



MARIE CORNU, ANITA VAIVADE, LILY MARTINET, CLEA HANCE (Eds.):
*Intangible Cultural Heritage Under National and International
Law. Going Beyond the 2003 UNESCO Convention*
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The safeguarding of intangible cultural heritage, internationally embedded in the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* of 2003 (hereinafter referred to as the 2003 Convention)¹ (as well as other international documents²), represents a rich source of research topics for experts in social sciences and humanities. At the same time, it is a relatively complex professional discourse that in various manners cuts across several dimensions of the process of handing down and taking care of selected expressions of traditional folk culture. According to the 2003 Convention, its most important actors are not exclusively state or legal entities, but especially communities, groups, and individuals with their own needs, values, and understanding of their own cultural heritage. The diverse legal guidelines concerning the ICH³ safeguarding and related to the 2003 Convention influence to various degrees all state administration levels (from national through regional to local) and, in the countries that have ratified the 2003 Convention, they are becoming the basis for guiding the activities and agenda of several ministries and specialised institutions.

The relationship between the 2003 Convention and the national legislative systems represents an important object of research and is even today subject to intensive expert reflections either in the form of case studies focusing on the implementation of the 2003 Convention in specific countries and local communities, or extensive scientific monographs (or their parts) covering the legal implications of the ICH safeguarding (e.g., Adel, Bendix, Bortolotto, Tauschek, *Eds.*, 2017; Bendix, Eggert, Peselmann, *Eds.*, 2013; Stefano, Davis, *Eds.*,

1 The original text of the 2003 Convention is available on the UNESCO website (see Text of the Convention for the Safeguarding of the Intangible Cultural Heritage, n. d.).

2 For instance, *Operational Guidelines for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage* (2018), *Sustainable Development Agenda 2030* (United Nations, 2015); at the national level, it is, for instance, the *Concepts of Sustainable Development of the ICH and traditional Folk Cultures for the Period 2020–2025* (adopted by Government Resolution No. 543 of 06 November 2019), which is also related to the objectives of the *Concept of Care for Traditional Folk Culture until 2020* (2015).

3 In the text below, the term *intangible cultural heritage* is replaced by its abbreviation ICH due to stylistic simplification or content shortening of the text.

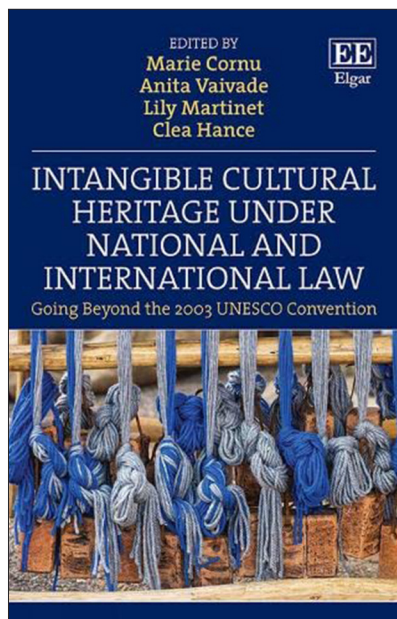
2017). The very term “intangible cultural heritage”, its professional as well as overall semantic “conceptualization”, and penetration in the public discourse have been examined, together with the analysis of the safeguarding processes in the light of the 2003 Convention, also in our country (Hamar, Voľanská, 2015).

So far, the most detailed and, in terms of international coverage, unprecedented research project, the objective of which was to conduct, starting from 2014, an in-depth and multi-dimensional analysis of the legal context and legislative tools for the safeguarding of intangible cultural heritage arising from the Convention, is the publication *Intangible Cultural Heritage Under National and International Law. Going Beyond the 2003 UNESCO Convention* (Cornu, Vaivade, Martinet, Hance, Eds., 2020) as the final scientific project output. In formal terms, it is a collection of detailed chapters addressing the partial aspects of the issue by a smaller group of members of the

otherwise large international research team of the *Osmose Project*.⁴ The primary research objective was to analyse national generally binding legal regulations (laws) related to intangible cultural heritage and the implementation modalities of the 2003 Convention in selected countries of the world and the ways the text of the Convention is actually reflected in their contents. The research under the *Osmose Project* followed two lines: on the one hand, it included extensive archive research of legal texts, and a semiotic and historical reflection on the legal protection of the ICH and its conceptualisation in the context of the development of the national legislative systems from the 19th to the 21st century. Another objective was to explore and evaluate, based on the legal categories, the very process of the legal genesis and conceptualisation of the term “intangible cultural heritage”, and to explore and comparatively evaluate the ways the specific laws arranged the relationships between ICH and stakeholders (the state, scientific institutions and experts, bearers, non-profit organisations) in individual countries. In addition, the research team analysed how specific laws aimed at the protection and safeguarding of the ICH interacted with other areas of national and international law (Blake, 2020: x)

The research covered 24 selected countries from all UNESCO Electoral Groups. To ensure as representative coverage of the issue as possible, this number also includes several countries that have not ratified the Convention but have created their own legal instruments to regulate the processes of safeguarding or inventory taking of the ICH elements.

