Rethinking the legal definitions of cultural heritage from gender and decolonial point of view

Repensando las definiciones jurídicas del patrimonio cultural desde una perspectiva de género y decolonial

Ondare kulturalaren definizio juridikoak birpentsatuz genero ikuspegitik eta ikuspegi deskolonialetik

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Abstract
Protection of cultural heritage is vital for the survival of cultural identity, collective memory and preserving deeply integrated values. A prerequisite for this achievement is a well-drafted definition of cultural heritage in the international legal framework. Yet, adopted legal instruments have faced multiple criticism is coming from legal doctrine, practicing lawyers and even bearers of the heritage. There are a couple of definitions. Heritage is divided, even though tangible and intangible heritage are considered to be «two sides of the same coin». Some of the definitions are overly restrictive or too broad, even problematic to interpret. Moreover, lack of inclusivity makes them easily challenged from a gender and decolonial point of view. The consequences of a patriarchal and Eurocentric approach are reflected in the heritage and the limitations of human rights of the bearers. Overall, questioning existing legal acts and implemented system is necessary in order to safeguard heritage for future generations.

Keywords: defining cultural heritage; international law; human rights; gender perspective; decoloniality.

Summary

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Resumen. La protección del patrimonio cultural es vital para la supervivencia de la identidad cultural, la memoria colectiva y la preservación de valores profundamente integrados. Un requisito previo para ello es una definición bien elaborada del patrimonio cultural en el derecho internacional. Sin embargo, los marcos jurídicos internacionales actuales suelen reflejar legados coloniales y patriarcales, perpetuando desigualdades sistémicas y marginando a las culturas no occidentales. Este artículo examinará críticamente las definiciones y normas del derecho internacional del patrimonio cultural, revelando cómo la colonialidad del poder, el conocimiento y el patrimonio continúan dominando las narrativas globales. A pesar de la interconexión entre el patrimonio tangible e intangible, los instrumentos jurídicos existentes siguen presentando deficiencias, socavando los derechos de los depositarios del patrimonio y subestimando las prácticas tradicionales de las mujeres. El actual «discurso autorizado sobre el patrimonio» refuerza la dominación occidental, limitando la preservación y el acceso equitativos. Para salvaguardar el patrimonio para las generaciones futuras, abogamos por un enfoque inclusivo y basado en los derechos humanos que aborde las barreras sistémicas, integre perspectivas de género y decoloniales, y redefina el patrimonio cultural para alinearse con los principios de derechos humanos.

Palabras clave: definición del patrimonio cultural; derecho internacional; derechos humanos; perspectiva de género; enfoque decolonial.

Laburpena. Ondare kulturala babestea erabakigarria da nortasun kulturala, memoria kolektiboa eta sakon errotutako zenbait balio gordetzeko. Horretarako beharrezkoa da nazioarteko zuzenbidean taxuz definitua egotea ondare kulturala. Nazioarteko oraingo esparru juridikoek, ordea, legatu kolonial eta patriarkalak islatzen dituzte, eta legatu horiek desparekotasun sistemikoak iraunarazten dituzte, eta Mendebaldekoak ez diren kulturak baztertu. Artikulu honetan, nazioarteko zuzenbideak ondare kulturalaren zer definizio eta arau dituen aztertuko da kritikoki, eta erakutsiko da boterearen, jakintzaren eta ondarearen kolonialtasunak nola menderatzen dituen oraindik narratiba globalak. Nahiz eta lotura estua dagoen ondare ukigarriaren eta ukiezinaren artean, gaur egungo baliabide juridikoek hutsuneak dituzte oraindik ere, eta ondarearen gordetzaile direnen eskubideak murriztu eta emakumeen jardunbide tradizionalak gutxiesten dituzte. «Ondareari buruzko egungo diskurtso baimenduak» Mendebaldearen nagusitasuna indartu eta ondarea gordetzeko eta eskuratzeko bidezko modua mugatzen du. Ondarea hurrengo belaunaldientzat babeste aldera, giza eskubideetan oinarritutako ikuspegi inklusibo baten alde egiten dugu guk. Ikuspegi horrek oztopo sistemikoak gainditu, genero ikuspegia eta ikuspegi dekolonialak barne hartu, eta ondare kulturala birdefinituko du giza eskubideen printzipioekin bat etor dadin.

