Foreword

It is with great pleasure that I write this Preface to the final report of the Osmose programme on intangible cultural heritage and the law, initially established in 2014 with the initial aim of conducting a comparative analysis of the various legal aspects of implementing the Convention for the Safeguarding of the Intangible Cultural Heritage (2003 Convention) in Europe. This ambitious project was jointly conceived and directed by Professor Marie Cornu (France) and Dr Anita Vaivade (Latvia). It began by undertaking a comparative synthesis of existing national rights relating to intangible cultural heritage in Europe, in order to gain a better understanding of the diversity of the ways in which the general concern to safeguard intangible cultural heritage was being translated into law in that region. Several research meetings were held during the process of this project which allowed the research team to consider more profoundly certain specific themes, in particular: the development of the concept of intangible cultural heritage (Paris, 4 November 2014), the subjective rights linked to the safeguarding of the intangible cultural heritage (Riga, 29 June 2015), intangible cultural heritage in nature – spaces, resources and practices (Riga, 8 September 2017) and on labels and other normative procedures for protecting intangible cultural heritage (Paris, 10 November 2017).

This resultant report of the project that grew out of this promising start, with a coverage subsequently extended far beyond Europe to cover 24 of the states parties to the 2003 Convention in North and South America, Africa and Asia as well as two non-states parties, is a testament to the quality of the conceptual underpinnings of this project as well as the effectiveness of the methodology employed. As the first such comprehensive and in-depth study of the legal regimes for safeguarding intangible cultural heritage across different regions of the globe, this report will serve as an invaluable and much-needed reference for scholars and practitioners in the field. Its many fascinating and profound findings should also serve as the impetus and catalyst for future research in this area and, hence, the impact of this report should continue to be felt for some time.

There are a number of serious challenges facing researchers looking into the domestic legal regimes for safeguarding intangible cultural heritage laws, especially since these laws are dispersed and scattered according to their subject-matter, their content and their level of normativity. In several states, laws on intangible cultural heritage are in the process of being drafted,

or pre-existing heritage protection laws are being revised to incorporate the concept of intangible cultural heritage. In some cases, these laws are not intended to establish legal regimes but, rather, may often form soft (non-binding) law, while, at other times, the relevant standards addressing issues relating to intangible cultural heritage are not identified as such and may appear to have another subject. Therefore, among the project's aims was to study these less obvious and, at times, invisible standards which nevertheless relate directly to the intangible cultural heritage; it sought to capture these and to demonstrate the diversity of such legislation through gathering examples of national experiences and the recognition of new rights. This was an extremely ambitious objective at the time it was conceived and has resulted in a ground-breaking report of exceptional interest to legal and other experts in the field.

As part of the methodology employed, this study used a qualitative questionnaire seeking to identify the universalization, at both conceptual and linguistic levels, of the law in this area through focusing on the legal instruments adopted at national and international levels in different legal fields. It was also concerned with understanding how the different legal regimes that contribute to the safeguarding of intangible cultural heritage worked together. By concentrating on the diversity of approaches – cultural, political, historical, scientific or other – found in different national contexts, this research sought to identify the significant links between those non-legal contexts and internal legal systems. In view of the difficulties presented by the terminologies employed in this field of law, the project also had an important focus on the history of the relevant legal language, including the redundancy, re-use or invention of terms applied in domestic law to safeguarding intangible cultural heritage. Among the topics addressed in this questionnaire were: legislation and policies adopted both before and subsequent to the adoption of the 2003 Convention in relevant areas (cultural heritage, the environment, intellectual property); relevant institutional contexts; definitional terms (such as ‘intangible cultural heritage’, ‘safeguarding’, ‘community’, ‘bearer’, ‘element’, etc.); national criteria for selecting intangible cultural heritage elements; the impact of the 2003 Convention on heritage protection generally; rights and duty holders; the nature of the rights and duties assigned to the different parties; and relevant case law.

In terms of its conceptual grounding, the Osmose project was built on two main axes. The first of these, based on the archival study of legal texts, comprised a semiotic and historical reflection on how legal safeguarding of intangible cultural heritage has been conceptualized in the history of the development of national rights from the nineteenth to the twenty-first centuries. Among other issues, this study drew out the various ways in which the concept of ‘intangible cultural heritage’ has been established and developed in these

instruments. It also examined ways in which these legal texts have sought to reconcile the competing interests of various actors and stakeholders – including the state, scientific institutions and experts, heritage bearers (communities, groups and individuals), non-governmental and civil society organizations, the private sector, and so on. The second axis comprised a reflection on the ways in which legal texts specifically designed to protect and safeguard heritage have interacted with other areas of international and national law, such as rights relating to material and intellectual property, human rights and environmental/biodiversity law. A further consideration that grew out of these two research axes was a focus on the ways in which the legal safeguarding of intangible cultural heritage can contribute to the current scientific debate on the commons and notions relating to the common good, in particular in relation to human rights (both individual and collective rights) in the intangible cultural heritage. Addressing such a broad field of reflection necessitated the development of an interdisciplinary approach in which disparate areas – such as the legal sciences, semiotics, history and ethnology – have been brought together. This is a further key aspect of this ambitious project that has provided it with a particular strength and intellectual rigour. Moreover, such a combination of different disciplines has allowed the authors of this report to understand better the genesis and development of legal discourses and concepts surrounding intangible cultural heritage.

