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INTANGIBLE CULTURAL HERITAGE & COMPARATIVE LAW

INTANGIBLE CULTURAL HERITAGE IN NATIONAL LAWS

A dialogue with the 2003 UNESCO Convention

Summary overview of the “Osmose” research report

Paris, June 6, 2018

Side event during the seventh session of the general assembly of
State parties to the 2003 convention for the safeguarding of
intangible cultural heritage.



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1.- PRESENTATION OF THE OSMOSE PROGRAM

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Managed by Anita Vaivade (Latvian Academy of Culture) and Marie Cornu (ISP-CNRS), the Franco-Latvian program Osmose aims at studying through a comparative approach the different national experiences in relation to intangible cultural heritage. The goal of the research program is to understand how the law apprehends the notion of intangible cultural heritage and the influence exerted by the Convention for the Safeguarding of the Intangible Cultural Heritage (hereafter the Convention) on law at the national and local level.

The project “Osmose” is carried out by a French-Latvian team of researchers - Marie Cornu, Jérôme Fromageau, Cléa Hance, Lily Martinet, Vincent Négri, Noé Wagener, Catherine Wallaert, Līga Ābele and Anita Vaivade. The project also benefited from the contributions of Christian Hottin, Emilie Terrier, Marie Trape, Dace Bula, Sanita Pretkalniņa and Daina Teters. The project received the support from a Scientific Committee (see Annex 1) and was made possible thanks to the collaboration of the respondents (see Annex 2) who contributed to the collect of information.

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1.1.- PROGRESS OF THE OSMOSE PROGRAM

The first biennium of the Osmose program (2014-2015) was devoted to setting a common framework to undertake the comparative study and identifying research direction. The second biennium (2016-2017) was used to set a shared comparative method and to decide the main axes of research. A qualitative questionnaire was drafted and addressed to respondents at the end of the year 2016. The answers gathered have often been complemented and commented by staff members of governmental institutions in charge of intangible cultural heritage, anthropologists and ethnologists from the various States.

Twenty-four States parties to the Convention from different regions of the world and diverse legal traditions were studied: Algeria, Belgium, Brazil, China, Congo, Egypt, Estonia, France, Germany, Iceland, Iran, Italy, Kenya, Latvia, Madagascar, Malawi, Mali, Mexico, Morocco, Poland, Spain, Switzerland, Zambia, and Zimbabwe. In addition, the choice was made to incorporate within the scope of the research two non-party States to the Convention (the United States and Canada) in order to enrich the comparison.

The study was undertaken just before the tenth anniversary of the entry into force of the Convention. Thus, it gives the opportunity to analyse how this international instrument influenced the laws of several State parties and non-parties in its early years. It offers a panorama of national examples and experiences drawn from twenty-six States. The authors of the study hope that this comparative perspective will reinforce the interest in the

development of intangible cultural heritage law in the various States.

Several thematic seminars open to the public were organized to deepen the study of certain aspects of intangible cultural heritage law, notably on the development of the concept of intangible cultural heritage (Paris, November 4, 2014), on subjective rights related to intangible cultural heritage (Riga, September 8, 2017), as well as on labels and other legal mechanisms of intangible cultural heritage (Paris, November 10, 2017).

On the basis of these documents and exchanges, a final report of the research was drafted. It will be published before the end of the year 2018. The present document presents the main conclusions of this report.

1.2.- OBJECT AND AXES OF RESEARCH

In order to understand the links between national laws and the 2003 Convention and identify the different layers it is composed of, it is necessary to approach the category of “intangible cultural heritage” within a long term historical trajectory. Laws related to ICH are dispersed thematically and with diverse content and levels of normativity. These laws are not always meant to establish definite legal regimes; instead they may be soft as for 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 directly used in legal texts that deal with issues that may be conceptualised as being part of ICH. As a consequence, one of the project’s contributions is to take into consideration these less evident or invisible forms of legal regulations in relation to ICH. The project captures and demonstrates such rich legislative diversity, it provides examples and cases of already existing legislative approaches and new rights that could be recognised.

The hypothesis at the heart of the Osmose project is that intangible cultural heritage represents an interesting vantage point to observe two dynamics of cultural heritage law:

- A dynamic of globalization of law, as we notice that national laws – some of which have been developing for decades tools to protect folklore, language or traditional know-hows – are being restructured in relation to this new category of cultural heritage,
- A dynamic through which laws are becoming more complex: we witness in the domain of intangible cultural heritage, more and more instances of laws of different nature interacting together (State law, local law, personal and group rights; individual rights and collective rights; rights to protect one’s heritage and rights of one’s heritage to be protected; etc.). This dynamic obviously, compels us to reconsider the equilibrium that traditionally defines the legal protection of cultural heritage.

In this context, the team of researchers of the Osmose project has identified several overarching axis that structure the comparative study.

- The first axis explores how each State has invested the category of “intangible cultural heritage,” and how a dialogue was established between the 2003 Convention, their respective legal system and their past experiences.
- The second axis focuses on interactions between intangible cultural heritage law and three other branches of the law that were particularly identified as complex: human rights, environmental law, and intellectual property law.
- The third axis aims at analysing different processes of formulating, in legal terms and at the national level, safeguarding measures of intangible cultural heritage.
- The fourth axis offers a reflexion on legal claims brought in relation to intangible cultural heritage issues from the study of case law.

