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Thiago Burckhart*

Intangible Heritage Law and Epistemic (In)justice
The participation of communities, groups, and individuals in safeguarding ICH

Abstract
Taking into consideration the enactment of the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* in 2003, and the provision for the participation of communities, groups and individuals, this article aims to critically analyse the interactions between the right to intangible cultural heritage safeguard with the theory of justice, especially with the insurgent perspective of "epistemic justice". The hypothesis states that the provision for the participation of communities, groups and individuals in the mentioned Convention, during the recognition of ICH or even when effectively safeguarding it, can be considered a new form of "epistemic justice", in the scope of the *participant perspective epistemic justice*. The article is methodologically grounded in the field of legal theory, in dialogue with the theory of justice and International Law, and is divided into three topics: I – The 2003 UNESCO Convention: participation of communities, groups and individuals; II – Theoretical fundaments of epistemic Injustice; III – From epistemic injustice to epistemic justice in safeguarding ICH.

Keywords: Intangible cultural heritage; Epistemic (in)justice; Safeguard measures; Community-based participation; Cultural heritage law.

1. Introduction

The *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage*, enacted in 2003, is a legal instrument of great relevance for the governance of the intangible cultural heritage across the globe. As a claim of several countries from the so-called "Global South", it brings about a series of legal innovations for *International Cultural Heritage Law*, which have a direct impact on member-states governance. One of these innovations – perhaps the most relevant one –, was the provision of *participation of communities, groups and individuals*, inscribed in Article 15, throughout two phases: 1) within the "recognition" and inclusion of ICH in one of the UNESCO lists created by the same Convention; and also 2) during the application of the "safeguard measures" aimed at protecting ICH and guarantee the continuity of these practices.

Such recognition goes beyond the boundaries of legal theory of either democratic theory debates and might be grounded on the interchanges between law and theory of justice. In this particular terrain, the recent theoretical proposal of "*epistemic justice*" gains particular relevance, conceived as a form of justice for "knowledge", especially for those that, due to countless reasons, were broadly marginalized from the modern construction of knowledge throughout legal and political modernity. Intangible cultural heritage (ICH) is itself one such example, since the modern legal discourse has privileged one peculiar form of heritage – "tangible cultural heritage" –, and the forms of "monumentality" and "patrimonialisation", in spite of other perspectives. In this regard, the theory of epistemic (in)justice

plays a relevant role in affording a better understanding of the legal dimension of the right to intangible cultural heritage safeguard, especially when related to ensuring participatory processes.

Taking this into consideration, this article aims to critically analyse the interactions between the right to intangible cultural heritage safeguard, as foreseen in the 2003 UNESCO Convention, with the theory of justice, especially with the insurgent perspective of "epistemic justice". The hypothesis states that the provision for the participation of communities, groups and individuals in the mentioned Convention, during the recognition of ICH or even when effectively safeguarding it, can be considered a new form of "epistemic justice", in the scope of the *participant perspective epistemic justice*. The article is methodologically grounded in the field of legal theory, in dialogue with the theory of justice and International Law, and is divided into three topics: I – The 2003 UNESCO Convention: participation of communities, groups and individuals; II – Theoretical fundaments of epistemic Injustice; III – From epistemic injustice to epistemic justice in safeguarding ICH.

2. The 2003 UNESCO Convention: participation of communities, groups and individuals

The international legal regime for the protection of intangible cultural heritage was effectively created by the *UNESCO Convention for the Safeguarding of Intangible Cultural Heritage*, enacted in 2003[1]. However, its shaping process – which is of great importance for understanding its legal and political meaning – was carried out right after the enactment of the 1972 *UNESCO Convention for the Protection of the World Cultural and Natural Heritage*. Three key reasons drove this debate in the international scenario: a) globalization; b) Eurocentrism; and c) new social movements of cultural scope, shaped at the centre and periphery of the world-system[2]. These key reasons mobilized the debate both in the international and national spheres[3] towards the recognition and promotion of the intangible dimension of cultural heritage.

As for the first key reason, it is worth noting that globalization is innately related to intangible cultural heritage (ICH). Globalization[4], this "G *word*", as Upendra Baxi has designated[5], refers to a process of deep transformation of social structures across the globe. This is a structural phenomenon of contemporary late capitalism, deeply interconnected with various other aspects of society[6]. One of these aspects is properly *culture* – broadly understood – and cultural heritage, in a strict sense. If, on the one hand, globalization can be conceived as a phenomenon that instils the *standardization* of cultural practices, by the projection of a "dominant" culture in global terms – especially the "American" culture

* Thiago Burckhart is Postdoc Research Fellow at UNESCO Chair on Intangible Cultural Heritage and Comparative Law, University of Rome Unitelma Sapienza, Italy.

[1] See Lixinski (2013); Blake; Lixinski (2006).

[2] The concept of *world-system* is used grounded on the perspective of Wallerstein (2004).

[3] In Brazil, for example, the constitutional recognition of intangible cultural heritage took place in 1988, as well as in Spain it was carried out in 1985.

[4] For an analysis of the sometimes-contradictory relationship between law and globalization, see the first part of Menski's book: Menski (2006).

[5] Baxi (2001).

[6] "Globalization may be thought of initially as the widening, deepening and speeding up of worldwide interconectedness in all aspects of contemporary social life, from the cultural to the criminal, the financial to the spiritual" (Held, 1999: 2).

