UDC 341.24:008
DOI https://doi.org/10.24144/2788-6018.2025.01.24

ISSUES OF THE LEGAL REGİME OF İNTANGİBLE CULTURAL HERİTAGE OBJECTS

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Galandarova E. Issues of the legal regime of intangible cultural heritage objects.
The article analyses the legal regime for safeguarding intangible cultural heritage, focusing on the 2003 UNESCO convention as the cornerstone of international efforts. It explores the evolution of the safeguarding concept, legal definitions, and challenges in regulating cultural heritage through intellectual property rights. Various stakeholders, such as states, NGOs, and communities, are highlighted in preserving and transmitting cultural practices. The article critiques the existing political influences and limitations in balancing cultural preservation. The article advocates for the harmonization of international and domestic legal norms to ensure effective protection against misuse and to facilitate global cultural cooperation. Different aspects of safeguarding are examined in the article. Furthermore, the article calls for a sui generis legal approach that respects cultural diversity while safeguarding intangible cultural heritage as a dynamic and living entity. By addressing these points, the article seeks to contribute to the development of more effective and useful mechanisms for the safeguarding and promotion of intangible cultural heritage worldwide.

Undoubtedly, the formation of a corresponding international legal regime depends on the adoption of binding legal documents that impose obligations on states. The establishment of certain obligations for states, along with regulatory mechanisms tailored to the object of regulation within each legal document are the main points for the establishment of a legal regime. The functionality of regulatory mechanisms determines the effectiveness of an adopted legal document. The subjects that define the legal regime are key factors which identify the problems in the relevant field. They regulate and propose alternative solutions to address challenging issues, thus managing the relationships arising from that field. When examining the existing regimes for the protection of intangible cultural heritage, we find that, alongside the sui generis regime, protection through intellectual property rights has always been a relevant topic of discussion. The article explores protection within the framework of these regimes from various perspectives.

Key words: legal regime, intangible cultural heritage, 2003 Convention, UNESCO, safeguarding, international law, folklore, cultural diversity.

Галандарова Е. Питання правового режиму об'єктів нематеріальної культурної спадщини.
У статті розглядається правовий режим охорони нематеріальної культурної спадщини з акцентом на Конвенцію ЮНЕСКО 2003 року. Розглядаються еволюція концепції охорони, правові визначення та проблеми регулювання культурної спадщини через призму прав інтелектуальної власності. Наголошується на ролі різних зацікавлених сторін – держав, неурядових організацій (НГО) та спільнот – у збереженні та передачі культурних практик. Автор критикує існуючі механізми, наголошуючи на політичному впливі та обмеженнях у забезпеченні балансу між збереженням культурної спадщини та її адаптацією. Вказується, заклик до гармонізації міжнародних та національних правових норм спрямований на забезпечення ефективного захисту від зловживань та сприяння глобальному культурному співробітництву. У статті докладно вивчаються різні аспекти охорони, включаючи необхідність sui generis підходу, який поважає культурну різноманітність та визнає нематеріальну культурну спадщину як динамічне та живе явище. Розглядаючи ці питання, автор прагне сприяти розвитку більш ефективних та практичних механізмів для охорони та просування нематеріальної культурної спадщини у всьому світі.

Безумовно, формування міжнародного правового режиму залежить від ухвалення обов'язкових юридичних документів, що накладають зобов'язання на держави. Створення конкретних зобов'язань держав, поруч із регуляторними механізмами, розробленими регулювання об'єкта у межах кожного юридичного документа, становить основу правового режиму. Ефективність будь-якого прийнятого юридичного документа визначається функціональністю його регуляторних механізмів.

Функціональність регуляторних механізмів визначає ефективність ухваленого юридичного документа. Суб'єкти, які визначають правовий режим, є ключовими факторами, що ідентифікують

проблеми у відповідній галузі. Вони регулюють та пропонують альтернативні рішення для усунення складних питань, тим самим керуючи відносинами, що виникають у цій галузі. При вивченні існуючих режимів охорони нематеріальної культурної спадщини виявляється, що поряд із режимом sui generis захист через права інтелектуальної власності завжди був актуальною темою для обговорення.

Ключові слова: правовий режим, нематеріальна культурна спадщина, Конвенція 2003 року, ЮНЕСКО, охорона, міжнародне право, фольклор, культурна різноманітність.