The book is the result of the research process that followed a specific research design⁵,



4 The research team was led by Prof. Marie Cornu (France) and Dr. Anita Vaivade (Latvia).

5 The key research method was an extensive international questionnaire survey mapping the conceptual and linguistic similarities of legal instruments at the national and international levels. In the analysis and interpretation of the legal systems, it also covered some of the cultural, political, historical, professional, and other perspectives. With the structure of the questions asked in the

worked with a specifically defined scope of typologically different legal texts⁶ and, within the analytical and interpretation process⁷, faced inevitable methodological as well as conceptual problems. Nevertheless, (thanks to the way the research team handled them both methodologically and theoretically) these problems represented an important added value of the contents of the entire publication.

In addition to the *Introduction*, the publication contains four more extensive parts, each of them consisting of three separate chapters. The final part of the book comprises a text that has the nature of an expert opinion (Deacon, 2020: 179–192) and the exact wording of the questionnaire, which was elaborated in detail for each country thanks to local team colleagues.

Chapter 1 was written by the leading members of the research team. This chapter explains the research project background, the motivations for the research and the main research findings. According to the authors, the adoption of the 2003 Convention led to an unprecedented legal debate that reaches far beyond the purely technical issues of the implementation of international laws, directives, or conventions into the national legislation. In addition, in their perception, intangible cultural heritage is localised on a completely different level, since it is fundamentally based on the dynamic of identification (i.e., according to the 2003 Convention, the bearers must identify by themselves an element as their ICH). The authors emphasise that this process involves an often intimate essential link that, to a certain degree, reflects the sense of belonging, yet they also consider it to be the fundamental factor of the 2003 Convention and a source of a more generally valid dynamic of its legal globalisation (Cornu, Vaivade, 2020: 1–2). They ask the (research) question: What is the power of these facts in bending or reorganizing the legal discourse and the individual laws? According to them, it is a specific legal situation mainly in the context of the legal discourse “based rather on an object-oriented approach to protection, centred around the notion of outstanding value. Intangible cultural heritage is thus located on a radically different plane because it principally derives from a dynamic of recognition” (Cornu, Vaivade, 2020: 1).

The ICH category is new at least in terms of the legal language. In the entire project, it became the basis for grasping the internal shifts in law, while the authors of the chapter note that the law aimed at ICH safeguarding has certainly not yet reached its maturity point. It is a field of law in the process of development, attempting to find its place in the general legislative area of cultural heritage (Cornu, Vaivade, 2020: 2).

The extensive body of data acquired by means of the questionnaire survey is analysed and broken down in the publication into logically arranged chapters that present various partial results of the analysis and the interpretation of an impressive number of legal texts, general

questionnaire, the project also attempted to understand and explore the relationship or links between the internal law and the non-legal context (Blake, 2020: x).

- 6 The laws of the individual countries often differ given their essence, focus, contents, and the degree to which they are binding. In some countries, the laws are only in the process of drafting, or are the result of modification of the existing legal regulations, or apply to the ICH safeguarding only implicitly (see Blake, 2020: ix).
- 7 The analysis of the laws related to the ICH followed a few basic lines of legal dynamics. According to J. Blake, one of them concerns the globalisation of law, where national legal systems that have for decades developed instruments for the safeguarding of folklore, language, or traditional knowledge, seek to find a way to reorganise the laws in the context of the new category of the “intangible cultural heritage”. The other one is about the growing complexity of the law and its links to the law governing the competencies of the different entities (national law, law of local self-governments, bearers, the right to preserve cultural heritage, etc.) (see Blake, 2020: ix-x).

legal regulations, as well as specific court cases. Each of them is briefly described in the text below – due to the importance of the given publication and to keep this review article within a reasonable scope.