–, on the other hand, "there is a core of meaning, of affect, of memory that people refuse to give up"[7]. It was precisely the concern over the possibility of undervalued cultures disappearance within the globalization process that boosted the concern over the need for legal protection of intangible cultural heritage[8].

The second key reason concerns the aforementioned *Eurocentrism* afforded by the notion of "world heritage", inscribed in the 1972 UNESCO Convention. A critical perspective on the geopolitics of world heritage preservation makes evident that this latter tends to privilege a specific facet of heritage, which is actually "tangible" and particularly connected to "European heritage" – either referring to the cultural heritage geographically located in Europe, or even the European heritage built in several ex-European colonies around the world. This way of conceiving cultural heritage, still largely linked to the modern notion of *monument*, left aside several intangible cultural practices that for a long time had no legal and political relevance and protection.

The third reason is related to one of the effects of globalization, namely, the empowerment of new subjects of rights and the emergence of new rights – human rights and fundamental rights. Indeed, globalization may also foster the self-preservation of cultures and cultural practices of minority groups and indigenous peoples worldwide. Besides, the staging of *new cultural identities* in the national and international public grounds was also an important phenomenon for the international recognition of this new element of cultural heritage, as the issues related to "cultural identity" have become part of the legal and political discourse, opening the way for triggering ICH within International Law.

Surely, it can be said that at least since 1952, UNESCO has been indirectly concerned with intangible cultural heritage, conceived at that time as *folklore*[9]. This concern, however, came about in a fragile and precarious way, as it was entrenched in the field of *copyright* rights, a specific field of Intellectual Property Law[10]. In 1967, "the Diplomatic Conference for the revision of the Berne Convention for the Protection of Literary and Artistic Works" was the first formal step taken to provide for a specific international protection of expressions of folklore through copyright[11]. By all means, although "both cultural heritage and intellectual property are creations of the mind that have economic value, being species of property"[12], it is worth noting that cultural heritage has "universal beneficiaries", while Intellectual Property rights have an "individual beneficiary". And additionally, while Intellectual Property Rights are localized and of limited duration in time, Intangible Cultural Heritage has a prospect towards *eternity*[13].

[7] Arizpe (2020: 22).

[8] Although there are discussions about the cultural results of globalization – there are those who consider that it produces a "*hybridity*" or "*syncretism*" between different cultures – it cannot be denied that this is a *dialogical process*, which produces constant syntheses and fruitful exchanges through intercultural dialogue.

[9] "Since 1952, UNESCO has begun the efforts to establish methods in protecting what is now known as ICH. Previously, ICH was known as folklore. However, concept and manifestation of protecting folklore has failed as folklore existed in many versions and variations rather than in a single and an original form" (Bakar, Osman, 2011: 2).

[10] Universal Copyright Convention, 1952.

[11] Blake (2001: 1).

[12] Shyllon (2015: 56).

[13] "Cultural heritage has universal beneficiaries, whereas intellectual property has an individual beneficiary, or, in the case of joint authors or intellectual property rights owned by a company or collective, group beneficiaries. Intellectual property rights are territorial in character and of limited duration. The grant of an exclusive right to the owner of an intellectual property confers a monopoly to utilize the grant during the term of the patent, copyright or design right in the country

So, aiming at bridging the gap regarding the 1972 UNESCO Convention, the 2003 UNESCO Convention was enacted to consolidate a specific international regime for the protection of intangible cultural heritage[14]. The success of the Convention was confirmed by the large approval by UNESCO's States Parties, and "is explained by the awareness of many states about the importance of intangible cultural heritage and the need for its protection"[15]. Indeed, the states of the Global South endeavoured to approve the Convention and ratify it in their national spheres, which fostered its recognition and status across the globe[16]. Currently – 2023 – the Convention counts on 178 States that have ratified or approved it.

In a more concise approach than the 1972 UNESCO Convention, the 2003 UNESCO Convention set up some obligations to States. The Convention refers to internationally recognized Human Rights, especially Cultural Rights; considers the importance of intangible cultural heritage as a way of promoting cultural diversity and sustainable development; considers the great relationship between the intangible cultural heritage and the tangible and natural heritage; recognizes that globalization may sometimes hamper the safeguarding of several intangible cultural practices; further considers the need to raise public awareness, especially among younger generations, of the need to preserve intangible cultural heritage; and, considers the crucial role that ICH plays as a catalyst for mutual understanding between different groups, communities and nations[17].

The 2003 UNESCO Convention, besides establishing a new international regime for the protection of intangible cultural heritage, also institutes relevant innovations, triggering new theoretical and practical controversies, either from the point of view of its conceptual definition, or even in what it comes to enforceability. One of these innovations is the provision for the *participation of communities, groups and individuals* 1) during the process of "recognition" and inclusion of ICH in one of the UNESCO lists, and also 2) during the application of the "safeguard measures", aimed at protecting it and ensuring the continuity of a specific ICH. It can be inferred as one of the *central* and *structural* aspects of the Convention – it is effectively at its heart[18]. Article 15 provides for, *ipsis literis*:

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where the grant is issued. Cultural heritage is eternal and everlasting. Even though copyright has expired with regards to the symphonies of Beethoven and novels of Dickens, they remain part of the cultural heritage not only of Germany and Britain, but of humanity. It also means that the same creation of the human intellect may be copyright material today, while tomorrow it is cultural heritage. Whereas intellectual property is subject to national treatment which is discriminatory, cultural heritage has no boundary. Items on the World Heritage List or on the International Memory of the World Register have no boundary, and belong to humanity. Indeed, the various definitions of cultural heritage emphasize age, longevity, and universality." (Shyllon, 2015: 59).

