding; a set of paradigmatic principles that transversal the processes and structures concerning cultural heritage, and a set of relevant definitions in the application and effectiveness of the legal order, such as cultural property, cultural heritage, and its typologies, protection and buffer zone, community;

- The characterization of the normative structuring of said system, consisting of provisions concerning the bodies and structures involved in the protection of cultural assets in terms of their functions, obligations, and responsibilities; the dynamics and social relations associated with the identification and recognition of heritage assets, their use and enjoyment, the preservation of their values and heritage significance, the transmission of the assets and their values, the safeguarding and management of heritage assets, their revaluation, and the elements of the administrative sanctioning regime aimed at controlling the actions of the Administration, owners, and users of heritage assets;

The exegetical and comparative study of the normative formulations of the protection of cultural heritage in the selected national regimes reveals the following tendencies: - Inclination towards the determination of a set of paradigmatic principles that transversal the processes and structures concerning cultural heritage;

- They contain a series of definitions relevant to the application and effectiveness of the legal order: cultural heritage, protection, safeguarding, heritage management, enhancement, declaration, and intervention;
- They conceive fragmented protection taking into account the physical nature of the heritage assets;
- The object of legal regulation is the preservation of heritage assets;
- They define the functions, obligations, and responsibilities of the state authorities responsible for its protection, especially highlighting the creation of registry entities responsible for the identification of the cultural manifestations that make up the heritage.

4. From the above, key elements emerge to elaborate guidelines for the redesign of the regulatory framework for the protection of cultural heritage, particularly those related to the methodological, legal, and extra-legal foundations, the object of protection, its scope and content, the main definitions, values and principles, the main institutions and actors involved in the protection and the elements of the administrative sanctioning regime.

**CHAPTER II. LEGAL MECHANISMS FOR THE PROTECTION OF
CULTURAL HERITAGE: TOWARDS AN INTEGRAL PROPOSAL FOR ITS
DETERMINATION.**

CHAPTER II. LEGAL MECHANISMS FOR THE PROTECTION OF CULTURAL HERITAGE: TOWARDS AN INTEGRAL PROPOSAL FOR ITS DETERMINATION.

This chapter systematizes, based on historical, theoretical, and comparative normative analysis, the mechanisms for the protection of cultural heritage. The phases, procedures, principles, purposes and objectives, instruments, subjects, and institutions involved are considered.

Theoretical guidelines for the integral protection of cultural heritage are configured, based on their historical, theoretical-doctrinal, and comparative normative foundations.

It has been useful to use the following research methods: analysis-synthesis, induction, deduction, historical, exegetical, and comparative legal; with the support of the technique of bibliographic review of a wide bibliography.

2.1. Identification and validation of the status of cultural property

The mechanisms of recognition are oriented to validate the legal status of a cultural manifestation that possesses relevant values through the fulfillment of the phases of patrimonialization¹⁶². They include the identification of the heritage values through the inventory and/or catalog, the patrimonialization, and the revocation of the administrative declaration, in cases of loss of the values that made it worthy of recognition. Reference will be made to each of them below.

2.1.1. Mechanisms for the Identification of heritage properties

To identify the cultural properties to be protected, the instruments of the inventory or catalog are conceived. Their basis lies in the notion that they are used to control the assets included in them.

¹⁶² According to CONTRERAS, J., "Patrimonio y globalización", in TELLO, S., En torno al patrimonio e interdisciplinariedad, Lima, Universidad San Martín de Porres, 2002, 21- 41, and ARRIETA, I., Participación ciudadana, patrimonio cultural y museos, Bilbao, Servicio Editorial de la Universidad del País Vasco, 2008, patrimonialization is "converting" into heritage or "building heritage", based on certain pre-existing elements, selected and evaluated in this process. Patrimonialization is a strategic process of social intervention and socio-political participation because it is a process of endowment of meaning, identification, and collective legitimization.

According to BAYÓ and MARTÍNEZ GARCÍA and LLOP¹⁶³, the inventory is the orderly and precise entry of the heritage assets according to the protective effects that derive from the inscription. It confirms the existence of cultural property through its location and the enumeration of its peculiarities, all of which make it possible to disseminate its values and effectively manage its use and enjoyment.

On the other hand, the catalog implies a higher level of knowledge by deepening the study of certain objects, which are usually included in previous inventories. This desire to deepen the knowledge of the manifestation itself implies preserving the object of study. It is therefore an instrument that favors the preservation of knowledge.

Based on these theoretical annotations, we are in favor of conceiving a heritage protection system based on the existence of catalogs. The inventories could be used in the registration and survey of cultural properties that have relevant values but do not have an administrative declaration as part of the national heritage, or for those cultural properties that have a file of initiation of the process of patrimonialization¹⁶⁴.

From the foreign legal practice, it is noticed, an indistinct denomination of both instruments, varying its nomenclature in the Census in Venezuela and List of Candidates in Belgium¹⁶⁵, does not conform to the theoretical postulates on the subject and its practical derivations.

¹⁶³ QUIROSA, M. V., *Historia de la protección de los bienes culturales muebles: definición, tipología y principios generales de su estatuto jurídico*, Editorial Universidad de Granada, Spain, 2005, 274 and 275.

¹⁶⁴ In Belgium, the Decree of June 30, 1993, modified in 2003, of the Flemish Community, on the protection of the archaeological heritage, articles 13, 14, and 15, which project the treatment to be granted to the possible goods to be protected in Lists of Monuments and Archaeological Zones; Decree of March 29, 2002, nautical heritage, article 4, provisional registration of nautical objects.

¹⁶⁵ The Venezuelan legislation, Law of Protection and Defense of the cultural heritage, of October 3, 1993, alludes in its Article 34, to the Censuses, although in its article 37, it alludes to the Inventory that the Institute of Culture can order to carry out about archaeological and paleontological objects. In Belgium: article 10, Register and its constituent elements, Decree of March 3, 1976, amended in 2001, of the Flemish Community, regulating the protection of monuments, urban and rural sites; Decree of March 29, 2002, nautical heritage, article 6, List of definitively protected properties; Flemish Government Regulation of December 5, 2003, on the protection of movable cultural heritage of exceptional value, articles 2 and 3, List consisting of two sections: individual properties and collections. Colombia: Article 7.8, Indicative List of Candidates for Cultural Heritage, of Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on tangible heritage and Properties of Cultural Interest. Articles 12 and 35 of the Spanish Historical Heritage Law of 1985, the former refers to the General Register of administrative

It is also necessary to clarify the definition of the term register, closely linked to the inventory, but in its content and essence with a different scope and which is expressly regulated in the legislations of Spain and Peru¹⁶⁶. To register is the resulting action to follow with the movable and immovable, tangible and intangible assets, which have an express declaration of patrimonial recognition for the values they possess and for which they deserve the maximum protection offered by the legal regime. It implies the normative conception of guarantees derived from the registry's legal publicity.

In the legal systems of Belgium, Spain, and Peru, it is observed that the regulation of the inventory action is fundamental for patrimonial preservation because it allows locating¹⁶⁷, to identify the cultural goods that can conform the cultural patrimony, classifying it and generating the bases and taking its information for its later cataloging¹⁶⁸.

Inventorying implies the execution of simple phases that the law has to set; the subject responsible or obliged to inventory and the consequences that derive

nature for properties declared of Cultural Interest, and the latter refers to the Census of Documentary Heritage.

¹⁶⁶ *Vid.* Ley 28296, Ley General del Patrimonio Cultural de la Nación peruana del 21 de julio de 2004, article 13; Ley de Patrimonio Histórico español de 1985, relative to the goods declared of Cultural Interest, article 12.2. GONZÁLEZ, M., "El contexto legal del patrimonio arqueológico en Galicia y su disposición para la gestión y revalorización", *Gallaecia: revista de arqueología e antigüidade* (2000) 395.

¹⁶⁷ It is closely linked to documentation, -through the use of different formats to identify the cultural values that the property possesses and that in turn, contribute to its preservation and dissemination-; education and diffusion. All actions related to safeguarding. Hence, it is the beginning of the process of heritage protection and safeguarding, an action in which the 1972, 2001, and 2003 UNESCO Conventions converge. BAJO, J. F., *supra* n.48, 40 and FILIPOVIC, D., "The implementation of the UNESCO Convention for the safeguarding of the intangible cultural heritage in the Republic of Serbia: documentation of the National Register of Intangible Cultural Heritage at the Ethnographic Museum of Belgrade", in SCHREIBER, H.S., *Safeguarding experiences in Central and Eastern European countries and China*, National Heritage Board of Poland, 203.

They are ordered based on inventories: Belgium: Walloon Code of land management, urban planning, and Heritage, sanctioned by the Belgian Government, April 1, 1999, Decree on the conservation and protection of Heritage, Article 192 and in the Decree on the protection of movable property and intangible heritage, French Community of 2002, amended in 2006, Articles 22, 24 and 25. Spain: Article 26.6 and 28 of the Spanish Historical Heritage Law of 1985, refers to a General Inventory of the properties even if they are not declared heritage. Peru: Article IV of Law 28296, General Law of the Cultural Heritage of the Peruvian Nation of July 21, 2004.

¹⁶⁸ Systematic compilation of data on the characterization, value, and recognition of the properties. BAJO, J. F., *supra* n. 48, 40. *Vid.* Article 35 of the Spanish Historical Heritage Law of 1985, relative to the Catalog of the goods declared bibliographic heritage; Administrative Ruling 12 of June 30, 2005, which regulates the General Registry of Venezuelan Cultural Heritage, article 25.

from its non-compliance¹⁶⁹; the entity in charge of the inventory, in this case, a public Registry with powers to that effect; deadlines and its derived effects; the conclusion of the inscription, its effects and the act of notification to the interested parties.

From the inclusion in the inventory derives the categorization or status of the cultural manifestations, so that each good has a degree of protection adequate to its value, all of which is specified in the regulatory norms of the activity¹⁷⁰.

The inventory of intangible cultural property is a challenge for legal operators and legislators since processes for identifying intangible values must be determined and reflected in regulatory provisions. Thus, the following must be taken into account: the system of knowledge, skills, and values; the socio-economic, cultural, and temporal context of the cultural manifestation; the actors that produce, use, transform, transmit, and recognize it as cultural heritage¹⁷¹.

The Spanish, Italian, and Venezuelan protective norms, when ordering the action of the public Registries in the development of the inventory, specify the following principles of action: promotion of cultural diversity through diffusion¹⁷²; communication and educational teaching as part of the safeguarding and the management model; cooperation of the communities and other entities committed with the patrimonial conservation and the establishment of the measures of conservation on the inventoried patrimonial good.

¹⁶⁹ Law 28296, General Law of the Cultural Heritage of the Peruvian Nation of July 21, 2004, Article 16.

¹⁷⁰ GONZÁLEZ, M., *supra* n. 165, 397.

¹⁷¹ DEL MÁRMOL, C., ROIGÉ, X. and ESTRADA, F., "Safeguarding Intangible Cultural Heritage? A critical perspective on the Inventory of Intangible Cultural Heritage in Catalonia", in LIRA, S, AMOEDA, R. and PINHEIRO, C., (Editors), *Sharing Cultures*, 2011, Chapter 3, Social practices, Green Lines Institute for Sustainable Development, 2011, (481) 488.

¹⁷² Royal Decree 111/1986, of January 10, 1986, of partial development of Law 16/1985, of Spanish Historical Heritage, articles 21, 22, and 25, establish what concerns the structure, membership, functions, requirements, and extremes that are noted in the General Register of Immaterial Cultural Heritage and the requirements for accessing the information contained in the General Inventory; in Italy, Decree 42 of January 22, 2004, article 122 states that the contents of the archives shall be public, except for those that are reserved due to the sensitive information they contain, and the following article establishes the procedure for accessing these types of archives; Venezuela: Administrative Ruling 12 of June 32, 2005, which regulates the General Registry of Cultural Heritage, articles 6 and 30. BRESHANI, S. and DOLLANI, A., "Intangible cultural heritage of Albania and the challenges in creating the National Inventory and the List of Phenomena and elements", in SCHREIBER, H.S., *Safeguarding experiences in Central and Eastern European countries and China*, National Heritage Board of Poland, 2017 (166) 180.

Other identification instruments are outlined in the international mandates contained in article 11.4 of the 1972 Convention for the World Protection of the Cultural and Natural Heritage and 17 of the 2003 Convention on the Safeguarding of the Intangible Heritage, when enunciating the need to create a List of World Heritage in Danger¹⁷³, whose protection requires major conservation work and efforts and, in the case of intangible heritage properties, the establishment of a Representative List, in the first Recognition of the Preamble of the Convention of the aforementioned international standard of 2003.

It is observed from the legal comparison that these instruments have been foreseen in the legal systems of Germany, the Flemish Community of Belgium, and Spain¹⁷⁴. It would be praiseworthy to plan their creation, to control and follow up the state of cultural property, given the risk of negligence, abandonment, natural events, and inefficiency in the processes of heritage preservation, and also from the methodological point of view, as they constitute instruments to guide the conservation work of heritage operators.

2.1.2. The patrimonialization of cultural properties

Patrimonialization is the administrative process projected in the legal norm to declare a property as part of the cultural heritage. This process generates the need to create institutions and to determine the responsible subjects in the development and follow-up of the procedures involved. Following KOTUR and SCHREIBER, it is estimated that it is made up of three fundamental stages: nominating, evaluating or selecting, and declaring the status of cultural property¹⁷⁵.

The nomination, according to the legal rules of Colombia, Italy, Peru, and Venezuela, is initiated at the request of the interested party. Other times, it is

¹⁷³ *Vid.* in addition, to the UNESCO Convention of 2003, article 17.

¹⁷⁴ *Vid.* German Cultural Property Act, Section 2.20; Decree on the protection of movable property of exceptional value, Belgian Flemish Community, 24 January 2003, Article 3; Spanish Law 10 of 2015 on intangible cultural heritage, Article 14.6.

¹⁷⁵ SCHREIBER, H.S., "Ten remarks on the Tenth Anniversary of entry into force of the 2003 UNESCO Convention for the Safeguarding Intangible cultural heritage", in SCHREIBER, H.S. (ed.), *Safeguarding experiences in Central and Eastern European countries and China*, National Heritage Board of Poland, 2017 (434) 453. KOTUR, M., "Safeguarding intangible heritage in Bosnia and Herzegovina", in SCHREIBER, H.S. (ed.), *Safeguarding experiences in Central and Eastern European countries and China*, National Heritage Board of Poland, 2017 (214) 218.

undertaken by the State itself, represented by the bodies responsible for the protection of cultural heritage, or by the holder of a real right over the cultural property¹⁷⁶. Since the entry into force of the 2003 UNESCO Convention, communities, groups, or individuals may also nominate. The special rules of the French Community of Belgium are associated with this last concept¹⁷⁷.

Likewise, state structures responsible for cultural heritage can also nominate, as the legal comparison in Spain and Italy has revealed¹⁷⁸. About these *ex officio* processes, the legislator establishes in the norm the grounds that protect it, namely: imminent risk of deterioration; to protect it immediately and carry out the interventions approved by law; as well as the nominations related to previous declarations of heritage properties or those located in the protection zone.

Regarding this phase, it must indicate the norm, the documents to be presented, the requirements to be demanded, the instances before which the request is made, and the deadlines of the process, especially regarding the delivery and reception of the response.

The implications of the nomination, even if it does not result in an effective declaration, must also be foreseen. The effects recognized by the legislations of Spain, Colombia, and Italy are in the order of notifying the interested parties; preventive annotation in the registry, inventory, or catalog of patrimonial goods, for its future registration; publication in the official means of socio-legal communication established by each system¹⁷⁹.

In the second phase, following PÉREZ, the cultural value of the property is evaluated; its exceptional importance for the country; its function and public

¹⁷⁶ *Vid.* Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on Material Heritage and Properties of Cultural Interest of Colombia, article 9; Italy, Decree 42, January 22, 2004, articles 14.1, 14.3, 137.1 and 138; Peru, Law 28296, General of the Cultural Heritage of the Nation, July 21, 2004, article 7; Venezuela, Administrative Providence 12 of June 30, 2005, which regulates the General Registry of Venezuelan Cultural Heritage and the management of the properties that comprise it, article 28.

¹⁷⁷ In Belgium: Decree on the protection of movable property and intangible heritage, the French community of 2002, amended in 2006, article 4, 500 signatories of the French community or the bilingual community of Brussels.

¹⁷⁸ *Vid.* Law 10/2015, of May 26, for the safeguarding of the Intangible Cultural Heritage of Spain, Article 12.4. Italy, Decree 42, of January 22, 2004, Article 138.

¹⁷⁹ *Vid.* Spanish Historical Heritage Law, Articles 11.1 and of the Regulations of the Law, Article 12.3; Law 397 of 1997 Colombian General Law of Culture, modified by Law 1185 of March 12, 2008, Article 8. Italy: Decree 42, of January 22, 2004, Article 140.

utility; its nature and characteristics¹⁸⁰. This selection process entails, according to QUIROSA, the adoption of a declaratory act of a discretionary nature, containing a technical-valuative judgment of extra-legal notions and concepts related to cultural identity, meanings, and moral values¹⁸¹.

In the projection of this stage it has been detected that the legislator of Colombia, Ecuador, Spain, and Italy, set the rules and necessary channels for such assessment, the instances and consultative bodies involved in the issuance of the qualification judgement; as well as all the parameters associated to the administrative legal statements of discretionary nature¹⁸².

Regarding the evaluation of intangible manifestations, there is an absence of procedures for the participation of their owners or possessors, especially the community or social group that develops them. It is therefore essential that these communities and social groups be legitimized at this stage.

The third stage concludes with the administrative declaration recognizing that a property is part of the nation's cultural heritage. This act is the most common way of recognizing the status. The Italian, Spanish, and Venezuelan legislations stand out in this regard¹⁸³. With this action, all the legal springs that lead to the protection of the property are activated with all the measures that the protection regime entails¹⁸⁴.

This proclamation can be extended for a specific property or to recognize collective patrimonial ensembles. The latter, according to BAILLIET's criterion, can be, in turn, joint, -relative to a group of cultural properties that present a similar risk situation-, or generic -referring to a group of properties that present common characteristics or values-¹⁸⁵.

¹⁸⁰ PÉREZ, O. A., *supra* n. 7, 200.

¹⁸¹ QUIROSA, M.V., *supra* n. 162, 215.

¹⁸² *Vid.* in Colombia: Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on Material Heritage and Property of Cultural Interest, article 6. Ecuador: Organic Law of Culture, 2016, articles 55- 59, 61 and 62. Spain: Historical Heritage Law of 1985, articles 3.2 and 9.2 and of Law 10/2015, of May 26, for the safeguarding of Intangible Cultural Heritage, article 12.4, subparagraphs a, b, and c. Italy: Decree 42, of January 22, 2004, articles 12 and 141.2.

¹⁸³ *Vid.* Italy, Decree 42, January 22, 2004, article 141; Venezuela, 1993's Protection and Defense Cultural Heritage, articles 6, 8 y 10; Spain, Law 16 of Historic Heritage, June 25, 1985, articles 11 y 12.

¹⁸⁴ FERNANDEZ, M., *supra* n. 30, 38.

¹⁸⁵ BAILLIET, E. History of the protection of architectural heritage in Spain. 1933- 1985, Doctoral thesis Universidad Politécnica de Madrid, Spain, 2015, 188 and 191.

This declaration implies greater legal certainty and gives the owner the guarantee of exercising his right of defense in case of disagreement with the decision adopted, as the Italian legislation has conceived it¹⁸⁶. The legislator, therefore, has to foresee these means of guarantee and defense together with the procedure to be followed.

The status of an object belonging to the cultural heritage can also be verified through the recognition of the legal presumptions contained in the normative framework. Such presumptions have been foreseen in the general laws for the protection of cultural heritage in Ecuador, Spain, Italy, and Peru for pre-Hispanic and archaeological properties and those related to ancestral peoples and cultures¹⁸⁷.

The process of patrimonialization can culminate without recognizing the inclusion of a nominated cultural property. For this case, the Spanish legislator has foreseen the expiration of the provisional protection measures declared at the time of the nomination and of the term established to re-nominate the property under the rules of the process¹⁸⁸.

It is observed in the laws studied that they define the effects of the resulting positive declaration. However, they do not stipulate the procedure to be followed if there has been no administrative recognition. This determination would be useful to the applicants since it stimulates them to continue developing effective strategies of preservation, revaluation, and patrimonial management for subsequent nominations.

The purpose of this procedure is to declare the legal status of the initiation of the guardianship regime. In it, the legislator has to foresee the legal treatment to be given to the assets that are part of the cultural heritage and that have lost the values that made them worthy of such recognition. In the latter case, the Administration must revoke or terminate the effects of that administrative act.

¹⁸⁶ *Vid.* Decree 42, January 22, 2004, of Italy, article 16. PÉREZ, O. A., *supra* n.7, 200.

¹⁸⁷ *Vid.* Ley Orgánica de la Cultura, 2016, article 54; Ley 28296 General del Patrimonio Cultural de la Nación peruana de 21 de julio de 2004, article III; Spain: Ley de Patrimonio Histórico, articles 40 and 60. Italy, Decree 42 of January 22, 2004, articles 10 and 142. Peru: Law 28296, General of the Cultural Heritage of the Nation, July 21, 2004, article 3. CHIRINOS, P. M., *El régimen de propiedad, protección y puesta en valor de los bienes muebles prehispánicos*, Tesis en opción por el Título de Abogado, Universidad de Piura, Facultad de Derecho, Lima, Peru, 2016, 22.

¹⁸⁸ FERNÁNDEZ, M., *supra* n. 30, 42.

That is why it is called the revocation process because it involves carrying out certain steps to cancel the previously declared will.

The comparative analysis shows that only four of the regimes studied provide for the recall process: Belgium¹⁸⁹, Colombia¹⁹⁰, Ecuador¹⁹¹, and Spain¹⁹². The legal systems of Belgium, Ecuador, and Spain are the oldest in the projection of the revocation process, since the eighties of the last century. All of them coincide in: projecting its processing coinciding with the phases of patrimonialization; establishing the grounds for revocation; specifying that the administrative authorities must express their decision, and stipulating its annotation in the corresponding inventory.

2.2. Mechanisms for the Preservation of patrimonial assets

The legal mechanisms of control are destined in the fundamental thing to preserve the material elements of the patrimonial goods and to those extremes related to their use, enjoyment, and disposition. They are linked to the content of the right of ownership over heritage assets and are designed to curb situations of abandonment, neglect, destruction, arbitrary transformation, and illegal acquisitions.

The normative precision of how the patrimonial goods will be used is important since it contributes to guaranteeing their preservation¹⁹³. In this sense, in agreement with BAJO, the primary thing would be to regulate the use in the social sense -that which will be made by those who are willing to appreciate their values in a generic sense-, and the work -proper of the subjects who carry

¹⁸⁹ *Vid.* Decree 2941 of 2009, Partial Regulation of the law of Intangible Cultural Heritage of the Flemish Community, Article 5 and of the Decree of March 3, 19 76, amended in 2001, of the Flemish Community, regulating the protection of monuments, urban and rural sites, Article 9.

¹⁹⁰ *Vid.* Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on Material Heritage and Properties of Cultural Interest, article 4.1.2 and of Decree 1080 of May 25, 2015, Regulatory of the Culture Sector, article 2.5.3.7.

¹⁹¹ *Vid.* Organic Law of Culture of Ecuador, 2016, article 78; Bolivian Cultural Heritage Law 530 of May 23, 2014, articles 34 to 38; Law 16 of 1985 of the Spanish Historical Heritage, articles 9 to 14 and Law 10 of 2015 of the Intangible Cultural Heritage of Spain, article 14.3; of the Law of Protection and Defense of the Cultural Heritage of Venezuela of October 3, 1993, article 13.

¹⁹² *Vid.* Historical Heritage Law, article 9.4; Royal Decree 111/1986, of January 10, of partial development of the Historical Heritage Law, articles 16, 19, and 20; of Law 10/2015, of May 26, for the safeguarding of Intangible Cultural Heritage, articles 17 and 18.

¹⁹³ A tradition that goes back to the founder of the modern restoration, Eugène Emmanuel Viollet-le-Duc, and passes through Alois Riegl, Louis Cloquet, and Gustavo Giovannoni, until reaching Marco Dezzi Bardeschi. VIEIRA DE ANDRADE, "Los espacios públicos en el Centro de Histórico de Salvador de Bahía", in LÓPEZ, F. J and VIDARGAS, F. (Editors), Encuentro Internacional Usos del Patrimonio: nuevos escenarios, Instituto Nacional de Antropología e Historia, Mexico City, 2015, (107)108.

out research, restoration actions, dissemination and management of such assets¹⁹⁴. To this end, legislation must specify the objectives, actions, and measures to be taken by those who use the property daily to carry out the activities for which it was created or intended.

The actions of fragmentation of patrimonial properties, divisions, additions, changes of use, reuse, reconvention or reuse, and any action of transformation, require authorization from the competent authorities. The legal comparison corroborated this requirement in Belgium, Italy, Spain, Colombia, Ecuador, and Peru. In the legislations of these countries, another requirement has been conceived, namely that specialized advice must be received for their execution¹⁹⁵.

It is worth noting the specialization of the Belgian legal framework, in that it provides for the use to be made of urban and rural heritage assets, such as windmills and watermills, bell towers, clocks, organs, tombs, and funerary heritage¹⁹⁶. This precision is relevant since it serves as a guide to other legislators in the eagerness to protect the cultural assets they possess in all spatial contexts.

Another novelty is the normative treatment of the use that the Italian legislator conceives the instrumental and temporary use of reproduction of the patrimonial property¹⁹⁷, which links the order of patrimonial protection with that of intellectual property; as well as making it possible to determine those areas where it is not possible to carry out commercial activities. This last measure impacts not only the patrimonial property but also extends to the contiguous or protection zone¹⁹⁸.

¹⁹⁴ BAJO, J. F., *supra* n.48, 52.

¹⁹⁵ *Vid.* In Belgium: Wallon Code of land management, urban planning, and Heritage, sanctioned by the Belgian Government, April 1, 1999, Decree on the conservation and protection of heritage, articles 187, 206 207; Decree on the protection of movable property and intangible heritage, French Community of 2002, amended in 2006, articles 7 and 9; Decree of March 3, 1976, amended in 2001, of the Flemish Community, regulating the protection of monuments, urban and rural sites, articles 11 and 12. In Colombia, Law 397 of 1997, article 11. Ecuador: Ley Orgánica de la Cultura, 2016, articles 70-73; Spain: Ley de Protección del Patrimonio Histórico de 1985, articles 19, 20.2, 20.3, 21.2, 37.1, 39.1, 39.2, 52.1 and 52.2. In Italy: Decree 42 of 2004, Code of Cultural Heritage and Cultural Landscape, articles 20, 21, 49, 50, 51, 153 and 154. In Peru: Law 28296, General Law of the Cultural Heritage of the Nation of July 21, 2004, articles 20, 22.1.

¹⁹⁶ *Vid.* Flemish Government Regulation of November 17, 1993, on general prescriptions for conservation and maintenance of urban and rural sites.

¹⁹⁷ *Vid.* Decree 42 of 2004, Italian Cultural Heritage and Cultural Landscape Code, article 107.

¹⁹⁸ *Vid.* Decree 42 of 2004, Italian Cultural Heritage and Cultural Landscape Code, article 52.

The Italian legislator conceived in the same way the regulation of the use in the tourism industry¹⁹⁹. In this activity, groups of people are transported throughout the territory, offering them services that facilitate the interaction of tourists with the landscape, the cultural heritage, and the people of the places they pass through²⁰⁰. It is a source of income for its maintenance and conservation, but at the same time, it generates risks of loss of patrimonial identity in the receiving communities by welcoming the identities, customs, and habits of the tourists, and increases the risk of material deterioration of the patrimonial goods.

BALLART believes that sustainable cultural tourism is a challenge for legislators and administrations²⁰¹. This idea is shared, because it is essential to relate the powers of the constitutional right of access and enjoyment of culture with the preservation, transmission, and projection of cultural heritage as an engine of social, economic, and intellectual development. Likewise, the obligation should be imposed on the tourism agents to carry out the tourist offer that respects the integrity and authenticity of the patrimonial goods.

It is necessary to establish the following elements in the normative scope, since the analyzed orders, except the Italian one, do not pronounce themselves in directing the cooperation, commitment, and consensus between the social actors linked directly or indirectly to the use of the cultural heritage, i.e.: the action of the state entities - in the sense of foreseeing their powers of direction, the adoption of measures, extension of regulations that guide the activity -; the possibilities of action of the scientific entities - that substantiate, research and promote the conservation and use of the patrimonial goods²⁰²-; the action of the communities owning the heritage assets -in deciding their conditions of use and the communication of the heritage values- and, finally, the participation of private economic entities -that dynamize, through their initiatives, the profits derived from the use of the cultural heritage-.

Related to the faculty of enjoyment derived from the right of ownership over the heritage property and the fundamental right of access to culture is the right of

¹⁹⁹ *Vid.* Legislative Decree 42 of January 22, 2004, Italian Cultural Heritage and Cultural Landscape Code, articles 105 to 109.

²⁰⁰ BALLART, J., "Uses of heritage, social action, and tourism: towards a necessary consensus", in *Diálogos- Revista do Departamento de História e do Programa de Pós-Graduaco em História*, Universidade Estadual de Maringá, Brazil, (2008)111.

²⁰¹ *Id.*, 112.

²⁰² Decree 42 of 2004, Italian Cultural Heritage and Cultural Landscape Code, Article 17.

public visitation, a true subjective right of citizens²⁰³. It is a right that guarantees the social function of the patrimonial goods through the contemplation of its values by the present and future generations -who become undetermined titular subjects-. It also guarantees the components of safeguarding and enhancement.

Its content includes the possibility of action by the owners in case of refusal of the owners to allow the visit, as projected by the Ecuadorian order, through the conception of public or popular action in the ordinary jurisdiction to demand access to its enjoyment. This public or popular action reflects the interest of the State to guarantee and promote its appreciation²⁰⁴.

Its content includes the obligation of the holders of patrimonial property to allow and facilitate its inspection and study, by the competent bodies and investigators, upon reasoned request and the so-called planned public visit. Interestingly, the Spanish regime has regulated the causes that are exempt from its compliance, and that are also part of the content of the right, mediating justified cause, and the fact that the property has been deposited in a state entity²⁰⁵.

The comparative analysis of the specialized regulations shows that the aspects related to the enjoyment of patrimonial goods are not regulated. Except for the Italian legal order that establishes it as a limitation to the exercise of the faculties emanating from the real right, since it implies a burden to be borne by the patrimonial owner and, at the same time, it favors the appreciation of the patrimonial values by the users or tourists²⁰⁶.

2.2.1. Preservation mechanisms

Heritage preservation is a conceptual proposition that groups the categories of conservation and restoration. This concept is illustrated by RUSKIN's phrase "Take care of your monuments and you will not need to repair them later"²⁰⁷.

²⁰³ MARTÍNEZ, E., El delito de daños al patrimonio histórico, Doctoral Thesis, Faculty of Law, Department of Criminal Law, University of Granada, Publisher: University of Granada, Doctoral Theses, 2015, 39.

²⁰⁴ ALEGRE, J. M., *supra* n. 7, 638. *Vid.* Cultural Heritage Law, Ecuadorian codification of November 19, 2004, Article 17.

²⁰⁵ Spanish Historical Heritage Protection Law of 1985, Article 13.2.

²⁰⁶ *Vid.* Legislative Decree 42 of January 22, 2004, Italian Code of Cultural Heritage and Cultural Landscapes, articles 103, 104, 110- 114.

²⁰⁷ GONZÁLEZ, A., La restauración objetiva (Método SCCM de restauración monumental), Memoria SPAL 1993- 1998, Barcelona, Spain, 1999, 56.

Although these categories differ in their content and essence, they are not contradictory but are conceptual statements with legal significance in the face of the deterioration, destruction, or aging of the heritage property, an aspect that must be clarified in the legal norms governing the activity²⁰⁸. To conserve refers to the maintenance with a view to the permanence and life of the heritage property, and to restore to intervene the heritage property as a strategic process.

The theoretical analysis revealed that the International Committee for the Conservation of Monuments and Sites (ICOMCC) has established that there are three variants of preservation: preventive conservation, curative conservation, and restoration²⁰⁹.

The comparative study shows that:

1. The Spanish and Peruvian legal systems are congruent with this methodological enunciation, including these alternatives in their regulations²¹⁰; while the Belgian one develops preventive conservation, and the Ecuadorian one is affiliated with a restoration as a variant of preservation²¹¹;
2. The legal systems studied veto the transformation of cultural heritage, except authorized conservation and restoration actions that facilitate its use, enjoyment, and enhancement;
3. Preservation measures are carried out directly on the property and seek to respect the original material with which it was made, although in some cases it may change the original appearance²¹²;
4. Preservation measures are essentially aimed at the tangible assets that are part of the nation's heritage. According to the legislator's intention, they can be extended to the properties that are in the process of being declared and to those located in the Buffer or Protection Zones. The above is corroborated by the

²⁰⁸ *Id.*, at 57.

²⁰⁹ ICOMCC 15th Triennial Conference, 2008.

²¹⁰ Spanish Historical Heritage Law of 1985, articles 21.3 and 39; Italian Decree 42 of 2004, article 29; Peruvian Law 28296, General Law of the Cultural Heritage of the Nation of July 21, 2004, article 23.

²¹¹ Belgium, Code wallon de gestion du territoire, de l'urbanisme et du Patrimoine, sanctioned by the Belgian government, April 1, 1999, decree relating to the conservation and protection of heritage, article 185; Ecuador, affiliates to restoration such as the Organic Law of Culture, 2016, articles 72 and 73.

²¹² These actions can be: the assembly of a broken piece, the retouching of a painting, or the reintegration of lost material in a stained glass window. BAJO, J. F., *supra* n. 48, 45.

Bolivian, Spanish, Colombian, French, and Portuguese regulatory frameworks²¹³.

5. These measures reach a higher degree of precision in the patrimonial modalities confirmed by the archaeological goods, the submerged ones, those of immaterial nature, the ruins, and the serial or transboundary goods, as detailed below.

The theoretical foundations of conservation are the postulates issued in the Venice Charter of 1964, the Quito Charter of 1967, the Machu Pichu Charter of 1977, the Florence Charter of 1982, the ICOMOS Charter on the Protection and Management of Archaeological Heritage of 1990, the International Charter on the Protection and Management of the Underwater Heritage of 1996, and the Krakow Charter of 2000.

These documents contribute to the legal systems of heritage protection the principles that the legislator has to take into account in the normative conception of the conservation mechanism. Taking into consideration CORREIA and NOGUERA they are²¹⁴:

- Neutrality, implies that the character and values of a heritage asset are guaranteed by conservation, even though the original functions are altered;
- Reversibility distinguishes between the original structure and that resulting from intervention, so that it is possible to appreciate the intervention separately from the original elements;
- Minimal intervention, pursues the conservation and consolidation of the parts valued as historic, their legibility and enhancement as a cultural asset as well as their suitability for use. It facilitates the principle of reversibility;
- Unity, advocates that the intervened property be appreciated and valued as a whole, for which it is suggested to use elements that associate the originals and those incorporated by the intervention.

The definition of conservation is associated with "all those measures or actions that aim at the viability of tangible cultural heritage, ensuring its accessibility to

²¹³ *Vid.* Law No. 530, of May 23, 2014, Bolivian Cultural Heritage Law, articles 50 and 51; Law 397 of August 7, 1997, of the Colombian cultural heritage, article 11.2; of the French Code du Patrimoine, Ordinance 178 of February 20, 2004, article L642.3; Lei of September 8, 2004, of Portugal, articles 16.3 and 43.4.

²¹⁴ CORREIA, M., "Conservation theory and its application to heritage on land", *Revista Apuntes* (2007), 202, 212 and 213; NOGUERA, F., "The active conservation of architectural heritage", *Revista Loggia*, 13, (2002) 10, 26.

present and future generations"²¹⁵. RUBILAR, on the other hand, defines conservation as the material action of a positive or negative nature²¹⁶, on tangible cultural property, which implies doing what is necessary to maintain it in a state compatible with the social function it performs.

The normative projection of Belgium, Ecuador, and Peru recognizes that heritage properties are conserved, guarded, and preserved by their owners or possessors. This principle limits the actions of the owners/possessors since it establishes a generic duty and makes them directly responsible for carrying out the actions of heritage preservation. To guarantee its compliance, the actions and measures to be taken are determined²¹⁷, and the Administration must control their compliance.

Other measures that limit the actions of the patrimonial owners, in favor of the conservation of the cultural property, and that arise from the legal comparison in the Belgian, Spanish, Italian, and Peruvian orders are: the prohibition of separating heritage properties from their surroundings; the imposition of obtaining administrative authorization as a requirement to carry out any change of use or interior or exterior work that directly affects the property or any of its integral parts or belongings, or to carry out works, because of force majeure, when there is urgency and imminent danger of demolition, and the impediment of the demolition of buildings declared heritage even if they are in a dilapidated state²¹⁸.

²¹⁵ "Terminology to characterize the conservation of tangible cultural heritage", XXV ICOM General Assembly in Shanghai in November 2009, available at www.icom-cc.org (accessed 31-1-21).

²¹⁶ Such actions may prevent or destroy the cause that devalues or negatively affects the values of the heritage property. RUBILAR, L. I., *Valuation of the urban landscapes of the Central Coastal Border: a strategy to rescue its identity. Case: Cartagena -Region of Valparaiso- Chile*, Doctoral Thesis, University of Seville, Spain, 2015, 106. *Vid.* Legislative Decree 42 of January 22, 2004, Italian Cultural Heritage and Cultural Landscapes Code, articles 29 and 30.

²¹⁷ *Vid.* in Belgium, Decree of June 30, 1993, modified in 2003, the Flemish Community, on protection of architectural heritage, Article 4.2; Decree of March 3, 1976, modified in 2001, the Flemish Community, regulating the protection of monuments, urban and rural sites, Article 11; Code Wallon handling territory, urbanism and heritage, government-sanctioned heritage, the 1 April 1999, Decree relating to the conservation and protection of heritage, Article 211. In Ecuador: Organic Law of Culture of December 27, 2016, and its Regulation of May 23, 2017, articles 13 and 14; Heritage Code of 2004, article 13. In Peru: article 7 of Law 28296, General Law of the Cultural Heritage of the Nation of July 21, 2004. ALEGRE, M., *supra* n. 7, 108.