Gako-hitzak: ondare kulturalaren definizioa; nazioarteko zuzenbidea; giza eskubideak; genero ikuspegia; ikuspegi deskoloniala.

1. Introduction

Legal protection of cultural heritage on an international level has been debated for more than a century. During this extended period of time many legal norms have seen the light of day and many more have ceased to exist. One thing is certain, every single one of them has made an impact on what is considered to be cultural heritage today – objects, artefacts, practices, etc. However, cultural heritage is much more than that; it's an abstract, complex, and dynamic notion, recreated over and over again. The cultural heritage consists of manifestations of human life which represent a particular view of life and witness the history and validity of that view[1]. Still, it is the value that underlies the notion of cultural heritage, in the sense

[1] Prott and O'Keefe, 1992, p. 307.

that it is neither the object nor the practice itself which is of some importance to a people, but the importance itself[2]. It is embodied in an object, a landscape, a dance, or all three in combination[3], i.e. its personification can be found in material things or immaterial expressions.

Colonial legacies of dominant power structures still dominate historic narratives and give classifications on the value of heritage. It distorts and flattens diverse communities' living expressions into Eurocentric homogenized discourses. Global linear thinking remains focused on the myth of Western advancement, prioritizing «universal values» while the erasure and cultural devaluation of indigenous and native heritage is being perpetuated. The international legal regime aims to preserve the cultural heritage of all. Yet, in order to do it in the most effective and efficient way, the very notion of cultural heritage needs to be (re) defined. It needs to be clear and well construed since every single legal norm will be using that very definition as a basis for further regulation. And it is what the international legal framework is still struggling to do. Under the guidance of both the UN and UNESCO, various conventions have been drafted, though it seems that cultural heritage is being more and more divided and alienated with each one of them, creating confusion not just for the general public, but also for lawyers and politicians. On top of that, feminist and decolonial movements are starting to emphasize existing patriarchal and colonial roots within cultural heritage.

Thorough examination of this phenomenon will be done via methods derived from the legal science. At first, sociological method will be used to explain the social reality of the current legal issues, i.e. the causal and functional link between both colonial and gender systems that have existing legal framework as a result. After that, a combination of the method of axiology and the linguistic method will be utilized to evaluate implemented legal norms. The concept of cultural heritage requests analysis of its current definitions in different legal acts belonging to international cultural heritage law as well as the norms regulating issues of gender and decoloniality. Exploring cultural heritage in this way will give a more comprehensive picture of the current issues.

2. Coloniality and Cultural Heritage. A Critical Overview

Europe's colonial legacies continue to define our modern everyday lives. The global order established during the colonial era persists in many ways, even as colonized nations have gained independence. Coloniality is described as «pat-

[2] Forrest, 2010, pp. 3-4.
[3] Forrest, 2010, pp. 3-4.

terns of power that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administration»[4]. Coloniality of power manifests in relations of dominance and subordination between Western-centric cultures and the Other. It naturalizes and reproduces relations of inferiority and superiority between the two sides. Western-centric values are presented as ideals to strive for, progressive and rational, whereas the racialized Other is primitive, impulsive and infantilized. Mignolo identified coloniality as the «darker side of modernity» and expanded on Quijano's idea of a masked continuing of colonial control and domination situated as the saviour of the undeveloped and uncivilized Others[5]. Colonizing nation states continue to be presented within an imaginary linear historical narrative of evolutionary progress and advancement. They are the core image of modernity. This narrative is then used as a universal global standard and pushed upon developing states as the only viable way forward.

