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Special Issue:
Cultural Rights and Global Development

The Journal of Law, Social Justice & Global Development

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- **To be a global public resource, and contribute to the empowerment of global civil society through knowledge, education and the critical interrogation of global development and its consequences.**
- **To construct dialogue, collaboration and collegiality between scholars, researchers, intellectuals, development workers and activists in the Global South and Global North.**

The Journal carries double blind peer-reviewed articles and is supported by both a Journal Editorial Board and an International Advisory Board. It is committed to diversity in methodology, theory and the regional-cultural backgrounds of authors. It especially welcomes contributions from scholars and practitioners (e.g. NGO workers, teachers or activists) based in the Global South and transitional economies.

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Special Issue Introduction: **Cultural Rights and Global Development**

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In our age of huge religious, political and territorial conflict, the essential cultural dimension of place, identity, values, and governance, is all too easily ignored. This special issue is given to the social and developmental significance of culture and cultural policies in a Rights framework. Since the 1966 UN International Covenant on Economic, Social and Cultural Rights, how far has the concept of culture as a 'right' been developed? Since the debates surrounding the UNESCO sponsored 2007 Fribourg Declaration, to what extent are Cultural Rights now accepted as an essential dimension of Human Rights? Perhaps using Human Rights law to facilitate Cultural expression and participation has been problematic and other legal instruments are more effective (such as cultural policies on access and equality, or heritage protections, or international treatises like the 2005 UN Convention on the Protection and Promotion of the Diversity of Cultural Expressions). Or perhaps a sustained legal, social and development discourse on Cultural Rights by writers, research scholars and development agencies, has not been sufficiently consistent and robust in any area of development research and policy.

When this Special Issue was first envisaged, it was intended as a global forum for dialogue on how rights currently pertain to this journal's principle (and multidisciplinary) fields of legal, social and development research. It aimed to attract research papers on (but not limited to) the following topics:

> Cultural Rights and Human Rights, international treatises and UN conventions.
> Cultural Rights and Cultural Policies (particularly diversity, equality, gender and heritage policies).
> The cultural conditions of the juridical interpretation and application of Human Rights.
> Cultural Rights, multiculturalism and political pluralism.
> Cultural Rights, mass immigration and diasporas. Cultural Rights in war and conflict zones.
> Religion, faith communities and Cultural Rights. Cultural Rights, censorship and contemporary arts.
> Arts organisations, NGOs and development agencies that promote Cultural Rights.

I have reproduced this list from the original Call for Papers as it indicates the significant scope of relevance for this otherwise under-researched subject. This special issue attracted many contributions, not all of them could be published. The ones that were published adequately cover the first three bullet points; the rest will now feature in a broader research project, out of which will hopefully see forthcoming further thematic issues of this journal. This special issue therefore, did not succeed in defining the parameters of this subject, and for the most part remains focused on the legal emergence of culture as a concept in Human Rights and cognate areas of supra-national policy discourse. Nonetheless, we also broach other significant topics and issues: justice for cultural workers and artists, arts censorship, information and the political management of the media, and NGOs in a specific corner of the European region (Serbia).

This issue opens with an interview, on the occasion of the new Arts Rights Justice Academy (ARJ), whose opening in 2017 attracted the first UN Special Rapporteur in Cultural Rights, Ms. Farida Shaheed (2009-2015). The Academy project does not aim to create an education or training institution as such but more a dynamic and mobile space, where cultural practitioners, activists and researchers, policy, legal and social experts, can come together to discuss the pressing issues facing Rights today. The ARJ's approach is dialogic and structured around the sharing of experiences and intelligence -- and cultivate the various forms of solidarity and democratic agency that emerged in the face of the 'European migrant crisis' starting 2015. The reason this interview was positioned at the opening of this special issue is because questions of 'Rights' invariably revolve around the institution of law, local, regional and global, and the legal application of its statutes, conventions, treatises and protocols. However, as has been made apparent by both first and second UN Special Rapporteur in Cultural Rights – the second being Ms. Karima Bennoune (since 2015) – the translation, transmission and application of law

require as much (in the words of the ARJ mission statement) "to strengthen and expand structures for the promotion and protection of artistic freedom" and other kinds of cultural freedom. The value of the UN institutions of Human Rights (and their regional and national expressions) extends far beyond the law and its application – to education, cultural diplomacy, negotiation in peace and reconciliation, promoting gender equality and minority or indigenous expressions of cultural life, and of course engaging in protest against prohibitions and suppression of cultural expression (whether grounded in law or not). On this latter subject, I must make reference to two notable publications brought to my attention during seminars I delivered on Cultural Rights in Hildesheim (December 2017-January 2018): UNESCO's contribution to the 1995 UN Year for Tolerance – 'Violence' – a study of attacks on artist and writers in Algeria, and the recent Freemuse group's international survey of 2018, 'The State of Artistic Freedom 2018' (Copenhagen: Freemuse.org). Both are testament to an historical discourse that has remained once-removed from mainstream cultural policy debates as much as development studies. This marginalisation must not persist: matters of rights, justice, citizenship and representation, must become (as they were in in the 1960s and 70s) more central to how we understand the relation between culture, policy, community, development and the resources and opportunities of evolving global legal discourse.

Polish lawyer and international writer, Marcin Górski, entitles his article with the cryptic indictment of Jesus, beginning "And whosoever shall offend one of these little ones..?" (Gospel of Mark 9:42). His problematic is the concept of ‘community standard’, which at once identifies the boundaries of reason and acceptability in legal rulings on censorship, yet is deeply ambiguous. Górski, with a forensic approach and international reach, cites seminal legal frameworks and rulings that legal define artistic expression and its limits internationally. He challenges the basis, and variance in the use of the community standard and the many assumptions on the meaning and operation of "expression" in art and artistic production and display. While raising many questions pertinent to the discipline of philosophical aesthetics, Górski maintains a focus on the legal articulation of his key concepts. And without contriving a judicial dialogue between the landmark differing interpretations of different courts he offers a full overview of legal practice internationally. His argument attends to the ambiguity – in part created by art's own "transgressive" character.

Legal scholar, Marcella Ferri (Italy), broadens our concerns from the concept of art to the concept of "culture" itself. She attends to the conceptual-legal architecture of Cultural Rights, as the concept emerged from the key UN conventions. She points out that while a political assumption on the semantics of the term "culture" has been maintained through the drafting of various UN conventions, the assumption conceals a range of meanings – each of which allowing for a range of legal applications of Cultural Rights. Our understanding of culture is invariably anthropological, ethnic, social and identiarian, but as a rigorous legal scholar will point out, a strict causal relation between the semantics and pragmatics of a term is necessary for legal rulings to harmonise, and the many articles of a declaration, convention or covenant to work together. With detailed precision, Ferri moves through the central legal frameworks for Cultural Rights, identifying the principal clauses in each, and forming a discussion around participation, the rights of children, and the judgement of the International Criminal Court in the "Al Mahdi case" (2016). The case is significant in its potential expansion of heritage, away from its traditional designation as property into realms of cultural identity, human development and community life.

Jordi Pascual (Spain), consultant, activist and academic, fleshes out what this might mean – and often it does mean for progressive cultural policies. He explains the various ways (organisations and their strategies) that Cultural Rights are practiced and how they are addressing central issues in cultural development, expressions of place, community and identity, and the sustainability of social life on local, regional and global registers. Pascual's experience at working in policy advocacy in these three registers are evident in his command of knowledge on how

major cultural policy frameworks articulate legal concepts of Rights, and moreover, how basic rights in participation, identity and historic cultural life, are interconnected with more contemporary practices of creative expression and the political fight for a more equitable society. Pascual's contribution stands as a significant summary overview of the relation between cultural policy and Cultural Rights, while underscoring the importance of NGOs and representative groups, like Agenda 21 for Culture – a pioneering venture of the civil society association, United Cities and Local Governments (UCLG). By way of conclusion, he offers six major steps forward in advancing Cultural Rights as cultural policy in practice.

The rest of this Special Issue features an approach to Cultural Rights in terms of critical contemporary issues – artistic production (Chinese opera; educational innovation with Syrian refugees), sustainability (in global development), information and media, and cultural NGOs in Serbia. The first of these, by notable China scholar Haili Ma (UK-China), is particularly interesting given the degree of field work in which her study is grounded (indeed, the scholar was once an opera singer). Moreover, both this contribution and that on information and media apprehend a central political dilemma – what do "rights" mean in a country whose legal system does not recognise an individual's separation (and even elevation over) the State. If the State is conceived as the collective expression of political will, then to posit an individual's will as somehow over the collective is nonsensical, notwithstanding that China has indeed positioned itself at the forefront of global cultural discourses of creative city urban development and cultural (indigenous and intangible) heritage.

Haili MA offers an outline of the rights issues at the basis of China's most traditional and common cultural expression (opera), yet entangled in political discourse and cultural policy developments. Chinese opera, once neglected (if not disdained as an improper expression of common sentiment) has recently become an object of political recognition, signifying both a crisis and an attempted renewal of political legitimacy. MA unravels the political shifts animating the new profile of Chinese opera, and how historical conceptions of arts and artists are ever-framed by the strategic political relation of government and culture. The question of rights in this article emerges "immanently" – given how rights in China are indeed submerged in layers of political expediency. This means that rights identify a struggle for professional identity, artistic autonomy and the spaces of cultural expression. Indeed, in Ni Chen's article on the political management of the media in China, the issue of cultural self-determination is central.

As cultural economy scholar Ni Chen (UK-China) points out, "rights" as a legal concept assumes that individual agency possesses the capacity to exercise a right or to use a rights to their advantage or self-regard. Yet this cannot be assumed, at least in a nation vigorously attempting to re-invent nationalism through cultural self-determination. As a country, China is asserting its self-perceived national cultural rights, in terms of a need for coherence and assertive self-expression in media, education, communication and information. President Xi Jinping, while urbane and educated, has reinvigorated political control over the nation's media industries and the strategic representation of current affairs. Chen's cultural-historical approach offers a broad and critical view on the significance of the new nationalism as identified in the political management media and communications – framed in terms of the lesser-developed area of Cultural Rights, information. With reference to the freedom of the public realm, editorial values, differing viewpoints in the media, and the multi-facetted character of nationalism as a current political project, Chen argues that while older forms of oppression and censorship have gone, a new assertive national unity has set the parameters of meaning and individual expression in the public realm. The status of individual rights remain political relative and not self-evident as assumed by the terms of the relevant UN conventions.

Deniz Gürsoy's (Turkey) contribution demonstrates how a seemingly simple form of cultural provision for refugees (an "Ideas Box"),

can provide hope and empowerment to an otherwise dispossessed and often ignored condition. The condition of PRS or 'protracted refugee situations' is not new, but only recently understood at UN policy level and equally only recently an object of cultural intervention. Why – given the evident significance of diasporas, exiles and immigrants to the cultural history of many of our countries – are we slow in recognising how the condition of the refugee is a cultural once as much as a political or humanitarian one? Gürsoy presents a framework around which we need to formulate urgent questions for cultural policy.

Serbia is a singularly interesting case as a country – in terms of its recent and present battles with the political management of culture and the public realm. On the edges of Europe (have been engaged in EU accession negotiations since 2014), this once center of communist Yugoslavia has experienced radical shifts in constitutional law, the current adopted only in 2006. In this interesting picture of the country's legal attitude and political approach to Cultural Rights, Belgrade lawyer Miljana Jakovljević identifies the fault lines of culture and freedom with reference to cultural NGOs. Her premise is that the ability of cultural organisations (historic and contemporary) to carry out their work of advocacy, commissioning, events and the promotion of culture, is indicative as the measure of freedom and protection the law allows. Using a normative analysis of constitutional and domestic law and with reference to specific major legal acts, Jakovljević explains how the admirably clear legal articulation of Cultural Rights in Serbia is not adequate for the flourishing of contemporary culture or even a diffusing of the historic tension between culture and State actors.

This Special Issue concludes with internationally-renowned scholar on global development and sustainability, John Clammer (UK-India). His article title is phrased as a question – on the relation between Rights, Sustainability and Development (as proper nouns, each identifying a normative and institutionalised discourse on the aims of a equitable society and cooperative global order). Clammer argues that these normative discourses are essentially contiguous, even though the current capitalist global order maintains vested interests in their separation. With a theoretically-informed exploration of their meaning and function in international development frameworks concerns most of the paper, the concluding six propositions are forceful as they are imaginative: his concluding statement is instructive: “The bottom line then is an expanded notion of human rights that not only includes cultural rights, but which sees the fulfillment or achievement of a rights-based world as constituting the nature of sustainability and the purpose or end of development. Social justice is the non-negotiable project, but in the recognition that social justice must now include both cultural and ecological justice in the recognition of development as a holistic and life-enhancing process.”

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Arts Rights Justice: protecting and promoting artistic freedom – an interview with Daniel Gad

Jonathan Vickery

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Abstract

The University of Hildesheim (Germany) is a leader in both arts education and research in cultural policy and management. They have a new innovative focus on social justice for artists and writers, and the policy implications and implementation of Cultural Rights for activists and NGOs. For the opening of this special issue, the journal Co-ed-in-Chief, Dr Jonathan Vickery, interviews Dr Daniel Gad on his new interests and the parameters of Rights as applied to culture and the arts.

Author

Daniel Gad is managing director of the UNESCO Chair (Professor Dr Wolfgang Schneider) in Cultural Policy for the Arts in Development at University of Hildesheim since 2012. He is head of the Arts Rights Justice Program, which apart from a broad research stream, is organiser of the annual Arts Rights Justice Academy at the Hildesheim Kulturcampus. Since 2017, he is representing the University of Hildesheim on the Steering Committee of the Hildesheim bid for European Capital of Culture 2025.

You are the manager of the UNESCO Chair in Cultural Policy for the Arts in Development at the Department of Cultural Policy, University of Hildesheim (Germany). Recently you and the Chair (Professor Dr Wolfgang Schneider) innovated a new educational forum, called the Arts Rights Justice Academy. Please explain your rationale.

It is vital that the rights of the artists and the protection of artistic freedom are recognised as an integral part of the international human rights frameworks -- and that States deliver on their obligations to uphold them. The aim of the ARTS RIGHTS JUSTICE PROGRAM [The ARJ programme] is to strengthen and expand structures for the promotion and protection of artistic freedom. To this end, we seek to disseminate and professionalise skills, ensuring that the exchange of knowledge and build expertise on the subject.

The ARJ PROGRAM was developed in cooperation with 30 international expert institutions with the support of the German Foreign Office and the International Cities of Refuge Network (ICORN). Mary Ann DeVlieg and Julia Farrington, of International Artists Rights Advisors (IARA), along with Todd Lanier Lester, acted as consultants to the program. It is further informed through exchange with specialist organisations such as FREEMUSE, PROTECT DEFENDERS and other significant agencies and actors.

In terms of content, The ARJ ACADEMY invites 30 young professionals to join a group of international experts in the field for a program of workshops, discussions, teamwork, presentations and individual consultancy. All participants in the ARJ ACADEMY are and will be practitioners in cultural policy-related work, arts or cultural management practice, free expression advocacy, human rights defense, or related areas.

We are committed to bringing together participants from as wide a range of places and regions of the world as possible, to create a peer-to-peer learning ambiance based on dialogue, learning and exchange. In focus, for us, are young professionals and practitioners of all nationalities working within ‘artists at risk’ residencies, arts and cultural project managers, artists, lawyers, jurists or further related area with working experience in a field related to human rights, cultural rights, cultural policy, freedom of expression and artistic freedom, artist mobility, arts or social development. *The specific topics under scrutiny can be identified as* (i) the fundamentals of freedom of expression; (ii) understanding freedom and threat: censorship and policy structures; (iii) legal frameworks and artists’ rights; (iv) advocacy & campaigning: creating the conditions for free expression to thrive; (v) working with artists: training, protection, visas, relocation; and (vi) funding & networking.

Cultural Rights are effectively a minor sub-section of Human Rights. They have maintained a low profile, despite the fact that "culture" is intrinsic to the 1948 Universal Declaration of Human Rights, and also it is one of the three principle terms of the 1966 International Covenant on Economic, Social and Cultural Rights [the ICESCR]. Why is Cultural Rights an important area for you now, and how does it intersect with the arts on the one hand, and justice activism on the other?

Human rights and fundamental freedoms are interrelated, and are regarded by us as prerequisites for a sustainable society -- meaning, a society that facilitates diverse participation in its prosperity and in its general aims of promoting a fulfilled life for its members. Following this, human rights and fundamental freedoms are also a prerequisite for artistic creation -- in the context of the potential diversity of cultural expressions in general. But, the question arises, why is it necessary to protect and promote artistic freedom? Why is this so at the beginning of the 21st century? And how, or what means or ways are there to engage in activities of protection and promotion?

Art cannot be said to be functionally good or useful for a society per se, and it is not necessary to argue that it is important for shaping a society into something more positive or better. Art, rather, possesses a facility to question society, to understand it anew, and to engage in a "re-think", and in a "language" that allows many different and parallel activities and approaches, far beyond

the direct spoken word. Artistic freedom allows us to operate outside the constriction of existing conventions, to question things and to "pronounce" the "how would it be different?" Freedom for art is expansive, and entails an acceptance of diversity, of perpetual change, and many other forces that are the opposite of homogeneity and an assumption that a society can cultivate a seamless continuity in its history. But freedom also has its limits, and not everything that is conceivable is immediately feasible or, in specific social contexts, tolerable. Freedom may certainly shake what is important and "holy" to us or our group, and can put into question our very identity. But freedom claims by us is on condition of us accepting the freedom of others; in this sense, freedom is not synonymous with abandonment and loss.

When considering social ills, it is inevitable that there are a range of different perspectives on whether something is genuinely wrong or a malady. An open, mutually appreciative, dialogue, is therefore a condition of a full understanding. It is a basic requirement for pursuing the idea of justice through an engagement with as many parts of the world as possible. Mutual dialogue is internal to the ethical comprehension manifest in the Universal Declaration of Human Rights of 1948.

For a number of years now, the Department of Cultural Policy at the University of Hildesheim has been promoting the concept of artists and cultural workers as "change agents" -- particularly in the realms of arts education, policy activism and local cultural enterprise (like arts centers). Yet, arguably, artists are historically defined by their introspection, focus and withdrawal from public life. How do you see the artist playing a more active role in shaping of social transformation processes?

In our experience, more and more artists through their artistic work are finding more effective ways at shaping processes of social transformation, and understanding art as a socially transformative activity (not just a work of art to "view" or passively gaze at). Yet, this introduces another dimension of work and vulnerability for the artist -- artists can find themselves under threat very quickly. Artists are often referred to as a kind of "seismograph" or watchdog in the context of social change, social dilemmas, political ideals and beliefs, and the constructs of social identity. They are an "early detection" of social earthquakes, although, I am not sure these terms are helpful or if they do they must remain open. From a scientific-analytical viewpoint, arguments can be made that would generically designate artists as this, but whether they, as so-called agents of change, are really entrusted or empowered with such a social role or set of socio-political tasks, is counter-intuitive. Artists are not generically so entrusted or empowered, and furthermore, it could run counter to the conditions of artistic freedom (particularly with regards the creation of art). Historically, it seems that it is usually only possible to assert whether a given work of art or artist has social significance in retrospect, and particularly so in relation to whether this significance was conducive and contrary to a desired social change. Importantly, it should be recognised that historically it is not artistic works so much as artistic movements and currents that have an influence on social processes.