²¹⁸ *Vid.* Law 25.743 of Argentina, on the Protection of Archaeological and Paleontological Heritage of 2003, articles 19, 35 to 37; in Belgium: Decree on the protection of movable property and intangible heritage, of the French Community of 2002, modified in 2006, article 7. Wallon Code of land management, urban planning, and Heritage, sanctioned by the Belgian government on April 1, 1999, decree on the conservation and protection of heritage, article 206;

The theoretical study revealed the existence of another modality in this field, called integral conservation. This refers to involving the strategic and tactical approach in heritage intervention activities. To this end, HERRÁEZ, TUNNER and LÓPEZ, and CUBA propose four fundamental parts or procedures that they identify as documentation - in which the material components and values of the property are listed, the updated inventory card being useful²¹⁹; analysis of risks or deterioration²²⁰; design and implementation of procedures - from which follow-up and control actions and the proposal for execution arise; and, finally, verification of their realization, suitability, updating, coordination and operation. Within this modality, the Conservation Plan, an instrument that guides the owners and officials on the measures and actions of a continuous nature to be carried out on the property for its preservation, is of special importance. The comparative analysis shows that the Spanish and Italian regulations contain this modality of conservation and project normatively these phases²²¹.

The theory of objective restoration brings to the legal field the notion of preventive conservation, which aims to work in the present to minimize or avoid damage and control the risks of deterioration or loss of the property. It is a strategy that proposes a systematic work method to identify, evaluate, detect, and control the risks of deterioration of heritage properties and/or their surrounding areas²²², without affecting the structure, materials, or appearance. This modality according to the work of GONZALEZ requires the owner/owner and the intervening agents to keep the documentation related to the works, to divulge the results of the works, to carry out periodic verification studies of the use and materials, in which the After Ten instrument can be used, to develop

Spanish Historical Heritage Law of 1985, articles 18, 19, and 24; Legislative Decree 42, Italian Cultural Heritage and Cultural Landscape Code of January 22, 2004, article 21 and 146 to 155; Law 28296 General of the Peruvian National Heritage of July 21, 2004, article 20.

²¹⁹ TURNER, G., "Theories of conservation and architectural avant-garde. A dialectical relationship", *Canto Rodado* 2 (2007) 125, 129.

²²⁰ These risks are grouped into physical damage, antisocial acts, catastrophic events, inadequate environmental conditions, negligence in documentation procedures, maintenance, control, monitoring, and absence of the Preventive Conservation Plan. HERRÁEZ, J. A., DURÁN, D., and GARCÍA, E., *Fundamentos de conservación preventiva*, Departamento de Conservación Preventiva Área de Investigación y Formación Instituto del Patrimonio Cultural de España (IPCE), Spain, 2017, 6; LÓPEZ, C., and CUBA, M., *Conservación preventiva para todos. Una guía ilustrada*, Agencia Española de Cooperación Internacional para el Desarrollo AECID, Spain, s/a., available at www.aecid.es (accessed March 4, 2020).

²²¹ *Vid.* Spanish Historical Heritage Law of 1985, refers to the Special Protection Plan, art. 20; Italian Decree number 42 of 2004, arts. 132 and 135. HERRÁEZ, J.A., *supra* n. 219, 7.

²²² BAJO, J., *supra* n.48, 44; HERRÁEZ, J.A., *supra* n. 219, 3.

prevention studies, the duty of constant vigilance, the writing of Guides for the daily use and maintenance of the heritage, as well as the plan to follow in situations of catastrophes²²³.

This variant of conservation has been little developed in the legal systems analyzed. The specialized legal statements of the Flemish Community in Belgium stand out, which determine the criteria for intervention of heritage assets, not only referring to urban spaces, but also extending them to rural areas, and combining them with the risks to which they are prone²²⁴.

On the other hand, following BAJO, curative conservation implies the realization of direct actions on the damaged property or real estate complex, to counteract the damages and strengthen its structure²²⁵. These actions can modify the appearance of the property even without the consent of the owner or owner, or of the authorities themselves, who are committed to preserving the integrity of the heritage property.

In the studied legal systems, the mention of this type of action is scarce, which is a consequence of the omission to conceive specific measures of curative conservation such as the reinforcement of structures, the disinfection, and cleaning of patrimonial goods, the treatment of the metals and humid areas, the establishment of a very brief process of taking and control of decisions.

In this sense, the Spanish experience that took place in the second half of the year 2020, related to the training of professionals and heritage volunteers to counteract the damages derived from the pandemic crisis caused by Covid-19, is significant. From it, an action protocol has been obtained that illustrates to the legislator measures to be adopted in similar cases, focused on a conscious process of assessment and decision-making of the measures to be implemented by the authorities and third parties interested in the conservation of heritage assets.

Restoration or active conservation, following NOGUERA, CORREA, TURNER, and the postulates of the Krakow Charter of 2000, refers to the set of actions

²²³ GONZÁLEZ, A., *supra* n. 206, 108.

²²⁴ *Vid.* Norma del Gobierno flamenco del 17 de noviembre de 1993, sobre prescripciones generales de conservación y mantenimiento de sitios urbanos y rurales (Flemish Government Regulation of November 17, 1993, on general prescriptions for the conservation and maintenance of urban and rural sites).

²²⁵ BAJO, J., *supra* n.48, 45; ICOMCC 15th Triennial Conference, 2008.

applied directly to an individual and stable asset, when it has lost part of its meaning or function through its alteration or deterioration. These actions aim at the enrichment of the collective memory, the recognition of its authenticity and changing values, and its appropriation by the community²²⁶.

It is a category based on the theoretical foundations of scientific or modern restoration, which defends the principle of minimum action on the property, as set out in the Venice Charter of 1964, from which actions that respect its authenticity are projected following the scientific methods of consolidation, recomposition, liberation, completion or renovation.

The theory of objective restoration is inclined to the equitable protection of the values of the property. CRUZ offers a methodology consisting of four phases that have to be projected in the legal norm: integral knowledge through historical, material, and sociological analysis; reflection and evaluation to propose the objectives and criteria that will guide the intervention; the intervention itself, and preventive conservation²²⁷.

According to GONZÁLEZ's criteria, it is relevant for the legislator to demand the drafting and presentation of the instruments that allow the following of the works carried out in the third stage, such as Chronicles, Works Diary, photographic report, and the final technical report of the works²²⁸.

Following this author, this researcher considers that incorporating in the norm the active participation of the agents linked to the patrimonial property would be of great importance since they contribute with their knowledge valuable information, related to the use, functions, and materials, which otherwise would not be known. GONZÁLEZ proposes their participation in two fundamental aspects in the executive stage: programming their participation and in the evaluation of the work, and as appropriation of the results of heritage preservation²²⁹.

²²⁶ ICOMCC 15th Triennial Conference, 2008. It conceives five fundamental methods: restoration by consolidation, restoration by recomposition or anastylosis, restoration by liberation, restoration by completion, and renovation. CORREIA, M., *supra* n. 213, 207; TURNER, G., *supra* n. 218, 128; NOGUERA, F., *supra* n. 213, 11.

²²⁷ CRUZ, P., "Methodology of objective restoration, by Antoni González Moreno- Navarro," *Archivo Churubusco Journal*, available at www.archivochurubusco.encrym.edu.mx (accessed June 8, 2022).

²²⁸ GONZÁLEZ, A., *supra* n. 206, 98.

²²⁹ *Id.*, at 99.

Citizen participation in these stages is crucial, an aspect that the analyzed ordinances do not reflect in their articles. Thus, in the first and second stages, it would be convenient to recognize the participation of public entities, non-governmental organizations, citizens, and users in the planning process and collection of important data; the realization of public events at the beginning of the works, and in the analysis and reflection in decision making; the implementation of didactic visits in which the progress of the works can be appreciated²³⁰; the celebration of protocol, liturgical, informative or festive activities at the end of the works or part of them. Likewise, a summary of the work, history, and significance of the monument can be added to the information provided to visitors, encouraging their education and inclination to cooperate in the conservation of the heritage property.

Finally, specific preservation measures obtained from the theoretical study and legal comparison are illustrated. The preservation of archaeological assets requires the extension of the Special Plan for archaeological areas and sites as an instrument of measurement and control of the works intended to be carried out on this type of asset. Interventions on these assets are subject to obtaining the appropriate authorization from the administrative entities. These conditions are reflected in the legal orders of Portugal, Italy, Colombia, and Venezuela²³¹. The 1990 ICOMOS Charter for the Protection and Management of Archaeological Heritage and the 2001 UNESCO Convention on the Protection of Submerged Heritage enunciate the principle of in situ conservation, which advocates preserving heritage properties at the site where they were discovered, to avoid changing the environmental conditions that are favorable for their preservation, as a consequence of the special environmental conditions to which they are subjected.

The Belgian legal system establishes measures aimed at in situ conservation, such as: limiting access to and enjoyment of such properties; placing fences

²³⁰ *Id.*, at 100.

²³¹ *Vid.* Portuguese Law of September 8, 2004, Articles 74, 75, 77, and 78; Italian Cultural Property and Landscape Code of 2004, Article 89; Colombian Law 397 of 1997, Articles 6 and 11.2; Venezuelan Law for the Defense and Protection of Cultural Heritage of 1993, Articles 37 and 39.

and metal structures, signage; conducting information campaigns; establishing surface or underwater video surveillance and satellite monitoring²³².

Other effective instruments and means to be used in this endeavor are the sensors or tools used in the monitoring of Smart Cities, since they measure the environmental parameters of vehicular and pedestrian traffic, contribute to the surveillance of security in urban spaces and favor the control of the use and important parameters for the preservation of archaeological or paleontological heritage assets located in urban areas.

The Argentine, Bolivian, and Ecuadorian Administrations order the protection of findings produced in situations of prospecting, research, maintenance, reconstruction, conservation, or works in heritage properties or in properties that do not have this legal *status*²³³. To this end, they declare that the pieces found belong to the State and establish the obligation to communicate the finding to the competent authorities, under penalty of penal or administrative sanctions.

Regarding the protection of ruins, the Spanish legal administrative property regime emphasizes the active role of the property authorities in preserving the values of ruinous buildings and coordinating between public urban planning entities and property owners or possessors²³⁴. In this sense, it distinguishes between commonly understood ruin and imminent ruin, the latter being seen as that which offers risks and serious dangers for the people and things surrounding the property. It also provides for a differentiated treatment of four situations: ruinous properties declared cultural heritage; ruins of properties that have an administrative file for declaration initiated; ruins of properties that have heritage values and do not have an administrative file for declaration initiated, but that deserve to be protected, and the case of eminent ruin²³⁵.

²³² *Vid.* in Belgium, Flemish Government Regulation of November 17, 1993, on general prescriptions for the conservation and maintenance of urban and rural sites, articles 6 and 28.

²³³ *Vid.* Law 25.743, of the Argentine Archaeological and Paleontological Heritage, articles 13 and 14; Organic Law of Culture, 2016, article 77 second paragraph; Law 530, of May 23, 2014 Law of the Bolivian Cultural Heritage, article 52.

²³⁴ The same treatment is offered by the Wallon Code of 1999, on land management, urban planning, and heritage, sanctioned by the Belgian government on April 1, 1999, Decree on the Conservation and Protection of Heritage, article 206, which provides for the prohibition of demolition.

²³⁵ *Vid.* Spanish Historical Heritage Protection Act of 1985, articles 16, 24.2, 24.3, 25, 36.1 and 37.2.

The preservation measures to be offered to serial or transboundary properties, by the suggestions of UNESCO, must privilege the coordination of the interests of all the owners or possessors, to preserve their values, as well as to determine ex officio actions that promote their conservation in the face of inconsistencies and impossibility of agreement²³⁶.

The preservation projected in the legal regimes studied is limited because it alludes to a biased protection, conceived for the material manifestations. The immaterial ones contain elements of the material order that in the same way have to be preserved. Preserving the immaterial elements or processes from which the intangible heritage manifestations result remains a challenge.

In this regard, the Belgian and Spanish legal systems stand out²³⁷. They specify that conservation actions shall extend to movable and immovable property and cultural spaces linked to intangible manifestations.

Preventive conservation and maintenance of intangible manifestations are proposed as preservation alternatives. Therefore, the risks to which the intangible manifestation is exposed and the alternatives for action must be established in conjunction with the bearers - experts in their execution. All this will be recorded in the Register of Good Safeguarding Practices.

CORREIA offers another alternative for preserving intangible manifestations: renewal. This concept comes from real estate heritage, but it is applicable in those cases in which new alternatives or new materials are used to preserve an intangible manifestation. Its use is accepted as long as it revalues the intangible asset, the cultural development, and the social integration of its bearers²³⁸.

2.2.2. Mechanisms to control the mobility of cultural property

The mechanisms of control of mobility are destined to the movable goods declared or recognized as cultural patrimony and to those that present significant values for the identity of the societies. They include export and import assumptions and the realization of dispositive acts of heritage property.

²³⁶ Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage: 2005, 62 and 70.

²³⁷ *Vid.* 2002 Decree on the Protection of Movable Property and Intangible Heritage of 2002, of the Belgian French Community, article 7; Law 210 of 2015, on the protection of Spanish intangible cultural heritage, article 4.

²³⁸ CORREIA, M., *supra* n. 213, 206.

These mechanisms are modeled on the precepts of the 1970 UNESCO Convention, which seeks to prohibit and prevent the illicit import, export, and transfer of ownership of cultural property. Although it is an instrument that presents deficiencies in regulating the current situation concerning illicit trafficking²³⁹, it establishes the guidelines for imports, exports, and legal transfer of patrimonial property and the confiscation and restitution of those that have been illicitly transferred or acquired. It is an instrument that emphasizes the obligation of the States to inventory the patrimonial goods and to establish the export certificates of patrimonial goods as the main control instrument.

The 1995 UNIDROIT Convention regulates cases in which the 1970 Convention is omitted since it protects all stolen, inventoried, or identified cultural property; it offers the legal treatment to be provided in the event of inadequate conservation of archaeological finds; it guarantees compensation to the third party acquiring the cultural property in good faith in the receiving State. Of the regimes studied, only France, Italy²⁴⁰, Peru, and Portugal²⁴¹ are States Parties to this instrument.

At the European level, Directive 60 of May 15, 2014, of the European Parliament and Council on the return of cultural objects unlawfully removed from the territory of a Member State stands out. Its statements have been implemented in the legal regimes of Italy²⁴², Portugal²⁴³, France²⁴⁴, and Germany²⁴⁵.

In the Latin American sphere, the 1979 Organization of American States Convention on the Defense of the Archaeological, Historical, and Artistic Heritage of the American Nations, which has had an impact on Argentina's 2003 legislation for the protection of archaeological property, stands out²⁴⁶.

²³⁹ *Vid.* BÁKULA, C., "The fight against illicit trafficking in cultural property The 1970 Convention: balance and prospects", Second Meeting of States Parties to the 1970 Convention Paris, UNESCO Headquarters, 20 - 21 June 2012.

²⁴⁰ *Vid.* 2004 Cultural Property and Landscape Code, article 87.

²⁴¹ It is one of the weaknesses of the instrument, which has only been signed by about thirty countries, it ends up being a text of relatively little use at the global level. Source: UNIDROIT Secretariat, available at www.unidroit.org, (accessed February 24, 2021).

²⁴² *Vid.* 2004 Cultural Heritage and Landscape Code, articles 75-86.

²⁴³ *Vid.* Law on the Bases of the Policy and Regime of Protection and Enhancement of the cultural heritage of September 8, 2001, Article 67.

²⁴⁴ *Vid.* Articles L111-8 to L111-11, L112-1 to L112-27.

²⁴⁵ *Vid.* Cultural Property Law of July 31, 2016, articles 20, 31, 50, 51, 79 and 82.

²⁴⁶ *Vid.* Law 25.743 of June 16, 2003, articles 50 and 51.

The mechanisms of control of the mobility of the heritage are regulated in the legal systems of Ecuador, Spain, Italy, and Peru, through the norms of state intervention in the realization of exportable operations on patrimonial goods²⁴⁷. Through them, the administrations act, when detecting an attempt of extraction of cultural heritage without the required formalities.

All this supposes the previous definition of export, prevailing in the studied legal systems in the wide sense, that is to say, that one that includes all exit of a patrimonial good from the national territory. Based on this statement, certain cultural property is classified and declared inalienable and imprescriptible, as has been done in Belgium, Colombia, Italy, Peru, and Venezuela, so that it cannot be acquired by acquisitive prescription, a declaration that facilitates its recovery in case of illicit acquisitions²⁴⁸. This declaration results in several categories of goods for their export or disposal, useful to order the treatment they will receive in non-exportable goods²⁴⁹, exportable goods with prior authorization²⁵⁰, and temporarily exportable goods²⁵¹.

Other legal declarations favor the return of illegally exported goods, such as the one that recognizes that patrimonial goods belong to the State of origin, as well as the declaration stating that the State will be in charge of carrying out all the acts tending to their recovery. The latter has led the Spanish legislature to establish that the owner has to pay the expenses incurred in the recovery²⁵².

Once the patrimonial goods are in foreign territory, the aforementioned rules of intervention are inoperative. The claim for the lost or stolen goods, derived from

²⁴⁷ *Vid.* Spanish Historical Heritage Law of 1985, articles 5.1 and 56; Royal Decree 111 of January 10, 1986, of partial development of Law 16 of 1985, article 45; Organic Law of Culture of Ecuador, articles 86-90; Italian Code of 2004, articles 64, 64 bis, 65 and 74; Law 28296, General of the Cultural Heritage of the Nation of July 21, 2004, of Peru, articles 10 and 18.

²⁴⁸ *Vid.* 1970 Convention, article 13, paragraph d); Law of April 4, 2014, on the protection of the Belgian sub-aquatic cultural heritage, article 15; Law 397 of 1997 of Colombia; article 54 of the Italian Code 42 of 2004, article 10; Law 28296, General of the Cultural Heritage of the Nation of July 21, 2004 of Peru, article VI; Venezuelan Cultural Heritage Protection and Defense Law of 1993, article 4.

²⁴⁹ *Vid.* Spanish Historical Heritage Law of 1985, articles 28 and 44 and Royal Decree 111 of January 10, 1986, of partial development of Law 16 of 1985, article 51.

²⁵⁰ *Vid.* Spanish Historical Heritage Law of 1985, articles 5.2, 49, and 50.

²⁵¹ *Vid.* Spanish Historical Heritage Law of 1985, articles 31; Spanish Royal Decree number 111 of 1986, partial development of Law 16 of 1985, articles 52, 56, and 57; Decree on the protection of movable property and intangible heritage, of the Belgian French Community of 002, amended in 2006, articles 16 and 20; Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on material heritage and Cultural Heritage of Colombia, article 52; Codified Law of Ecuador of 2004, articles 52 and 54; Italian Code of 2004, article 65.

²⁵² *Vid.* Spanish Historical Heritage Law of 1985, article 20.3.

the dominion ownership of a patrimonial property, then comes into play. Model this action Article 13 clause c) of the Convention of UNESCO 1970, which sets the formula that can be exercised by legitimate owners or can be represented by the State²⁵³.

Another mechanism for the recovery of heritage property is the repatriation of cultural property. This process can be carried out in several ways: Negotiated return, by Article 9 of the 1970 Convention; return ordered by a judge of the receiving country - by return in the case of own property, and by restitution in the case of property exported in violation of the national law of the country of origin, by the 1995 UNIDROIT Convention; The return of cultural goods product of the use of private international law, -mediate the application of civil or special rules of the country's cultural heritage where the country is located the good-, and the return derived from institutional or diplomatic negotiation process -they are supported by soft law- rules²⁵⁴.

The return or restitution of illicitly trafficked property imposes the obligation on States to formulate the right of re-appropriation. The holders of this right are the communities or peoples of origin. According to OCHOA, its content refers to the creation or strengthening of the original conditions that make possible the preservation and enjoyment of the repatriated cultural property²⁵⁵. When this is not possible, the conditions that allow the creation or development of new cultural goods or manifestations related in some way to the repatriated good must be guaranteed²⁵⁶.

Also underlying its content are the obligations to re-know, re-understand and re-apprehend the repatriated cultural property; preserve the re-appropriated property; guarantee access to and enjoyment of the repatriated heritage; and participate in the formulation and adoption of policies and decisions concerning heritage property.

²⁵³ CAMPS, N., *supra* n.35, 484. In Spain, Spanish Historical Heritage Law, article 36.3.

²⁵⁴ OCHOA, M. J., "Reappropriation of cultural property and human rights", in *Derecho y Realidad*, (2013) 116, 121 and 122.

²⁵⁵ Grounded in other human rights: the right to participate in cultural life, in the sense of access to and enjoyment of cultural heritage, and the right to cultural self-determination and the principle of equality. UN Human Rights Council 2010, para. 78. OCHOA, M. J., *supra* n. 253, 123.

²⁵⁶ The community of origin not only values the cultural property and wishes to transmit it to future generations, but can keep it alive because it is an integral part of the very life of the community. Committee on Economic, Social and Cultural Rights, 2010, paragraphs 2, 7, 11, 15, and 62.

The comparative study corroborated the existence of customs mechanisms for the exit of patrimonial goods in the special laws of Bolivia, Ecuador, and France²⁵⁷; the regulation of the export certificate in the regimes of Germany, France, and Italy²⁵⁸, as a control instrument; the establishment of limitations to the power of disposal in Argentina, Colombia, Ecuador, and Italy such as the foreseen fulfillment of certain requirements, usually administrative authorization; the duty to communicate the intention to dispose of the cultural property and the recognition of real rights of preferential acquisition in favor of the State²⁵⁹.

Regarding the possibility of alienation, CARRILLO states that the protection regime restricts freedom in the national and international trade of tangible and intangible heritage assets through the so-called imperative rules of direction²⁶⁰. These limit their free circulation, to avoid plundering, control trade activities, and illicit alienations that affect the identity of nations through the loss of cultural values.

This trend can be seen in the Spanish and Peruvian legal systems by declaring the nullity of legal transactions of transfer of ownership entered into without complying with the requirements for obtaining authorization²⁶¹. In principle, the consequences deriving from non-compliance with these rules must be

²⁵⁷ Ecuadorian Codified Law of 2004, articles 6, 24, and 36; Law 530 of Bolivia, article 43; in the French Heritage Code: L111-2 and L111-7.

²⁵⁸ *Vid.* Italian Code of 2004, articles 68, 69, and 71; German Cultural Property Law of 2016, articles 23 to 27 and; in the French Heritage Code: L111-3 to L111-6 and L112-24.

²⁵⁹ *Vid.* Law 25.743 of Argentina, on Protection of Archaeological and Paleontological Heritage of 2003, articles 50 and 53 and of Law 24.633 on International Circulation of Works of Art of March 20, 1996, of Argentina, articles 13; Law 397 of 1997, modified by Law 1185 of March 12, 2008, General Law of Culture of Colombia, articles 11. 4 and Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on material heritage and Property of Cultural Interest of Colombia, article 53; Organic Law of Culture, 2016, articles 89 and 90; Legislative Decree 42, Italian Cultural Heritage and Cultural Landscape Code of January 22, 2004, articles 55, 56 and 74.

²⁶⁰ *Vid.* Decree on the Protection of Movable Property and Intangible Heritage, of the Belgian French Community of 2002, amended in 2006, article 10; Law 10/2015, of May 26, for the safeguarding of the Spanish Intangible Cultural Heritage, article 27; Law 28296, General of the Cultural Heritage of the Nation of July 21, 2004 of Peru, articles 9. 2, 9.5 and 42.3; Administrative Ruling 12 of June 30, 2005, which regulates the General Registry of the Venezuelan CP and the management of the goods that comprise it, Article 22. CARRILLO, B. L., "Tráfico internacional ilícito de bienes culturales y Derecho Internacional Privado", in *Anales de Derecho*, Universidad de Murcia, Spain, (2001), 205, 208 and 210.

²⁶¹ *Vid.* Royal Decree 111 of January 10, 1986, of partial development of the Spanish Law 16 of 1985, article 44; Law 28296, General of the Cultural Patrimony of the Nation of July 21, 2004, of Peru, articles 9.1 and 9.2.

established in the domestic civil order. In the absence of such rules, it is necessary to establish them in the special system of property protection.

The Belgian, Spanish, and Peruvian administrations have regulated the preemptive rights in the acquisition of patrimonial assets in their favor, in the event of unlawful or attempted unlawful tradition. They also specify the deadlines to be met for their effective materialization²⁶².

It was also observed that in foreign national laws, certain legal transactions are allowed for the transfer of ownership of patrimonial property. Such is the case of the Spanish and Italian legal systems that allow the exchange of movable goods between States, as an exceptional way to recover or exchange patrimonial goods²⁶³. The idea of extending the exercise of this power between the State and national natural or juridical persons is defended²⁶⁴. The Colombian legal system allows the realization of loans between institutions or juridical persons for their exhibition or exposition as part of the management or actions of safeguarding.

2.3. Safeguarding cultural heritage as a Mechanism of legal protection

In the opinion of RATCOVI, the safeguarding of cultural heritage is an organic and collaborative process based on the establishment of a set of protection measures and actions developed by the State, its agencies, and the parties involved. The main actors of this mechanism must be the individual and collective heritage owners. The object to be safeguarded are the values and heritage assets, as well as the cultural spaces associated with them. Its purpose is to promote economic and social development and to build the future based on current cultural conditions²⁶⁵.

These elements are corroborated when considering the evolution that this category has undergone. Initially conceived, in the UNESCO Convention of 1954, to be applied by the States to warlike situations, under circumstances of

²⁶² *Vid.* Decree of protection of movable property and intangible heritage, of the Belgian French Community of 2002, amended in 2006, articles 14, 15, and 21; Spanish Historical Heritage Law of 1985, article 38 and Royal Decree 111 of January 10, 1986, of partial development of the Spanish Law 16 of 1985, articles 41- 43; Italian Code of 2004, articles 6, 61 and 62; Law 28296, General of the Cultural Heritage of the Nation of July 21, 2004, of Peru, article 9.4.

²⁶³ *Vid.* Spanish Historical Heritage Law of 1985, article 34; Italian Code of 2004, article 58.

²⁶⁴ *Vid.* Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on material heritage and Cultural Heritage of Colombia, article 53.

²⁶⁵ RATCOVI, D. L., "DISCUSSION", in NIKOCEVIC, L., Culture or heritage? The problem of intangibility, *Etnološka tribina*, (2012), 57, 92.

necessity and urgency to protect material patrimonial goods due to their imminent deterioration²⁶⁶. This same original conception is extended to cultural and natural heritage properties protected by the aforementioned Convention of 1972²⁶⁷.

The celebration in 1982 of the World Conference on Cultural Policies in Mexico produced a change in the definition of cultural heritage, by integrating the spirituality and values of the peoples contained in it, both elements of an intangible nature. From then on, it is understood that the material is the support where the meanings, information, skills, techniques, and values of an intangible nature rest. Hence the need to approach cultural heritage holistically, overcoming protectionist conceptions that tend to perpetuate the dichotomy between the tangible and intangible, offering a comprehensive treatment of heritage manifestations²⁶⁸.

The aforementioned 2003 Convention echoes these fundamentals, broadening the scope of safeguarding and conceiving it as an alternative for the protection of intangible manifestations. It also specifies safeguarding measures²⁶⁹, which promote the creation, maintenance, and transmission of the values represented by the cultural property for the benefit of present and future generations.

Safeguarding is a category that has been made more dynamic by the requirements of the 2003 Convention itself to devise mechanisms and procedures that guarantee the participation of its owners and citizens in decision-making related to intangible cultural heritage²⁷⁰. To this end, States must focus their work in and with communities, to educate the viewing public about the value of the cultural property and provide security for the identity and cultural process it represents²⁷¹.

²⁶⁶ *Vid.* 1954 Convention, articles 1 to 10, 16 and 17.

²⁶⁷ *Vid.* Article 13.4.

²⁶⁸ The work and contribution of UNESCO has also contributed to this. In 1993, it proposed the establishment of a Program for Living Human Treasures, focused on identifying the bearers of intangible skills, techniques, and knowledge to provide them with opportunities to practice and transmit them to new generations. In 1998, the Proclamation of Masterpieces of Oral and Intangible Heritage was instituted, offering protection to valuable traditions and other intangible cultural manifestations.

²⁶⁹ See 2003 Convention, Article 3.4.

²⁷⁰ *Vid.* 2003 Convention, Article 15.

²⁷¹ Citing Lenzerini, HARDING, S., "Contemporary ICH and the right to exclude", in WAELDE, Ch., CUMMINGS, C., PAVIS, M., and ENRIGHT, H. (Editors), *Research Handbook of Intangible cultural heritage*, Edward Elgar Publishing, Cheltenham, United Kingdom. Northampton, United States of America, 2018, (78) 86.

PÉREZ points out that direct safeguarding refers to the measures proposed by international regulations, aimed at ensuring the viability and permanence of cultural heritage: identification, documentation, research and promotion, transmission, education, and enhancement²⁷². The Italian and Peruvian legal systems make this distinction in congruence with international postulates²⁷³.

Regarding identification, the measures to be adopted are focused on the creation of registers to be updated regularly²⁷⁴. The States are obliged to create the Representative List of Intangible Cultural Heritage and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding²⁷⁵.

In addition to these instruments, the Operational Guidelines for the implementation of the 2003 UNESCO Convention include the creation of the Register of Good Safeguarding Practices, as a means of consulting those references that show favorable measures and models for the protection of intangible manifestations. The comparative study showed that it is an instrument that has not been conceived by the orders analyzed.

About transmission, it is important to highlight that it contributes to the perpetuation of knowledge, techniques, and skills through formal and non-formal education. In this sense, it is important to identify in the norm the relations or interactions with the educational system or other specialized public or private entities, as a strategy that leads the new generations to appreciate and enjoy the cultural riches of the nation. This determination can be seen in the Peruvian legal text²⁷⁶.

Another measure that contributes to the patrimonial transmission is the establishment of moral and monetary distinctions for individuals who possess the relevant skills and knowledge in the recreation, transmission, and perpetuation of the cultural heritage. This has been done through the

²⁷² PÉREZ, Y., *supra* n.34, 234.

²⁷³ *Vid.* Legislative Decree 42, Italian Cultural Heritage and Cultural Landscape Code, January 22, 2004, articles 118 to 127 and 131; Law 29296 General of the Cultural Heritage of Peru of July 21, 2004, articles 51 and 52.

²⁷⁴ *Vid.* 2003 Convention, article 11.

²⁷⁵ *Vid.* UNESCO Convention of 2003, articles 16- 18.

²⁷⁶ *Vid.* Spanish Law 10 of 2015, article 7; Peruvian Law 29296 of 2004, article 7.

distinctions of Living Human Treasures, Bearers²⁷⁷, or Master Artists, as has been the case in France since 1994²⁷⁸.

Regarding dissemination and communication, and based on the 1989 Recommendation on the Safeguarding of Folklore, it is proposed that States: encourage the organization of national, regional, and international events; create full-time jobs for specialists in traditional and popular culture to encourage and coordinate activities related to intangible cultural heritage; support the production of educational audiovisual materials; and facilitate exchanges between individuals, groups, and institutions interested in traditional and popular culture²⁷⁹. The conventional precepts of 2003, on the other hand, suggest favoring the creation of structures that facilitate the understanding, deepening, communication, education, sensitization, dissemination, and knowledge of the intangible cultural heritage²⁸⁰.

In the Spanish and Peruvian legal systems, therefore, it is observed that they stimulate the dissemination of its values in the fundamental means of mass communication and oblige the national entities responsible for cultural heritage to propose the contents to be included in the national educational plans²⁸¹.

From the theoretical-normative analysis emerge other measures that can be defined as indirect safeguarding, because they are aimed at protecting the processes and spaces where cultural manifestations are developed and because they are regulated in other branches of Law, such as Intellectual Property.

The theoretical systematization shows that this matter has been regulated by establishing guidelines similar to those of the 1982 WIPO Model Provisions on

²⁷⁷ Distinctions whose origin dates back to the Japanese Law of 1950, which names "Living National Treasures" or "Bearers of Intangible Cultural Property" to the groups or subjects that possessed certain knowledge, skills, and techniques, essential for the continuity of the manifestations of the traditional culture of the country. This system was adopted by UNESCO in 1990 under the "Masterpieces of the Oral and Intangible Heritage of Humanity" program. In 1994, the Living Human Treasures Program was instituted. Since 2001, "Proclamations of Masterpieces of the Oral and Intangible Heritage of Humanity" have been made.

²⁷⁸ Master Artists are chosen every two years. These Master Artists are entrusted with the mission of transmitting their knowledge to apprentices for a period of 3 years. For this purpose, the Ministry of Culture grants Master Artisans an annual allowance during this period. LABACA, M. L., "The identification of Intellectual Property agents and intangible cultural property and WIPO", *Revista RIIPAC*, (2012), 9.

²⁷⁹ *Vid.* 1989 UNESCO Recommendation on the Safeguarding of Traditional Folk Culture.

²⁸⁰ *Vid.* 2003 Convention, Article 14.

²⁸¹ *Vid.* Spanish Law for the Safeguarding of Intangible Cultural Heritage of 2015, articles 6, 7, 8, and 10; Peruvian Law of 2004, articles 51 and 52.

Copyright, while others have preferred to regulate a unitary system referring to communities or indigenous peoples²⁸². The latter option has been implemented in Venezuela²⁸³. The legal comparison showed that the laws of Bolivia, Ecuador, and Colombia contain references to the treatment of property belonging to communities and ethnic groups²⁸⁴.

According to copyright law, original and derivative works are protected. Intangible cultural heritage, due to its characteristics, fits into both categories, therefore it is necessary to elucidate between the original or primary work and the resulting derivations. The rights granted by this legal order offer temporary protection after the term of benefit has elapsed, the manifestation remains under the public domain, applying to the administrative regime object of study of this work.

Copyright protects authors, artists, performers, and performers equally. The economic rights have a limited duration in time, more extended for authors than for artists, performers, and executants. In this context, moral rights are particularly relevant, especially those related to paternity and integrity, from which defense mechanisms are derived against plagiarism, distortions, modifications, and alterations, mainly based on their improper use²⁸⁵. All this is linked to the identification, preservation, and safeguarding measures mentioned above.

These measures must be implemented in a balanced manner. The criterion relating to transformation, proper to preservation, must be used in a restrictive manner²⁸⁶, so as not to hinder constant recreation and its transmission to present and future generations.

²⁸² The Indigenous Peoples' Rights Act of 1997 of the Philippines; Bangui Agreement Establishing the African Intellectual Property Organization (OAPI) of 1999; The Special Intellectual Property Regime on the Collective Rights of Indigenous Peoples, for the Protection and Defense of Cultural Identity and Traditional Knowledge of 2000 of Panama, and its corresponding Executive Decree of 2001; Regional Framework for the Pacific on the Protection of Traditional Knowledge and Expressions of Culture of 2000. LABACA, M. L., *supra* n.277, 31.

²⁸³ *Vid.* Law on Cultural Heritage of Indigenous Peoples and Communities of 2009.

²⁸⁴ *Vid.* in Colombia; Law 397 of 1997, articles 8 and 13; Ecuador: Organic Law of Culture, 2016, articles 80, 82, 85 j) and 99; Law 530 of 2014 of Bolivia, articles 5 and 12.

²⁸⁵ DE ROMÁN, R., "Obras del patrimonio cultural en la Ley de Propiedad Intelectual: estudio de un caso concreto (El Misterio D 'Elx)", in *Revista de la Facultad de Ciencias Sociales y Jurídicas de Elche*, (2011) 109, 113- 117.

²⁸⁶ *Id.*, at 117.

Industrial Property, on the other hand, provides the mechanisms of protection referred to patents, utility models, industrial designs, trademarks of products and services, trade names, geographical indications, and appellations of origin. This special property grants the recognition of the exclusive right to use the object of protection, and the exclusive right to prevent a third party from using something identical or confusingly similar without the consent of the owner²⁸⁷. The Industrial Property right, of a constitutive and temporary nature, requires the registration of the object to be protected. It is necessary to harmonize the criteria or requirements between the Industrial Property registers and the one containing the patrimonial inventory, to favor its protection.

Protection from unfair competition (established reputation, unmistakable character, and goodwill)²⁸⁸, favors groups, communities, and individuals who are bearers of intangible cultural heritage. All this contributes to safeguarding the quality and authenticity of their arts and crafts.

Patents, seen as a source of technological information, contribute to the publication and disclosure of the object of protection, since during their application and granting, the technology used to obtain the object of invention is described in a structured manner. In this sense, special attention must be paid to the claims, which detail the characteristics of the object that will be legally protected, and a summary containing data that allows the identification of the holder and the geographical location²⁸⁹. Although they are protected in the national or geographical area where they are applied for, they are a source of information that is distributed worldwide through databases.

2.3.1. Mechanisms for heritage management

The management in the area of cultural patrimony is shaped by the arguments coming from the Declaration of the Heads of State of Punta del Este, Uruguay of 1967, which considers that the patrimonial goods have to be assumed like a resource tending to the progress, through the establishment of a systematic plan that revalues them in the function of the economic-social development.

²⁸⁷ ASTIZ, E., "El Misteri D'Eix: marcas y Propiedad Intelectual: protección sui generis", Revista de la Facultad de Ciencias Sociales y Jurídicas de Elche (2011), 94.

²⁸⁸ LABACA, M. L., supra n. 277, 23, on the three areas of unfair competition.

²⁸⁹ SUKHWANI, A., "The protection of traditional knowledge and genetic resources in WIPO and the CBD," RIIPAC Journal (2012), 6-10.

This Declaration also highlighted the urgency of implementing legislation that would combine public interest and private initiative.

The UNESCO General Conference held in Nairobi, Kenya, in 1976, proposed the distribution of powers and the formulation of plans clarifying objectives, programs, distribution of functions, and execution of actions; the need for a leader to coordinate all the actors involved; the establishment of legal measures to legally protect management; the participation of the private sector through tax incentives; and the requirement that the community be organized and play a leading role in the process.

The 1987 Charter of Petrópolis, Brazil, calls for including the community in planning decision-making; strengthening civil society leaders; creating citizen awareness of duties and rights concerning cultural heritage; and recognizing heritage recovery as a tangible benefit to the community.

On the other hand, the 1987 Washington Charter recognizes the need for multidisciplinary studies to define principles, guidelines, and actions for the resulting plan to be effective.

Likewise, the 1992 Charter of Veracruz, Mexico, considers the political will to conserve and manage cultural heritage to be important. It also states that it is imperative to establish a special legal framework at the national level and to create a specialized management office with sufficient delegated powers for this purpose. It attaches vital importance to the drafting of a strategic plan and its follow-up to ensure its implementation, for which there must be adequate and concrete legal and financial instruments.