Additionally, these narratives are rooted in the many global «civilization» missions that European countries used as justification for massive labour exploitation and extermination of indigenous communities. Initially framed in religious terms (Christianity) and later in secular terms (rationality and scientific progress), they have always been used in serving Eurocentric capitalist hegemony. Quijano centers coloniality of power in two axes: racial systems of social classifications which created new identities and hierarchies and the hyper labour and resource exploitation of capitalism[6]. These two axes have outlived colonialism and continue to influence all facets of human social experience. While coloniality of power remains a critical element of modernity, coloniality extends to other areas of everyday life such as knowledge, being, gender[7]. Maldonado-Torres poignantly highlights «as modern subjects we breathe coloniality all the time and everyday»[8]. The coloniality of knowledge examines the dominant forces that control the production of knowledge. As Kelechi Ugwuanyi, articulates, it asks: Who produces what knowledge, for whom and for what purpose?[9] Domination under coloniality required not only the complete assimilation of the colonizers' values, cultures, and institutions but also the erasure of indigenous identities. Colonized communities were forced to adapt to new identities within these imposed systems, often at the cost of their own cultural and epistemological traditions. The erasure and destruction of indigenous knowledge systems have been a consistent

[4] Maldonado-Torres, 2007, p. 243.
[5] Mignolo, 2011, p. 2, 87.
[6] Quijano, 2024, pp. 95-96.
[7] Lander *et al.*, 2002; Mignolo, 2002; Maldonado-Torres, 2007.
[8] Maldonado-Torres, 2007, p. 243.
[9] Kelechi Ugwuanyi, 2024, p. 428.

feature of coloniality, further entrenching the dominance of Eurocentric epistemologies. The dependency on Eurocentric epistemologies is internalized as the only legitimate framework for understanding the world. As knowledge systems of the colonizer and colonized conflict within the established dominant value structures, cultural heritage gets distorted and fragmented. This conflict often leads to the marginalization of indigenous heritage, which is either erased, appropriated, or reinterpreted through a Eurocentric lens, perpetuating cycles of cultural and epistemic violence.

Coloniality of being naturalizes the dehumanization of those subordinated within the colonial system, reducing them to «non-thinking» beings – entities stripped of full humanity and agency[10]. Walker states «that is – how coloniality defines who we are, and how we are, and who exactly "we" is»[11]. The dehumanization justifies non-ethical warfare, systemic violence, and massive exploitative practices. Coloniality internalized these narratives within indigenous communities, leading to devaluing and rejecting their cultural heritage as inferior, as primitive.

The implementation of racial social classifications was closely followed by the enforcement of a binary gendered system of hierarchies, which established rigid gender roles for men and women. This system created a power dynamic that classified the masculine (male) as superior and the feminine (female) as inferior. However, colonized communities, already dehumanized and racialized as «the other», were often excluded from this gendered hierarchy. Instead, this binary Eurocentric gendered structure was imposed as an ideal to strive toward, framed as a tool for «civilizing» these communities. Lugones expands upon the original framework of sexuality and gender within coloniality by critically analyzing the biological dimorphism, the patriarchal and heterosexual organizations of relations that underpin the new gender norms imposed by colonialism[12]. The matrix of power supports the simultaneous implementation of racialized and gendered modes of domination. This oppression has fragmented and disturbed their family structures, decision-making bodies, systems of property, cosmologies and spiritual practices.

Gutiérrez Bascón goes further by stating there is a coloniality of heritage which she defines as «forms of heritage production that uncritically approach the past to position the material and cultural creations of Europe and its descendants as desirable, "civilized" and worthy of praise and conservation, while devaluing or altogether erasing the tangible and intangible legacies of colonized peoples»[13].

[10] Maldonado-Torres, 2007, p. 252.
[11] Walker. https://medium.com/@walkertj/on-the-coloniality-of-being-cb5f7d30c56d
[12] Lugones, 2007, pp. 189-190.
[13] Gutiérrez Bascón, 2024, p. 35.