In this sense, artistic freedom is not a fundamental value because it somehow awards an artist a license to do anything imaginable. The offensive aspects of Russia's Pussy Riot performances, as well as the scandalous poem by Jan Böhmermann, raises an explicit dilemma on how to discuss (not least define) boundaries[1]. A part of this concerns how important it is that boundaries, conventions or borders can be crossed so as to shed light on established power structures, or on the role of social convention, stigmatism or taboo. Art can, and does, break them down in the cause of social change, which is something that coheres with the basic understanding of universal human rights.

In what context are we speaking? It is assumed that Rights, being universal and a feature of global governance -- the UN system -- that somehow they are guaranteed or absolute. However, even with regional courts (like the ECHR), rights have to be worked out "on the ground" and in the course of everyday social and cultural life, right?

One of the significant aspects of rights, and the discussions that follow, is that you have to range between universal and particular -- general concepts and statutes and specific cases or instances. The artist Jan Böhmermann, for example, is a specific case whereby his individual context is the legal system of the Federal Republic of Germany. General cultural policy in Germany adheres to the principle of framework provision for the freedom of artistic creation. In a similar way, our conception of state "police" is not as opponent but as protector of the individual, again a generic concept. Other countries have a similar framework for implying the legitimate role of state or public agency, but in all too many instances, a principle of State as protector is almost completely absent or cannot be relied on by artists (or others).

In the context of the United Nations, and UNESCO in particular, there have been many efforts to persuade and enable member states to ratify and implement the contents of the Universal Declaration of Human Rights into existing and practiced law. This requires some "translation" of universal precepts into specific national domestic laws. With regard to artistic freedom, the so-called social pacts of 1966 (the ICCPR and ICESCR), the "Recommendation on the status of the artist" of 1980, the UNESCO Convention on the Protection and Promotion of Artistic Expressions of 2005, and the UN report "The right to freedom of artistic expression and creativity "of 2013, all provide valuable legal assistance and evidence for the construction of protection and support mechanisms within domestic legal and security systems.

And yet, so much of the documentation and supporting agreements seem to end up in the "ether" of diplomacy. The interconnection of formal legislation and lived life is not inevitable, and a right in one place may be relative and elsewhere considered irrelevant. The Lèse-majesté is an example here (the law prohibiting the insulting of dignitaries of State or monarchy -- abolished in Germany in 2017): it is common around the world to find that artistic freedom is not directly opposed but relative to so-called higher social interests, which can effectively impact on its preservation.

This raises the question of practice. As John Clammer points out in his article for this special issue, a Right to Culture is an odd concept, as human beings are cultural beings, already inseparable from culture. Yet, in terms of the arts, Rights become very specific to social contexts, often in unpredictable ways (in relation to unexpected public outrage, for example)?

To shape society in a way that increases tolerance and an appreciation of diversity is not something that cannot be left to chance, even with the legal establishment of general freedoms. Managing freedom in social (and often local) contexts, and the consequent challenges for each individual, demands a perpetual and dialogue on agency and structure, freedoms and boundaries, and that should never be a linear process. The case of the German comedian Jan Böhmermann -- where his poem "Schmähkritik" ("abusive criticism" of the Turkish Prime Minister Recep Tayyip Erdogan) read as part of his satirical TV show Neo Magazin Royale on Germany's public ZDF channel in March 2016 -- demonstrates how in the Federal Republic of Germany the physical well-being or protection of the artist is categorically separate from (not contingent upon) the question of whether their artistic work or action was a criminal offense (under the now abolished principles §103 and §104 of the German national penal code or Strafgesetzbuch).

Böhmermann could rely on fair legal procedures, during which he was offered police protection. This categorical division illustrates a protective mechanism, as it has long been defined according to international legal concepts, but not universal and in places legal accepted but implemented with difficulty. In many parts of the world, artists can find themselves confronted with sometimes obvious, sometimes deliberately obscure, threats to their person or physical well-being as a result of their artistic work or perceptions on the meaning of their work. The result is that a preemptive understanding of their work, or what it purportedly represents, prevents them from

undertaking artistic work. Despite the comprehensive protective measures with the case of the comedian Böhmermann, the outcome of the assessment remained open to the charge of criminal offense. Central to this was a procedure that necessitated the evaluation of the artistic work by the State, and which had four implications:

First, this case was subject to legal assessment on the basis of existing legislation -- that was interrelated with the defendants' existing fundamental rights. Secondly, the action in question led to the German Bundestag (the federal parliament) to question and reconsider the relevant laws, specifically the relevance of Article 103, the so-called Majestätsbeleidigungsparagraph (Lamentation of Majesty Paragraph, or Lèse-majesté). It was, as I noted, deleted from the Criminal Code. The actions of Böhmermann and subsequent legal discussion at a national political level, illustrates the complexity of the respective context, illustrating why the evaluation of art must always be considered intrinsically difficult, contested, and always open to all factors in the context of a general understanding of justice.

Thirdly, the outcome, where Böhmermann was ultimately protected by another section of the legal system, the Section 5, Paragraph 3, of the constitution, or German Basic Law (Grundgesetz für die Bundesrepublik Deutschland). This explicitly sets out a protection and freedom for art. Nonetheless, it remains a notable fact that the public service broadcaster (of the comedian's TV programme) deleted the routine video recording of the programme from its online library, despite internal advocates who wanted to keep it accessible because of the ignited debate. Inevitably, the deleted video went viral through various Internet platforms and circumvented the self-imposed censorship of the broadcaster.

Fourthly, Böhmermann's artistic work demonstrates the velocity and level on which art can spark a debate on relevant social issues as much as the legal system. It also shows that as a public issue and debate need not inevitably and immediately play out in a certain direction, but will remain largely uncontrollable. A work of art or the actions of artists should not be determined purely by a legal understanding and the values that flow from this, nor purely in terms of national boundaries.

Cultural Rights involves more people -- more change agents -- than artists or cultural workers. What about the role of about civil society?

Artist are not the only significant group of change agents or actors in social transformation. It is obvious that civil society is of an enormous significance in protecting artists and promoting the existence, distribution and access to their works. We must not think of rights merely as what a State can confer, or what a law protects. Rights are active, and the subject of artistic freedom exemplifies this. After more than a decade trying to implement the objectives of the 2005 UNESCO Convention (on cultural diversity), the limits of influence and cultural management on behalf of States and their public institutions in so many countries of the world is plainly evident.

However, to practice the art of criticism, and allow a freedom of expression in relation to a critique of maladministration in the implementation of cultural conventions, is not something that would be tolerated the established system of international diplomacy.

This is where a civic initiative can play a significant role, and work in parallel with existing State procedures, working to implement the objectives of a convention. But, this remains a tenative suggestion as for this to happen in its full sense, a drastic increase in the willingness to assume responsibility within civil societies worldwide, would be needed. We have not fully begun to even explore ways of implementing this.

What specific forms of support for endangered artists or cultural workers can civil society perform -- even supporting the self-protection of artists?

Motivated by the case of British Indian novellist Salman Rushdie, and the violent reactions in the years following his 1988 novel *The Satanic Verses*, various models and strategies of support for endangered artists were created. The models range from temporary financial support programs

(with assistance in the country of origin, or at least the region), to long-term residential, or even resettlement programs. With the increase in repressive regimes in recent years, it is noticeable that the number of support programs is increasing. However, the range of funding available to artists in need is far from being enough, particularly given the diversity of circumstances in which artists can find themselves. It is important -- at least as a guiding principle -- to remain ready both to combat the causes of threats to freedom, with the practical measures to protect and promote art and the artist. This is part of the understanding that sees cultural policy as a social policy.

And for the broader public sphere -- what Cultural Rights issues should we be debating in public, exposing to the media, and foregrounding with consciousness-raising events?

It is necessary to make abuses of freedom visible and the meaning of the preservation of artistic freedom transparent and evident in the public realm. To discuss and debate issues in public is also a way of promoting a consciousness of the plurality of freedom and the complexity of its legal designations. Moreover, artists and institutional players in the cultural landscape themselves need to be sensitized to these issues, and coordinate their concerns where regional and international networking can be strategic. We are still a long way off in understanding artistic freedom, and the relation between the law, society and culture. Similarly, we are a long way from comprehending the complex nature and variety of forms of censorship, as well as the range of strategic approaches that could be innovated in promoting and protecting artistic freedom. In conclusion, it must also be mentioned that according to the current annual report of the Freemuse organisation – 'The State of Artistic Freedom 2018' -- documents 553 cases of violations in 78 countries, observing that this is, nonetheless, "a big tip of a big iceberg". More than 1,000 artists were explicitly threatened, a well-existed dark figure of unclear size not included. Not infrequently, artists are deprived of their livelihood, many are imprisoned or forced to go into exile. This fact should be more visible in the cultural public sphere than it is.

Notes

1. Vgl. http://verfassungsblog.de/erlaubte-schmaehkritik-die-verfassungsrechtliche-dimension-der-causa-jan-boehmermann/)

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And whosoever shall offend one of these little ones..? Is 'community standard' applicable to cases of freedom of artistic expression?

Marcin Górski

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Abstract

This article considers the parameters that govern the categorisation, conceptualisation and judgement of "offense" in art, and so the limits of artistic freedom. Taking a legal and internationally informed perspective, the paper charts the establishment of conventional views on artistic expression and its assumed impact on the public or "community". It questions the conceptual accuracy of legal assumptions on the nature of art, as of the nature of expression and its impact. With reference to key cases and legal rulings, the article, while invested primarily in a forensic explication of the law and its phraseology, argues that all legal limitations on artistic expression embody assumptions that are paradoxical.

Author

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> *And whosoever shall offend one of these little ones that believe in me, it is better for him that a millstone were hanged about his neck, and he were cast into the sea*
> Mark 9:42-50 King James Version (KJV)

Is it really the 'common citizen' who should dictate what is and what is not acceptable in the sophisticated field of art? Or should we rather teach the general public new art conventions and trends by challenging traditional taste and habits? After all, if we *really* and *seriously* treat the 'community standard test' as decisive, we may end up with the conclusion that we cannot go any further but keep on admiring Hogarth's *The Graham Children* (1742) in London's National Portrait Gallery.

In spite of that, courts from different jurisdictions (e.g. the USA, India, Romania, the Russian Federation or Japan) continue to apply the 'community standard [or tolerance] test' in order to delimitate the scope of freedom of artistic expression. In some other states, the applicability of this test in cases concerning freedom of artistic expression has been disqualified either explicitly (Canada) or implicitly (Colombia). This text focuses on whether the community standard test is applicable at all to cases where freedom of artistic expression is at stake.

What is artistic expression?

Defining what is freedom of artistic expression (hereafter referred to as 'FAE') implies establishing, firstly, what is meant by 'artistic expression'. Farida Shaheed, the first UN Special Rapporteur in the field of cultural rights, declared in her 2013 *Report on the right to freedom of artistic expression and creativity* that she had no intention 'to propose a definition of art'[1]. Similarly, the German *Bundesverfassungsgericht* held in the now famous *Anachronistischer Zug* case decision, that construing the definition of art [which is the notion employed in Article 5.3. of the German *Grundgesetz* – MG] cannot imply a reference to a general concept applicable to all manifestations of artistic activity and for all artistic genres (*läßt sich nicht durch einen für alle Äußerungsformen künstlerischer Betätigung und für alle Kunstgattungen gleichermaßen gültigen allgemeinen Begriff umschreiben*)[2].

Therefore, in the majority of jurisdictions, courts abstain from defining the content of FAE. Some courts even criticize categorizing certain forms of expression as 'artistic' – like the South African Constitutional Court in *Case and other*[3]. Some other courts simply assume that lawyers do not possess proper qualifications to assess artistic merit of disputed works[4]. Indeed, if art is an autopoietic system[5], it is unlikely to be categorized from the perspective of another autopoietic system, namely the legal one[6].

Nevertheless, certain supreme or constitutional courts attempt to propose definitions of artistic expression. The earliest effort undertaken to that effect was the *Mephisto* decision[7] of the German *Bundesverfassungsgericht* delivered in 1971 where the BvG held that:

> …the life sphere of art is to be determined by the structural features,

[1] Report of the UN Special Rapporteur in the field of cultural rights, Farida Shaheed, *The right to freedom of artistic expression and creativity*, A/HRC/23/34, 14 March 2013, source: http://www.cdc-ccd.org/IMG/pdf/The_right_to_freedom_of_artistic_expression_and_creativity.pdf, see I.4.

[2] Judgment of the [German] Federal Constitutional Court of 17th July 1984, *Anachronistischer Zug*, BVerfG, Beschluß des Ersten Senats vom 17. Juli 1984, 1 BvR 816/82.

[3] Judgment of the Constitutional Court of South Africa of 9th May 1996, CCT 21/95 *Case and other v. The Minister of Safety and Security and others,* where the court held that '*there is an inherent artificiality in categorising expression in principle as 'political' or not. Few forms of what we conventionally class as 'artistic' expression can be said to be devoid of 'political' implications. Conversely, history records many a rhetorically distinguished 'political' speech that could fairly be characterised as a form of dramatic art*'.

[4] See e.g. Judgment of the US Supreme Court of 2nd February 1903, *Bleistein v Donaldson Lithographing Co.*, 188 US 239, 251 (1903), or a concurring passage made by sorely missed Justice Antonin Scalia in *Pope v. Illinois,* 481 U.S. 497 (delivered 4th May 1987): '*I must note [...] that, in my view, it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can*'.

[5] See: J. M. Bishop, M. M. Al-Rifaie, *Autopoiesis in Creativty and Art,* 2016 [in:] *Proceedings of the 3rd International Symposium on Movement and Computing*, Greece.

[6] See: G. Teubner, *Law as an Autopoietic System,* Oxford/Cambridge, Blackwell Publishers, 1993, European University Institute Series.

[7] Judgment of the [German] Federal Constitutional Court of 24th February 1971, *Mephisto*, BVerfG, Beschluß des Ersten Senats vom 24. Februar 1971, 1 BvR 435/68.

> which are characterized by the essence of art, and are their only characteristic features. The interpretation of the concept of art in the Constitution must be based on them. The essence of artistic activity is free creative creation, in which impressions and experiences of the artist are brought to immediate perception through the medium of a certain formal idiom. All artistic activity is an intertwining of conscious and unconscious processes, which are not rationally resolvable. In artistic creation, intuition, imagination and artistic sense work together; it is primarily not communication, but expression, and the most direct expression of the individual personality of the artist. The guarantee of freedom of art likewise affects the scope of work (Werkbereich) and the sphere of influence (Wirkbereich) of artistic creation. Both areas form an indissoluble unity. Not only the artistic activity (Werkbereich), but also the performance and dissemination of the work of art are necessary for the encounter with the work as a likewise art-specific process[8].

Quite similarly, the Colombian Constitutional Court defined artistic expression as 'intimate way of turning into material reality that what previously existed only in artist's imagination'[9].

ECtHR Justice de Meyer in his separate opinion in *Müller*[10] also reached similar conclusions declaring that:

> Whilst the right to freedom of expression 'shall include' or 'includes' the freedom to 'seek', to 'receive' and to 'impart' 'information' and 'ideas', it may also include other things. The *external manifestation of the human personality* may take very different forms which cannot all be made to fit into the categories mentioned above.

Finally, the Canadian Supreme Court held in *Sharpe*[11]:

> What may reasonably be viewed as art is admittedly a difficult question – one that philosophers have pondered through the ages. [...] The question of whether a particular drawing, film or text is art must be left to the trial judge to determine on the basis of a variety of factors. The subjective intention of the creator will be relevant, although it is unlikely to be conclusive. The form and content of the work may provide evidence as to whether it is art. Its connections with artistic conventions, traditions or styles may also be a factor. The opinion of experts on the subject may be helpful. Other factors, like the mode of production, display and distribution, may shed light on whether the depiction or writing possesses artistic value. It may be, as the case law develops, that the factors to be considered will be refined'.

Without in fact entering into a judicial dialogue with each other, these authorities seem to have reached similar conclusions, namely that art (artistic expression) is a *medium for expression of inseparable combination of conscious and*

[8] In German: 'der Lebensbereich Kunst ist durch die vom Wesen der Kunst geprägten, ihr allein eigenen Strukturmerkmale zu bestimmen on ihnen hat die Auslegung des Kunstbegriffs der Verfassung auszugehen. Das Wesentliche der künstlerischen tätigung ist die freie schöpferische Gestaltung, in der Eindrücke, Erfahrungen, Erlebnisse des Künstlers durch das Medium einer bestimmten Formensprache zu unmittelbarer Anschauung gebracht werden. Alle künstlerische Tätigkeit ist ein Ineinander von bewußten und unbewußten Vorgängen, die rational nicht aufzulösen sind. Beim künstlerischen Schaffen wirken Intuition, Phantasie und Kunstverstand zusammen; es ist primär nicht Mitteilung, sondern Ausdruck und zwar unmittelbarster Ausdruck der individuellen Persönlichkeit des Künstlers. Die Kunstfreiheitsgarantie betrifft in gleicher Weise den Werkbereich und den Wirkbereich des künstlerischen Schaffens. Beide Bereiche bilden eine unlösbare Einheit. Nicht nur die künstlerische Betätigung (Werkbereich), sondern darüber hinaus auch die Darbietung und Verbreitung des Kunstwerks sind sachnotwendig für die Begegnung mit dem Werk als eines ebenfalls kunstspezifischen Vorganges'.

[9] Judgment of the Constitutional Court of Colombia of 27th March 1996, T-104/96 Castro Daza, with the following passage: „la libertad de expresión artística comporta dos aspectos claramente diferenciables: el derecho de las personas a crear o proyectar artísticamente su pensamiento, y el derecho a difundir y dar a conocer sus obras al público. El primero de ellos, dado su alcance netamente íntimo, no admite restricción alguna, aparte de las limitaciones naturales que la técnica escogida le imponga al artista, y las fronteras de su propia capacidad para convertir en realidad material lo que previamente existe sólo en su imaginación'.

[10] Judgment of the ECtHR of 24th May 1998 *Müller and others v. Switzerland,* app. no. 10737/84.

[11] Judgment of the Supreme Court of Canada of 26th January 2001, *R. v. Sharpe*, [2001] 1 SCR 45.

unconscious processes occurring in the intimate sphere of the artist (expression of one's personality and feelings he or she experienced). It can, but not necessarily does it have to, constitute means of communicating information or ideas. Whether particular work constitutes art can be assessed by references to expert opinions, modes of distribution, artistic conventions, as well as content and form, however this list of assessment tools in not exhaustive.

Defining the content of term 'artistic expression' contributes towards more legal certainty for artists and other beneficiaries of FAE (those acting in the *Wirkbereich* or art). One must note that FAE (labeled sometimes as 'freedom of creation', 'freedom of artistic activity' or similar) is an explicit normative category of constitutional rank in many jurisdictions[12].

