

RESEARCH ARTICLES

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National Laws Related to Intangible Cultural Heritage: Determining the Object of a Comparative Study¹

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¹ This article gives an insight into the initial stage of the French-Latvian comparative law research project “Osmosis” (2014-2018) co-chaired by the Latvian Academy of Culture (UNESCO Chair on Intangible Cultural Heritage Policy and Law) and the Institute for Political Social Sciences in France (National Centre for Scientific Research / Paris-Nanterre University / École normale supérieure Paris-Saclay). The project, led by Marie Cornu and Anita Vaivade, studies the impact of the UNESCO Convention for the Safeguarding

Abstract: This article is part of a collective research that focuses on studying various national legal tools elaborated for implementing the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (ICH), adopted in 2003. Instead of presenting the first results of this comparative law research project still in progress, the purpose of this article is to question the object of such a comparative study – before comparing and even before defining the scope of the study in terms of countries to be studied. It is certain that a comparative study on ICH law cannot be carried out simply based on a database gathering national laws using the term “ICH”. The pit-fall is twofold: on one hand, it would be an error to think that one starts from nothing, and that ICH law remains still to be written in the vast majority of States; while on the other hand it would also be an error to create artificial continuities, with more or less assumed political implications, made up of legal regulations of yesterday and today which, nevertheless, do not claim to concern ICH. It is in the interval between these two extremes that legal continuities, as well as disruptions of the legislative histories may be observed, and all of these would enrich our understanding about the contexts in which the term “ICH” has been incorporated into national legal systems.

Keywords: intangible cultural heritage, cultural heritage law, national law, legal history, comparative analysis

Introduction

A convention as an international public law instrument can have various levels of specificity with respect to the obligations of its parties, proposing (as one extreme) a set of concrete and detailed duties, or (as another extreme) – enunciating general principles. This means potentially different levels of influence on national legislation. The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage adopted in 2003 (“the 2003 Convention”) has been purposefully left relatively generic and soft in terms of obligations, for several reasons. (1) The specificity of intangible cultural heritage (ICH) as living cultural traditions required avoidance of the possible restrictive consequences and harms that overly detailed

of the Intangible Cultural Heritage on various national legal systems. See the research project’s blog at: <http://dpc.hypotheses.org/le-projet-osmose> [accessed: 27.12.2017]. The project “Osmosis” is funded by the Latvian-French Research Partnership Program, French Ministry of Culture, Latvian national research programme “Habitus”, and State Culture Capital Foundation of Latvia. The reflections presented are influenced by the discussions among the members of the research team, however all deficiencies of this article are the authors’ own responsibility.

legal regulations could have. (2) Also, there was a necessity to apply the 2003 Convention to a wide variety of cultural, social, and political realities worldwide, thus having certain flexibility of interpretation.² This potentially broad scope of application, however, was not without limits. Namely, for the sake of the coherence of international law, there was a need to draft the 2003 Convention in relation to the other already existing international public law instruments in the fields of cultural heritage, as well as human rights.³ These relations to other legal instruments are still being explored in UNESCO documents⁴ and the scholarly literature.⁵ However, the burning issues – “issues like tourism, copyright, marketing, folklore-isation, cultural industries, generating and sharing financial benefits, commercialisation or, for example, animal rights”⁶ (we would add – and more than anything – the issue of collective rights) – were “put in the fridge”⁷ when drafting the 2003 Convention. Indeed, the 2003 Convention left States with a very wide margin of appreciation on these issues, and it is not unreasonable to believe that the 12 Ethical Principles for Safeguarding Intangible Cultural Heritage approved by the UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage in 2015 were designed to weigh in on this margin.⁸

² *International Meeting of Experts Intangible Cultural Heritage: Priority Domains for an International Convention, Rio de Janeiro, Brazil, 22-24 January 2002. Final Report*, p. 12, <https://ich.unesco.org/doc/src/00074-EN.pdf> [accessed: 27.12.2017]; see also: N. Aikawa, *An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage*, “Museum International” 2004, Vol. 56(1-2), pp. 137-149.

³ For example, the international instruments that the 2003 Convention directly refers to are: the Universal Declaration on Human Rights of 1948; the International Covenant on Economic, Social and Cultural Rights of 1966; the International Covenant on Civil and Political Rights of 1966; the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989; the UNESCO Universal Declaration on Cultural Diversity of 2001; the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture; as well as the Convention for the Protection of the World Cultural and Natural Heritage of 1972.

⁴ See: B. Torggler, E. Sediakina-Rivière (with J. Blake as consultant), *Evaluation of UNESCO's Standard-setting Work of the Culture Sector. Part I - 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. Final Report*, UNESCO, Paris 2013, <http://unesdoc.unesco.org/images/0022/002230/223095E.pdf> [accessed: 27.12.2017] (in particular chapter 6.1. “UNESCO Culture Conventions and Other International Legal Instruments”, pp. 56-59).