These forms and practices continue silencing non-white communities while glorifying monuments of colonial legacies. Gutiérrez Bascón divided this concept into a material and epistemological aspect[14]. The material element is associated with the tangible colonial legacies that are preserved and promoted while disregarding and destroying the heritage of the colonised. The epistemological aspect produces the hierarchical and classification systems that sustain hegemonic domination. Monuments and statues serve as powerful examples of colonial heritage. Gutiérrez Bascón highlights the reconstruction of the monument to José Miguel Gómez, notorious for ordering the massacre of Black Cubans in 1912, while the nearby statue of Black independence hero Quintín Bandera has been excluded from this restoration effort[15]. On the other hand, protest movements such as Rhodes Must Fall[16], which demanded the removal of the statue of Rhodes at the University of Cape Town in South Africa, remind us of the continued presence of coloniality in both former colonies and colonizer nations (e.g. Leopold II statue in Brussels[17]). Even communications at heritage sites convey messages of a world dominated by coloniality. Those who don't have a sense of belonging within these messages are excluded as they don't recognize themselves within presented narratives[18]. This exclusion reinforces the epistemological violence of coloniality, which privileges certain narratives while silencing others.

The coloniality of power, knowledge, being, and heritage collectively reveal the deep and enduring structures of domination that define modernity. These structures are not confined to the past but continue to shape our present, influencing everything from global power dynamics to individual identities. To dismantle coloniality requires a radical reimagining of universality – one that delinks from existing Eurocentric knowledge systems and practices.

3. UNESCO's comprehension of cultural heritage

Looking from aside UNESCO's overall approach to culture can be, from time to time, confusing from a legal point of view. The definition of culture itself in one of the most important *soft law* legal acts – The Mexico City Declaration on Cultural Policies[19] seems built for the political arena, and not for practicing lawyers.

[14] Gutiérrez Bascón, 2024, p. 35.
[15] Gutiérrez Bascón, 2024, pp. 36-37.
[16] Timalsina. https://harvardpolitics.com/rhodes-must-fall/#google_vignette
[17] Contested histories. https://contestedhistories.org/wp-content/uploads/Belgium-Leopold-II-Statue-in-Brussels.pdf
[18] Högberg, 2012, p. 133.
[19] The Mexico City Declaration.

So, no wonder, that way of managing the overflowed field of cultural heritage. To be precise, definitions of cultural heritage in UNESCO's conventions differ from one legal act to another[20]. It seems that they are all conditioned upon the socio-political and economic context in which they were adopted, without any tangible connection between them. The very core of these definitions can be complex and, in some cases, even descriptive, leaving a lot of space for different interpretations, depending on their subject, aim, current socio-political and economic situation, in addition to the current needs. Further on, those interpretations on top of criticism of definitions are intensifying the problem. On top of that, these definitions and frameworks (as they will be presented) remain inextricably tied to the colonial legacies that have long shaped international law.

The first step made in the modern era of international law in order to protect cultural heritage was taken a couple of years after World War II. The convention for the Protection of Cultural Property in the Event of Armed Conflict is so important that it is considered to be the basis for one of the human rights – right to cultural heritage. In total, 136 state parties agreed to that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind[21]. On the other side, cultural property was defined as movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above[22]. As it can be seen, the focus was on the material manifestations of cultural heritage. It was the time when the world was trying to recover from all of previous

[20] It is important to emphasize that in the English language, just like in Russian or Arabic (or even in Serbian) the word *heritage* is directly linked to inheritance. Interestingly, Chinese characters signifying *heritage* mean «something valuable that is left to future generations», and if we go even deeper, we can see that Chinese term is even related to seashells, since they were the first currency, before the use of money. In Roman languages, like French and Spanish, the notion is connected with patriarchy. Since the United Nations resolved this issue through various resolutions on multilingualism, many other international soft law acts (e.g. The Nara document on authenticity) only use the word *heritage* and even the 2003 Convention entered into force without still being translated into every single UN official language. So, the methodology used in legal science and this particular paper relies heavily on already approved semantics and legal acts surrounding it and doesn't go any further into the roots of the words, since it's not within its expertise. In addition to that, gender and decolonial issues of the notion of heritage are global problems, emerging in every single corner of the world, as they were already elaborated above.

[21] The 1954 Hague Convention, Preamble.

[22] The 1954 Hague Convention, Article 1.

devastation, colonial regimes were still active, and second wave feminism hadn't started yet. In addition to that, the definition given above is far from the general one. As the 1954 Hague Convention clearly stated it shall be used only for the purposes of that particular act. Further on, provided legal protection is focused solely on the specific circumstances related to war and other forms of hostilities.