These methodological instruments provide the notion of strategy or integrated system, the different forms of leadership in the process, the need for citizen participation, and the legal recognition of the aspects required to enhance the value of heritage assets. However, they do not provide elements to define management.

An approach to the definition of management outlined by BÓVEDA allowed us to notice that it is linked to the adoption of methods that transform heritage into capitalizable goods or products for social development²⁹⁰. The Spanish Association of Managers defines it as the efficient administration of resources

²⁹⁰ BÓVEDA, M. M., (Coordinator), *Gestión Patrimonial y Desarrollo Social*, University of Santiago de Compostela, 2000 (5).

aimed at achieving social objectives that affect cultural heritage²⁹¹. HERNANDEZ, on the other hand, assures that for management to be efficient, it is necessary to have resources, information, and structures that make it possible and the participation of citizens and specialized professionals²⁹². From the above, cultural heritage management can be defined as the set of strategic²⁹³ and integrated²⁹⁴ operational processes²⁹⁵ or actions aimed at the administration and revaluation of heritage assets. The Bolivian and Colombian legal systems define the management of cultural heritage in terms of planning and with a view to the preservation, access, and enrichment of the heritage²⁹⁶. The Italian legal order, on the other hand, declares direct management carried out by state institutions, and an indirect one, one executed by third parties²⁹⁷. According to MARTÍNEZ and TORRES, the core or axes of management comprise actions or measures aimed at the identification, research, preservation, dissemination, and activation of cultural heritage²⁹⁸. These components have been regulated by the laws of Italy and Bolivia²⁹⁹. Although

²⁹¹ ZAMORA, F., "La gestión del patrimonio cultural en España: presente y futuro", Actas del Congreso Internacional "Restaurar la memoria", Valladolid, (2002) 213, 214.

²⁹² HERNÁNDEZ, F., El patrimonio cultural: la memoria recuperada, Trea, Gijón, 2002 (12).

²⁹³ Based on strategic planning, whose origin goes back to territorial planning, and which in its practical phase constitutes heritage management. The advantages of strategic planning are supported by numerous methods: The Triple Bottom Line tool, which aims to find solutions to maximize social, environmental, and financial benefits, is used both to monitor current operations and to inform future planning, and is widely used in business management and by the National Trust of England, Wales and Northern Ireland; the "new paradigm for protected areas" developed by Adrian Phillips and presented in 2003, is notable for its broad and inclusive approach to community participation, and many of its guidelines are also applicable to cultural sites.

²⁹⁴ Agenda 21 for Culture, promoted by United Local Governments and Cities, within the framework of the World Forum of Cultures, Barcelona, Spain, 2004. This instrument is based on citizen participation and identifies five fundamental themes: culture about human rights, governance, territorial sustainability, social inclusion, and the economic dimension. It presents four tools to promote progress: local cultural strategy; charter of cultural rights and responsibilities; cultural council and cultural impact assessment. RODRÍGUEZ, P., Gestión del desarrollo integral de los Centros Históricos. La Metodología "Tesis", Doctoral Thesis, Instituto Superior Politécnico "José Antonio Echeverría", Faculty of Architecture, Havana, Cuba, 2009, 67.

²⁹⁵ UNESCO, Managing Cultural World Heritage, 2013, 25, available at www.unesco.org, (accessed February 1, 2021).

²⁹⁶ *Vid.* Law 530 of May 27, 2014, of the Bolivian cultural heritage, article 4.23, and of Law 397 of 1997, article 57.

²⁹⁷ *Vid.* Decree 42 of 2004 Italian, article 115.

²⁹⁸ MARTÍNEZ, C., *supra* n.51, 602. UNESCO, Managing Cultural World Heritage, 2013, 26. TORRES, N.A., "Models, Design and Management of Cultural Heritage. Reflexión discursiva y líneas de acción entre los años 2006 y 2017, en Argentina," in Cuaderno 102 del Centro de Estudios en Diseño y Comunicación, (2022) 145, 155.

²⁹⁹ *Vid.* Law 530 of May 27, 2014, Bolivian Cultural Heritage Law, article 25; Legislative Decree 42, Italian Cultural Heritage and Cultural Landscape Code, January 22, 2004, article 115.

in the latter, safeguarding operations are associated, emphasizing educational and dissemination actions.

The management mechanisms allow other actors (private and public companies, citizens, universities, academic and research centers, and museums) legitimized by the State to participate in the management of cultural heritage. The legitimized third parties offer specialized skills and knowledge, resources, and ideas that make possible the enrichment of heritage assets. The State in this scenario promotes, examines, controls, and supervises the management, as stipulated by the Bolivian and Italian laws³⁰⁰.

UNESCO has identified the components of the management system³⁰¹. These are the legal framework, the institutional framework, and resources. Its phases are planning, implementation, and monitoring. Its purposes are the protection of heritage values for present and future generations as well as the enhancement of the condition of these assets and the provision of benefits to society through the use and enjoyment of cultural heritage.

The legal framework empowers individuals and entities to act in the management system. The powers, competencies, and actions of the institutional framework structures must be adequately identified in the law. It is essential to include in the law the decision-making mechanisms that facilitate management³⁰². To this end, it is necessary to specify the functions of the responsible bodies on which the decision-making power rests, the operations to be carried out in the event of failure to reach an agreement, the means of peaceful settlement of disputes arising in asset management and everything related to the control and monitoring of management.

Regarding the institutional framework, there is a proposal from the Guidelines for the implementation of the 2003 Convention, which proposes to organize it by creating a central organization that directs and coordinates the work with

³⁰⁰ *Vid.* 2004 Italian Code, articles 146 to 148 and 156; of Decree 2941 of 2009, partial regulation of the Colombian Law, article 17; Bolivian Law 530 of May 27, 2014, article 27, and; Decree of March 29, 2002, Belgian nautical heritage, article 55. BOADO, F. C., "Para una teoría de la gestión del patrimonio cultural", in AYÁN, X. M., (coordinator,) *Curso de Especialización en Gestión del Patrimonio Cultural, Módulo 1, Laboratorio de Arqueología e Formas Culturais*, Universidade Santiago de Compostela, first edition, (2001), 23.

³⁰¹ UNESCO, *Managing Cultural World Heritage*, 2013, 56.

³⁰² A feature that evidences good governance, because it indicates that there is an ability to order or reconcile the wills involved in heritage management issues, to which a clear response is offered.

other small entities involved³⁰³. Another tendency projects a hybrid institutional framework that mixes functions, and contributions and shares responsibility for managing cultural heritage³⁰⁴. This type of structure hinders the harmonization of management entities, the adoption of direct and effective decisions, as well as control and monitoring, causing double accountability, or partial information that does not integrate management results.

The legal comparison showed that the instruments that link the interests of the subjects involved in management are the Agreements of Wills in Argentina³⁰⁵, management contracts in Belgium³⁰⁶, Collaboration Pacts, and Management Plans in Spain, Bolivia, and Colombia, respectively³⁰⁷. The latter, in the Spanish and Colombian legal systems, have a term of 10 and 5 years³⁰⁸.

The resources used, as the third element of the management system, are classified as human, financial, and intellectual. It is the one that can undergo the most modifications due to the economic variations of the social-historical context.

The human resources involved are managed based on the possession of skills and knowledge related to heritage values, as well as by the action of groups and communities that derive their livelihood from heritage assets. The legal framework regulates their performance, through the adoption of Codes that delineate their conduct within the management framework, determining the behaviors that sustain the administrative system that sanctions their violation, and the creation of professional performance evaluation systems.

Intellectual resources are valuable since the experience or knowledge linked to the asset or heritage site is as important as those concentrated in the management structures. They are constantly growing and are visualized through training, staff development, exchange, dissemination, research, and monitoring.

³⁰³ Guidelines were adopted in 2008 for the implementation of the 2003 UNESCO Convention.

³⁰⁴ It groups official public heritage organizations with new entities.

³⁰⁵ *Vid.* Law 25.473 for the protection of archaeological and paleontological heritage of June 4, 2003, article 56.

³⁰⁶ *Vid.* Decree of 29 March 2002, the nautical heritage of Belgium, article 8.4.

³⁰⁷ *Vid.* Law 530 of May 27, 2014, Bolivian cultural heritage, articles 28- 31 and of Decree 2941 of 2009, partial regulation of the Colombian Law, article 14.

³⁰⁸ *Vid.* Law 10 of May 26, 2015, of the Spanish intangible cultural heritage, articles 13.4 and of Decree 2941 of 2009, partial regulation of the Colombian Law 397 of 1997, article 36.

It is necessary to pay attention to the intellectual resources, which become part of the realization of the intangible manifestation itself. To this end, it is essential to determine, among the powers and content of Intellectual Property, those related to intangible heritage, always bearing in mind that, according to the 2003 Convention itself³⁰⁹, no heritage protection provision may affect rights related to Intellectual Property. The patrimonial protection norms will then integrate those elements linked or common to the Intellectual Property system that favors the conservation and transmission of patrimonial goods³¹⁰.

The financial resources, by their relationship with the source, scope, and terms, may be fixed or variable³¹¹. Their source is varied, it can be state, local, obtained from loans, private financing, and international cooperation. The legal framework must allow or recognize the sources and procedures for obtaining financial resources.

There is a diversity of sources adopted in the Italian, Bolivian, Spanish, Belgian, and Peruvian social context, such as preferential purchase through the legal categories of purchase option or the real rights of preferential acquisition of first refusal³¹²; expropriation³¹³; donations or credits from national and international organizations, as well as the authorization of contributions from natural or legal persons³¹⁴.

Concerning the phases, it is observed, derived from the normative examination, an absence in regulating aspects related to the control that attends the following aspects: structures, levels, subjects involved or responsible for exercising it; the ends or matters that will be submitted to the control; the periodicity with which the control actions will be executed, and the control instruments: periodic

³⁰⁹ *Vid.* article 3. b).

³¹⁰ In this sense, the use of knowledge and techniques associated with the intangible manifestation shall be made by what is allowed in that ordinance, in favor of training, capacity building, exchange, and dissemination of human resources associated with the revaluation of cultural heritage.

³¹¹ UNESCO, *Managing Cultural World Heritage*, 2013, 79.

³¹² *Vid.* Italian Landscape Code of 2004, articles 60 to 62; French Code of 2003, articles L123-1 to L123-4, L621-39.

³¹³ *Vid.* Law 530 of 2014 of Bolivia, article 56; Italian Code of 2004, articles 95 to 100; Spanish Law 16 of 1985, article 37.3.

³¹⁴ *Vid.* Bolivian Law 530 of 2014, Article 63; Decree on the Protection of Movable Property of Exceptional Character of the Flemish Community of Belgium, Article 19; Peruvian Law on the Protection of Cultural Heritage of 2004, Article 45; French Code of 2003, Articles L122-2 and L122-3.

reports, rendering of accounts, standardized procedures of internal revision, the realization of quality financial reports and audits.

Systematic monitoring actions have not been conceived in the legal order, which, according to the World Heritage Committee, is a process of continuous observation of the material state and values of heritage properties, the identification of dangers or risk situations that threaten them and the adoption of measures and recommendations aimed at reversing the state of heritage vulnerability³¹⁵.

The legal norms studied have not modeled an integrated, inclusive and systematic follow-up -as a continuous process with perfectly delimited cycles and deadlines- that requires the implementation of concrete actions to ensure compliance with the measures, and the presentation of concrete reports.

2.4. Mechanisms to Ensure the Enhancement of cultural heritage

The concept of enhancement was developed in the 1967 Quito Rules. In them, it is proposed to protect the heritage values through its manifest exhibition in favor of territorial development. According to GARCÍA, enhancing heritage means providing it with conditions that, without detracting from its nature, highlight its characteristics and allow its optimal use. The idea of enhancement is linked to protection and aims to maintain a balance between preservation and economic profitability³¹⁶.

The mechanisms for the enhancement of cultural heritage are designed to make the unexploited wealth that underlies cultural heritage productive, through the establishment of measures that encourage institutional cooperation, private initiative, and citizen participation.

At present, the term enhancement has been replaced by revaluation, in an attempt to distance the activity and relationships that derive from the strictly economic sense. Although it is undeniable that economic-financial resources are necessary for heritage preservation.

Article 111 of the 2004 Italian Code of Cultural Heritage and Landscape defines valorization as the activity aimed at constituting and organizing resources, structures, and goals, through the establishment of technical and financial

³¹⁵ CAMPS, N., *supra* n. 35, 390.

³¹⁶ GARCÍA, M. P., *El patrimonio cultural: concepto básicos*, Prensas Universitarias de Zaragoza, Spain, 2011, 129 and 130.

measures that make possible the knowledge and preservation of cultural heritage. It also recognizes the valorization of public or private initiatives, as well as its principles: cooperation, participation, transparency, and social solidarity.

This legal definition is focused on the economic aspect of cultural heritage, without taking into account other areas of valorization, which from a theoretical point of view are relevant and deserve to be admitted into the legal regime. In line with this, it is noted that the Spanish Law of 1985 privileges measures of fiscal nature, regulating in its Title VIII eleven articles related to exemptions and financial deductions for the possession and preservation of patrimonial goods. The Portuguese legislation of 2001 also follows this model, with important regulations on the payment of notary and registry services related to patrimonial assets³¹⁷, and the Peruvian legislation of 2004³¹⁸.

Among the regimes studied, the Colombian legislation is noteworthy because it breaks this trend and conceives, as early as 1997, the establishment of a variety of measures such as the creation of job exchanges, scholarships, annual awards, contests, festivals, workshops, support for individuals and groups engaged in cultural activities, fairs, exhibitions, outreach activities, incentives, and credits³¹⁹.

To delve further into these dissimilar mechanisms, we have taken into account the classification criterion that takes into account their nature and the subjects for whom they are intended, provided by SÁNCHEZ- MESA³²⁰. This proposal has been extended to the particularities of the legal framework for the protection of cultural heritage. These arguments have been useful in visualizing the starting point for its normative conception and incorporating other measures of a different nature.

Thus, there are measures of economic content aimed at owners and holders of heritage assets; of non-economic intervention, developed by the Administration

³¹⁷ *Vid.* Law 107 of September 8, 2001, which establishes the bases of policy and the regime of protection and valorization of cultural heritage, articles 97 to 99.

³¹⁸ *Vid.* Law 28296, General of the Cultural Heritage of the Nation of July 22, 2004, articles 45 to 48.

³¹⁹ *Vid.* Law 397 of July 18, 1997, on cultural heritage, promotion and support of culture, articles 18 to 56.

³²⁰ SÁNCHEZ-MESA, L.J., "El fomento del patrimonio cultural a través de las vías no fiscales o presupuestarias: nuevos canales o estímulos de la participación privada en el sector", AFDUAM 19 (2015) 495, 503, 509, 511, 515 and 516.

in favor of heritage owners; of encouragement of private participation of third parties who do not hold real rights over heritage assets; honorific, and those that favor the access, enjoyment, and safeguarding of heritage assets.

The first ones were visualized in the orders of the Belgian Wallonian Community, in Colombia, Spain, and Italy, as economic aids for the conservation and fulfillment of the duties of the owners or possessors of patrimonial properties³²¹. They are also directed to other public entities and for purposes other than conservation, the increase of the national patrimonial mass, through new acquisitions of cultural goods in Spain and Venezuela³²², or for their study or divulgation as in Italy³²³. Likewise, the Belgian French Community plans other aids to certain patrimonial goods like Historical Sites, archaeological goods, and masterpieces³²⁴.

Expropriation, compulsory and voluntary, is one of the mechanisms for the acquisition of heritage property by the Administration³²⁵. This institution supposes that the legislator determines the assumptions of use, the declarations of public utility that the State will make on goods to expropriate and the possible forms of compensation, as the Ecuadorian regime reflects³²⁶, and the general criteria for the quantification of the value to compensate as

³²¹ *Vid.* Wallon Code of land management, urban planning and Heritage, sanctioned by the Belgian Government, April 1, 1999, Decree relating to the conservation and protection of heritage, articles 211, 250 and 251; in Colombia: Decree 763 of 2009, Partial Regulation of Law 397 of 1997, on material heritage and Properties of Cultural Interest, article 77; in Spain: Law 16/1985 of June 25, 1985, on Spanish Historical Heritage, article 68 and of Royal Decree 111 of January 10, 1986, of partial development of Law 16 of 1985, articles 58, 59 and 62. 2; in Italy: Landscape Code of 2004, articles 35, 36, and 37.

³²² Using the establishment of measures, it is possible to settle tax debts or other debts of a different nature with the Administration using the delivery of assets. The distinguishing feature of this transfer is that the Administration assesses the value of the property to be delivered before its acceptance or refusal, or through the acceptance of inheritances, legacies, and donations on the part of private individuals. *Vid.* Law 16/1985, of June 25, 1985, of the Spanish Historical Heritage, article 73 and Royal Decree 111 of January 10, 1986, of partial development of Law 16 of 1985, articles 64 and 65; in Venezuela: Law of protection and defense of the Cultural Heritage, of October 3, 1993, article 42.

³²³ *Vid.* Code of Cultural Heritage and Cultural Landscapes of Italy of 2004, articles 117, 118, and 119.

³²⁴ *Vid.* Decree on the protection of movable property and intangible heritage, French Community of Belgium of 2002, amended in 2006, article 29.

³²⁵ It is an institution derived from the social function of cultural property in society, which justifies the intervention of the State in certain cases to preserve and maintain them for the benefit of society and future generations.

³²⁶ *Vid.* Legislative Decree 42, Italian Cultural Heritage and Cultural Landscape Code, January 22, 2004, articles 95 to 100.

those established in Spain³²⁷. These legal provisions facilitate the application of the regime and contribute to avoiding speculation with patrimonial assets.

It is a normative tendency that the intervention measures of the Administration include advising and technical assistance to the interventions in the patrimonial goods, to the actions of investigation in archaeological sites and the execution of works with exceptional character; as well as the measures of supervision and control to the cultural property³²⁸. This is evidenced by the laws of the Flemish Community of Belgium, Argentina, Spain, and Italy.

As for the measures that propitiate the raising of finances destined for the actions of preservation, use, and enjoyment of the patrimonial goods, the instruments of the Collaboration Agreements and the realization of pure and simple donations of money, goods, and rights are significant³²⁹. Its sources are centered not only on private third parties, through the forms of patronage or sponsorship, such as those recognized in the Italian regime³³⁰, but also on the participation of other Administrations, banking or credit institutions, or public and private legal entities, such as those recognized in Bolivia³³¹.

This means the contractual figure of sponsorship, in its variant regulated in the Italian Code of Cultural Heritage and Landscape of 2004³³². This legislation also

³²⁷ *Vid.* Law 16 of 1985, of June 25, 1985, of the Spanish Historical Heritage, article 69.

³²⁸ *Vid.* Italian Code of Cultural Heritage and Cultural Landscapes of 2004, article 120; Spain, Law 16 of 1985, articles 26.6, paragraphs a and 42; Argentina: Law 25743 of June 26, 2003, articles 15, 23 to 29 and 32; Law of organization and financing of the cultural heritage policy of the Flemish Government of 2004, articles 43 to 46.

³²⁹ Other figures to be taken into account as a legal channel to make effective the capture of assets are: monetary or non-monetary donations, pure and simple, remunerative, onerous or modal; constitution of usufruct on goods or rights; testamentary dispositions or succession agreements containing institution of heirs, legacies or testamentary substitutions; deposits and bailments; transfer of use of goods by any title; provision of services; agreements or arrangements that are taxed for personal income tax purposes under the regime of economic activities; cancellation or partial assumption of debts; payment of membership fees to associations and organizations; donations or transfers *mortis causa* to endowments constituted by public universities; free transfer *inter vivos* or *mortis causa* of rights to exploit literary, artistic or scientific works; free transfer *inter vivos* or *mortis causa* of patents or patent applications. RUBIO, J. A. and VILLARROYA, A., *El papel del mecenazgo en la política cultural española. Propuestas para reconfigurar su papel en la crisis en las artes y la industria cultural*, Fundación alternativas para la cultura y el mecenazgo, Ministerio de Cultura y Deporte, Spain, 2019, 69. *Vid.* in Peru: Law 28296, General Law of the Cultural Heritage of the Nation of July 21, 2004, article 47.

³³⁰ Sponsorship of skills, financial, popular or crowd funding, monetary donations from companies or natural or legal persons, private or public. *Vid.* Landscape Code of Italy of 2004, article 111.

³³¹ *Vid.* 2004 Landscape Code of Italy, articles 114 and 121; in Bolivia: Law 530, of May 23, 2014, of the Bolivian Cultural Heritage, articles 63 and 65.

³³² *Vid.* Article 120 of the cited norm. Among the requirements of this measure are to specify the qualification of the sponsor, in terms of presenting the ideal qualifications according to the

recognizes other institutions that promote collaboration in the heritage area, such as concessions of public works and services, project financing, and leasing³³³.

The Flemish Community of Belgium's regulation in this area is to be highlighted, through the formulation of a procedure for the granting of subsidies and the conclusion of national and international agreements. The most important thing is that the applicants for such economic funds are required to regularize and organize themselves by the parameters required by the norm³³⁴. All this tends to standardize the operation and structuring of the holders and asset managers by the projection and normative conception.

The comparative study showed that the orders of Spain, Ecuador, and Peru establish rewards in favor of the patrimonial investors, focused on the fiscal or tax level³³⁵. However, according to RUBIO and VILLARROYA, these can be extended to favor patrons or donors³³⁶. Other rewards have been conceived in Spanish law, referring to private actions in the management and use of heritage assets, as long as such actions do not distort their values³³⁷.

The European Union, on the other hand, encourages the use of public-private partnerships as a source of resources in the heritage sector³³⁸. This conception

intervention to be developed and demonstrating satisfactory experience in this regard; the selection procedure of the sponsor, and; the limits and conditions to the advertising measures of the sponsor. SÁNCHEZ- MESA, L.J., *supra* n. 319, 523.

³³³ *Vid.* Italian Landscape Code of 2004, art. 115.

³³⁴ Law on the organization and financing of the cultural heritage policy of the Flemish Government of 2004.

³³⁵ *Vid.* Organic Law of Culture of Ecuador of December 27, 2016, and its Regulation of May 23, 2017, articles 20 and 21; in Spain: Law 16/1985 of June 25, 1985, of Spanish Historical Heritage, articles 30, 70, and 72 and Royal Decree 111 of January 10, 1986, of partial development of Law 16 of 1985, articles 62.1, 62.3, 63 and 64; in Peru: Law 28296, General Law of the Cultural Heritage of the Nation of July 21, 2004, articles 46, 47 and 48.

³³⁶ Income tax deduction for non-resident patrons; deductions for participation in support programs for events of exceptional public interest; exemptions from inheritance and gift tax; exemptions derived from patronage collaborations; considerations in kind. RUBIO, J. A. and VILLARROYA, A., *supra* n. 328, 70.

³³⁷ Often the use transcends the commercial idea and becomes concrete in the use of the patrimonial real estate by public entities to take advantage of the patrimonial context given their need for infrastructure. *Vid.* Law 16/1985, of June 25, 1985, on Spanish Historical Heritage, Ninth Additional Provision.

³³⁸ Forms of cooperation between public authorities and the business world that aim to ensure the financing, construction, rehabilitation, management, or maintenance of an infrastructure or the provision of a service, can assume two types: one of a contractual nature, in which the administration and individuals regulate their commitments only conventionally; the other is the institutionalized association, in which cooperation is carried out through a separate legal entity (usually a joint stock company with mixed public and private participation). Green Paper of the Commission of the European Community on Community legislation on contracts and concessions, presented on April 30, 2004; SELO, M., "The use of the legal institution of

presupposes the normative identification of the actors legitimized in their intervention, their purposes, variants³³⁹, and processes. In Germany, France, and Spain, its use is limited to the assumption of demonstrating that it is the most efficient solution compared to other alternatives³⁴⁰. In the Flemish Government's 2004 regulation, these partnerships are called Heritage Pacts and are intended to develop a sustainable and integrated policy on cultural heritage at the local level³⁴¹.

In the package of measures of revaluation of honorary character, those that grant distinctions, mentions, or prizes not endowed with economic content and those that allow the action of cultural volunteering are meant³⁴². This is reflected in the laws of Colombia, Italy, Spain, and France³⁴³.

Other general measures of revaluation, encourage public visits and the enjoyment of the patrimonial goods. Among them are those projected in the Italian, Colombian, and Peruvian regulations, that control and give follow-up to the promotion and realization of reproductions and copies of cultural goods; the promotion of the divulgation of the investigations and the realization of public campaigns of diffusion of the values of the community cultural goods, and the creation of specific structures for the promotion of the diffusion³⁴⁴.

The conception of the Colombian Law stands out since it provides in Article 22 that architectural barriers shall be eliminated in the cultural infrastructure, so that the disabled may have access to heritage assets. In this same precept, it

sponsorship in the field of cultural heritage. Archaeological excavations of Herculaneum and the Flavian Amphitheater in Rome, two comparative cases", in AEDON, Revista de arte y derecho online, 2014.

³³⁹ *Vid.* Directive 2014/23/EU, on the award of concession contracts, Article 5.

³⁴⁰ FAL, "Las Asociaciones Público Privadas bajo la mirada de "Primero las personas", en Boletín 383, número 7 de 2020, available at www.cepal.org/transporte, (accessed June 15, 2021) 3.

³⁴¹ Law on the organization and financing of cultural heritage policy, Government of Flanders, 2004, articles 17 to 25.

³⁴² It is a measure derived from the citizen's constitutional right to participate in cultural life. The regulatory norm specifies the definition of volunteering, the requirements to be met by those aspiring to collaborate, their functions, rights, and duties, and the procedure for their appointment and loss of status.

³⁴³ *Vid.* Colombian Law 397 of 1997, article 18; Italian Cultural Heritage and Landscape Code of 2004, article 144; Spanish Law 10 of 2015, articles 6 to 9; French Code of 2003, articles L122-4 to L122-8.

³⁴⁴ *Vid.* Code of Cultural Heritage and Cultural Landscapes of Italy of 2004, article 132.3; in Peru: Law 28296, General Law of the Cultural Heritage of the Nation of July 21, 2004, article 51; Law 397 of 1997 of Colombia, articles 22 to 24, 37, 38, 40, 42, 46, 48, 49.

establishes that it will co-finance projects aimed at ethnic groups and the poorest and most vulnerable population groups.

Another type of general measure is related to education and the purposes that derive from them in terms of conservation, appreciation, and transmission to future generations of the values contained in cultural property. Among them, it is necessary to emphasize those recognized by the Peruvian law that conceives to include general contents in the study plans and artistic education³⁴⁵, and those recognized in Spain and Colombia tending to the promotion of specific formation and the measures directed to the professionals of the patrimonial public function and improvement of the scientific investigation³⁴⁶.

According to QUEROL, the laws of urban planning indirectly contribute to revalue of the patrimonial goods, when in their content they regulate the treatment that will be given to the ground and subsoil and to the discovery of archaeological goods, when establishing the General Plans of Urban Planning or Territorial Plans, as an instrument that harmonizes the protective activity of the cultural patrimony and the urbanism³⁴⁷.

Among the mechanisms established in the urban development legislation for land valuation are the valuation contribution -the advance of the increase in the price of urban land-; the payment of urbanization fees; potential overhead - which manages the potential derived from the increase in buildability over a basic index established by plan-; urban co-development operations -where potential construction rights are transferred between urban areas of the city-³⁴⁸.

2.5. Theoretical guidelines of elements and mechanisms for the improvement of the legal protection of cultural heritage.

To reach higher levels in the preservation, safeguarding, and enhancement of the cultural heritage of nations, it is necessary to modify the conception of existing policies and legal regulations so that heritage fulfills the social task of consolidating national, regional, and local cultural identity and is a resource that favors the economic and social development of present generations, as well as

³⁴⁵ *Vid.* in Peru: Law 28296, General Law of the Cultural Patrimony of the Nation of July 21, 2004, article 52.

³⁴⁶ *Vid.* in Spain, Law 10 of 2015 for the protection of intangible cultural heritage, article 7; Colombia: Law 397 of 1997, articles 28 to 37, 50 and 51.

³⁴⁷ QUEROL, M. A., *Manual de Gestión del Patrimonio Cultural*, Ediciones AKAL, 2010, 96 and 97.

³⁴⁸ RODRÍGUEZ, P., *supra* n. 294, 27 and 28.

transmitting values to future generations. Thus, the initial approach of protecting the historical-artistic, material, and static aspects of heritage properties must be overcome, towards one that favors the integrated protection of heritage ensembles, the intangible values they contain, the spaces and environment they occupy, and the cultural process that makes them viable.

The state authorities responsible for heritage assets and the legislator must understand the elements that contribute to achieving this purpose, to promote the change of mentality that is required through the adoption of policies and reforms to the legal regime of heritage protection. For this reason, based on the theoretical, exegetical, and legal-comparative systematization of the main elements and mechanisms that make up the legal framework for the protection of cultural heritage, from the study of international and foreign law norms, the following theoretical guidelines³⁴⁹ are proposed to facilitate their understanding and serve as a basis for the conception and improvement of legislation in this area.

The proposal is divided into six groups, in correspondence with the possible normative structure that provides clarity and makes it possible to identify the main activities and relationships involved in the social sphere of cultural heritage and the provisions of the legal regime that protects it³⁵⁰. The thematic order that follows is based on the formulations of GROSSO and SVETAZ by a generalization of the Ibero-American legislative practice³⁵¹.

First group: Guidelines relative to the methodological, legal, and extra-legal foundations, which will have as purpose to contextualize the political, social, scientific, and normative scope of the legal system.

1. The political motivation that has considered the cultural, economic, social, and strategic factors that cause its drafting. In particular, those related to the paradigm of sustainable development and respect for cultural diversity, the governance of cultural heritage, and cultural policy;
2. The legal doctrine and customary law on which it is based;

³⁴⁹ Theoretical guidelines are a set of criteria or guidelines that indicate how something should be done correctly or properly, to achieve order, harmony, systematization, or neatness.

³⁵⁰ GROSSO, B.M. and SVETAZ, M.A., *supra* n. 23, 37, 52 and 53.

³⁵¹ *Id.*, at 54, 59-64.

3. The relevant technical and scientific aspects taken into account to ensure its viability;

4. The legal adequacy of the rules for the protection of cultural heritage with domestic law, especially with the mandates of Constitutional Law; the relationship with precepts of Civil Law and Intellectual Property, which allow to establish its limits, limitations, and interrelation.

5. The form of reception of International Law comes from UNESCO and the methodological guidelines are derived from specialized and regional international organizations.

Second group: Guidelines that delimit the object of protection and the scope of the legal system. Fundamentally, the protected properties and the temporal and spatial scope of application must be taken into account.

1. The object of the legal framework is to protect, safeguard and revalue the declared heritage properties and those that have the vocation to be declared, as well as the properties located in the Protection and Buffer Zones.

2. For those heritage properties which, due to their territorial location or their actual materialization or recreation, are owned or managed by several public or private entities. It must be foreseen that agreements or pacts are established that determine the actions of cooperation tending to their conservation, use, and enhancement.

Third group: Guidelines relating to the main definitions to facilitate the application of the legal system.

Those terms should be defined for the correct application of the law to acquire a more precise, more restricted, or different meaning than that which the term has in common usage.

Those that are of general application may be grouped, among them: cultural heritage and its different meanings or classifications, environment, protection zone, buffer zone, community, protection, safeguarding declaration, intervention, enhancement, and management. They should be grouped at the beginning of the protection standard.

Definitions that apply to only part of the law should be placed at the beginning of that grouping: inventory, catalog, conservation, rehabilitation, restoration, managers, museums, export, import, illicit heritage property, archaeological excavations, and chance discoveries.

The definitions containing theoretical-doctrinal arguments will be placed in an annex. This will facilitate the work of the legislator when new ideas appear that merit improvement.

Fourth group: Guidelines delimiting the content of general protection and protection of specific cultural assets, spaces, processes, etc.

1. Protection will be defined, integrating the preservation, safeguarding, and enhancement of tangible and intangible heritage assets and the assets, dynamics, and spaces located in the environment.

Cultural properties that are in the process of being declared will be subject to temporary protection, similar to that of properties that have already been recognized.

It should be stated that the properties included in the surroundings will be subject to temporary protection -similar to properties that have already been declared heritage-, while the declaration process lasts. The procedure for the delimitation of the environment that influences its preservation and efficient management will be determined.

Cultural manifestations whose authors are alive and which possess relevant values will be recognized as cultural heritage on an exceptional basis, taking into account the consent of their owner and the passage of at least 25 years since their creation.

2. The values to be promoted by the norm shall be universality, identity, memory, authenticity, integrity, truthfulness, respect for cultural diversity, productive use of cultural heritage, and solidarity.

3. The regulation of cultural heritage shall be governed by the principles of unity of the regime for the safeguarding of cultural property, public protection, cooperation, citizen participation, sustainable management, exhaustive control of cultural property, and protection against infringement.

4. The elements of the right of ownership over heritage property shall be specified, with special reference to its content, limits, limitations, and other rights in rem related to the legal protection of cultural heritage.

In the case of the right of ownership over State property declared cultural heritage, the participation, and collaboration of public and private entities and agents that favor its conservation, safeguarding, management, and

enhancement shall be allowed. For this purpose, agreements or pacts will be drawn up to establish the actions and responsibilities of the parties involved. Private and collective ownership of heritage assets will be respected. The exercise of powers will be limited in its use, enjoyment, disposition, management, and revaluation, by the value of exceptional public interest that they contain and that merit their conservation and transmission to future generations.

The faculties derived from the right of ownership over the properties located in Protection Zones and Buffer Zones will be limited in terms of disposition and management. The treatment to be given to them will be reflected in the Management Plans of the declared patrimonial properties.

5. The treatment of findings made during archaeological, scientific, or casual excavations, or construction work, will be specified. The cases in which there will be rewards will be established.

6. The demolition of ruinous heritage assets will have an exceptional character, specifying the protocol and the heritage authorities involved. The ruins will be submitted to the control and supervision of the patrimonial authorities.

Fifth group: Guidelines for the identification of the structures and entities involved in the protection of cultural heritage, as well as the mechanisms to be used in its protection.

1. The structures involved in the protection of cultural heritage shall be determined; their functions associated with the procedures to be developed below, from an integral conception that favors planning, control, follow-up, and evaluation of the implementation of the measures and the development of the procedures, and that favors cooperation and active participation of the communities and the private sector.

2. The procedures to be regulated shall describe the procedures, deadlines, instances, and effects of the mechanisms related to the recognition of heritage manifestations -including those of identification and those that declare the heritage status-; those related to the control of the use, enjoyment, disposition and the material preservation and in values of heritage assets; those related to the safeguarding, including research, education, communication and management of heritage assets, and those linked to the enhancement of value.

These mechanisms have to be foreseen harmoniously with institutions and figures of several branches of law, recognizing their explicit regulation, harmonization, limits, limitations, and incentives.

-Regarding the mechanisms of recognition, these include the identification of heritage values through the inventory or catalog, the patrimonialization, and the procedures related to the revocation of such declaration.

Concerning the identification of heritage manifestations, the main organizational instruments revolve around the Inventory or Catalog, establishing the obligation to create the Lists of Cultural Heritage at Risk or Threat and those requiring Urgent Safeguarding Measures; the party responsible or obliged to request the initiation of the procedure; the entity in charge of the inventory; and the processing: instances, deadlines and effects of the conclusion, including the act of notifying the interested parties.

Regarding patrimonialization, its three phases will be modeled: nomination with a participative approach the citizenship, selection procedure, and evaluation of the significance and the conclusive stage. Institutions must be created and the subjects responsible for the development and follow-up of the procedures involving nomination, legitimization, classification, selection, and inclusion must be determined. The causes, competent instances, phases, and effects of the revocation of the status granted must also be specified.

Regarding the revocation process, the grounds for initiating the procedure and the parties responsible for excluding cultural manifestations shall be determined. The terms and effects of the procedure will be determined.

-Regarding the control of the use and enjoyment of heritage properties, the rights, duties, and obligations of the owners, the administrative entities and the users of the heritage properties and those located in the Protection and/or Buffer Zones must be determined.

The right of the public visit will be configured, whose content includes the public or popular action in the administrative route, to demand access to its enjoyment and the obligation of the holders of patrimonial goods to allow and facilitate its appreciation, inspection, and previously planned study.

Special reference will be made to the actions of fragmentation, division, addition, change of use, reuse, reconvention or reuse, or any action of transformation, cultural tourism, and commercialization of heritage property,

subject to obtaining authorization and receiving specialized advice for its development.

- Regarding the preservation of cultural heritage, the general measures and mechanisms related to preventive and curative conservation and restoration must be established. Citizen participation in the execution of interventions must be defined. The measures aimed at archaeological and underwater assets, ruins, and intangible heritage manifestations in terms of their materiality and the survival of their creative, performative, and transmission processes will be specified.

-Regarding the control of the mobility of the patrimonial goods and the displacement of the real rights associated, it is necessary to conceive measures and mechanisms that cover the actions of export and import and the treatment that will be given to the stolen goods and to those that are presumed of illicit provenance. The assumptions in which the real rights of preferential acquisition will be enforced will be determined. The requirements for the realization of dispositive legal transactions of purchase and sale, transfer, exchange, and loans, as regards the obtaining of authorizations, their formalization, and registration in administrative registries will be specified. The right of re-appropriation of the repatriated patrimonial goods will be dimensioned, especially the institutional guarantees that control and verify their insertion and adaptation in the society that receives them.

- About safeguarding, its content and scope will be specified, based on the establishment of a set of cooperative protection measures and actions developed by the State and its dependencies, heritage owners, and social groups carrying them, on the intangible heritage values and the tangible assets and cultural spaces associated with them. It will be specified the measures included and the treatment that will be given to the tangible goods linked to the intangible manifestations and the defense of the values that underlie the tangible heritage.

The creation of the Register of Good Safeguarding Practices must be determined. The rules and principles for the establishment of coordination relations with public and private entities and organizations for educational, research, and promotional purposes will be defined. The system for recognizing

skills and knowledge relevant to the recreation, transmission, and perpetuation of cultural heritage in individuals, groups, or communities will be established.

- It is necessary to define heritage management as the set of processes or actions whose purpose is the administration and revaluation of heritage assets, with the intervention of the managers legitimized to do so. The measures involved, especially the identification, research, preservation, dissemination, and activation of cultural heritage, should be specified. How the State promotes, examines, controls, and safeguards management must be specified; the legal instruments that link the interests of the parties involved; its elements, especially the institutional and resource framework; the instruments for planning, control, and monitoring of management; the means of peaceful settlement of disputes arising during management; delineating the conduct of human resources in the management framework through the creation of Codes of Conduct for users, managers, and the professional performance evaluation system; determining the sources of financial resources and the means of protecting intellectual resources.