⁵ For example, see J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015; S. Labadi, *UNESCO, Cultural Heritage and Outstanding Universal Value: Value-based Analyses of the World Heritage and Intangible Cultural Heritage*, AltaMira, Lanham 2013.

⁶ M. Jacobs, *The Spirit of the Convention - Interlocking Principles and Ethics for the Safeguarding of Intangible Cultural Heritage*, “International Journal of Intangible Heritage” 2016, Vol. 11, p. 74.

⁷ *Ibidem*. As is also observed, “in the Flemish language and Belgian politics, ‘putting a problem in the fridge’ is an expression that refers to the technique of obtaining a partial compromise and moving on, by postponing the discussion about difficult issues to a later, unspecified date”. *Ibidem*.

⁸ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 10.COM 15.A and its Annex - Ethical Principles for Safeguarding Intangible Cultural Heritage, 15 October 2015, <https://ich.unesco.org/en/decisions/10.COM/15.A> [accessed: 27.12.2017].

The 2003 Convention does not directly propose common solutions for ICH safeguarding, and it states only a few obligations for its States Parties, such as national policy development for ICH safeguarding, including identification of ICH elements present in its territory (Articles 11 and 12), a responsibility to submit periodic reports (Article 29),⁹ as well as an overarching duty to involve communities, groups, and other stakeholders in the processes of policy-making and policy-implementation (Article 15). The 2003 Convention leaves the major decisions on its implementation to be taken at the national level. This is particularly visible regarding “other safeguarding measures” (Article 13) for ICH safeguarding, which are to respond to the particular needs of a State Party in question. The number of States Parties of the 2003 Convention has reached 175,¹⁰ and its terminology, obligations, and principles are being referred to and integrated in numerous national legal systems with diverse legal histories. This scope of its potential influence raises particular interest in studying the impact of the 2003 Convention on national laws, and understanding how the general guidelines and principles provided at the international level are not only applied, but “translated”, “transposed”, and “transplanted” in more detailed regulations (if existing) to be found at the national level.¹¹

Since the adoption of the 2003 Convention there have been a growing number of research projects and publications on the issues related to it. Among the publications specifically dealing with legal issues,¹² much attention has been paid

⁹ This obligation, or namely the pitfalls for its fulfilment, has been extensively debated at the UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage. Its latest decision recommends that the General Assembly of the States Parties to the Convention introduce a regional principle within the periodic reporting mechanism, which could serve as additional motivation for States Parties to fulfil their duties in this regard. See: UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 12.COM 10, 5 December 2017, <http://ich.unesco.org/en/Decisions/12.COM/10> [accessed: 27.12.2017].

¹⁰ <http://ich.unesco.org/en/states-parties-00024> [accessed: 27.12.2017].

¹¹ This article will not further explore the discussion of academic concepts – internationally known – that allow to properly analyse the dynamics of legal circulation. To mention the main publications here: D. Nelken, J. Feest (eds.), *Adapting Legal Cultures*, Hart Publishing, Oxford 2001; E. Özücü, D. Nelken (eds.), *Comparative Law: A Handbook*, Hart Publishing, Oxford 2007; P. Legrand, R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, Cambridge 2003; P. Legrand (ed.), *Comparer les droits, résolument*, Presses Universitaires de France, Paris 2009. In general terms, we consider that: (1) “rules cannot travel” (P. Legrand, *The Impossibility of ‘Legal Transplants’*, “Maastricht Journal of European & Comparative Law” 1997, Vol. 4, p. 114) in principle, since the rules do not have a meaning that would be “already there”, but their meaning is a product of each legal system and its interpreters, who are themselves historically and culturally conditioned; (2) at the same time, a rule adopted in another legal system which differs from the one in which the rule was born, rarely starts over from the beginning: every rule “transplanted” in a new legal system preserves (through its words and through the effects of imitation) elements likely to give identical or similar interpretations (see in French: J.-L. Halpérin, *Profils des mondialisations du droit*, Dalloz, Paris 2009).

¹² A commented bibliography specifically on the literature of legal studies dealing with ICH is prepared within the research project “Osmosis”. It will be published online on the research project’s blog at: <http://dpc.hypotheses.org/le-projet-osmose>, and will become an integral part of the project’s report, upcoming in 2018.

to connecting ICH and intellectual property,¹³ despite the fact that this aspect is not directly dealt with by the 2003 Convention itself.¹⁴ This interest stems from a particular approach that highlights studying ICH from the angle of intellectual property law. On the other hand, little attention has been paid to legal issues regarding the implementation of the 2003 Convention at the international, regional, and national levels.¹⁵ More specifically, while the implementation of the 2003 Convention has been studied, at this stage it has been more as a public policy issue¹⁶ than as a legal issue. National policy-making and legislation have gradually gained particular attention within the UNESCO Global capacity-building programme in the field of ICH safeguarding, developing guidance material for providing policy advice.¹⁷ Similarly, the 12 Ethical Principles for Safeguarding Intangible Cultural Heritage of 2015 could be considered as ideas for a legal reform to be explored at the national level for developing a safeguarding policy. Nevertheless, there is certainly a need for more research on national legislative experiences and agendas regarding ICH safeguarding.