A characteristic feature of the normative phenomenon of art is its transgressive nature. Art is ever-changing and it always challenges the *status quo* (be it artistic, political social etc.) thereby discovering the unknown. As Aristotle said, 'art completes what nature cannot bring to finish. The artist gives us knowledge of nature's unrealized ends'. Honore de Balzac added: 'what is art? Nature concentrated' and Emil Zola echoed 'a work of art is a corner of nature seen through a temperament'. Can one therefore be *offended* by so-defined art? Ruling certain works of art illegal would amount to finding certain manifestation of nature itself in breach of the law. We may be disappointed about nature (art) but it will remain nature (art).

What is the community standard test?

In some jurisdictions courts tend to delimitate the boundaries of FAE by referring to the so-called community standard test. Just to remind us of rudimentary constitutional information, let us state briefly that the US Supreme Court's approach to the interpretation of the First Amendment is based on the assumption that certain categories of expression fall outside of the field of protection granted by the Constitution by virtue of their characteristics (in most European jurisdictions, exemplified by the ECtHR case-law, to the contrary, *all* expressions are in principle covered by freedom of expression, however this freedom is not unlimited). One of the characteristics causing that a given expression will be left unprotected is that according to the 'contemporary community standards' of a given State the work in question 'taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value'[13].

What is then a 'contemporary community standard'? In fact, when introduced in the US Supreme Court's case law, it liberalised the previous approach influenced by English courts, according to which disputed material 'could be judged merely by the effect of an isolated excerpt upon particularly susceptible persons'[14]. As noted by the Supreme Court in *Roth*[15],

> …later decisions have rejected it and substituted this test: whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest[16].

The contemporary community standard test

[12] E.g. in Europe in Germany, Russian Federation, Italy, Spain, Portugal, Poland, Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Serbia, Switzerland, Sweden, in Asia in South Korea, Kazakhstan, Mongolia, in Africa in Egypt, Morocco, Tunisia, Democratic Republic of Congo, Kenya, Republic of South Africa, Angola, Ethiopia, Chad, Algeria, Niger, Mali, Zimbabwe, Mozambique, in South America in Brazil, Chile, Venezuela, Colombia, Peru, Paraguay, Ecuador.

[13] Judgment of the US Supreme Court of 21st June 1973, *Miller v. California,* 413 U.S. 15 (1973). See also: judgment of the US Supreme Court of 21st June 1973, *Kaplan v. California*, 413 U.S. 115 (1973).

[14] See: *Regina v. Martin Secker Warburg,* [1954] 2 All Eng. 683 (C.C.C.).

[15] Judgment of the US Supreme Court of 24th June 1957, *Roth v. United States,* 354 U.S. 476 (1957).

[16] See: *e.g., Walker v. Popence,* 80 U.S.App.D.C. 129, 149 F.2d 511; *Parmelee v. United States,* 72 App.D.C. 203, 113 F.2d 729; *United States v. Levine,* 83 F.2d 156; *United States v. Dennett,* 39 F.2d 564; *Khan v. Feist, Inc.,* 70 F.Supp. 450, *aff'd,* 165 F.2d 188; *United States v. One Book Called 'Ulysses,'* 5 F.Supp. 182, *aff'd,* 72 F.2d 705; *American Civil Liberties Union v. Chicago,* 3 Ill.2d 334, 121 N.E.2d 585; *Commonwealth v. Isenstadt,* 318 Mass. 543, 62 N.E.2d 840; *Missouri v. Becker,* 364 Mo. 1079, 272 S.W.2d 283; *Adams Theatre Co. v. Keenan,* 12 N.J. 267, 96 A.2d 519; *Bantam Books, Inc. v. Melko,* 25 N.J.Super. 292, 96 A.2d 47; *Commonwealth v. Gordon,* 66 Pa. D. & C. 101, *aff'd sub nom. Commonwealth v. Feigenbaum,* 166 Pa.Super. 120, 70 A.2d 389.

> …in each case is the effect of the book, picture or publication considered as a whole *not upon any particular class, but upon all those whom it is likely to reach*. In other words, you determine its impact upon the *average person* in the community[17].

So, the community standard test is based on the assessment of the influence a work of art is likely to have in respect of average members of the community. Similar approach to that of the US Supreme Court can be traced in different jurisdictions all over the world. For instance, the Romanian Constitutional Court ruled in *Bala Istvan*[18] that a ban on distributing works compromising good morals (dating back to 1864) serves the maintaining a 'minimum morality of social life' (*minim de moralitate a vietii sociale*) and should be construed by reference to 'norms of social behaviour of an individual' (*normelor de comportare sociala a individului*). The latter concept is yet another label to what we call 'community standard test'. The Indian Supreme Court took identical approach in *Ghandi Mala Bhetala* case[19] ruling that 'the factum of obscenity has to be judged from the point of view of an average person'[20]. Similarly, the Japanese Supreme Court in *Matsue*[21] applied the 'social standard' test (*shakai tsūnen*) to designate the limits of artistic expression[22]. Finally, identical approach can be found in the (very limited) case law of the Russian Constitutional Court in the area of FAE: in *Alekhina*[23] (one of the 'Pussy Riot' cases) it held that 'historical and cultural heritage of the Russian nation' must be taken into consideration while delimiting the scope of FAE as well as 'contemporary state of norms of social behaviour' (*исторического и культурного наследия народов России, складывающихся на современном этапе развития общества общепризнанных правил поведения*).

Community standard test is universally understood as the *assessment of the disputed work by reference to its perception by an average member of the community*. It is characteristic that no expert opinion is required in order to establish this perception. To put it short and tersely, 'contemporary community standard test' implies confronting the work of art with the judge's sensitivity, prejudices and sophistication.

Is any community standard applicable to transgressive and ever-changing phenomenon of art?

Once we established what is 'artistic expression' and 'community standard test' we can now address the question of whether a 'community standard test' is applicable to 'artistic expression'. More precisely put, the question arises whether 'community standard' or 'community tolerance' may define boundaries of FAE at all. The answer proposed in this work is obviously: No. Let us explain why.

Before we present our standpoint, we will first defend our position by proving that we are not isolated in our approach. The Canadian Supreme Court dealt with the problem of 'community tolerance standard' in *Sharpe*[24]. One cannot but note that it was a very sensitive case where the defendant claimed that distribution of child pornography should be unpunished since he was under the protection of the *artistic merit defence*. One of the questions addressed by the Supreme Court was whether the *artistic merit defence* imports a requirement that material must comport with community standards in the sense

[17] *Roth,* op. cit., page 354 U.S. 491. See also: judgment of the US Supreme Court of 21st March 1966, *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) at p. 419.

[18] Judgment of the Constitutional Court of Romania of 2nd November 1995, 108/1995, *Bala Istvan*.

[19] Judgment of the Supreme Court of India of 14th May 2015, *Devidas Ramachandra Tuljapurkar vs. State of Maharashtra & Ors.*, Criminal Appeal No. 1179 of 2010.

[20] See also: judgment of the Supreme Court of India of 24th March 2015, *Shreya Singhal vs U.O.I.*, writ petition (criminal) no. 167 of 2012.

[21] Judgment of the Supreme Court of Japan of 12th December 1984, *Matsue v. Japan*, 38 Minshfi 1308 (Sup. Ct., G.B., Dec. 12, 1984).

[22] See also: Y. Shinoiri, *Art il-legally defined? A Legal and Historical Analysis of Akasegawa Genpei's Nodel Thousand-yen Note Incident* (w:) R. Hutchinson, *Negotiating Censorship in Modern Japan*, New York 2013, p. 202.

[23] Judgment of the Constitutional Court of the Russian Federation of 23rd October 2014 *concerning the constitutional complaint of Maria Alekhina*, 2521-O/2014. See also a twin judgment of the same court of 25th September 2014 *on the constitutional complaint of Nadiezhda Tolokonnikova*, 1873-O/2014.

[24] See: footnote 12.

of not posing a risk of harm to children[25] (one should note a very specific, narrow understanding of the community tolerance standard). Chief Justice McLachlin who drafted the majority opinion held:

> I am not persuaded that we should read a community standards qualification into the defence. To do so would involve reading in a qualification that Parliament has not stated. Further, reading in the qualification of conformity with community standards would run counter to the logic of the defence, namely that artistic merit outweighs any harm that might result from the sexual representations of children in the work. Most material caught by the definition of child pornography could pose a potential risk of harm to children. To restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence. Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence; otherwise there is no need for it.

In other words, the Canadian Supreme Court actually accepted that artistic work encompassing pictures of child pornography *is allowed to* pose risk of harm to the most vulnerable members of the community (children) but nevertheless still be protected under the *artistic merit defense*. It means that in their view artistic value of the disputed work is capable of outweighing possible harm to the community simply because it presents a greater value of itself.

A similar (or maybe even stricter) approach was proposed by the Colombian Constitutional Court in *Castro Daza*[26] where the Court simply held that assessing art must be left for individual viewers who, however, cannot expect the state to prohibit the distribution of a certain work of art and that is because of the pluralism on which the constitutional protection of freedom of artistic creation is based[27].

But the question remains if we can apply 'community standard' to artistic works at all?

The '*community standard*' approach assumes that freedom to create and distribute works of art can be opposed by tastes and feelings of *average persons*. This assumption seems illogical because it implies that *average person* actually confront themselves with art (and when we say 'art' we do not mean pictures decorating pages of *The Sun*). In reality, according to the UK Department of Digital Culture Media and Sport[28], in November 2017 only some 400,000 visitors exposed themselves to challenging nudity of Modigliani in Tate Modern and a similar number of imprudent innocent citizens visited British Museum to see e.g. politically stirring works of contemporary Arab artists. Both numbers include crowds of tourists (including the author). So, if we talk about *average person*, he does not normally bother himself with art. Consequently, art is unable to shock or disturb *average persons* since the latter simply do not see it.

Obviously, it is not only art specialists who visit art galleries, museums, theatres or independent cinemas (e.g. sometimes specialists invite some friends). So, *average persons* may happen to be accidentally exposed to the 'wickedness' of art. But if they are, are they really *average members of community*? Certainly not the *community* of those associating themselves with art, because in such a group the proportions of those sophisticated art consumers and *average persons* are inversed if compared to the whole society. It brings us to the conclusion that since *average*

[25] This approach was previously adopted in *Ontario (Attorney General) v. Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Ct. (Gen. Div.)).
[26] See: footnote 10.

[27] Cit. '*Son las personas quienes han de decidir, libremente y sin imposición de las autoridades, si se detienen o no en la contemplación de lo expuesto. Por ende, no se puede válidamente prohibir o recortar la exposición, con el pretexto de proteger un supuesto interés de terceros a no ser ofendidos por el contenido de las obras. El pluralismo existente en nuestra sociedad, además reconocido y amparado por la Constitución, comporta un deber de tolerancia que les es exigible a quienes, ejerciendo su derecho a elegir libremente, rechazan una determinada exhibición. Ellos son libres de manifestar su inconformidad, pero sin impedir que el artista ejerza su derecho a la libre expresión y que el resto del público aprecie la obra'.*
[28] See: https://www.gov.uk/government/statistical-data-sets/museums-and-galleries-monthly-visits, uploaded 21st January 2018.

members of society are a minority in the group of those actually being up-to-date with contemporary art, the rationale for their protection seems particularly weak. If the US Supreme Court accepts in *Roth* that 'average persons are not any particular class, but all those whom [art] is *likely* to reach' we realise that *average person* means something different when it comes to consorting with art.

This problem was noticed by the ECtHR who seems to perceive art as elitist and niche experience, starting already from *Müller*[29] where the Court held (in § 36) that the disputed paintings

> were painted on the spot – in accordance with the aims of the exhibition, which was meant to be spontaneous – and the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to – and sought to attract – the public at large.

The same view of the elitist nature of art was later expressed in *Karataş*[30], Alinak[31] or *Lindon, Otchakovsky-Laurens and July*[32], in each of them holding that artistic expressions '*appeal generally to a relatively narrow public*', which must be reflected in the test of 'necessity in a democratic society'. However, never did the ECtHR explicitly state that it applied a sort of *community standard test à rebours* – by which we mean that proportions of individuals less and more tolerant towards the challenging nature of art, its transgression and ever-changing character, are different in the group of those actually confronting themselves with art than in the society as a whole.

But there is another argument against juxtaposing FAE with assumed feelings and reactions of – *excusez le mot* – the common (citizens). We proposed the definition of artistic expression, based on the case law from different jurisdictions, as a medium for expression of inseparable combination of conscious and unconscious processes occurring in the intimate sphere of the artist (expression of one's personality and feelings he or she experienced). Therefore, another doubt must arise immediately: can something as intimate as art, by definition, be challenged by the reactions of *average persons*? Arguably, no one else but the artist (creator of work) him or herself can understand and explain the feelings (inseparable unconscious element of art) expressed by their work. Malevich said that his *Black square* was not just an empty square but 'the experience of superfluous'[33]. And finally, if modern art is challenging *today* by proposing *tomorrow*, can we – at all – confront it with the perception of the *contemporary* general public? It does not seem plausible.

Conclusions

Searching for definitions of *artistic expression* exposes a lawyer to criticism from those assuming that art, as an autopoietic system and a constantly transgressing phenomenon, does not subject itself to normative classifications. Nevertheless, certain judicial authorities – characteristically from jurisdictions attached to FAE – endeavor to develop their definitions. Although they do not engage in judicial dialogue, their propositions are quite similar in that they suggest that art is an inseparable combination of conscious and unconscious elements of manifestation of human personality in its most intimate dimension.

In cases concerning FAE references to *community standards* (or *community tolerance*) test are universally widespread reaching from Japan and Russia via Romania to the United States. This test is based on the assumed (perceived by a judge) reaction of *average person* to the work of art.

This approach can be criticized for three reasons. Firstly, the *average art consumer* is not always the same as *average person.* Art is very often an elitist and niche experience. Secondly, by its intimate

[29] See: footnote 11.
[30] Judgment of the ECtHR of 8th July 1999, *Karataş v. Turkey*, app. no. 23168/94.
[31] Judgment of the ECtHR of 29th March 2005, *Alinak v. Turkey,* app. no. 40287/98.
[32] Judgment of the ECtHR of 22nd October 2007, *Lindon, Otchakovsky-Laurens and July v. France,* app. no. 21279/02 i 36448/02
[33] K. Malevich [in:] R. Goldwater, M. Treves [eds.], *Artists on Art: from the 14th-20th centuries*, London 1972.

character, art cannot be juxtaposed with the perception of the common viewer because only the creator himself (if any) can understand fully the message (emotional burden) carried by the work of art. And thirdly, the transgressive nature of art which challenges the *status quo* makes it impossible to assess it by reference to the reactions of the *contemporary* general public.

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The Recognition of the Right to Cultural Identity under (and beyond) international Human Rights law

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Abstract

After summarising the range of reflections by legal scholars on Cultural Rights, this article scrutinises the principle interpretations of the right to take part in cultural life – by the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. Due to the evolving interpretations adopted, these bodies have come to define both a right to cultural identity and a right to cultural heritage that is both nuanced and direct. Moreover, they open the door to more extensive attempts at defining customary state obligations, for instance, to respect cultural heritage as recently demonstrated by the decision of the International Criminal Court in the well-known *Prosecutor v. Ahmad Al Faqi Al Mahdi* case (2016). This article underlines the importance of this ruling in identifying the human dimension to cultural heritage. It established that the human perspective of cultural heritage is not a prerogative of human rights bodies only, but is beginning to be recognised and valued by other international agencies and organs.

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Introduction

A brief assessment of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) would show that these two treaties enshrine two different concepts of culture, and consequently of cultural rights. In the ICCPR, the only reference to cultural rights is represented by Article 27, which secures the right "to enjoy their own culture" to persons belonging to ethnic, religious and linguistic minorities.[1] This provision is based on a notion of culture which, on the one hand, supposes a broad conception of culture and on the other, makes reference to an anthropological meaning. In this regard, it is worth recalling the *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* elaborated in 1979 by Professor Francesco Capotorti, as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights – as well as the General Comment No. 23 (1994) adopted by the Human Rights Committee (HRC) on the rights of minorities. Both of these documents make reference to a broad notion of culture, encompassing not only literature, art, education, cultural heritage of minorities, but also customs, traditions and all elements «which form an integral part of their "way of life" (Capotorti , 1979:596).[2]

At the same time, Article 27 of the ICCPR borrows an anthropological and "identitarian" notion of culture, according to which culture provides minorities' members with values and meanings by which they build their identity. This conception emerges firstly from the definition of "minority" proposed by Capotorti in his Study. This definition is based both on objective elements *(the* minorities' numerically inferior condition, their non-dominant position and the ethnic, religious or linguistic characteristics of their members) and on subjective elements, namely the shared sense of belonging aiming to preserve the minority's identity.[3] In other words, the notion of minority in itself implies a reference to the sense of identity and belonging characterising its members. This element is even more evident as for indigenous groups. [4] Indeed, as specified by the definition proposed in 1987 by Mr. José R. Martinez Cobo, another Special Rapporteur of the Sub-Commission, the notion of indigenous peoples differs from the general definition of minority in two aspects: first, the origin of indigenous peoples, which traces back to the pre-colonisation period; and second, the close connection existing between their cultural identity and their ancestral lands.[5] The anthropological notion of culture adopted by Article 27 finds confirmation in General Comment No. 23 (1994); indeed, the Committee underlines that the provision's scope is to ensure the protection and development of minorities' identity.

[1] ICCPR, Article 27: «In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language».

[2] Emphasis added; in this regard, see also HRC 1994:7, the Committee specified that «culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples». As to this broad notion of culture, cf. also Nowak 2005: 658-659: «The term "cultural life" is to be understood in the broad sense. In addition to the customs, morals, traditions, rituals, types of housing, eating habits, etc., that are characteristic of the minority, the term covers economic activities, […] the manufacture of objects of art, the encouragement of music, the establishment of cultural organisations, the publication of literature in the minority's language, etc.». Cf. also Thornberry 1991 and Burchill, 2009.

[3] Capotorti 1979:568; according to Capotorti, the term minority identifies «A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language». This element emerges also in the Study presented in 1985 by Jules Deschênes, another Special Rapporteur of the Sub-Commission, see Deschênes, 1985:181: «A group of citizens of a State, constituting numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law».

[4] While the literal formulation of article 27 ICCPR makes only reference to persons belonging to minorities, the HRC has always extended its scope of application to members of indigenous groups.

[5] Martinez Cobo 1987:379: «Indigenous communities, peoples and nations are those which, having a historical continuity with preinvasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems».

