



Book Review: Marie Cornu *et al* (eds), *Intangible Cultural Heritage under National and International Law Going Beyond the 2003 UNESCO Convention* (Edward Elgar Publishing, 2020) ISBN 978 1 83910 002 4, pp 224. *

Kay Dunn**

Intangible Cultural Heritage and its recognition within the law has been developing for well over thirty years. However, very little progress in creating a harmonised, completely equitable system is yet to be realised. Since the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage¹ in Europe, some progress has been made in recognising appropriate legal frameworks and discussing potential protection mechanisms to develop this area of the law significantly. The development nationally and internationally has been sporadic and incorporates many established areas of law such as intellectual property law,² environmental law,³ human rights law⁴ and others that are all entwined in recognising the rights, adequate protections and connected issues with protecting and promoting intangible cultural heritage.

The edited book published by Edward Elgar Publishing clearly unravels the national and international efforts to establish a legal regime to protect and promote intangible cultural heritage. Through four distinct parts, *Cornu and Others* have skilfully broken down the issues and progression that have happened since the 2003 Convention came into force, leading the reader on a journey of understanding and contextualisation.⁵ Indeed, the greatest achievement of this book is being able to accurately relate all the competing interests as well as present clearly the vast comparative analysis research that has taken place prior to its completion.

Part 1 discusses the issues in establishing and defining intangible cultural heritage, with a historical approach that introduces the reader to the chronological development of the term

* The eBook version is priced from £22/\$31 from Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

** Kay Dunn is currently a Graduate Teaching Assistant for the Wolverhampton Law School, University of Wolverhampton.

¹ 'UNESCO - Text of the Convention for the Safeguarding of the Intangible Cultural Heritage.' Available: <https://ich.unesco.org/en/convention>. All links in this review have been verified on 18 June 2021.

² The World Intellectual property Organization (WIPO) and others have multi-nation working groups looking into intellectual property protections for aspects of intangible cultural heritage. *E.g.* World Intellectual Property Organization 'Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Thirty Seventh Session Geneva, August 27 to 31, 2018 The Protection Of Traditional Cultural Expressions: Updated Draft Gap Analysis' (2018) WIPO/GRTKF/IC/37/7. Available: https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365.

³ UN 'UN Convention on Biological Diversity' (1992). Available: <https://www.cbd.int/convention/text/>.

⁴ UN 'United Nations Declaration on the Rights of Indigenous Peoples' (2007). Available: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

⁵ Marie Cornu *et al* (eds), *Intangible Cultural Heritage under National and International Law Going Beyond the 2003 UNESCO Convention* (Edward Elgar 2020).

intangible cultural heritage within the responding nations. A chapter looking into prior and parallel terms⁶ is helpful in giving context to the development of the law but also the inconsistency across jurisdictions that has led to the need for further research and discourse analysis. The annex on pages 40-43 is extremely useful to the reader in tabulating the development of legal terminology for intangible cultural heritage within those mentioned jurisdictions that responded to the Osmoste⁷ research questionnaire sent out by the authors. The Osmoste project is a set of questionnaires sent out internationally to explore individual approaches to intangible cultural heritage law.⁸ This thoroughness throughout the book establishes it as a handbook to those seeking to research and understand intangible cultural heritage and its legal development before looking further into its interactions with other areas of the law.

Vincent Négri's chapter focussing on the notion of community establishes the link between the legal issues and those it aims to assist. The notion of community represents new terminology in the field of law within these parameters. Within this notion states or individuals are usually recognised, rather than the communities themselves. This chapter is imperative to identifying to the reader who the 2003 Convention aims to safeguard. In the current climate there is a wealth of conversation on decolonisation and the move to recognise the rights of indigenous or minority communities.⁹ This has been recognised within the developing law to acknowledge communities, minorities and even individuals. The law of intangible cultural heritage is entwined with this idea of community. National identity is irrelevant; instead, societal bonds, recognised more adeptly within anthropology, need this explanation and definition to apply any legal regime coherently. Négri's chapter analyses this appropriately, explaining the controversy and difficulty for individual nations as well as internationally in recognising rights for communities other than those of states.¹⁰

Part II discusses interactions between intangible cultural heritage and other fields of law. This is especially important for practitioners or researchers in other fields that may take an interest in this developing area and how it interacts with what they already know. Indeed, from personal experience, having intangible cultural heritage mapped against existing intellectual property law was both helpful and insightful; the development of these two distinct areas in parallel and then together gives a picture of why this area of the law is so difficult to protect and promote accurately for all heritage holders. When added to further discussions on environmental law and human rights law a picture begins to unfold of how all these legal areas need to come together to offer a full and appropriate legal regime. Again, the helpful annexes at the end of each chapter really bring together the presented textual information that can be lost with so much detail. The use of examples from the research questionnaires is helpful to contextualise the law in each area, informing the reader who may be comfortable with only one of the other areas of law.