The specially-developed national legal regulations on ICH, and the connections to other fields of legislation that directly or indirectly influence the ICH safeguarding, form the major focus of interest in the “Osmosis” research project. In short, the project aims to identify types of legislative approaches and

¹³ For example, see: J.A.R. Nafziger, R.K. Paterson, A.D. Renteln, *Cultural Law: International, Comparative, and Indigenous*, Cambridge University Press, Cambridge 2010, in particular the chapter “Intangible Cultural Heritage”; for a recent doctoral research, see: L. Martinet, *Les expressions culturelles traditionnelles en droit international*, [Ph.D. diss.], Université Paris 1 Panthéon Sorbonne 2017; also C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London 2018.

¹⁴ The 2003 Convention itself does not deal with intellectual property issues (except Article 3 on the relationship to other international instruments). However, reference to intellectual property is given on two occasions in the Operational Directives for the implementation of the 2003 Convention, namely in Paragraph 104 adopted by the General Assembly of States Parties in 2010 (inviting States Parties to protect the rights of the communities, groups, and individuals, including through the application of intellectual property rights), as well as similarly formulated Paragraph 173(b) within the additional chapter “Safeguarding Intangible Cultural Heritage and Sustainable Development at the National Level”, adopted in 2016. UNESCO, *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, <http://ich.unesco.org/en/directives> [accessed: 27.12.2017].

¹⁵ For example, see the following monographs (published in English or French, mentioned chronologically): J. Blake (ed.), *Safeguarding Intangible Cultural Heritage - Challenges and Approaches*, Institute of Art and Law, Buihth Wells 2007; M. Cornu, J. Fromageau, C. Hottin (eds.), *Droit et patrimoine culturel immatériel*, L'Harmattan, Paris 2013; L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford University Press, Oxford 2013; L. Wang, *La Convention pour la sauvegarde du patrimoine culturel immatériel. Son application en droits français et chinois*, L'Harmattan, Paris 2013.

¹⁶ For example, see C. Bortolotto, *The French Inventory of Intangible Cultural Heritage: Domesticating a Global Paradigm into French Heritage Regime*, in: R.F. Bendix et al. (eds.), *Heritage Regimes and the State*, Göttingen University Press, Göttingen 2013, pp. 265-282.

¹⁷ This material is elaborated for use by the global network of facilitators of the UNESCO Global capacity-building programme for the safeguarding of the ICH. See: <https://ich.unesco.org/en/capacity-building> [accessed: 27.12.2017].

national legal tools adopted for the implementation of the 2003 Convention,¹⁸ and this variety in the methods of transposition of the internationally recognized interest in safeguarding ICH into national law is studied through perspective of comparative law. The project also envisages broadening knowledge on different patterns of how the notion of ICH is incorporated in law at the national and local levels, identifying interactions between international and domestic legal orders. The research was undertaken based on individual research experiences dealing with national laws of several countries. It also relies on scholarly debates and doctoral theses on ICH and national laws.¹⁹ Further, a broader comparative study was launched.²⁰

In carrying out such a comparative law study, several problematic issues have been recognized and are being tackled by the “Osmosis” project. Laws related to ICH are dispersed thematically, and with diverse content and level of normativity. These laws are not always meant to establish definite legal regimes; instead they may be soft law regarding duties and obligations. Also, in some countries new ICH laws are being drafted, or heritage laws being amended in order to integrate ICH therein. But “ICH” as a term is often not used in legal texts that nevertheless deal with issues that may be conceptualized as being part of ICH. As a consequence, it is in the interest of the project to consider these less evident or even invisible forms of legal regulations in relation to ICH, and to capture and demonstrate such legislative diversity, providing examples and cases on already existing legislative approaches and new rights that could be recognized.²¹

¹⁸ For a typology on different approaches within national laws, see also: J. Blake, *Patrimoine culturel immatériel*, in: M. Cornu, F. Orsi, J. Rochfeld (eds.), *Dictionnaire des biens communs*, Presses Universitaires de France, Paris 2017, p. 909.

¹⁹ Defence of doctoral thesis of Wang Li on the subject *La Convention pour la sauvegarde du patrimoine culturel immatériel et son application en droits français et chinois* in Paris, Université Paris Sud-11 on 14 June 2010; International scientific conference “Droit et patrimoine culturel immatériel” in Paris, Quai Branly Museum on 13 and 14 January 2011; defence of doctoral thesis of Anita Vaivade on the subject *Conceptualisation of Intangible Cultural Heritage in Law* in Riga, Latvian Academy of Culture on 11 October 2011.