Nevertheless, in the years to follow UNESCO adopted various *soft law* instruments whose principles of legal protecting cultural heritage followed those in the 1954 Hague Convention. I.e. their focus was on material heritage (archaeological excavations, museums, landscapes and sites). The only act that actually gave some sort of concrete comprehension of the notion was the Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works[23]. Its definition of cultural property is similar (yet not the same) to the 1954 Hague Convention, and once again only applicable in the cases regulated by this soft law act.

Next step forward was made by drafting the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[24] in the year of 1970. It was right around the time in which colonial regimes were slowly fading away. Like we have seen before, the term *cultural property* was coined only for the purposes of this Convention. It means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the enumerated categories (like rare collections and specimens of fauna, flora, minerals and anatomy property relating to history, products of archaeological excavations elements of artistic or historical monuments, antiquities more than one hundred years old)[25]. Further on, the States Parties to this Convention recognized that for the purpose of the Convention property which belongs to the certain, again specifically enumerated categories forms part of the cultural heritage of each State[26]. It's clear that lawmakers considered cultural property a narrower term than cultural heritage. Actually *cultural property* refers to the specific objects of guaranteed legal protection, while cultural heritage is the one with the higher value for the society and states.

It wasn't long until the next *hard law* legal instrument was adopted. It had a much wider impact than any other act before. Just by looking at the statistics Convention Concerning the Protection of the World Cultural and Natural Herit-

[23] The 1968 Recommendation.
[24] The 1970 Convention.
[25] The 1970 Convention, Article 1.
[26] The 1970 Convention, Article 4.

age[27], adopted in 1972, is one of most widely accepted legal acts. Once again, this legal instrument made a clear distinction between two terms *cultural property* and *cultural heritage*. Even though it never gave a proper definition of *cultural property* itself, based on the text of the convention itself, it is clear that it is the one that heritage consists of. Interconnectedness was necessary, so it persisted. On the other side, heritage was divided for the purposes of the convention into two categories – cultural and natural, with each of them clearly designated. The aim of the act was to provide legal protection for the cultural and natural heritage of the «outstanding universal value» and «outstanding interest for mankind». Authenticity and integrity were the preliminary tests for properties to be inscribed in the World Heritage List but also were the cause of numerous practical problems that emerged[28]. Cases like preserving constructions made out of mud, wood, bones, leather, etc. overflowed administration. In those moments it was clear that this legal instrument had a clearly Eurocentric orientation, and that the existing legal framework was not applicable. In addition to that, the exhaustive intense nomination process contributes to the dominance of developed countries as they have the necessary resources and experts to comply with all conditions. Finally, when cultural and natural sites become World Heritage Sites, indigenous communities are sometimes displaced and their way of life is disrupted[29].

It took more than 20 years for a new legal act with the intention to solve the problem to emerge. *Soft law* instrument – the Nara document on authenticity[30] followed already existing UNESCO's comprehension of *cultural property* and *cultural heritage* introduced by experts who drafted the 1972 Convention. Interestingly, this time, the term *heritage properties* was introduced, though it was never further explained nor repeated in any other *hard* or *soft law* legal act. The idea of the whole document was to move away from the Eurocentric approach of comprehension of heritage and make a less ambiguous understanding of property's value and authenticity. So, the act clearly stated that judgements about values can differ depending on a culture and that heritage properties must be considered and judged within the cultural contexts to which they belong[31]. Hence, the door was wide open for a new, deeper understanding of the core of the notion in the legal circles. No wonder the Nara Document stirred so much attention on a global level. Hitherto, nothing has changed; the Eurocentric approach remained and the *heritage property* didn't gain much attention. After all, it was a *soft law* act

[27] The 1972 Convention.
[28] See: Francioni, 2020, pp. 256-257.
[29] #DecolonizeUNESCO. https://www.survivalinternational.org/documents/DecolonizeUNESCO-report
[30] The Nara document.
[31] The Nara document, Article 11.

and there was no further analysis how these criteria can be tailored to fit all the cultures on one side, be applicable in the administrative processes and useful to the local communities whose heritage is in question[32].