2.- THE STANCE OF STATES TOWARDS THE CATEGORY OF “INTANGIBLE CULTURAL HERITAGE”

Following the adoption of the 2003 Convention and considering the great number of State parties, the category of “Intangible Cultural Heritage” is today part of the political and legal vocabulary of many States, it is also translated in many languages. This dynamic can lead us to think that the law is globalizing, notably at a conceptual level. Nevertheless, it also compels us to take notice of variations and differences in the ways that this new category is perceived, adapted and developed by the various national legal systems. The relationship between the Convention and the national legal systems is not a one-way dynamic, but manifests real dialogues, as the influences have been reciprocal: The Convention having originally been inspired by national experiences.

The first axis of the “Osmose” research questions the various historical contexts this category of heritage integrates by taking under consideration the terminology already in place and previously used, or at the same time (2.1.). The Convention also refers to other notions that are intimately linked to this heritage, hence our focus on the notion of “community” and the way it was translated in national legislations (2.2.). This research also looks into the variety of ways national legislations define the notion of “Intangible Cultural Heritage.” In order to do so we analysed the development processes of national inventories (2.3.) Finally, the scope of ICH varies in relation to the choices made by the States and the example of the variety of statuses granted to Language is a good illustration of this phenomenon (2.4.).

2.1.- LINKING NEW LAW WITH A LEGAL PAST

The Convention was developed in relation to the legal tools already existing in international law, such as the 1972 World Heritage Convention, but also in relation to national legislations in place, amongst which the Japanese legislation is one of the most cited. In many cases, national legislations have preceded international law in the field of ICH. At the national level, there are different conceptual and terminological trajectories that can be linked to ICH, even if other terms are actually being used.

In general, the first legislations pertaining to cultural heritage that the nation States adopted express the initial logics of the legislator in relation to the categorization of heritage. Some of the legislations adopted at the beginning of the 20th century already mentioned categories of ICH elements to justify the necessity of protecting some tangible cultural heritage: for instance, “old traditions” and “folklore memories” in France, or “legends of the people” in Latvia. We can also note attempts to conceptualize this heritage in some discussions even before these first legislations pertaining to cultural heritage were ever adopted. For instance, there was an attempt to categorize “the monuments of language and traditions (folklore) of the people” as a sub-category of movable cultural property (Latvia), but the proposition was not retained in the final version.

More recently, one year before the adoption of the Convention, the notion of “Masterpieces of the Oral and Intangible Heritage” was used, not only by UNESCO at the international level, but also by the French Community in Belgium, where it found echo in a national legislation. Rapidly, this notion was strongly criticized in the international community, who preferred to substitute this paradigm of differentiation by a more inclusive approach, inviting a larger recognition of ICH. Nevertheless, the general change in terminology brought by the 2003 Convention, does not imply a radical elimination of all traditional concepts at the national level. For instance, the terms “folklore” and “intangible cultural heritage” can be featured in the same legislation. In Latvia, the former is used to name an institution, an archive that has been in function since the 1920s. The history of institutions demonstrates that the term “folklore” has been used throughout the 20th century, from its early years (Belgium) and also in its second half (USA, Iceland), and sometimes currently in some places. Conversely, some States already referred to the criteria of “intangibility” in relation to cultural heritage before the adoption of the Convention (Algeria, Brazil).

Since the entry into force of the Convention, we can observe a trend of adoption of new legal tools, including national legislations in which the notion of “intangible cultural heritage” is central (for instance, amongst the States studied: China, Spain, Latvia and Madagascar). Others incorporate their desire for the safeguard of ICH in their

laws pertaining to cultural heritage in general (Latvia is currently adopting such amendments), and sometimes by directly referring to the 2003 Convention (France).

Various national legislations addressed the question of the safeguard of ICH long before the adoption of the Convention, but it is really with the Convention that the principle of participation was effectively put forward as being fundamental for the safeguarding of ICH. States are gradually starting to define participatory rights as well as rights not to participate to the safeguard of ICH (Latvia). In such a context, the notion of community is crucial, designating subjects of rights (for instance by defining variations in the definition of the term “community,” which is the case in Latvia) who are at the heart of the identification of ICH and subsequently of its safeguarding.

2.2.- RECEIVING IN DOMESTIC LAW CONCEPTS BORN BY THE CONVENTION: FOCUS ON THE NOTION OF COMMUNITY

The 2003 Convention propels new actors, aggregated under the notion of community, within the designation space of what is recognized as cultural heritage. Before the Convention, this space was enclosed, reserved to State organs. Article 2 of the Convention, through the definition of ICH, introduces communities as guarantor of the recognition of this heritage and as such, establishes them in the game of institutionalized actors. In this game, communities act as the yeast of a protection process of ICH, and, in that wake, of the promotion of a cultural experience. The community is the space of a cultural experience.

Nevertheless, the 2003 Convention did not introduce for the first time in International law the notion of community as a way to designate a social group. Indeed, the political and territorial conflicts during the 19th and 20th century tore peoples apart and produced minorities, singled out under the term *community*; the use of this terminology aimed at side-lining these groups from the nation-State, positioning them at the fringes – outer limits – of the State. The specificity of a community expresses itself through cultural attributes, recognized to be immediately confined – “communitarised”- in the third-space of a dominant culture or religion. The notion of minority, that the notion of community thereby covers, stems out from this dynamic (notably see the advisory opinion of the Permanent Court of International Justice, *The Greco-Bulgarian “communities,”* July 31st, 1930).