Relevance. The 2003 Convention is a key document in defining the international legal regime for the safeguarding of intangible cultural heritage. As an integral part of international law, this Convention establishes the foundation for the international legal regulation of intangible cultural heritage safeguarding.

The essence of safeguarding intangible cultural heritage has been elevated to an international level, and a corresponding international legal regime has been established with the adoption of the 2003 Convention. Every legal regime arises as a result of the shared concerns and expectations of specific communities. The development of any document forming part of an international legal regime involves extensive deliberations. Following this, "soft law" norms – non-binding recommendations for states – are typically introduced.

The purpose of the study is to comprehensive theoretical and legal analysis of the legal regime of objects of intangible cultural heritage, identify the main problems of their legal protection and protection, as well as the development of practical recommendations for improving the legislation in this area.

The analysis of scientific sources shows that the issues of the legal regime of intangible cultural heritage were investigated by such scientists as V. Akulenko, M. Boguslavsky, O. Melnychuk, V. Maximov, who made a significant contribution to the development of theoretical principles of cultural heritage protection, but the issue of legal status and the regime of intangible cultural heritage objects require further thorough research, taking into account the current challenges and international obligations of the state in the field of cultural heritage protection.

Presentation of the main material. The origin of every legal regime comes from discussions concerning the relationships it is designed to regulate. In the context of the international legal regime for intangible cultural heritage, the primary topics of discussion have centred on the emergence of the concept of safeguarding, defining intangible cultural heritage accurately, and determining the legal essence of its protection [2].

The concept of safeguarding intangible cultural heritage emerged from deliberations conducted within the framework of UNESCO. In 1971, UNESCO prepared a report titled "The Possibility of Establishing an International Instrument for the Protection of Folklore." Following the adoption of the 1972 Convention, discussions arose regarding safeguarding cultural heritage elements not covered by that convention. In 1973, the Bolivian government proposed adding a protocol on the protection of folklore to the Universal Copyright Convention and submitted this proposal to UNESCO.

Subsequent discussions from 1973 onwards focused on regulating relations concerning intangible cultural heritage through copyright law. However, by 1982, it was concluded that a specific international instrument was necessary to regulate these relations [1]. At the Mondiacult World Conference held in Mexico in 1982, the importance of eliminating intercultural hierarchies and redefining culture to encompass all aspects of daily life – including customs, traditions, beliefs, and values – was the main focus. It was the Mondiacult Conference where for the first time, the concept "intangible cultural heritage" was used, highlighting the necessity of safeguarding not only historical monuments but also other elements of cultural heritage. Following this conference, UNESCO adopted its 1989 Recommendation, which was the first international tool addressing the safeguarding of intangible cultural heritage. However, as it was non-binding, it did not impose legal obligations on states.

An analysis of UNESCO's activities from 1973 to 2003 reveals that intangible cultural heritage – comprising folklore, popular and traditional culture, intangible heritage, oral heritage, and more – was progressively recognized as requiring dedicated legal protection [5].

All these processes lead to the establishment of unified terminology for all countries which can be considered a significant achievement in the formation of the international legal regime for intangible cultural heritage. By consolidating various existing concepts under a single definition, the 2003 UNESCO Convention has precisely defined the object of its regulation. The subjects of the relevant legal relationships include subjects with varying legal capacities, such as the States Parties to the Convention, international organizations (e.g., UNESCO and WIPO), non-governmental organizations, and individuals who were stakeholders in preserving intangible cultural heritage.

One of the key factors influencing the effectiveness of the established legal regime is the attitude of the States Parties to the Convention. In this regard, significant differences exist between developed countries and developing or third-world countries. Democracy, free-market economies, and transparency have notable impacts on the functionality of the legal regime, either positively or negatively. While third-world countries are often rich in intangible cultural heritage, safeguarding that type of heritage is not typically a priority for them. Interest in safeguarding cultural heritage tends to vary also based on a country's economic conditions. Therefore, achieving the protective regime emphasized by the 2003 Convention demands striking an appropriate balance. To ensure the effective operation of the international legal regime, a system must be established in which all states uniformly contribute to the safeguarding of intangible cultural heritage. The influence of political considerations is another critical factor affecting the effectiveness of the legal regime. Although UNESCO was established to contribute to education, science, and culture, it occasionally faces the impact of political factors, which can weaken the legal regime.