It didn't take long until a new *hard law* international act emerged. Underwater cultural heritage is important because it constitutes what has been called a «time capsule» – meaning that everything on a site may well be as it was when it disappeared beneath the surface of the water[33]. So, the 2001 Convention on the Protection of the Underwater Cultural Heritage provided us with a definition of *underwater cultural heritage* and those are all traces of human existence having a cultural, historical, or archaeological character that have been partially or totally under water, periodically or continuously, for at least 100 years[34]. There was no mention of «cultural property» even though some of the assets enumerated by the definition would be «perfect candidates» if they were on land (like buildings, artefacts, sites, etc.). Just like the definition of any other act before, this one was heavily debated too. It was emphasized that the temporal problem (since artifacts from world wars wouldn't be considered as heritage at the time when the act was drafted), the problem with the term *underwater* (there are sites that are depending on the level of water, sometimes under the water and sometimes on the land, which raises the question of which legal act is applicable), etc.[35] In addition to that, unlike prior legal acts, it is quite interesting that deep values were not emphasized in the text. As a matter of fact, the notion of *underwater cultural heritage* was drafted as a response to the underwater pillages of ancient ships and sites, which is one of the reasons why legal doctrine and practicing lawyers had to analyze it further. Still, it seems that more work needs to be done, especially in the sense of deconstructing it from the decolonial point of view in order to protect the human rights of the communities. Namely, indigenous communities of Latin America are underlining the fact that their rights were neglected in the fight that took place on an international level over retrieved treasure from the shipwrecks originally belonging to them. Spain was the one who eventually won the case[36] and took the treasure just like it did hundreds of years ago. Verdicts similar to this one are silently recreating real life and legal situations in which minorities have to «take the back seat».

Final hard law UNESCO's instrument focused on intangible cultural heritage and it followed previously established policy of this organization-definition of the heritage was only applicable for the purpose of the act itself. The one provided by

[32] See critique of the legal act in: Gfeller, 2017.
[33] O'Keefe, 2020, p. 295.
[34] The 2001 Convention, Article 1.
[35] See: Dromgoole, 2013.
[36] See: Perez-Alvaro, 2023.

the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage is descriptive, too broad, difficult to use not just by those who are practicing law and providing various administrative services, but it was also widely criticized by legal doctrine[37], and its flexibility is still in question. The value that intangible heritage has, was never explicitly mentioned. Yet, there were no further amendments made to the act that would affect it in any way. So, when we take a look at it today, the first thing that stands out is the influence of the legacy of the Nara document, visible in its focus on the comprehension of cultural heritage by the local communities themselves. According to the act, *intangible cultural heritage* are the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity[38]. Interpreted like this, heritage starts to incorporate a gendered element as women in their material role created cultural patterns that were transmitted throughout future generations. Heritage defined like this was further divided into five domains, just like «tangible» and underwater heritage had enumeration following the definition. It seems like the same pattern was followed when it comes to officially drafting legal norms regulating this form of heritage.

Lately voices that are talking about interconnectedness between these aforementioned «types» of heritage are getting louder. These comments belong to legal doctrine, international experts, practicing lawyers and even bearers of the heritage themselves. After all, numerous monuments and places exist today as a consequence of a deeply rooted knowledge. What's more is that objects and artefacts are also a result of that same cognizance, and all of them can be significant for the practices and the bearers. On top of that, the notion of underwater heritage is set aside without any attempts to connect it to its counterparts and, as it was shown, it refers to «all traces of human existence».