The 2003 Convention uses the notion of community in another way. Through this instrument, international law henceforth initiates a dynamic of integrating communities in the policies and preservation processes of cultural heritage. The community, thus integrated in the game of actors, is one of the symptoms of a rewriting of the social contract, in which the right of individuals to take part in the workings of the State is heightened, a movement in action since the 1990s.

In the elaboration of the national legislations pertaining to the identification, promotion or safeguarding of ICH, and alongside the recognition of the action and important role – promoting function – of the communities, it is not so much an inversion of the recognition mechanism that occurs but rather a redistribution, even a scattering, of the prerogatives of recognition and designation of ICH. Indeed, the communities are not substituted to the State. The space allotted to communities transpires more on the ground of the collective representation upon which the State projects its identity, than within the institutional structures of the State themselves. We can thus observe that the idea of “one people” and “one Nation” will impact the nature and the scope of the prerogatives of the communities, even on their designation in order to affiliate them to existing social structures.

The notion of community represents a portal for dynamics of sharing, of participation and access to cultural heritage. It renews the wordings of national laws, which are adapted, elaborated, modified, to incorporate the intangible dimension of cultural heritage. The notion of community in the definition and use of national policies pertaining to cultural heritage also produces an ambivalence: it operates at the same time a subjectification of the groups and populations, by transforming them into communities, and an objectification of practices and expressions of these communities, by transforming them into cultural heritage. The community, aligned with ICH, is a fiction that establishes a permanency: on one side, ICH is a resource that the State uses to manage populations or social groups; on the other side, cultural heritage represents a leverage for communities to assert themselves before the State.

2.3.- THE INVENTORY AS A DEFINITIONAL TOOL OF ICH

If the Convention and its implementation have often influenced the development of the inventories, some States have nonetheless taken liberties in the choice of the criteria and categories that UNESCO otherwise promotes. Thus, Kenya has woven a relationship with tangible heritage by using the category of cultural landscape. As for Germany, it created the category of elements of self-organized and civil society. These new categories are often at the fringe of the category of intangible cultural heritage. In a similar way, some States diverged from the traditional criteria listed by the Convention to register a certain intangible cultural heritage. Malawi requests for instance, that the elements must be anonymous. Brazil considers that an element must be of interest for the national memory, the identity and the constitution of its society. As part of the framework of the Osrose project, the reasons for refusing to inventory a certain intangible cultural heritage were also studied to better understand what were some of the limits set on this category. For instance, animal welfare and the need to encourage dialogue between communities justified in Italy the refusal to register the Palio di Siena and the Giostra del Saracino.

2.4.- DEFINING THE PERIMETER OF ICH: FOCUS ON LANGUAGE

When approached from the vantage point of national legislation, language is a good example to understand how the scope of the definition of ICH varies from one State to another. To implement the Convention, some States simply reinvest the logic initiated by the 2003 Convention, others refer to language as an ICH element in its own right. For instance, one of the sub-categories of "ICH" in the Estonian inventory is "language and its poetic genres" and six elements from various dialects are registered.

Furthermore, the ways by which States approach and frame the question of language in relation to the notion of heritage is very enlightening on the interaction between ICH law and language. The questionnaires studied in the framework of the Osrose project illustrate the richness of legal approaches pertaining to language. We can identify three main series of mechanisms. 1/ Some use the category of heritage to designate language and apply to it a specific regime (shared heritage or national heritage). More often, and in a rather disconcerting way, this identification through heritage is not formulated in terms of ICH, at least not explicitly. 2/ In a majority of cases, languages are considered through the prism of human rights (use of language in private and public life, access to law and justice, right to translation, etc.) and, again, not through ICH law. Here the case of the Kashubian language in Poland could be mentioned: it has the status of a regional language, and the education rights to this language are established. When the claim to a protection of language rises from a linguistic community, we could naturally be led to think that the 2003 Convention offers a pertinent framework. But, as made evident, ICH law does not represent the main vector for protection of language, even when presented through its heritage dimension. What are the obstacles that impede language to be, more often, considered as an ICH? 3/ Most likely, the need to formalize linguistic rights to the benefit of individuals and groups, implies the mobilization of other motives, notably in the realm of human rights. In a way, this phenomenon stresses the contradictions and weaknesses of the 2003 Convention. But we could just as well claim that nothing refrains States to legally invest by way of ICH certain notions left out in the 2003 text. In this case, if the ICH tool according to the Convention does not meet the legal expectations in terms of linguistic rights, it could nonetheless be used to support a claim on a right to a language. Hence, the question that should be explored is the one to know what could be the convergences between the 2003 Convention and linguistic rights.

3.- INTERACTIONS BETWEEN INTANGIBLE CULTURAL HERITAGE AND OTHER LEGAL FIELDS

ICH is a very crosscutting category of cultural heritage its elements connect to a great variety of social realities. Hence, ICH safeguarding issues manifest themselves in legal domains that were not usually associated with heritage preservation. The answers to the questionnaires put forward three legal branches that are sensitive in the safeguarding of ICH: environmental law (2.1.), human rights (2.2.) and intellectual property law (2.3.).