As noted above, one of the great strengths of the Osmose project is the strong and insightful conceptual framework within which it was conducted. A central working hypothesis of the Osmose project has been that the intangible cultural heritage constitutes an important position from which to observe two current dynamics of cultural heritage law. The first of these dynamics relates to the globalization of the law. This is the case in so far as national legal systems which have, for decades, developed tools for the protection of folklore, language or even traditional knowledge are now seeking to reorganize these in the light of this new category of intangible cultural heritage. The second dynamic relates to an increasing complexity of the law whereby an intertwining of rights with various facets (rights of the state, local authorities, individuals and groups of individuals; individual and collective rights; the right to protect the heritage and the right to the protection of its heritage; etc.) is emerging in the field of intangible cultural heritage safeguarding. This phenomenon obviously requires a reconsideration of the balances of rights and interests on which the legal protection of cultural heritage has classically been based. Within this conceptual understanding, the Osmose research team then identified a number of main research axes which made it possible for them to structure this comparative study on the intangible cultural heritage. The first axis addressed the different ways in which states have invested in the category of ‘intangible cultural heritage’, establishing a dialogue between the obliga-

tions (and rights) set up under the 2003 Convention with their own legal orders and their past experiences. The second axis had as its focus those interactions between the law of intangible cultural heritage and three other branches of law – human rights, environmental law and intellectual property law – that the team identified as particularly complex. The third axis sought to analyse the work of giving a legal form at the national level to measures for safeguarding the intangible cultural heritage. Finally, the fourth axis provided a reflection on the types of legal action involving the intangible cultural heritage, based on the comparative study of certain significant areas of conflict.

I now wish to point to some of the significant findings of the Osmose study which are presented in this report. First, with regard to the interactions between intangible cultural heritage and human rights, responses to the questionnaire demonstrated no *direct interactions* between intangible cultural heritage and human rights. In other words, no countries included in the research mentioned any legal provision stating that the safeguarding of intangible cultural heritage is protected as a fundamental right, and, in addition, none of the human rights cases pertaining to a cultural practice mentioned in the questionnaires made explicit reference to the notion of intangible cultural heritage. This is a potentially significant finding given that the safeguarding of intangible cultural heritage under the 2003 Convention is understood to be placed firmly within a human rights framework. The report's authors interpret this as suggesting a certain unease in making this linkage too explicit in practice, possibly due to the fact that intangible cultural heritage law is still a rather new field and has not reached a point of maturity allowing for a theorization of its interaction with human rights. Where claims to protect traditional practices go beyond what the state is willing to grant, such conflicts may lead to a general concession of fundamental rights in favour of certain communities, most often national minorities. Such conflicts can also lead to the recognition of certain liberties, often referred to as cultural rights, allowing the protection of a specific traditional practice, such as a religious practice or freedom of speech. However, this is a highly complex area since intangible cultural heritage practices may also violate individual human rights. These findings strongly suggest the need for much more research in both the heritage law and human rights fields in order to unpick this highly complex question, and the work undertaken in the Osmose project has gone a long way towards determining the scope and content of such future studies.

Despite a number of serious challenges facing interactions between intangible cultural heritage and intellectual property law, such as the latter's individualistic and exclusive essence as opposed to the idea of a collectively shared heritage and serious concerns over 'fossilizing' intangible cultural heritage, it was found that over half of the answers to the comparative law questionnaires mentioned intellectual property. In a number of cases where respondents did

not mention intellectual property protection for intangible cultural heritage, a relevant statute or other provisions did actually exist in national law. This may be because the legal provisions in question do not refer explicitly to ‘intangible cultural heritage’ or it may be down to lack of knowledge of intellectual property issues among many professionals and practitioners in the field of intangible cultural heritage protection. Again, this is an important area for further study since, although the 2003 Convention sought to exclude intellectual property from its scope, states and communities often turn to intellectual property rights to protect aspects of their intangible cultural heritage, in particular against the misappropriation and distortion of elements and to defend the economic interests of a community. However, since the foundations of intellectual property law and those of cultural heritage law are so dramatically different, the potential for serious inconsistencies from layering safeguarding measures and intellectual property rights over a single element of intangible cultural heritage must be addressed by legislators. This study represents an important step in addressing this hugely complex question.