PART I – The Stance of States Towards the Category of ‘Intangible Cultural Heritage’

Chapter 1 in Part I of the publication analyses the semantic embeddedness and the historical contexts of the conceptual maturation of (not only legal) terminology that has at least partially related to the term “intangible cultural heritage” in individual countries as the basic category of the 2003 Convention (Vaivade, 2020). The ratification of the Convention led in several countries to a re-evaluation of the terms and their semantic definition both at the level of the national legislation and in the expert discourse. The countries have undergone the necessary adaptation of their national legal regulations to successfully comply with the principles of safeguarding and care of intangible cultural heritage to which they committed themselves by adopting the 2003 Convention.

Through examples of selected countries, the chapter gradually answers several questions. It begins with an examination of how some countries had previously identified, both terminologically and conceptually, and incorporated in the contents of various laws as well as in the discourse of social sciences and humanities the cultural expressions that the 2003 Convention considers intangible cultural heritage. These examples illustrate the legal context associated with terms like “spiritual culture”, “folklore”, “goods with an ethnographic value (or interest)”, or “cultural goods of an intangible nature”. The analysis of the legal texts also made it possible to successfully identify traces of the safeguarding of “intangible” heritage (in contrast to or in a close link to “tangible” heritage) in selected countries as early as at the beginning of the 20th century. Attention is paid to the discussion between experts and legal authorities with respect to the shift from common terms like “folklore” or “folk culture” (in some countries) towards a new term. One of the conclusions of this chapter is the statement that, prior to the adoption of the 2003 Convention, the ICH category existed neither in the national legislations nor in the languages of most of the studied countries. This resulted, among other things, in problems with its translation or application when drafting related national generally binding legal regulations.⁸

The next chapter offers an analytical insight into the legal problem which has been caused by the term “community” at the level of national legislation (Négri, 2020). The 2003 Convention does not provide a detailed semantic definition of this term despite its key position in the contents of the Convention as well as in ICH safeguarding processes. In addition, the 2003 Convention complements this category with some other terms that define the principal ICH bearers, i.e., “group”, “individuals”, which expands in an interesting way the possibilities for exploring the legal, political, as well as social contexts of the individual countries. Increased attention is paid to the ways the term “community” (in the context of the implementation of the Convention at the level of states) resonates with and finds application in the laws of the

8 This chapter is complemented by an overview of ICH-related terms (or their part) in table form, before and after the adoption of the 2003 Convention in the studied countries. Even though the necessary data were not obtained in all cases in the framework of the *Osmose Project*, the final overview represents a valuable source of information (Vaivade, 2020: 40–43).

countries with different doctrines of their social and political arrangement that they claim politically, culturally, as well as legislatively.

The last chapter of the first part of the monograph (Cornu, 2020: 54-67) explores language as a cultural expression. The author analytically moves from the text of the 2003 Convention as a reference framework towards the processes of implementation of language-related laws up to the ways the concept of intangible cultural heritage has been reflected in the relationships with language rights and the multiple levels of its scope in selected countries (Cornu, 2020: 54). The issue is all the more interesting, as the more problematic is the understanding of language as an object of legal protection in the context of cultural heritage as an expression of fundamental human rights or the rights of national minorities. The contextualisation of language and the design of the instruments for its safeguarding or regulation acquires various shades in national laws. The scope of the contexts as well as the very importance of the line of thinking about the legislative implications of the safeguarding of the ICH and language has been significantly enriched by the inclusion of other international legal instruments in the process of analysis and interpretations of the legal texts of selected countries (see Cornu, 2020: 55).⁹

PART II – Interactions Between Intangible Cultural Heritage and Other Fields of Law

Chapter 5 explores both the mutual links and discrepancies between intangible cultural heritage and natural heritage based on international as well as national legal texts. Communities characterised by special expressions of cultural heritage often emphasise the ties and dependence of cultural practices on specific ecosystems. ICH safeguarding is understood also as a means of environment protection or conservation of biodiversity and is closely linked also the protection of sophisticated agricultural heritage systems (Fromageau, 2020: 70). The entire legal context is thereby expanded by other types and levels of legal texts and instruments of both international and national legal mechanisms. The chapter is rich in legislative implications concerning the needs and rights of local communities and problems related to the climate crisis, the protection of tropical forests, and the availability of natural (including water) resources. The author also deals with related elements inscribed in the UNESCO world lists as a tool or the safeguarding of (also) the ecosystems of local communities at the state level and the forms of pursuing a legal balance between environment protection and the legitimate interests of indigenous communities.

Chapter 6 analyses the 2003 Convention as the first legally binding instrument that explicitly links ICH safeguarding to human rights. UNESCO accentuated this approach already in 2001 by the adoption of the *UNESCO General Declaration on Cultural Diversity* (Hance, 2020a: 81).