3.1.- INTERACTIONS WITH ENVIRONMENTAL LAW

Communities create ICH in relation to their environment, their interactions with nature. According to article 2 of the Convention, this ICH is transmitted from generation to generation, it is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history. Agricultural, pastoral practices, modes of logging, fishing, hunting and foraging are tightly linked to the specificities of the different natural spaces on which they are applied: for instance, humid zones, irrigated zones (salted ponds, wetlands, peatland, alluvial plains, etc.). In this framework, there exists a profound interdependency between cultural and natural heritage. ICH refers to technics that notably aim at regulating the access to natural resources to the advantage of the communities, and thus in a durable way. Safeguarding these elements of ICH implies, not only the recognition of the rights of communities to access these ecosystems, but also to use the resources meanwhile preserving their traditional ways of life. These rights must nonetheless be exercised in a sustainable way in order to moderate the impact that these practices can have on the environment. For instance in Latvia, the regulatory framework of the protection of natural areas that are particularly sensitive implement general bans on foraging forest resources and wetlands, except for the tradition of picking cranberries, as a tradition transmitted from generation to generation. A written license is issued only to the people living in the vicinity, with specific restrictions (access period, frequency, etc.) in order to limit the potential negative impacts on the natural environment.

According to the Convention, a good number of knowledge and practices linked to nature and the universe are real management systems of resources of sustainable traditional knowledge. In that case, the safeguarding of ICH directly contributes to the preservation of the environment and conservation of biodiversity. The sacred forest in Kenya and Congo are excellent examples of the way ICH can contribute to the safeguard of natural heritage. Nevertheless, this relation between nature and ICH is ambivalent. When the relationship is not mutually beneficial, there may be the necessity to implement provisions to contain certain negative effects that an ICH practice may come to have on the environment. In these two hypotheses, customary norms, uses, transmitted from generation to generation, play a crucial role. They enable to maintain a balance between the safeguarding of ICH and the necessity to preserve the environment. More and more preservation methods implemented by environmental law take under consideration issues relating to the respect of traditional knowledge and practices when dealing with the management of natural resources. Indeed, these traditional practices have largely proven, because of their long history, their capacity to preserve certain forms of biodiversity.

3.2.- INTERACTIONS WITH HUMAN RIGHTS LAW

In this section, we observe that if there was an original explicit intimacy between human rights and the ICH safeguarding system, this intimacy does not appear when we analyse the implementation of either one of these two grounds. Indeed, contrary to the direct mention of human rights in the Convention's preamble, a lack of any mention of a legal rule, case law or cultural policy linking the two realms blatantly comes through the answers to the questionnaire. Thus, the legal scholar is compelled to adopt a prospective approach to analyse such interaction. To that extent, we have referred to instances of implementation of cultural rights to practices that can be assimilated to ICH; we will call these instances cases of implicit interactions.

We distinguish two types of implicit interactions: on the one hand, human rights as a support mechanism to a

traditional practice and on the other hand, human rights as a limitation. Within the instances of human rights as a support, we differentiate proclaimed rights from claimed rights. Proclaimed rights are essentially the rights of a cultural community recognized by the State without referring to a specific heritage. They derive from and are contingent to the history of the State and of what the government is willing to grant to these communities, which often pre-date the State, usually following a long-lasting political struggle. We have the example of indigenous people in the USA, Canada, Brazil and Mexico; but also the religious communities in Iran and a particularity of the Latvian State that protects its national community. Regarding claimed rights, they relate essentially to the instances when heritage holders will bring an action in justice to defend a specific cultural practice on the ground of human rights violation. In that case, the traditional character of that practice is not the essential element, what matters is the ability to frame it as a fundamental right. The cases mentioned throughout the answers to the questionnaire focus on three fundamental rights: freedom of speech, freedom of religion and equal protection.

In the cases when human rights limit a traditional practice, we find the usual necessity to balance the different fundamental rights. Thus, a Ku Klux Klan group in the USA cannot request the protection of its tradition on the ground of freedom of speech when it otherwise violates the fundamental rights of other citizens. Or the Italian government who did not follow through with the candidacy of a tradition to the international list of ICH because it could have offended Muslims.

Thus, if the Convention offers a volunteering image to the safeguarding of ICH by the State, the interaction of this heritage with human rights illustrate a more contentious side of this relationship: maybe another reason why this interaction still remains implicit in the implementation of these two legal grounds?

3.3.- INTERACTIONS WITH INTELLECTUAL PROPERTY LAW

The questions of the safeguarding of ICH and of its protection through intellectual property law have been intertwined from the start. More than half of the answers to the comparative law questionnaire mention intellectual property. The analysis of the data gathered, complemented by a study of the national legislations in force in the States part of the research project, outlines that States have followed four main paths to protect ICH through intellectual property.

The first path followed by some States consisted in the introduction of specific provisions protecting a sub-category of ICH, usually named “folklore” or “expressions of folklore”, into copyright law. They were influenced in that approach by instruments adopted by UNESCO and WIPO, notably the Tunis model Laws (1976) and the model provisions for national laws on the protection of expressions of folklore against illicit exploitation and other prejudicial actions (1982). States having sought this path are mainly Arab and African States, such as Egypt, Morocco, Mali or Congo. In several copyright legislations, the influence of the work conducted by UNESCO and WIPO can be felt, but legislators also sometimes emancipated themselves from these models. Zimbabwe, for instance, established a complex system of reservation of rights for certain works of folklore.