²⁰ The comparative research has evolved to cover 26 countries, which represent various regions of the world, different legal systems and historical pasts, including both States that are and are not parties to the 2003 Convention. These diverse experiences are studied in cooperation with legal scholars in the countries chosen, using an extensive questionnaire and enriching the responses by such additional sources as: national policy documents, administrative reports, comments from local ICH safeguarding mediators in administrative institutions, and others. As this article concentrates only on the considerations concerning the object of the study, the choices made in elaborating the questionnaire, the arguments, the conditions for the selection of countries, as well as responses received will be explored in the research project’s report, upcoming in 2018.

²¹ The cases of France and Latvia can be given as examples of different legislative approaches. A minimalistic approach has been chosen in the French case, introducing only an amendment within the definition of the cultural heritage and providing a direct reference to the 2003 Convention. See Article 55 of the Loi n° 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l’architecture et au patrimoine [Law no. 2016-925 on the freedom of creation, architecture, and heritage], 7 July 2016, « Journal officiel de la République française » 2016, no. 158, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JOR->

This article offers initial observations of the study, namely those aimed at identifying the research object for comparison, without yet providing a further elaboration on how to compare or even on the scope of the comparison in terms of the choice of countries, nor the conclusions of the research project or definite results. With some illustrations it focuses on two aspects for reflecting upon the comparison of national laws aimed at the safeguarding of ICH; and raises two sets of questions. (1) What are the problematic issues for identifying the object of such a comparative law study on ICH? (2) How should such research interest be positioned in relation to the diversity of contexts of national legislative histories, and what implications and influences do such contexts create for the implementation of the 2003 Convention?

Identifying the Object: Comparative Law Study

At first glance, it may seem rather simple to study ICH law: it would only be a matter of studying, State by State, the legal tools by which ICH is safeguarded. It is true that it is tempting to believe that the data for a comparative law study of ICH are only waiting “to be compiled”, and not “to be constituted”. But such an approach, if followed, would obviously be quite naive. In short, it would be based on the ideas that: (1) in reality (in the outside world, in real life, etc.), there are things that are “ICH”; (2) that this “ICH” is subject to rules of law, which, taken together, form what can be called, by convention, the “ICH law” (just as speaking of “heritage law”, “archival law”, or “horse law”); and (3) that we should finally study, among all these rules, those whose object is the “ICH”, that is to say that manifest a public policy specific to “ICH”, and use the term. The opposite approach would include rules that apply to ICH matters without naming them as “ICH” – as is the case, for example, of rules guaranteeing religious freedoms.

Such an approach poses many methodological problems. The most pragmatic of these problems lies in the fact that the term “ICH” is new: to this day, and even if it changes quickly, the number of national legal texts that expressly use the term “ICH” is still rather small. In these conditions, because of not using the exact words, we are tempted instead to find the thing described by the words: what are the rules that manifest a public policy specific to ICH, but which do not use the words “intangible cultural heritage”? In short, given the extreme heterogeneity of legal statements and instruments, where is ICH law located? Asking the question in these terms may seem trivial. However, it is important to bear in mind that in doing so

FTEXT000032854341&categoryLien=id [accessed: 27.12.2017]. As for the Latvian case, a separate law on ICH has been adopted in 2016, consisting of altogether 12 articles, including on the rights of communities in relation to ICH safeguarding. See: Intangible Cultural Heritage Law, 29 September 2016, “Latvijas Vēstnesis” 2016, Vol. 204, <https://likumi.lv/ta/en/id/285526-intangible-cultural-heritage-law> [accessed: 27.12.2017].

we are performing an action that has far-reaching consequences from a scholarly point of view: we do not use ICH as a notion that exists in positive law (which would have been the case if we had just studied the legal rules using the term “ICH”), but as a classification concept, based on the generic understanding of ICH that we share more or less consensually.

In concrete terms, this process requires us to establish a series of equivalences between terms. For instance, we assume that the rules of law expressly applicable to “folklore” / “know-how” / “traditional specialties”, etc. are basically rules that should be related to ICH law. We could, for example, consider that in French law the ICH law would encompass: the provisions of the Environmental Code authorizing certain types of waterfowl hunting in places where “this practice is traditional” (Fr. *où cette pratique est traditionnelle*, law of 2000); or the provisions of the Law of 2010 prohibiting the concealment of the face in the public space, which authorizes the concealment of the face in the context of “traditional events” (Fr. *manifestations traditionnelles*); or the provisions of the Penal Code authorizing bullfighting and cockfighting in cases of an “uninterrupted local tradition” (Fr. *tradition locale ininterrompue*, law of 1951).