Currently, 183 UNESCO member states are parties to the 2003 Convention. Unfortunately, leading countries such as Russia, the United States, and Israel are not parties to the Convention. The United States and Israel withdrew from UNESCO membership following the organization's acceptance of Palestine as a member state. It is undesirable that universal issues of global significance, such as the advancement of science and culture, are subjected to political influences. Support can enhance the effectiveness of the legal regime.

Regarding the identification of intangible cultural heritage elements intended to be safeguarded under the 2003 Convention and their inclusion in the lists established by the Convention, issues such as minority rights, and ethnic, religious, or territorial conflicts should not interfere with this process. Otherwise, the implementation of the legal protection regime established by the Convention will be undermined. To mitigate this issue to some extent, not only states but also other entities should participate as subjects of the relationships regulated by the Convention. These entities include non-governmental organizations (NGOs) operating in the field of intangible cultural heritage and specialized experts in this area, who are expected to be actively involved in the process of safeguarding intangible cultural heritage within the framework of the 2003 Convention by state parties. Although states are the primary subjects managing the process of safeguarding intangible cultural heritage, its creators are individuals or communities, religious and ethnic groups, indigenous peoples, and national minorities. These groups play a crucial role in the creation, transmission, and preservation of intangible cultural heritage [2]. NGOs and specialists working in the relevant field are subjects capable of establishing direct contact with these subjects. Their role in the implementation of the legal regime established for the safeguarding of intangible cultural heritage is undeniable. Once accredited, NGOs operating in this field can provide advisory services to the Intergovernmental Committee. According to the 2003 Convention, the Intergovernmental Committee, composed of state representatives, determines the regime for the safeguarding of intangible cultural heritage. Articles 16 and 17 of the Convention regulate that the Committee is responsible for ensuring the safeguarding of intangible cultural heritage by developing the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding. Since the decision to create these lists is made by the Committee rather than the creators of the intangible cultural heritage themselves, there is a possibility that the decision-making process may be influenced by political factors, so this aspect is regarded as a weakness of the Convention [4, p. 417]. The assignment of the responsibility for safeguarding intangible cultural heritage objects, which belong to individuals and groups as the direct creators and bearers of such heritage, to the state is a limitation of the established legal regime [2]. Following this, the involvement of NGOs can be crucial in enhancing the effectiveness of the Convention's mechanism. Even indirect participation of NGOs in the process of compiling the lists of intangible cultural heritage is especially important for developing and least-developed countries. This participation makes the existing regime more effective and functional. NGOs have especially value in terms of achieving a balance between least developed, developing, and developed countries. NGOs carry out their activities by participating in discussions and providing relevant knowledge and technological support. Through the activities of NGOs accredited by UNESCO, the voices of the groups and communities who are the bearers of the intangible cultural heritage are represented. This is particularly significant in terms of the implementation of the 2003 Convention. In terms of the functioning of the legal regime established by the Convention, it is crucial to define the objects and subjects of the regulated relationships, address existing problems in the relevant field, and ensure a correct cause-and-effect relationship, which are essential aspects for the effective application of the Convention.

The goal of the subjects involved in the legal regime established by the 2003 Convention is to identify intangible cultural heritage elements that belong to the common heritage of humanity, ensure their preservation, and transmit them to future generations. The aim is to prevent the destruction of

intangible cultural heritage and the cultures of the communities to which they belong, especially as these examples face the risk of extinction in the context of globalization.

Intangible cultural heritage does not protect physical objects, but rather the processes that create the cultural heritage elements and the individuals who carry out these processes. In this sense, determining the boundaries of these processes, protecting them from changes, and preserving them as they are is a rather complex task. According to the 2003 Convention, the questions of "to what extent should intangible cultural heritage be safeguarded", "how should it be transmitted," and "which heritage is worth transmitting" remain contentious and open to debate [3].

Culture, as a continuous process, is always subject to change, making efforts to preserve it as it is, define it, and list its relative concepts. The main goal in the preservation of material cultural heritage objects is to maintain them in their original form, without any alterations, and this process is relatively easier to control. However, the safeguarding of intangible cultural heritage objects is a much more complex process. We are dealing with a dynamic, ongoing process with the term "intangible", making it more challenging to achieve stability in preserving these elements. According to Professor Dawnee Yim, unlike material cultural heritage objects, the existence of intangible cultural heritage objects is not tied to a specific historical date, and their survival depends on their adaptation to the future. The question arises whether intangible cultural heritage objects should be allowed to undergo necessary changes for adaptation to the future, without being tied to a specific historical context. If changes are permitted, to what extent should these changes occur? And if changes take place, what is the meaning of protection? [10, p. 10].