The second path, less used than the first one, only concerns two African Anglophone States: Kenya and Zambia. These States have adopted laws that establish hybrid systems combining prior authorisation with the recognition of moral rights of heritage holders, and respect for the principles of free prior and informed consent and the equitable sharing of benefits. These laws transpose in part the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010). Because they only have been recently implemented, it seems risky to give an opinion on the impact that these legislations may have on the safeguard of ICH.

The third path entails, conversely to the first two that tried to inject considerations linked to ICH within intellectual property laws, the recognition of intellectual property rights to communities within laws pertaining to the safeguarding of ICH. This case is marginal, only two States engaged in that process: Latvia and China. Latvia recognized, on the one hand, a right of communities to their name on elements of ICH, and, on the other hand, a paternity right when an element is used for lucrative purposes or any other transaction. As for the ICH law of the People’s Republic of China (2011), it enshrined an opposable right of ethnic communities to ensure the respect of their moral rights on cultural expressions.

The last path is very different from the previous ones. Communities, a long time before WIPO and UNESCO got interested in ICH, have taken this path. In the domains of traditional arts and crafts and culinary traditions, industrial property rights have been used to defend communities against a competition that could, in the long run,

devalue their ICH. In some cases, protection from competition is reserved for a specific community or a category of products. For instance, in the USA, the Indian Arts and Crafts Act (IACA) (1990) was enforced to protect the Native Indian arts and crafts market from copies. Communities in France also resort to geographical indications to protect agricultural products and foodstuffs as well as handicrafts that have a geographical anchoring. Nevertheless, these distinctive signs run the risk to freeze the know-hows in time. Gaps can also form between the community that owns a distinctive sign and the community practicing an ICH. One of the solutions to end these discrepancies would be to create a label specific to ICH, like Germany and Switzerland have done it. Using these labels indicates to the public that the element is registered in their national inventories.

4.- NATIONAL LEGAL TOOLS TO SAFEGUARD THE ICH

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This section focuses on the national process by which ICH safeguarding measures are given a legal dimension. Three initial assessments can be done:

- As such, the 2003 Convention does not impose for its implementation one type of mechanism over another: it sets out some goals to attain, but it leaves State parties largely free to determine the conditions in which they intend to reach these results.
- All national safeguarding measures of ICH cannot be only apprehended within the legal domain. It appears from the national answers to the comparative law questionnaire, that there is a wide range of different tools used by the States: legal measures, administrative and financial techniques, education, research and training actions, etc. The difficulty does not reside so much in the diversity of these tools rather than in the porosity of their respective boundaries: in the field of ICH, many legal tools express such a weak element of “*bindingness*,” that they cannot usually be distinguished from measures considered “administrative” or “financial” (the procedures according to which an element can be registered in an inventory, the right to use a logo or the criteria defining the attribution of a subvention are all examples of evasive forms that legal safeguarding measures can adopt).
- Delineating national safeguarding measures is all the more complex that we observe great differences in the analysis of the actions undertaken before the 2003 Convention: Some States and authors aim at “recycling” pre-existing tools in the wake of the safeguard of ICH, when others establish absolutely no link at all. For instance, can we classify the Icelandic legislation on names (*Personal Names Act*, n° 45, May 17, 1996) as a national safeguarding measure? We made the choice in our research not to solve that issue: not that we think it would be impossible, but because, from a legal standpoint, we consider that ultimately it is not important to know whether these tools predating the 2003 Convention should in fact be analyzed as safeguarding measure of ICH; in any event, studying their legal structures opens an interesting debate.

Hence, it is important to distinguish between two perspectives: the analysis of the legal forms in general (4.1.); the analysis of specific legislations that explicitly present themselves in direct relation to the Convention (4.2.).

4.1.- THE POTENTIALITY OF THE LEGAL TOOLBOX OF ICH SAFEGUARDING

If we adopt a strictly technical standpoint on the legal tools (independently from the justifications we attach to them as safeguarding measures of ICH or not), we can observe a great diversity. In this context, one of the major goals of the report is to offer an analytical tool enabling to compare the forms of bindingness of the safeguarding measures of ICH in the different national legal systems studied in the framework of the Osme project.

The national safeguarding measures can be classified in relation to their legal power, from the weakest legality (measures the least legally binding) to the strongest legality (measures the most strongly legally binding)

- Firstly the measure with the weakest legality that we could identify is the “dry” definition, *i.e.* the simple definition, of “ICH” a) for which the process was not legally framed and b) to which no legal consequences was attached if only the simple fact that the practice was such defined. Conversely, the measure with the strongest legality that we could identify entails the recognition of subjective rights to a subject of law (a State, individuals or groups), which is the source of legal obligations for everyone else because this right is enforceable any time in the name of the safeguard of ICH. In between these two extremes, a great many number of national safeguarding measures exist, which can potentially greatly vary in types (granting of a logo, official subventions, geographical indications, etc.)
- Secondly, national safeguarding measures can be classified in relation to the decision process that produced them: from the measure deriving from a consensus (“contractual” measures) to measures originating from a unilateral decision (“unilateral” measure) – and these two extreme points frame a new intermediary “zone,” in which, again, most of the measures are located (what we often refer to as “participation” apparatus).