[14] Scovazzi (2020: 18).

[15] "Scovazzi (2020: 19), my translation.

[16] As Janet Blake outlines, "The 'problem' of ICH, therefore, was predominantly the lack of formal international recognition of this reality and the dominance of a cultural heritage protection paradigm that prioritized monumental 'European' cultural forms over local and indigenous ones and that, when it did address traditional culture, it did so from a heavily researcher-oriented viewpoint". Blake (2015: 151-152).

[17] As established in the Preamble of the Convention.

[18] As Tulio Scovazzi points out, "This means that intangible cultural heritage cannot exist in the mind of a single individual or be kept secret in his private home, but must be made public to the outside world. However, it is not necessarily required that everyone should have access to the intangible cultural heritage, given that States parties to the Convention are obliged to respect 'customary practices governing access to specific aspects of such cultural heritage' (Article 13, below -para. d, ii). The provision must be understood in the sense that practices of a confidential nature and accessible to a small group of individuals can remain so". (Scovazzi, 2020: 37), my translation.

> Article 15: Participation of communities, groups and individuals
> Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

However, this is also one of the most *controversial* aspects of the Convention, since, although participation is provided for by the Convention, there is no clear definition of how effectively States must enforce it. This is undoubtedly an important element for safeguarding the ICH, given that this new facet of heritage requires the constant involvement of civil society, so that the protection is truly taken seriously. In this regard "a diversity of voices from within the community needs to be heard in order to achieve truly participatory approaches to safeguarding"[19], with a view towards making participation more adequate to what the Convention itself determines.

As Lucas Lixinski points out, the mechanisms to ensure real and effective community participation within the operation of the Convention are effectively weak[20]. In this light, Janet Blake highlights that "community participation as conceived of under the Convention is mostly restricted to actions taken at the national level – identification and inventorying of ICH, designing and carrying out safeguarding and management actions etc.", but the involvement of communities, groups and individuals in the international level is restricted "to the requirement for consultation and proof of free, prior, and informed consensus"[21]. However, it is also not clear how much and to what degree participation can effectively influence the national governmental law and policies, and what should be the position of governments regarding participation[22].

In this context, although participation is a fundamental value of the Convention, the effective application of this provision by states tends to privilege the interpretation that the governments of each state provide for the meaning and extent of participatory governance in each situation. The *Operational Directives* of the 2003 Convention, designed by the Intergovernmental Committee of the 2003 UNESCO Convention, has designed a specific chapter to cope with "*Participation in the Implementation of the Convention*", in which it determines, among other things, that:

> 79. Recalling Article 11(b) of the Convention and in the spirit of Article 15 of the Convention, the Committee encourages States Parties to establish functional and complementary cooperation among communities, groups and, where applicable, individuals who create, maintain and transmit intangible cultural heritage, as well as experts, centres of expertise and research institutes.
> 80. States Parties are encouraged to create a consultative body or a coordination mechanism to facilitate the participation of communities, groups and, where applicable, individuals, as well as experts, centres of expertise and research institutes, in particular in:
> (a) the identification and definition of the different elements of intangible cultural heritage present on their territories; (b) the drawing up of inventories; (c) the elaboration and implementation of programmes, projects and activities; (d) the preparation of nomination files for inscription on the Lists, in conformity with the relevant paragraphs of Chapter 1 of the present Operational Directives; (e) the removal of an element of

[19] Blake (2015: 185).
[20] Lixinski (2011).
[21] Blake (2015: 186).
[22] Not even with regard to Prior Consultation is there even an adequate regulation. As Janet Blake writes, "However, the text of the 2003 Convention does not specify how such communities will be able effectively to influence government policy since it would appear that, unless they are invited to do so by the State, they cannot initiate safeguarding measures of their own or block state-sponsored programmes to which they are opposed", Blake (2015: 186).

> intangible cultural heritage from one List or its transfer to the other, as referred to in paragraphs 38–40 of the present Operational Directives.
> [...]
> 84. Among the private and public bodies mentioned in paragraph 89 of the present Operational Directives, the Committee may involve experts, centres of expertise and research institutes, as well as regional centres active in the domains covered by the Convention, in order to consult them on specific matters.
> 85. States Parties shall endeavour to facilitate access by communities, groups and, where applicable, individuals to results of research carried out among them, as well as foster respect for practices governing access to specific aspects of intangible cultural heritage in conformity with Article13(d) of the Convention [23]

Accordingly, despite the lack of definitions in the Convention, the Operational Directives seek to broaden the definition of participation, moving the understandings from the "state-centric" approach to another, that could be called "community-centred" or "community-based" approach – more adequate to what the convention itself predicts. Nevertheless, from the point of view of its operability, especially at the national level, states still retain, in general, the prevalence in the sense of "saying" what can or cannot be considered as ICH, as well as in defining who may effectively participate in its safeguarding process, so that the interpretation of each state's bureaucracy occasionally prevails over the interpretations carried out in the international sphere[24].