As for the ICESCR, cultural rights are secured by Articles 13, 14, and 15. The first two articles concern the right to education and the parents' right to educate their children according to their own religious and moral convictions. Article 15 enshrines the right to (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; and (c) to benefit from the protection of the moral and material interests resulting from scientific, literary or artistic productions. The analysis of the *Travaux Préparatoires* of ICESCR, and particularly of Art. 15, para. 1(a), shows that these provisions were elaborated adopting a materialistic notion of culture. The original aim pursued by the drafters was to overcome inequality then characterising the access to cultural institutions (theatres, libraries, museum, and so on), and to guarantee everyone equal enjoyment of the highest and noblest expressions of human creativity and intellectual activities, such as philosophy, art, literature, music. While, as underlined by a commentator (Craven, 1994:162), the notions of culture and cultural life were perceived by delegates as "self-explanatory", (and they had not been debated during the discussions taking place at the General Assembly before the adoption of the ICESCR),[6] the statements made by some delegations exemplify the materialistic approach prevailing at that time. For example, an Indian representative underlined the scope of provision corresponding to future Article 15, para. 1(a) stating that it "was to recognize the loftiest aspects of culture after defining the right to education […and] referred to culture in its most intellectual" (General Assembly, 1957b: 18-19). Similarly, other delegates demonstrated their compliance with the right to take part in cultural life by referring to the number of scholarships offered by their country to study art, science and literature, as well as the number of libraries, theatres, cinemas and printed books.[7]

In distinction to Article 27 ICCPR, the ICESCR's provisions on cultural rights, and in particular Article 15(1)(a) on the right to take part in cultural life, were elaborated, as noted, by drawing on a materialistic notion of culture: it was conceived as including the highest and noblest manifestations of intellectual activities, and ultimately it was assimilated to a material good, while remaining lofty and noble. Strangely perhaps, the two International Covenants embraced two different notions of culture, and consequently of cultural rights – on the one hand, the right to enjoy one's own culture, recognised in relation to members of minorities and indigenous peoples, and which had an identitarian meaning and anthropological function; on the other hand, the right to take part in cultural life, to which everyone is entitled, regardless of their belonging to a minority or an indigenous groups, and which was conceived in a materialistic sense.

Over the years, legal scholars, influenced by anthropological studies, have promoted a significant reflection on notions of culture and cultural rights. They have pointed out the necessity to stress the identitarian and anthropologican nature of culture in relation to everyone, and not only to persons belonging to minorities and indigenous peoples. Among these authors, it is worth recalling the reflection elaborated by the Fribourg Group, a working group composed of international experts, organised from the Interdisciplinary Institute for Ethics and Human Rights (IIEDH) of the University of Fribourg (Switzerland), and coordinated by Professor Patrice Meyer-Bisch. The Group was created in 1991 after a Conference on "Les droits culturels: une categorie sous-développée de droits de l'homme" (Meyer-Bisch, 1993), and since its origin has worked in strong connection with the Council of Europe and UNESCO, and with the Office of the United Nations High Commissioner for Human Rights.[8]

Developing the legal and philosophical reflection on cultural rights, the Fribourg Group has elaborated an articulate theorisation which allowed it to propose, in 2007, the Fribourg Declaration on Cultural Rights. While the Declaration does not possess any legal status, it is

[6] In this regard, see General Assembly 1957a; General Assembly 1957b; General Assembly 1957c.

[7] cf. General Assembly 1957b: 27; General Assembly 1957a: 6.

[8] To examine in depth the composition and history of Fribourg Group, see Meyer-Bisch and Bidault, 2010: 141 ss.

of considerable significance. It does not define *new* cultural rights, but has gathered in a single document all the cultural rights already recognised under international human rights law, albeit “in a dispersed manner” (Declaration 2007: Preamble, IX recital). This systematisation consents to clearly identify cultural rights, precisely define their content, and ultimately encourage their full implementation. This merit has been widely recognised by human rights treaty bodies, and in particular by the Committee on Economic, Social and Cultural Rights (CESCR). As a matter of fact, the notion of culture elaborated by this organ has undergone a meaningful evolution, which has led to elaborate a new interpretation of the right to take part in cultural life. And this interpretation has been widely influenced by the Fribourg Declaration.

This article will proceed as follows. Firstly, it will summarise the reflection elaborated on by legal scholars concerning notions of culture and cultural rights, and do so by paying a great deal of attention to the proposal made by the Fribourg Group, formalised in the Fribourg Declaration on Cultural Rights. Secondly, it will analyse the evolutive interpretation elaborated by the CESCR on the right to take part in cultural life; and special attention will be given to the General Comment No. 21 (2009), in which the Committee came to embrace a broad interpretation of the right to take part in cultural life, and to recognise a right to cultural identity. Thirdly, this article delves into the protection assured by the Committee on the Rights of the Child (CRC) to the child's right to take part in cultural life, and more generally to the cultural identity of children. Finally, the article will briefly analyse the judgement rendered by the International Criminal Court in the case *Prosecutor vs. Ahmad Al Faqi Al Mahdi* on the international crime of attacking cultural heritage. The protection of cultural heritage under international law is not a topic to be discussed here; however, the *Al Mahdi* decision is of utmost importance as the Court stressed the human dimension of cultural heritage and endorsed the interpretation of cultural identity elaborated by human rights treaty bodies.

I. The Scholars' Reflection on Culture and Cultural Rights

The development of contemporary anthropology since the 1960s eventually had a significant measure of impact on international lawyers in their reflection on the notions of culture and cultural rights adopted by the two International Covenants. A survey of the legal literature would show that one of the most shared definitions is that proposed by Stavenhagen (1995) and then adopted by other notable authors (Eide, 1995; O’Keefe, 1998; Stamatopoulou, 2007; Psychogiopoulou, 2008; Yupsanis, 2012). In Stavenhagen’s view, it is possible to identify different definitions of the "right to culture" depending on the specific conception of culture adopted. The analysis of international human rights law allows Stavenhagen to distinguish three different notions of culture. First, culture can be conceived as the "accumulated material heritage of humankind as a whole or of particular human groups"; according to this notion, the right to culture is the right to have access to cultural capital. Second, culture can be defined as "the process of artistic and scientific creation"; in this perspective the right to culture identifies the right to free cultural creation and the right to have access to cultural creations. Finally, the term culture can qualify "a coherent self-contained system of values and symbols that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationship in everyday life"; in this light, the right to culture must be defined as the right to maintain and develop one’s own culture or, in other words, "the right to cultural identity" Stavenhagen (1995: 65-66).

As for the specific definition of cultural rights, it is worth recalling that several Authors have proposed to distinguish between a narrow and a broad notion of these rights (Symonides, 1993 and 2000; Häusermann, 1994; Eide, 1995; Donders, 2002 and 2007). According to the narrow conception, it is possible to qualify as cultural rights only the kinds of rights that include a specific and explicit reference to culture, such as the right to take part in cultural life and the right

of minorities' members to enjoy their own culture. Instead, the adoption of a broad notion of cultural rights makes it possible to include, along with these rights, all those which, while traditionally classified as civil, political, economic or social rights, have a significant "link" with culture, such as for example freedom of religion, freedom of expression, freedom of association, and right to education.[9] While not adopting this distinction between a narrow and a broad notion of cultural rights, other authors (Prott, 1988; Symonides, 2000) have proposed a list of cultural rights which, clearly, supposes the adoption of an anthropological notion of culture, and indeed includes also the right to cultural identity.[10]

I.I. *The notion of cultural rights proposed by the Fribourg Group*

The analysis of academic studies on cultural rights cannot help but mention the pivotal contribution of the Fribourg Group which, as recalled above, came to propose the Fribourg Declaration on cultural rights. To study the reflection of the Fribourg Group, it is necessary to start examining the definition of culture formalised in Article 2(a) of the Declaration, according to which the term "culture" covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meanings that they give to their existence and to their development.'

The relevance of this definition lies in a couple of different aspects. Firstly, it embraces a broad definition of culture, including not only material aspects, but also traditions and ways of life. Secondly, and more importantly, it lays stress on the identitarian role of culture: culture performs a pivotal role in developing individual identity as it provides individuals with a horizon of meanings, senses and values where they can find references to build and shape their identity.[11] This notion presumes that cultural goods cannot be reduced to their material and tangible basis; instead, as stated by the UNESCO Universal Declaration on cultural diversity (2001), they are "vectors of identity, values and meaning" (Article 8).

When a person encounters a "cultural good", he/she encounters the values and meanings expressed by it, and unavoidably takes a position in relation to these values. When they are assessed as positive values, the individual will appropriate these values as a reference point in building his/her identity. Against this background, cultural goods represent the means whereby persons constructs interpersonal relationships; indeed, when an individual recognises himself/herself in values expressed by a cultural good, he/she establishes an indirect link with persons sharing these same values, and in this way, he/she becomes part of a cultural community.[12] According to the Fribourg

[9] This classification is proposed in particular by Donders (2007); Häusermann (1994) makes reference to right to education, freedom of expression and information, right to privacy, and freedom of religion; Symonides (1993) includes in the broad definition of cultural rights the right to education, the right to participate in scientific progress, and the right to information. While not recalling the distinction between a broad and a narrow notion of cultural rights, Eide stresses the «close link» (1995:232) existing between cultural rights identified by the provisions of the two Covenants and some other rights, such as right to education, freedom of information and expression, freedom of religion, freedom of assembly and association, and the right to property.

[10] Prott (1988) defines cultural rights as including (1) the right to freedom of expression, religion and association; (2) the right to education; (3) the parents' right to choose the education to be given to their children; (4) the right to take part in cultural life; (5) the right to protect the artistic, literary and scientific work; (6) the right to develop a culture; (7) the right to respect cultural identity; (8) the minorities' right to respect for their identity, traditions, languages, and cultural heritage; (9) the people's right to their own artistic, historical and cultural wealth; (10) the people's right not to have an alien culture imposed; and (11) the right to the equal enjoyment of the common heritage of mankind. Symonides (2000), while recognising that some rights, such as freedom of religion, expression, association and assembly, play a critical role to assure cultural rights, he does not qualify them as cultural rights. According this Author, it is possible to qualify as cultural rights: (1) the right to cultural identity; (2) the right to take part in cultural life; (3) the right to education; (4) the right to creativity and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production; (5) the right to information; (6) right to enjoy benefits of scientific progress and its applications; (7) the right to cultural heritage; and (8) the right to cultural international cooperation. As to the right to cultural identity, cf. also Riedel who refers to the individuals' right to «to define their own identity and/or to do so as part of a culture» (2010: 78).

[11] Wilhelm, 1993; Bassand, 1993; Ayton-Shenker, 1995; Meyer-Bisch and Bidault, 2010; Riedel, 2010. As underlined by Ayton-Shenker (1995): «Cultural background is one of the primary sources of identity. It is the source for a great deal of self-definition, expression, and sense of group belonging».

[12] It is important to specify that, in Meyer-Bisch's view (Meyer-Bisch and Bidault, 2010), belonging to a community does not suppose a formal membership, but it exists as soon as individuals recognise themselves in values shared by the community's members, and consequently create an indirect relationship with them.

Declaration, a cultural community is the group of persons sharing the same cultural references, and these references constitute the cultural heritage of the community.[13] In the light of this, cultural goods and cultural heritage acquire a fundamental "human" dimension: they do not simply label a material good, but they have an identitarian value as they allow individuals to recognise themselves in values expressed by them, and to shape their identity.

It is important to refer to some specification as to the process characterising the development of individual cultural identity. This is a complicated process as it lies in the creative contribution of everyone: while, on the one hand, culture provides individuals with references allowing them to build their identity, on the other, individuals offer a fundamental contribution for the development and interpretation of culture. The individual contribution lies in two different aspects. First, when person recognise a cultural value as one of their identitarian references, this value is not accepted in an acritical and automatic manner, following standardised and predetermined standards; instead, the reference is re-interpreted and re-elaborated by others. Consequently, when the acquired reference is shared and communicated with others, it will have a different and new guise arising from the reinterpretation made by the person who, thereby, becomes creator of cultural references. Cultural goods cannot be conceived without considering the creative contribution of everyone, and ultimately their freedom and dignity.[14] Second, as stressed by Sen (2006), individuals are not characterised by one single identity; instead they have multiple and interlaced identities. Individuals build their identities on different and simultaneous affiliations which, sometimes, can respond to inconsistent logics. To overcome the opposition existing between multiple cultural references, persons must reinterpret them to assure their conciliation. As underlined by Meyer-Bisch, contractions existing between different affiliations represent some "espaces de libertés" (2000: 271): they provide persons with rooms to freely and autonomously decide how to conciliate them. In other words, cultural references are not imperatively imposed on individuals; these latter develop and build their identities by fully expressing their freedom and autonomy. This implies that, as underlined by Donders, cultural identity is not a fixed entity "given from birth" (2001:30); instead, it corresponds to a dynamic and never-ending process of re-interpretation and re-elaboration of cultural references.[15] As the appropriation of a cultural reference implies the establishment of a relation with a cultural community, it is crucial to stress that freedom and autonomy characterising the development of personal identity similarly affect the communities' membership. Indeed, as underlined by Article 4 of the Fribourg Declaration, the adhesion to a cultural community must be absolutely free, as well as the decision to modify this choice.[16] Moreover, in the light of multiple affiliations marking human identity, the belonging to a cultural community does not exclude, but is normally associated with, the adhesion to other cultural communities.

Before concluding, it is worth stressing an additional character of the notion of culture proposed by the Fribourg Declaration. As the development of individual identity implies the creative approach of everyone who gives their personal interpretation of cultural references, culture is characterised by a dynamic and evolutive nature as well. It cannot be conceived as a set of given and defined elements, but represents a *quid in fieri*, a "*moment provisoire*" (Meyer-Bisch and Bidault, 2010: 33) of a never-

[13] Fribourg Declaration 2007: 2(c) : «"Cultural community" connotes a group of persons who share references that constitute a common cultural identity that they intend to preserve and develop».

[14] Cf Meyer-Bisch 2008 : 4 and 19; the Author underlines that the free and creative participation of individuals «à la reconnaissance et au développement des références culturelles» represents a fundamental precondition to respect human dignity.

[15] As underlined by Donders, cultural identity ««should be considered a process, instead of a creation according to a fixed scheme. Cultural identity is not a simple, uniformly consisted entity given from birth». In this sense, cf. also Meyer-Bisch and Bidault, 2010 : 34 : «L'identité est culturelle, car elle est le résultat d'un travail permanent de recherche de sens et de communication». Cf. also Wilhelm 1993 and Keller 1998.

[16] Fribourg Declaration 2007: 4 : «(a) Everyone is free to choose to identify or not to identify with one or several cultural communities, regardless of frontiers, and to modify such a choice; (b) No one shall have a cultural identity imposed or be assimilated into a cultural community against one's will.»

ending process which is open to continuous developments and evolutions.[17]

I.I.I. *The notion of cultural rights proposed by the Fribourg Declaration*

As individuals shape and develop their own identity from meanings and values expressed by culture, cultural rights must be defined as rights allowing persons to access to cultural references necessary to build and express their cultural identity.[18] The Fribourg Declaration consists of a Preamble with 8 recitals and 12 Articles: after the firsts two Articles, defining some fundamental principles and key concepts, there is six provisions listing cultural rights (Articles 3-8) and four provisions concerning their implementation (Articles 9-12). Here it is not possible to analyse the entire content of the Declaration; however, it seems important to reflect on Article 3 concerning the right to identity and cultural heritage; it reads as follows: "Everyone, alone or in community with others, has the right:

a. To choose and to have one's cultural identity respected, in the variety of its different means of expression. This right is exercised in the inter-connection with, in particular, the freedoms of thought, conscience, religion, opinion and expression;
b. To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage;
c. To access, notably through the enjoyment of the rights to education and information, cultural heritages that constitute the expression of different cultures as well as resources for both present and future generations.

The right to choose and to have one's cultural identity respected (Article 3 (a) represents the essence itself of cultural rights: it formalises the principle underpinning the whole Declaration, and it is further specified and developed in the following provisions. They secure the right to identify or not with one or several cultural communities (Article 4), the right to access and participate freely in cultural life (Article 5), the right to education and training (Article 6), the right to communication and information (Article 7), and the right to participate in the cultural development of one's own community and cultural cooperation (Article 8).

The definition of culture provided by the Fribourg Declaration makes it possible to overcome the dualism characterising the notion of cultural rights embraced by the two International Covenants, in which the ICCPR embraces an anthropological conception, and the ICESCR a materialistic one. Starting from an anthropological and identitarian notion of culture, the Fribourg Declaration adopts a broad definition of cultural rights, which encompasses all rights allowing individuals to develop and express their own cultural identity.

II. The evolutive interpretation elaborated by the CESCR on the right to take part in cultural life

After the adoption of the ICESCR, the interpretation elaborated by the CESCR on the right to take part in cultural life has undergone a significant evolution. This evolution has been deeply influenced, on the one hand, by the reflection elaborated by scholars, and on the other, by the important instruments adopted by UNESCO on cultural heritage and cultural diversity. In this regard, the scholarly reflection on culture and cultural rights had influenced and, in its turn, had been influenced by the action promoted by UNESCO. Certainly, culture is at the heart of UNESCO's mission; and indeed, UNESCO had consecrated several studies on culture and cultural rights: this is illustrated by the significant International Conference on cultural rights organised in 1968. At the same time, it is important to remember that beginning with this Conference, UNESCO started to promote an

[17] Cf. Prott, 1988; Marks and Clapham, 2005; Pedrazzi, 2011.
[18] Cf. Meyer-Bisch, 2008: 14; here the Author affirms that «Les droits culturels désignent les droits, libertés et responsabilités pour une personne, seule ou en commun, avec et pour autrui, de choisir et d'exprimer son identité, et d'accéder aux références culturelles, comme à autant de ressources qui sont nécessaires à son processus d'identification» ; similarly cf. Meyer-Bisch and Bidault, 2010 : p. 17.

inclusive notion of culture which is understood as the way of life expressing the identity of an individual or a people (UNESCO 1970). This conception has been fully recognised by the Recommendation on participation by the people at large in cultural life and their contribution to it (1976), and then in the Mexico City Declaration on cultural policies (1982), the Universal Declaration on cultural diversity (2001) and in the Convention for the safeguarding of intangible cultural heritage (2003). This set of hard and soft law instruments, adopted by UNESCO, borrows a notion of culture which stresses both culture's dynamic character, and the role it performs to make it possible the development of individual identity.

Academic reflection and studies promoted by UNESCO have deeply influenced the interpretation elaborated by the CESCR on the right to take part in cultural life and have allowed the Committee to overcome the original notion characterised by a materialistic approach. A first stage in this evolution was represented by the reporting guidelines, adopted by the Committee in 1991, to define the elaboration of reports which states party to the ICESCR are periodically requested to submit according to Articles 16 and 17 of the Covenant. The new guidelines, replacing the preceding ones, borrowed a notion of culture which, while keeping elements of the original conception, was really more open and inclusive. On the one side, the guidelines require member states to provide information on infrastructures created to guarantee the participation to cultural life, such as museums, libraries, cinemas, theatres, and so on; on the other side, the Committee stressed the importance to promote "cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions" (CESCR 1991). This formulation is illustrative of a more inclusive notion of culture, which points out the role it plays to allow individuals to develop their own personal identity.[19]

Another fundamental step is identifiable in the general discussion day, organised by the CESCR in 1992, on the right to take part in cultural life. The working paper, elaborated by Mr. Samba Cor Konaté, a Committee's member, on the content of Article 15.1 (a) stressed that the tendency to reduce the notion of culture only to its "external manifestations of culture, such as libraries, museums, works of art" (CESCR 1992: para. 5) risks leading towards the adoption of a « materialist or even mercantilist» definition (CESCR 1992: para. 6). This manner of conception is not able to emphasise the deep relationship existing between culture and human dignity, and consequently the pivotal role played by culture in the human rights system. During the general discussion day, several Committee members highlighted the necessity to conceive culture as broad and comprehensive, including all human activities manifesting the way of life of a person or a group and to express their values and worldview.[20] Culture "mirrored and shaped" a community's life, provides individuals with a sense of belonging and defines their identity (CESCR 1992: para. 17). In the light of this, they stressed the necessity to overcome the subsidiary position recognised to cultural rights and emphasised the central role of the right to take part in cultural life in the human rights system.[21]

The meaningful evolution characterising the interpretation elaborated by the CESCR on the right to take part in cultural life emerges in a significant way from the reporting guidelines adopted in 2008 to replace the previous ones. Certainly, they keep some references to the materialistic notion of culture, requiring states to

[19] In this regard see also Donders, 2002:151; as underlined by the Author, the reference to cultural identity as « a factor of mutual appreciation» expresses a notion of culture really more inclusive than a notion only including its materialist aspects.