In light of the national answers to the comparative law questionnaire, it appears that the great majority of these measures reside in between these two scales. We offer to regroup all these measures under the terminology “label.” Two common feature of all these labels would be their semi-contractual and semi-normative characters: semi-contractual at least with regard to the granting procedure, because there is always the possibility for the heritage holder to thwart the process of granting the label; semi-normative in as much as the terms of the contract cannot be negotiated, but are imposed as a whole. This massive use of “label” is not surprising: we can sense that there are strong connections between the contractual logic of the label and the participatory logic of ICH; but it is an illusion (almost a wrongful implementation of the Convention) as these two legal mechanisms are, in fact, so different from one another (it is not because there is an agreement to receive a label that there is participation, unless we reduce participation to a simple contract).

Hence, the last question one can ask is to understand why States use labels so much, or said in another way, why they do not lean more towards adopting measures that have a stronger legality and are more strongly unilateral. The following hypothesis, of great simplicity, is offered by the report: we cannot impose excessive constraints to heritage holders, which would entail imposing ways of life to individuals in the same way we impose work and restoration to monuments. In these conditions, it is not surprising that in ICH law always, or almost, oscillate between these two extreme points.

4.2.- THE TRANSLATION OF THE CONVENTION IN NATIONAL LAWS

Several States studied for this project chose to go beyond the ratification, agreement, approbation or adhesion process to the 2003 Convention. These States adopted, subsequently to the entry into force of the Convention, national laws in their national legal systems that expressly follow in its wake. We can witness through the relationships that these laws have with the Convention so many practices of implementation; nevertheless, such a reading should not lead to smooth out the complexity and the diversity of forms of the phenomenon taking place: at the national level, it appears that the laws studied are adopted “in reference to” the Convention, rather than “in implementation of” the latter.

The “references” are manifest either at a formal level (direct reference to the Convention: measures quoting entire stipulations from the Convention, measures directly referring to articles in the Convention, measures invoking one or several concepts from the Convention); or at a substantial level (measures introduced as complementing the Convention, complementing or guiding its interpretation). In any case, we observe that in that process, the issue of ICH is sifted through the sieve of national legal traditions. Indeed, States tend to stick on it pre-existing models of legal thinking, which themselves, in return, do not remain unaffected: they evolve in contact with ICH.

In order to demonstrate that process, the report focuses especially on recent legislations (in particular the legislations from Spain, Flanders, France, China and Latvia). This report shows already the variability of legal contents that these laws (of more or less great ambition) offer and the ways they take seriously or not the rights of ICH holders. ICH reveals other actors, notably collective, more often obliterated in the classical safeguarding mechanism of this heritage. When resorting to, or inventing new legal mechanism, the States confront the complex question of the legal translation of the principle of participation, the cornerstone of this system. The

Convention did not frame this principle as a sophisticated legal notion, in the same way that it evacuates any precisions regarding the notion of community, even if other forms of normativity take a hold of it. Nevertheless, the national legislators are ultimately responsible to define the legal substance and arrangement of participation, a process that some States have attempted. From this overview of the primary ground works laid out by the national legislators: what teachings can we draw regarding the technics used? What is certain is that the incorporation of the legal material dedicated to ICH within the national laws withholds potentialities that, up to this day, are not yet known. If we lack hindsight in relation to the implementation of these laws, we can observe that the references to heritage holders' groups and their necessary participation, which are key notion of the Convention, remain more or less, sometimes apprehended in a very limited way. Through this notion of participation, it is this process of implementation that we need to grasp. The implementing measures of ICH focus more often on the development of the national or regional inventories, without always measuring up to the issue of participation and particularly giving it a legal meaning.

A more detailed analysis of laws specifically designated for the safeguarding of ICH will demonstrate the variety of mechanisms chosen by the legislators. Four laws are analysed (China, Spain, Latvia and Madagascar) as examples of legislations adopted after the year 2003 that focus on the safeguard of ICH in each country. The respondents to the Osmose questionnaire also referred to these laws as implementation laws to the Convention. The same reference is mentioned in the texts of the legislation (within the body of the text, the preamble). We do not study here the ordinances linked to these aforementioned legislations or laws in which ICH is mentioned as a part of the cultural heritage.

We can witness some similarities in the goals of these four legislations, notably in the definition of ICH safeguarding as a full part of the cultural heritage of the country. We can identify nuances more on the level of the inherent motivation for this safeguard. This motivation can be presented as the desire to promote values, creativity, the development and improvement of the quality of life (Latvia) up to more specific motives as socio-economical aspects (Madagascar).

Each of the four legislations effectively uses the Convention's definitions – the definition of ICH and fields of occurrences on the one hand, and the safeguarding measures, notably the national inventory of ICH, on the other hand. Nevertheless, in some countries, the scopes of ICH are complemented by elements specific to this country (China, Spain). In the Spanish legislation, the culinary heritage and the practices in using natural landscape are mentioned as Spanish ICH elements (article 2, paragraph f) and g)). The Chinese legislation mentions calligraphy and acrobatic gymnastics (article 2, paragraph 2).

The level of specification of the rights of individuals and organizations affected by the safeguard of ICH varies. It goes from the lack of mention of these rights (Spanish legislation) up to a rather detailed description of the required behaviours and pertaining sanctions (Madagascar). This diversity also characterizes the object of the law. In the cases when the object refers to the regulatory institutional and organisational framework of the State, the status of public institutions, the way they operate, as well as the cooperation between various public actors is incorporated within the implementation scope of the legislative provision (Spain, Latvia). In the Latvian legislation, the rights of individual, notably of communities, were mentioned in order to underline their active role in the safeguarding of their own heritage, but the legislator remained satisfied with a rather vague description on the scope of these rights and obligations. In the meantime, in the Madagascar and Chinese legislations, the behavioural modes required on the part of the actors of the safeguard of ICH as well as their sanctions for any abuse are defined.