⁶ Anita Vaivade, 'Linking new intangible cultural heritage law with a legal past,' in Cornu *et al* (n5) 30.

⁷ The Osmoste research was completed to inform the authors in this book. The data collected is freely available here: https://dpc.hypotheses.org/files/2018/06/Osmose_rapport_synthese_2018_EN_5juin2018_10h.pdf The questionnaire is available as an annex to the book (n5) on page 193.

⁸ An example questionnaire is available at: Cornu *et al* (n5) 193.

⁹ E.g. United Nations Human Rights Council 'Rights of persons belonging to national or ethnic, religious and linguistic minorities, Report of the United Nations High Commissioner for Human Rights' A/HRC/19/27/ Available: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/172/78/PDF/G1117278.pdf?OpenElement>.

¹⁰ Vincent Négri 'Receiving in domestic law concepts born by the 2003 Convention: focus on the notion of community,' in Cornu *et al* (n5) 51.

The use of case law within the Human Rights chapter¹¹ by Clea Hance, shows how imperative recognition of intangible cultural heritage is for individuals as well as communities. The lack of strict protection within individual nation's constitutions highlights the problem with diffusing these specialised rights with strict human rights protections¹² instead opting to claim human rights infringements on already established rights recognised nationally and internationally. An example being the *Alabama & Coushatta Tribes v Big Sandy School* case where the right to freedom of religion was used to protect male school children's rights to wear their hair long.¹³ This is then contrasted within the chapter with other similar cases to show that national courts are reluctant to discuss culture as a human right, instead looking to other freedoms which are more established.¹⁴

The intellectual property (IP) law chapter¹⁵ from Lily Martinet, being the most developed area of law interacting with intangible cultural heritage, gives a greater insight into the legal regimes developing nationally and internationally. The chronological approaches aid the reader in following the development of language and protections and again the use of tables and graphics improves the readers' ability to summarise the given information. The chapter clearly explains the IP terminology that is most prevalent; traditional knowledge¹⁶ and traditional cultural expressions¹⁷ but recognises that intangible cultural heritage goes further than this. Some elements cannot sit under those umbrellas, and as such remain unprotected through IP law. Martinet expertly directs the reader through the diversity of approaches within the national laws, introducing the Model provisions¹⁸ and the success stories. The Swakopmund protocol¹⁹ is used as an exemplary illustration of how regional approaches can work to inform nation states more effectively of the best and most appropriate protection mechanisms under IP law. This *sui generis* approach has been acclaimed in the way that it has allowed signatory states to adopt the measures as they see fit, but to also give great guidance on terminology and appropriate measures to use. Not only protecting economic rights but also moral rights through regeneration and promotion. Martinet concludes that the 2003 Convention sought to ignore or exclude IP law from its provisions. Most states have however included IP law in their legal frameworks, as demonstrated by responses to the Osmose project, recording the wide-spread use of IP law mechanisms.²⁰

Part III discusses the legal tools used within nations to safeguard intangible cultural heritage. The first chapter expertly explains and examples the differing legal tools currently in use to safeguard intangible cultural heritage in national, local, or community-based programmes. This breaking down of the legal tools aids researchers in this area, in recognising but also understanding the degree of protection afforded by each system. The authors then classify the

¹¹ Clea Hance, 'The interactions between intangible cultural heritage and human rights,' in Cornu *et al* (n5) 88.

¹² *Ibid* 86.

¹³ *Alabama & Coushatta Tribes v Big Sandy School* D. 817 F. Supp.1319 (E.D Tex. 1993).

¹⁴ Clea Hance, 'The interactions between intangible cultural heritage and human rights,' in Cornu *et al* (n5) 93.

¹⁵ *Ibid* 97.

¹⁶ WIPO, 'Glossary of Key Terms Related to Intellectual Property and genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' 40. WIPO/GRTKF/IC/INF/7. Available: https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_inf_7.pdf.

¹⁷ *Ibid* 39.

¹⁸ UNESCO 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions' (1982) XVI (4).

¹⁹ ARIPO, 'Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore' (2010). Available: <https://www.aripo.org/wp-content/uploads/2019/06/Swakopmund-Protocol-on-the-Protection-of-Traditional-Knowledge-and-Expressions-of-Folklore-2019.pdf>.

²⁰ Lily Martinet, 'The interactions between intangible cultural heritage and intellectual property law,' in Cornu *et al* (n5) 121.

tools into categories; legality and participation, showing a sliding scale of strength. For the reader this clarity is extremely helpful in reaching their own conclusions on best practice, alongside the critical analysis provided by the authors.