-Regarding the enhancement of cultural heritage, it would be praiseworthy to conceive a set of measures of an economic and financial nature, advisory and technical assistance; those aimed at raising finance and resources for the preservation, use, and enjoyment of cultural heritage, emphasizing the instruments of collaboration agreements or public-private partnerships, sponsorship contracts, the figures of patronage, sponsorship and its consequent system of rewards; the honorary ones, which establish awards, distinctions and other recognitions, and the measures that promote the enjoyment and access to heritage assets through education, dissemination and safeguarding and associated structures, using institutional cooperation, private initiative, the role of cultural volunteers and citizen participation.

Sixth Group: Guidelines that adjust the performance of the Administration and the administered ones in favor of the fulfillment of the legal order and the protection of the cultural heritage and the goods located in its surroundings.

These will contain the principles of the regime; the inspection of the patrimonial goods, as an important measure to achieve that the sanctioning regime is effective; the obligation to denounce deposited in the citizens, the civil servants, and the public authorities; the terms and proceedings of substantiation of the

sanctioning procedure; the precautionary and preventive measures and the means of the challenge; the infringements of the officials and the administered about the obligations, duties, responsibilities, functions, and rights regulated; a variety of sanctions including fines and other consequences aimed at repairing material and intangible damages.

Conclusions of the Chapter

1. During the development of this chapter, the theoretical and comparative law foundations, purposes, dynamics, phases, and instances involved were determined, as well as the main instruments of the mechanisms for recognition, control of the use, enjoyment, and disposition of heritage assets, preservation, safeguarding, management and revaluation of cultural heritage.

From the above, key elements emerge to elaborate the guidelines for the improvement of the normative order for the protection of cultural heritage, particularly those related to the legal mechanisms that will protect it.

2. The exegetical and comparative study of the normative formulations of the protection of cultural heritage in the selected national regimes reveals as tendencies the determination of mechanisms for its identification, recognition, preservation, disposition, and safeguarding. The mechanisms that to a lesser extent are conceived in the legal frameworks studied are those of control of the use and enjoyment, enhancement and management of heritage properties.

3. Finally, and based on the fundamentals determined in the first and the present chapter, theoretical guidelines were designed for the improvement of the legal order in this matter. They were grouped into six groups, in correspondence with the possible normative structure that a rule of general application applicable to cultural heritage should contain, to provide clarity and facilitate the identification of the provisions of this legal regime. These guidelines constitute a powerful instrument to conceive, guide, evaluate, systematize, or perfect the legal regime that favors the fulfillment of the social functions assigned to heritage properties. They can be adapted to different contexts, especially the Latin American and Cuban contexts since they share similar problems regarding cultural assets and are intended to solve them. They confirm the essential contents that this legal framework must contain, to achieve its purpose, since they outline the main ideas or essential contents related to the foundations or reasons that contextualize the normative

framework, the object, scope, and content of the legal protection, the main definitions, structures, entities, and mechanisms that will be used in the protection, and those that adjust the performance of the Administration and the administered in favor of the fulfillment of the legal order.

**CHAPTER III. THE ELEMENTS AND LEGAL MECHANISMS FOR THE
PROTECTION OF CULTURAL HERITAGE IN CUBA. TOWARDS ITS
IMPROVEMENT**

CHAPTER III. THE ELEMENTS AND LEGAL MECHANISMS FOR THE PROTECTION OF CULTURAL HERITAGE IN CUBA. TOWARDS ITS IMPROVEMENT

This chapter diagnoses, based on the determination of the legal elements and mechanisms that propitiate the recognition, preservation, control, safeguarding, management, and enhancement of heritage assets, as well as from the theoretical guidelines to perfect the proposed legal regime, emphasizing the insufficiencies of the Cuban legal framework related to its conception.

It has been useful the use of the following research methods: analysis-synthesis, induction, deduction, historical, exegetical, and comparative legal; with the support of the bibliographic review technique of a considerable number of texts and general and specialized literature.

3.1. Past and present of the legal regime for the protection of cultural heritage in Cuba

Throughout its history, Cuba has conceived the creation of structures and defined its responsibilities to facilitate conservation work. In this regard, one of the first regulations adopted to protect cultural property in the last century should be highlighted: Presidential Decree 1306 of August 7, 1928. By this decree, a commission was created to prevent the dispersion of Cuban archaeological goods. It determined the requirements for the realization of archaeological investigations, the treatment to be granted to the collections containing pieces of this nature, and prohibited their extraction from the national territory. The law enacted on July 24 of the same year granted the President of the Republic the authority to order the conservation of historic sites and properties³⁵². Protection was thus extended to the built heritage.

In 1934, Decree Law 613 was approved, declaring the Cathedral Plaza and adjacent buildings a National Monument. It also established restrictions on the power of transformation, disposition, and interventions in these buildings, establishing technical advice as a means of control of the actions on heritage assets. With this normative antecedent, the creation of the Office of the Historian of Havana was conceived in 1938, as an autonomous municipal

³⁵² VALDÉS, A. D., "Consideraciones en torno a las leyes que protegen el patrimonio cultural en Cuba", *Cadernos de Sociomuseología*, (2018) 4 and 5.

organism in charge of rehabilitating, conserving, and managing Havana's heritage assets.

The evolution of the legal protection of cultural heritage was marked by precepts 47 and 58 of the 1940 Constitution, in which the State was declared responsible for conserving the nation's cultural treasure. Special protection was given to national monuments and places remarkable for their natural beauty or their recognized artistic and historical value. In the same year, Decree 116 was issued, which provided for the creation of the Commission of Monuments, Buildings, and Historical and Artistic Places of the City of Havana³⁵³.

On November 17, 1947, the Cuban National Commission for UNESCO was founded by Presidential Decree 4097. It was composed of prestigious figures of the Cuban intelligentsia, who favored the rapprochement between the international organization and strengthened the cultural development and consolidation of the Cuban identity. All this allowed for the inauguration of the UNESCO Regional Center for the Western Hemisphere³⁵⁴. This institution placed our country in a relevant position as an epicenter that radiates the culture and scientific advances of the time through education and training in humanist values.

When the Revolution triumphed, a new social project began to take shape. Changes were needed in the cultural and educational fields. A cultural policy is required to consolidate the values and cultural identity, based on the role of the Cuban intelligentsia. One of its main documents is the Words to the Intellectuals pronounced by Fidel Castro Ruz, in the framework of a series of meetings held on June 16, 23, and 30, 1961. These enunciate the principles that culture must favor the spiritual welfare of the people and the development of the Revolution and the process of institutionalization of culture, which later became a reality. Based on them, entities are conceived, and political decisions and legal regulations are adopted to support this process. The National Council of Culture and the National Commission of Monuments were created by Resolution 1117

³⁵³ ALFONSO, A., "Legislación y patrimonio inmueble. Antecedents and application in Havana", *Arquitectura y Urbanismo*, (2014) 12.

³⁵⁴ VALDÉS, A.D., *supra* n. 351, 8 and 9.

of 1963³⁵⁵, as the seed of the current Ministry of Culture and its dependencies related to heritage protection.

The legal framework adopted supports this conception. The Cuban Constitution of 1976, in Article 38, paragraph i), established a state duty to watch over the conservation of the cultural heritage and the artistic and historical wealth of the nation. In the 1970s, Laws 1 and 2 were adopted to protect Cuba's cultural heritage and monuments, respectively. These laws, together with their respective regulations, made up the main Cuban legal framework on the subject. These laws regulate the relations between the Cuban Administration and the owners of Cuban heritage and monuments and have not been modified since their enactment.

Other legal regulations related to the protection of Cuban cultural heritage were:

-Law of the National System of Museums, of 1979, which was updated in 2009 by Law 106 of the same name.

- At the structural level, in 1995 the National Council of Cultural Heritage was created, attached to the Ministry of Culture.

- After the economic crisis caused by the fall of the Eastern Socialist Bloc, the State's will to invigorate heritage protection and management materialized with the creation of public entities with special legal status throughout the national territory³⁵⁶. The experience of the Office of the Historian of the City of Havana (OHCH) was generalized as a model for the management of the activity throughout the country. Among others, the creation of the offices of Santiago

³⁵⁵ ALFONSO, A., *supra* n. 352, 13.

³⁵⁶ *Vid.* Decree-Law 143 of October 1933; modified and expanded by Decree-Law 283 of June 21, 2011; Agreement 2951 of 1995 of the Council of Ministers; Decree-Law 216 of January 31, 2001, of the Council of State: included the traditional Malecón as a Priority Zone for Conservation; Agreement 121 of December 18, 2002, of the Council of the Municipal Administration of Old Havana: creates the urban planning regulations of Old Havana; Agreement 4942, of 2003, of the Executive Committee of the Council of Ministers: included Barrio Chino in the Prioritized Zone for Conservation; Resolution 175 of 2004 of the Ministry of Finance and Prices: establishes the contribution to restoration and preservation in the Prioritized Zone for Conservation of the Office of the Historian of Havana; Resolution 294 of 2007 of the Ministry of Economy and Planning: defines the procedures to be transferred to the Office of the Historian.

de Cuba, in 1996³⁵⁷; Camagüey and Trinidad, in 1997³⁵⁸, and Cienfuegos, in 2007³⁵⁹, stands out.

- Resolution 126 of 2004 issued by the Minister of Culture created the National Commission for the Safeguarding of the Cuban Intangible Cultural Heritage.

- Other areas of legislation that indirectly affect the protection of Cuba's cultural heritage are Decree-Law 272 of 2001 on contraventions in matters of land use and urban planning, the Penal Code, and the Copyright Law.

The framework described above basically responded to the postulates emanating from the 1972 Convention and to the ideological component of the Cuban Revolution to strengthen the collective conscience to elaborate the Nation's cultural project. This international standard emphasizes state management and the possibilities of the institutional framework to preserve cultural heritage³⁶⁰. However, the mechanisms for the protection and safeguarding of cultural heritage do not reflect the evolution stemming from the 2003 UNESCO Convention, which covers the reproduction, communication, and transmission of intangible cultural manifestations. As for the scope of protection, its scope was aimed at movable and immovable tangible property. There is no specific regulation for industrial heritage, cultural landscapes and routes, and cultural assets with relevant values to be declared national heritage. In addition, this legal framework and the consequent Cuban practice regarding the protection of cultural heritage contained many ambiguous terms, which also differ from the international conventional understanding. Terms such as monuments, traditional popular culture, communities, and bearers, turn out to be key terms, since they constitute the basis of the legal mechanisms of protection available and of the specific tools to be projected in the legislation and which are not properly identified.

³⁵⁷ *Vid.* Decree 204 of March 21, 1996.

³⁵⁸ *Vid.* Decree 213 of February 27, 1997, for the City of Camagüey, and; Decree 216 of February 1997, and Resolution 245 of September 16 of the same year of the Ministry of Economy and Planning, which declares it as a Budgetary Unit attached to the then Council of the Administration of Trinidad.

³⁵⁹ *Vid.* 2007 Resolution of September 3 of the President of the Provincial Assembly of Cienfuegos and Resolution 319 of 2007 of the Minister of Economy and Planning.

³⁶⁰ Cuban Institute of Cinematographic Art and Industry (ICAIC), Casa de las Américas, the National Folkloric Ensemble in 1962; Ministry of Culture, created in 1976; System of Houses of Culture created in 1978 and the Museums, both ascribed to the Ministry of Culture.

Given this situation and in line with the updating process derived from the adoption in 2019 of the Cuban Constitution, the Assembly approved in May 2022 the Draft General Law on Cuban Cultural Heritage. Said document has not yet been published in the Official Gazette of the Republic of Cuba, so the procedures related to its effectiveness have not yet been verified. Agreement IX-140 was adopted by the National Assembly of the People's Power of the Republic of Cuba, using evidence of the approval of the Law, under number 155, called "General Law for the Protection of the Cultural Heritage and Natural Heritage" which was given³⁶¹.

This General Law has been analyzed in the light of the results obtained from the systematization and legal comparison, in the same order and systematics of the headings of the previous chapters, to diagnose the state of the preceding Cuban legal framework and the current one, and to offer the theoretical guidelines that will contribute to its improvement.

As regards the relationship and linkage of the Cuban administrative legal order of patrimonial protection with the constitutional framework, it should be pointed out that the theoretical arguments related to the fundamental cultural rights are not reflected in the objective law, nor are the fundamental rights and their guarantees recognized in the constitutional sphere dimensioned in the special norm, as will now be explained.

Article 79 of the Cuban constitutional text of 2019 recognizes the right to participate in the cultural and artistic life of the nation³⁶². The special administrative legal order does not dimension its content, nor does it conceive the measures and mechanisms that favor the enjoyment and access to cultural heritage, especially that of private property, citizen participation, its enhancement, and heritage management.

The Cuban constitutional text also regulates the right of citizens to participate in the conformation, exercise, and control of the power of the State, and that the exercise of the recognized rights and freedoms imply responsibilities. To this end, it declares the duty of Cuban citizens to protect the cultural and historical heritage of the country³⁶³. This category has not been dimensioned in

³⁶¹ Official Gazette of the Republic of Cuba Ordinary 58, dated June 8, 2022.

³⁶² *Vid.* Cuban Constitution, Article 79.

³⁶³ *Vid.* Cuban Constitution of 2019, Article 90, paragraph k).

Law 155 of 2022. This implies regulating the possibilities of action, mechanisms, and instruments that allow citizens to participate responsibly in the dynamics of heritage preservation: identification, recognition, protection, safeguarding, management, and enhancement.

The Cuban constitutional text recognizes other rights that indirectly affect the protection of cultural heritage³⁶⁴ and that the legal framework does not dimension in all its fullness. Among them:

- The right to the enjoyment of the property owned; of special relevance, since it allows access and enjoyment not only by its owners but also by other interested subjects;
- The right to education, of incidence in the conception of the safeguarding of the patrimonial values, to perpetuate them in the memory of the present and future generations;
- The right to a healthy environment, of relevance in cases relating to the classification of actions or omissions in the special administrative sanctioning regime;
- Access to prior information on the consumption of quality goods and services, related to the requirement to respect the values and integrity of heritage assets in dissemination and communication actions.

It should also be noted that the general guarantees outlined in the Cuban constitutional text favor the enjoyment of the rights recognized therein³⁶⁵. Alternative means of conflict resolution are mentioned in the constitutional text as a guarantee for the enjoyment and exercise of human rights³⁶⁶. Consequently, Decree Law 69 of 2023, on conflict mediation, has been adopted³⁶⁷. It is inferred from articles four and five, that conflicts associated with the application of the regime of protection of the Cuban cultural heritage, are susceptible to be aired according to its postulates. Likewise, it determines in its second paragraph that the National Organization of Collective Law Firms will be the entity in charge of guaranteeing the realization of the mediation processes. Following GONZÁLEZ, it is considered that this procedure can

³⁶⁴ *Vid.* Cuban Constitution of 2019, Articles 58, 73, 75, 78 and 80.

³⁶⁵ *Vid.* Cuban Constitution of 2019, Articles 92, 93, 98 and 99.

³⁶⁶ *Vid.* Cuban Constitution of 2019, Article 93.

³⁶⁷ Official Gazette of the Republic of Cuba Ordinary 19, dated February 22, 2023.

benefit and lighten the application of the legal regime, especially in the area of material interventions in real estate and patrimonial management³⁶⁸. Notwithstanding the foregoing, it is believed possible to determine in the law of the subject matter its specifications given the nature of the assets and the treatment they will receive. These notes will emerge from the application of Decree Law 269 and the accumulation of positive experiences in the management and solution of cultural heritage litigation. In this regard, the responsible authorities must follow up on the achievement of such procedures. Another important regulation of the constitutional framework that impacts the administrative regime for the protection of cultural heritage is the establishment of the sources. Article 8 states that "the Constitution of the Republic of Cuba takes precedence over international treaties". This statement is affiliated with the monist theory that explains the relationship between domestic law and international law, placing the latter in an infra-constitutional rank.

Given this legal precision, it is necessary to take into account the provisions of Article 27 of the 1969 Vienna Convention on the Law of Treaties, which states that "a party may not invoke the provisions of its internal law as justification for its failure to comply with a treaty". The foregoing refers to a specific case of application, which places the Cuban State in an uncomfortable position before the breach of a Treaty of which Cuba is a signatory, wielding the provisions of Article 8 of the 2019 constitutional text. In these cases and accordance with the 1969 Vienna Convention, compliance with the provisions of this International Treaty is required, under penalty of international liability for non-compliance with the obligations undertaken.

In the opinion of this researcher, it would be pertinent to evaluate the relationship between Cuban law and the provisions of international treaties to which Cuba is a party, especially in the cultural and cultural heritage field. In the event of finding internal regulations that prevent compliance with international provisions, one of the possible solutions is the presentation of reservations, waiver, or withdrawal of the treaty in question. Reservations serve

³⁶⁸ GONZÁLEZ, R.J., "La mediación derivada de la protección y salvaguarda del patrimonio cultural cubano: supuestos e ideas preliminares", in PLAZA, J. and LABAÑINO, M., (Directors), Resolución Extrajudicial de Conflictos en España y Cuba. El modelo de la Universidad de Oriente, ARAZANDI Magazine of Patrimonial Law, Editorial Thomson Reuters, 2020(177-188).

the function of excluding or modifying the legal effects of certain clauses of the treaty, provided that they are not incompatible with the object and purpose of the treaty.

3.1.1. Values, definitions, and principles of the regime of protection of patrimonial property in Cuba

Regarding the values that the Cuban legal order will favor, in the historical legal framework formed by Laws 1 and 2 of 1977, there was a clear allusion to integrity in the definition of protection made by Decree 55 of 1979, Regulation for the Execution of Law 2 of 1977 on Monuments, in its article 37 and articles 27 and 28 of Decree 118 of 1983, Regulation for the execution of Law 1 of 1977 on Patrimony. In the same order, it is deduced from the reading of article 39, which established the different levels of protection in the Regulation of the Monuments, the values of authenticity and veracity.

In the first article of the Cuban constitutional text of 2019, the values that must govern and provide firmness to the Cuban legal system are regulated. They are: independence, sovereignty, unity, industriousness, dignity, -which is recognized as supreme in Article 40-; humanism, freedom, equity, equality, solidarity, welfare, and individual and collective prosperity. The values of identity and cultural diversity are indirectly recognized in constitutional articles 11, 32, clauses j and k, and 90, clause I. These last two are considered pillars to be dimensioned in the special administrative regime.

However, Law 155 of 2022 does not establish the values that will favor or will be useful in its application. It regulates, -from the reading of articles 31, 32, 79, paragraphs a and b and article 82 paragraph b of Law 155 of 2022-, the values of authenticity and integrity by the theoretical postulates and the trend appreciated in the legal comparison. It does not develop the values of identity and diversity indirectly recognized in the Cuban Constitution of 2019.

In this situation, and given the direct applicability of the Cuban constitutional text, the aforementioned values can be invoked in the argumentation of actions and solutions of situations for which there is no specific special provision. In the improvement of the current regime of protection of cultural heritage, it is considered that the values recognized in the Cuban Constitution of identity, cultural diversity, individual and collective welfare, and solidarity, are the first to be regulated or verified. Their inclusion would be the basis and inspiration for

the legislator in conceiving the procedures of protection, especially the actions of preservation, safeguarding, management, and enhancement.

For example, respect for diversity can be materialized through the precision of mechanisms and procedures for the participation of citizens, social and non-governmental organizations, and other national and international agents in the preservation and safeguarding of heritage properties.

Solidarity, through the design of procedures that promote cooperative action with other States, citizens, and public and private entities in the protection of cultural heritage.

That of individual and collective welfare, through the establishment of promotion measures that allow private owners, sponsors, volunteers, and society in general, to obtain economic-financial dividends and other personal incentives that result in social progress.

As for the relevant definitions of the legal system that protects the Cuban cultural heritage, Laws 1 and 2 of 1977 and the Cuban Law of May 2022, unlike the norms studied, did not opt to leave the definitions preliminarily established in a section of their own. This would not only facilitate the comprehension of the text but would also make the drafting of the articles easier.

The General Law of 2022, unlike the previous legal framework, has included a series of lexicographical and clarifying definitions throughout the regulatory text, such is the case of articles 4, 5, 8. 2, paragraph c), 20.1, 23, 31, 32, 33, 36, 38, 41.2, 48, 55.1, 55.2, 55.3, 57.2, 62, 82.2, 82.3, 97, 100.2, 102.2, 102.3, 104, 148, 150, 162.1, 163.1, 164.1, 166.1, 172, 173, and 182.

We wish to highlight the definition contained in article 8.2 of bearer community, bearer group, and bearer individual, to recognize their real rights over the patrimonial pieces. The denomination used is different from that established in the theory and conventional texts studied. This definition is centered around the fact that the members of the community are bearers of a cultural reference, identity, collective memory, and certain knowledge related to an intangible manifestation. Notwithstanding the above, there is a lack of precise definitions related to actions aimed at preservation and conservation, such as intervention, rehabilitation, conservation, and preventive conservation. All this is derived, in our opinion, from the absence of these mechanisms in the conception of the Law.

Regarding the principles that make up the order of protection of cultural heritage, and when contrasting the guiding and extra-systematic principles with the Cuban constitutional regulations of 2019, the following principles related to the protection of the cultural heritage of mankind and the national one can be glimpsed:

- The categories of expropriation and confiscation order the actions of agents, State bodies, managers, and officials responsible for heritage protection, by the limits of their competence and their grounds for application. It is a derivation of the principle of subsidiarity discussed above³⁶⁹;
- The principle of respect for the sovereignty of the state is accepted from the declaration of the territories or regions over which the Cuban state will exercise its sovereignty³⁷⁰. A particularly useful principle in the protection of underwater assets;
- The principle of cooperation is recognized through the statements referring to the international relations that the Cuban state will maintain with other states³⁷¹;
- The principle of effective financing is enacted indirectly, by stipulating as a duty of citizens their contribution to public expenditures³⁷²;
- The principle of free circulation is recognized indirectly, as a starting point to order the traffic of patrimonial goods inside and outside the national territory³⁷³;
- Respect for cultural heritage finds shelter in the constitutional legal formulations. It is a direct reference to the special order in this matter³⁷⁴ configured as a right, as a function of the State, and as a duty of the citizens. As for the responsibility derived from the damages caused to patrimonial goods, the statements contained in the Chapter dedicated to the guarantees of rights can be extended³⁷⁵.

In the Cuban legal framework formed by Laws 1 and 2 of 1977, the allusion to the following specific principles can be deduced:

³⁶⁹ *Vid.* Cuban Constitution of 2019, articles 9 second paragraph, and 58 and 59 related to expropriation and confiscation.

³⁷⁰ *Vid.* Cuban Constitution of 2019, Article 11.

³⁷¹ *Vid.* Cuban Constitution of 2019, Article 16, paragraphs c, d, e, f, m and ñ.

³⁷² *Vid.* Cuban Constitution of 2019, article 90, paragraph d.

³⁷³ *Vid.* Cuban Constitution of 2019, Article 52.

³⁷⁴ *Vid.* Cuban Constitution of 2019, Articles 13 clause h, 32 clause k, 46, 90 clause k.

³⁷⁵ *Vid.* Cuban Constitution of 2019, Articles 98 and 99.

I Public guardianship of the cultural property, through the regulation of prohibitions, authorization procedures to carry out works, excavations, export and traffic of cultural property, and the possibilities of State intervention in certain situations to defend the Cuban cultural heritage³⁷⁶;

I The cooperation with other institutions, conceived from the collaborative work of the members of commissions and structures that contributed to the protection and control of the patrimonial goods³⁷⁷;

I The exhaustive control of the patrimonial goods, through the enunciation of the actions that on the Monuments could be carried out³⁷⁸;

The principle of contraventional protection was indirectly recognized, according to Article 19 of Decree 272 of February 20, 2001, referring to infractions against national and local monuments. This article focused on the material elements of heritage buildings, basically their facades and ornaments. As a result, we were in the presence of a fragmented regulation, lacking the criterion of integrality that ignored other assumptions and possible negative manifestations in intangible assets.

The recently approved Cuban legal framework for the protection of cultural heritage sets forth specific principles in its third article. They are national, regional, and local identity; cultural sovereignty; cultural and natural diversity; prosperity of citizens; and sustainable development. These include guiding principles such as cultural sovereignty and extra-systematic principles such as diversity, prosperity, and sustainable development.

In the researcher's opinion, the principles of participation and sustainable management lack formulations that specify the mechanisms for participation not only of citizens but also of other social organizations in the defense of cultural heritage.

In this *corpus juris*, identity is also recognized as both a value and a principle, and the others are distant, except sustainable development, from those obtained through the comparative theoretical and normative study. However, it

³⁷⁶ *Vid.* Law 1 of 1977, articles 1 and 7 to 13; Decree 118, Regulation of Law 1, articles 21 to 65; Law 2 of 1977, articles 1, 10, 17, 18, and 19, and Decree 55, Regulation of Law 2, articles 29, 31, 35, 36 to 41, 67 to 87.

³⁷⁷ *Vid.* Law 1 of 1977, article 4 and Decree 118, Regulation for the execution of Law 1, articles 5, 6, 53 and 56; Law 2 of 1977, articles 6 and 9, and Decree 55, Regulation of Law 2, articles 12, 18 and 26 to 28.

³⁷⁸ *Vid.* Decree 55 of 1979, Regulation for the execution of Law 2, articles 44 to 66.

is understood that the principle of public guardianship is indirectly recognized in the principle of cultural sovereignty and that of sustainable management in the principles of citizen prosperity and sustainable development.

It should be noted that this regulation includes a Chapter for the control and application of the legal regime of patrimonial protection, as a derivation of the principles of exhaustive control of the patrimonial property and contraventional protection not expressly regulated.

3.1.2. Of the entities and normative structure of the legal regime for the protection of cultural heritage in Cuba

Regarding the institutions as entities responsible for the protection of cultural property, Law 1 of 1977 declared that the Ministry of Culture was the body in charge of determining the property that would belong to the Cuban cultural heritage, as an expression of the institutional model it established.

In this order, the conception of an important entity in the procedures of identification, recognition, and control of the mobility and disposition of patrimonial goods, the Registry of Cultural Goods, created by Law 1 of 1977, shone³⁷⁹. The registry activities of this institution extended to the annotation of the declarations of National or Local Monuments that were made, according to the provisions of Article 31 of Decree 55 of 1979, Regulation of the Cuban Law of Monuments. In such a way that it concentrated important information referring to Cuban cultural goods and monuments.

It is also worth mentioning the creation of the network of provincial commissions of Monuments that were instituted by Law 2 of 1977 and its Regulations³⁸⁰. Their main functions were directed to watch over the conservation of the Monuments, to control the maintenance, and to adopt the necessary measures for their conservation³⁸¹. The other functions were directed to guard the documentation transcendent to the monuments and, to work in coordination with the superior instance³⁸². These commissions could create Municipal Delegations in those localities where there were a considerable number of properties to be protected³⁸³. Likewise, to support the activity related to the

³⁷⁹ *Vid.* Law 1 of 1977, article 3.

³⁸⁰ *Vid.* Law 2 of 1977, Chapters II and III, and articles 8 to 28 of its Regulations.

³⁸¹ *Vid.* Law 2 of 1977, article 8, paragraphs 1, 2, and 4.

³⁸² *Vid.* Law 2 of 1977, Article 8, paragraphs 3, 5, and 6.

³⁸³ *Vid.* Decree 55 of 1979, Article 25.

promotion, study, conservation, restoration, and care of the monuments, they had working groups, according to Article 26 of the Regulation of Law 2 of 1977. The General Law of May 2022, for its part, declares the State, the Ministry of Culture through the National Council of Cultural Heritage, the territorial structures for the protection of cultural heritage, the Ministry of Science, Technology, and Environment, and the Ministry of Energy and Mines, responsible for the protection of cultural heritage³⁸⁴.

It points out, as in the legal orders studied, as responsible for the safeguarding of intangible heritage, the Provincial Governments, Municipal Assemblies of People's Power, Municipal Administration Councils, and the institutions that manage it³⁸⁵. However, there is a lack of mandates regarding cooperation and coordination of actions between these entities and other social organizations, cooperative movements, and private actors.

This recognition of the plurality of actors, although it evidences an openness of the institutional model of guardianship to the participation of other actors: groups and communities, and public and private entities, is formal and declarative. This is supported by the reading of the legislative body, in which there are no concrete mechanisms and procedures to guide its actions. It is suggested that in the process of creating the Regulations or in future modifications to the legal order, this particular issue be corrected.

The functions of the State in favor of heritage protection are determined in Article 73 of the General Law of 2022. Unlike the trend observed in other national norms, it does not recognize its obligations in the actions concerning the disposition of the patrimonial pieces in the national territory and outside of it.

In the Third Title of Law 155 of 2022, related to patrimonial management, the subjects involved in this process are recognized. Its second chapter regulates the functions of the bodies involved in the management. These functions describe operations and actions that correspond to the processes of identification, inventory, patrimonialization, revaluation, and safeguarding and to the determination of the role that these structures and entities play in the

³⁸⁴ *Vid.* Articles 11, 13, 14, 15, 16, 17.

³⁸⁵ *Vid.* Draft General Law for the Protection of Cultural and Natural Heritage, National Assembly of the People's Power of Cuba, May 2022, articles 73, 74, 76, and 85.

protection of the heritage³⁸⁶. These precisions must be grouped in a section of the Law where these institutions and their functions related to protection are specified.

The normative structuring of Laws 1 and 2 of 1977, established that the protection includes the measures of a legal or institutional character, technical, constructive, restoration, and others tending to maintain the integrity of the patrimonial goods in front of the different agents that can put in danger their durability in a part or of the whole³⁸⁷.

In the absence of precepts applicable to relevant intangible assets in Cuba, and accordance with the adoption of the UNESCO Convention of 2003, the Minister of Culture issued Resolution 126 of 2004, which created the Commission for the Safeguarding of Intangible Cultural Heritage, in an attempt to offer protection to manifestations of this nature that present values worthy of international recognition.

This regulation only referred to the composition, functions, and obligations of the Commission. What was lacking in this body of rules and regulations was the determination of the measures and content of protection. From its functions, it could be glimpsed that the identification of intangible manifestations would be made according to the procedure instituted by Law 1 of 1977, aided by the activity and operation of the Registry of Cultural Heritage Assets.

Article 19 of Decree-Law 272 of 2001 on Contraventions in matters of territorial planning and urbanism regulated the treatment to be offered to situations damaging the façades and exterior ornaments of buildings. These actions have been the main reason for the application of fines to violators. This provision was the main referent of the elements of the administrative sanctioning system that was to be applied to the conservation of cultural real estate.

Law 106 of 2009 of the National System of Museums of the Republic of Cuba, tributes to the protection of cultural heritage, through the enunciation of the role of museums in the dissemination, appreciation, research, and education of cultural values and the determination of important functions such as the

³⁸⁶ *Vid.* Articles 106 f, g, h, k, l, o, p, q and r, 113 a and g, 115 a, c, d and e, 117, 118.1, 121 a, c, d and e, 137, 143. I.a, 145.2 among others of this Chapter II.

³⁸⁷ *Vid.* Decree 118 of 1985, Regulation of Law 1 of 1977 on Cultural Heritage, articles 27, and Decree 55 of 1979, Regulation of Law 2 of 1977 on Monuments, article 37.

maintenance of documentation related to cultural material goods of movable, natural and immaterial nature³⁸⁸.

The normative environment described above shows that the protection offered was fragmented by the scope, object, and scope of the provisions in force. The normative dispersion, derived from the existence of three normative bodies aimed at protecting Cuban heritage assets, would require the updating of concepts, definitions, structures, and functions of the Administration, and the harmonization between the current provisions and the internal administrative procedures, the political decisions contained in the Cuban cultural policy and the new legal framework established since the adoption of the 2019 Constitution.

To recognize new types of heritage, especially intangible heritage, management mechanisms, devising its sanctioning system, as well as update definitions, provisions, terms, and concepts by international requirements, and avoiding normative dispersion; by the updating process derived from the adoption of the Cuban Constitution of 2019, the National Assembly approved General Law 155 of 2022³⁸⁹.

In its fourth article, it is determined that protection is the set of provisions, strategies, programs, plans, actions, and control measures, of legal, administrative, technical, and financial nature, aimed at identifying, registering, and managing cultural and natural heritage.

Then, in its second paragraph, it states that protection is recognized as safeguarding when it refers exclusively to intangible cultural heritage. This statement divides the concept of integrality, since tangible assets and the processes of creation, preservation, and dissemination of heritage are also susceptible to safeguarding, as referred to in international normative and methodological documents.

Concerning the properties protected according to the integrated approach in the protection of cultural heritage, the legal order contained in Cuban Laws 1 and 2 of 1977, required to specify the procedures to delimit the heritage environment, as the methodological documents have outlined. Likewise, it was

³⁸⁸ *Vid.* Law 106 of 2009, Article 16.

³⁸⁹ *Vid.* Preliminary draft of the General Law for the Protection of Cultural and Natural Heritage, National Assembly of the People's Power, Republic of Cuba, May 2022.

necessary to determine the legal treatment to be given to the assets located in those areas³⁹⁰.

This absence has been transcended in the General Law of 2022, by defining the categories of Protection and Buffer Zone. For the former, it establishes a temporary protection that extends until the conclusion of the patrimonialization process. Properties located in the Buffer Zone are protected indefinitely³⁹¹. In this particular, the Cuban regulation reflects an advance toward an integrated approach to heritage assets.

The normative body that will regulate this General Law makes explicit the assets and other elements that will be protected. Among them: the material elements of the intangible manifestations (Article 30); the cultural spaces where the intangible manifestations are developed (Article 32); properties or geosites in series (Article 105); the Buffer and Protection Zones (Articles 106 and 107), for the latter it is established that it will be protected for a term of 10 years.

Notwithstanding the above provisions, it is necessary to specify the protection to be granted to the tangible assets and cultural spaces associated with the intangible heritage and to specify the procedures to delimit these zones, the instruments that contribute to their balance and to the maintenance of the environment, social relations and the values they entail. These elements and clarifications could also make up the text of the Regulations of the Law.

The normative structuring of the regime for the protection of Cuban patrimony, conformed by Law 1 of 1977, in its first article, regulated that its object was to determine the goods that would integrate the cultural patrimony and the appropriate means of protection. Both aspects were effectively regulated in the text. Law 2 of the Monuments of the same year and the Regulations of Law 1 and 2 of 1977, did not follow this same system, since they lacked the object of regulation.

The Law approved in May 2022 by the Cuban National Assembly, unlike the previous legal framework, establishes in the first of its articles the object of regulation. It is made up of six points: the protection of cultural and natural heritage in an integral manner; the import and export of heritage goods; the subjects of management and their functions; the operation of museums; the

³⁹⁰ *Vid.* Law 2 of 1977, article 12.

³⁹¹ *Vid.* Draft General Law of May 2022, article 55.4.

modes of action of owners, possessors, managers, and public and private entities linked to the protection of cultural heritage, and the contraventional conducts of the sanctioning regime.

From these points, we wish to emphasize that the pronouncement on the comprehensive protection of the Cuban cultural and natural heritage has not been fully articulated in the normative body. The foregoing is affirmed by the fact that the fourth article, numeral two, refers that protection being recognized as safeguarding when it is exclusively granted to immaterial manifestations. This insufficiency in the wording of the text has transcendence in its application since it implies that the material manifestations will not be subject to safeguarding, ceasing to receive the proper treatment of this institution, and moving away from the integrated approach of legal protection.

Other aspects of the object of regulation that the General Law has insufficiently developed are those referred to as the determination of the components of the patrimonial management process and the elements of the sanctioning regime. This is evident from the reading of the Third and Fourth Chapters of the law, which lack rules regarding the intellectual and economic components of the management and those that specify the administrative procedure to control and apply measures in the event of acts detrimental to the Cuban patrimony.

Contrasting the text of Article 1 of the General Law with other foreign national norms, it is also noted the absence of regulating the procedures, mechanisms, and instruments related to preservation and revaluation. These insufficiencies have a direct impact on the perpetuation of cultural assets and the obtainment of social benefits.

Finally, we wish to present the situation of the Cuban corpus juris adopted in 1977 and the current one, about the theoretical and normative arguments of the administrative sanctioning regime previously exposed.

The rules of the 1977 Laws mixed the faculties of the owners or possessors, patrimonial, and the administrative consequence in case of violation³⁹². They established as conducts deserving of sanctions, assumptions in which the authorization of the competent entities was not counted on, relative to the transmission of dominion or possession in the national and international scope

³⁹² *Vid.* Law 1 of 1977, Articles 9, 11, 12, and 13.

of patrimonial goods or its suspicion; changes of facades and ornamental elements; alteration or accomplishment of works on patrimonial goods and archaeological sites³⁹³.

The measures to be adopted were similar to those of the Belgian legislation, insofar as it recognized confiscation, suspension of procedures relating to the transfer of ownership, suspension of work begun, and revocation of authorization to carry out archaeological excavations³⁹⁴.

The lack of elements relating to its principles and procedural details was another of its shortcomings. This situation was aggravated by the absence of the Cuban legal system of a General Law for the Administrative Sanctioning Regime, which deals with the general material and procedural aspects that could be applied to any administrative sector. It is deemed necessary, based on the constitutional pronouncements on due process³⁹⁵ and with the support of the best doctrine on the matter, to conceive a rule of this nature.

Law 155 of 2022, as mentioned above, states as one of its objectives, to regulate the contraventional conducts to protect the Cuban patrimonial manifestations. This aspect has not been covered in the text presented, since Chapter IV of the third Title does not regulate the four essential elements of the sanctioning regime. In this regulation, the Inspectors are declared responsible for applying the corresponding measures. It refers to the future Regulations the task of establishing the infringements and the measures applicable to the offenders.

In the clauses designed to regulate the sanctioning power in this field, the Regulation distinguishes between prior notification, fine, and confiscation, as the main measures to be applied in the event of damage to cultural heritage (articles 340-342).

It determines the contraventions in articles 343 and 344. To emphasize the precision of the contraventions to the intangible cultural heritage in 344.5, a novel conception compared with the foreign legislations studied in which it is not meant. It is also worth highlighting the enunciation of the principles that

³⁹³ *Vid.* Law 1 of 1977, articles 9, second paragraph and 11; Decree 118 of 1985, articles 33, 34, 52, 53; Decree 55 of 1979, articles 43, 68, 73, 78.