[20] See in particular CESCR 1992: para. 17, the intervention of Mrs. Bonoan-Dandan; she proposed a broad notion of culture encompassing «language, non-verbal communication, oral and written literature, song, religion or belief systems which included rites and ceremonies, material culture, including methods of production or technology, livelihoods, the natural and man-made environment, food, clothing, shelter, the arts, customs and traditions consisting of practices, behaviour and institutions which reflected the norms of social order by which members of the community abided freely, plus a world view representing the totality of a person's encounter with the external forces affecting his life and that of his community. Those fundamental elements of culture distinguished man from beasts». See also the intervention of Mr. Zachariev, UNESCO's representative, who underlined the organisation's will to «to go beyond the materialistic vision of culture, to one that included every aspect of the creativity of individuals and groups, both in their style of life and in their mode of practical activity» (para. 36).

[21] CESCR 1992: para. 52, intervention of Mr. Fofanà; he defined the right to take part in cultural life as «a central pillar of human rights».

submit information on infrastructures established to assure the access to and the participation in cultural life, and to guarantee that "access to concerts, theatre, cinema, sport events and other cultural activities is affordable for all segments of the population" (CESCR 2008a: 67 a). However, these guidelines are characterised by some really significant aspects. Different to previous ones, the 2008 guidelines not only refer to participation in cultural life, but introduce the issue of access. As it will be underlined below, the General Comment No. 21 (2009) recognised a fundamental role to "access" to cultural life and cultural heritage. In the light of this, the references made by the guidelines to access to cultural infrastructure acquire a different meaning: accessing to culture is not simply functional (understood as a mere availability of a material good); access becomes a fundamental condition to assure an effective and active participation in cultural life. Moreover, it is really meaningful that the guidelines require states to "Indicate the measures taken to protect cultural diversity, promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs" (CESCR 2009a: 68). This paragraph is important for two different references. Firstly is its reference to cultural diversity and cultural heritage, and how these reflect the influence of instruments adopted by UNESCO on these issues. The Committee recognises the essential link existing between the right to take part in cultural life (*rectius*, cultural rights), cultural diversity, and cultural heritage. In particular, this is directly relevant to the UNESCO Universal Declaration on cultural diversity, which defines the protection of cultural diversity an "ethical imperative" in guaranteeing respect for human dignity (Article 4) and where cultural rights are an essential precondition to assure the effectiveness of cultural diversity (Article 5). Secondly is its reference to identity of indigenous groups and minorities. Recalling not only the preservation of cultural identity, but also the development and expression, the guidelines overcome a “museum” notion of cultural heritage, but embrace an evolutive and dynamic notion.

II.I *The General Comment No. 21 (2009) on the right to take part in cultural life*

In 2007, the CESCR decided to hold another general discussion day on the right to take part in cultural life. The discussion day took place in 2008 with the specific aim to reflect on notion of cultural life and on the content of the right to take part in cultural life, and to open the way for the adoption of a General Comment on this right. Undoubtedly, the General Comment No. 21 (2009) represents a real turning point: as it will be underlined below, the Comment gave an interpretation of culture and of the right to take part in cultural life which is deeply involving the whole notion of cultural rights. Not by chance, the General Comment starts with a reference to all cultural rights, the importance of which is emphasised by the Committee stating that they "are an integral part of human rights" (CESCR 2009a: 1).

II.I.I. *The anthropological notion of culture*

One of the main reasons makes it possible to qualify the General Comment as a revolutionary milestone in the interpretation of cultural rights lies in the formalisation of an anthropological and identitarian notion of culture. The concept of culture is defined in paragraph 13, according to which culture

> …encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.

In elaborating this definition, the Committee exemplifies the learning over the years both by UNESCO and academic scholarship, and in particular by the Fribourg Group. Indeed, the

Committee's definition seems to completely embrace the definition of the Fribourg Declaration which, as a matter of fact, is explicitly quoted, as well as the UNESCO Universal Declaration of Cultural Diversity.[22] More generally, the influence of UNESCO and Fribourg Group emerges in the overall Comment.

The definition of culture provided by the General Comment No. 21 is characterised by three significant aspects. First, it is a dynamic and evolutive notion. As clearly underlined by the Committee, culture must be conceived as "a living process" (CESCR 2009a:11)[23]: it is not static and unchanging, but thanks to creative contributions of everyone, it is liable to a constant evolution and development. Second, it is a broad and omni-comprehensive definition: culture is not reduced to its materialistic or "external" aspects, but it includes "all manifestations of human existence" (CESCR 2009a: 11). Third, and most important, it is an identitarian notion which stresses the critical role played by culture to make it possible the development of personal identity. According to the definition proposed by the Committee, culture covers all activities and practices which, thanks to their capacity to express a sense and meaning, represent the references allowing individuals to shape their identity. It is just in the light of this that, throughout the Comment the term identity is always associated with the qualification cultural: between culture and identity there is such a close relation that identity cannot but have cultural origin. The deep link existing between culture and identity is underlined by the definition of culture itself, according to which culture includes all human activities allowing persons and community to "express their humanity and the meaning they give to their existence and build their world view". This aspect emerges also when the Committee, dealing with the children's right to take part in cultural life, stresses that education must ensure the "the transmission […] of common cultural and moral values in which the individual and society find their identity" and "enable children to develop their personality and cultural identity" (CESCR 2009a: 26). In this point, education is interpreted according to a cultural approach: it is viewed as the means permitting the transmission of cultural values which are qualified as the reference points needed by individuals to develop and build their personal identity. Consistently with this perspective, the General Comment quotes the UNESCO Universal Declaration of Cultural diversity and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, and underlines that cultural goods and services must be conceived "as vectors of identity, values and meaning" (CESCR 2009a: 49(a).[24]

II.I.II. *The content of the right to take part in cultural life*

To define the content of the right to take part in cultural life, it is necessary to mention two different parts of the General Comment: the section dealing with the meaning of the expression "to take part" (paragraph 15), and the section on member states' obligations stemming from the right to take part in cultural life (paragraph 49 ss.). As to the first aspect, the Committee underlined that the right to take part in cultural life includes three different "components", such as the participation in, the access to and the contribution to cultural life, and each of them "cover" several rights (CESCR 2009a: 15). The first component, namely the participation *stricto sensu*, covers two different spheres: on the one side the participation in political life and cultural activities, and on the other the choosing of one's own cultural identity, the adhesion to cultural communities and the use of one's own language. Similarly, the access concerns two different fields – on the one hand, the right to education and information whereby everyone can know their culture and cultures of others, and the right to benefit from cultural heritage, and on the other hand, the right to follow one's own way of life associated with the use of natural resources and cultural good. Finally, the contribution covers the right to be involved and to contribute to creative activities of the community, and the right to participate to the community's development

[22] See in particular, CESCR 2009: 13, footnote 12.
[23] See also CESCR 2009: 12.
[24] See Universal Declaration of Cultural diversity, Article 8; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Preamble XVIII recital and Article 1 (g).

and in the definition of policies impacting on cultural rights.

With regard to the section on states' obligations, it is necessary to make a few remarks on the general structure of General Comments. In his report submitted in 1987, *Right to Adequate Food as a Human Right*, the Special Rapporteur to the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Professor Asbjorn Eide proposed a tripartite classification of state obligations stemming from human rights, identifying the obligation to respect, to protect, and to fulfill.[25] The Eide's tripartite distinction was widely accepted by the CESCR beginning with the adoption of the General Comment No 12 (1999) on the right to adequate food, and it has been further developed by the Committee in its next General Comments. According to the Committee, the obligation to respect implies that states refrain from interfering with enjoyment of the right; the obligation to protect requires states to take necessary measures preventing private parties from interfering with the enjoyment of individuals' rights, and the obligation to fulfil supposes the adoption of measures aiming to assure the full realisation of the right.

Normally, the Committee, in its General Comments provides some illustrative examples in order to detail the specific content the obligations assume with regard to the specific right covered by the Comment.[26] Instead, General Comment No. 21 does not present such a structure, which as a matter of fact characterises all Comments both previous and following its adoption. The peculiarity of General Comment No. 21 lies in particular in paragraph 49 on states' obligation to respect, reading as follows:

> The obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group ….

After this affirmation, the following subparagraphs (from (a) to (e)) enumerate some specific rights. Each of these rights is characterised by a composite content, which is further specified in the following lines of the subparagraph. In particular, the Committee identified:

i. the right to freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected;
ii. the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life;
iii. the right to enjoy freedom of opinion, freedom of expression in the language or languages of their choice;
iv. the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers of any kind;
v. the right to enjoy the freedom to create, individually, in association with others, or within a community or group;
vi. the right to have access to their own cultural and linguistic heritage and to that of others;
vii. the right to be taught about one's own culture as well as those of others;
viii. the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life;

[25] ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Adequate Food as a Human Right*, Report prepared by Mr A. Eide, UN Doc. E/CN.4/Sub.2/1987/23 (1987), paras. 66 et seq.

[26] For example, see the General Comment n. 19 (2005), *The right to social security*: «The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation includes, inter alia, refraining from engaging in any practice or activity that, for example, denies or limits equal access to adequate social security» (CESCR 2005: 44). General Comment No. 24 (2017) on *State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*: «The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects. Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk». (CESCR 2017a: 12).

ix. the right to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights.

It is important to stress the highly exceptional character of this structure. In its other General Comments, while exemplifying some measures states are requested to take in order to implement their obligation to respect, the Committee has never referred to measures necessary to guarantee rights different from the specific right dealt with in the Comment. Instead, in General Comment No. 21, the CESCR stated that the implementation of obligation to respect the right to take part in cultural life requires states to adopt measures necessary to respect some other rights, namely the rights listed above.

Also paragraph 50 on the obligation to protect is characterised by a structure different from the usual Comments' structure. On the one hand the Committee upheld the traditional definition of obligation to protect, according to which it requires states to adopt necessary measures to prevent third parties from interfering with the right. However, on the other hand, the CESCR stated that the measures states are requested to adopt are those measures necessary to protect the exercise of rights listed in paragraph 49. Along with these measures, the Comment identified some other obligations to protect which are focused on the respect and protection of cultural heritage and cultural production. Unlike the obligations to respect and protect, the obligation to fulfil keeps the traditional content characterised by the usual distinction between obligations to facilitate, promote and provide.[27]

The exceptional and peculiar structure of paragraphs defining the content of the obligation to respect makes it possible to affirm that in the General Comment No. 21, the CESCR defined the right to take part in cultural life as a right having a broad and composite content and including some other (cultural) rights. Moreover, it is possible to find a match between rights listed in paragraph 49 (a)-(e) and rights covered by the three components, identified in paragraph 15. In other words, the rights included in the three components identified by the Committee (participation in, access to and contribution to) become object of the states' obligation to respect. As these rights are covered by some states' obligations, they are not simple components of the right to take part in cultural life but become rights which states party to the ICESCR are obliged to guarantee. It is meaningful to underline that the rights identified by the Committee correspond to a large extent to the broad notion of cultural rights proposed by scholars and formalised in the Fribourg Declaration. Not surprisingly, the first right identified by the Committee, both in paragraph 15 and in paragraph 49, is the right of everyone to freely choose their own cultural identity.

Needless to say, the General Comment No. 21 represented a meaningful revolution as regards the international protection of cultural rights. The broad and anthropological notion of culture adopted by the Committee makes it possible to qualify the right to take part in cultural life as a right having a broad and composite content including all cultural rights, as broadly understood.

II.I.III. *Subjects entitled to the right to take part in cultural life (rectius: cultural rights)*
Another fundamental aspect characterising the General Comment No. 21 and giving it a fundamental importance concerns the subjects who are entitled to enjoy the right to take part in cultural life, and more generally all cultural rights. As already underlined, according the traditional interpretation, cultural rights have been only recognised in favour of persons belonging to minorities and indigenous groups. While paying a great deal of attention to these categories, the General Comment adopted an "individualistic" notion of culture and cultural rights.

This approach emerges first in paragraph 9, underlining that "cultural rights may be exercised *by a person* (a) as an individual, (b) in association with others, or (c) within a community or group, as such". Firstly, the Committee recognised that the right to take part in cultural life can be

[27] CESCR 2009:52-53-54.

exercised not only collectively, but also by individuals in themselves (a). Secondly, while these rights keep an important collective dimension, and indeed they can be exercised in association with others or within a community, cultural rights are recognised and exercised by a person. In other words, rights-holders are individual persons, not community or groups.

In this regard, it is important to recall also the definition of culture provided in paragraph 13: it is conceived as the expression of human existence through which, not only "groups of individuals and communities", but also individuals "express their humanity".[28] In this perspective, the Committee underlined that culture is a good to be recognised and protected in favour of individuals, too. The adoption of such an approach is extremely meaningful as it can open the way to assure an effective protection of cultural rights into modern societies. Indeed, knowledge communications and people movements are so simple and swift that cultural identity – while keeping a strong collective dimension -- is becoming a good affecting everyone who in their lifetime can experience numerous cultural influences and thus build their own identity referring to different cultures and ways of life. The protection of cultural identity is becoming urgent and overdue, in particular, for migrant workers, refugees and asylum seekers. Indeed, their cultures are not, generally, shared with the majority of the society; at the same time, they can have multiple and interlaced identities that makes it difficult to identify them into one single community of belonging (Sen 2006).

The CESCR, in the General Comment No. 21, proved to overcome the traditional tendency only recognising cultural rights in favour of persons belonging to minorities and indigenous groups also in the section E of the Comment dealing with "Persons and communities requiring special protection". In this section, the Committee made reference to minorities and indigenous groups, but also to some other vulnerable categories of persons, namely women, children, older persons, persons with disabilities, persons living in poverty, and migrants. Two specific paragraphs, albeit quite short, are dedicated to the protection of cultural identity of migrants.[29] A specific reference is also present in relation to obligation to facilitate which, as underlined by the Committee, includes also the adoption of measures and programmes aiming to support the preservation of migrants' culture (CESCR 2009a:52(f).[30]

II.II. *The right to take part in cultural life in the CESCR's Concluding Observations*

To complete the analysis of the right to take part in cultural and clarify the concrete application it can have, it can be instructive to recall the Concluding Observations adopted by the CESCR at the end of the examination of periodic reports states are requested to submit according to Articles 16 and 17 ICESCR.

Before analysing the most interesting aspects concerning the right to take part in cultural life, it is possible to make some general considerations in this regard. First, due to the cross-cutting nature of cultural rights, on several occasions the Committee refers to cultural rights not only in the specific session concerning this, but in some other points of the Concluding Observations. So, for example, it is possible to find significant references to cultural rights in sections dedicated to some specific groups of vulnerable persons (i.e. indigenous peoples, African descent, migrant workers, refugees and asylum seekers) or to some specific issues (lands, equality between women and men, poverty, non-discrimination, business and human rights) or rights (in particular the right to work, to education, to health).

Second, the analysis of Concluding Observations makes it possible to remark the tendency towards

[28] In this regard, see also CESCR 2009:7; in this paragraph the Committee underlines that « The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality».

[29] CESCR 2009:34-35: «34. States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin.
35. As education is intrinsically related to culture, the Committee recommends that States parties adopt appropriate measures to enable the children of migrants to attend, on a basis of equal treatment, State-run educational institution and programmes».

[30] For a more comprehensive analysis of the protection of cultural identity of migrants, let me make reference to Ferri, 2017.

recognising the right to take part in cultural rights especially in favour of persons belonging to minorities and indigenous groups. On several occasions, the Committee expresses its concern about the situation of persons living in a vulnerable condition (migrant workers, refugees, asylum seekers, women …) and requires states to adopt measures necessary to guarantee them to enjoy social and economic rights without discrimination, and in particular the right to health, to work, to adequate housing, to education, and to social security. While, as underlined above, the General Comment No. 21 marked a significant turning point from this point of view, the Concluding Observations keep – also after the General Comment's adoption – several references to cultural rights of minorities and indigenous peoples.

The following paragraphs are focused on the main topics the Committee deals with in its Concluding Observations, and in particular in the sessions specifically devoted to the right to take part in cultural life.

Access to cultural institutions and protection of cultural heritage. Frequently, the Committee underlines the necessity to assure equal access to culture and cultural activities, and to institutions promoting culture, such as museums, cinemas, theatres, and so on.[31] In the most recent Concluding Observations, the Committee has made significant references to cultural heritage: it has recommended states to protect and preserve *cultural heritage*, expressing its concern about the massive destruction of cultural heritage and looting of cultural goods.[32] Sometimes, while more rarely, the Committee recognises the right to access to cultural heritage as an important condition to assure the effectiveness of the right to take part in cultural life. In this regard, it is particularly illustrative to quote the Concluding Observations adopted in 2008 in relation to report submitted by Angola; the Committee asked the state to include in its following report some information on the right to take part in cultural life and on measures adopted "to implement the right of Angolan communities, including San people, to the preservation, protection and development of their cultural heritage".[33]

On several occasions, the Committee has highlighted that members of minorities have *the right to express in the language of their choice*, and it has qualified this aspect as an element of the right to take part in cultural life. As highlighted by the Committee, the right to take part in cultural life implies that minorities must be allowed to use their own language not only in their private sphere, but also in public, for instance in dealings with public administration.[34] A special attention has been given to the use of languages at school: as underlined by the General Comment No. 21, member states must assure the right to be taught about and in one's own language; this aspect has been frequently stressed in Concluding Observations not only in relation to the right to education and the necessity to assure its cultural adequacy, but also in specific reference to the right to take part in cultural life.[35]

[31] CESCR 2017b: 60; CESCR 2014a: 24; CESCR 2014b: 27; CESCR 2013a: 30; CESCR 2013b: 35; CESCR 2010a: 37; CESCR 2008b: 40; CESCR 2000: 29.

[32] CESCR 2016a: 43; CESCR 2015a: 59; CESCR 2015b: 31; CESCR 2015c: 58-59; CESCR 2015d: 30; CESCR 2014c: 34; CESCR 2013c: 26; CESCR 2013d: 31. As destruction of cultural heritage see in particular and Iraq, E/C.12/IRQ/CO/4 (2015), paras. 58-59: «The Committee […] remains concerned that such acts continue to be carried out by ISIL and affiliated armed groups on a large scale […] The Committee recommends that the State party further strengthen its measures, including through technical cooperation with and international assistance from the United Nations Educational, Scientific and Cultural Organization and other organizations, to stop destruction and looting of sites and objects with cultural heritage significance, and take steps to bring perpetrators to justice».

[33] CESCR 2008b: 40.

[34] CESCR 2016b: 60; CESCR 2016c: 57; CESCR 2016d: 68; CESCR 2012a: 27.