Chapter 9²¹ is a case study chapter; using China, Spain, Latvia, and Madagascar to provide examples of the 2003 Convention having been translated into national law. This chapter brings together all the elements already discussed in the book and relates them to national laws that are already operating to try and safeguard intangible cultural heritage. The use of terminologies, frameworks and institutional approaches vary, but allow the reader to explore these established frameworks as well as assess them for themselves. The earlier chapters in the book are more critical, where this chapter is more descriptive, allowing the reader to make their own decision on effectiveness. However, this chapter makes it very apparent that the preferred method of safeguarding is inventorying, and so the last chapter in this part looks to explain the different ways inventories have been created and who is responsible to create and maintain these lists.²² It correctly brings questions to the reader's mind, who should be responsible for these inventories and what should the restrictions be? There will always be conflict in the registration of certain heritage practices, whether to the true owner/s but also in conflict of other existing rights. The author correctly questions, does a list equal a right? For many states this has not been taken into consideration, misconstruing that inventorying establishes a right.

Part IV discusses justiciability and judicialization of intangible cultural heritage, leading on from the previous part that discusses the inventorying that has led to a conflict concerning rights. Martinet's chapter discusses the interaction between the human based rights to intangible cultural heritage and the evolving area of animal rights. Many cultural practices are now in conflict with the recognition of rights for animals who may suffer due to these practices. Animal rights reform within the UK is imminent,²³ perhaps many other states will be looking to develop their legislation in the near future. Martinet expertly guides the reader through the exceptions made in state legislations to allow indigenous communities to still undertake their practices, although in under strict regulation.²⁴ The ban on fox hunting in the UK however is not mentioned,²⁵ perhaps due to the suppression of the practice in totality within England and Wales, with the animal rights overriding any claims made by communities to the economic or cultural value this practice has had within the UK. Examples from other states are used to exemplify the conflict however, the differing approaches showing how there is and perhaps always will be a plethora of approaches, dependant on a state's level of priority to animal rights as well as the intangible cultural heritage that is in question.

The chapter looking into the tension between the tangible and intangible is particularly interesting from the perspective on how nation states have recognised cultural heritage through litigation and the develop of the common law to promote and safeguard cultural diversity. The *Delgamuukw* case²⁶ is expertly explained, from the constitutional to the colonialist issues to those of the law developing in intangible cultural heritage. The courts in this case chose to

²¹ Liga Ābele, 'Translating the 2003 Convention into national laws,' in Cornu *et al* (n5) 134.

²² Lily Martinet, 'Defining intangible cultural heritage through inventories,' in Cornu *et al* (n5) 147.

²³ Fiona Harvey, 'Animal Rights to be formally recognised as beings in UK law' (2021). Available: <https://www.theguardian.com/world/2021/may/12/animals-to-be-formally-recognised-as-sentient-beings-in-uk-law>.

²⁴ Lily Martinet, 'Balancing animal rights and the safeguarding of the intangible cultural heritage,' in Cornu *et al* (n5) 152; e.g., Marine Mammal Protection Act 1972 (United States of America).

²⁵ Hunting Act 2004.

²⁶ *Delgamuukw v British Columbia* 1997 ConLII 302 (SCC) [1997] 3 SCR 1010.

address the issue of 'aboriginal title' by adapting the approach of evidence collection and presentation to one that was more inclusive of aboriginal recordkeeping.²⁷ All these are clearly brought together, making the reader question if these considerations have taken place in other jurisdictions, so as to be open to recognising the rights of minorities. As expressed in the chapter, the tension between national identity and cultural groups is real, defining nation's approaches to intangible cultural heritage claims. The French example of secular and religious practices highlights the problem of nations' policies that could potentially stifle safeguarding of specific cultural heritage.²⁸ Could this be an area for further development? Indeed, human rights have always recognised the right to religious freedoms,²⁹ so perhaps this could be a way to encourage states to recognise intangible cultural heritage as partially religious freedoms.

The afterword provides some insightful updates on the chapters presented within the book. It is useful to see the updates and new approaches taken, as well as the editors' thoughts to further research and the limitations of their current study for others wishing to develop their own research in this area.

Concluding, I for one question what now? Will the authors come together to create another book? It is definitely warranted; research on this scale, looking at intangible cultural heritage is slim. As the law develops both nationally and internationally, there is still more to discover. Perhaps as suggested further focussed research will identify better approaches to truly safeguard intangible cultural heritage.

²⁷ Clea Hance, 'The judicialization of the tension between the cultural identity of states and intangible cultural heritage,' in Cornu *et al* (n5) 172.

²⁸ *ibid* 175.

²⁹ *E.g.* European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, Art.9.