³⁹⁴ *Vid.* Law 1 of 1977, articles 9 and 11; Decree 118 of 1985, articles 33, 34, 49, 51, 52, 53; Decree 55 of 1979, articles 43, 68, 73 and 78.

³⁹⁵ *Vid.* Cuban Constitution of 2019, articles 92, 94, 96- 100.

facilitate to the operators the assignment of the measures and their amount, taking into account the relevance of the damaged object and the harmful result (articles 345 and 347).

3.2. The mechanisms for the protection of cultural heritage conceived in the Cuban legal system

The following is an analysis, following the exegetical method, of the legal framework for the protection of Cuban cultural heritage that precedes and that will govern with the recently approved Law 155 of 2022, once the process of publication in the Official Gazette has been verified. The proposed Regulation of the General Law, which was presented as part of the legislative updating process together with the body of the General Law, has also been submitted to this analysis. Thus, the normative inadequacies of the Cuban legal system in this matter will be revealed, to visualize the aspects that require reform and improvement.

Thus, concerning the procedures that allow the identification of cultural manifestations relevant to being bearers of patrimonial values of the society, it is highlighted that in the historical legislation, there were absent rules for the revocation of the status granted for any reason that attempts against the preservation and safeguarding of cultural and natural assets. Although the identification and patrimonialization procedures were recognized, they were insufficient, as will be discussed below.

Law 1 of 1977 emphasized the structural and operational aspect of the Registry as the entity where the inventory action is developed. Thus, Article 21 of its Regulations, regulated that the National Registry of Cultural Goods of the Republic of Cuba was composed of a Registry for goods declared national heritage or of museum value and with a General Inventory that allowed the knowledge and evaluation of these. Article 23 regulated that the inventory was made to inventory and catalog cultural assets. From this formulation it can be deduced that the Registry created is a complex and integral administrative entity, with two clearly defined sections and different approaches, which not only favored the control of Cuban patrimonial assets but also corroborated their existence and material state, as well as deepened through scientific research activities the knowledge of their values.

Law 2 of 1977 on National, Provincial and Local Monuments, on the other hand, projected in its Article 11 that the National Commission in coordination with the Provincial Commissions would keep a Registry of National and Local Monuments - a copy of which would remain under the custody of the Executive Secretaries of the Provincial Commissions³⁹⁶-, and in which not only the Monuments would be registered, but also those properties that, without having relevant values, belonged to a Historic Center or Site declared Monument³⁹⁷. From the reading of Article 34, the first paragraph of its Regulations, it can be seen that the information allows for the identification of the Monument. It is deduced that such data collection coincides with the activity of the inventories. In the following article, the formal publicity of the contents of the Register in the official media was formulated.

The activity of the registers had been conceived for cultural properties recognized as cultural heritage, without any treatment of properties located in the Protection and Buffer Zones. It was a determination that had to be specified through the incorporation in the Register of Cultural Properties in a special section for them.

This refers to tangible cultural property. The intangible cultural heritage manifestations were legally protected with the adoption of Resolution 126 of 2004, of the Minister of Culture. According to this resolution, the intangible manifestations were identified by the Commission created for their attention and protection. This administrative structure had among its functions the establishment of methods for the review, validation, and updating of applications for inclusion in the Register of Intangible Cultural Heritage³⁹⁸.

In this normative panorama, it was required to specify the effects of diffusion derived from the inventory, especially those relative to the access of the information of the Registry, the subjects legitimized for its consultation, the regulation of the diffusion of its information for investigative and educational purposes in all the levels of education and the one associated with tourism. It

³⁹⁶ *Vid.* Decree 55 of November 29, 1979, Regulation of Law 2 of 1977 on National and Local Monuments, article 34 second paragraph.

³⁹⁷ *Vid.* Decree 55 of November 29, 1979, Regulation of Law 2 of 1977 on National and Local Monuments, article 33.3.

³⁹⁸ *Vid.* Resolution 126 of December 15, 2004, of the Minister of Culture, second paragraph.

was also necessary to establish the creation of a List of Heritage in Danger to promote heritage conservation.

The new General Law 155 of 2022 transcends the absence of previous regulation and makes explicit certain operations related to identification. However, there are still some aspects that need to be improved, as detailed below:

To specify the main category to be protected: Cultural Heritage. This unifies and includes movable, immovable, and intangible cultural manifestations, recognized from the inventory process that evaluates their values and particularities. Such recognition is only effective once it is registered in the Central Registry of Cultural Heritage³⁹⁹.

In this particular, the proposed Regulation, in Article 22, stipulates the phases of the inventory, among which cataloguing is the second stage. This regulation shows that the role of the catalog is understood as an instrument of protection that allows to deepen and give not only material but also legal treatment to cultural property. However, by placing it as a stage of the inventory, it subordinates it to an activity of lesser relevance for the characteristics and purposes of the inventory. According to the theoretical and normative postulates, it would be appropriate to recognize the catalog as the only instrument to be used, the one that involves in its conformation the realization of an inventory, or; to conceive the existence of both instruments, regulating the scope in which they would operate.

In this same article, the third stage of the inventory is the approval of the competent authority as a previous step to the inscription in the Register of Cultural Heritage Assets. This phase is typical of the patrimonialization as it has been exposed in previous epigraphs, since to be verified it implies that a local government organ issues an administrative declaration. This form of regulation does not follow the same logic of the theoretical and normative arguments found from the bibliographical examination and the legal comparison made. Its regulation is inadequate since the purpose of the inventory is to control and have knowledge of the cultural assets that present significant values for the territories, and not to declare a legal status.

³⁹⁹ *Vid.* Draft General Law for the Protection of Cultural Heritage and Natural Heritage, National Assembly of the Republic of Cuba, May 2022, articles 33, 34, and 35.

About the above, it would have been necessary to determine the qualified and specialized personnel who, together with the community and other agents, will specify and interpret the values and social contribution of the property in question. It would have been different if a declaration process had been foreseen for these properties. Then the statements in Article 22 would correspond, since they refer to the stages of nomination, evaluation, and actual declaration.

As for the instruments designed for the identification of cultural properties, Law 155 of 2022 contains the mandate to create the Urgent Safeguarding and Good Practices Lists for Intangible Cultural Heritage⁴⁰⁰. Although it is superior to the previous regime, since it recognizes the instruments that will contribute to the identification of cultural property in certain situations that merit special protection, it moves away from the comprehensive approach with which such instruments were created, not only for intangible property and, consequently, splits protection.

Another of its novelties is the creation of a new category, that of the Cultural Heritage of the Nation, made up of assets that have been recognized as Cultural Heritage. For its identification, it uses Representative Lists of Intangible Heritage, Distinctive Lists of Movable Heritage, and National and Local Monuments⁴⁰¹. This gradation must be accompanied by effects that distinguish it. An aspect that is not verified in the normative text consulted, since the content of the conceived protection is the same for both Cultural Heritage and Cultural Heritage of the Nation.

This legal text does not provide for the activation of inventory or cataloging procedures for assets included in the National Cultural Heritage. It also does not provide for the treatment that will receive in the Central Registry or the Lists of National and Local Monuments, the properties located in the Protection and Buffer Zones. In this sense, instruments or specialized sections should be established to inventory or catalog the properties present in them.

Another notorious absence is the precision of the notification to the interested parties and the public in general of the properties that make up both categories. There is no allusion to the publicity of its contents, nor its role in the

⁴⁰⁰ *Vid.* Article 35 of the same Bill.

⁴⁰¹ *Vid.* Articles 41, 48, and 55 of the Bill.

safeguarding actions related to the communication, dissemination, management, and transmission of heritage values. Issues that should be incorporated in the process of improvement and regulatory creation.

On the other hand, concerning heritage preservation, the system established by Cuban Laws 1 and 2 of 1977 did not specify its phases, deadlines, and procedures, as well as the need to establish the relevant process for intangible cultural manifestations, as announced in Resolution 126 of 2004 by the Minister of Culture⁴⁰².

The legal statements proposed to the Cuban National Assembly in May 2022, conforming to the new regime, do not order in an independent section the phases related to the patrimonialization of the assets that will integrate the Cultural Heritage and the Cultural Heritage of the Nation. It only regulates that the Cultural Heritage is recognized through the inventory. It does not specify which subjects will nominate the cultural manifestations before the authorities that will carry out the inventory.

Law 155 of 2022 regulates some vestiges of the patrimonialization process. This is the case of the precision of the subjects entitled to nominate and the authorities empowered to include cultural heritage assets in the Lists that make up the Cultural Heritage of the Nation⁴⁰³. To these are added the statements related to the selection of Cultural and Natural Heritage, from articles 27 to 32, and the reference to the evaluation of the properties that will make up the List of Monuments in article 55.4. All this evidences the absence in conceiving a process of declaration ordered by phases and its lack of correspondence with the conception in theory and comparative law.

The second of the phases lacks in its normative conception the identification of the entities or natural persons involved in the evaluation of the interest presented by the postulated property. It would be convenient to grant well-defined powers to legal or natural persons that could collaborate in this task to interpret and evaluate the conditions and impact of the patrimonial property.

⁴⁰² *Vid.* Resolution 126 of 2004 of the Minister of Culture, regarding the Commission for the Safeguarding of the Intangible Cultural Heritage, Section two, numeral four.

⁴⁰³ *Vid.* Articles 46 and 54 of the aforementioned Project.

It is also recognized, the foresight of the revocation process when they do not represent the values that made them worthy of that condition⁴⁰⁴, and; the determination of the authorities that will recognize the Protection and Buffer Zones.

The proposed Regulation has been more explicit in determining the grounds for revocation in Article 81, and the instances involved in Article 82. It provides without modeling the specific procedure required to adopt such a decision, a detailed technical evaluation⁴⁰⁵, and the effects related to publicity and notification once the status has been revoked⁴⁰⁶.

At this point, it will be explained how the Cuban legislator has conceived the use and enjoyment of cultural property. The Cuban legal regime established by Laws 1 and 2 of 1977, as regards use, obliged the owners of cultural property to conserve and protect the integrity of the cultural property⁴⁰⁷. This obligation reached the owners of properties that are in the process of valuation to be declared Monuments⁴⁰⁸.

This framework required authorization for changes in the use of heritage properties and obtaining a building permit to modify the use of the monuments. Authorization was also required for the realization of shows and public events; transfer of monuments or archaeological remains; installation of electric, telegraphic, telephone, radio, or TV lines; planting and cutting of trees; disposal of land, wastelands, or public or private spaces to store substances or materials or to deposit or park vehicles or any equipment⁴⁰⁹.

On the Monuments and those properties located in its Buffer Zone, it was declared the impossibility to install industries, productive centers, exploitation of mines and quarries, waste evacuation, sanitation facilities; use of sound transmitting or reproducing devices; the realization of fairs, festivals, tourist camps or any other activity that leads to the deterioration of the landscape in its aspect or its integrity; the use of water from fountains, moats, and

⁴⁰⁴ *Vid.* Articles 46 and 54 of the aforementioned Project.

⁴⁰⁵ *Vid.* Articles 99 and 123.1 of the Proposed Regulations.

⁴⁰⁶ *Vid.* Articles 100 and 123.2 of the Proposed Regulations.

⁴⁰⁷ *Vid.* Law 1 of 1977 on Cultural Heritage, Article 7; Decree 118, Regulation of the previous law, Article 28; Decree 55 of 1979, Regulation of the Law of National and Local Monuments, Article 31.

⁴⁰⁸ *Vid.* Law 2 of 1977, of the National and Local Monuments, article 15.

⁴⁰⁹ *Vid.* Decree 55 of 1979, Regulation of the Law of National and Local Monuments, articles 46, 47, 53, 54 and 60.

ornamental ponds, and the regulation of traffic, parking, determination of pedestrian ways, closing of squares and public areas and other similar dispositions in urban historical centers and sites⁴¹⁰.

This regime was configured based on establishing prohibitions and restrictions not only for owners or possessors but also for users and public entities. These prohibitions or restrictions are mixed with legal statements relating to the disposition of heritage property, all of which required clarification in the legal text⁴¹¹. The foregoing has resulted from providing for the control of both powers from the requirement of authorization or approval. The truth is that they are independent powers, with different implications for the subjects and the patrimonial assets.

As regards use, the new Cuban General Law of May 2022 declares the State as responsible for favoring the sustainable use of Cultural Heritage⁴¹². Thus, use is understood as any fixation, reproduction, public communication, translation, and compilation of a good that comes to constitute a contemporary work, always respecting its authenticity and integrity and the rights of its owners or possessors⁴¹³.

The owners or possessors of cultural property are obliged to use it in a way that guarantees and enhances its attributes and to request approval from the competent authorities for any change of use⁴¹⁴. It determines this same requirement to the subjects that reproduce, communicate, or fix them, exposing their name, origin, and owners⁴¹⁵.

It obliges those who wish to promote or commercialize an intangible manifestation and those who wish to carry out archaeological research or extraction of any property found in a terrestrial or underwater archaeological site, to request the authorization of its bearers⁴¹⁶ and the competent authorities⁴¹⁷, respectively.

⁴¹⁰ *Vid.* Decree 55 of 1979, Regulations of the Law of National and Local Monuments, Chapter X of the control of constructions and land use.

⁴¹¹ *Vid.* Decree 55 of 1979, Regulation of the Law of National and Local Monuments, articles 55, 56, 57, 65 and 66.

⁴¹² *Vid.* Article 75 clause c.

⁴¹³ *Vid.* Article 83.

⁴¹⁴ *Vid.* Article 79 paragraphs b and c.

⁴¹⁵ *Vid.* Article 83.

⁴¹⁶ *Vid.* Article 86.

⁴¹⁷ *Vid.* Article 93.1. I.

In this new projection, there is an absence of statements that order the use of the goods located in the Protection and Buffer Zones concerning the previous legal order, and of legal formulations that regulate the use of the patrimony in the tourism industry. The latter should be incorporated, because of the importance of this line of business for the country's economy.

The proposed Regulation, on the other hand, stipulates the duty to communicate to the corresponding instances of the Cultural Heritage Registry, any change of use or modification within 30 working days of its occurrence. The purposes of this duty are linked to the updating of the registry notes concerning the characteristics and use of the registered property, as expressed in Article 164.

Regarding enjoyment, it makes the State responsible for encouraging the generation of benefits for the communities derived from patrimonial management⁴¹⁸. In this sense, it imposes the obligation to the owners and possessors to allow access and recognition of the patrimonial property and to control its attributes, excluding the appreciation of the general public, as has been recognized in the theoretical and comparative normative field. It also requires those interested in its use to ensure that the property is accessible to the public and that their actions benefit the heritage owners and revalue cultural manifestations⁴¹⁹.

Regarding the preservation of heritage properties, the Cuban heritage normative framework formulated by Laws 1 and 2 of 1977 used inadequate terminology related to conservation⁴²⁰, which led to confusion and errors in the interpretation of institutions related to this matter for the owners and those responsible for the activity.

This undifferentiated use of terms can be seen in the formulation of the four degrees of protection given to National and Local Monuments⁴²¹ when from the reading of the conceived levels, the actions were inclined to coincide with the theoretical arguments related to curative conservation and restoration. These levels of intervention should be reformulated, including the measures,

⁴¹⁸ *Vid.* Article 75 clause d.

⁴¹⁹ *Vid.* Articles 79 clause e, 82 clause a and 86.2.

⁴²⁰ Decree 55 of 1979, Regulation of Law 2 of 1977, Articles 39 and 40.

⁴²¹ *Vid.* Decree 55 of 1979, Regulation of Law 2 of 1977, Article 39.

instruments, and processes of preventive conservation, especially those related to the analysis of internal and external risks affecting heritage properties, community participation, and the decision-making process.

It also stated that the heritage owners bear the costs of conservation and restoration⁴²². This enunciation of responsibility collided with the objective conditions of Cuban society, in terms of materials and personnel specialized in conserving and restoring heritage, making it difficult for the subjects involved to apply the legislation fully.

This legal order privileged restoration. The above statement is based on the reiteration of legal precepts that contain the term, as well as the interpretation of the statements that allude to the organizational structure created to preserve heritage assets, monuments, and works of fine arts.

Conservation actions operated under the requirement of obtaining authorization and the corresponding Building Permit⁴²³, a clear reflection of the urban planning working methods that impacted the legal treatment of preservation procedures. The procedures were not conceived in cases of archaeological discoveries during the interventions.

The Conservation Plan was not an enforceable instrument, although its elaboration was indirectly required to be confirmed, according to articles 32 and 33 of Law 1 of 1977. These statements show a weakness of the system created since it stipulates that the data related to the property shall be provided by the interested parties in the conservation, ignoring the possibility of falsification of the information. It omitted the control, follow-up, and updating functions of the authorities and administrative officials in charge of the activity.

The understanding of in situ conservation, stated in Articles 83 and 84 of the Regulations of the Law of National and Local Cuban Monuments, Decree 55 of 1979, transgressed the scope outlined in international instruments since it ordered that the archaeological pieces discovered should be kept by the Provincial Commission of Monuments, or by other public entities until their studies were concluded. All this implied that the goods found had to be moved to the places determined by those structures.

⁴²² *Vid.* Decree 118 of 1983, Regulation of Law 1 of 1977, article 35.

⁴²³ *Vid.* Decree 55 of 1979, Regulation of Law 2 of 1977, Article 40.

The text of the Cuban General Law of May 2022, like the comparative orders, declares the owners, possessors, and users of heritage properties to be responsible for their conservation⁴²⁴. This declaration does not take into account the special situation of the owners of properties located in the Protection and Buffer Zones.

Like the legal order established by Laws 1 and 2 of 1977, the Draft of May 2022 does not develop precepts related to heritage preservation consolidated in the theory and related scientific doctrine that is aimed at preserving movable and immovable property and the material and spatial component of immaterial manifestations. It does not regulate the assumptions of findings derived from the realization of works and interventions in real estate, nor does it make any allusion to measures or categories related to preventive conservation. It only states the responsibility of the owners and the requirement of authorization for the realization of interventions in real estate⁴²⁵.

Consequently, it lacks the projection of the principles of preservation mentioned above, especially those related to the cooperation and institutional collaboration of the actors involved in the execution of conservation work through the establishment of agreements and mechanisms for joint decision-making, and the assessment of risks and threats to influence preservation through preventive conservation.

There is no evidence of participation mechanisms that allow public entities and communities to intervene as subjects executing conservation actions. This absence is related to the lack of measures to promote and enhance the value of heritage, allowing public or private actors to act through the contribution of financial resources or their knowledge and skills in conservation or restoration. The proposed regulation, in Article 173, stipulates that any intervention in real estate must be approved for its implementation. Articles 170, 174 to 177, and 179 list the authorities responsible for issuing it, according to the degree of protection of the property. In Article 82, it enumerates extensively the types of interventions that may be made on heritage properties. These are rules that divide protection insofar as they are intended for tangible heritage properties.

⁴²⁴ *Vid.* Articles 77, 79 paragraphs a to d.

⁴²⁵ *Vid.* Articles 79, 93.1. II and 95.

On the other hand, they fill the void that the General Law contains concerning preservation mechanisms.

In another order of the mechanisms tending to control the patrimonial goods, especially those referred to the acts of import and export, it means that Cuba is a signatory of the Convention of 1970, being reflected in the conception of the legal instruments of protection of the cultural goods and the National Monuments of 1977. In this normative system, the exports of patrimonial goods were prohibited, unless they were authorized⁴²⁶; for their realization, it was imposed the obtaining and presentation of the export certificate⁴²⁷. This requirement extended to temporary or definitive imports of patrimonial goods from other latitudes⁴²⁸.

The norms of state intervention that regulated exports and imports were oriented to facilitate the work of the institutions involved in guarding the entry and exit of Cuban patrimonial goods at the border⁴²⁹; they established real rights of preference on the part of the State before the export request⁴³⁰; the procedures to authorize and issue the export certificate⁴³¹; they demanded the insurance in case of temporary export⁴³²; they determined the actions on the part of the exporting subjects and for the re-export⁴³³.

Regarding the disposition of patrimonial goods and the rights in rem associated with them, the Cuban Administration conceived the pre-emption when it is requested to process the transfer authorization⁴³⁴. Another requirement established to carry out dispositive legal transactions was to state in the formalization of such acts that the goods involved were registered in the Registry of Cultural Goods⁴³⁵.

⁴²⁶ *Vid.* Law 1 of 1977, Articles 9 and Decree 118 of 1983, Regulation of this Law, Article 41.

⁴²⁷ *Vid.* Law 2 of 1977, Articles 17; Decree 118 of 1983, Regulation of Law 1, Articles 50 and 51; Decree 55 of 1979, Regulation of Law 2, Article 72.

⁴²⁸ *Vid.* Law 1 of 1977, Article 13.

⁴²⁹ *Vid.* Law 1 of 1977, Articles 10 and 11; Decree 118 of 1983, Regulation of Law 1 of 1977, Articles 7, paragraph e), 53, 54, 56, 59 and 60.

⁴³⁰ *Vid.* Articles 9 and 10 of Law 1 of 1977.

⁴³¹ *Vid.* Article 13 of Law 1 of 1977.

⁴³² *Vid.* Decree 118 of 1983, Regulation of Law 1 of 1977, Article 55.

⁴³³ *Vid.* Decree 118 of 1983, Regulation of Law 1 of 1977, Articles 57 and 58.

⁴³⁴ *Vid.* Law 1 of 1977, article 9, third paragraph; Decree 118 of 1983, Regulation of Law 1 of 1977, articles 46 and 47.

⁴³⁵ *Vid.* Decree 55 of 1979, Regulation of the Law of National and Local Monuments, article 36.

Regarding the rules for the management of dispositive acts, it is important to highlight the functions of the Registry of Cultural Property in such transactions, such as: granting authorization; controlling the actions of the negotiating parties; demanding compliance with the order, and applying confiscation as the main legal consequence in the event of non-compliance⁴³⁶.

Law 155 of 2022, for its part, conceives among its objectives to regulate the import and export of cultural property recognized or not as cultural heritage⁴³⁷. This purpose is not fulfilled to its full extent, since throughout the text only aspects related to the goods declared cultural heritage are regulated. Exports and imports are subject to administrative authorization, which specifies the instances that will authorize derived from the category of recognition they possess⁴³⁸. It demands insurance coverage against all risks as a guarantee for the assumptions of temporary export⁴³⁹.

The Cuban Administration, in this control model, relies on the customs authorities to control and act in the event of unauthorized exportation, retaining the goods and seizing them when they are movable goods belonging to the Cultural Heritage of the Nation⁴⁴⁰.

The regulation of definitive imports of cultural goods is singular, declaring them as worthy of being included in the Distinctive List of Movable Cultural Heritage. However, it does not specify the requirements to prove the legality of such imports, nor the treatment to be given to the declared stolen goods and to the non-inventoried goods that have significant patrimonial values for the Cuban identity, nor does it regulate precepts related to the right of reappropriation of the repatriated cultural goods.

In another order of things, the provision indicates the ownership of the real right of preferential acquisition of the National Council of the Cultural Patrimony⁴⁴¹ and establishes the duty to communicate to the Central Registry of the Cultural Patrimony the negotiable acts carried out, for which it establishes the making of the instrument of the Sworn Declaration before its officials or the sample of

⁴³⁶ *Vid.* Law 1 of 1977, articles 9-second paragraph; Decree 118 of 1983, Regulation of Law 1, articles 7 paragraphs f) and i), 42, 43, 44 and 49.

⁴³⁷ *Vid.* Article 1, paragraph b.

⁴³⁸ *Vid.* Articles 22.2 and 88.

⁴³⁹ *Vid.* Article 90.2.

⁴⁴⁰ *Vid.* Articles 89.2 and 91.2.

⁴⁴¹ *Vid.* Article 81.2

the document of its formalization⁴⁴². It is an order that does not conceive the realization of the legal transactions of exchange, cession, and loans on patrimonial movable goods. It also does not foresee the execution of acts of transfer of ownership of declared real estate and those located in the Protection and Buffer Zone.

The role of museums in controlling the legality of acquisitions through the functioning of the Selection, Valuation, and Acquisition Commission⁴⁴³, as well as the determination of the legal transactions that can be carried out to increase their collections, should be highlighted in the regulation of the Regulations⁴⁴⁴. Although the meticulousness of the statements is positive, it would be opportune to extend these considerations to all the movable goods that integrate the Cuban patrimony before suppositions of exchange, exhibition, and spreading of values inside Cuba and outside of her.

About safeguarding, it should be pointed out that the Cuban legal framework, which consisted of Laws 1 and 2 of 1977, did not contemplate the criteria and methodology of action required by the special nature of intangible heritage assets, and the safeguarding arguments provided by international methodological and normative instruments since 1989. The Ministry of Culture, as mentioned above, issued Resolution 126 in 2004, establishing the Commission for the Care of Intangible Heritage Expressions, and determined its composition and the functions that this structure would perform. These functions were the germ of the treatment to be given to Cuba's intangible cultural heritage.

It is worth mentioning the functions that Cuban museums also performed in the identification, documentation, research, and promotion of intangible cultural manifestations administratively recognized or those with the vocation to be recognized. This role was recognized by the Law of the National System of Museums⁴⁴⁵.

The current Cuban General Law number 155, although it establishes that the protection of intangible assets will be called safeguarding, does not specify its

⁴⁴² *Vid.* Articles 79, paragraphs d, 80, and 81.1.

⁴⁴³ *Vid.* Articles 276 and 279 of the proposed Regulations.

⁴⁴⁴ *Vid.* Articles 287, 288, 291, and 292 of the proposed Regulations.

⁴⁴⁵ *Vid.* Law 106 of 2009, of the National System of Museums of the Republic of Cuba, Article 16, paragraphs c), d), d), g), i), k), and l).

content. From the reading of the fourth article, which states that protection is oriented to the identification, registration, and management of Cuban cultural heritage, it is interpreted that such mechanisms are the ones that make up the core of safeguarding in Cuba since it homologates both terms in its second numeral. These legal considerations are far from what is established at the international level, since the aspects related to transmission, dissemination, and communication would not be part of safeguarding, thus limiting its scope. Although no section in General Law 155 specifies the content of safeguarding, aspects related to it can be glimpsed throughout the text. Thus, Article 8 recognizes the collective ownership of the bearers of intangible cultural manifestations; Article 35 indicates the possibility that intangible manifestations may be included in the Urgent Safeguarding and Good Practices Lists; Articles 41 to 47 regulate the process of patrimonialization and the instruments of Representative List and the Special Safeguarding Plan; Articles 73 and 75 establish the State's duties towards heritage, which include educational, research and management actions⁴⁴⁶; Article 83 obliges those who reproduce or communicate heritage values to mention their origin and owners when carrying out their activities; Article 85 sets forth the principles of action of the authorities responsible for safeguarding, and Article 86, the requirements for promoting an intangible manifestation, consisting of obtaining the consent of its bearers.

Article 25 of the proposed Regulation regulates the definition of safeguarding, by the theoretical and conventional postulates set out above. However, it contradicts what is stipulated in Article 4.2 of Law 155 of 2022. In short, it defines it as the process of implementation of the measures recognized in Article 4.2 and includes the identification, documentation, research, protection, promotion, valorization, transmission, and revitalization, with the participation of the communities, groups, and individual bearers. This situation can be transcended by modifying in the future the text of the Law in congruence with the Regulations.

Other legislative gaps need to be filled. Their precision is expected in the elaboration of the implementing regulations. Such is the case with the treatment

⁴⁴⁶ *Vid.* Articles 73, clauses c, d, f, g, and h, and 75, clauses a, c, and d.

that will be given to the material objects associated with the intangible manifestations and the cultural spaces necessary for their recreation. It would be useful to adapt the preservation measures conceived in the theoretical and comparative legal field or to create special measures to that effect.

Regarding management, it is worth mentioning that a Cuban theoretical reference has been detected, containing a methodology for the management of Historical Centers, called Emerging Themes and their Signs of Integrality and Sustainability (TESIS)⁴⁴⁷. It identifies the fundamental dimensions of management, different in their denomination, but close in their conception to that adopted by UNESCO.

This methodology has been conceived to evaluate the management of the Historic Centers of cities, based on scientifically observing the experience in the management of the Office of the Historian of Havana and other heritage cities in the Latin American context. Their contributions are valuable since they can be generalized to the modalities protected by the Law.

It is necessary to warn that the Revolutionary Historical Law, conformed by Laws 1 and 2 of 1977, did not offer precise channels for heritage management. Therefore, all the management actions that took place during its validity were based on the strong Cuban political will and the social programs of rehabilitation and renovation of housing, especially in the centers of cities and heritage and historical sites. A positive example of this has been the integral revitalization of Havana's Historic Center, carried out by the OHCH⁴⁴⁸.

The management of Cuban heritage began without the support of a special norm in this area. However, a special legal jurisdiction was adopted for its execution by the OHCH, made up of a significant number of administrative norms that supported the decentralization of competencies⁴⁴⁹. This corpus juris has undergone modifications that add new areas under the administration of the OHCH⁴⁵⁰ and others that expand the procedures to be carried out by this

⁴⁴⁷ RODRÍGUEZ, P., *supra* n. 294, 29- 37.

⁴⁴⁸ Leading entity founded in 1938. In 1981, it is responsible for the five-year planning of its work in the city of Havana. It is attached to the Council of State and reports on its activities to the authorities of the Municipal Administration.

⁴⁴⁹ It has cultural competencies over the entire city of Havana and the administration of the cultural process in the territory it intervenes in or manages.

⁴⁵⁰ Malecón Tradicional was included by Decree-Law 216 of January 31, 2001, of the Council of State; Chinatown was included using Agreement 4942 of 2003 of the Executive Committee of the Council of Ministers.

institution⁴⁵¹. In this experience, there is a dispersion of regulations around the management developed by the Office, all of which can lead to structural disharmony and lack of uniformity, which limits its generalization.

Through this model, the creation of institutional structures and a business system that provides economic-financial resources to support the management activity⁴⁵², grouped and controlled by the Financial Directorate of the OHCH⁴⁵³, has been novel. Aspects that have been extended to the provinces of Camagüey, Sancti Spíritus, Cienfuegos, and Santiago de Cuba⁴⁵⁴, so it was necessary to dictate a legal norm regulating the essential aspects of the elements and phases of the management system for the entire national territory.

The proposed Law presented to the Cuban National Assembly in 2022, models an institutional management system, open to other models according to the postulates regulated in Section Thirteen. However, the binding instruments of work and control of these forms are not specified.

The third of the Titles is dedicated to declaring the subjects involved in the management, by the objectives of the Law, proposed in the first article, clause d. However, from the reading of its statements, we can see a considerable number of functions and competencies granted to administrative structures that go beyond management, linked to preservation, use, mobility mechanisms, promotion, and safeguarding. These are issues that should be part of the organic framework where the system of legal protection to be provided to the Cuban Cultural Heritage and the Cultural Heritage of the Nation is established. It is also noted that the National Systems of Protected Areas and Documentary Management and Archives are declared as managers⁴⁵⁵, when from the reading of the following articles the subjects in charge of the management

⁴⁵¹ Resolution 294 of 2007 of the Ministry of Economy and Planning, authorizes the OHCH to grant in the areas prioritized for conservation and areas that may be prioritized in the future, licenses for land use; changes of use; Technical Opinions; Micro-location; Preliminary Work License; Construction License and Usable Habitable.

⁴⁵² Resolution 38 of 1997, Resolution 405 of 2001, and Resolution 48 of 2004, all repealed by Resolution 175 of 2004, all of the Ministry of Finance and Prices.

⁴⁵³ Compañía Turística Habaguanex S.A. (1994); Agencia de Viajes San Cristóbal S.A. (1995); Empresa D'Leone S.A. (1996); Inmobiliaria Fénix S.A. (1996) and Inmobiliaria Áurea S.A. (1996). The institutional system also includes construction companies and those specialized in planning and investments.

⁴⁵⁴ Camagüey, Santiago de Cuba, Cienfuegos, Sancti Spíritus.

⁴⁵⁵ *Vid.* Tenth and Eleventh Sections.

would be the National Coordinating Board of Protected Areas and the National Archive.

Chapter III regulates aspects related to the functions, classification, composition, goods, and collections of the Museums. These precepts contain expressions inappropriate to the context of the regulations promulgated in Title III on management. They mix these regulations with the activities of museums in favor of heritage management. All this can lead to confusion and misunderstandings, as it does not place the reader and future executor of the regulation in the activities that museums carry out in the context of management.

The definition of management stated in Article 97 includes control, which is one of the phases of management, and transmission to future generations, which is one of the purposes of preservation and safeguarding, in the axes of administration.

The distinctive features of the management of intangible manifestations are stated and the details of the tangible assets associated or not with them are omitted. In this sense, it is stated that the main instrument is the Agreement between the bearers and the Council of the Municipal Administration⁴⁵⁶, ignoring the role played by the managers who are not part of the Administration, whose interests, obligations, and responsibilities must be set out in such an important document.

As for the Management Plan, as a programmatic and planning instrument, the requirement to comply with the execution and monitoring phases is omitted. Regarding the latter, the tools for the control and follow-up of the activity must be specified.

We wish to highlight the provisions of the Regulation, in its rules number 194 and 195.2.2.2, to determine the structure that the Monuments will have to be managed. A Unit will be created for this purpose and will be subject to the institutional system of the territory where it is located. It also outlines flexibility as a principle of action of the entity to achieve the expected goals.

In the Regulations, as in the text of Law 155, the functions and attributes of the National Council of Cultural Heritage are mixed in the Sections and Titles

⁴⁵⁶ *Vid.* Article 98 clause a.

whose denomination indicates that they will regulate heritage management. Articles 205.1, 210, and 211, specifically, regulate matters concerning importation and exportation and the actions of the customs authorities in such cases. It is possible to perfect the wording of this body of law before it enters into force.

Finally, concerning the measures of administrative promotion as a means of revaluation of heritage assets, the scope of the Cuban legal framework preceding Law 155 of 2022 did not directly regulate sections aimed at revaluing the Cuban heritage. However, from the reading of the first article of Law 1 of 1977, which regulated the possibility of establishing other suitable means for the protection of cultural property, the participation of state and private-public sector entities in the conservation or restoration work that the National or Provincial Commissions of Monuments coordinated and directed could be instrumented⁴⁵⁷. In the same sense, the normative development related to the functions of the Commission for the Safeguarding of the Cuban Intangible Cultural Heritage was derived⁴⁵⁸.

The measures of administrative intervention concerning the advising of the conservation, restoration, and patrimonial investigation works were formulated as functions of the patrimonial structures⁴⁵⁹. Other legal statements formulated them directly directed to the activities related to the archaeological prospection carried out by groups of amateurs⁴⁶⁰; others in an indirect way, mixed with the enumeration of the faculties of the patrimonial owners or possessors⁴⁶¹.

The forced expropriation in the Cuban legal system was projected as a mechanism for the acquisition of patrimonial goods in favor of the State⁴⁶². The Cuban legislator had determined the assumptions of its use basically to preserve them⁴⁶³.

⁴⁵⁷ *Vid.* Law 2 of 1977, Article 13; Decree 55 of 1979, Regulation of Law 2, Article 21.

⁴⁵⁸ *Vid.* Resolution 126 of 2004 issued by the Minister of Culture, Section Two, numeral 11.

⁴⁵⁹ *Vid.* Decree 118 of 1983, Regulation of Law 1 of 1977, articles 7, paragraphs f, g and j, 30; Law 2 of 1977, articles 4, numeral 1, 2, 4 and 6 and article 8, numeral 1, 2 and 5.

⁴⁶⁰ *Vid.* Decree 55 of 1979, Regulation of Law 2 of 1977, articles 79 and 81.

⁴⁶¹ *Vid.* Decree 118 of 1986, Regulation of Law 1 of 1977, articles 33 and 40; Decree 55 of 1979, Regulation of Law 2 of 1977, articles 23, 24, 67, 70, 71 and 86.

⁴⁶² *Vid.* Law 2 of 1977, Article 10; Decree 55 of 1979, Regulation of Law 2, Article 31, second paragraph.

⁴⁶³ *Vid.* Resolution 126 of 2004 of the Minister of Culture, Section Two, numbers 7, 8, and 10.

The measures of promotion directed to the spreading, education, and investigation were projected as functions of the National and Provincial Commissions of Monuments⁴⁶⁴. In the field of intangible cultural heritage, the creation of a National Documentation Center for these manifestations is also planned.

The new legislative proposal lacks statements that specify the administrative promotion measures in favor of the enhancement of Cuban cultural heritage, even though the principles it embodies are conceived to promote the prosperity of citizens and sustainable development through the knowledge, appreciation, and enjoyment of cultural heritage. It is, likewise, an absence incongruent with the State's responsibilities declared in the eleventh article.

Notwithstanding the above, it is indirectly understood that technical advisory measures are glimpsed in the articles that grant functions to the structures involved in the protection of cultural heritage since they establish that they will adopt whatever measures are needed to guarantee its preservation⁴⁶⁵.

3.3. Towards the improvement of the Cuban legal framework for the protection of cultural heritage

Given the universal character of the values contained in the patrimonial goods and the specific ones that allude to the individual characteristics of the Cuban nationality, which in turn represent the world cultural diversity that must be protected, it is believed that it is possible to "translate" the universal concepts reflected in the guidelines proposed in the second chapter to the Cuban socialist socio-political scenario. For their adaptation to the Cuban context, and taking into account the inadequacies of the legal framework that limit heritage protection, it is suggested that they be improved as follows:

I. Regarding the methodological, legal, and extra-legal foundations, which will contextualize the political, social, scientific, and normative scope of the legal system:

⁴⁶⁴ *Vid.* Decree 55 of 1979, Regulation of Law 2 of 1977, articles 20 and 82.

⁴⁶⁵ To mention only: articles 85 paragraphs b, 95, 106 paragraphs a, k, l, q, r, t and u; 107.1; 113 paragraph c; 117 paragraphs h, j and k; 121 paragraphs d and f; 127; 154 paragraphs g and j.