This lack of criteria at the international level and the difficulty of operating it at the national level is widely explored by legal[25], political[26] and anthropological[27] literature, and mainly refers to the difficulty that many states face in reconciling the construction of their cultural heritage – which is closely related to the construction of the "national" perspective – with the participation of groups, communities and individuals who, for various reasons, have been marginalized from this process for a long time. This "*institutional symbolic negotiation*" that participation directly implies poses several challenges to the theory and practice of intangible cultural heritage law and policy within international and comparative spheres.

3. Theoretical fundaments of epistemic injustice

Citizen participation is currently triggered as a new paradigm of modern democracy, in parallel with other forms of participation – especially those considered "indirect", related to voting and political representation. Several authors have theorized on the potential of this new "approach" and their institutional repercussions[28]. In this regard, the guarantee of participation and deliberation, in the most diverse institutional and decision-making instances, increases the "*epistemic value of democracy*", as pointed out by Carlos Santiago Nino[29]. In his perspective, citizen participation increases democracy through "ethical constructivism", in which the epistemic value of democracy is defined when people effectively participate and argue in the democratic debate and decision-making processes. In fact, it can

[23] Operational Directives, n. 79-89. Online access in: https://ich.unesco.org/en/directives
[24] For more details, see: Bendix, Eggert, Peselman (2012). Also see: Bortolotto, Demgenski, Karampampas (2020).
[25] Lixinski (2019).
[26] Adell, Bendix, Bortolotto, Tauschek (2015).
[27] Bortolotto (2013).
[28] Elster (1998); Nino (1997); Habermas (1998).
[29] Nino (1997).

be inferred that the increase of "epistemic value of democracies" is at the basis of contemporary democratic and constitutional states based on the rule of law.

The issue of the "epistemic value of democracy" broadly relates to the "governance of knowledge", which is essentially an epistemological problem, as it concerns the building of a model of strong democracy nowadays. The assurance of community-based participation enables the possibility of deliberation, that is, the comparison of ideas and ideals in an open space, in which all could participate. In the field of intangible cultural heritage, this refers to guaranteeing the possibility of recognizing cultural practices historically marginalized from the historical concept of "cultural heritage", and the recognition of several "knowledges" associated with this heritage, which increases the promotion of cultural diversity.

However, Boaventura suggests that modern Western thought is characterized by a certain *indolence*. This concept attempts to explain the rationale that ignore, despise and do not recognize much of the knowledge created outside of the "Global North" context. In doing so, modern thought wastes much of the social experience available or possible in the world. It definitely gives up thinking in facing necessity and fatalism[30], and therefore, it is a limited experience in itself. For this reason, this is a rationality that deserves to be criticized, by which Boaventura proposes the construction of a *new "common sense"* in order to shelter, recognize and relate on an equal footing with other knowledges from all over the world. Therefore, "it is necessary to resort to a broader rationality that reveals the availability of much social experience declared non-existent (the sociology of absences) and the possibility of much emergent social experience declared impossible (the sociology of emergences)"[31].

Hence, Boaventura proposes to overcome these abyssal lines, by the construction of a *post-abyssal thought*. This "new" rationale recognizes that social exclusion is determined by abyssal lines and, therefore, seeks to disrupt it, insofar as it is characterized as non-derivative thinking, imposing a break up with the usual – dominant – western rationale[32]. Then, it implies the co-presence between different subjects and different cultures. In summary, post-abyssal thought is the one that dialogues, criticizes, elaborates and re-elaborates on a par with the *epistemologies of the South*. It implies in raising to a level of *parity* the knowledges that have historically been neglected by the latter logic[33].

In this perspective, post-abyssal thought confronts the monoculture of knowledge with the *ecology of knowledge*, based on the plurality of heterogeneous perspectives and on the sustainable and dynamic interaction between them. As a consequence, one can recognize the *epistemological diversity* of the world and a plurality of knowledge and ways of knowing the world – even beyond the technical-scientific one. The ecology of knowledge, therefore, also recognizes and validates the epistemological adversities brough about in the clash between *center* and *periphery* of the world-system – between the Global North and South. Defining precisely what "southern epistemologies" are is a difficult task, as defining what is from the South, and invariably what is from the North, can incur great inaccuracies. According to Boaventura, the "*southern epistemologies*" can be characterized as a set of thoughts, theories and issues that come from marginalized countries, societies, individuals, groups or social movements and, therefore, have been disregarded in the process of constructing narratives during modernity[34].

[30] Santos (2002: 44).
[31] Santos (2018: 459).
[32] In this light, see: Santos (2002).
[33] For further analysis, see: Santos; Menezes (2010).
[34] Santos; Menezes (2010).

Boaventura argues that the Western world is currently passing through a paradigmatic transition, in which the current problems faced by these societies may not be tackled by using the same vocabulary and theories formulated by European modernity, but instead, need to dialogue with other rationales, in order to merge them with the aim of building a possible future. In this light, beyond theoretical abstractions, the notion of southern epistemologies seeks to dialogue with the contextualized reality of social groups that have gone through – or are going through – processes of knowledge "erasing". Hence, the notion of "southern epistemologies" is not however an "epistemology" in the conventional sense – as a systematized study of knowledge as such –, but can be treated as a *counter-epistemology*, insofar as it is experimental and prospective[35].

