CASE STUDY 53

Colombia: a far-reaching policy with intersectoral implications

As a result of a process started in 2007, Colombia now has a comprehensive policy and legal framework for the safeguarding of the ICH on its territory.

#### **A policy grounded in the 1991 Constitution**

In 1991 Colombia ratified the International Labour Organization (ILO) Convention No 169[[1]](#footnote-1) which promotes ‘the full realisation of the social, economic and cultural rights of [indigenous or tribal] peoples with respect for their social and cultural identity, their customs and traditions and their institutions’ (Article 2.2(b)) and asserts the need for special measures to protect them (Article 4.1). The National Commission on Indigenous Territories (under Decree 1397 of August 8, 1996, Article 12) established a bureau to work with indigenous communities to help develop ways to protect indigenous rights regarding access to genetic resources, biodiversity, and protection of collective knowledge, intellectual property, and collective cultural rights.

A new Constitution was promulgated in 1991. Article 70 of the Constitution states that culture and its various manifestations ‘are the basis of citizenship, and that the State recognizes the equality and dignity of all those present in the country’ (Ministry of Culture, 2009). Colombia ratified the Intangible Heritage Convention in 2008, by which time the State had already started developing an ICH policy.

Colombia’s 2009 ICH policy asserts that:

The primary basis for the ICH Policy is the Constitution of Colombia, which establishes an obligation for the State and the individuals to protect the cultural and natural wealth of the nation and enshrines the respect and recognition of the cultural and ethnic diversity of all Colombians. (…)

ICH safeguarding is seen as a way to achieve the goals of respect and promotion of cultural diversity enshrined in the constitution, within a human rights-based approach.

#### **a framework for safeguarding with community participation**

Under the ICH policy, lists of ICH are set up at national, department, and municipal and district level, or at the level of ethnic groups. These lists are seen as an instrument of cooperation between the competent public authorities and the communities concerned to implement a special safeguarding plan for each element, which is compiled with the consent of the communities concerned.

The safeguarding plan must include among other things, identification of the element, safeguarding measures to ensure the viability of the element, consultative/participatory mechanisms for the community, regulations regarding access to the element, and a budget (Ministry of Culture, 2009).

#### **an Intersectoral approach**

The Colombian policy for ICH safeguarding takes an intersectoral approach, which derives from the clear link envisioned between ICH and sustainable development. While recognizing that this heritage is a ‘strategic factor’ for sustainable development, the policy also seeks to mitigate or prevent the negative impacts of economic development on ICH. Intersectoral cooperation is cited among the tools to do so (Ministry of Culture, 2009).

The policy document asserts the role of other sectors than culture in ICH safeguarding: it also clearly delineates the roles of various State agencies in respect to various domains of ICH.

* The **Heritage Directorate of the Ministry of Culture** and its ‘ICH group’ plays a leading role in facilitating inter-institutional coordination.
* The **Ministry of Environment, Livelihoods and Territorial Development**, is responsible for ‘traditional knowledge associated with biological resources’, in relation with the Convention on Biological Diversity.
* The **Ministry of Trade, Industry and Tourism** is in charge of aspects related to intellectual property as well as ICH elements related to crafts or other productive processes.
* The **Agriculture Ministry** is in charge of the rights of peasants and ICH elements connected with cultivation and breeding.
* The **Ministry of Social Security** has traditional medicine under its umbrella.

In practice, intersectoral cooperation has successfully unfolded around specific initiatives such as the 2012 policy for awareness and safeguarding of Colombia’s traditional cuisines. The design of this policy concerning a specific field of ICH has been undertaken by an ‘intersectoral roundtable’, comprising Health, Tourism, and Education institutions, all gathered with the joint objective of developing a holistic strategy from the bearers’ perspective (Ministry of Culture, 2014).

#### **intellectual property protection**

In line with the Convention’s Operational Directives Colombia’s policy has sought to tackle the challenges posed by intellectual property rights with regards to ICH:

The Ministry of Culture, in the framework of the Conpes Document 3.533 of 2008, will ensure that the knowledge, practices, technologies and innovations developed by the groups and communities based on the expression of their collective intangible heritage be duly protected through a sui generis regime, in which intellectual property rights related to ICH are considered inalienable, expressions are protected from cultural piracy and communities benefit from their intangible cultural heritage. The main reason for the sui generis regime is the collective nature of intangible heritage (…). (Ministry of Culture, 2009).

The application of collective intellectual property rights is still an ongoing discussion more than a reality, in the absence of a clearly defined international legal framework in this area. The Ministry of Culture notes that the ICH lists established at the national and local level have in practice functioned like a public system of registry, protecting ICH from misuse and preventing third parties from claiming intellectual property rights over it (Sanchez & Restrepo, 2014).

Some ICH-related products are protected in Colombia using the legal system for intellectual property protection in the Andean States (established under Decision 486 of the Commission of the Andean Community). Article 136(g) of Decision 486 provides that trademark registration can be refused to signs that ‘consist of the name of indigenous, Afro-American or local communities’, or ‘the expression of their culture or practice, except where the application is filed by the community itself or with its express consent’. Colombia applied this law in refusing the registration of the trademark TAIRONA in one instance because it refers to an indigenous culture that inhabited Colombian territory, is an expression of their culture and was not filed with their consent.[[2]](#footnote-2)

#### **Innovative funding mechanism**

In order to mobilize the resources needed for the implementation of its ambitious ICH safeguarding policy, Colombia has benefited from an innovative funding mechanism: a mobile phone tax used to finance cultural policy. The tax has so far raised about 25 millions of Colombian pesos per year (about 14,000 US$), an amount which is managed by the local governments and their respective cultural institutions (Sanchez & Restrepo, 2014; Culture Ministry, 2014).

Colombia has also put in place economic incentives to finance ICH safeguarding. Those who contribute to the ‘Special Safeguarding Plans’ associated with ICH elements on the lists can benefit from tax deductions (Culture Ministry, 2009).

#### **Further information and sources**

* CRESPIAL. 2010. *Experiencias y politicas de salvaguardia del patrimonio inmaterial en América Latina*.
* Interview with Enrique Sanchez and Isabel Cristina Restrepo Erasao, Direction of Heritage, Colombian Culture Ministry. Conducted by Skype on 2 July 2014.
* Ministerio de Cultura. 2009. *Politica de salvaguardia del patrimonio cultural inmaterial*. <http://www.mincultura.gov.co/ministerio/politicas-culturales/salvaguardia-patrimonio-cultural-inmaterial/Documents/03_politica_salvaguardia_patrimonio_cultural_inmaterial.pdf>
* Ministry of Culture. 2014. *Balance del Programa de Salvaguardia del Patrimonia Cultural de Naturaleza Inmaterial*. Documento de trabajo preparado por la Fundación Erigaie.
1. . <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> [↑](#footnote-ref-1)
2. . WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore <http://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf>, p.46 [↑](#footnote-ref-2)