1. Special attention shall be paid to what is related to the Cuban cultural policy and the Bases of the National Economic and Social Development Plan until 2030;
2. The Cuban and foreign legal doctrine and the rules of the common law that sustain the legal order;
3. The relevant technical and scientific aspects taken into account to ensure its viability;
4. The form of reception of the International Law coming from UNESCO of which Cuba is a signatory and the probable reservations that the Cuban State has presented to these and that directly affect the protection of the Cuban cultural heritage, and; the methodological guidelines derived from the specialized and regional international organisms that affect the determination of the elements, mechanisms, and legal contents;
5. The legal adequacy of the norms for the protection of cultural heritage with the mandates of Constitutional Law concerning: the values of respect for cultural diversity and cultural identity, citizen participation, the rights to the enjoyment of property, education, a healthy environment and access to prior information on the consumption of quality goods and services; its relation with precepts of the Civil Law in force, especially those related to the real rights of ownership, co-ownership, preferential acquisition rights, the system of acquisition of rights over goods, the causes of extinction of such rights, and; the mechanisms not foreseen in the Intellectual Property order related to the groups or communities as bearers of cultural intangible goods and the activities related to the commercialization of the patrimonial pieces in the national territory and outside of it.

II. Concerning the object of protection and the scope of the legal system, it is required:

1. to expand the object of the legal framework, not only aimed at protecting and safeguarding but also at conserving, managing, and revaluing the declared heritage properties and the properties located in the Protection and Buffer Zones;
2. To specify the values that the legal system will promote. Among them, are those regulated in the Constitution: identity, cultural diversity, individual and collective well-being and solidarity, and those specific to the subject matter:

universality, identity, memory, truthfulness, authenticity, integrity, productive use, and solidarity;

3. Heritage assets which, due to their territorial location or their actual materialization or recreation, are in the possession of several public or private subjects, it must be foreseen that action agreements be established to determine the cooperative actions aimed at their conservation, use, management, and enhancement.

III. The main definitions to be regulated will determine those terms that for the correct application of the law acquire a more precise or different meaning than that which the term has in common usage.

Those of general application shall be grouped in a section, including cultural heritage and its different meanings or classifications, environment, protection zone, buffer zone, community, protection, safeguarding declaration, intervention, enhancement, and management.

The definitions of inventory, catalog, conservation, rehabilitation, restoration, managers, museums, carriers, export, import, illicit heritage property, archaeological excavations, and fortuitous discoveries, should be placed at the beginning of the related grouping.

The definitions containing theoretical-doctrinal arguments will be placed in the annexes of the norm. We wish to highlight preventive conservation and anastylosis.

IV. Concerning the content of the general protection and the protection to be given to certain cultural properties, spaces, and processes:

Protection will be defined as the set of administrative and legal measures aimed at the recognition, conservation, preservation, safeguarding, and enhancement of the tangible and intangible heritage assets administratively recognized and of the assets, dynamics, and spaces located in their surroundings.

Cultural assets that are in the process of being declared and those included in their surroundings will be subject to temporary protection, similar to that of assets that have already been recognized.

Cultural manifestations whose authors are alive and which possess relevant values will be recognized as cultural heritage on an exceptional basis, taking into account the consent of their owner and the passage of at least 25 years since their creation.

2. The protection of cultural heritage shall be governed by the principles of unity of the regime for the safeguarding of cultural property, public protection, cooperation, citizen participation, sustainable management, exhaustive control of the cultural property, and protection against infringements.

The content of the right of ownership over heritage property shall be specified, with special reference to its limits and limitations. The exercise of powers shall be limited in its use, enjoyment, disposition, management, and revaluation, due to the exceptional public interest value they contain and which merit their conservation and transmission to future generations.

In the content of the right of ownership over state, property declared cultural heritage, the participation and collaboration of public and private entities and agents that favor its conservation, safeguarding, management, and enhancement must be allowed. For this purpose, agreements or pacts will be drawn up to establish the actions and responsibilities of the parties involved.

The powers of the right of ownership over the assets found in the Protection Zones and Buffer Zones will be limited in terms of their disposition and management. The treatment to be given to them will be reflected in the Management Plans of the declared patrimonial assets.

4. The cases in which the real rights of preferential acquisition and forced expropriation will be enforced will be determined, especially derived from the illicit traffic of cultural goods, and negligence in the conservation, safeguarding, and enhancement of the value.

5. The treatment of discoveries made as a result of scientific research, archaeological excavations, or based on chance occurrences or the carrying out of constructive actions will be specified. A reward shall be established for the last two cases.

6. The demolition of ruinous heritage assets will have an exceptional character, specifying the protocol to be followed and the heritage authorities involved. The ruins will be submitted to the control and supervision of the patrimonial authorities.

V. Regarding the structures and entities involved in the protection of cultural heritage, as well as the mechanisms to be used in its protection:

1. The structures involved in the protection of the cultural heritage shall be determined whether they are proper to the system of the Ministry of Culture,

other public state and private entities, highlighting those that will develop the inventory and cataloging, patrimonialization;

2. Their functions will be determined by the mechanisms of guardianship, through the conception of a cycle that includes the planning, control, follow-up, and evaluation of its implementation.

3. They will specify the procedures that favor the cooperation and active participation of the communities and the private sector, especially regarding the nomination, conservation, use, commercialization, control of the disposition of the cultural pieces, management, and enhancement.

4. The mechanisms shall be regulated in terms of describing the procedures, deadlines, instances, and their effects. They will deal with the recognition of heritage manifestations -including those of identification and declarations of heritage status-; those related to the control of the use, enjoyment, disposition, and material and value preservation of heritage assets; those related to safeguarding, including research, education, communication, and management of heritage assets, and those linked to the enhancement of value.

-Regarding the identification of heritage values through the general inventory and cataloging for properties declared Cultural Heritage of the Nation. Establish the obligation to create the Lists of Cultural Heritage at Risk or Threat and those requiring Urgent Safeguarding Measures;

- Referring to patrimonialization, its three phases will be modeled: nomination with a participative approach to citizenship, the procedure of selection and evaluation of the meaning, and the conclusive stage. The instances, deadlines, and effects must be specified, especially the notification procedure to the interested parties.

The procedure for the delimitation of the surroundings of the recognized heritage properties will be determined, either based on spatial criteria or by the relationship that exists between this and those.

As for the process of revocation of the status granted, the grounds for initiating the procedure and the parties responsible for excluding the cultural manifestations will be determined. The terms and effects of the procedure will be determined.

-Regarding the control of use, the rights, duties, and obligations of the owners, the administrative entities, and the users of the heritage properties and those located in the Protection and/or Buffer Zones must be determined.

-Regarding the enjoyment of the patrimonial pieces, the right of public visit will be configured, whose content includes the public or popular action in the administrative route, to demand access to its enjoyment and the obligation of the holders of patrimonial goods to allow and facilitate its appreciation, inspection and previously planned study.

-Concerning the disposition, special regulation will be made to the material actions of fragmentation, division, addition, change of use, reuse, reconvention or reuse, or any action of transformation. Actions derived from cultural tourism and the commercialization of heritage property will be subject to obtaining authorization and receiving specialized advice for their development.

- The general measures and mechanisms related to preventive conservation, curative conservation, and restoration must be established. Citizen participation in the initiation, development, and end of the execution of the interventions must be defined. The measures aimed at archaeological and underwater assets, ruins, and intangible heritage manifestations will be specified in terms of their materiality and the survival of their creative, performative, and transmission processes.

-Measures and mechanisms will be devised to cover export and import actions, beyond customs control, and the treatment to be given to stolen goods and those presumed to be of illicit provenance. The requirements for the realization of dispositive legal transactions of purchase and sale, transfer, exchange, and loan, as for the obtaining of authorizations, their formalization, and annotation in the administrative registries will be specified. The right of reappropriation of the repatriated patrimonial goods will be dimensioned, especially the institutional guarantees that control and verify their insertion and adaptation in the community that receives them.

- About safeguarding, its content and scope will be specified, based on the establishment of a set of measures and cooperative actions of protection developed by the State and its dependencies, heritage owners, and social groups carrying them, on the intangible heritage values and the material goods and cultural spaces associated to them. It will include measures for

documentation, research, protection, promotion, enhancement, transmission, and revitalization. The treatment to be given to tangible assets linked to intangible manifestations and the defense of the intangible values underlying the tangible heritage will be planned.

It is necessary to determine the creation of the Registry of Good Safeguarding Practices. The rules and principles for the establishment of coordination relations with public and private entities and organizations for educational, research, and promotional purposes will be defined.

- It is necessary to define heritage management as the set of processes or actions whose purpose is the administration and revaluation of heritage assets, with the intervention of the managers entitled to do so. The measures for the activation of the cultural heritage must be indicated. How the State promotes, examines, controls, and protects the management must be specified; the legal instruments that link the interests of the subjects involved; its elements, especially the institutional framework and the resources; the instruments tending to the planning, control, and follow-up of the management; the means for the peaceful settlement of disputes arising during management, considering mediation as the most suitable model for this purpose; outlining the conduct of human resources in the management framework through the creation of Codes of Conduct for users, volunteers, managers, and the professional performance evaluation system; determining the sources of financial resources and the means of protecting intellectual resources.

- Regarding the enhancement of cultural heritage, it would be praiseworthy to conceive a set of measures of an economic and financial nature, advice, and technical assistance; those aimed at raising finance and resources for the preservation, use, and enjoyment of cultural heritage, emphasizing the instruments of collaboration agreements or public-private partnerships, sponsorship contracts, the figures of patronage, sponsorship and its consequent system of rewards; honorary awards, which establish prizes, distinctions, and other recognitions, emphasizing the establishment of a system of recognition of skills and knowledge relevant to the safeguarding of cultural heritage in individuals, groups or communities, and; measures that promote the enjoyment of and access to heritage assets through education, dissemination

and safeguarding and associated structures, through institutional cooperation, private initiative, the role of cultural volunteers and citizen participation.

VI. The administrative sanctioning regime will be extended to properties located in the surroundings of heritage properties and will contain the principles on which it is based. It shall also regulate:

1. The obligation to periodically inspect the patrimonial goods and the obligation to denounce deposited in the citizens, the civil servants, and the public authorities;
2. The terms and formalities for the substantiation of the sanctioning procedure shall be determined; the precautionary and preventive measures and the means of challenging the administrative decisions adopted shall be determined;
3. The infractions of the civil servants and the administered about the obligations, duties, responsibilities, functions, and rights regulated;
4. The sanctions to be imposed shall be expanded, in terms of providing for the possibility of establishing measures of non-repetition: concerning teaching, training, carrying out awareness campaigns aimed at the population and social tasks of valorization of cultural spaces and assets; measures of satisfaction, including public apologies and commemorative acts related to heritage assets and their values, and; of rehabilitation, aimed at the recovery/repair of heritage assets.

Conclusions of the Chapter

During the development of this chapter, a characterization of the current Cuban regulatory framework for the protection of cultural heritage was obtained, which reflects a set of inadequacies as follows:

1. Regarding its elements:
 - It does not develop what pertains to the values present in the 2019 Constitution such as respect for cultural diversity and identity; it does not specify the values that it will propitiate or will be useful in its application;
 - It does not dimension the content of the constitutional right to enjoyment and access to cultural heritage and to participate in the cultural and artistic life of the Cuban nation; the content of the right of ownership over the Cuban cultural heritage is built from the enunciation of the obligations, limitations, and prohibitions of the holders and bearers; it is omissive in specifying the possibilities of action of the holders of heritage assets, especially linked to the

reevaluation measures, which propitiate the obtaining of technical-economic aids for the preservation and adequate management of heritage assets.

- It does not provide for the protection of tangible and intangible assets; it does not provide for the treatment of the environment and cultural processes and spaces; it does not determine the procedures for the delimitation of heritage environments, nor the instruments that contribute to their balance and to the maintenance of the environment and the values they entail;

- There are certain lexicographic and clarifying definitions, without being arranged in a special section; lack of precision of definitions related to actions aimed at preservation and conservation, such as intervention, rehabilitation, conservation, and preventive conservation; the existence of terminological innovation concerning the holders of intangible assets that it calls bearers;

- It does not recognize the principles of exhaustive control of the patrimonial property and contraventional protection; the principles of participation and sustainable management lack formulations that specify the mechanisms of participation not only of the citizens but also of other social organizations in pursuit of the defense of cultural heritage; the mandates related to the cooperation and coordination of actions between state entities and others of different nature are missing;

- Existence of vagueness concerning the functions of state agencies, as they are mixed with management actions;

- It does not regulate the mechanisms of preservation, reevaluation, promotion, and the elements of the sanctioning regime related to infractions and sanctions; lack of regulation of alternative mechanisms for conflict resolution on the occasion of the application of the law and during actions aimed at its protection. Concerning the conception of the legal mechanisms for the protection of cultural property, it is noted that:

- It does not conceive the Urgent Safeguarding Lists and Best Practices for heritage manifestations of a tangible nature;

- It does not provide for the activation of inventory or cataloging procedures for the assets included within the Cultural Heritage of the Nation;

- Lack of regulation of the treatment to be received in the Central Registry or Lists of National and Local Monuments by the assets located in the Protection and Buffer Zones;

- Lack of provisions regarding the effects derived from the declaration that recognizes a cultural property as part of the cultural heritage and Cultural Heritage of the Nation;
- It omits to regulate the aspects derived from the publicity of the entity in charge of the inventory and the functions related to the safeguarding of the information it possesses;
- Incomplete and inaccurate regulation of the phases related to the patrimonialization of the goods that integrate the Cultural Heritage of the Nation;
- Absence of statements that order the use of the assets located in the Protection and Buffer Zones and of legal formulations that regulate the use of heritage in the tourism industry;
- It does not develop precepts relative to the preservation of the patrimonial goods, nor does it conceive the treatment to grant to the material goods and the cultural spaces associated with the immaterial manifestations;
- It does not regulate the assumptions of findings derived from the realization of works and interventions in real estate, nor does it make any allusion to measures or categories related to preventive conservation;
- Lack of pronouncements regarding the import and export of cultural goods that present relevant values and are not part of the cultural heritage;
- It does not specify the requirements to prove the lawfulness of imports, nor the treatment to be given to declared stolen goods and non-inventoried goods that have significant heritage values for the Cuban identity;
- Absence of regulation of precepts related to the right of reappropriation of repatriated cultural property;
- It does not provide for the execution of legal transactions of exchange, transfer, and loans on movable patrimonial property;
- It does not provide for the execution of acts transferring ownership of declared real estate and those located in the Protection and Buffer Zone;
- It omits to regulate the measures related to the transmission, diffusion, and communication proper to the safeguarding;
- It mixes the recognition of the subjects legitimized for the management of cultural heritage with functions and competencies granted to administrative structures linked to the preservation, use, mobility mechanisms, promotion, and safeguarding;

- Presence of inaccurate provisions regarding the recognition of managers of natural, documentary, and archival assets;
- Inaccuracy in the provisions related to the axes, phases, purposes, and instruments of management; - Lack of precepts that revalue the Cuban cultural heritage, allowing the action of public or private actors through the contribution of financial resources or their knowledge and skills in conservation or restoration.

The above corroborates the importance of using in the process of creation and evaluation of the protective legal regime of Cuban heritage assets, the guidelines offered in the second chapter contextualized to the shortcomings of the Cuban legal order described above. They must be conveniently adapted to the Cuban legal reality and regulations. The extent that these guidelines are clearly defined, the greater will be the tendency to effectively protect Cuban patrimonial assets and to ensure that they fulfill the social functions assigned to them, thus fulfilling the hypothesis put forward.

CONCLUSIONS

CONCLUSIONS

FIRST: The characterization of the legal system for the protection of cultural heritage allowed identifying the methodological, legal, and extra-legal foundations for its redesign to fulfill its functions of consolidating the national, regional, and local cultural identity, being a resource that favors the social progress of present generations, as well as transmitting values to future generations. All this, based on its elements and starting point in the definition of cultural heritage, is the set of cultural goods of material and immaterial nature that society has received as heritage and that constitute significant elements of their identity as peoples; with its values of universality, identity, memory, veracity, authenticity, integrity, respect for cultural diversity, productive use and solidarity and under the principles of unity of the regime of guardianship, public guardianship of cultural property, cooperation, citizen participation, sustainable management and comprehensive control of cultural property. Also from the responsibility of the institutions, with the protagonism of the State and the created registries, of which their functions and obligations are determined, in a normative set, where the prohibition or limitation of certain acts also predominates, delimiting the content and scope of the protection that will be dispensed to the cultural goods.

SECOND: The historical analysis confirmed the evolution of the notion, content, and scope of legal protection, conformed by the technical, administrative, and legal measures referred to the preservation, safeguarding, and enhancement, directed to the patrimonial properties, their environment, and towards the processes and dynamics that make possible their existence and transmission to future generations, in which the participation of the communities, possessor groups, and the public and private entities have a primordial role.

THIRD: The theoretical systematization of the mechanisms of the legal system for the protection of cultural heritage made it possible to identify its content. The mechanisms of identification, delimit the process of patrimonialization and the methodology and tools to follow in the inventory of the tangible and intangible pieces. The mechanisms that control the properties and values of heritage assets refer to the use, enjoyment, internal and international mobility, and preservation of heritage assets. Safeguarding encompasses transmission, education, dissemination, communication, and heritage management

measures for tangible and intangible assets, surrounding spaces, and the social processes and dynamics associated with them. The mechanisms of enhancement, on the other hand, aim at increasing the values of cultural assets, through the establishment of measures of an economic-financial nature, technical assistance, recognition, education, and participation of citizens and other entities in their custody, promotion and dissemination.

FOURTH: From the exegetical and comparative study of the normative formulations of the protection of cultural heritage in the selected national regimes, the following tendencies are revealed: 1. inclination towards the determination of a set of paradigmatic principles that transversal the processes and structures concerning cultural heritage; 2. they contain an accumulation of relevant definitions in the application and effectiveness of the legal order: cultural heritage, protection, safeguard, patrimonial management, enhancement, declaration and intervention; 3. They conceive fragmented protection taking into account the physical nature of the heritage assets; 4. The object of legal regulation is the preservation of heritage assets; 5. They dimension the functions, obligations, and responsibilities of the state authorities responsible for their protection, in particular, they highlight the creation of the registry entities in charge of the identification of the cultural manifestations that compose the heritage, and; 6. The determination of the mechanisms for their identification, recognition, preservation, disposition, safeguarding, valorization, and the administrative sanctioning regime.

FIFTH: By the previously identified fundamentals, theoretical guidelines were designed that favor the fulfillment of the functions of cultural heritage. They are susceptible to being used in the normative process and the valuation of the legal order of protection of the cultural heritage so that the patrimonial goods fulfill the social functions that are assigned to them so that the hypothesis raised is fulfilled. These are divided into six groups:

1. Guidelines relating to methodological, legal, and extra-legal foundations, which will have the purpose of contextualizing in the political, social, scientific, and normative spheres the legal order;

Guidelines that delimit the object of protection and the scope of the legal system;

3. Guidelines concerning the main definitions that facilitate the application of the legal system. 4;

Guidelines that delimit the content of the general protection and specific cultural properties, spaces, and processes;

Guidelines aimed at determining the structures and entities involved in the protection of cultural heritage, as well as the mechanisms to be used in its protection; and;

Guidelines that adjust the actions of the Administration and the administration in favor of the compliance of the legal order and the protection of the cultural heritage and the goods located in its surroundings.

SIXTH: Among the inadequacies that threaten the social functions of heritage assets in Cuba and the compliance and effectiveness of the legal framework, the following stand out: the lack of correspondence with the Constitution, by not regulating the protective mechanisms of human rights linked to cultural heritage in the Cuban constitutional text; the limited scope of protection, by fixing it in identifying, registering and managing cultural heritage, as well as dividing protection for tangible assets and intangible manifestations; the formulation of a legal definition of cultural heritage based on classifying assets according to their physical nature; The lack of content on the right of ownership of heritage assets and the limitations to the ownership of assets located in the Protection and Buffer Zones, the use, enjoyment, disposition, preservation, material and procedural elements of the sanctioning regime; incomplete development of the norm, as there are several essential procedures that have not been developed: preservation, enhancement, phases, management mechanisms and instruments; absence of mechanisms and instruments for citizen participation; rules that treat tangible assets associated with intangible manifestations; deficient formulation of safeguarding mechanisms concerning recognition, education, transmission and dissemination; existence of terminological innovations not legitimized by current international law with transcendence to the effectiveness of protection; the recognition of the subjects legitimized for the management of cultural heritage is mixed with the functions and competencies granted to administrative structures linked to preservation, use, mobility mechanisms, promotion and safeguarding; the presence of inaccurate provisions regarding the recognition of the managers of natural, documentary

and archival assets; inaccuracy in the provisions related to the axes, phases, purposes and instruments of management.

The above corroborates the importance of using the guidelines offered in the second chapter in the process of creation and evaluation of the protective legal regime of Cuban heritage assets, to protect them effectively and to ensure that they fulfill the functions assigned to them in Cuban society, thus fulfilling the hypothesis put forward.

RECOMMENDATIONS

FIRST: To the Committee on Constitutional and Legal Affairs of the National Assembly of People's Power of the Republic of Cuba, so that in the exercise of the functions conferred to it by Article 108 Clause c) of the Cuban Constitution of 2019, they may be valued, in future modifications of the Cuban legal system:

1. The adoption of a General Law regulating the administrative sanctioning process.
2. The modification of the Cuban Civil Code, about the recognition of the principles and content of the right of joint ownership in common and the specifications of the different cases of community, especially on property recognized as cultural heritage.

SECOND: To the Committee on Constitutional and Legal Affairs of the National Assembly of People's Power of the Republic of Cuba, so that in the exercise of the functions conferred to them by Article 108, paragraph c) of the Cuban Constitution of 2019, the following bases be evaluated in future modifications or improvement of the legal framework for the protection of the Cuban cultural heritage:

1. Expand the object of the Law in terms of determining the measures for the revaluation of cultural heritage.
2. To conceive legal guardianship as a means of protecting and safeguarding the recognized heritage values and assets and the assets located in the Protection and Buffer Zones, the processes of production and recreation of heritage assets, and the spaces associated with them.
3. To conceive in the content of the protection the procedures, mechanisms, measures, and instruments tending to the control of the use, enjoyment, disposition, education, preservation, transmission, dissemination, and revaluation of the tangible and intangible cultural heritage.
4. To dimension the human rights linked to cultural heritage recognized in the Cuban constitutional text of 2019.
5. To dimension the content of the right of ownership over heritage assets and the limitations to the ownership of assets located in the Protection and Buffer Zones.
6. To establish the different assumptions and the treatment to be given to the findings of assets that have heritage values.

7. Determine the structures involved in the protection of cultural heritage and their functions, according to the protection procedures and mechanisms, establishing the role in the control, follow-up, and evaluation of the implementation of the measures and the development of the procedures.
8. To complete the regulation of the procedures and determine the mechanisms and instruments for preservation, enhancement, and management phases.
9. To determine the treatment to be given to the tangible assets and spaces associated with the recognized intangible manifestations.
10. To formulate the principles and instances responsible for developing the mechanisms of safeguarding concerning the education, transmission, and diffusion of the heritage manifestations.
11. To include in the administrative sanctioning regime in matters of cultural heritage, its principles, infractions, and consequences.
12. Review and, if necessary, harmonize the innovations used in national legislation that are not legitimized by current international law with transcendence in the protection of cultural heritage.
13. To implement procedures and ways of citizen participation and of the mass, political and social organizations, associations, and foundations, of the voluntary work and public and private entities in the identification, nomination, and valuation of the process of patrimonialization; in the actions of use, enjoyment, preservation, safeguarding and management, and control of the fulfillment of the legal frame of the administrative sanctioning regime.

THIRD: To the Ministry of Culture of the Republic of Cuba, so that, in the exercise of the attributions conferred to it, it issues instructions to:

1. Promote the elaboration of the Regulations of the General Law for the Protection of the Cuban Cultural Heritage and of as many norms as may be required for the application, follow-up, and monitoring of the legal framework;
2. To provide technical advice to state bodies and government agencies on preservation and safeguarding methods;
3. Coordinate inter-institutional cooperation actions at the national and international levels;
4. To develop a training program that encourages citizen participation in the protection of Cuba's cultural heritage;

5. To manage bilateral collaboration mechanisms for technical and financial assistance to promote the preservation and integral safeguarding of Cuban patrimonial assets.

FOURTH: To the Union of Jurists, Universities and Faculties and Departments of the country where Bachelor's Degrees in Law, Art, and Architecture are studied, and to the scientific community in general, so that:

1. to continue developing, supporting, and facilitating the development of research that studies and deepens what is related to landscape, City Center, environment, archaeological, submerged, industrial and modern cultural heritage, cultural tourism, cultural volunteering, governance in the protection of cultural heritage, mechanisms of inclusion in legislation that favor diversity, resilience, and citizen participation, the scope of heritage protection from Intellectual Property, the procedural dimension of cultural heritage protection due to civil and State legal liability;

2. To work on the improvement of the programs of the subjects whose content is linked to the protection of the Cuban cultural heritage and in the formation of a competent professional committed to the ideals and principles of the Revolution;

3. To continue perfecting the post-graduate education programs aimed at legal operators and agencies of the Administration of Justice regarding the mechanisms and system of protection of Cuban heritage assets, with special mention to professionals, specialists, and technicians of the Offices of the Historian and/or Architects, Provincial and Municipal Centers of Cultural Heritage, Provincial and Municipal Directorates of Municipalities and Directorates of Physical Planning.

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ANNEXS

ANNEX 1**Terms included in the definition of cultural heritage according to the bibliographic review.**

Author	Heritage as a whole	Assets	Values	Cultural	Potentiates identity	Usefulness and social impact	Collective ownership
BONFILL, G.	x	x	x		x	x	x
BRANES, R.	x	x			x		x
DURÁN, L.	x	x	x	x	x		x
GARCÍA, M. P.	x	x	x	x	x	x	x
PRATS, LI.	x	x	x	x			x
GARCÍA, A.	x	x	x	x	x	x	x
CARRASCO, C.	x	x	x	x	x	x	x
PALMA, J. M.	X	X	X	X	X	X	
GÓMEZ, L.	X	X	X	X	X	X	
CHAFONS, C.	X	X	X	X	X		
VALDES, A.D.	X	X	X				

ANNEX 2

Values in comparative regulations.

Country	Universality	Identity	Memory	Veracity	Authenticity	Integrity	Respecto for cultural diversity	Productive use	Solidarity
Germany						Art. 18			
Belgium Decree on the protection of the movable cultural heritage of the Flemish Community of 24 January 2003.		Art. 3 and 4.1							
Bolivia						Art. 14.V y 54.4	Art. 5	Art. 5	Art. 15.2, 21 y 47.
Colombia						Art. 11.1			
Ecuador				Art. 16	Art. 16	Art. 13			Art. 6
Spain		Art. 76.a y e		Art. 39.2	Art. 39.3	Art. 36.2		Art. 39.1	
Italy		Art. 4, 7 bis, 131.2	Art. 1.2			Art. 20, 45, 146		Art.1.3, 131.5	Art.1.4, 131.6, 133
				Art. 38.1	Art. 20b	Art. 20 a			Art. V, second paragraph
Portugal	Art. 2.3	Art. 1.1, 5	Art. 2.4		Art. 2.3				

ANNEX 3

Guiding principles according to normative and methodological instruments from International Law

Instrument	Respect of the cultural heritage	Publicity	Free circulation	Effective financing	International cooperation
1954 Convention	Art. 4	Art. 6, 10, 16, 17 y 25	Art. 12 y 13		Preamble art. 22 y 25
Recommendation for archaeological excavations, 1956.	x				Preamble
Committee of Ministers of the European Union, Resolution (76) 28, 1976.	x				
Convention for the Safeguarding of the European Architectural Heritage, 1985		Art. 17-21		Art. 6	
European Convention on the Protection of the Archaeological Heritage, 1992		x	Art. 10	x	
Charter for the Protection and Management of Archaeological Heritage, 1990 "Icomos Charter".		Art. 7			
1960 Recommendation concerning the most effective means of making museums accessible to all.		Paragraphs I.1, II.2, V.15			
1970 Convention		Art. 5 and 10	X		Art.9
Recommendation concerning the International Exchange of Cultural Property, 1976.			x		
International Council of Museums, in its Professional Code of Ethics, 1986.			Paragraph 3.2		
1972 Convention		Art. 5d, 11, 27-29		Art. 5 and 26	Preamble, art. 6
European Convention on Infringements of Cultural Property, 1985.					Art. 5 and 7
2001 Convention		Art. 19, numbers 2,3,4 and 20			Eleventh preambular paragraph and articles 2.2, 19, 21 and 25
2003 Convention		Art. 1c, 12,14,16 y 17	Art. 13 d) i), 14 y 15	Art. 21 f) y g) y del 25 al 28	Art. 19

ANNEX 4

Reflection of extra-systematic principles in international normative and methodological instruments

Instrument	Respect for State sovereignty	<i>In situ</i> conservation	Subsidiarity
1954 Convention	Art. 4.1 y 5.1	Art. 3, 4.3, 4.4, 6 y 7	Art. 8, 13, 18 y 23
Recommendation for Archaeological Excavations, 1985	Paragraph I.2		
Venice Charter, 1964		Art. 7	
European Union Treaty			Art. 3B
1970 Convention		Art.5 d.	
1972 Convention	Art. 4, 5, 6.3, 11.3 y 11.4	Art. 3, 4, 5, 6.2, 11.1, 27 y 29.1	Art.5b, 7 y 17
Recommendation November 16, 1972		Paragraph V	
Declaration of Amsterdam, Council of the European Union, 1975	x		
Recommendation concerning the safeguarding of historic areas and their role in contemporary life, 1976.			x
Convention for the Safeguarding of the European Architectural Heritage, 1985.	Preamble and art. 5	Art.5	x
Charter for the Protection and Management of Archaeological Heritage, 1990 "Icomos Charter".		Art.5	
European Convention on the Protection of Archaeological Heritage, 1992.	Art.5	x	x
2001 Convention	13o paragraph from Preamble and art. 1.2,1.8, 2.11, 10.2, 10.4, 10.6, 13, 15, 19.3 y 19.4	Art. 2.5, 7, 9, 10.1, 10.2, 10.3, 10.6, 11- 14, 16- 18 y 22	Art. 2.4 y 6.1
2003 Convention	5o paragraph from Preamble, art. 2.5, 17.1 y 35	Art. 11, 13 b y 35	7o paragraph from Preamble, art. 1b, 11b, 14 a ii) y 15

ANNEX 5

Specific principles according to comparative law

Country	Principles	Indirect recognize principles
Germany Act on the Protection of Cultural Property (Cultural Property Protection Act - KGSG) of 31 July 2016	<p>Section 5 General principles As part of Germany's cultural heritage, national cultural property shall be subject to protection against removal from the federal territory under this Act.</p> <p>-Section 20 Free movement of cultural property Cultural property may be imported, exported and placed on the market unless this Act or any other national legislation such as directly applicable legal acts of the European Union, in particular, provide for bans or restrictions.</p> <p>-Section 40 Ban on the placing on the market (1) It shall be prohibited to place cultural property on the market that has been lost, unlawfully excavated or unlawfully imported.</p> <p>-Section 49 Claims for return under public law (1) Claims for return of cultural property pursuant to this Part shall be public-law claims. Civil law claims shall remain unaffected. (2) The person obliged to return cultural property shall be the direct possessor, alternatively the direct holder.</p> <p>-(1) If cultural property from abroad is lent temporarily for a public exhibition or other forms of public presentation, including prior restoration for this purpose, or for research purposes to a scientific institution or an institution preserving cultural property, the supreme Land authority may, in consultation with the supreme federal authority responsible for culture and the media, issue a legally binding commitment to return cultural property for the duration of the cultural property's presence in the federal territory. The duration of the legally binding commitment shall not exceed two years.</p>	<p>-Chapter 9 Provisions on criminal and administrative sanctions</p> <p>-Section 83 Criminal provision</p>
Argentina Law 25.743 of June 26, 2003, pat. Archaeological and Palaeontological		<p>-Art. 4, it is the power of the State to exercise the defense and protection of the archaeological and paleontological heritage.</p> <p>-Crimes, 46- 49.</p>
Bolivia Law No. 530, of May 23, 2014 Bolivian Cultural Heritage Law.	<p>Article 3</p> <p>-Legality and Presumption of Legitimacy.</p> <p>-Normative Hierarchy</p> <p>-Integrity. The Bolivian Cultural Heritage is integral, the interdependence that exists between its immaterial and material components must be preserved and safeguarded in the management, planning and execution of policies.</p> <p>- Interculturality.</p> <p>-Sustainability.</p> <p>-Decolonization.</p> <p>-Transversally.</p> <p>-Sustainable development</p> <p>-Coordination</p> <p>Awareness-raisin</p>	
2014 Bolivian Cultural Heritage Law	Art. 2, second paragraph: decentralization, diversity,	

	participation, coordination and autonomy. Art. 58, complementarity, the areas in charge must establish forms of collaboration and cooperation that allow the articulation of management plans.	
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<p>Ecuador 2004 Code</p>		<p>Art. 17, second paragraph: Art. 34, the Institute shall ensure that the cultural reality of the country is not distorted through control and supervision. Art. 40- The Institute will be able to impose precautionary measures, sanctions, expropriate or confiscate cultural goods. Art. 41, the Institute will be able to delegate the faculties of control to the entities and authorities it deems convenient.</p>
<p>Spain 16 Law, 1985</p>		<p>-Art. 1.1, protection, enhancement and transmission to future generations of Spanish Historical Heritage. -Art. 2.1, the State Administration shall protect such property against illicit exportation and spoliation. -Art. 2.2, the State Administration shall adopt the necessary measures to facilitate its collaboration with the other public authorities and their collaboration with each other, as well as to collect and provide as much information as may be necessary for the purposes indicated in the previous paragraph. Art. 7, The Town Councils shall cooperate with the competent bodies for the execution of this Law in the conservation and custody of Spanish Historical Heritage within their municipal boundaries, adopting the appropriate measures to avoid its deterioration, loss or destruction. -Art. 2.3, The State Administration is also responsible for the international dissemination of knowledge of the property forming part of Spanish Historical Heritage, the recovery of such property when it has been illegally exported and the exchange of cultural, technical and scientific information with other States and international organizations. Art. 75-79-Administrative infractions and their sanctions.</p>
<p>Spain 10 Law, 2015</p>	<p>Art. 3 a) The principles and values contained in the Spanish Constitution and in the European Union Law, as well as, in general, the fundamental rights and duties established therein, especially freedom of expression. b) The principle of equality and non-discrimination. c) The protagonism of the communities that are bearers of the intangible cultural heritage, as holders, maintainers and legitimate users of the same, as well as mutual recognition and respect. d) The principle of participation, with the purpose of respecting, maintaining and promoting the protagonism of groups, bearer communities, organizations and citizen associations in the recreation, transmission and dissemination of intangible cultural heritage. e) The principle of accessibility, which makes possible the knowledge and enjoyment of intangible cultural</p>	

	<p>manifestations and the cultural enrichment of all citizens without prejudice to customary practices governing access to certain aspects of such manifestations.</p> <p>f) The principle of cultural communication as a guarantor of interaction, recognition, rapprochement, and mutual understanding and enrichment among intangible cultural manifestations, through collaborative action between the Public Administrations and the communities or groups that are bearers of intangible cultural property.</p> <p>g) The inherent dynamism of intangible cultural heritage, which by nature is a living heritage, recreated and experienced in the present time and responds to practices in continuous change, carried out by individuals, groups, and communities.</p> <p>h) The sustainability of intangible cultural manifestations, avoiding quantitative and qualitative alterations of their cultural elements that are alien to the communities that carry and manage them. Tourist activities must never infringe on the essential characteristics or the development of the manifestations themselves, so that their appropriation and public enjoyment can be made compatible with respect for the assets and their protagonists.</p> <p>i) The consideration of the intangible cultural dimension of the movable and immovable goods that are object of protection as cultural goods.</p> <p>j) The actions that are adopted to safeguard the protected legal goods must in any case respect the principles of guarantee of the freedom of establishment and the freedom of movement established in the regulations in force in the matter of market unity.</p>	
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France Code du Patrimoine		Penal and administrative measures: L624-1 to 624-7; L641-1 to 642-2
Italy Code of the cultural property and landscape of 2004	<p>Art. 1, strengthen and protect cultural heritage in accordance with the constitutional postulates referred to in Art. 117.</p> <p>Art. 5, cooperation of the regions and other public institutions.</p> <p>Art. 6.3- the State favors participation in the revaluation.</p> <p>Art. 18- The surveillance of the patrimony corresponds to the Ministry who will coordinate with the regions.</p> <p>Art. 19 - The superintendent may give notice of inspections of cultural property.</p> <p>Art. 132- International cooperation for the conservation and revaluation of the landscape.</p> <p>Art. 160- 181- Administrative sanctions</p>	
Perú Law 28296, 2014		<p>Art. V- The goods belonging to the cultural heritage are protected by the State and are subject to this law. Common responsibility to comply with the legal provisions. Active participation in the protection of the heritage.</p> <p>Art. 25, The Executive Branch encourages the celebration of international agreements for the execution of conservation, restoration and dissemination projects of properties belonging to the National Cultural Heritage through non-reimbursable international cooperation. It also promotes the signing of international agreements to reinforce the fight against illicit trafficking of such property and, if necessary, to achieve its repatriation.</p> <p>Art. 28-Regional governments shall provide assistance and cooperation to protect the patrimony.</p> <p>Art. 29-The municipalities shall cooperate with the Institute; they shall dictate the necessary measures to preserve the patrimony, and; they shall elaborate plans and strategies in this respect.</p>
Portugal Lei 107/2001 de 8 de Setembro	<p>Artigo 3.o Tarefa fundamental do Estado 1 — Através da salvaguarda e valorização do património cultural, deve o Estado assegurar a transmissão de uma herança nacional cuja continuidade e enriquecimento unirá as gerações num percurso civilizacional singular.</p> <p>2 — O Estado protege e valoriza o património cultural como instrumento primacial de realização da dignidade da pessoa humana, objecto de direitos fundamentais, meio ao serviço da democratização da cultura e esteio da independência e da identidade nacionais.</p> <p>3 — O conhecimento, estudo, protecção, valorização e divulgação do património cultural constituem um dever do Estado, das Regiões Autónomas e das autarquias locais.</p> <p>Artigo 4.o Contratualização da administração do património cultural 1 — Nos termos da lei, o Estado, as Regiões Autónomas e as autarquias</p>	

	<p>locais podem celebrar com detentores particulares de bens culturais, outras entidades interessadas na preservação e valorização de bens culturais ou empresas especializadas acordos para efeito da prossecução de interesses públicos na área do património cultural.</p> <p>Artigo 5.o Identidades culturais 1 — No âmbito das suas relações bilaterais ou multilaterais com os países lusófonos, o Estado Português contribui para a preservação e valorização daquele património cultural, sito no território nacional ou fora dele, que testemunhe capítulos da história comum. 2 — O Estado Português contribui, ainda, para a preservação e salvaguarda do património cultural sito fora do espaço lusófono que constitua testemunho de especial importância de civilização e de cultura portuguesas. 3 — A política do património cultural visa, em termos específicos, a conservação e salvaguarda do património cultural de importância europeia e do património cultural de valor universal excepcional, em particular quando se trate de bens culturais que integrem o património cultural português ou que com este apresentem conexões significativas.</p> <p>Artigo 6.o Outros princípios gerais Para além de outros princípios presentes nesta lei, a política do património cultural obedece aos princípios gerais de: a) Inventariação, assegurando-se o levantamento sistemático, actualizado e tendencialmente exaustivo dos bens culturais existentes com vista à respectiva identificação; b) Planeamento, assegurando que os instrumentos e recursos mobilizados e as medidas adaptadas resultam de uma prévia e adequada planificação e programação; c) Coordenação, articulando e compatibilizando o património cultural com as restantes políticas que se dirigem a idênticos ou conexos interesses públicos e privados, em especial as políticas de ordenamento do território, de ambiente, de educação e formação, de apoio à criação cultural e de turismo; d) Eficiência, garantindo padrões adequados de cumprimento das imposições vigentes e dos objectivos previstos e estabelecidos; e) Inspeção e prevenção, impedindo, mediante a instituição de organismos, processos e controlos adequados, a desfiguração, degradação ou perda de elementos integrantes do património cultural; f) Informação, promovendo a recolha sistemática de dados e facultando o respectivo acesso tanto aos cidadãos e organismos interessados como às competentes organizações internacionais; g) Equidade, assegurando a justa repartição dos</p>	
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	<p>encargos, ónus e benefícios decorrentes da aplicação do regime de protecção e valorização do património cultural;</p> <p>Responsabilidade, garantindo prévia e sistemática ponderação das intervenções e dos actos susceptíveis de afectar a integridade ou circulação lícita de elementos integrantes do património cultural; i)</p> <p>Cooperação internacional, reconhecendo e dando efectividade aos deveres de colaboração, informação e assistência internacional.</p>	
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<p>Venezuela Law for the defense of cultural heritage of 1993.</p>	<p>Art. 2, the defense of cultural heritage is an obligation of the State. Art. 4, the heritage is inalienable and imprescriptible.</p>	<p>Art. 45-48, criminal and administrative sanctions.</p>
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ANNEX 6

Other actors contributing to the protection of cultural heritage in comparative law.