As noted by Boaventura de Sousa Santos and Maria Paula Menezes, "epistemology is any notion or idea, reflected or otherwise, about the conditions of what counts as valid knowledge"[36]. Actually, the current political and cultural context, in the Global North and South, is marked by the "openness to the diversity of knowledge"[37], which is also fostered within political and legal realms. This openness implies 1) the recognition of diverse knowledge and different ways of knowing; and, 2) setting up a dialogue between subjects who hold this knowledge, with the aim of mutual understanding and mutual learning. In this context, the "classic" models for managing cultural pluralism, namely, *assimilationism*, *integrationism* and, to a certain extent, "*multiculturalism*", are no longer adequate[38].

Assimilationism refers to a political practice of "total incorporation of an individual or group into national society, with the loss of their ethnic and cultural identity". *Integrationism*, on the other hand, "would consist of participation in national society without the loss of ethnic" and cultural identity"[39]. The notion of *interculturality*, however, differs from "multiculturalism", as while interculturality proposes to effectively live, interact and learn with the other, with "different" cultures – in view of cultural hybridization[40] –, multiculturalism proposes to "coexist"[41] with each other in the same geographic space. The key word of multiculturalism, therefore, is "*tolerance*", understood as the way to build a peaceful society, meanwhile "*dialogue*" is at the core of interculturality's proposal[42].

Although there is the possibility to evince several models of "multicultural space" in different contexts, since their birth in Canadian and US public debate in the 1980s – such as the classical liberal political model, the liberal multicultural model, the "maximalist" multicultural model" and the "combined multiculturalism" model, as defined by Andrea Semprini[43] –, the idea of *tolerance* remains at the heart of this proposal for the political management of cultural pluralism. Interculturality, rather, proposes to *overcome the logic of tolerance*, as the latter contribute to social cohesion and mutual

[35] Santos (2018, p. 301).
[36] Santos; Menezes (2010: 9).
[37] Santos; Menezes (2010: 6), my translation.
[38] For an in-depth analysis of the relationship between democracy, pluralism and the "cultural diversity management", see: Farinas Dulce (2014).
[39] Villas-Boas Filho (2003: 284).
[40] As Bhabha (2013).
[41] Lopes (2012: 71).
[42] "While in multiculturalism the key word is tolerance, in interculturality 'the key word is dialogue'. Interculturality partly encompasses multiculturalism, in the sense that in order to dialogue it is necessary to presuppose mutual respect and conditions of equality between those who dialogue" (Tubino, 2002: 74), my translation.
[43] Semprini (1999: 134-143).

understandings between culturally "different" subjects – but, in certain cases, may still further inequalities and animosities within a society.

According to Catherine Walsh[44], the term "interculturality" became part of the Latin American lexicon in the 1980s, at first conceived within the educational policies in Mexico. The debate, at that time, surrounded the proposal of a "bilingual intercultural education" in public school systems. In the 1990s, as Walsh explains, the discourse over interculturalism has been appropriated by Ecuadorian indigenous peoples, who associated it with legal, linguistic and public health issues[45]. Since then, interculturalism has been fostered as an ideal for political and legal management of cultural pluralism in Bolivia – as well as in other countries, more recently.

As Walsh points out, however, "since its inception, interculturality has meant a struggle in which issues such as cultural identification, law and difference, autonomy and nation have been in permanent dispute"[46]. Unlike assimilationism and integrationism, the proposal of interculturality is based on the methodology of "*intercultural dialogue*". As Boaventura de Sousa Santos states, intercultural dialogue, a key proposal for the process of intercommunication and interknowledge, is a methodological proposal based on dialogue as a possible remedy for political and social problems. It has five premises: 1) overcoming the dichotomy *universalism vs. relativism* on human rights; 2) understanding that different cultures have conceptions of "human dignity"; 3) comprehending cultures as incomplete and problematic in their conceptions of human dignity; 4) emphasizing that cultures have different versions of "human dignity"; 5) stating that cultures tend to establish hierarchies based on the logic of equality and difference[47].

Considering these premises, the path is opened for "*diatopical hermeneutics*", as Boaventura has asserted – or, in an even more complex proposal, a "*multitopic*" hermeneutics. It presupposes that the *topoi* is the most comprehensive rhetorical commonplace of a culture, and therefore, the diatopical hermeneutics attempts to comprehend a certain culture from a dialogical perspective by which one seeks to understand the culture of the "other" with one foot in "his" own culture and another foot in "the other's" culture. This is an attempt to strengthen mutual understandings, in order to give rise to different epistemologies that may interact in a given political space, with the aim of expanding the capacity of understanding the incompleteness of each culture[48] to create *interchanges*. As Boaventura says, "the recognition of this 'mutual incompleteness' is a *sine qua non* condition for intercultural dialogue"[49].

Boaventura points out the conditions for carrying out this *intercultural dialogue*: 1) *from completeness to incompleteness*: diatopical hermeneutics only progresses when the understanding of the incompleteness of the most diverse cultures increases; 2) *from narrow cultural versions to broad cultural versions*: openness to awareness of cultural and epistemological diversity; 3) *from unilateral to shared times*: each community must decide when they are ready to open up towards cultural dialogue; 4) *from unilateral partners and imposed subjects to partners and themes chosen by mutual agreement*: both the partners

[44] As Walsh (2008).
[45] Walsh (2008: 44).
[46] Walsh (2008: 45).
[47] Santos (2009: 14-15).
[48] Santos (2009: 15).
[49] "The recognition of this 'mutual incompleteness' is a *sine qua non* condition for intercultural dialogue" (Santos, 2009: 16), my translation.

and the issues of dialogue between them must be the result of a mutual agreement; and, 5) *from equality or difference to equality "and" difference*: one has the right to be equal when difference is inferior, and one has the right to be different when equality mischaracterizes[50].