[35] CESCR 2017c: 58; CESCR 2017d: 64; CESCR 2017e: 55; CESCR 2017f: 86; CESCR 2017g: 9; CESCR 2017h: 68. CESCR 2016b: 60; CESCR 2016c: 57; CESCR 2016d: 68; CESCR 2016e:56; CESCR 2016f: 63; CESCR 2016g: 74; CESCR2016h: 59; CESCR 2016i: 55; CESCR 2015b: 31; CESCR 2015e: 53; CESCR 2015f: 57; CESCR 2015g: 27 («The Committee is concerned about the limited and decreasing use of minority languages, particularly Uzbek, in education, the media and cultural life (art. 15). The Committee recommends that the State party allocate specific budgetary resources to promoting the cultural diversity of ethnic minorities, allow mother tongue education and minority language press, and enable all groups to express and develop their culture, language, traditions and customs»); CESCR 2015h: 50; CESCR 2015i: 31; CESCR 2015j: 37 («The Committee is concerned at the decreasing number of classes provided in the languages of ethnic minorities and of students attending schools where the teaching is given in the languages of ethnic minorities, owing to the insufficient number of teachers, the lack of retraining programmes for teachers and a shortage of textbooks in minority languages (art. 13). The Committee recommends that the State party

Another significant aspect recalled by the Committee concerns the *(right to) cultural identity*. On several occasions, the Committee has recommended states to take steps to allow minorities and indigenous groups to promote, develop and express their cultural identity.[36] The most meaningful aspect lies in the explicit references to the right to cultural identity. For instance, in the Concluding Observations adopted in 2013 with regard to report presented by Kuwait, the Committee recommended to the state to "develop a legislative framework which defines and recognizes that minorities, minority communities and groups, among others, have: (a) the right to freely choose their own cultural identity and to belong or not to a community and have their choice respected; (b) the right to conserve, promote and develop their own culture; and (c) the right to cultural diversity, traditions, customs, religion languages and other manifestations of cultural identity and membership. The Committee refers the state party to its general comment No. 21 (2009) on the right of everyone to take part in cultural life".[37] This is a really interesting passage as the Committee adopted the same formulation employed by the General Comment No. 21 in referring to the right to cultural identity. Another illustrative reference, underlining the deep connection existing between culture and identity, can be found in the Concluding Observations adopted in 2017 as for the report submitted by the Netherlands; referring to Dutch Caribbean territories, the Committee stressed the necessity to promote a culturally adequate education which "enable children to develop their personality and cultural identity" (CESCR 2017e: 55).

In relation to right to cultural identity, it is important to recall also the significant references to member states' obligations to recognise and protect traditional practices and ways of life. In this regard, it is possible to recall two important elements.

Firstly, Concluding Observations include some references to the right of minorities groups' members to have and see formally recognised in official documents their traditional names.[38] Secondly, on several occasions the Committee has underlined the necessity to recognise traditional means of livelihood and to assure access to ancestral lands. It has particularly stressed the double values that indigenous peoples recognise to their lands and to natural resources. On the one hand, lands and natural resources play a key role from the economic point of view, i.e. guaranteeing the necessary means of subsistence; on the other hand, the CESCR has emphasized the cultural meaning of traditional lands: indigenous groups have a spiritual and identitarian relationship with their lands represent a fundamental element of their own identity; in this perspective, ancestral lands must be recognised as "an integral part of their cultural identity (art. 15)".[39] Against this background, the Committee has pointed out that the right to take part in cultural life implies the protection of traditional lands and natural resources. In particular, states must recognise and assure the right of indigenous peoples to own, develop, control and use lands they have traditionally owned, occupied, or acquired, and express their free, prior and informed consensus with regard decision on their lands' use.[40]

take the necessary steps to improve education in ethnic languages, and consider adopting multilingual education programmes in the education system»); CESCR 2014b: 27 and 52; CESCR 2014c: 32; CESCR 2014d: 26; CESCR 2014e: 29; CESCR 2014f: 26; CESCR 2014g: 36 and 40; CESCR 2014h: 23; CESCR 2014i: 28; CESCR 2014j: 36; CESCR 2014k: 24; CESCR 2014l: 26; CESCR 2013a: 29; CESCR 2013e: 37; CESCR 2010b: 22; CESCR2006: 48.

[36] CESCR 2017e: 55 («The Committee reminds the State party of its general comment No. 21 (2009) on the right of everyone to take part in cultural life, in which it stated that education must be culturally appropriate and enable children to develop their personality and cultural identity, and to learn and understand the cultural values and practices of the communities to which they belong, as well as those of other communities and societies»); CESCR 2016h: 59; CESCR 2014b: 27; CESCR 2014h: 24; CESCR 2014j: 27; CESCR 2014k: 24.

[37] CESCR 2017g: 9 (« the Committee is particularly concerned about restrictions faced by Crimean Tatars and ethnic Ukrainians in exercising their economic, social and cultural rights, particularly the rights to work, *to express their own identity and culture* and to education in the Ukrainian language»); CESCR 2014c: 33 (here the Committee recalled «the right of everyone, alone or in association with others or as a community, to choose his or her identity, including the right to identify as belonging to an indigenous peoples»); CESCR 2014j: 36; CESCR 2013d: 30; CESCR 2013f: 21; CESCR 2012b: 27.

[38] CESCR 2017i: 75; CESCR 2016i: 55; CESCR 2015h: 50.

[39] CESCR 2011a: 25.

[40] CESCR 2017g: 59; CESCR 2017h: 70; CESCR 2014c: 29; CESCR 2014d: 27; CESCR 2014e: 9; CESCR 2014f: 6; CESCR 2014g: 38-39; CESCR 2014i: 29; CESCR 2012c: 33; CESCR 2012d: 11; CESCR 2012e: 29;

According to the 2008 guidelines, the Committee has often underlined that the right to take in part in cultural life implies the necessity *to protect and value cultural diversity*. Generally, this aspect is referred to indigenous peoples and ethnic minorities, and like the Concluding Observations stress the necessity to "preserve, develop and disseminate their identity, culture, language, traditions and customs".[41] However, it is significant that in some recent Observations, the CESCR has highlighted the importance of cultural diversity in order to assure the respect of migrants' cultural tradition and promote their integration. In this regard, it is particularly illustrative to cite the Concluding Observations adopted in 2017 as to the report submitted by the Republic of Korea; on this occasion, the Committee expressed its concern "about the low level of acceptance of multiculturalism among the state party's population. While noting the measures taken to facilitate the social integration of non-nationals in the state party, the Committee is concerned at the lack of policies promoting cultural diversity that reach out to the population at large [and] recommends that the state party promote the value of cultural diversity among its population, including by countering prejudices against non-nationals" (CESCR 2017j, 65-66). Another interesting reference in this sense can be found in Concluding Observations adopted in 2015 with regard to Italy; here, the Committee recommended the state to promote its efforts to assure second-generation migrants to maintain their mother tongue and cultural traditions. (CESCR 2015f: 57).

III. The right to take part in cultural life in the Convention on the rights of the child.

As anticipated above, the interpretation elaborated by the CESCR on the right to take part in cultural life has been upheld by the CRC too. Before looking into this aspect, it is important to make some considerations on cultural rights secured by the Convention on the rights of the Child. Unlike the ICESCR, this Convention seems to pay a great deal of attention to cultural identity, beginning with the Preamble which stresses "the importance of the traditions and cultural values of each people for the protection and harmonious development of the child" (XII recital). This cultural approach finds confirmation in the Convention's provisions which include some important references to the protection of cultural rights. In this regard, it is worth recalling Article 8 on the children's right to preserve their identity: while the provision does not make explicit reference to cultural identity, it offers some rooms to protect it. Even more important potentialities are offered by Article 20.3, which in relation to children deprived of family environment, states the necessity to take into account their cultural background, and Article 29 including the development of cultural identity among the aims of education. Finally, it is necessary to recall Articles 30 and 31 respectively dealing with children's rights belonging to minorities or indigenous groups, and the right to take part in cultural life.

III.I. *The children's right to cultural identity*

As already recalled, Article 8 of the Convention of the rights of the child deals with the preservation of children's identity. It does not include any specific reference to cultural identity, and it was elaborated according to a traditional approach which qualifies the right to identity as essentially the right to a name and nationality. However, in interpreting this provision, the Committee has sometimes qualified the identity in terms of *cultural* identity, in particular, the right to preserve identity assumes a cultural connotation with specific regard to children belonging to minorities and indigenous groups.[42]

CESCR 2011a: 25; CESCR 2011b: 34; CESCR 2009b: 27; CESCR 2009c: 35; CESCR 2009d: 33; CESCR 2009e: 36; CESCR 2008c: 20; CESCR 2008d: 34; CESCR 2008e: 15.

[41] CESCR 2017b: 60; CESCR 2017d: 66; CESCR 2016f: 63 ; CESCR 2016h: 59; CESCR 2016j: 67 («The Committee recommends that the State party take all necessary steps to strengthen the protection of cultural rights and respect for cultural diversity by fostering an enabling environment for the efforts of Afro-descendent communities to preserve, develop, express and share their identity, history, culture, traditions and customs»); CESCR 2015a: 59; CESCR 2015b: 31; CESCR 2015g: 27 ; CESCR 2015h: 49; CESCR 2014e: 29; CESCR 2014j: 36; CESCR 2014l: 27; CESCR 2014m: 36; CESCR 2013b: 35; CESCR 2013g: 35; CESCR 2013h: 30; CESCR 2007: 37 («officially recognize the need to protect the cultural diversity of all minority groups residing in its territory, in accordance with the provisions of article 15 of the Covenant».

[42] In this regard, see for example CRC 2011: 68, where the Committee recommended State to adopt necessary measures to ensure to

The children's right to cultural identity has been recognised in relation to cases in which they are deprived of their family environment or, in their best interest, they must be removed from it. In these cases, children are entitled to a special protection and assistance (i.e. adoption, foster placement); as provided by Article 20, "When considering [these] solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background". Recalling this provision and the right to preserve children's identity, the Committee has underlined that when it is necessary to implement special protection measures, states must adopt instruments to ensure children do not lose their cultural identity.[43]

The importance to protect cultural identity is deeply underlined by Article 29.1(c) which, among the education aims, includes "The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own". This is a really meaningful provisions underling the necessity to reach an equilibrium between the respect and promotion of children's cultural identity, and the development of their openness towards other cultures. As pointed out by the CRC in the General Comment No. 1 (2001) on the aims of education, the promotion of cultural identity is inconsistent with other education aims, and in particular with the promotion of understanding, tolerance and friendship among all peoples; instead, these two goals are perfectly coherent. Article 29.1(c) aims to reach "a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference" (CRC 2001:4).

A great recognition of the crucial role played by cultural identity can be found in General Comment No. 14 (2013) on the principle of the best interest of the child (Article 3.1). According to the Committee, the assessment and the identification of the best interests of the child must consider several elements, namely the child's own viewpoint, the child's identity, the preservation of the family environment, the care, protection and safety of the child, the situation of vulnerability, the right to health, the right to education. With specific regard to children's identity, the CRC specified that it encompasses also their cultural identity.[44] Recalling the right to preserve one's own identity (Article 8) and the necessity to take into account the cultural background in case of measures of special protection (Article 20.3), the Committee recognised that due consideration of the best interests of children implies guaranteeing them access to the culture of their origin, and more generally, to consider the "preservation of religious and cultural values and traditions as part of the identity of the child" (CRC 2013: 57).[45] This reasoning allowed the Committee to define, while implicitly, a right to cultural identity which must be recognised in favour of all children, and not

indigenous children the «right to grow up in a safe cultural environment, maintain and develop their identity and use their own language without being disqualified and discriminated against»; see also CRC 2012c: 39-40; here the Committee recommended State to «ensure full respect for the preservation of identity for all children, and to take effective measures so as to eliminate all efforts to assimilate ethnic minority populations with the Kinh majority» (par. 40). See also CRC 2010: 83; CRC 2006c: 79; CRC 2005a: 32; CRC 2004: 73.

[43] With specific regard indigenous children, see CRC 2009: 48: « In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity. Specifically, if an indigenous child is placed in care outside their community, the State party should take special measures to ensure that the child can maintain his or her cultural identity»; see also CRC 2012b: 43; CRC 2012a: 37-38. As for children not necessarily belonging to indigenous groups, see CRC 2005b: 40: «Mechanisms established under national law in order to ensure alternative care for such children in accordance with article 22 of the Convention, shall also cover unaccompanied or separated children outside their country of origin. […] When selecting from these options, the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process»; see also CRC 2006a: 41 and 2006b: 35.

[44] CRC 2013b: 55: «The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities».

[45] This reference was detailed in CRC 2017a: 31.

only those belonging to minorities and indigenous groups. Indeed, it is worth stressing the great deal of attention payed by the CRC to cultural identity of migrant children. In this regard, it is important to remark that, while the principle of cultural adequacy has been mainly recalled in relation to indigenous children, the Committee has sometimes referred it also to migrant children, too. It is really meaningful the General Comment No. 22 (2017) on the general principles regarding the human rights of children in the context of international migration, and the General Comment No. 23 (2017) on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, both jointly adopted with the Committee on the protection of the rights of all migrant workers and members of their families. These Comments included several references to the importance to adopt a culturally appropriate approach, especially in relation to the right to be heard,[46] to health[47] and education.[48] Certainly, the most explicit recognition of the right to cultural identity can be found in the General Comment No. 6 (2005) on unaccompanied and separated children which, in relation to the right to education, specified that they "have the right to maintain their cultural identity and values" (CRC 2005b:42).

With specific regard to the right to take part in cultural life, it is secured by Article 31 of the Convention of the rights of the child, along with the right to rest, leisure, play, recreational activities, and the arts.[49] As the right to take part in cultural life is associated with activities characterising free time, it is possible to affirm that originally cultural life was conceived according to a materialistic conception. On the one hand, this interpretation seems to be confirmed by the General Comment No. 17 (2013), adopted by the CRC on Article 31 of the Convention; indeed, in the Comment's introduction, the Committee declared to focus on "aspects related to creative or artistic activities", and pointed out the difference existing between this approach, and the "broader definition" adopted in relation to article 30 on the right of indigenous children to enjoy their own culture (CRC 2013a:6). However, on the other hand, in the following paragraphs the General Comment uphold the identitarian and anthropological notion of culture, elaborated by the CESCR. Indeed, the CRC explicitly "endorses" the definition adopted in the General Comment No. 21 according to which "it is through cultural life and the arts that children and their communities express their specific identity and the meaning they give to their existence and build their world view representing their encounter with external forces affecting their lives" (CRC 2013a:14 (f)).

The CRC underlined that culture plays a fundamental role as it provides children with references allowing them to discover, develop "and forge their sense of identity" (CRC 2013a:11) and their belonging. At the same time, the Comment stressed how this process is far from being passive and forced: instead, creativity and imagination of children consent them to re-interpret, re-create, transform culture, "translate and adapt its meaning through their own generational experience" (CRC 2013a:12).

As underlined above, the General Comment No. 21 underlined that the right to take part in cultural implies the right to be taught about one's own culture as well as about culture of others. To a certain extent, the CRC further developed this reference by highlighting that the right to take part in cultural life plays a fundamental role in learning and understanding other cultures, and in developing children's openness, spirit of understanding and an appreciation of cultural diversity.[50] Like the General Comment No. 21 of the CESCR, the CRC payed a greater deal of attention – if compared to previous CRC's Comments – to children who, due to their vulnerable conditions, need a special attention; in this way, recognised that the right to take part in cultural life must be recognised not only in favour of children belonging to minorities and indigenous groups. It is worth remarking the Committee's

[46] CRC 2017a: 36.
[47] CRC 2017b: 58.
[48] *Ibi*, para. 62-62.
[49] For a specific comment on this provision, see David 2006.

[50] CRC 2017: 12; see also para. 46: here, the Committee expressed its concern about the media's trend to not reflect the diversity of culture existing within societies and to prioritize mainstream culture.

references to refugees and asylum seekers children who, as pointed out in General Comment No. 17, must face several difficulties in enjoying rights secured by Article 31 and in particular their right to take part in cultural life. As a matter of fact, often they can find difficulties in maintaining connections with their culture of origin and, at the same time, their culture is different from the culture of host country, from which thus they risk being excluded. In this perspective, the Committee underlined that member states must pay special attention to assure children to preserve and practise their traditions and cultures.

IV. The protection of cultural identity and cultural heritage beyond international human rights law: the judgement of the International Criminal Court in the *Al Mahdi* case

The interpretation elaborated by the CESCR and CRC on the right to take part in cultural life received an historical acknowledgement in the judgement delivered in 2016 by the Trial Chamber VIII of the International Criminal Court in *Prosecutor v. Ahmad Al Faqi Al Mahdi* case (International Criminal Court 2016).[51] The special protection that cultural heritage requires in situations of armed conflict is a matter that has been widely recognised under international law since the Hague Convention of 1907[52] and, more recently by the Statute of the International Criminal Tribunal for the Former Yugoslavia,[53] as well as the Rome Statute of the International Criminal Court.[54] In particular, Articles 8.2 (b)(ix) and 8.2 (e)(iv) of the Rome Statute concerning crimes of war, respectively committed in international armed conflict or in conflicts not of an international character, qualifies as war crimes the "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives".

The judgement adopted by the Trial Chamber VIII of the International Criminal Court on the Al Mahdi case is an historical decision as it represented the first occasion on which the Court – and more generally, an international tribunal – adopted a judgment of conviction for crimes concerning the destruction of cultural heritage: indeed, Al Mahdi was convicted, under Article 8.2 (e) (iv) of the Rome Statute of the International Criminal Court, for the war crime of directing attack on ten religious and cultural buildings in Timbuktu (Mali). The facts occurred between June and July 2012, during the occupation of Timbuktu by the armed groups of Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM). Since April 2012 until January 2013, in the context of armed violence taking place in Mali, the control of the territory of Timbuktu was taken by Ansar Dine and the AQIM, which imposed their government on population. This government included an Islamic tribunal, an Islamic police force, a media commission, and the *Hesbah*, namely a morality brigade tasked with assuring the implementation of a fundamentalist version of Islamic Law. Mr. Ahmad Al Faqi Al Mahdi, a local Koran scholar and expert on religious matters, gave his active support to Islamic administration, and since April 2012 until September 2012 lead the *Hesbah*. As according a fundamentalist interpretation of Islamic law the construction of building over graves is prohibited, the Islamic government decided to destroy the mausoleum and cemeteries in Timbuktu. While having previously recommending not to raze the monuments, Al Mahdi then implemented the instructions received by supervising and actively participating

[51] For a comment on this judgement see, among others, Lostal, 2017a and 2017b; Rossi, 2017; Scovazzi, 2017; Webb, 2016, Casaly, 2016.

[52] Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land; see also the Four Geneva Conventions of 1949 (I Convention on Wounded and Sick in Armed Forces in the Field, II Convention on Wounded, Sick and Shipwrecked of Armed Forces at Sea, III Geneva Convention on Prisoners of War, and IV Convention on Civilians), and their two Additional Protocols of 1977, the Hague Convention for the protection of cultural property in the event of armed conflict (1954) and its two Protocols of 1954 and 1999.

[53] Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 3 (d): «seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science».