Such an approach is necessarily unsatisfactory however. First, and very prosaically, this is so because beyond the archetypal cases such as “folklore” or “tradition”, the establishment of some of these equivalences is very difficult and non-consensual in practice. For example, would ICH-related law cover regional laws adopted in Italy regulating the functioning of eco-museums (for example, in Piedmont, Trento, Sardinia, and Lombardy)?²² And should we consider that a national legal system requiring the use of a particular language in the name of its defence – as is the case in France with the law of 1994 on the use of the French language – can be seen as falling under the “ICH law”? Second, this approach also raises fundamental issues relating to the nature of scholarly work. Indeed, it is the work of “codifier” that one tackles: since one intends to gather scattered rules, historically and geographically located, as a roughly coherent set of rules – coherent because gathered *a posteriori* in the same thematic unit, that of “ICH”. If so, then one starts to engage, as a researcher, in a process of codification on the basis of established law similar as in the legislative process (only without the legal effects).

In other words, it is an approach which can be criticized substantively, insofar as this work of qualification concerns, inseparably, the determination of the properties of the things that it takes for an object, and that of their value. It can also be criticized with respect to its effects, as we would contribute, using scholarly resources, to establishing ourselves as guardians of ICH, in the sense that

²² UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 9th session, Paris, UNESCO Headquarters, 24 to 28 November 2014, *Report on the Implementation of the Convention and on the Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity: Periodic Report No. 00925/Italy*, p. 11.

we participate directly in the construction, for the benefit of the ICH, of a legal history that, objectively speaking, it does not have. And finally, what is the “ICH” if not an artefact which appeared on the occasion of the adoption of the 2003 Convention? In what way has this division of the world appeared as a category of public actions which must be imposed on us within scholarly research? In short, is it up to us to help naturalize and rationalize this legal artefact? Thus, it would be much more coherent to take ICH for what it is: a legal qualification only, which has since been disseminated – in extremely interesting ways and forms to study, and precisely – in national laws. This is a fairly ordinary statement, but it is important to keep it in mind that what we see at work, when studying ICH law, is not so much a real entity (ICH) that should be introduced in law so as to safeguard it, but a legal category that, inspired by the real world, in return influences the reality beyond the law.²³

In these conditions, of course it is the ontological point of view that is in question. By separating, as is often the case, ICH and the rules of law applicable to it, we reduce law to its condition as an instrument. Indeed, to support the position that ICH law is nothing other than the law applicable to “ICH”, is to suppose that the law does not build the world, but only regulates it. Consequently, we would miss out the most interesting aspects of the phenomenon at work, which could be summarized in the following questions: From the point of view of the law, what do national actors do with the “ICH”? What exactly are the older notions that these actors “recycle” under the banner of “ICH”, and those that, on the contrary, they reject? Is “ICH” only a term that national actors borrow from UNESCO, or do we see here at work a form of the so-called globalization of the law?²⁴ If so, then it becomes really instructive to understand the genealogies that are built in the various States between the “ICH” as newly-legally defined, and all the configurations that preceded it or accompany it (“folklore”, “tradition”, etc.).

Contextualizing the Object: National Legislative Histories

The term “ICH” has been introduced in national legal systems and languages of the States Parties to the 2003 Convention mainly as an outcome of translation,

²³ This process is being confirmed at the state level, as we observe that the term “ICH”, as defined by the 2003 Convention, is becoming more and more often used, not only in public policies, but also as a broadly used social and scholarly category of description of the world. Of course, this does not mean that no one spoke of ICH until UNESCO established it as a legal category in international law in 2003, as we will see later; but we see how much an international text – and law in general – contributes to shaping the ways individuals give meaning to the world.

²⁴ Reflections on the globalization of the law are increasingly present in the legal scholarship literature. As an example, see: J.-B. Auby, *Globalisation, Law and the State*, Hart Publishing, Oxford 2017; or, for a more philosophical approach, M. Delmas-Marty, *Vers une communauté de valeurs ? Les forces imaginantes du droit (IV)*, Editions du Seuil, Paris 2011.

the concept being transplanted in national legal systems from international law. In some countries however, there were already similar terms used nationally. For instance, the national laws of Japan (where the term “intangible cultural property” was used in its Law for the Protection of Cultural Property of 1950)²⁵ and of the Republic of Korea (Cultural Property Protection Law adopted in 1962)²⁶ have served as examples for introducing “ICH” in international policy on cultural heritage. In 1996, Mongolia adopted the Law for Protection of Cultural Heritage with a separate chapter on the protection of ICH.²⁷ Algeria was also one of the first to use intangibility in national law as a criterion for categorizing cultural property (the term “intangible cultural property” was used in its Law on the Protection of Cultural Property of 1998²⁸). It is worth noting that this Algerian law was adopted already after the Section of Intangible Heritage was established at UNESCO, and after the programme of proclaiming Masterpieces of the Oral and Intangible Heritage of Humanity was launched at UNESCO in 1997. It has also been noted that before the adoption of the 2003 Convention, “four countries (the Dominican Republic, Uzbekistan, Morocco and Guinea) had already started a procedure for establishing legal protection measures”.²⁹ The criterion “intangible” or “immaterial” was also used even earlier, for example, in the Constitution of the Federative Republic of Brazil of 1988, where it was stated: “The Brazilian cultural heritage consists of the assets of a material and immaterial nature, taken individually or as a whole, which bear reference to the identity, action and memory of the