The Peruvian jurist Fidel Tubino evinces that the notion of interculturalism and intercultural dialogue is nowadays politically triggered as a *political methodology*, whether in its procedural dynamics or in a substantial one[51]. Indeed, taking into account Boaventura's theoretical contributions, the *ecology of knowledge*, the *rescue of southern epistemologies*, as well as *post-abyssal though* and *intercultural dialogue*, through a diatopical hermeneutics, pave the way for thinking the concept of "*cognitive justice*" or "*epistemic justice*"[52] within the field of "Intangible Cultural Heritage". According to Boaventura, global social injustice is closely linked to *global cognitive injustice* and, therefore, *there is no social justice without global cognitive or epistemic justice*[53]. This shift towards the linear movement of contemporary Western thought is precisely what marks the complex challenges of the 21st century[54], that is, to recognize and overcome the inequalities concerning knowledge hierarchies.

4. From epistemic injustice to epistemic justice in safeguarding ICH

The concept of *epistemic justice* has recently been discussed in the field of political philosophy and political sociology. Indeed, the term was coined in 2007 by the English philosopher Miranda Fricker in her book entitled "*Epistemic Injustice: power and ethics of knowing*"[55]. This publication triggered "epistemic (in)justice" into contemporary political, theoretical and philosophical debate. In summary, her analysis confirms – in the same way as Boaventura de Sousa Santos, but on a different scale – that there is a form of unequal treatment related to problems of knowledge, especially related to the individual's participation in communicative processes in the political ground. In this light, "epistemic injustice refers to those forms of unfair treatment that relate to issues of knowledge, understanding, and participation in communicative processes"[56].

From considering this "injustice" expressed in several manners in different societies, it is evident how power affects the subject's rationale[57], and occurs when "someone naively or inadvertently belittles or depreciates another person with regard to their status as an epistemic subject"[58]. Fricker indicates in her book two main schemes by which the concept of "epistemic justice" takes place: as *testimonial injustice* and as *hermeneutical injustice*. The first one comes about when some form of prejudice compels the listener to attribute a lower level of credibility to the speaker's word. The second one arises at an

[50] Santos (2009: 17-18).
[51] Tubino (2002).
[52] In this article the terms "*cognitive justice*" and "*epistemic justice*" will be treated as synonyms.
[53] Santos (2007: 10).
[54] In this sense, Edgar Morin's theoretical perspective directly dialogues with that of Boaventura. For more details, see: Morin (2005).
[55] Fricker (2007).
[56] Kidd, Medina, Pohlhaus (2017: 1).
[57] Fricker (2007: 3).
[58] Fricker (2021: 97).

earlier stage, when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences[59].

These concepts provide some elements to reflect on the ethics of everyday life, based on experiences of "injustice", particularly little elaborated in contemporary philosophical thought. Indeed, the main aim of epistemic injustice concept, as Miranda Fricker points out, is to shed light on certain injustices that occur in everyday epistemic practices. This is due to the fact that "epistemology as it has traditionally been pursued has been impoverished by the lack of any theoretical framework conducive to revealing the ethical and political aspects of our epistemic conduct"[60]. As Fricker underlines, epistemic injustices are not limited to the two mentioned situations, they can also manifest themselves within the scope of the redistributive dimension. Thus, the author has already asserted the need to expand the concept to the characterization of a "*discriminatory epistemic injustice*", which can manifest precisely "When someone receives less than they should if there were a fair distribution of epistemic goods, such as education or access to information and expert advice"[61].

Although this theoretical perspective falls within the broad field of "moral philosophy", it offers several elements for thinking and rethinking law, politics and the institutional dynamics of epistemic injustice and, in this realm, it deeply dialogues with Boaventura de Sousa Santos' theory.

By establishing a linkage between *epistemic injustice* and *colonization*, Miguel Mandujano Estrada argues that epistemic injustice can manifest in different ways: ethnic, cultural, social or "natural" inferiority[62], for instance. Actually, the concept presumes the *universalization* of a certain criteria – or a specific sort of knowledge –, whereas most of the injustices manifested in social contexts could also be considered a sort of epistemic injustice[63]. In this regard, the hierarchization of knowledge, carried out more evidently in colonial contexts, has triggered Boaventura to develop the term "*epistemicide*"[64]. This concept seeks to describe the destruction of several knowledges during the colonial period, especially when relating to Latin American reality, but not only. The most peculiar case has been the epistemicide on Indigenous Peoples from the Americas – and also Oceania, Asia, Africa and in some cases even Europe – in which they were epistemologically destroyed in order to impose the dominant epistemology, based on Western thought.