Another important area of the report’s findings relates to the judicialization of the tension between the cultural identity of states and intangible cultural heritage. Although the safeguarding of intangible cultural heritage is often represented as a shared interest between the state and heritage bearers, and efforts to implement the 2003 Convention derive from such a consensual relationship, a more conflict-based reality exists whereby the interests of heritage bearers and those of the state may often diverge. This may result in the phenomenon of judicialization¹ of intangible cultural heritage, i.e. its referral to the judiciary. This, in turn, leads to the question of its justiciability² which relates to the capacity of an element of intangible cultural heritage to be litigated. Notably, three aspects of justiciability were illuminated by the answers to the questionnaire: the identification of the legal grounds invoked to support a claim relating to intangible cultural heritage, the recognition of heritage holders’ standing, and lastly, the rules of evidence applied to intangible cultural heritage. The questionnaire responses revealed three main legal grounds used to support claims relating to elements of intangible cultural heritage: the 2003 Convention, constitutional rights and legal exceptions. Although, as yet, the 2003 Convention does not appear to be a predominant legal ground, it is possible that this will change over time and, again, represents an area where the

¹ Judicialization is ‘the operation by which one moves from conflict or disagreement to litigation’. See: Loïc Cadiet, *Dictionnaire de la justice* (PUF 2004) 677.

² Justiciability should be understood as ‘a possibility, a capacity, a potential submission to an authority, to its power and decisions, to a regime, to a treatment’, *ibid* 798.

study has flagged up an important topic for further study.³ The two main legal grounds invoked by claimants were constitutional rights and freedoms and exceptions. The constitutional rights in question are either *sui generis*, such as Aboriginal Rights in Canada, or fundamental rights.⁴ The law often uses exceptions as a mechanism to justify the survival of certain cultural practices, which would otherwise have become illegal because of the evolution of social norms. Legal exceptions are usually *ad hoc*, specific and limited to a particular tradition, and are therefore not available to all heritage holders. Another salient point revealed by the questionnaires is that proving the existence of an intangible cultural heritage element before the Courts relies on a dynamic of the influence between heritage customs and the common rules of evidence. At the same time, it may be that the specificities of intangible cultural heritage may require the common rules of evidence to evolve.

One important area of judicialization has been the result of national and international heritage recognition and protection procedures, amongst which two main categories of litigation can be identified from the study. The first category of conflicts derives from inventorying intangible cultural heritage and the inscription of new elements. The second category of disputes relates to the difficulty of taking into consideration both the material and non-material aspects of a cultural heritage element. In addition, another indirect mechanism of recognition has been identified that can lead to conflicts, namely the creation by legislators of a legal exception in favour of a specific community or element of intangible cultural heritage, excluding them from the scope of a general legal obligation. One such area of litigation examined in detail in the report concerns balancing animal welfare against safeguarding intangible cultural heritage elements such as the *corrida* in cases where safeguarding one community's element is at odds with the values of the rest of the population. In such cases, states have two options: to tolerate such alternative heritage forms or to suppress them. This is clearly a policy and legal challenge that will require substantial reflection and development over future years, and this report's findings can contribute usefully to that reflection.

The report also highlighted a potential for tension in cases where a community uses intangible cultural heritage in support of a claim between the cultural identity of that group and national identity. Indigenous people's claims, in particular, proved to be a major battleground for negotiating such tensions

³ Two French disputes cited the 2003 Convention in connection with the inscription of elements on the national inventory of intangible cultural heritage. See in ch 12 'The judicialization of heritagization procedures' the cases concerning the *yole ronde* and bullfighting.

⁴ See ch 6 'The interactions between intangible cultural heritage and human rights'.

between national and the local identities. In the face of the previous dominant discourse of the assimilation of Indigenous peoples, this study notes that the assertion of the notion of ‘cultural diversity’ as a democratic principle has enabled the rise of new legal reasoning in favour of the protection of the culture of each individual and group.⁵ Traditional practices are increasingly invoked to prove the existence of a fundamental right, including religious rights and freedoms, which can subsequently help challenge regulations adopted by public institutions, even those enacted in the name of the public good.⁶ However, and in addition to this, the legal assertion of an Indigenous people’s specific culture and elements of their intangible cultural heritage can serve to raise the level of recognition of the community in question and entails positive obligations on the part of the state, even limiting its scope of influence.

To conclude, this ambitious and well-conceived project which has gathered and analysed responses to a questionnaire from 26 countries in four continents (including two non-state parties to the 2003 Convention) probably represents the most comprehensive such study yet undertaken. As such, this is a ground-breaking publication and will be an invaluable resource for legal and other scholars working in the, as yet poorly researched, field of intangible cultural law. Moreover, and perhaps even more importantly, it will serve as a catalyst for future research into a number of hitherto poorly understood (and even unidentified) areas of the legal safeguarding of intangible cultural heritage at the national level.

Janet Blake

⁵ *ibid.*

⁶ *ibid.*, especially the cases *Alabama & Coushatta Tribes v. Big Sandy School D.* 817 F. Supp.1319 (E.D. Tex. 1993) and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U. S. 520 (1993).