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Session B: Protection of cultural heritage

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We often talk about the need to provide constitutional protection for cultural, artistic and architectural heritage. On the one hand, it is common for constitutional texts –and the legislation enacted pursuant to them– to address this matter through overarching provisions, particularly with regard to the powers of state bodies. Nevertheless, this issue can be given a dogmatic framework, particularly with regard to the right to culture, equal access to it, and the State's obligations to protect it.

However, this requires some prior consideration: Cultural heritage is not limited solely to tangible works. It may also refer to intangible practices or customs, such as places and traditions, which are inherent to human nature and consistent with the pursuit of the greatest possible material and spiritual development, whilst respecting the dignity, equality and significance accorded to every individual of the human race.

From this perspective, cultural heritage is eligible for legal protection; indeed, it could even be argued that it would be desirable for it to be safeguarded under criminal law in the face of serious offences that warrant a punitive response from the State.

Human development is inconceivable without culture. We can say that cultural heritage encompasses not only the past –which constitutes only part of it– but also the present, and serves as a passport to the future. It manifests itself in both tangible and intangible forms, taking on a wide variety of shapes such as artistic creations, literature, beliefs, traditions and, indeed, the law.

All of this constitutes a heritage that is valuable not only to present generations but also to future ones, highlighting the public responsibility that underlies the preservation of cultural heritage. It is therefore up to legal practitioners to give this concept specific content and meaning.

As mentioned at the beginning, both national constitutions and international instruments have enshrined the right of individuals to participate in cultural life. This presents a challenge, not only in terms of potential threats to this right –such as armed conflicts– but also in defining its scope, which is, by its very nature, a dynamic and evolving concept.

It is in this sense that, even without necessarily defining it in explicit terms, various national and international actors have given substance to this concept, linking it to notions such as privacy, education and freedom of expression, as the European Court of Human Rights has done in applying the European Charter. Furthermore, constitutional texts have linked this notion to the concept of the public interest or national interest, and it has even been recognised in case-law as a constitutionally permissible ground for limiting or restricting the right to property. Furthermore, as two sides of the same coin, the protection of cultural heritage should be linked to intellectual property rights, even though at first glance these may seem to be somewhat distinct legal concepts.

This reflects a predominantly legal matter, closely linked to human dignity, fundamental rights and diversity –all values that States have a special duty to uphold. In that regard, we must condemn attempts to commercialise cultural life.

Religious minorities and indigenous peoples are vital expressions of identity and, as such, represent a cultural life that deserves respect and protection. The cultural life of minority groups and communities is an expression of the significance of human existence, and deserves to be protected under this principle. They reflect cultures, beliefs and identities, such that court rulings safeguarding the free expression of faith or religious belief may also be recognised as specific manifestations of the protection of cultural heritage.

Furthermore, the need for social cohesion also underpins the concept of cultural heritage. Protecting cultural life means safeguarding identities and, ultimately, championing humanity as a whole. This refers to fundamental rights and freedoms, which define the identity of individuals, groups and communities. Culture is also about diversity, and reflects a collective identity. They are the living roots of a globalised world.

That is why it is inconceivable to view this right as solely an individual one, as that would be reductive. Nor would it be appropriate to confine the protection of cultural heritage to a matter of each State's sovereignty, as this would unduly restrict the protection of this right. Preserving cultural values is a task that falls to all countries.

It is the duty of States, through their respective legal systems, to ensure access to specific and effective means of protecting this right, and in this regard constitutional justice plays a crucial role. In the face of threats such as armed conflict, certain aspects of new technologies and climate change, culture is a legal right worthy of protection, in both its tangible and intangible forms.

It is therefore necessary to bear in mind that the tools traditionally employed by the law may not be sufficient or the most appropriate for ensuring effective protection. As legal practitioners, we must bear in mind that the protection of cultural heritage is not solely the responsibility of archaeologists or historians. It is a matter of justice, and also of constitutional justice.

In addition to the protection provided by international treaties and conventional law, states should facilitate access to justice through an effective remedy or a specific legal action, preferably before a specialised court. Thus, the constitutional remedy for the protection of rights is seen as a procedural tool well-suited to the effective protection of cultural heritage, as it enables individuals to have direct access to the constitutional court in defence of cultural heritage, in both its tangible and intangible forms.