²⁵ Law No. 214. Japan was the third country to join the 2003 Convention, having deposited its acceptance on 15 June 2004. For more details on this law, see: UNESCO General Conference, 20th session, *Reports of Member States on the Action Taken by Them to Implement the Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (1964) and the Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (1970)*, 15 September 1978, Ref. 20 C/84. See also: N. Shikaumi, *Cultural Policy in Japan*, UNESCO, Paris 1970; V.G. Cang, *Defining Intangible Cultural Heritage and its Stakeholders: The Case of Japan*, “International Journal of Intangible Heritage” 2007, Vol. 2, pp. 45-55.

²⁶ See: Y. Jongsung, *Korean Cultural Property Protection Law with Regard to Korean Intangible Heritage*, “Museum International” 2004, Vol. 56(1-2), pp. 180-188.

²⁷ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 7th session, Paris, UNESCO Headquarters, 3 to 7 December 2012, *Report on the Implementation of the Convention and on the Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity: Periodic report No. 00786/Mongolia*, p. 14.

²⁸ Law No. 98-04. Algeria was the first country to join the 2003 Convention, having deposited its approval on 15 March 2004. For more details, see: UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 6th session, Bali, 22 to 29 November 2011, *Report on the Implementation of the Convention and on the Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity: Periodic report No. 00755/Algeria*, p. 7.

²⁹ N. Aikawa-Faure, *From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage*, in: L. Smith, N. Akagawa (eds.), *Intangible Heritage*, Routledge, London – New York 2009, p. 35.

various groups that form the Brazilian society [...]”.³⁰ In 2000, Brazil also adopted a presidential decree on “cultural goods of immaterial nature” and on a national programme on intangible heritage.³¹ In addition to these rather exceptional examples, in most of the cases the term “ICH” did not exist in national laws prior to the 2003 Convention, or at least prior to the international reconsideration of respective terminology in 1990s (gradually shifting from “folklore” and “traditional and popular culture”³² to “ICH”).³³ The concept of ICH was mainly a novelty to be integrated into national legal systems that had their own established terminologies, including terms related to the ICH concept.

The term “ICH” has been received, interpreted, and eventually adapted in the contexts of national legal (as well as political and scholarly) histories.³⁴ In national policies and laws, the safeguarding of ICH often started not with joining the 2003 Convention, but well in advance, although mostly conceptualized and named differently. This may concern conceptualizing heritage in law, elaborating policies for the transmission of cultural traditions and practices, and regulating the work of nationally established administrative, research, or other institutions. Such pre-existing contexts may constitute already established grounds for further fruitful policy implementation, as well as complexities, if the existing institutional frames and terminologies contain, when confronted with those internationally proposed, slightly different concepts and approaches. The novelty of the 2003 Convention should be assessed in dialogue with national conceptual and institutional histories, and with the evolution of national policy measures.

³⁰ Chamber of Deputies, *Constitution of the Federative Republic of Brazil*, 4th edn., Constitutional text enacted on October 5, 1988, with the alterations established by Revision Constitutional Amendments No. 1, 1994 through 6, 1994, by Constitutional Amendments No. 1, 1992 through 90, 2015, and by Legislative Decree No. 186, 2008, Documentation and Information Center, Edições Câmara, Brasília 2016.

³¹ C. Londrès, *The Registry of Intangible Heritage: The Brazilian Experience*, “Museum International” 2004, Vol. 56(1-2), p. 166. On Brazil, see also: M. Bedjaoui, *The Convention for the Safeguarding of the Intangible Cultural Heritage: The Legal Framework and Universally Recognized Principles*, “Museum International” 2004, Vol. 56(1-2), p. 151.

³² These terms were used in the UNESCO 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore. Nevertheless, it may be worth recalling that, after international discussions on the matter during the drafting, the term “folklore” finally was not used in the official French and Spanish versions of the Recommendation.