Paradoxically, the results of the questionnaire survey under the *Osmose Project* do not confirm this link at the level of the national law of the individual countries. The research team interprets this fact as an absence of specific legal provisions that would conceptualise the safeguarding of intangible cultural heritage as a matter of fundamental human rights. The

9 For instance, the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005), the *European Charter for Regional and Minority Languages of the Council of Europe* (1992), *Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings* (2010), or *Recommendations regarding the language rights of national minorities* (Oslo, 1998).

data also showed that none of the analysed court cases concerning human rights and penetrating in the topic of culture was explicitly linked to intangible cultural heritage issues in the questionnaires (Hance, 2020a: 81). The chapter therefore deals with partial court cases characterized by an “indirect link” between the safeguarding of intangible cultural heritage and human rights. At the end of the chapter, the author notes that even though the Preamble of the Convention explicitly refers to the human rights protection instrument, the two legal protection frameworks remain more or less separated at the implementation level.

The final chapter of Part 2 focuses on the results of the analysis of the relationship between intangible cultural heritage and the intellectual property law, the individualist principle, and the essence of exclusivity, which is at first sight contrary to the principle of the collectiveness of intangible cultural heritage as one of its fundamental characteristics. As L. Martinet, the author of the chapter, notes, “the recognition of intellectual property rights on certain elements is thought to bear the risk of fossilising intangible cultural heritage by freezing it in a static state. Yet, over half of the answers to the comparative law questionnaires mentioned intellectual property” (Martinet, 2020c: 97). This is one more reason why the research team extended the spectrum of studied materials to include an analysis of other generally binding legal regulations that ultimately helped identifying the broad spectrum of levels at which the said relationship is reflected in specific judicial consequences, laws, and ICH safeguarding processes at the national and regional levels. This part of the research concludes that even though the 2003 Convention seeks to exclude intellectual property from its scope, in practice, both states and communities often turn to intellectual property laws to protect certain aspects of their intangible cultural heritage (Martinet, 2020c: 121).

PART III – National Legal Tools to Safeguard the Intangible Cultural Heritage

In the three chapters of Part III of the monograph, the authors explore in detail the specific levels and instruments of the legal safeguarding of ICH and their legal authority. After all, this was one of the primary objectives of the *Osmose Project*: to compare the national legal systems that enable the safeguarding of intangible cultural heritage; and to assess whether, in their case, it is possible to speak about “hard” or rather “soft” law. Chapter 1 discusses thoroughly the legal instruments, such as ICH (representative) lists – national, regional, or those managed by specific types of institutions (Cornu, Hance, 2020). It also deals with the awards and recognitions awarded to ICH bearers in selected countries, trademarks, regulatory instruments, as well as promotion tools aimed at safeguarding ICH. Subsequently, this chapter presents the results of an analysis of their legal weight, which was defined based on the scope of the legal consequences that a particular legal instrument can bind.

The next chapter presents an analysis of four specific laws related to ICH safeguarding, adopted in the course of the ten years of the *Osmose Project* in China, Spain, Lithuania, and Madagascar (Åbele, 2020). These legal texts are examined and mutually compared from several aspects: the definition and meaning of ICH through its content; the description and definition of the role of the communities, groups and individuals; the identification of the responsible institutions and safeguarding measures; the typology of the lists of ICH elements; and the description of the local nomination process. It is an extremely instructive part of the monograph, which effectively and appropriately contextualises both the differences and similarities between the approaches of the studied countries with regard to the nature of the political establishment and legislative culture.

The last chapter of Part Three turns attention to the way intangible cultural heritage is defined through the creation and management of ICH (representative) lists as one of the few binding provisions of the 2003 Convention (Martinet, 2020b). Except for the countries in which the inscription of an element in the list goes hand in hand with the safeguarding plan, the main legal consequence of a systemic maintenance of the list at the national level is the opening of the way to the inscription of the element in one of the UNESCO world lists. The research also included an analysis of a convincing number of various processes through which “national” or regional lists of ICH elements in the individual countries were created. The last chapter also offers intellectually rich material, and, thanks to many specific examples, it represents an important part of the publication.

PART IV – Justiciability and Judicialisation of Intangible Cultural Heritage

The last Part IV of the publication focuses on the applicability of the legal regulations related to intangible cultural heritage, as well as cases of intangible cultural heritage judicialisation in which the cultural traditions of communities become part of the discourse of the legal disputes at the level of states. The analysis of the questionnaire survey data highlighted the three most frequent types or areas of the dynamics that illustrate in an interesting way the content and limits of the legal authority of the 2003 Convention and the related national legal provisions. Each of them is described separately in Chapters 11 to 13, based on specific, yet diverse cases (Martinet, 2020a; Hance, Martinet, 2020; Hance, 2020c).