All the legislations also define the institutional framework for the safeguard of ICH in each respective country. The administrative tools that were selected manifest a more political, rather than regulatory, approach to the management of this field. These laws order the subsequent adoption of documents that will detail the competences, operating rules, the cooperation mechanisms between the various institutions (Latvia, Spain), as well as between institutions and individuals and communities (Latvia). The Chinese legislation also indirectly mentions documents for planning as an administrative tool for the safeguarding of ICH.

One of the only binding provisions in the Convention pertains to the creation by the States of one or several inventories of ICH existing on their territory. The inscription of an element on one of these national lists determines its further registration on one of the Convention's lists. Hence, every States studied in the framework of the Osmose project, with the exception of Iceland, have undertaken to inventory their ICH. Most of the States even situated the creation and the updating of an inventory at the heart of their policies relating to ICH. For that matter,

this task represents often one of the main modalities of participation of communities in the safeguard of their ICH: either they initiate the inventory of some elements, or they contribute to the inventories.

We observe a great diversity in the development of the inventories. There exist national inventories, like in Algeria or Latvia, regional inventories, like in Spain, and even local ones. The city of Morocco for instance established its own inventory of ICH. Sometimes the inventories overlap, like in Belgium where the inventories of communities are coupled to an inventory for the region of Brussels-Capital. In other cases, the inventory is seen as a multi-layered system. For instance, China has a national inventory and a national representative list. Switzerland is also an interesting example. It established from its inventory indicative tentative list to plan its nominations for an inscription on the representative List. This list is similar to the one established by the World Heritage Convention (1972). The operations undertaken in relation to the inventory process have often triggered the creation of *ad hoc* institutional bodies. In Zambia, for instance, the National ICH Committee was established to manage the inventory of ICH. The creation of inventories also sometimes required the adoption of provisions to frame the procedures of incorporation of the elements. The Ordinance of March 5th, 2012, pertaining to the committee on ethnological and intangible heritage formalized for instance the French procedure of inventory.

5.- JUSTICIABILITY AND JUDICIALIZATION OF ICH

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The study of the dynamics of justiciability and judicialization helps to understand how ICH crystallizes litigation and how it is brought before the courts. Before all, it is important to note that the respondents mention a very limited number of case law explicitly referring to ICH. The legal existence and formal recognition of ICH being rather recent, this assessment is not surprising. Nevertheless, after adding to the few case law directly dealing with ICH, other case law dealing with elements that can be assimilated to ICH, we were able to outline three spaces of judicialization and start a reflection on the justiciability of this heritage.

The first space of judicialization that we identified covers the cases when the claim over an ICH clashes with the cultural identity created by a State through its fundamental legal principles. Notably, this tension appears through a decision by a Canadian Supreme Court Judge pertaining to the nature of an “aboriginal title,” as recognized by the Constitution. In this case, the chief Judge ordered the lower courts to take also under consideration traditional indigenous people’s customs evidence, in addition to the ones prescribed by Common Law. We also feel this tension when the French administrative supreme court confirms the impossibility to fund a religious association for its religious activities because of the principle of separation between Church and the State, which is considered a fundamental rule of the French Republic.

Secondly, we also found that the heritagization process favors litigation. In France, the procedure to inventory ICH has progressively been judicialized. Several parties have contested administrative decisions in relation to inventories. Others have invoked the fact that an element was included in one of the Convention’s lists to support a legal claim. Courts have therefore been called upon to rule on the merit of such registration in national law. Heritagization processes also trigger some litigation because of the difficulty to apprehend together the tangible and intangible dimensions of one heritage. Thus, a Hawaiian tribe in the USA requested the repatriation of human bones as “living people” while they are defined as cultural objects by the law. Other case law relate to urban spaces and their usages and opinions diverge regarding the interaction between these two aspects. In Mexico, a court extensively interpreted the preservation scheme of a historical city center to incorporate the local gastronomy tradition. Conversely, a Swiss court refused that the preservation mechanisms applied to tangible heritage be extended to ICH.

Finally, in some cases, the traditional practices of a local community clash with the values of the rest of the population, which opens a space favourable to judicialization. The study of the case law mentioned in the answers put forward a strong tension between the safeguarding of ICH and the protection of animal welfare. The questionnaires mention five decisions focusing on ICH elements that imply acts of violence on animals: Corrida and cockfights in France, the *Krakelingenfeest* in Belgium, the *vaquejada* in Brazil and the *Santeria* religion in the USA. We complemented the analysis of these decisions with the European case law on ritual slaughter.

A cross-analysis of these spaces of judicialization puts forward three aspects of ICH justiciability. Firstly, it reveals the legal grounds used for litigation. Three main legal grounds stand out: the Convention, constitutional rights and legal exception conceded to heritage practices. These three legal grounds all manifest the capacity that ICH has to attract an important political leverage in order to develop legal tools for its safeguard.

A second important aspect of the justiciability of ICH relates to the capacity to bring a case recognized to heritage holders by the courts. The analysis of the case law underlines the diversity of structures used by the claimants: isolated individuals, institutions, tribes... Moreover, it stands out from our analysis that the definition of “community” and of its representatives is rarely determinant to define the capacity to claim.