[54] In this regard see, *inter alia*, Francioni and Lenzerini, 2003; Gerstenblith, 2006 and 2009; Blake, 2011; Francioni, 2011; Frulli, 2011, Borelli and Lenzerini, 2012; Lenzerini, 2013 and 2016; Pocar, Pedrazzi, Frulli, 2013; Vlasic and Turku 2016 and 2017; Giulini, 2017; Venturini, 2017.

in the destruction. In the light of the admission of guilt made by Al Mahdi under Article 64(8)(a) of the Rome Statute, and the evidences presented, the Chamber concluded that all the elements for the co-perpetration (Article 25(3)(a)) of a direct attack of religious and cultural objects could be established, and sentenced Al Mahdi to 9 years of imprisonment.

The Al Mahdi judgement represented the first occasion on which the ICC convicted an individual for the war crime of directing attack of cultural objects, and the first occasion that an international tribunal qualified a crime against cultural heritage as the principal charge. Indeed, in some important cases, the International Criminal Tribunal for the former Yugoslavia has convicted individuals for attacking cultural objects under Article 3 (d) of the Statute, but in conjunction with other international crimes.

IV.I. *The recognition of human dimension of cultural heritage*

The innovative character of the Al Mahdi judgement lies also in the meaningful references made by the Chamber to cultural value of destroyed monuments. Indeed, in assessing the gravity of the crime in order to determine the appropriate sentence, the Chamber payed a great deal of attention to the value of monuments and the impact their destruction had on cultural life of victims. While the Chamber remarked that crimes against property are less grave than crimes against persons, it came to recognise the significant gravity characterising the crimes for which Al Mahdi was charged. The Chamber reached this conclusion in the light of several considerations, such as the careful planning of the attack, the intensification of its impact due to the relaying provided by media, the discriminatory religious motive characterising its commission. However, the most significant part lies in the value of destructed cultural goods. Recalling some testimonies, the Chamber underlined that the destroyed mausoleums were of highly significant for persons living in Timbuktu: they were important places of worship and pilgrimage, and their symbolic maintenance played a crucial role in the community life. In the light of this, the Court came to state that "targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu" (ICC 2016:79).[55] Moreover the Chamber distinguished between the direct victims of the crimes, namely the inhabitants of Timbuktu, and the indirect victims. As all destroyed buildings, with the exception of one mausoleum, had the status of protected UNESCO World Heritage sites, the Chamber pointed out that the attack and destruction affected also the broader population of Mali and the international community. In particular, with regard the international community, the Court underlined that, as affirmed in his testimony by Mr. Francesco Bandarin, UNESCO Assistant Director-General for Culture, the destruction of a protected site causes acute anguish for the entire international community because cultural heritage "is part of cultural life" (International Criminal Court 2016: 80).

These references were further and significantly developed in the reparation order adopted in 2017, in which the Chamber concluded that Mr Al Mahdi is liable for 2.7 million euros (International Criminal Court 2017). As the Al Mahdi's conviction concerns the destruction of cultural heritage, the Court pointed out the necessity to reflect on the importance recognised to cultural heritage by international law. In this regard, a high recognition is granted to reports submitted by some experts appointed by the Chamber to assist it in determining the reparations, and in particular to the report presented by Ms. Karima Bennoune, the UN Special Rapporteur in the field of cultural rights.[56] The Chamber totally embraced the approach, adopted by the Special Rapporteur, focused on the necessity to consider cultural heritage in "its human dimension" (ICC 2017a: 16). In the light of this, the Chamber stressed the role played by cultural heritage in protecting the identity of individuals and groups. Cultural

[55] See also para. 80: recalling the testimony of a witness, the Chamber underlined that «The witness testified that destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at *breaking the soul* of the people of Timbuktu» (International Criminal Court 2016: 80, emphasis added).

[56] In these paragraphs, the Chamber referred also to the Report submitted by Professor Marina Lostal who, in her turn, made some meaningful references to the approach adopted by the UN Special Rapporteur in the field of cultural rights.

heritage is defined as “encompassing the resources enabling cultural identification and development processes of individuals and groups" (ICC 2017a: 15); it provides individuals and communities with resources allowing them to qualify themselves, define their identity and build their sense of belonging. In the light of this, the destruction of cultural heritage has not only physical consequences, but it affects in a serious manner the identity and dignity of communities and individuals. The perspective adopted by the Chamber is even more evident by reading the report submitted by the Special Rapporteur. She recalled the interpretation elaborated by the CESCR on the right to take part in cultural life, and the reports the UN Special Rapporteurs in the field of cultural rights have elaborated over the years on the protection of cultural heritage. In the light of this, she highlighted that international human rights law recognises the "right of access to and enjoyment of all forms of cultural heritage" as a right finding its legal basis in the right to take part in cultural life (ICC 2017b: 8).

Concluding Remarks

The foregoing analysis makes it possible to underline the meaningful evolution of the notion of cultural rights, and how the notion has undergone significant elaboration in interpretation in the context of human rights treaty bodies. As underlined in the Introduction, when the two International Covenants were adopted they enshrined two different notions of culture and cultural rights. In particular, the conception of culture borrowed by the ICESCR was reduced to material expressions of artistic and intellectual activities and, unlike the definition founding Article 27 ICCPR, did not recognise at culture any role in the development of personal identity.

Since the 1980's legal scholars have promoted a meaningful reflection on notions of culture. Influenced by scholarly advances in the discipline of anthropology, they underlined the importance of the identitarian role of culture in relation to everyone, and not only to members of minorities and indigenous peoples. While the latter certainly face a high risk in seeing their cultural identity repressed, in this broader sense, cultural identity must be protected in favour of everyone.[57] The proposal formalised in the Fribourg Declaration represented a fundamental turning-point in this regard, as it overcame the dual definition of culture originally enshrined in international human rights law. Culture assumes a broad and anthropological denotation: it was recognised as including all human activities allowing persons and communities to "express their humanity and the meaning they give to their existence and build their world view" (Fribourg Declaration 2007: 2(a)). Against this background, the Declaration identified as "cultural rights" all rights that allowed individuals to develop and express their cultural identity. This elaboration, along with the UNESCO’s work, deeply influenced the interpretation elaborated in turn by human rights treaty bodies on cultural rights. This evolution has created a specific focus on the right to take part in cultural life, secured by Article 15(1)(a) ICESCR. Except for Article 27 ICCPR, Article 15(1)(a) ICESCR is the only provision including an explicit reference to culture. Consequently, the interpretation of the right to take part in cultural life has forced the CESCR to look into the legal conception of culture itself. Over the years, the Committee has recognised a necessity in overcoming a materialistic view of culture, and has progressively come to embrace the stance proposed by scholars and in particular by the Fribourg Group. This evolution culminated in the adoption of the General Comment No. 21 (2009): the formalisation of an identitarian notion of culture allowed the Committee to give a broad interpretation of the right to take part in cultural life. This right is now interpreted as a composite right including all rights allowing persons to develop and express their identity. Among the rights listed by the Committee, it is possible to distinguish three different groups of rights.

First: the rights already qualified as cultural rights, whose identitarian aspect is further emphasised by the General Comment (v. the right to enjoy the

[57] Fribourg Declaration, Preamble, 7th recital: «Observing that cultural rights have been asserted primarily in the context of the rights of minorities and indigenous peoples and that it is essential to guarantee these rights in a universal manner, notably for the most destitute».

freedom to create, individually, in association with others, or within a community or group; vii. the right to be taught about one's own culture as well as those of others; viii. the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life).

Second: the rights traditionally qualified as civil or political rights, which the General Comment reinterpreted in the light of their cultural value (iii: the right to enjoy freedom of opinion, freedom of expression in the language or languages of their choice; iv: the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers of any kind; ix: the right to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights).

Third: this most important category is represented by the right to freely choose one's cultural identity, to belong or not to belong to a community, and have their choice respected; the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life, and the right to have access to their own cultural and linguistic heritage and to that of others. Differently to the other two groups of rights, these rights are not recognized as such by international human rights instruments, as their "content" is covered by other rights, for example the right to cultural identity is protected by "a connexion des libertés", such as freedom of thought, conscience and religion, freedom of expression, the right not to be discriminated against, and the right to respect for private life (Meyer-Bisch and Bidault, 2010: 42). However, with the General Comment No. 21, these rights acquire a new guise, and are now recognised as autonomous and self-standing rights. This is the aspect which gives a revolutionary and historical value to General Comment No. 21 (2009).

However, the notion of culture adopted in the General Comment No. 21 is not a prerogative of the CESCR. As underlined above, it was upheld by the CRC. Unlike the CESCR, the CRC has not recognised the right to cultural identity from the right to take part in cultural life. Indeed, the references to cultural identity included in the Convention of the rights of the child facilitated the CRC in elaborating the right to cultural identity. At the same time, it must be underlined that for many years only children belonging to indigenous groups and minorities were conceived as entitled to this right; instead, more recently, the CRC has started to recognise this right in relation to every child, and in particular paying a great deal of attention to children living in the context of migration.

The analyses of the interpretation elaborated by the CESCR and CRC made it possible to underline that these bodies, while having some slight differences in their approaches, have come to recognise a right to cultural identity and a right to cultural heritage. Such a recognition is of utmost importance and can open the door towards the definition of a customary states' obligation to respect cultural heritage. In this perspective, the judgment delivered by the International Criminal Court in *Prosecutor v. Ahmad Al Faqi Al Mahdi* is particularly relevant.

The brief analysis of this judgment allowed for the assertion that the human perspective of cultural heritage is not a prerogative of human rights bodies, but it is starting to be recognised and valued by other international organs.

The *Al Mahdi* decision represented an historical turning point, not only as it the first time the International Criminal Court adopted a judgement on the destruction of cultural heritage but, more specifically, in the light of the perspective adopted by the Court with regard to this kind of crime. Cultural heritage is not perceived as a physical good belonging to the collective memory of humanity. In the judgement and even better in the reparation order, the Court made explicit that the importance inherent to this memory is represented by its human dimension and its identitarian role. The relevance of destroyed monuments in Timbuktu does not lie only in being an element of the heritage of humanity, but also in being part of heritage which makes it possible the cultural identity and development of

individuals and communities. In other words, cultural heritage is important not only as the heritage of humanity, but also – and primarily – as heritage of individuals and communities who build their identity with reference to it. This evolution has been made possible as the Court adopted the perspective, elaborated by the CESCR and the Special Rapporteur in the field of cultural rights on the notions of culture and cultural heritage and the interpretation they have elaborated on the right to take part in cultural life and, more generally, on cultural rights.

In the light of this, the *Al Mahdi* decision is extremely relevant from a double point of view. First, and more generally, it provides a good illustration of the authoritative character of the interpretative work of human rights treaty bodies and the Special Rapporteurs. While their recommendations do not have a legal binding nature, their interpretations can become a fundamental reference for the (binding) decisions of the International Criminal Court. Second, and with specific regard the topic of this paper, the *Al Mahdi* judgement represented one of the first occasions in which the anthropological and identitarian notion of culture, elaborated by the human rights treaty bodies, has been adopted and endorsed by an international court.

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Cultural Rights, local cultural policies and sustainable development: constructing a coherent narrative

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Abstract

Cultural rights are the foundation of cultural policies, and the guarantee of their legitimacy and coherence. The various documents elaborated in the framework of the UN human rights system are an extraordinary source of inspiration. Yet cultural rights in practice is still regarded as problematic at a national level in terms of the formulation of domestic public policy, but are not so difficult to identify and be operationalised at a local level. This article will attempt to be pedagogical, and explain to the reader: (a) the contents of key documents by the UN human rights system – considering their consistency with the new 'local sustainable development' agenda; (b) the global guiding documents that interconnect cultural rights and local sustainable development; (c) examples of cities and local governments that are operationalizing cultural rights at a local level; and (d) a potential list of key issues to be considered by actors on local cultural policies based on cultural rights.

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The 'right to participate in cultural life'

The international community has been very late the exploration of 'Cultural Rights'. The beginning of this exploration arguably commenced in 1990,[1] when a group of academics and activists approached the UN Committee on Human Rights in order to elaborate a 'General Comment' on the Article 15.1 (a) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR); it recognizes 'the right of everyone to take part in cultural life'.[2]

This international Covenant, (approved in 1966 and came into force in 1976), can be seen as the cornerstone of the UN work on cultural rights insofar as it is the only international legally-binding document that explicitly mentions 'the right to participate in cultural life'.[3] It is foundational for any document on culture produced in the context of the UN human rights system.[4] In order to understand the relevance of the ICESCR, one figure is worth highlighting: 165 countries have signed and ratified the ICESCR (and 5 countries more have only signed it).[5] This figure may be compared to the 144 countries that have ratified, accepted or accessed, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[6]

In order to be operational, the articles and paragraphs of the ICESCR need to be 'explained': the creation of a conceptual and operational frame, as clear as possible, mapping the reach of each human right, is essential. These 'explanatory' or 'standard-setting' documents are named 'General Comment' and written (and adopted) in order to explain exactly what is behind a specific right. In the area of cultural rights, the early work in the 1990s and the early years of 2000, guided mainly by academics and activists, led to the adoption in December 2009 of an important document: the 'General Comment 21: Right of everyone to take part in cultural life' (UN - Committee on Economic, Social and Cultural Rights, 2009). The numbering of the General Comments is chronological: as a reference, the General Comment 4 was adopted in 1992 and addressed the 'right to adequate housing'; the General Comment 13 was adopted in 1999 and addressed the right to education, whereas General Comment 15, adopted in 2003, addresses the right to water.[7] It must also be acknowledged that Article 15.1 (c), which recognizes the right of everyone 'to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [she or he] is the author' was also the object of a General Comment, number 16, adopted in 2006.

[1] The General comment (2009) mentions the first 'day of general discussion' of the Committee with representatives of international organisations and civil society took place in 1992.

[2] The exact wording of article 15 (source: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx) is as follows: (1) The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. (4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

[3] It is important to recall that the Universal Declaration of Human Rights, approved in 1949, is 'just' a declaration, with no legally binding provisions. Very often, human rights or cultural rights activists recall the wording of the Article 27 of the Universal Declaration of Human Rights which reads: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which (s)he is the author.

[4] This system includes: (a) the Human Rights Council (HRC), an intergovernmental body, to which the countries (or 'parties' once they have adopted the Covenant) have specific duties, such as periodically reporting on the activities implemented nationally in order to respect, protect and fulfil human rights, (b) the 'Special procedures', devoted to gather expert observations and provide advice and include individuals (called 'Special Rapporteurs' or 'Independent Experts' or are 'working groups', and (c) the Office of the United Nations High Commissioner for Human Rights (OHCHR) led by a High Commissioner.

[5] See http://indicators.ohchr.org/. Retrieved on 4 September 2017. See also wikipedia: https://en.wikipedia.org/wiki/International_Covenant_on_Economic,_Social_and_Cultural_Rights

[6] Source: http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E

[7] More information can be obtained in the website of the UN High Commissioner on Human Rights: http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx. The list of the General comments is directly accessible here: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11).

The 'General Comment 21: Right of everyone to take part in cultural life' includes a 'normative content', with accurate definitions of each one of the key concepts of the article (such as 'everyone', 'take part' or 'cultural life'). The General Comment also analyses 'special topics of broad application' as well as 'persons and communities requiring special attention'. An interesting example is paragraph 11, which relates culture to cultural life: 'culture is a broad, inclusive concept encompassing all manifestations of human existence'. The expression 'cultural life' is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future'. The General comment further explains the 'states parties' obligations', in two different lists of areas: firstly, a detailed list is provided in paragraphs 48 to 54, with a total of 23 policy areas, according to the key concepts of 'respect, protect and fulfil' (with this 'fulfil' still unfolded in 'facilitate, promote and provide');[8] secondly, in paragraph 55, the General Comment summarises the right in five 'core obligations applicable with immediate effect'. These are as follows:

(a) To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life.

(b) To respect the right to identify or not identify themselves with one or more communities, and the right to change their choice.

(c) To respect and protect the right of everyone to engage in their own cultural practices, while respecting all human rights which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right to use the language of his or her choice; freedom of association and peaceful assembly; and freedom to choose and set up educational establishments.

(d) To eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind.

(e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

These five 'core obligations' become a very useful list that provides a conceptual frame for cultural rights.[9] And the relevance of this for cities and local government will soon form a focus for this article.

The work of the Special Rapporteur on Cultural Rights

The General Comment 21 was adopted in 2009 and, in parallel, the Human Rights Council created a new position, the 'Independent Expert in the field of Cultural Rights'.[10] The first person to be appointed as Independent Expert in the field of Cultural Rights was Ms Farida Shaheed, a Pakistani sociologist and activist. Three years later, in 2012, the Human Rights Council decided to 'upgrade' this mandate, which was given the status of 'Special Rapporteur in the field of Cultural Rights', and the mandate of Farida Shaheed was extended for a period of three more years. In 2015, this mandate was further extended for a period of three more years and a new Special Rapporteur was appointed Professor Karima Bennoune for this position.[11]

The two special rapporteurs on Cultural Rights have elaborated several thematic reports. Among others, reports have been published on cultural

[8] It is impossible here to provide an in-depth analysis of the relevance of each one of these 23 policy areas to the policies, programmes and projects, developed by cities and local governments.

[9] Certainly, as the reader will have noted, the 23 policy areas and the 5 core obligations go beyond a 'narrow' interpretation of the right to participate in cultural life to explicit the interdependence and interrelation among this right and many other human rights (freedom of expression, education, etc.).

[10] In the Human Rights Council, the 'Independent Experts' are part of the Special Procedures of the Human Rights Council and their mission is to examine the implementation of a specific human rights theme as well as to report on the situation of a specific country.

[11] The positions of 'Independent Experts' and 'Special Rapporteurs' are honorary. Experts are not United Nations staff. They are not paid for this work. See OHCHR, Fact Sheet N° 27: Seventeen Frequently Asked Questions about United Nations Special Rapporteurs: http://www.ohchr.org/Documents/Publications/FactSheet27en.pdf.

heritage (2011), the enjoyment of cultural rights by women on an equal basis with men (2012), freedom of artistic expression and creativity (2013), advertising and marketing (2014) and the intentional destruction of cultural heritage (2016). Several of these reports contain important considerations related to local sustainable development as well as useful observations on local cultural policies.

Also, the special rapporteurs have elaborated 'country reports', after investigatory visits to countries such as Brazil (2010), Morocco (2011), the Russian Federation (2012), Bosnia-Herzegovina (2013), Botswana (2014) and Cyprus (2016), among others. Again, in these reports similar considerations on issues that are significant for cities and local government can be found.

An in-depth analysis of the implications for local policies on culture to be found within all the reports (thematic and national) – the significant local 'relevance' of the 'acquis' on cultural rights produced in the last decade by the Special Rapporteurs – is beyond the scope of this paper.[12] In order to cross-analyse (in the next section) whether the work undertaken by the special rapporteurs on cultural rights is especially significant for local policies on culture, this paper has chosen to reference the last general report (A/HRC/31/59), written by Karima Bennoune in 2016. In this report, the Special Rapporteur...

– Reminds that 'the purpose of the mandate is not to protect culture or cultural heritage per se, but rather the conditions allowing all people, without discrimination, to access, participate in and contribute to cultural life in a continuously developing manner' (para 9).