Country/Disposition	Normative text
<p>Germany Act on the Protection of Cultural Property (Cultural Property Protection Act – KGSG) Cultural Property Protection Act of 31 July 2016.</p>	<p>Section 4.3. The Federation and the Länder shall establish an administrative committee to coordinate the fulfilment of major tasks under this Act and to guarantee uniform administrative practice in the Länder, in particular to 1. Agree on principles of publishing the registers of cultural property of national significance pursuant to Section 16; 2. Agree on principles of the joint procedure pursuant to Section 79; and 3. Foster cooperation between the Federation and the Länder.</p> <p>Part 2 Procedure and obligations to cooperate; publication Section 14 Registration procedure (2) The supreme Land authorities shall convene expert committees which are not subject to directions. The committees shall be composed of five experts and shall be appointed for five years, with the possibility to be reappointed. Competent persons from institutions preserving cultural property, from research, art and antiquarian book trades, and private collectors shall be considered when appointing experts. Associations and organizations from these areas may suggest persons to be appointed. One competent person shall be appointed at the suggestion of the supreme federal authority responsible for culture and the media. The composition of the Länder expert committees shall be published on the Internet portal pursuant to Section 4. Before making a decision, the committees may also hear competent external persons.</p> <p>Section 15 Obligations to cooperate during the registration procedure (1) During the procedure for entry in a register of cultural property of national significance the owner, alternatively the direct possessor, shall be obliged 1. To provide the supreme Land authority with the information necessary to identify the cultural property, information on ownership and on the place of storage; 2. To provide the supreme Land authority with appropriate pictures of the cultural property, or to allow the competent supreme Land authority or a person authorized by the competent supreme Land authority to make such pictures; and 3. To grant or delegate to the supreme Land authority non-exclusive, permanent, global rights to reproduce and make publicly available the identifying information and pictures in order to use them for the register of cultural property of national significance. Copyright rules shall remain unaffected. (2) During the registration procedure, the owner, alternatively the direct possessor, shall be obliged to immediately notify the supreme Land authority of any changes to the information provided pursuant to subsection 1, first sentence, no. 1.</p>
<p>Belgium Government of Flanders, on the organization and financing of a cultural heritage policy, 2003.</p>	<p>Art. 38, support center for the activity of museums, archives, libraries, documentation center through support tasks and practical development and image and communication.</p>
<p>Bolivia Law 530, 2014</p>	<p>Art. 4 34. Museo. Es la institución cultural permanente al servicio de la sociedad y de su desarrollo, abierta al público y que adquiere, conserva, investiga, comunica, difunde y exhibe el patrimonio inmaterial y material de los pueblos y su entorno natural, con propósitos de estudio, educación y deleite al público. 35. Museo Comunitario. Es un espacio cultural creado por los miembros de una comunidad, en el sentido no restringido de su significado, donde se construye autoconocimiento colectivo, propiciando la reflexión, la crítica y la creatividad, reafirmando los valores materiales y simbólicos de su Patrimonio Cultural, reconocido según sus usos y costumbres.</p> <p>Art. 17.I, las Fuerzas Armadas y la Policía se constituyen en custodios del patrimonio del pueblo boliviano.</p> <p>Art. 18.I. las universidades, centros de estudios e investigación se constituyen en custodios del patrimonio del pueblo boliviano.</p> <p>Art. 21, es obligación de todo ciudadano o extranjero residente: proteger y custodiar el patrimonio; respetar el patrimonio; denunciar toda falta contra el patrimonio a las autoridades.</p> <p>Art. 22, son reconocidos los museos como espacio culturales y naturales con funciones de adquirir, registrar, proteger, conservar, investigar, exponer y difundir.</p> <p>Art. 24, se establece una gestión descentralizada en coordinación con todos los órganos del Estado y niveles del Gobierno, con la participación y control social correspondiente.</p> <p>Art. 47.2, todas las personas naturales y colectivas están obligadas a tomar las medidas que tiendan a la conservación del patrimonio cultural.</p>
<p>Ecuador Code 24, 2004</p>	<p>Art. 6, las personas naturales y jurídicas, las Fuerzas Públicas y el Servicio de Vigilancia Aduanero están obligados a prestar su colaboración en la defensa y conservación del patrimonio.</p> <p>Art. 8, obligación de poner en conocimiento de los administradores, propietarios y tenedores de bienes patrimoniales.</p>

	<p>Art. 15, las municipalidades de ciudades que posean centros históricos, dictarán ordenanzas o reglamentos que los protejan.</p> <p>Art. 19, cualquier persona puede denunciar infracciones a la ley. En caso de veracidad tendrá una gratificación del 25 % del valor de la multa impuesta.</p> <p>Art. 28, la fuerza Pública y el Servicio Aduanero velará porque los trabajos arqueológicos o paleontológica tengan autorización de las autoridades competentes.</p> <p>Art. 39, los museos podrán canjear excepcionalmente objetos con otros bienes que se encuentren en el exterior.</p> <p>Art. 65, cada departamento ministerial garantizarán el funcionamiento adecuado de los archivos ministeriales.</p>
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<p>Spain Law 16, 1985</p>	<p>Art. 3, facilitan la comunicación e intercambio de programas de actuación e información por cada Comunidad Autónoma, un representante. Art.4, el Consejo de Gobierno de cada Comunidad Autónoma podrá tomar medidas para evitar el expolio. Art. 6, organismo competentes para la ejecución de la ley, los que cada Comunidad Autónoma tenga para proteger el patrimonio cultural. Art. 7, los Ayuntamientos cooperarán con los organismos competentes, adoptando las medidas pertinentes para evitar su deterioro, pérdida o destrucción. Notificarán cualquier daño o amenaza sobre su función. Art. 8, las personas que observen cualquier daño o riesgo sobre el patrimonio cultural deberá ponerlo en conocimiento de la Administración. Art. 10, cualquier persona puede incoar expediente para la declaración del bien.</p>
<p>Italy Code 2004</p>	<p>Art. 5.1, los otros entes públicos territoriales cooperan con el Ministerio en el ejercicio de la tutela como se regula en esta Ley. 5.6- la función administrativa de tutela del paisaje será ejercitado, de modo que siempre será asegurado la presencia de un nivel de gobierno lograr la finalidad de la tutela.</p>
<p>Peru Law 28296, 2004</p>	<p>Art. V- El Estado, los ciudadanos y los titulares de derechos sobre bienes del patrimonio de la nación, tienen la responsabilidad en común de vigilar el debido cumplimiento del régimen legal de protección. El Estado promoverá la participación activa del sector privado en la conservación, restauración, exhibición y difusión del patrimonio peruano. Art. 28, los Gobiernos locales prestarán asistencia y cooperación a los organismos estatales responsables de proteger el patrimonio cultural.</p>
<p>Portugal Lei 107, 2004</p>	<p>Artigo 4.o Contratualização da administração do património cultural 1 — Nos termos da lei, o Estado, as Regiões Autónomas e as autarquias locais podem celebrar com detentores particulares de bens culturais, outras entidades interessadas na preservação e valorização de bens culturais ou empresas especializadas acordos para efeito da prossecução de interesses públicos na área do património cultural. 2 — Entre outros, os instrumentos referidos no número anterior podem ter por objecto a colaboração recíproca para fins de identificação, reconhecimento, conservação, segurança, restauro, valorização e divulgação de bens culturais, bem como a concessão ou delegação de tarefas, desde que não envolvam a habilitação para a prática de actos administrativos de classificação. 3 — Com as pessoas colectivas de direito público e de direito privado detentoras de acervos de bens culturais de excepção de importância e com as entidades incumbidas da respectiva representação podem o Estado, as Regiões Autónomas ou as autarquias locais acordar fórmulas institucionais de composição mista destinadas a canalizar de modo concertado, planificado e expedito as respectivas relações no domínio da aplicação da presente lei e da sua legislação de desenvolvimento. 4 — O disposto nos números anteriores aplica-se a todas as confissões religiosas e no que diz respeito à Igreja Católica, enquanto entidade detentora de uma notável parte dos bens que integram o património cultural português, com as adaptações e os aditamentos decorrentes do cumprimento pelo Estado do regime dos bens de propriedade da Igreja Católica ou de propriedade do Estado e com afectação permanente ao serviço da Igreja Católica, definido pela Concordata entre a República Portuguesa e a Santa Sé. Artigo 8.o Colaboração entre a Administração Pública e os particulares As pessoas colectivas de direito público colaborarão com os detentores de bens culturais, por forma que estes possam conjugar os seus interesses e iniciativas com a actuação pública, à luz dos objectivos de protecção e valorização do património cultural, e beneficiem de contrapartidas de apoio técnico e financeiro e de incentivos fiscais. Artigo 10.o Estruturas associativas de defesa do património cultural 1 — Para além dos contributos individuais, a participação dos cidadãos interessados na gestão efectiva do património cultural pela Administração Pública poderã ser assegurada por estruturas associativas, Designadamente institutos culturais, associações de defesa do património cultural, e outras organizações de direito associativo. 2 — Para os efeitos da presente lei, entende-se por estruturas associativas de defesa do património cultural as associações sem fins lucrativos dotadas de personalidade jurídica constituídas nos termos da lei geral e em cujos estatutos conste como objectivo a defesa e a valorização do património cultural ou deste e do património natural, conservação da natureza e promoção da qualidade de vida. 3 — As estruturas associativas de defesa do património cultural são de âmbito nacional, regional ou local e de representatividade genérica ou específica, nos termos da lei que as regular. 4 — As estruturas associativas de defesa do património cultural gozam do direito de participação, informação e acção popular, nos termos da presente lei, da lei que as regular e da lei geral. 5 — A Administração Pública e as estruturas associativas de defesa do património cultural colaborarão em planos e acções que respeitem à protecção e à valorização do património cultural. 6 — As administrações</p>

	<p>central, regional e local poderão ajustar com as estruturas associativas de defesa do património cultural formas de apoio a iniciativas levadas a cabo por estas últimas, em particular no domínio da informação e formação dos cidadãos. 7 — As estruturas associativas de defesa do património cultural gozam dos incentivos e benefícios fiscais atribuídos pela legislação tributária às pessoas colectivas de utilidade pública administrativa.</p> <p>Artigo 11.o Dever de preservação, defesa e valorização do património cultural 1 — Todos têm o dever de preservar o património cultural, não atentando contra a integridade dos bens culturais e não contribuindo para a sua saída do território nacional em termos não permitidos pela 2 — Todos têm o dever de defender e conservar o património cultural, impedindo, no âmbito das faculdades jurídicas próprias, em especial, a destruição, deterioração ou perda de bens culturais. 3 — Todos têm o dever de valorizar o património cultural, sem prejuízo dos seus direitos, agindo, na medida das respectivas capacidades, com o fito da divulgação, acesso à fruição e enriquecimento dos valores culturais que nele se manifestam.</p> <p>Artigo 93.o Atribuições comuns, colaboração e auxílio interadministrativo 1 — As Regiões Autónomas e os municípios participam com o Estado na tarefa fundamental de proteger e valorizar o património cultural do povo português, prosseguido por todos como atribuição comum, ainda que diferenciada nas respectivas concretizações e sem prejuízo da discriminação das competências dos órgãos de cada tipo de ente. 2 — Sem prejuízo das reservas das atribuições e competências próprias, o Estado, as Regiões Autónomas e os municípios articularão entre si a adopção e execução das providências necessárias à realização de fins estabelecidos na presente lei e os respectivos órgãos assegurarão a prestação recíproca de auxílio entre os serviços e instituições deles dependentes no tocante à circulação de informação e à prática de actos materiais que requeiram conhecimentos ou utensilagem especializados. 3 — O Estado, as Regiões Autónomas e os municípios constituirão fundos e estabelecerão regimes de participação, de modo a enquadrar as intervenções de conservação, restauro, manutenção e valorização dos bens culturais por eles classificados ou inventariados e, tanto quanto possível, de bens culturais que, não obstante haverem sido objecto de um tal acto por parte de outra pessoa colectiva pública, se encontrem na respectiva área de jurisdição.</p>
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Venezuela	-
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ANNEX 7

Roles of States from the legal comparison of special national regimes for the protection of cultural heritage.

Country	
<p>Germany Act on the Protection of Cultural Property (Cultural Property Protection Act – KGSG) Cultural Property Protection Act of 31 July 2016 (Federal Law Gazette [BGBl.] Part I p. 1914)</p>	<p>Section 3 Competent authorities (1) Within the meaning of this Act, competent authorities shall be the competent authorities of the Länder, unless this Act provides otherwise. The Länder shall appoint the competent authorities by law or statutory instrument. (2) The central authority of the Federal Republic of Germany within the meaning of Article 4 of Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) (OJ L 159, 28.5.2014, p. 1), corrected by Corrigendum to Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (OJ L 147, 12.6.2015, p. 24), for contacts and cooperation among member states is the supreme federal authority responsible for culture and the media.</p> <p>Section 4 Internet portal on the protection of cultural property (1) The supreme federal authority responsible for culture and the media shall be obliged to establish and maintain a central Internet portal on the protection of cultural property. The Internet portal shall serve in particular to inform the public and to create transparency regarding the protection of cultural property.</p> <p>Section 7 Entry in a register of cultural property of national significance (1) The supreme Land authority shall enter cultural property in a register of cultural property of national significance.</p> <p>(3) The supreme Land authority of the Land where the cultural property is kept upon initiation of the registration procedure shall be responsible for entry in a register of cultural property of national significance. Responsibility shall remain with the supreme Land authority until the decision on registration becomes incontestable.</p> <p>Section 8 Subsequent registration (1) The competent supreme Land authority may enter cultural property exported in violation of Section 24 in a register of cultural property of national significance even after the export if the requirements pursuant to Section 7 (1) and (2) are fulfilled. (2) Local responsibility for registration shall depend on the last permanent location in the federal territory. If such location cannot be identified, the supreme federal authority responsible for culture and the media shall appoint the competent supreme Land authority. In the process, the supreme federal authority responsible for culture and the media shall take into account the special connection of the cultural property with a Land for historical or other reasons.</p> <p>(3) The competent supreme Land authority shall forfeit the right of subsequent entry in a register of cultural property of national significance if it fails to initiate the registration procedure within one year of discovering the unlawful export and the new location. (4) Upon initiation of the registration procedure, the cultural property pursuant to subsection 1 shall be considered national cultural property until the decision on registration becomes incontestable.</p>
<p>Argentina Law 25.743 of June 26, 2003, pat. Archaeological and Palaeontological</p>	<p>Art.4, funciones exclusivas del Estado: tutelar el patrimonio, para ello adoptará las medidas tendentes a su preservación, investigación y fomentar la difusión; ejercer la defensa y custodia del patrimonio, mediante la prevención y sanción de importación y exportación ilegales.</p> <p>Art. 5, el Instituto de antropología y pensamiento latinoamericano para el patrimonio arqueológico y otro organismos para el paleontológico. Sus funciones: crear un registro nacional y uno de infractores y reincidentes.</p> <p>Art. 6, facultades de las provincias y el gobierno de Buenos Aires: crear IOS organismos que controlará todo lo relativo al patrimonio arqueológico y paleontológico; registra los yacimientos; crear registros de infractores; otorgar concesiones para las prospecciones; adecuar sus legislaciones; procurar la creación de delegaciones en sus territorios; comunicar al organismo superior las concesiones dadas y las exportaciones autorizadas.</p> <p>Art. 7, son funciones concurrentes de todos los anteriores organismos concretar políticas y medidas uniforme en todo el territorio.</p> <p>Art. 8, el poder de policía podrá ejercitarse concurrente entre varias instancias responsables del patrimonio cultural.</p>
<p>Belgium Government of Flanders, on the organization and financing of a cultural heritage policy.</p>	<p>Art. 9, The Government of Flanders may allocate an annual subsidy to optimize the operation of the museum. The Government shall classify museums.</p> <p>Art. 17, 26, 29, 32, 35 conclude a heritage pact to develop a sustainable and integrated policy for the protection of cultural heritage, heritage editions, exhibitions related to cultural heritage, national and international development projects.</p> <p>Art. 40, the Flemish government will develop management agreements with the</p>

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<p>Bolivia Law 530, 2014</p>	<p>Art. 13. IV. The central level of the State, through the governing body, in coordination with the autonomous territorial entities, will generate the necessary conditions for the management of these cultural assets, supporting their registration, conservation, protection, research, restoration and dissemination.</p> <p>Art. 14. In cases where the tangible immovable cultural heritage is in a situation of abandonment, deterioration and/or destruction, the central level of the State, through the governing body, in coordination with the autonomous territorial entities, may proceed to expropriate the tangible immovable cultural property in accordance with the provisions of the Political Constitution of the State and the laws.</p> <p>Art. 15. II. In the public interest and for the proper conservation of the heritage, the central level of the State, through the governing body, in coordination with the autonomous territorial entities, shall cooperate in the conservation, protection and exhibition.</p> <p>Art. 15. II. The Plurinational State of Bolivia shall generate the necessary conditions for the management of the cultural assets of the church and religious congregations, supporting their registration, security, conservation, protection, research, restoration, dissemination and training of human resources.</p> <p>Art. 44, the Ministry of Cultures and Tourism, according to their competences, will exercise the legal actions of recovery.</p> <p>Art. 45, the Ministry of Culture and Tourism, the Ministry of Foreign Affairs, the diplomatic representations, and the State Attorney's Office are responsible for the repatriation in cases of illegal exportation, permanence or commercialization.</p>
<p>Colombia Law 397, 1997</p>	<p>Art. 1, el Estado impulsará y promoverá los procesos culturales en el marco del respeto por la diversidad; censurará el contenido de las manifestaciones culturales; garantizará que los pueblos originarios promuevan, desarrollen y transmitan sus manifestaciones culturales; brindará atención a las expresiones culturales caribeñas; protegerá el castellano y promoverá el desarrollo y transmisión de lenguas indígenas; garantizará la libre investigación; garantizará el acceso a la cultura; promoverá la interacción de la cultura nacional con la universal; garantizará el acceso y participación de todos los interesados en el patrimonio cultural, especialmente, los más vulnerables.</p> <p>Art. 7, el consejo de Monumentos es el órgano encargado de asesora al Estado en materia de patrimonio cultural.</p> <p>Art. 57, se crea el Consejo Nacional de Cultura, con las funciones de: promover y recomendar para el cumplimiento de los planes relativos a la cultura; sugerir al Gobierno las medidas para la gestión y protección del patrimonio cultural; asesorar el diseño del plan de protección del patrimonio cultural; conceptuar sobre las materias que le solicite el Estado; vigilar el gasto público en materia del desarrollo cultural.</p> <p>Art. 60, consejos departamentales, distritales y municipales, instancias de concertación entre el Estado y la sociedad civil que asesora al gobierno en la formulación de políticas y planificación de los procesos culturales.</p> <p>Art. 61, objetivos de los Consejos: ídem. Al del Consejo de Cultura.</p> <p>Art. 64, el Ministerio de Cultura es responsable de orientar, coordinar, fomentar, el desarrollo de la educación artística no formal.</p> <p>Art. 66, se crea el Ministerio de Cultura como organismo rector de la cultura, encargado de formular, coordinar, ejecutar y vigilar la política del Estado en materia cultural, bajo el principio de participación.</p>
<p>Ecuador Codification 27, November 19, 2004, Cultural Heritage Law.</p>	<p>Art. 2, aprobar el Reglamento de funcionamiento.</p> <p>Art. 4, el Instituto del Patrimonio Cultural tiene como funciones: investigar, conservar, exhibir, promocionar el patrimonio cultural; regular en Ley toda la actividad; inventariar los bienes declarados patrimonio cultural; efectuar investigaciones antropológicas y regular estas actividades; velar por el correcto cumplimiento de la ley.</p> <p>Art. 12, reglamentar el comercio de los bienes patrimoniales dentro del país. Imponer sanciones ante incumplimiento y demandar ante Juez competente.</p> <p>Art. 17, inspeccionar los lugares donde hubiere bienes patrimoniales.</p>
<p>Spain Law 16, 1985</p>	<p>Art.2, La Administración protegerá los bienes culturales de la exportación ilícita y la expoliación. Adoptará las medidas necesarias para facilitar su colaboración con los restantes poderes públicos y la de estos entre sí. Difundir internacionalmente el conocimiento a nivel internacional; recuperación de los bienes cuando son ilícitamente exportados; intercambio de información cultural con otros Estados y organismos internacionales</p> <p>Art. 34, el Gobierno podrá concertar con otros Estados la permuta de bienes culturales.</p> <p>Art. 42, la Administración competente podrá ejecutar excavaciones en lugares donde se presuman la existencia de yacimientos arqueológicos.</p> <p>Art. 51, la Administración del Estado con las demás Administraciones competentes confeccionará el censo de los bienes bibliográficos.</p> <p>Art. 61, la Administración del Estado podrá crear bibliotecas, archivos y museos. Promoverá el funcionamiento coordinado de todas estas instituciones.</p>

	<p>Art. 62, garantizar el acceso a las bibliotecas, archivos y museos. Art. 67, el Gobierno dispondrá las medidas necesarias para la conservación, rehabilitación, mantenimiento.</p>
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<p>Spain Law 10, 2015</p>	<p>TÍTULO III Competencias de la Administración General del Estado Artículo 11. Competencias. 1. Corresponde a la Administración General del Estado, de conformidad con lo establecido en los artículos 44, 46, 149.1, reglas 1.^a y 28.^a, y 149.2 de la Constitución Española, garantizar la conservación del patrimonio inmaterial español, así como promover el enriquecimiento del mismo y fomentar y tutelar el acceso de todos los ciudadanos a sus diferentes manifestaciones. A tal fin, se adoptarán las medidas necesarias para facilitar su colaboración con los restantes poderes públicos y la de éstos entre sí, así como para recabar y proporcionar cuanta información fuera precisa a los fines de esta ley. 2. Corresponden a la Administración General del Estado, a través del Ministerio de Educación, Cultura y Deporte, en colaboración con las Comunidades Autónomas, las siguientes funciones: a) La propuesta, elaboración, seguimiento y revisión del Plan Nacional de Salvaguardia del Patrimonio Cultural Inmaterial. b) La gestión del Inventario General de Patrimonio Cultural Inmaterial. c) La salvaguardia del patrimonio cultural inmaterial mediante la Declaración de Manifestación Representativa del Patrimonio Cultural Inmaterial, en los términos previstos en esta ley. 3. La Administración General del Estado, sin perjuicio de las competencias propias de las Comunidades Autónomas, cooperará con la acción cultural de las distintas Administraciones Públicas en el marco del artículo 9. A tal efecto, el Estado pondrá al servicio de la comunicación cultural las instituciones museísticas, archivos, bibliotecas y otros centros culturales de su titularidad. 4. Corresponde a la Administración General del Estado y a las Comunidades Autónomas, en el ámbito de sus competencias, la difusión internacional del conocimiento de los bienes del patrimonio cultural inmaterial español, así como el intercambio de información cultural, técnica y científica con los demás Estados y con los Organismos internacionales. En particular, y de conformidad con lo dispuesto en la regla 3.ª del artículo 149.1 de la Constitución Española, corresponde a la Administración General del Estado elevar a la UNESCO las propuestas para la inclusión de bienes culturales inmateriales en la Lista: BOE-A-2015-5794 BOLETÍN OFICIAL DEL ESTADO Núm. 126 Miércoles 27 de mayo de 2015 Sec. I. Pág. 45298 Representativa del Patrimonio Cultural Inmaterial de la Humanidad, en la Lista de bienes que requieren Medidas Urgentes de Salvaguardia, así como los programas, proyectos y actividades de salvaguardia del patrimonio cultural inmaterial que reflejen de modo más adecuado los principios y objetivos de la Convención. De igual modo, corresponde a la Administración General del Estado la formulación, ante el Comité Intergubernamental para la Salvaguardia del Patrimonio Cultural Inmaterial de la UNESCO, de solicitudes de asistencia internacional para la salvaguardia de dicho patrimonio presente en el territorio nacional, así como la remisión de informes periódicos al citado Comité sobre las disposiciones legislativas, reglamentarias o de otra índole que se adopten en aplicación de la Convención para la Salvaguardia del Patrimonio Cultural Inmaterial. La Administración General del Estado podrá promover conjuntamente con otros Estados, la puesta en valor del patrimonio cultural inmaterial compartido, estimulando la promoción de candidaturas ante las Instituciones internacionales competentes.</p>
<p>France Code du patrimoine</p>	<p>Art. L115-1, Article L115-1 La commission scientifique nationale des collections a pour mission de conseiller les personnes publiques ou les personnes privées gestionnaires de fonds régionaux d'art contemporain, dans l'exercice de leurs compétences en matière de déclassement ou de cession de biens culturels appartenant à leurs collections, à l'exception des archives et des fonds de conservation des bibliothèques. A cet effet, la commission : 1° Définit des recommandations en matière de déclassement des biens appartenant aux collections visées aux 2° et 3°, et de cession des biens visés au 4° ; elle peut également être consultée, par les autorités compétentes pour procéder à de tels déclassements ou cessions, sur toute question qui s'y rapporte ; 2° Donne son avis conforme sur les décisions de déclassement de biens appartenant aux collections des musées de France et d'œuvres ou objets inscrits sur l'inventaire du Fonds national d'art contemporain et confiés à la garde du Centre national des arts plastiques ; 3° Donne son avis sur les décisions de déclassement de biens culturels appartenant aux autres collections qui relèvent du domaine public ; 4° Donne son avis sur les décisions de cession des biens appartenant aux collections des personnes privées gestionnaires de fonds régionaux d'art contemporain.</p> <p>TITRE IV: INSTITUTIONS RELATIVES AU PATRIMOINE CULTUREL Chapitre 1er: Centre des monuments nationaux. Article L141-1 Le Centre des monuments nationaux est un établissement public national à caractère administratif. Il a pour mission d'entretenir, conserver et restaurer les monuments nationaux ainsi que leurs collections, dont il a la garde, d'en favoriser la connaissance, de les présenter au public et d'en développer la fréquentation lorsque celle-ci est compatible avec leur conservation et leur utilisation. Par dérogation à l'article L. 621-29-2, il peut également se voir confier la maîtrise d'ouvrage des travaux de restauration sur d'autres monuments historiques appartenant à l'Etat et affectés au ministère chargé de</p>

	<p>la culture. Il est administré par un conseil d'administration et dirigé par un président nommé par décret. Le conseil d'administration est composé de représentants de l'Etat, notamment de membres du Conseil d'Etat et de la Cour des comptes, de personnalités qualifiées, parmi lesquelles figurent des élus locaux et de représentants élus du personnel. Les ressources de l'établissement comprennent notamment les dotations de toute personne publique ou privée, le produit des droits d'entrée et de visites-conférences dans les monuments nationaux, les recettes perçues à l'occasion des expositions et des manifestations artistiques et culturelles, le produit des droits de prises de vues et de tournages, les redevances pour service rendu, les dons et legs et toute autre recette provenant de l'exercice de ses activités. Un décret en Conseil d'Etat détermine les conditions d'application du présent article.</p> <p>Chapitre 2: Cité de l'architecture et du patrimoine. Article L142-1 La Cité de l'architecture et du patrimoine est un établissement public national à caractère industriel et commercial. Elle a pour mission de promouvoir la connaissance du patrimoine et de l'architecture, leur histoire et leur insertion dans les territoires, ainsi que la diffusion de la création architecturale tant en France qu'à l'étranger. Elle participe à la valorisation de la recherche et à la formation des agents publics et des professionnels du patrimoine et de l'architecture. Elle est administrée par un conseil d'administration et dirigée par un président nommé par décret. Le conseil d'administration est composé de représentants de l'Etat, de représentants élus du personnel et de personnalités qualifiées désignées par le ministre chargé de la culture. Un décret en Conseil d'Etat détermine les conditions d'application du présent article.</p>
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<p>Italy Code from 2004</p>	<p>Art. 1.3, lo Stato, la Regione e la Città metropolitana assicurano e sostengono la conservazione e la rivalutazione del patrimonio culturale. Art. 4, per garantire l'esercizio unitario della funzione di tutela, il Ministero per i Beni e le Attività Culturali la eserciterà direttamente o la conferirà alle Regioni. Il Ministero esercita le funzioni di amministrazione fiduciaria sui beni di proprietà dello Stato. In base all'art. 5.6, la funzione di tutela amministrativa del paesaggio è esercitata dal Ministero. Art. 7, il Ministero e altri enti pubblici perseguono il coordinamento, l'armonizzazione e l'integrità dell'attività di rivalutazione del patrimonio culturale. All'art. 8, in materia disciplinare, la competenza è attribuita alle regioni e alle province ad autonomia speciale.</p>
<p>Peru Law 28296, 2014</p>	<p>Art. VII- organismos competentes del Estado: el Instituto Nacional de Cultura, la Biblioteca Nacional y el Archivo General de la Nación. Art. 29, las municipalidades les corresponde: cooperar con los organismos estatales; dictar las medidas administrativas necesarias para la protección del patrimonio; elaborar planes orientados a la protección patrimonial.</p>
<p>Portugal Lei 107/2001 de 8 de Setembro</p>	<p>Artigo 3.o Tarefa fundamental do Estado 1 — Através da salvaguarda e valorização do património cultural, deve o Estado assegurar a transmissão de uma herança nacional cuja continuidade e enriquecimento unirá as gerações num percurso civilizacional singular. 2 — O Estado protege e valoriza o património cultural como instrumento primacial de realização da dignidade da pessoa humana, objecto de direitos fundamentais, meio ao serviço da democratização da cultura e esteio da independência e da identidade nacionais. 3 — O conhecimento, estudo, protecção, valorização e divulgação do património cultural constituem um dever do Estado, das Regiões Autónomas e das autarquias locais. Artigo 5.o Identidades culturais 1 — No âmbito das suas relações bilaterais ou multilaterais com os países lusófonos, o Estado Português contribui para a preservação e valorização daquele património cultural, sito no território nacional ou fora dele, que testemunhe capítulos da história comum. 2 — O Estado Português contribui, ainda, para a preservação e salvaguarda do património cultural sito fora do espaço lusófono que constitua testemunho de especial importância de civilização e de cultura portuguesas. 3 — A política do património cultural visa, em termos específicos, a conservação e salvaguarda do património cultural de importância europeia e do património cultural de valor universal excepcional, em particular quando se trate de bens culturais que integrem o património cultural português ou que com este apresentem conexões significativas. Artigo 12.o Finalidades da protecção e valorização do património cultural 1 — Como tarefa fundamental do Estado e dever dos cidadãos, a protecção e a valorização do património cultural visam: a) Incentivar e assegurar o acesso de todos à fruição cultural; b) Vivificar a identidade cultural comum da Nação Portuguesa e das comunidades regionais e locais a ela pertencentes e fortalecer a consciência da participação histórica do povo português em realidades culturais de âmbito transnacional; c) Promover o aumento do bem-estar social e económico e o desenvolvimento regional e local; d) Defender a qualidade ambiental e paisagística. 2 — Constituem objectivos primários da política de património cultural o conhecimento, a protecção, a valorização e o crescimento dos bens materiais e imateriais de interesse cultural relevante, bem como dos respectivos contextos.</p>
<p>Venezuela Law for the defense of cultural heritage of 1993</p>	<p>Art.5, corresponde al Instituto de Patrimonio cultural todo lo relativo a su defensa. Art. 8, tiene por objeto la identificación, preservación, rehabilitación, defensa, salvaguardia y consolidación de las obras, conjuntos y lugares patrimoniales. Ejercerá funciones de coordinación con los municipios y otras entidades. Art. 10, atribuciones: determinar los bienes que serán considerados patrimonio cultural; establecer los planes de conservación y velar por su ejecución; autorizar investigaciones arqueológicas; autorizar convenios interinstitucionales; organizar el presupuesto interno; regular y dictar las normas relativas a la investigación, restauración, conservación, salvaguarda, defensa, consolidación y reparación de los bienes patrimoniales; actuar como órgano de consulta; actuar como consulta en materia urbanística y de patrimonio cultural; elaborar el inventario general de bienes patrimoniales; crear el Registro Nacional de bienes patrimoniales; realizar notificaciones relativas a la protección del patrimonio cultural; prestar asistencia técnica necesaria; firmar acuerdos internacionales relativos a la preservación de los bienes patrimoniales; autorizar las obras de ejecución en las zonas de protección que circunda al patrimonio cultural; atender las solicitudes de los museos y otras instituciones; levantar el mapa arqueológico y paleontológico de la nación; celebrar convenios de explotación arqueológicos y paleontológicos con instituciones nacionales e internacionales; patrocinar campañas divulgativas que promuevan el patrimonio; notificar a los propietarios patrimoniales de declaratorias administrativas; estimular la</p>

	<p>creación de museos. Estas funciones se harán tomando en cuenta la coordinación con otros Estados.</p> <p>Art. 11, el Consejo consultivo es un órgano asesor del Instituto, que le propone instrumentos, procedimientos y mecanismos necesarios.</p>
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ANNEX 8

Obligations of the State in the protection of cultural heritage, in the light of comparative law