Since the adoption of the Convention, many countries have complied with its obligations by creating their own lists of intangible cultural heritage. These nations have also submitted their proposals to be included in the Convention's Representative List and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding. The preparation of these lists has played a significant role in enhancing states' attention to and participation in the safeguarding of intangible cultural heritage.

The inclusion of intangible cultural heritage in UNESCO's respective lists leads to a deeper understanding and recognition of a country's heritage, contributing to the increased awareness of communities about their cultural practices. The identification of intangible cultural heritage objects and their registration by the state is criticized as being solely within the sovereign authority of states; however, it should be noted that the conditions for including these heritage elements in the lists provided by the 2003 Convention are regulated by the convention itself. According to Article 2.1 of the Convention, only intangible cultural heritage is taken into account which complies with existing international legal instruments on human rights, as well as the requirements for mutual respect and sustainable development among communities, groups, and individuals. The identification and registration of intangible cultural heritage elements at both national and international levels ensure the standardization to safeguard intangible cultural heritage. Following this, the legal regime of intangible cultural heritage is regulated by both domestic law and international law. According to the 1972 Convention (Article 4), the responsibility for identifying, preserving, promoting, and transmitting cultural heritage to future generations lies directly with the state to which the cultural heritage belongs [7, p. 57]. Similar provisions are established in the 2003 Convention (Articles 11.1 and 13) regarding the obligations of states concerning intangible cultural heritage. That is, the legal regime of intangible cultural heritage is primarily defined by domestic law, and the integration of international law with national legal norms forms the basis of the international legal protection regime for intangible cultural heritage. The legal protection of intangible cultural heritage is implemented through the incorporation of international legal norms into domestic law. Since both legal regimes are formed based on the will of states, the legal protection regime for intangible cultural heritage is established through the harmonization of international and national legal norms. Such harmonization is only possible with the acceptance of the superiority of international legal norms over national law, provided that it does not undermine the state's general order (ordre public) related to the protection of cultural heritage [7, p. 59].

As a natural process, all states should work towards the establishment of the highest legal regime in this direction, as determined in the 2003 Convention, by recognizing the invaluable role of intangible cultural heritage as a factor that promotes exchange and mutual understanding among people. The main purpose of this legal regime is to ensure the equitable use of intangible cultural heritage objects by all of humanity without causing harm to them and to guarantee the transmission of this heritage to future generations. Therefore, according to the 2003 Convention, the safeguarding of intangible cultural heritage primarily refers to measures aimed at identifying, recognizing, documenting, and preserving intangible cultural heritage.

Discussions towards the establishment of more effective mechanisms for the legal regime of safeguarding intangible cultural heritage are still ongoing in the international arena. The regulation

of intangible cultural heritage through intellectual property rights is one of the main topics. As noted above, before the adoption of the 2003 Convention, proposals were made to regulate intangible cultural heritage within the framework of intellectual property rights. As we know, before the concept of intangible cultural heritage was fully developed, the term "folklore" was more commonly used. But folklore is mainly considered as oral folk literature. The widespread use of folklore examples in medicine, industry, music, and other fields is encountered in works regulated by intellectual property rights and considered objects of intellectual property [6].

Naturally, this issue also has an economic side, as the income generated from the use of folklore examples for trade and business purposes is not shared with the owners of this heritage. As a result of rising concern discussions in the legal sphere about regulating relations concerning the use of folklore examples through intellectual property rights remain relevant today. The question arises: can the safeguarding of intangible cultural heritage be determined by the legal regime of intellectual property rights? One of the central subjects of discussions in this context is to what extent intellectual property rights can ensure the preservation of traditional knowledge and folklore beyond individual commercial interests.