In this specific point, the concept of "epistemic injustice" meets the protection of *cultural heritage*, and especially the protection of *intangible cultural heritage*. In one first analysis, it is possible to state that the legal recognition of ICH – both in international and national laws – could be treated as a form of *epistemic justice*, since the modern legal discourse has privileged one particular from of cultural heritage – the "*tangible*" cultural heritage, and its monumentalist bias –, with no regard for other possible

[59] In Miranda Fricker words, "I call them testimonial injustice and hermeneutical injustice. Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word; hermeneutical injustice occurs at a prior stage, when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences. An example of the first might be that the police do not believe you because you are black; an example of the second might be that you suffer sexual harassment in a culture that still lacks that critical concept. We might say that testimonial injustice is caused by prejudice in the economy of credibility; and that hermeneutical injustice is caused by structural prejudice in the economy of collective hermeneutical resources", as (Fricker, 2007: 1).
[60] Fricker (2007: 2).
[61] Fricker (2021: 98).
[62] Estrada (2017: 149).
[63] Estrada (2017: 150).
[64] Santos (2010).

perspectives – such as ICH. In this regard, the sole awareness related to ICH recognition might bring light to several cultural knowledge manifestations that were not considered legally "relevant" some decades ago. Giving the opportunity to evidence these new knowledge manifestations and legally safeguard them is itself providing for epistemic justice.

The connections between cultural heritage and epistemic justices were better explored by Andreas Pantanzatos in a chapter published in "*The Routledge Handbook of Epistemic Injustice*", entitled "*Epistemic Injustice and Cultural Heritage*"[65], focusing primarily on the concept of tangible heritage.

In this chapter, Pantanzatos outlines that cultural heritage is one of the areas in which the marginalization of communities concerning the protection and the collective elaboration of the past has been recently discussed. Indeed, cultural heritage is an institute in constant *symbolic institutional negotiation* between different social and political actors, given that different people are engaged in the production and enhancement of tangible and intangible cultural heritage. This evidences that cultural heritage changes its meaning from time to time, according to the cultural changes inscribed in each society[66]. One of the issues faced by Pantanzatos concerns the privilege of certain forms of symbolic interpretation of cultural heritage prevailing over others during the negotiation process. In this regard, communities with greater epistemic and social power tend to impose their interpretation and meanings of cultural heritage over the marginalized ones[67].

The institutions responsible for carrying out this symbolic negotiation are indeed spaces in which epistemic interactions between different subjects are provided in a significant way. When carrying it out, they cooperate – or not – for the distribution of epistemic sources, which might be related to cultural heritage[68]. Taking this into account, Pantanzatos describes his central thesis by pointing out that a particular form of epistemic injustice can manifest within this action, which he calls "*participant perspective epistemic injustice*"[69]. This implies that if institutions do not "take seriously" the perspective of participants, their engagement and knowledge, during the symbolic negotiation carried out by them, they end up marginalizing this knowledge. Hence, in the specific case of "cultural heritage", "not to take someone's interpretation and understanding seriously means that the significance of what is transited from past to future is distorted"[70].

This form of epistemic injustice, therefore, is grounded in the refusal by the institutions – and the individuals who work in them – to take seriously the participation of the communities involved. Pantanzatos' theory is, therefore, of great relevance for studies on the legal and political protection of cultural heritage and focuses on this last concept in a comprehensive perspective. Other aspects,

[65] Pantanzatos (2017: 370).
[66] Pantanzatos (2017: 370).
[67] "One of the issues that has been debated for some time is why and how some communities have a stronger stake in heritage than others. And more importantly, why communities with more social and epistemic power tend to marginalize and ignore other communities with less power in the interpretation of heritage and the decision-making structures about its future" Pantanzatos (2017: 370).
[68] Pantanzatos (2017: 370).
[69] "In this essay, my aim is to defend the idea that there is a kind of epistemic injustice, namely participant perspective epistemic injustice, drawing upon Hookway's work, which is highly relevant to heritage if we accept that heritage and its institutions are unique areas of epistemic interaction, and if we adhere to the idea that part of what heritage institutions broadly construed so is to distribute epistemic goods. It follows from this that as distributors and interpreters and preservers of epistemic goods, heritage institutions should act in the light of the ethics of sharing". Pantanzatos (2017: 371).
[70] Pantanzatos (2017: 371).

however, can also be analyzed when establishing the relationship between ICH and "epistemic injustice": 1) the imprisonment of values related to cultural heritage in a *Eurocentric* view of culture and its expressions; and, 2) the appropriation of the logic and representations of cultural heritage by the market. These two facets are related to the concept of "participant perspective epistemic injustice", and can also be understood as such.

The *imprisoning of values related to cultural heritage in a Eurocentric perspective* concerns the linkage of individuals and institutions only to the very historic-monumental dimension of heritage. The modern notion of cultural heritage has emerged in France aiming, at first, to value a specific perspective, linked to monumentality and its expressiveness, especially as a milestone of the "national feeling". The complex process of broadening this definition did not imply the compliance of all actors who operate the institutions responsible for safeguarding cultural heritage. Likewise, in countries colonized by European nations, it did not immediately overcome the connections between the notion of cultural heritage and European heritage, which currently still remains as a form of epistemic injustice.

In the same sense, *the appropriation of the logic and representations of cultural heritage by the market* also takes place as a form of epistemic injustice insofar as it makes the authentic development of cultural heritage and its effective protection, whether tangible or intangible, difficult. Although cultural heritage has a relevant economic dimension[71] – and it can promote economic growth, well-being and boost the several economic sectors, such as tourism, for instance – its seizure by the logic of the market can represent the degradation and the loss of the intrinsic sense of what constitutes it as such. Therefore, it is necessary for States and institutions to intervene in order to regulate this dynamic, with the participation of citizens directly involved in the protection of cultural heritage, ensuring the latter the possibility of preserving their own heritage without incurring *commodification*.