The last aspect of ICH justiciability pertains to the proof of this heritage. We see that sometimes the specificities of this heritage require outgrowing the usual laws of evidence. Nevertheless, the legal procedure more often pressures this heritage into specific frameworks, thus redefining it. Notably, heritage holders usually have to prove that their tradition is shared with a cultural community, or that it is tightly linked to an identifiable geographical zone.

>> FINAL STEP OF THE PROJECT

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A symposium presenting the results will close the Osmose research project on September 27, 2018. It will take place at the Library Françoise Sagan in Paris.

More information on the Osmose research project are available at dpc.hypotheses.org/le-projet-osmose.

Notably, a commented bibliography, videos and recordings are accessible on the blog.

ANNEXE 1. SCIENTIFIC COMMITTEE

Janet BLAKE, Associate Professor of Law at the University of Shahid Beheshti (Tehran), Iran

Isabelle CHAVE, Chief Curator, French Ministry of Culture, Heritage Directorate, Department for piloting research and scientific policies, Paris, France

Tim CURTIS, Secretary of the 2003 Convention, UNESCO

Manlio FRIGO, Professor, University of Milan, Italy

Kamal PURI, Professor Queensland University of Technology, Australia

ANNEXE 2. RESPONDENTS

Note: the list of respondents is given in alphabetical order, regardless of the extent of their contributions to the national questionnaires.

States	Name	Title and Institution
Group I		
Germany	Sophie Schönberger	Professor of Public Law, Art Law and Cultural Heritage Law, University of Konstanz
Belgium	Marie-Sophie de Clippele	Researcher, FNRS, Assistant, Facultés Universitaires Saint-Louis
	Marc Jacobs	Director, Flemish Interface Center for Cultural Heritage (FARO)
Spain	Sara González Cambeiro	Anthropologist, Labrit Patrimonio
	Cristina Sánchez-Carretero	Institute of Heritage Sciences (Incipit), Spanish National Research Council (CSIC)
France	Jérôme Fromageau	President of the International Society for Research on Art and Cultural Heritage Law (ISCHAL)

	Christian Hottin	Director of Studies (Department of Curators), Institut national du patrimoine
	Lily Martinet	Senior Research Fellow, Institute Max Planck Luxembourg for Procedural Law
	Noé Wagener	Assistant Professor, Université Paris-Est Créteil
Iceland	Valdimar Tr. Hafstein	Professor of ethnology, University of Iceland
	Vilhelmína Jónsdóttir	Lawyer, student enrolled in a master program in ethnology, University of Iceland
Italy	Sabrina Urbinati	Post-Doctoral Research Fellow, University of Milano-Bicocca
Switzerland	Antoinette Maget Dominicé	Lecturer, Law School, University of Lucerne
Group II		
Estonia	Margit Siim	Coordinator of Culture Programmes, Estonian National Commission for UNESCO
	Epp Tamm	Intangible Heritage Specialist, Estonian Folk Culture Centre
Latvia	Līga Ābele	Researcher, Latvian Academy of Culture
	Dace Bula	Director, Institute of Literature, Folklore, and Art, University of Latvia
	Anita Vaivade	Researcher, Latvian Academy of Culture
Poland	Hanna Schreiber	Law Lecturer, University of Warsaw
Group III		
Brazil	Anita Mattes	Doctor in law, University of Paris-Saclay
Mexico	Martin Michaus	Lawyer, Basham, Ringe y Correa S.C.
	Esthefania de Pando	Lawyer, Basham, Ringe y Correa S.C.

	Mariana Vargas	Lawyer, Basham, Ringe y Correa S.C.
Group IV		
China	Wang Li	Associate Professor, Central-South <i>University</i> of China, Changsha
Iran	Susan Cheraghchi	Legal Expert, Iranian Cultural Heritage, Handicrafts and Tourism Organization (ICHHTO)
Group V(a)		
Congo	Ulrich Kévin Kianguebeni	Lecturer, Law School, <i>Marien Ngouabi University</i> , Brazzaville
Kenya	Kiprop Lagat	Director of Culture, Ministry of Sport, Culture and the Arts
	George Litswa	Cultural Officer, Culture & Heritage Museums
Madagascar	Anjavola Razafinarivo	Research fellow, Ministry of Handicraft, <i>Culture</i> and Heritage
	Tahina Ratsiambakaina	Head of Department, Ministry of Handicraft, <i>Culture</i> and Heritage
Malawi	Christopher Magomelo	Assistant Executive Secretary (Culture), Malawi National Commission for UNESCO
Mali	Moulaye Coulibaly	National Director of Cultural Heritage
Zambia	Munukayumbwa Munyima	Research Fellow, Institute of Economic and Social Research, University of Zambia
Zimbabwe	Elvas Mari	Director, National Arts Council of Zimbabwe
Group V(b)		
Algeria	Jihane Chedouki	Protection Delegate at International Committee of the Red Cross - ICRC
Egypt		
Morocco		

Non party States		
Canada	Antoine Gauthier	Director General of the Conseil québécois du patrimoine vivant (CQPV)
	Robert K. Paterson	Professor, University of British Columbia
USA	Clea Hance	Doctoral Student, University Versailles Saint-Quentin-en-Yvelines, École normale supérieure de Cachan
	Michelle Stefano	Specialist in the Research & Programs, American Folklife Center, Library of Congress

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