Currently, UNESCO and WIPO (World Intellectual Property Organization) are the two main international organizations involved in shaping the legal regime for intangible cultural heritage. As highlighted, in the 2003 Convention, UNESCO mainly focuses on the identification, safeguarding, preservation, and transmission of intangible cultural heritage objects and the status of intellectual property. On the other hand, WIPO has worked on creating a legal regime mechanism that grants intangible cultural heritage objects the status of intellectual property. A review of recent history reveals certain efforts in this regard. Thus, for the first time in 1967, at the Diplomatic Conference held in Stockholm to revise the Berne Convention for the protection of literary and artistic works, the idea of protecting folklore examples through copyright was proposed. At this conference, discussions were held on adding a provision related to the protection of folklore to the Stockholm Act. As a result, in 1971, the following changes were made:

- If there exists an unpublished work with an unknown author, but there are sufficient grounds to confirm that the author is a citizen of any country within the union, then, according to the legislation of that country, an authorized body must represent the author, protect their rights, and enforce them.
- Under this provision, the union country that establishes such a fact must submit a detailed written statement describing the fact to the Director-General [9].

With this addition, WIPO amended the Berne Convention (art. 15.4) and created certain conditions for the protection of folklore works along with the author's works. In 1976, the Tunisian Model Law on Intellectual Property for Developing Countries, a joint publication of WIPO and UNESCO, was adopted at the Tunis meeting. This model law was prepared to adapt the legislation of developing countries on intellectual property rights to international conventions and was of a recommendation character, providing for the protection of folklore, and prevention of illegal use and dissemination [8]. As a result of a proposal on international regulation for the protection of folklore at the UNESCO General Conference in 1980, UNESCO and WIPO have established a joint group to work on potential measures for the national protection of folklore within the framework of joint cooperation.

In the next stage, to support and facilitate activities related to the protection of folklore and traditional knowledge in countries, the "Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore" was established within the framework of WIPO in 2000. An international draft document was developed by this committee to prevent illegal appropriation of traditional knowledge, genetic resources and folklore. Bu komitə tərəfindən ənənəvi biliklərin, genetik resursların və folklorun qanunsuz mənimsənilməsinin qarşısını almaq məqsədilə beynəlxalq sənəd layihəsi hazırlanılıb. The document was discussed at the session of the Committee in 2014, but it was unsuccessful due to serious differences of opinion between the United States, the European Union and the developing country blocs. Additionally, draft documents on the safeguarding of traditional cultural expressions and traditional knowledge within the framework of intellectual property rights have been prepared. The introduction of the registration system, and prevention of illegal use of traditional knowledge, folklore, and genetic resources have been reflected in these projects. However, factors such as the subject matter of these legal instruments, beneficiaries of protection, and the scope of protection are disputed among states.

Conclusion. All these processes emphasize that WIPO strives to prepare a legal document that will create a legal obligation for states in the relevant field and can be applied at the national and international levels. While examining the recent projects, we realized that WIPO does not use a single term as an expression of intangible cultural heritage. Instead, it uses terms such as traditional knowledge, genetic resources, and traditional cultural expressions. As we mentioned earlier, attempts to regulate

folklore and other intangible cultural objects with international conventions regulating intellectual property rights have not proven itself yet. These documents did not provide for legal norms that ensure effective and comprehensive legal protection of the intangible heritage as a whole, prevent its illegal appropriation, and regulate the material income obtained as a result of the use of intangible cultural heritage samples. For this reason, it is considered necessary to regulate intangible cultural heritage objects in a sui generis manner within the framework of intellectual property rights. Certain objections to the intellectual property regime of intangible cultural heritage are that this kind of heritage belongs to any social group, while intellectual property is an individual right. In copyright law, the identity of the author is important for the provision of appropriate rights, while intangible heritage is an indicator of a certain social group. Also, what kind of property will be attributed to intangible cultural heritage?! In addition, while intellectual property rights are limited to a certain time, it is required a certain period for any object to be considered cultural heritage. We should also mention similarities between intangible cultural heritage objects and intellectual property objects. Thus, both are the product of mental activity and both have immaterial significance. The unique characteristic of intangible cultural heritage objects also applies to objects of intellectual property.

We believe that a comprehensive approach regarding safeguarding intangible cultural heritage seems to be a necessary condition for establishing an effective legal regime. Thus, intangible cultural heritage should be defined as a special type of intellectual property, as supported by legal literature and national legislation, and a comprehensive legal safeguarding regime should be provided as a component of cultural heritage, taking into account its national cultural value.

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