However, the expansion of the cultural heritage concept towards ICH and its effective legal protection are elements that stand as "*epistemic justice*". This can be better clarified for two main reasons, namely, the recognition, even if occasionally *precarious*, of *historically marginalized identities* within the process of defining the content of cultural heritage; and the guarantee, at least in a formal perspective, of communities, groups and individual participation during the process of *institutional symbolic negotiation* of heritage in its two "phases", that is, 1) in the course of the recognition of cultural heritage, as well as 2) during the actions for its effective safeguard.

Indeed, the *recognition of historically marginalized identities* is not a declared objective of the 2003 UNESCO Convention. However, it could be conceived as an *undeclared* objective, since the establishment of ICH in International Law – along with internal law of several countries – was a historical demand of ethnic minority groups, which is the case of the Indigenous Peoples, for example. Hence, the recognition of the intangible elements of cultural heritage created and maintained by these groups may also represent their own recognition as peoples and groups, and contribute to *intercultural dialogue* between different peoples and between peoples and state. Indeed, ICH can also be triggered as an *intercultural policy*, which protects and values "cultural diversity", being able to *prevent* and *restore* ethnic conflicts[72].

Accordingly, the legal provision for participation by communities, groups and individuals might also be conceived as a form of "epistemic justice", as it provides for communities the capability of having an active voice in the processes of defining and safeguarding their own ICH. The history of tangible

[71] On this argument, see: Yudice (2002).
[72] On this argument, see: Burckhart (2023).

cultural heritage polices is marked by little or no participation of the subjects directly involved in protecting it, while the decision on what to protect was generally assigned to the institutions and their technicians who, very often, reproduced the vision and conceptions of those who occupied the positions of political and economic power in a given society. Thus, the inclusion of these subjects implies the diversification of views and epistemologies.

In this light, one can point to two *new* forms of epistemic justice, which can be named as "*epistemic justice through the legal recognition of the ICH*" and "*epistemic justice through community-based participation in safeguarding ICH*" – the latter dialogues more directly with the concept of *participant perspective epistemic injustice*. Bearing this in mind, the effective legal protection of ICH, by institutional policies and safeguard measures, can be considered a form of *epistemic justice* and, therefore, also – in a broad sense – as a pattern of *social justice* related to the knowledge of groups, communities and individuals.

5. Conclusion

The legal protection of intangible cultural heritage, especially since the enactment of the 2003 UNESCO Convention, might be conceived as a remarkable legal innovation in the field of public international law and within the scope of legal theory. This is due to the fact that this legal instrument enables communities, groups and individuals who have been – for various reasons – marginalized from the effective construction of modern cultural and "national" heritage, to have the possibility, and legal viability, of participating in this process, and redesign the modern foundations of the nation. Accordingly, this is not a merely symbolic trace, as the ICH can only be maintained through the concrete involvement of communities, groups and individuals, and therefore, safeguarding measures are only possible through active participation.

In this sense, the right to intangible cultural heritage can be read as an element that interchanges with the emerging notion of epistemic justice. In fact, the legal recognition of the ICH itself might be defined as a "new" form of epistemic justice. However, it is evident that one of the most relevant aspects of the Convention – that is, the guarantee of community-based participation – lies at the centre of the relationship between ICH and epistemic justice. Thus, this emerging concept can have a direct practical repercussion in promoting the highest possible level of participation by communities that hold intangible cultural elements and practices, as well as associated knowledge, in its management and decision-making processes. This is a concept that can ascertain the basis of state's public policies with regard to ICH safeguarding, as the strengthening of national, regional, and local policies for ICH could provide the means for advancing epistemic justice, and widely encourage community-based participation in different scales and manners.

Taking this into consideration, the research hypothesis was confirmed, insofar as the legal provision on community-based participation enshrined by the 2003 UNESCO Convention, either during the recognition of ICH and its inclusion in one of the UNESCO lists, or even during the application of safeguarding measures, is a new form of "epistemic justice", falling within the precise scope of the "participant epistemic justice perspective". Besides, it can manifest in at least two forms: "epistemic justice through the legal recognition of the ICH", and "epistemic justice through community-based participation in safeguarding ICH". In this context, the legal protection of ICH is

triggered within the legal and political debates surrounding "social justice" and "global justice", as a new theme yet to be explored, especially regarding its *praxis*.

Indeed, the theory of epistemic justice has the remarkable value of highlighting the dynamics of inequality related to the production and diffusion of knowledge. It seeks to break with the hegemony of modern epistemology, allied to the geographic context of the "Global North", in order to point out the existence of several other epistemological manifestations that were – and, occasionally continue to be – downgraded – for several reasons – to marginality. However, the great challenges that mark the 21st century require cognitive openness towards complexity, the ecology of knowledge, to the most diverse forms of knowledge, as is the case of intangible cultural heritage. It is, thus, within the scope of resignification and appreciation of knowledges – in plural – and intangible cultural heritage, that epistemic justice gains body and strength not only as an abstract ideal, but as a concrete practice.

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thiago.burckhart@gmail.com

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