³³ Despite the fundamental conceptual shift since 1989, a reference to the 1989 Recommendation is still present, for example in the periodic report of the Plurinational State of Bolivia on the implementation of the 2003 Convention. See: UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 10th session, Windhoek, 30 November – 4 December 2015, *Report on the Implementation of the Convention and on the Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity: Periodic report No. 00806/Bolivia*, p. 6; A. Vaivade, *Discursive Legacies of Folklore in International Law*, in: D. Bula, S. Laime (eds.), *Mapping the History of Folklore Studies: Centers, Borderlands and Shared Spaces*, Cambridge Scholars Publishing, Newcastle upon Tyne 2017, p. 315.

³⁴ For some examples of national legal histories related to ICH, see: A. Vaivade, *Folklore in the National Educational and Cultural Policies*, in: D. Bula (ed.), *Latvian Folkloristics in the Interwar Period*, Suomalainen Tiedeakatemia, Helsinki 2017, pp. 56-75; L. Wang, *op. cit.*

In order to conceive and explore such national legal histories, some questions need to be reflected upon: What is the time frame whereby the historical experience of a country would still influence the present reception of the concept of ICH? May such a time frame be different in different cases, and how to evaluate its relevance? Taking for example the legislative developments in Europe that we may relate to ICH, the experiences and reflections during the time of building and framing national heritage legislation can serve as a historical insight. The beginning of the 20th century, and the interwar period, was a particularly intense time when several countries either drafted, or already revised, their basic national heritage laws, and this raised legislative debates that we may now relate to ICH. At that time, they were closely associated with the concept of “folklore”. Heritage protection became one of the fundamental preoccupations of policy-making in a number of the present day European nation-states, once they were founded. And some of these histories also bear witness to early reflections on the intangible side of heritage, although named differently. For example, during the drafting of the first national law on monuments in Latvia in 1920s, there was a proposal to consider mentioning folklore as part of the movable monuments. “Monuments of language and people’s traditions (folklores)” (Latv. *valodas un tautas tradīciju (folkloru) pieminekļi*) were considered in the draft law as being among movable objects, along with archaeological objects, bibliographic rarities, etc. This division however was not maintained in the final version of the Law on Monument Protection adopted in 1923.³⁵ Despite this unsuccessful attempt to integrate interest in folklore as being part of monument protection, this conceptual connection was put forward by the term “monuments of life” (Latv. *dzīves pieminekļi*), used in 1924 Regulations on the Archives of Latvian Folklore. Similarly, in France in the 1930s there were intentions to amend the 1913 Law on Historical Monuments in order to introduce a “Section of folklore monuments” (Fr. *section des monuments folkloriques*) within the Commission of historical monuments. This, however, also remained as a draft amendment only.³⁶

In addition to witnessing interest in folklore (as part of the idea of protecting movable monuments), the popular aspects of heritage (related to the interest in traditional practices of people) were formulated as criteria also for the identification of movable cultural objects and immovable monuments or sites. For example, the 1923 Law on Monument Protection adopted in Latvia mentioned “ethnological value” (Latv. *etnoloģiska vērtība*) as one of criteria for monument identification (both movable and immovable). It also spoke of “folk legends” and “religious cults”

³⁵ A. Vaivade, *Folklore...*

³⁶ N. Wagener, *The 2003 Convention in the Light of French Law: Historical Perspective*, “Intangible Cultural Heritage: National Law & Subjective Rights”, International Research Seminar. Riga, Latvian Academy of Culture, 29 June 2015.

(Latv. *tautas teikas, reliģiskais kults*) as criteria of monument identification. Monuments could include “battle and gravesites, as well as other locations that are linked to historical events, folk legends and ancient religious cult memories”.³⁷ As another example, in 1930 the Law on Natural Monuments and Sites adopted in France included a similar provision to protect sites with a “legendary character” (Fr. *caractère légendaire*), which were also connected to “old traditions” (Fr. *vieilles traditions*) or “folkloric memories” (Fr. *souvenirs folkloriques*).³⁸ Also, national legislation in Italy in 1939 included a state law on the preservation of the “things of ethnographic interest” (It. *le cose di interesse etnografico*). This was in the context of protecting cultural and artistic works, previously limited to objects such as paintings and antiquities.³⁹ These examples demonstrate how domains that are now seen as part of ICH served to characterize the cultural value of monuments to be identified and protected. Thus, the intangible part of heritage (either separately as folklore, folklore monuments or otherwise, or as a characteristic criterion for the identification of material heritage) was already conceived in some countries (the named ones serving just as examples) at the beginning of the 20th century in their early attempts to define cultural heritage in national laws.