If we take a closer look at the lists established by the aforementioned legal acts, we can see that these forms of heritage are truly deeply intertwined. For example, traditional skills related to wooden architecture in Japan, inscribed on the Representative list of the 2003 Convention (RL), are related to the creation of the monuments of Kyoto and Nara, and shrines of Niko, which can be found on the World Heritage List (WHL). Also, the city of Sheki, once a significant trading

[37] See: Lenzerini, 2011; Prott, 2007; Shahamati *et al.*, 2024; Hafstein, 2015.
[38] The 2003 Convention, Article 2.

center on the Silk Road, is home to the practice of making women's silk headscarves (both of them are inscribed on the WHL and the RL). These headpieces are seen as religious tradition, parts of cultural identity, and symbol of social cohesion. It is quite interesting and significant for this research that even though they are seen as a symbol of cohesion, these pieces are mostly made by men for women to wear and cover themselves. Likewise, traditional knowledge about medicinal plants from the area of sacred forests of the Mijikenda (Kenya's inscription on the WHL and List in need of urgent safeguarding) emerged over time due to the interaction of local communities with the site. This particular practice is endangered due to land reform, urbanization and social transformations. These land reforms are a legacy of the colonial government (principles and management are inherited from those times) which are raising the question of optimal use of the land. Loss of the site can lead to loss of the knowledge and vice versa, so various measures for their safeguarding are implemented, yet their result is debatable.

Everything is intertwined and it looks like that law is the one making the division. With that in mind, it wouldn't be wrong to say that a new, unique approach to cultural heritage, a new way of defining it, could be a game changer for its further regulation and efficient safeguarding. A gender and decolonial approach to heritage might give the ever evolving concept its shape and prove the most marginalized groups adequate protection. After all, numerous countries with strong colonial background and problems still emerging from them (e.g. Australia, the United States, Canada, New Zealand, etc.) never actually ratified all of the acts mentioned above. Their policies are mostly reinforcing current situations with only a few steps forward. Therefore, changes in the adopted approach within international organizations can have a significant impact on a global scale.

4. Whose Rights, Whose Heritage? A Human Rights-Based Gender and Decolonial Analysis

While the definition of cultural heritage has evolved and changed, it's still being interpreted in Eurocentric and gender neutral. Coloniality of law persists in every area of international law. It perpetuates Western – centric patterns of domination throughout the world. The current backlash against gender and race is a result of the existing colonial systems that never went away. Smith states that heritage is perceived and interpreted by a masculine perspective with class-specific social and aesthetic values[39]. The focus remains on monumentality and aesthetics

[39] Smith, 2008, p. 161.

linked to the ideas of masculinity and nationhood. Such methods limit the human rights of bearers and fail to offer adequate protection to the cultural heritage.

Articles 5 and 13(c) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) have been vital for upholding and advancing women's cultural rights[40]. Combating gender stereotypes and prejudice is necessary for achieving substantive equality for women and girls. Coloniality of gender rewards those who uphold the strict gendered binary division of roles. Authorised heritage discourse frequently highlights narratives of «Great Men» with their political, social and cultural achievements but women continue to be portrayed in their domestic or child-rearing roles[41]. Women are deemed «guardians of society»[42] within their maternal roles yet in most cases they are limited in accessing and participating in dominant forms of cultural heritage. What's more, when they do contribute to heritage within their gendered roles, the value of these contributions is usually forgotten or undervalued. States parties are required to implement various measures in order to eliminate gender stereotypes and combat systemic gender inequality[43]. Cultural practices that disproportionately harm women and girls must either be abolished or women and girls must be given the right to opt out[44]. However, CEDAW still primarly favours a white feminist narrative.

Indigenous and minority communities has suffered land theft and forced assimilation which has decimated their cultural heritage. Economic commodification of heritage often excludes communities from their own ancestral sites or even results in their destruction. Who can forget the infamous destruction of the Juukan Gorge, which was destroyed for the extraction of iron ore[45]. In a recent letter, the Committee on the Elimination of All Forms of Racial Discrimination(CERD) has insisted that Australia review or revoke «all consents to landowners given under the post 15 November 2023 legislative framework» in light of its obligations under ICERD and other international human rights instruments[46]. CERD has in Article 5(e)(vi) guaranteed the right to equal participation in cultural activities[47]. Some examples include: criticising Georgia for a «lack of effective preservation of the cultural heritage and monuments of minorities»[48], expressing