Country/ Legal disposition	Normative text
<p>Germany Act on the Protection of Cultural Property (Cultural Property Protection Act – KGSG) Cultural Property Protection Act of 31 July 2016.</p>	<p>Section 37 Confiscation of seized cultural property (2) The competent authority may have an institution preserving cultural property take the confiscated cultural property into safekeeping. Request for return The request for return shall be filed 1. With the supreme federal authority responsible for culture and the media for a claim of a member state pursuant to Section 50; or 2. Through diplomatic channels with the Federal Foreign Office for claims pursuant to Section 51 to 53.</p> <p>Section 61 Tasks of the Länder (1) The competent authority of a Land shall have the following tasks in particular: 1. undertaking inquiries into cultural property suspected to have been unlawfully removed or unlawfully placed on the market; 2. undertaking inquiries concerning the owner or the direct possessor of the cultural property in question; 3. supporting the requesting member state or state party in undertaking inquiries, especially concerning the owner or the direct possessor of the cultural property in question; 4. conducting or initiating measures preserving the seized cultural property; 5. conducting measures ensuring that the cultural property is actually returned; 6. conducting the administrative mediation procedure between the requesting member state and the person obliged to return the cultural property; and 7. supporting the Federal Government in returning cultural property. (2) The competent authority shall be obliged to provide support pursuant to subsection 1 no. 3 only if, within six months of notification pursuant to Section 62 (1) no. 1, a member state informs the competent authority that the cultural property falls within the meaning of Article 2 no. 1 of Directive 2014/60/EU. If a member state does not provide this information before the deadline expires, the competent authority shall no longer be obliged to take measures pursuant to subsection 1 nos. 4 and 5.</p> <p>Section 62 Tasks of the supreme federal authorities (1) The supreme federal authority responsible for culture and the media shall have the following tasks: 1. notifying the member state concerned of the discovery and seizure of cultural property suspected to have been unlawfully imported; 2. supporting the administrative mediation procedure between the requesting member state and the person obliged to return the cultural property; and 3. informing the central authorities of the other member states if the requesting member state has taken legal action to have the cultural property returned. (2) In cooperation with the supreme federal authority responsible for culture and the media, the Federal Foreign Office shall have the following tasks: 1. notifying the state party concerned of the discovery and seizure of cultural property suspected to have been unlawfully imported; and 2. conducting the administrative mediation procedure between the requesting state party and the person obliged to return the cultural property.</p> <p>Section 79 Joint procedure of the Federation and the Länder (1) The Federation and the Länder shall conduct a joint procedure within the meaning of Section 11 of the E-Government Act to ensure comprehensive protection of national cultural property. They shall be authorized to process information, including personal data, under the joint procedure. (2) Each authority of the Federation and the Länder participating in the joint procedure shall be responsible for the lawfulness of its data collection, data processing and data use. (3) The authorities of the Federation and the Länder participating in the joint procedure shall be subject to the Federal Data Protection Act when using the joint procedure. The competent supervisory authority within the meaning of Section 1 (5), second sentence, of the E-Government Act responsible for verifying compliance with data protection regulations in connection with the joint procedure shall be the Federal Commissioner for Data Protection and Freedom of Information. The responsibility of the Land Commissioner for Data Protection shall remain unaffected by the responsibility of the Federal Commissioner for Data Protection and Freedom of Information. (4) In addition to data needed to identify cultural property, personal data of the owner and, if necessary, the possessor of the national cultural property shall also be processed under the joint procedure. In particular, these data shall include their names and addresses. (5) Details of the joint procedure, in particular</p>

	the bodies responsible for defining, amending, developing and complying with organizational and technical specifications pursuant to Section 11 (4), first sentence, no. 1 of the E-Government Act, shall be governed by binding decisions of the administrative committee pursuant to Section 4 (4).
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<p>Bolivia Law 530, 2014</p>	<p>Art. 12.II. El Estado Plurinacional de Bolivia registrará la propiedad del Patrimonio Cultural Comunitario y Colectivo Inmaterial y Etnográfico, a nombre de la comunidad o las comunidades, o de las naciones y pueblos indígenas originarios campesinos o comunidades interculturales y afrobolivianas, con las restricciones establecidas en la presente Ley y su reglamento.</p> <p>Art. 46, las embajadas, consulados o representaciones de Bolivia en el exterior están obligadas a denunciar la existencia o exhibición no autorizada de patrimonio cultural. El Ministerio de turismo y culturas en el territorio nacional están obligadas a denunciar toda exportación ilegal.</p> <p>Art. 48, en caso de peligro, deterioro, daño o pérdida, el Ministerio de turismo y/o sus comunidades autónomas dispondrán las medidas necesarias, incluso su decomiso. El Ministerio de Turismo y Culturas, el de Relaciones Exteriores y la Procuraduría del Estado dispondrán las medidas que se requieran cuando el patrimonio sea reclamado por otro Estado. El Ministerio de Turismo y Culturas en coordinación con las entidades territoriales autónomas priorizarán la inscripción de las manifestaciones de pueblos originarios en situación de vulnerabilidad.</p>
<p>Colombia Law 397, 1997</p>	<p>Art. 1.5, es obligación del Estado y las personas, valorar, proteger y difundir el patrimonio cultural.</p>
<p>Ecuador Code 27, 2004</p>	<p>Art. 9, retener para uso cultural los bienes arqueológicos hallados, o entregarlos a los museos.</p> <p>Art. 10, actuar como representante del Gobierno para el establecimiento de acuerdos y control de los mismos con el Vaticano.</p> <p>Art. 11, autorizar o no las transferencias de dominio de bienes patrimoniales.</p> <p>Art. 13, autorizar o no modificaciones de los bienes patrimoniales. Imponer multas.</p> <p>Art. 26, el Estado procurará celebrar convenios internacionales en contra del tráfico ilícito de bienes patrimoniales.</p> <p>Art. 32, todo convenio para la realización de investigaciones arqueológicas, incluso los realizados por el Gobierno Nacional deben contar con la autorización del Instituto.</p> <p>Art.33, Conservar por medio de fotografías, cinematografía o grabación sonora, las manifestaciones de grupos étnicos culturalmente homogéneos.</p> <p>Art. 34, velar porque no se distorsione la realidad cultural del país.</p> <p>Art. 40, imponer medidas precautelatorias, expropiar o confiscar para proteger los bienes patrimoniales.</p>
<p>Spain Law 16, 1985</p>	<p>Art.60, los organismos competentes velarán por la elaboración y actualización de los catálogos en las bibliotecas, archivos y museos estatales.</p>
<p>Portugal Lei 107/2001 de 8 de Setembro</p>	<p>Artigo 22.o Deveres especiais da Administração 1 — O Estado deverá promover a existência e adequada estruturação e funcionamento de um sistema nacional de informação do património cultural, através da implantação, compatibilização e progressiva interoperatividade das diferentes redes de bases de dados. 2 — A legislação de desenvolvimento deverá obrigatoriamente regular a constituição, organização e funcionamento das redes nacionais de arquivos, bibliotecas e museus. 3 — Serão assegurados os direitos e as garantias estabelecidas na Constituição e na lei geral em matéria de protecção de dados pessoais e os imperativos de segurança dos bens, designadamente através do estabelecimento de níveis de acesso e gestão adequados. 4 — A administração do património cultural deverá promover a cooperação entre os seus serviços e instituições, a qual poderá incluir a cedência e troca de bens culturais sempre que se trate de integrar ou completar colecções ou fundos de natureza histórica ou de especial interesse literário, artístico, científico ou técnico.</p> <p>Artigo 76.o Deveres especiais das entidades públicas 1 — Constituem particulares deveres do Estado, sem prejuízo do disposto nos estatutos das Regiões Autónomas: a) Criar, manter e actualizar o inventário nacional georreferenciado do património arqueológico imóvel; b) Articular o cadastro da propriedade com o inventário nacional georreferenciado do património arqueológico; c) Estabelecer a disciplina e a fiscalização da actividade de arqueólogo. 2 — Constitui particular dever do Estado e das Regiões Autónomas aprovar os planos anuais de trabalhos arqueológicos. 3 — Constituem particulares deveres da Administração Pública competente no domínio do licenciamento e autorização de operações urbanísticas: a) Certificar-se de que os trabalhos por si autorizados, que envolvam transformação de solos, revolvimento ou</p>

	<p>remoção de terreno no solo, subsolo ou nos meios subaquáticos, bem como a demolição ou modificação de construções, estão em conformidade com a legislação sobre a salvaguarda do património arqueológico; b) Dotar-se de meios humanos e técnicos necessários no domínio da arqueologia ou recorrer a eles sempre que necessário</p> <p>Artigo 92.o Deveres das entidades públicas 1 — Constitui especial dever do Estado e das Regiões Autónomas apoiar iniciativas de terceiros e mobilizar todos os instrumentos de valorização necessários à salvaguarda dos bens imateriais referidos no artigo anterior. 2 — Constitui especial dever das autarquias locais promover e apoiar o conhecimento, a defesa e a valorização dos bens imateriais mais representativos das comunidades respectivas, incluindo os próprios das minorias étnicas que as integram.</p>
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Venezuela Law for the defense of cultural heritage of 1993	Art. 2, la defensa del patrimonio es tarea prioritaria del Estado.
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ANNEX 9

The legal protection of cultural heritage under international law

Normative texts	Principles	Measures	Obligations of the States	Object	Scope
1954 Convention	Respect; cooperation between belligerent States	Safeguarding; respect; use of emblem; inventory of cultural property; special protection: refuges and property inscribed on the "International Register of Cultural Property under Special Protection".	International Register of Cultural Property under Special Protection". Prevent theft, pillage, and vandalism; no retaliatory measures against the cultural property; provide for compliance with the Convention in peacetime; guarantee immunity to property under special protection	Action by States to protect cultural property in wartime situations	Tangible, movable, and immovable cultural property with heritage and instrumental significance.
1970 Convention	Legality; international cooperation; sovereignty; respect for	Export certificate; inventory of property whose disposal would impoverish the nation; publicizing any disappearance of cultural property; restitution procedure; criminal and/or administrative sanctions; claim action for lost or stolen property.	Establish services for the protection of cultural heritage; repress illicit dispositive acts; create scientific and technical institutions for the conservation and enhancement of cultural property; prevent the illicit acquisition of cultural property; report periodically on its performance.	Measures to prohibit the illicit import, export, and transfer of cultural property.	Movable cultural assets

1972 Convention	International assistance and cooperation; sovereignty	Inventory; establishment of World Heritage Lists and "List of World Heritage in Danger; identify, protect, conserve, rehabilitate and transmit to future generations	Identify and delimit the various properties located in its territory and mentioned; adopt a general policy aimed at attributing to the cultural and natural heritage a role in collective life and at integrating the protection of this heritage in general planning programs; (b) to establish within its territory, where such services do not already exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage, with adequate staff and the means to enable them to carry out their tasks; (c) to develop studies and scientific and technical research and to improve methods of intervention which will enable a State to deal with dangers threatening its cultural and natural heritage; (d) to take appropriate legal, scientific, technical, administrative and financial measures for the identification, protection, conservation, presentation and rehabilitation of such heritage; and (e) to facilitate the establishment or development of national or regional centers for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field; (e)	Protection, conservation and enhancement of the cultural and natural heritage.	Movable and immovable cultural and natural assets
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			<p>encourage the establishment of national public and private foundations or associations whose purpose is to stimulate donations for the protection of the cultural and natural heritage;</p> <p>(f) encourage the establishment of national public and private foundations or associations whose purpose is to stimulate donations for the protection of the cultural and natural heritage;</p> <p>(g) encourage the establishment of national public and private foundations or associations whose purpose is to encourage donations for the protection of the cultural and natural heritage</p>		
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<p>Charter of the European Architectural Heritage 1975, ICOMOS</p>	<p>Integrated conservation depends on legal, administrative, financial, and technical measures; cooperation, and public participation; European architectural heritage is the common property of this continent.</p>	<p>Integrated conservation of architectural heritage and its surroundings. Financial aid, incentives, and fiscal measures.</p>	<p>Laws that do not tax integrated conservation will be modified by others that facilitate the achievement of the integrated approach. Administrative staff to advocate this approach. Establish financial resources that contribute to heritage conservation. Facilitate training in the acquisition of technical skills that allow heritage conservation.</p>	<p>Integrated conservation of the European architectural heritage and its surroundings.</p>	<p>European architectural heritage and its surroundings</p>
<p>2001 Convention</p>	<p>Cooperation; in situ conservation; no commercial exploitation; respect; responsible and non-detrimental public access; sovereignty; shared information; peaceful settlement of disputes</p>	<p>Sanctions of seizure of elements of underwater cultural heritage located in its territory, which has been recovered in a non-compliant manner; seizure of underwater cultural heritage located in its territory, which has been recovered in a non-compliant manner; register, protect and take all reasonable measures for the stabilization of seized underwater cultural heritage</p>	<p>Avoid or mitigate any possible negative impact of activities under its jurisdiction incidentally affecting underwater cultural heritage. Regulate and authorize activities directed at underwater cultural heritage in its internal waters, archipelagic waters, and territorial sea. protect underwater cultural heritage in the exclusive economic zone and on the continental shelf; report discoveries and any activity on underwater heritage; prevent the entry into its territory, trade, and possession of underwater cultural heritage illicitly exported and/or recovered; prohibit the use of its territory, including its maritime ports and artificial islands, installations and structures under its exclusive jurisdiction or control, in support</p>	<p>Secure and strengthen underwater heritage.</p>	<p>Underwater heritage more than 100 years old.</p>

			<p>of any activity directed at underwater cultural heritage which is not in conformity; disseminate information on underwater cultural heritage excavated or recovered contrary to this Convention or in violation of other provisions of international law, including, where possible, through the use of appropriate international databases. raising public awareness; training in underwater archaeology</p>		
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2003 Convention	Cooperation and respect, international assistance	<p>"Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission - mainly through formal and non-formal education - and revitalization of this heritage in its various aspects; inventories.</p> <p>A. Representative List of the Intangible Cultural Heritage of Humanity.</p> <p>List of intangible cultural heritage in need of urgent safeguarding measures.</p>	<p>(a) to submit periodic reports; to adopt a general policy aimed at enhancing the role of the intangible cultural heritage in society and integrating its safeguarding into planning programmes; (b) to designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory; (c) to encourage scientific, technical and artistic studies, as well as research methodologies, for effective safeguarding to adopt appropriate legal, technical, administrative and financial measures in order to: (i) encourage the creation or development of new or existing cultural heritage; (ii) promote the safeguarding of the intangible cultural heritage; (iii) promote the safeguarding of the intangible cultural heritage present in its territory; and (iv) adopt appropriate legal, technical, administrative and financial measures for the safeguarding of the intangible cultural heritage present in its territory: (i) encourage the establishment or strengthening of institutions for training in the management of the intangible cultural heritage, as well as the transmission of such heritage in forums and spaces intended for its</p>	Safeguarding intangible cultural heritage	Intangible manifestations
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			<p>manifestation and expression; (ii) ensure access to the intangible cultural heritage, while respecting customary practices governing access to certain aspects of such heritage; (iii) establish institutions for documentation of the intangible cultural heritage and facilitate access thereto. (b) ensure recognition, respect for, and enhancement of the intangible cultural heritage in society, keep the public informed of threats to such heritage and of activities carried out in pursuance of this Convention; (c) promote education concerning the protection of natural spaces and places of collective memory whose existence is indispensable for the expression of the intangible cultural heritage; seek the widest possible participation of the communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and involve them actively in its management.</p>	
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Yamamoto Declaration, 2004	Respect for communities and bearer groups; patrimonial viability; economic benefits Respect for human rights and fundamental freedoms; sovereignty; equal dignity and respect for all cultures; solidarity and international cooperation; the complementarity of economic and cultural aspects of development; sustainable development; equitable access; openness and balance.	Public awareness; formal and informal education; Use of new technologies; integrated safeguarding strategies.		An integrated approach to safeguarding tangible and intangible cultural heritage.	Integrated cultural heritage
2005 Convention	Respect for human rights and fundamental freedoms; sovereignty; equal dignity and respect for all cultures; solidarity and international cooperation; the complementarity of economic and cultural aspects of development; sustainable development; equitable access; openness and balance; - Respect for human rights and fundamental freedoms; sovereignty; equal dignity and respect for all cultures; solidarity and international cooperation; the complementarity of economic and cultural aspects of development; sustainable development; equal access; openness and balance	At the national level: protection and promotion of the diversity of cultural expressions; (b) provide opportunities, in an appropriate manner, for domestic cultural activities and goods and services, among all cultural activities, goods, and services available within the national territory, for their creation, production, distribution, dissemination, and enjoyment; (c) provide domestic independent cultural industries and informal sector activities with effective access to the means of production, dissemination, and distribution of cultural goods and services; (d) to grant public financial assistance; (e) to encourage non-profit organizations, as well as public and private entities, artists and other cultural	Information exchange and transparency; education and public awareness; civil society participation; international cooperation; integration of culture in sustainable development; development cooperation; - Exchange, analysis, and dissemination of information.	Protection and promotion of cultural diversity	Cultural expressions; cultural goods and services; cultural industries

		<p>professionals, to foster and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods, and services, and to stimulate in their activities the creative spirit and spirit of enterprise. (f) to establish and adequately support relevant public service institutions; (g) to support and assist artists and others involved in the creation of cultural expressions; (h) to promote diversity in the mass media, including the promotion of public service broadcasting. Measures to promote and protect cultural expressions</p>			
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ANNEX 10

Treatment of the environment in comparative law.

Country	
Argentina Law 25.743 of June 26, 2003 on the protection of archaeological and paleontological heritage.	Art. 10, fijar el espacio que reúnan los requisitos de organización y seguridad indispensables
Bolivia Law No. 530 of May 23, 2014 Bolivian Cultural Heritage	ARTÍCULO 50. (AUTORIZACIONES DE PROYECTOS). I. Todas las obras y actividades privadas que pretendan intervenir en un bien patrimonial o cerca del mismo, con carácter previo a su desarrollo deberán contar con estudios necesarios y los informes técnicos y jurídicos correspondientes. Sus recomendaciones, normas y límites constituirán la referencia técnico legal para la otorgación de la autorización pertinente, la clasificación periódica del desempeño y su ejecución. ARTÍCULO 51. (OBRAS PÚBLICAS). Los proyectos de obras públicas a cargo de instituciones públicas o privadas que se pretendan ejecutar o se encuentren en ejecución en áreas de influencia directa con el Patrimonio Cultural Boliviano, tendrán un tratamiento diferenciado en función a su naturaleza y finalidad, conforme a reglamentación. ARTÍCULO 54. (PROHIBICIONES). Están prohibidos: 3. Realizar construcciones nuevas cerca de los monumentos o inmuebles arqueológicos, coloniales o del periodo republicano, ciudades y pueblos históricos, asentamientos o paisajes culturales, que hayan sido declarados o de los cuales se tiene la presunción de ser Patrimonio Cultural Boliviano, salvo aquellos con autorización expresa de la entidad competente
Colombia Law 397 of August 7, 1997 on Cultural Heritage.	Art. 11.2, el propietario de un predio que se encuentre en el área de influencia o que sea colindante con un bien de interés cultural, que pretenda realizar obras que afecten las características de éste, debe pedir autorización de la autoridad que lo declaró.
Ecuador Cultural Heritage Law, codification, November 19, 2004.	Art. 7, último párrafo: cuando se trate de inmuebles se considerará que pertenece al patrimonio cultural el entorno ambiental y paisajístico para otorgarle una visibilidad adecuada, debiendo conservar las condiciones de ambientación e integridad en que fueron construidos, corresponde al Instituto delimitar esa área de influencia. Art. 8, obligación de los propietarios de poner en conocimiento por medio de lista detallada de objetos y permitir el inventario por parte del Instituto.
Spain Law 16 of June 25, 1985, on Spanish Historical Heritage.	Art. 11.2: se delimitarán el entorno afectado por la declaración y se definirán y enumerarán las partes integrantes, pertenencias y accesorios comprendidos en la declaración. Art. 19, se requiere autorización para realizar obras en los entornos Art. 20, Plan Especial de protección para el patrimonio y el entorno. Art. 21.2, excepcionalmente se permitirán remodelaciones, siempre que constituyan mejora en el entorno. Art. 68, establecimiento del incentivo del aporte estatal del 1% para el mantenimiento del patrimonio y su entorno. Art. 36, limita a las localidades a otorgar licencia de obras en el patrimonio y en el entorno con el visto bueno de la Consejería. Art. 37, obligación de restituir los valores, reconstrucción o demolición de lo construido ante acciones ilegales.
France Code du Patrimoine, Ordinance 178 of February 20, 2004.	Art. L621.1, les zones de conservation ont pour objet la conservation, la restauration et la mise en valeur de tout ou partie d'un ensemble de bâtiments. Art. L621.2, le bâtiment classé ou en voie de l'être doit avoir un périmètre de protection de 500 mètres (circulaire). Art. L642.1, protection de l'environnement dans le but de renforcer la base de ses valeurs esthétiques, artistiques, historiques ou culturelles. L642.3, l'autorisation de démolir, nettoyer ou modifier l'apparence des bâtiments environnants.
Italy Legislative Decree of January 22, 2004, Cultural Property and Landscape Code.	Art. 142: area protetta per legge: territorio costiero, laghi, fiumi, torrenti, montagne, ghiacciai, parchi e riserve nazionali, zone umide. Per tutte esistono precise delimitazioni metriche. Art. 143, elementi del Piano Paesaggistico.
Peru Law 28296, general of the cultural patrimony of the Nation, July 22, 2004.	Art. 1. Clasificación: 2., la protección de los inmuebles patrimonio comprende el marco circundante en la proporción técnica necesaria para cada caso. Art. 22.3, puede disponerse la paralización o demolición de obra no autorizada que se ejecuten cambiando y que afecten la estructura y armonía del inmueble vinculados al patrimonio.

<p>Portugal</p> <p>Lei de 8 de setembro de 2003</p>	<p>Art. 2.6 — Integram o património cultural não só o conjunto de bens materiais e imateriais de interesse cultural rele</p> <p>Art. 16.3 — A aplicação de medidas cautelares previstas na lei não depende de prévia classificação ou inventariação de um bem cultural.</p> <p>Art. 19.6 — Ficarão a constar do inventário independentemente do desfecho do procedimento os bens que se encontrem em vias de classificação.</p> <p>Artigo 33.o Medidas provisórias 1 — Logo que a Administração Pública tenha conhecimento de que algum bem classificado, ou em vias de classificação, corra risco de destruição, perda, extravio ou deterioração, deverá o órgão competente da administração central, regional ou municipal determinar as medidas provisórias ou as medidas técnicas de salvaguarda indispensáveis e adequadas, podendo, em caso de impossibilidade própria, qualquer destes órgãos solicitar a intervenção de outro. 2 — Se as medidas ordenadas importarem para o detentor a obrigação de praticar determinados actos, deverão ser fixados os termos, os prazos e as condições da sua execução, nomeadamente a prestação de apoio financeiro ou técnico. 3 — Além das necessárias medidas políticas e administrativas, fica o Governo obrigado a instituir um fundo destinado a participar nos actos referidos no n.o 2 do presente artigo e a acudir a situações de emergência ou de calamidade pública.</p> <p>Art. 41.2 — A lei pode condicionar a afixação ou instalação de toldos, de tabuletas, de letreiros, de anúncios ou de cartazes, qualquer que seja a sua natureza e conteúdos, nos centros históricos e outros conjuntos urbanos legalmente reconhecidos, bem como nos locais onde possa prejudicar a perspectiva dos imóveis classificados.</p> <p>Art. 42.4 — As zonas de protecção são servidões administrativas, nas quais não podem ser concedidas pelo município, nem por outra entidade, licenças para obras de construção e para quaisquer trabalhos que alterem a topografia, os alinhamentos e as cêrceas e, em geral, a distribuição de volumes e coberturas ou o revestimento exterior dos edifícios sem prévio parecer favorável da administração do património cultural competente. 5 — Excluem-se do preceituado pelo número anterior as obras de mera alteração no interior de imóveis.</p> <p>Artigo 44.o Defesa da qualidade ambiental e paisagística 1 — A lei definirá outras formas para assegurar que o património cultural imóvel se torne um elemento potenciador da coerência dos monumentos, conjuntos e sítios que o integram, e da qualidade ambiental e paisagística. 2 — Para os efeitos deste artigo, o Estado, as Regiões Autónomas e as autarquias locais promoverão, no âmbito das atribuições respectivas, a adopção de providências tendentes a recuperar e valorizar zonas, centros históricos e outros conjuntos urbanos, aldeias históricas, paisagens, parques, jardins e outros elementos naturais, arquitectónicos ou industriais integrados na paisagem. 3 — Relativamente aos conjuntos e sítios, a legislação de desenvolvimento estabelecerá especialmente: a) Os critérios exigidos para o seu reconhecimento legal e os benefícios e incentivos daí decorrentes; b) Os parâmetros a que devem obedecer os planos, os programas e os regulamentos aplicáveis; c) Os sistemas de incentivo e apoio à gestão integrada e descentralizada; d) As medidas de avaliação e controlo.</p> <p>Artigo 45.o Projectos, obras e intervenções 1 — Os estudos e projectos para as obras de conservação, modificação, reintegração e restauro em bens classificados, ou em vias de classificação, são obrigatoriamente elaborados e subscritos por técnicos de qualificação legalmente reconhecida ou sob a sua responsabilidade directa. 2 — Os estudos e projectos referidos no número anterior devem integrar ainda um relatório sobre a importância e a avaliação artística ou histórica da intervenção, da responsabilidade de um técnico competente nessa área. 3 — As obras ou intervenções em bens imóveis classificados nos termos do artigo 15.o da presente lei, ou em vias de classificação como tal, serão objecto de autorização e acompanhamento do órgão competente para a decisão final do procedimento de classificação, nos termos definidos na lei. 4 — Concluída a intervenção, deverá ser elaborado e remetido à administração do património cultural competente um relatório de onde conste a natureza da obra, as técnicas, as metodologias, os materiais e os tratamentos aplicados, bem como documentação gráfica, fotográfica, digitalizada ou outra sobre o processo seguido.</p> <p>Artigo 48.o Deslocamento Nenhum imóvel classificado nos termos do artigo 15.o da presente lei, ou em vias de classificação como tal, poderá ser deslocado ou removido, em parte ou na totalidade, do lugar que lhe compete, salvo se, na sequência do procedimento previsto na lei, assim for julgado imprescindível por motivo de força maior ou por manifesto interesse público, em especial no caso de a salvaguarda material do mesmo o exigir imperativamente, devendo então a autoridade competente fornecer todas as garantias necessárias quanto à</p>
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	<p>desmontagem, à remoção e à reconstrução do imóvel em lugar apropriado.</p> <p>SUBSECÇÃO II Monumentos, conjuntos e sítios Artigo 51.o Intervenções Não poderá realizar-se qualquer intervenção ou obra, no interior ou no exterior de monumentos, conjuntos ou sítios classificados, nem mudança de uso susceptível de o afectar, no todo ou em parte, sem autorização expressa e o acompanhamento do órgão competente da administração central, regional autónoma ou municipal, conforme os casos.</p> <p>Artigo 52.o Contexto 1 — O enquadramento paisagístico dos monumentos será objecto de tutela reforçada. 2 — Nenhuma intervenção relevante, em especial alterações com incidência no volume, natureza, morfologia ou cromatismo, que tenham de realizar-se nas proximidades de um bem imóvel classificado, ou em vias de classificação, podem alterar a especificidade arquitectónica da zona ou perturbar significativamente a perspectiva ou contemplação do bem. 3 — Exceptuam-se do disposto no número anterior as intervenções que tenham manifestamente em vista qualificar elementos do contexto ou dele retirar elementos espúrios, sem prejuízo do controlo posterior. 4 — A existência de planos de pormenor de salvaguarda ou de planos integrados não desonera do cumprimento do regime definido nos números anteriores.</p> <p>Artigo 53.o Planos 1 — O acto que decreta a classificação de monumentos, conjuntos ou sítios nos termos do artigo 15.o da presente lei, ou em vias de classificação como tal, obriga o município, em parceria com os serviços da administração central ou regional autónoma responsáveis pelo património cultural, ao estabelecimento de um plano de pormenor de salvaguarda para a área a proteger. 2 — A administração do património cultural competente pode ainda determinar a elaboração de um plano integrado, salvaguardando a existência de qualquer instrumento de gestão territorial já eficaz, reconduzido a instrumento de política sectorial nos domínios a que deva dizer respeito. 3 — O conteúdo dos planos de pormenor de salvaguarda será definido na legislação de desenvolvimento, o qual deve estabelecer, para além do disposto no regime jurídico dos instrumentos de gestão territorial: a) A ocupação e usos prioritários; b) As áreas a reabilitar; c) Os critérios de intervenção nos elementos construídos e naturais; d) A cartografia e o recenseamento de todas as partes integrantes do conjunto; e) As normas específicas para a protecção do património arqueológico existente; f) As linhas estratégicas de intervenção, nos planos económico, social e de requalificação urbana e paisagística.</p> <p>Artigo 54.o Projectos, obras e intervenções 1 — Até à elaboração de algum dos planos a que se refere o artigo anterior, a concessão de licenças, ou a realização de obras licenciadas, anteriormente à classificação do monumento, conjunto ou sítio dependem de parecer prévio favorável da administração do património cultural competente. 2 — Após a entrada em vigor do plano de pormenor de salvaguarda, podem os municípios licenciar as obras projectadas em conformidade com as disposições daquele, sem prejuízo do dever de comunicar à administração do património cultural competente, no prazo máximo de 15 dias, as licenças concedidas. 3 — Os actos administrativos que infrinjam o disposto nos números anteriores são nulos.</p>
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<p>Venezuela</p> <p>Administrative Ruling No. 012/05, Instructions regulating the General Registry of the Venezuelan cultural heritage and the management of the properties that compose it.</p>	<p>Artículo 9: Centros históricos englobados dentro de una poligonal determinada. Se trata de zonas históricas ubicadas dentro de ciudades, que están delimitadas por una poligonal levantada por el Instituto del Patrimonio Cultural. Las intervenciones de las edificaciones contenidas en los centros históricos que pongan en peligro su integridad física general y la de sus diversos componentes, sean estructurales, de cerramientos, de pisos y cubiertas, ornamentales y de revestimientos, no se podrán realizar sin la previa autorización del Instituto del Patrimonio Cultural. Las obras nuevas a realizarse en terrenos sin construcción contenidos en esa poligonal deberán ajustarse a las normas y procedimientos que establezca el Instituto del Patrimonio Cultural conjuntamente con las oficinas municipales de patrimonio.</p> <p>Artículo 10: Barrios, urbanizaciones o sectores específicos de la ciudad. Son sectores urbanos no contenidos en una poligonal determinada, que cuentan con un reconocimiento global del conjunto, lo que constituye su valor coral. La permanencia del valor coral es el objeto de protección, por lo que cualquier intervención que pudiera afectarlo deberá estar previamente autorizada por el Instituto del Patrimonio Cultural. Para cada caso el Instituto del Patrimonio Cultural establecerá criterios específicos de protección y resguardo coordinadamente con el municipio competente. Las intervenciones de los barrios, urbanizaciones o sectores específicos de la ciudad inscritos en el Registro General del Patrimonio Cultural, requerirán la autorización del Instituto del Patrimonio Cultural cuando puedan lesionar las cualidades que les dieron sus valores corales.</p> <p>Artículo 11: Calles, avenidas, plazas y parques. Estas áreas públicas inscritas en el Registro General del Patrimonio Cultural, la conforman todo lo que dentro de ellas se encuentre, como monumentos, estatuaria, mobiliario urbano, jardines, árboles y los edificios que bordean o limitan ese espacio, así como los diversos componentes de éstos, sean estructurales, de cerramientos, de pisos y cubiertas, ornamentales y de revestimientos, todo lo cual no podrá ser intervenido cuando se comprometa su integridad o visualización, sin la previa autorización del Instituto del Patrimonio Cultural. Las obras nuevas a realizarse en terrenos sin construcción en las áreas públicas antes descritas deberán ajustarse a las normas y procedimientos que establezca el Instituto del Patrimonio Cultural conjuntamente con las oficinas municipales de patrimonio.</p> <p>Artículo 12: Edificaciones, monumentos, estatuarias e hitos urbanos. Las intervenciones de las edificaciones, monumentos, estatuarias e hitos urbanos, inscritos en el Registro General del Patrimonio Cultural que pongan en peligro la integridad física general del bien, la de sus componentes estructurales, de cerramientos, de pisos y cubiertas, ornamentales y de revestimientos, así como el entorno ambiental o paisajístico necesario para su visualidad o contemplación adecuada, requerirán la autorización previa del Instituto del Patrimonio Cultural. Asimismo, se requerirá la autorización del Instituto del Patrimonio Cultural para la intervención de los espacios urbanos y rurales circundantes a los monumentos nacionales.</p> <p>Artículo 13: Ruinas y sitios arqueológicos o paleontológicos, históricos, conmemorativos y asociados a rituales. Se trata de aquellos lugares del suelo o del subsuelo, donde existen restos, evidencias o símbolos materiales o manifestaciones intangibles, de culturas pasadas o presentes, poseedores de valores que los caracterizan y los hacen significativos para un colectivo. Cualquier intervención de los sitios antes enunciados, requerirá la autorización previa del Instituto del Patrimonio Cultural. El Instituto del Patrimonio Cultural tiene derecho perpetuo de paso sobre los sitios antes enunciados, lo cual no incide en la titularidad de la tierra, pudiendo la misma pertenecer a entes públicos o personas naturales o jurídicas de carácter privado. El Instituto del Patrimonio Cultural y los municipios podrán tomar las medidas que consideren necesarias para la protección de los referidos sitios, debiendo las autoridades municipales demarcarlos adecuadamente</p>
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ANNEX 11

Object of the Law according to the comparison in Germany, Argentina, Bolivia, Spain, Italy, Peru, Portugal, Venezuela

Country	
<p>Germany Act on the Protection of Cultural Property (Cultural Property Protection Act – KGSG) Cultural Property Protection Act of 31 July 2016 (Federal Law Gazette [BGBl.] Part I p. 1914)</p>	<p>Chapter 1 General provisions Section 1 Scope The Act shall govern 1. the protection of national cultural property against removal; 2. the import and export of cultural property; 3. the placing on the market of cultural property; 4. the return of unlawfully imported cultural property; 5. the return of unlawfully exported cultural property; and 6. The legally binding commitment to return cultural property in international lending.</p>
<p>Argentina Law 24.633, international circulation of works of art. Ley 25.197, Regime of the Cultural Heritage Registry.</p>	<p>Art. 1, importación y exportación de artistas vivos o fallecidos hasta 50 años sean argentinos o extranjeros Art. 1, tiene por objeto la centralización del ordenamiento de datos de la nación, en el marco del sistema de protección colectiva de su patrimonio a partir de su identificación y registro (Registro de Bienes Culturales).</p>
<p>Law 25.743, protection of archaeological and paleontological heritage.</p>	<p>Art. 1, es objeto la protección, preservación, tutela y el aprovechamiento científico y cultural del mismo.</p>
<p>Bolivia Law 530 from May 23, 2014</p>	<p>Art. 1, normar y definir políticas públicas que regulen la clasificación, registro, restitución, repatriación, protección, conservación, restauración, difusión, defensa, propiedad, custodia, gestión, proceso de declaratorias y salvaguardia del Patrimonio Cultural Boliviano. Art. 2 tiene como finalidad poner en valor las identidades culturales del Estado Plurinacional de Bolivia, sus diversas expresiones y legados, promoviendo la diversidad cultural, el dinamismo intercultural y la corresponsabilidad de todos los actores y sectores sociales, como componentes esenciales del desarrollo humano y socio-económico del pueblo Boliviano</p>
<p>Spain Law 16, 1985</p>	<p>Art. 1, Son objeto de la presente Ley la protección, acrecentamiento y transmisión a las generaciones futuras del Patrimonio Histórico Español. Art. 2.1, garantizar la conservación del Patrimonio Histórico Español, así como promover el enriquecimiento del mismo y fomentar y tutelar el acceso de todos los ciudadanos a los bienes comprendidos en él protegerá dichos bienes frente a la exportación ilícita y la expoliación. Art. 2.3, la difusión internacional del conocimiento de los bienes integrantes del Patrimonio Histórico Español, la recuperación de tales bienes cuando hubiesen sido ilícitamente exportados y el intercambio, respecto a los mismos, de información cultural, técnica y científica con los demás Estados</p>
<p>Spain Royal Decree 111/1986, of January 10, 1986, of partial development of Law 16/1985, of June 25, 1985, on Spanish Historical Heritage.</p>	<p>Responsible entities, control instruments, promotion measures.</p>
<p>Law 10/2015, of May 26, for the safeguarding of Intangible Cultural Heritage.</p>	<p>Art. 1, regular la acción general de salvaguardia que deben ejercer los poderes públicos sobre los bienes que integran el patrimonio cultural inmaterial, en sus respectivos ámbitos de competencias.</p>

ANNEX 12

Main mechanisms regulating legal orders

Country	Identification mechanisms		Preservation mechanisms	Disposition mechanisms	Use mechanisms	Enjoyment mechanisms	Administrative sanctioning regime	Safeguarding	Management	Promotion
	Inventory	Recognition								
Alemania	x	x		x			x			x
Argentina	x	x		x	x	x	x			
Bélgica	x	x	x	x	x	x	x			
Bolivia	x	x	x	x	x	x	x		x	x
Colombia	x	x	x	x	x	x		x	x	x
Cuba	x	x		x				x	x	
Ecuador		x	x	x	x	x	x	x		
España	x	x	x	x	x	x	x	x	x	x
Francia	x	x	x	x	x	x	x	x	x	x
Italia	x	x	x	x	x	x	x	x	x	x
Perú	x	x	x	x	x	x	x	x		x
Portugal	x	x	x	x		x	x	x		x
Venezuela		x	x	x	x	x	x	x		

ANNEX 13

Purpose and objectives according to the analysis of the content of the legislation of Colombia and France.

Colombia	Francia
Law 397 of August 7, 1997.	Code du patrimoine (Version consolidée au 12 août 2018) Partie législative
Principles and definitions (Section I)	Livre IER : Dispositions communes à l'ensemble du patrimoine culturel -Titre Ier: protection des biens culturels - Titre II: acquisition de biens culturels - Titre III: dépôt légal - Titre IV: institutions relatives au patrimoine culturel
Cultural heritage (Section II)	Livre II: archives -Titre I: régime général des archives -Titre II: archives audiovisuelles de la justice
Promotion (Section III)	Livre III: bibliothèques -Titre I: dispositions communes -Titre II: bibliothèques municipales et intercommunales -Titre III: bibliothèques départementales
Management (Section IV)	Livre IV: Musées -Titre I: Dispositions générales. -Titre II: Musees nationaux -Titre III: Haut conseil des musées de france. -Titre IV: Régime des musées de france -Titre V: Collections des musées de france
	Livre V: Archéologie -Titre I: Définition du patrimoine archéologique. -Titre II: Archéologie préventive -Titre III: Fouilles archéologiques programmées et découvertes fortuites -Titre IV: Dispositions diverses
	Livre VI: Monuments historiques, sites patrimoniaux remarquables et qualité architecturale -Titre I: Dispositions générales -Titre II: Monuments historiques -Titre III: Sites patrimoniaux remarquables -Titre IV: Dispositions pénales et sanctions administratives -Titre V: Qualité architecturale
	Livre VII: Dispositions relatives à l'outre-mer -Titre I: Dispositions particulières aux départements d'outre-mer -Titre II: Dispositions particulières à Saint-Pierre-et-Miquelon -Titre III: Dispositions applicables à Mayotte. -Titre IV: Dispositions applicables en Nouvelle-Calédonie -Titre V: Dispositions applicables en Polynésie Française. -Titre VI: Dispositions applicables dans les îles Wallis et Futuna. -Titre VII: Dispositions applicables au territoire des terres australes et antarctiques françaises.

ANNEX 14

Functions of cultural heritage in society, according to the literature review

Author	Memory support, cognitive function	Identity support	Instrument of cohesion	Support for artistic, archaeological, historical, pedagogical values.	Resource for development
GARCÍA, M. P.	x	x	x	x	x
KURSE, B.C	x	x			
MARTÍNEZ, C.	x	x		x	
PRATS, LI.			x		
MONTERROSO, J.	x	x		x	
BALLART,	x	x			
CHOAY, F	x	x		x	
BÓVEDA, M. M.				x	
GARCÍA, A	x	x	x		x
ZENDRI, L.	x	x			x
HERNÁN, M.	x	x		x	
PENALBA, J. LI.	x	x		x	
AVILÉS, P	x	x	x	x	x
GARCÍA, N.	x	x		x	
OLIVEIRA, S.C	x	x		x	

ANNEX 15

Functions of heritage according to normative and methodological instruments emanating from international or regional bodies

Instruments	Identity support	Memory support	As common heritage	Support of artistic, archaeological, historical, pedagogical values	Resource for development	Recognition of diversity, tolerance and integration of differences.
Athenas Charter, 1931	x	x	x	x		
Roerich or Washington Pact, 1935	x	x	x	x		
Venice Charter, 1964			x	x		
Quito Standards				x	x	
First Conference of Ministers Responsible for the Safeguarding and Rehabilitation of the Immovable Cultural Heritage, held in Brussels in 1969.	x	x	x		x	
1972 Convention		x	x	x	x	
European Charter of Architectural Heritage, 1975				x	x	
European Conference of Ministers Responsible for Architectural Heritage, 1985.	x	x			x	
IV Conference of Ministers responsible for Cultural Heritage, Helsinki, 1996.					x	x
UNESCO Culture for Development Indicators	x	x			x	x
Convention on Cultural Diversity, 2005	x	x	x	x	x	x
Faro Convention, 2005			x		x	x