Although some of the above-described legal texts are not in force anymore, they bear witness to certain paths of conceptualization that have been experienced. In some cases, legislators abandoned terms that were used previously, and “folklore” is an illustrative example in this regard. For instance, in the Belgium’s French community in 1937 the Belgian National Commission for Folklore was established, and in 1956 it was united with the Traditional Folk-Song Commission under the name of the Belgian Royal Commission for Folklore. Later, in 1984 the Superior Council of Popular Art and Tradition and Folklore was established by decree. However, the term “folklore” was replaced by the term “ICH” once it was introduced in the international discourse, and a decree concerning cultural heritage, including intangible heritage, was passed in 2002.⁴⁰ In other cases, conceptual and terminological choices, as well as institutional decisions made at the beginning of the 20th century still have their legacies even today. For instance, the Archives of Latvian Folklore are an example of a research institution being established back in 1924 and still in existence today, and – despite conceptual shifts in international

³⁷ A. Vaivade, *Folklore...*

³⁸ N. Wagener, *op. cit.*

³⁹ Law No. 1089. See: S.G. Giuliano, O. Sorgi (eds.), *Norme per la catalogazione di beni demoetnoantropologici materiali*, Regione Siciliana. Assessorato dei beni culturali, ambientali e della pubblica istruzione, Dipartimento dei Beni Culturali, Ambientali e dell’Educazione Permanente, Centro Regionale per l’Inventario, la Catalogazione e la Documentazione grafica, fotografica, aerofotografica, fotogrammetrica e audiovisiva dei beni culturali ed ambientali, Palermo 2006, p. X.

⁴⁰ R. Demotte, *National Policies Concerning Intangible Cultural Heritage: The Example of Belgium’s French Community*, “Museum International” 2004, Vol. 56(1-2), p. 175.

heritage policy – still bearing the same name. Institutional decisions were taken also at universities, and research interest in what we may now call “ICH” grew from the departments of ethnology, ethnography, and folklore studies. Similar processes took place in various universities in Europe, and there is a continuity of these scholarly disciplines. Histories of scholarship in academic and research institutions together form a separate and broad field of study that has continuously interacted with the conceptual changes in legal language.

One may thus trace both legal continuities, as well as disruptions, in the legislative histories in Europe, and all these enrich our understanding about the contexts in which the term “ICH” has been received in national legal systems. The examples mentioned yield only some insights into national legislative histories that have preceded the adoption of the 2003 Convention and its entry into force in its States Parties. Such national histories certainly may also reveal larger contexts – such as legacies of colonialism, relations between governments and indigenous people, and other. There is a considerable diversity of legislative experiences that may be traced in relation to the field of ICH, although using different terms. It thus invites to consider the adoption of the 2003 Convention and its impact at the national level as a process of transformations. In other words, various segments of law have become influenced by the 2003 Convention, first conceptually (with the introduction of the term “ICH”), and then institutionally and also in other ways. Hence, a decade after the entry into force of the 2003 Convention, this dialogue between international law and national legislative histories is continuing and invites researchers to study it in order to grasp these contextual diversities worldwide.

Conclusions

Undertaking a comparative law study on ICH which would be more than a compilation of legislation hastily attached to ICH on the basis of non-questioned criteria is a much more complicated exercise than it seems at first glance. It is certain that such an exercise cannot be carried out simply by the compilation of a database gathering the legislation presented – by whom? – as dealing with ICH. The pitfall, as we have seen, is twofold: on the one hand it would be an error to think that one starts from nothing and that ICH law remains totally to be written in the vast majority of States; while on the other hand it would also be an error to bring everything back to ICH, by creating artificial continuities, with more or less assumed political implications, between legal regulations of yesterday and today, especially when many do not claim to concern ICH. It is obviously somewhere between these two extreme points that a study of the national laws on ICH can most usefully be placed; by observing how, precisely, the States position themselves in this space. This exercise is increasingly stimulating, as laws (and, more generally, public policies) claiming their link to the 2003 Convention are gradually being adopted in various States, as it has

been done recently, for example, in 2016 in Latvia and France. What kind of rules should we introduce in these laws, especially given that the 2003 Convention does not really offer any concrete leads? How do we relate new ICH law to the existing laws – still numerous – that can be connected, some more and some less convincingly, with issues of ICH?

The most problematic issue obviously concerns the main contribution – and the main innovation – of the 2003 Convention: the question of community participation. Numerous national regulations which one might choose to relate to ICH (even though they are often much older than the 2003 Convention) only marginally integrate the issue of community participation. This is a strong argument for thinking that everything remains to be done when preparing a law on ICH. But it is actually more complicated: sometimes these same national laws already provide the recognition of rights that can be exercised by individuals and groups for the benefit of safeguarding the ICH; and having a “legal weapon”⁴¹ which becomes available for active use by social actors can be more effective than participation procedures. Indeed, social actors can (and already do) defend many subjective rights and even fundamental freedoms for the purpose of safeguarding what they identify as ICH. This happens at the level of national laws, and it is obviously something that a comparative law study cannot ignore. This makes the study even more complex; but it also shows just how important it is that such work go forward.

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⁴¹ L. Israël, *L'arme du droit*, Les Presses de Sciences Po, Paris 2009.

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