[40] CEDAW, Articles 5, 13(c).
[41] Lähdesmäki *et. al.*, 2020, p. 225.
[42] Vo, 2020.
[43] CEDAW, Articles 3, 4.
[44] Report of the Special Rapporteur in the field of cultural rights, paras. 25-26.
[45] Al Jazeera. https://www.aljazeera.com/news/2020/12/10/rio-tinto-government-faulted-for-blast-at-aboriginal-caves
[46] CERD, Letter to the Government of Australia.
[47] ICERD, Article 5(e)(vi).
[48] UN Doc. A/66/18, 2011, p. 43, para. 16.

concerns to Poland for «the continued incidence of anti-Semitic activities in the State party, including the desecration of Jewish cemeteries»[49] and rising allegations against China of the «destruction by the State of mosques, Buddhist and Lama temples and other places of worship of the minority nationalities»[50]. In the ongoing case *Armenia v. Azerbaijan*[51], the International Court of Justice might expand the interpretation of ICERD to be explicitly applicable in cases of cultural heritage destruction. This would allow for a wider scope of protections and enable individuals and groups to access the ICERD framework. As such, it would affirm racism and racial hate as valid bases for heritage destruction.

Even with the opportunity of using multiple international legal instruments to protect cultural heritage, there is an over-reliance on one framework. The UNESCO legal regime vastly depends on the state's will to engage with the framework and the recourse for violations remains limited. In the failed campaign to inscribe Hasankeyf as a World Heritage Site, Turkey didn't nominate the site so UNESCO can't do anything[52]. This has led to a case before the European Court of Human Rights as a last resort to protect the area from destruction, which in the end was deemed inadmissible[53]. The Court couldn't find a link between the Convention and protection of cultural heritage[54]. International human rights primarily safeguard individual rights, so they often fail to fully address the communal and collective aspects of cultural heritage. However, we are certain that a more integrated approach with these two regimes would fix some of the current gaps. This would allow for a more inclusive and holistic legal framework with better protections but as culture is complex and even changing it's questionable if a complete and effective protection framework is even possible. One thing is certain; any approach must ensure meaningful participation of communities whose heritage is being regarded.

5. Conclusion

As it was presented, cultural heritage is a complex multifaceted concept. The original idea was to safeguard what mankind considered to be of the utmost value. Yet, by looking at it through gender and decolonial lenses, existing systemic inequalities and power imbalances appeared. It all resulted in barriers in accessing

[49] UN Doc. A/64/18, 2011, p. 87, para. 7.
[50] UN Doc. A/51/18, p. 58, para. 417.
[51] Application of the ICERD, *Armenia v Azerbaijan*, ICJ GL No 180, ICGJ 556 (ICJ 2021).
[52] Rivera. https://savethetigris.org/flooding-the-cradle-of-civilization-campaign-against-the-ilisu-dam
[53] *Ahunbay and Others v. Turkey*, Application no. 6080/06.
[54] *Ahunbay and Others v. Turkey*, Application no. 6080/06.

and preserving cultural heritage. It seems that heritage has always been gendered and inextricably linked to the colonial pasts of states, leading to it reproducing patterns of systemic inequalities.

No wonder that longstanding debate about the legal definition of cultural heritage once again stirred up. While legal instruments provide a more robust and inclusive framework, they still fail to properly address the needs of the oppressed in developing and preserving their heritage. After all, cultural heritage is intrinsically tied to a person's and community's identity and dignity, individual and collective memory. By changing the narrative (losing the Eurocentric aesthetic viewpoint) surrounding cultural heritage, it can be directly influenced onto its preservation for the generations to come. In any event, as García-López and Winter-Pereira proposed «law produces subjects, produces truths and produces power».

At this moment, it is essential to be realistic. There will be no significant changes to adopted legal acts, especially when it comes to drafting new gender-sensitive and decolonial aware definition(s). Yet, there is still a possibility of fixing the current gaps in the existing legal regime by using an integrated, coordinated approach that combines human rights law and cultural heritage law frameworks. In order to achieve that, it is necessary to implement an intersectional, gender-sensitive, and decolonial approach to cultural heritage protection, where both human rights and cultural identities are protected through meaningful participation and representation. Without such an approach, all changes become mere surface-level, rather than fostering lasting transformation.

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