The first type of the legal dynamic is formed by the relationship, or rather tensions, between animal rights and the safeguarding of intangible cultural heritage. The authors illustrate it through a series of legal disputes and laws which demonstrate in an interesting way the dynamic between the cultural traditions of a particular community and the values and commitments claimed by the country in the context of animal rights.¹⁰ As the examples mentioned in the completed questionnaires show, the state is forced through such court cases (among other things) to react and solve even more complex cultural and social issues, and its decision ultimately enhances the legal status and enforceability of the rights of particular population groups with regard to a certain segment of national legal regulations or the international law. As noted by L. Martinet (2020a: 152), the state has two options in such cases: either to tolerate or legally authorise (i.e., in fact preserve) cultural differences, or to suppress them so that they eventually gradually disappear. In order to prevent the legislative conservation of the otherwise developmentally dynamic cultural practices (which would also be contrary to the principles of the 2003 Convention), the states as well as regional jurisdictions, according to the research results, most frequently resort to a mechanism of legal exemptions to mitigate or eliminate a conflict between the parties to the dispute. However, they don't always succeed in fully resolve problematic cases. The selected examples well illustrate the cases where an ICH phenomenon was removed from the list, or the application was rejected because of a problem or suspected violation of animal rights.

Chapter 12 analyses several court cases that demonstrate the way the process of inscription of ICH elements in the lists has a direct – if it results in a lawsuit for various reasons – shaping influence on the inheritance of intangible cultural heritage in a given country (Hance,

10 In the examples of court cases, they are tied to the religious traditions of particular communities, sports, or local festivities.

Martinet, 2020). This discourse is also influenced by the efforts to inscribe elements in a UNESCO world list. The analysed cases also comprise those in which the problem of distinguishing tangible and intangible heritage or content of a cultural segment was resolved by court. Among others, there is an interesting case of dealing with (in this case, returning) the remains looted during the colonial expansion in North America to the indigenous ethnic group, based on the *Native American Graves Protection and Repatriation Act* of 1990. This chapter offers a detailed analysis of the case. It similarly describes other lawsuits that find legal support in the Convention and related legal provisions, which shows that the border between the tangible and the intangible is not always clear from the point of view of the court authority and is not always legally defensible by the “aggrieved” party to the dispute (community, ethnic group).

The last chapter of the monograph discusses in detail the forms of tensions between the cultural identity of states and the intangible cultural heritage of the communities that live in them. The court disputes between the state and religious groups or indigenous ethnic groups are interesting in this context. They show, for instance, how a state can represent legal obstacles to ICH bearers in the case of defence of cultural heritage or traditions as well as their legal status in society. The issue is well illustrated by an analysis of a lawsuit in which a community (as part of a country with a colonial history) based its legal claims to recognise its existence on the intangible cultural heritage and the democratic principle of “cultural diversity” implied by the 2003 Convention. Another group of lawsuits directly concerned the conflict between the secularism of the state, embedded in its constitution, and the religious traditions the legal support of which it applied for (the case from France is extremely interesting in this regard; see Hance, 2020b: 175). The chapter also presents other types of notable legal disputes that present the state vs. communities conflict as a particularly complex and multi-layered type of legal tension with important cultural and social implications.

The publication *Intangible Cultural Heritage Under National and International Law. Going Beyond the 2003 UNESCO Convention* is an unprecedented excursion into the legal reality arising from the implementation of the 2003 Convention at the level of the legislations of 24 countries of the world. Despite the fact that data from all of them were not included in the content of the partial chapters in the form of examples, and we often read about the legal contexts of a limited number of countries, all chapters represent a model approach to the partial aspects of the studied issue. The publication – despite the complexity of the legal diction of the contents – can be considered mandatory or recommended study literature for lectures focused on intangible cultural heritage and the legislative implications of the 2003 Convention at the state level. It can also serve as an excellent, full-fledged reference material for carrying out similarly conceived in-depth research on the legal consequences and contexts of the implementation of the Convention for the Protection of Intangible Cultural Heritage, which the Slovak Republic adopted in 2006.

JANA AMBRÓZOVÁ,
*Institute for the Management of Culture and Tourism, Culturology and Ethnology,
Faculty of Arts of Constantine the Philosopher University in Nitra*

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