– Understands 'cultural rights as protecting, in particular: (a) human creativity in all its diversity and the conditions for it to be exercised, developed and made accessible; (b) the free choice, expression and development of identities, which includes the right to choose not to be a part of particular collectives, as well as the right to change one's mind or exit a collective, and indeed to take part on an equal basis in the process of defining it; (c) the rights of individuals and groups to participate – or not to participate – in the cultural life of their choice and to conduct their own cultural practices; (d) their right to interact and exchange, regardless of group affiliation and of frontiers; (e) their rights to enjoy and have access to the arts, to knowledge, including scientific knowledge, and to their own cultural heritage, as well as that of others; and (f) their rights to participate in the interpretation, elaboration and development of cultural heritage and in the reformulation of their cultural identities' (para 9).

– Announces the priorities for the mandate holder (para 33-44), to be the following: (i) the intentional destruction of cultural heritage, (ii) the impact of fundamentalism and extremism on the enjoyment of cultural rights, (iii) the situation of artists, scientists and intellectuals at risk; (iv) the right to artistic expression and creativity, including censorship and unemployment; (v) the cultural rights of refugees and migrants; (vi) public space; (vii) the cultural rights of children and youth, both girls and boys, and education about the importance of cultural rights and cultural heritage; (viii) the cultural rights of people with mixed or multiple identities, and (ix) the relationship between culture and new technology.

– Develops in some detail two areas as deserving special attention: (1) the relationship between individuals and groups, especially the use of the concept 'community' and 'communities' (para 10-19), and (2) the intentional destruction of cultural heritage (para 45-85).

These above initial two sections of this article have served to present the notable aspects of the UN human rights system in relation to cultural rights; the next sections will be devoted to the potential use of this 'acquis' by cities and local governments, particularly considering their consistency in relation to the 'local sustainable development' agenda, so central to many of the UN's Sustainable Development Goals and the broader aims of global sustainable development.

[12] It remains, though, an issue this author will develop in the near future.

Cultural rights in the frame of sustainable development

The now global discussion on sustainable development (or sustainability) has run (almost) in parallel to the evolution of international debates on cultural rights. As Baltà and Dragićevic Šešić (2017, 161) explain, 'sustainable development has become a core component of international policy discussions since the late 1980s, notably upon the publication of the UN-commissioned 'Our Common Future' report, which famously defined it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (World Commission on Environment and Development, 1987). A few years after, the Rio de Janeiro Earth Summit (UN, 1992) enshrined as the paradigm of coordinated local, national and global development strategies the three pillars of the 'economy', the 'social' and the 'environmental'. That the current 'three-pillar' paradigm simplifies a more complex reality is a well-known issue in the social and human sciences, and moreover, more 'modelling' is required for a wholesale social understanding and transformation.

A problem appears when such a paradigm becomes obsolete. The work of Thomas Kuhn (1962) and his now famous analysis of scientific revolutions, explains how paradigms are useful as far as they explain a current reality. The current paradigm, however, is being challenged arguably because it does not explicitly include now recognised essential values – values for each person in our world, such as dignity, well-being, happiness, balance, harmony and identity. These values lie at the core of the 'human development' concept, which has been taken shape with the work of, for example, Amartya Sen (1999), Arjun Appadurai (1996) or Martha Nussbaum (2001 and 2011), to name but a few. These values have always, arguably, been implicit to the development practiced by many traditional and indigenous people, and which now appear in new visions on development emerging in Bhutan (Ura, Alkire and Zangmo, 2013) or Latin America (Rivera Cusicanqui, 2010) or even in some Western countries (the 'transition towns' movement). All in all, the current three-pillar triangular paradigm of sustainability has difficulties in explaining reality, because it does not include as explicit two key components in our global world: human rights and culture.

In the last years, several attempts to explicitly connect cultural factors and actors to the global debate on sustainable development have taken place. Only a few will be mentioned here because of lack of space.[13]

– The advocacy for culture to become the 'fourth' pillar of sustainable development, by a range of actors, commencing with a seminal paper by Jon Hawkes (2001) and the Manifesto of Tutzing (Kupoge, 2001), the early (discontinued) exploration by the UN in the Johannesburg Summit Rio+10 (UNEP and UNESCO, 2002) to the important support from organisations such as UCLG (2010) with the Policy statement 'Culture: Fourth Pillar of Sustainable Development', and the European Economic and Social Committee (EESC, 2016) with research under the rubric 'Culture, Cities and Identity in Europe'. This discussion is certainly ongoing.[14]

– The pivotal UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO, 2005) recognises cultural rights as the basis of sustainable development, and stresses the connection between communities, identity, the cultural sector and sustainability. The Convention's management and ongoing discourse has paid attention to issues related to human rights, governance and mobility, mediating a difficult balance between the expectations of the stakeholders of the cultural sector, civil society activists and member states – as illustrated in the recent report that celebrates the 10th anniversary 'Reshaping Cultural Policies' (UNESCO, 2015).

– Key research reports, widely distributed, have accurately analysed the place of culture (including cultural rights) in sustainable development. The works of Nancy Duxbury (2011), the final

[13] A more complete analysis can be obtained in the paper 'Rio+20 and culture. Advocating for Culture as a Pillar of Sustainability' (Pascual, 2013) and the article 'Culture as a pillar in sustainability: the best is yet to come' (Pascual, 2017).

[14] See Pascual (2009); Pascual and Hawkes (2015) and Hawkes (2016).

publication of the European COST Action 'Investigating Cultural Sustainability' developed in 2012-2015 (Dessein et alii, 2015) and the more recent paper of Baltà and Dragićevic Šešić (2017), can all be regarded as essential landmarks in the new policy landscape.

– The global campaign 'The Future We Want Includes Culture', also known as 'Culture2015Goal', served to unite several global cultural networks (including civil society organisations, cities and national arts councils) in the advocacy for the place of culture (and cultural rights) in the UN Agenda 2030 and the Sustainable Development Goals (SDGs). The campaign produced four very concrete documents with proposals of a 'Culture Goal' (September 2013), culture-related targets (May 2014) and indicators (February 2015) as well as a 'closing document' with a self-explanatory title 'Culture in the SDG Outcome Document: progress made, but important steps remain ahead' (September 2015).

The adoption by the United Nations' General Assembly of the Agenda 2030, which includes the Sustainable Development Goals, has confirmed the central place of the term in global agenda-setting and policy-making (UNGA, 2015). This global Agenda of and for Sustainable Development Goals includes 17 goals and 169 targets, and will guide sustainable development policies and strategies in the next 15 years. This agenda can be regarded as a (more implicit that explicit) step forward, both in the recognition of culture as a dimension of sustainable development and in the acceptance that a human rights based approach to development[15] should be the approach to empower people and widen freedoms.

In the Sustainable Development Goals, the preamble and four of the targets explicitly mention culture, whereas other (secondary) references can be found in other four targets;[16] the wording 'human rights' can be found 12 times in the Preamble, once in the 'Means of Implementation' chapter, and once in the 'Follow Up and Review'. And, it is a revealing 'coincidence' that the only target that makes human rights operational is target 4.7, which reads as follows: 'By 2030, ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development'.
All in all, it must be explicitly asserted that cultural rights do not appear in the UN Agenda 2030 and the SDGs. Some critical articles on (the lack) of culture in the SDGs have already been published; for example, Martinell (2015) or Vlassis (2015) analyse in detail why United Nations is not yet ready to seriously and consistently operationalise culture (and human rights) in the development agenda. Being aware of the difficulties, and building on the argument that 'all SDGs should be 'localized' – localizing development means taking into account subnational contexts in the achievement of the 2030 Agenda, from the setting of goals and targets, to determining the means of implementation and using indicators to measure and monitoring progress', UCLG (2017) is preparing a guide on 'Culture and the SDG' for all actors interested in strengthening partnerships, policies, projects and practices around the place of culture in the achievement of the SDGs. This guide is based on the explicit recognition of cultural rights and provides the evidences that culture as a fundamental dimension in the localisation and the implementation of the SDGs is already happening. Other complementary explanations of the direct connection between cultural rights and sustainable development can

[15] A human rights based approach (HRBA) to development is not based on 'needs' but on the 'capacities' of people. 'The purpose of a needs-based approach is to reduce the gaps with transfers while that of a human-rights-based approach is to increase the capacities of people. Each one of the human rights is a capacity to be developed, which makes effective the exercise of freedoms and responsibilities included in this right. A HRBA first targets the development of these capacities.' See Meyer-Bisch (2015, 2).

[16] The above mentioned 'Culture2015Goal' closing document affirms that 'when compared to the Millennium Development Goals', the Agenda 2030 'represents a significant step forward with regard to the acknowledgement of the role of culture in development processes' but it affirms also that 'the Outcome Document falls short of a full understanding and affirmation of the importance of culture to sustainable development'.

be found in the texts 'Reflections on Culture, Sustainable Development and Cultural Rights' by Farida Shaheed (2014) and in 'Implementing Agenda 21 For Culture (and Cultural Rights) in Today's World: the Perspective of the UN Special Rapporteur in the field of Cultural Rights', by Karima Bennoune (2017).

As a summary of the place of cultural rights in the global policy framework of sustainable development, this article has chosen the paper written by Jordi Baltà and Dragićevic Šešić (2017) as a seminal reference. It recognizes that 'the discourse on cultural rights has increasingly entered discussions and approaches in the field of cultural policies, but the exact operational implications are not always made', and suggests five policy domains (for national or local policies) that summarize 'the implications for cultural rights from a perspective concerned with sustainable development and cultural sustainability'. The five policy domains are the following, and require a substantial recognition:

1. *Access to and participation in cultural activities*. This is the 'most evident' domain for a rights-based approach to cultural policy. The authors explicitly insist in the fact that this policy domain should not only include the 'passive' participation in cultural life (with the obvious 'availability of venues, resources and activities'), but that 'particular emphasis' should be placed in the active participation of citizens in cultural activities ('the ability of everyone to actively engage in creative processes, including individual and collective creation (or 'co-creation') of expressions, symbols, and narratives and the presentation of a wide range of individual and collective memories and heritages'. Therefore, the authors express a clear message on the need to balance passive and active participation.

2. *Participation in policy decision-making and management*. The second domain is closely linked to the first one, but it is identified as a different domain because of the importance of an explicit 'policy perspective' when the implementation of cultural rights is analysed; this perspective is explicit in the General Comment (2009) when it explains the contents of the 'contribution to cultural life' (para 15.b). This second domain 'involves the possibility to take part in decision-making processes as *regards* priority setting and resource allocation'. Programmes like participatory budgeting, the existence of cultural councils or deliberation bodies, as well as the representation of civil society in the management of cultural venues and facilities, are mentioned as examples.

3. *Addressing the obstacles that prevent participation in cultural life.* There are two main factors that lead the authors to identify this policy domain. The first one is explicit: the scientific evidence that 'gender, age, educational level, ethnicity, social class and spatial segregation may influence trends in cultural participation'. The second is more implicit than explicit: rights-based policies always focus on those-who-are-in-need. The authors identify several possible policies in this domain: 'improved communication of existing activities (including using a diverse range of languages and channels), outreach work, revised pricing strategies, partnerships with educational, social, and transport organisations, revised programming to cater to a diversity of interests and research on participation trends, enablers, and obstacles'.

4. *Protection of minorities and threatened identities and expressions.* The fourth domain is closely linked to the third one, but it is probably identified as a different domain because of the historic existence of nation-building 'majority' policies that threaten identities and expressions of minorities.[17] The principle of 'non-discrimination and equal treatment' that is a cornerstone of the protection and promotion of human rights (see General Comment 21, para 21-39) can be logically applied to cultural policies with these notions. Being this issue a very controversial one in cultural policy-making, the authors do not list a number of policies (such as quotas

[17] The use of the concept 'minorities' instead of 'minorised' may lead to accept a situation of imbalance and is not useful to deconstruct the narratives of the 'majority'.

on the expressions of 'minorities' in cultural policy, or presence of indigenous languages in the media), but remind that 'measures adopted to protect minority identities and expressions should in no way prevent individuals and communities from freely defining their identities and cultural practices of choice, nor prevent the ability of cultural expressions to evolve'.

5. *Protection of cultural resources, rights and activities which may be put at risk by policies in other areas*. The last policy domain refers to the analysis of 'other policies', those that are not related to culture, but that may negatively impact on cultural rights. The authors mention the free-trade agreements, the issues related to defamation of religion, and the restrictions to artistic freedom of expression.

Cultural rights in the cities: the conceptual frame

Cultural rights has an obvious local dimension. The work of the UN human rights system is meant to be implemented by all layers of government, and this is made explicit as early as in the resolution 10/23 of the HRC that created in 2009 the position of 'independent expert in the field of cultural rights'.[18] In fact, it is in the first 'mandate' in which the mention to local governments is explicit: 'To identify best practices in the promotion and protection of cultural rights at the local, national, regional and international levels'. The third mandate is also explicit: 'to work in cooperation with States in order to foster the adoption of measures at the local, national, regional and international levels aimed at the promotion and protection of cultural rights through concrete proposals enhancing subregional, regional and international cooperation in that regard'.
It is clear that the 'local' dimension is relevant for the work of the UN human rights system in the field of cultural rights. It is also worth stating that, although the UN human rights system has not yet elaborated a report on 'cultural rights and local cultural policies', this issue could deserve consideration by future mandate holders and become the central issue of a specific report in the future. Therefore, the next section of this article will make reference in those documents that have explicitly focused in the relation between culture, cultural rights and sustainable development.

The Agenda 21 for culture
The relevance of cultural rights for cities and local governments emerged explicitly at least since 2004, the year in which the Agenda 21 for culture was approved within United Cities and Local Governments (UCLG). This document was the first to address guidance and recommendations to cities and local governments around the world that wished to align their cultural policies (or their policies for culture) within the paradigm of sustainability. Some of the 67 paragraphs are explicitly related to cultural rights in the city, and it is worth to highlight the following:

Article 3: [Principle] 'Local governments recognise that cultural rights are an integral part of human rights, taking as their reference the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the UNESCO Universal Declaration on Cultural Diversity (2001).

Article 7: [Principle] 'Cities and local spaces are a privileged setting for cultural invention which is in constant evolution, and provide the environment for creative diversity, where encounters amongst everything that is different and distinct (origins, visions, ages, genders, ethnic groups and social classes) are what makes full human development possible'.

Article 17: [Undertakings] 'To establish policies that foster cultural diversity in order to guarantee a broad supply and to promote the presence of all cultures especially minority or unprotected cultures, in the media and to support co-productions and exchanges avoiding hegemonic positions'.

Article 19: [Undertakings] 'To implement the appropriate instruments to guarantee the

[18] Resolution 10/23. Independent expert in the field of cultural rights (http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_23.pdf). It is relevant to recall that the 'Summary of thematic issues' that appears in the page of the HRC devoted to Cultural Rights in September 2017 (http://www.ohchr.org/Documents/Issues/CulturalRights/Summaryonthematicissues-2017-new.doc) reproduces the same 6 areas of the initial mandate.

democratic participation of citizens in the formulation, exercise and evaluation of public cultural policies'.

Article 22: [Undertakings] 'To promote expression as a basic dimension of human dignity and social inclusion without prejudice by gender, age, ethnic origin, disability, poverty or any other kind of discrimination which hinders the full exercise of freedoms. The struggle against exclusion is a struggle for the dignity of all people'.

Article 63: [Recommendation] 'To the United Nations Committee on Economic, Social and Cultural Rights: include the urban dimension in its analysis of the relations between cultural rights and other human rights'.

Two years after the adoption of the Agenda 21 for culture (in 2006), the Committee on culture of UCLG published the document 'Advice on local implementation of the Agenda 21 for culture', and it included several considerations related to cultural rights.

This document affirms that 'local implementation of the Agenda 21 for culture can be seen as an exercise of cultural planning',[19] as an 'opportunity for every city to create a long-term vision of culture as a basic pillar in their development' and encourages cities and local governments to 'considering the local characteristics (history, population, size, type of government, vitality of civil society, identity and characteristics of cultural sectors...)' implement Agenda 21 for culture, offering 18 general principles and 4 tools: a Local Cultural Strategy, a Charter of Cultural Rights and Responsibilities, a Culture Council and/or a Cultural Impact Assessment system.

The recommendation on the Charter of Cultural Rights and Responsibilities reads as follows: 'A local charter of cultural rights is a document that specifically defines the cultural rights and responsibilities of the inhabitants of a territory. Such a document would be based on the Universal Declaration of Human Rights and other recognized international texts that cover human rights and culture. The effective development of a local charter of cultural rights relies on active participation by the cultural agents of a territory, the citizenry, the administration and experts in human rights. The document would normally be approved by the municipal plenary and implies the creation of a person or organization to guarantee the fulfilment of the Charter and to be the mediator in the often complex situations related to cultural rights and responsibilities.'

Therefore, it is in 2006 when the global community (one year after the adoption of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, one year before the adoption of the Fribourg Declaration) has access to a guiding reference to cultural rights at a local level.

The Fribourg Declaration

The document entitled as the 'Fribourg Declaration on Cultural Rights', also known as the 'Fribourg Declaration', was launched on two consecutive days, on 7 May 2007 at the University of Fribourg (Switzerland) and on 8 May 2007 at the UN Palais des Nations in Geneva (Switzerland). The text was promoted by the Observatory of Diversity and Cultural Rights (whose headquarters are at the Interdisciplinary Institute of Ethnics and Human Rights at the Fribourg University) and written by a group of international experts 'The Fribourg Group', coordinated by Patrice Meyer-Bisch. The International Organization of the Francophonie and UNESCO appear as partners of this initiative. The Fribourg Declaration can be understood as a civil society initiative and is supported by a wide number of NGO, civil society organisations and activists on cultural and human rights.

The Declaration 'groups together and defines rights that are already recognized, albeit in a dispersed manner in many instruments. Clarification is necessary to underscore the crucial importance of these cultural rights as well as the cultural dimension of other human rights.'

[19] Although the 'cultural planning' has become widespread over the last 20 years, and it has been used to (a) develop local cultural policies based on the values (memory, creativity, critical knowledge, diversity, rituality...) that culture brings to individuals and communities, and (b) to underline the significance of culture in other local policies, such as employment and social inclusion, and to introduce cultural considerations into all public policies. The concept of cultural planning, though, is still difficult, because some actors still see 'cultural planning' as an exercise to limit freedoms and influence behaviours.

The Declaration has 50 paragraphs, grouped in an Introduction, 12 articles and a foreword named 'Why a Declaration on Cultural Rights?' The 12 articles develop the following issues: (a) Fundamental principles; (2) Definitions; (3) Identity and cultural heritage; (4) Reference to cultural communities; (5) Access to and participation in cultural life; (6) Education and training; (7) Information and communication; (8) Cultural cooperation' (9) Principles of democratic governance; (10) Integration into the economy; (11) Responsibility of actors in the public sector; and (12) Responsibility of international organizations.

The Declaration is addressed to 'people, communities, institutions and organizations that intend to work to ensure the development of the rights, freedoms and responsibilities it expresses' (Fribourg, page 12). More explicitly the Declaration is presented 'with a view to encouraging the recognition and implementation of cultural rights at the local, national, regional and universal levels'. The Declaration, therefore, has been used by many local governments, as an explicit reference, in the elaboration of local cultural policies (see section 6, below).

The toolkit Culture 21 Actions

In 2015, the organization of United Cities and Local Governments adopted the toolkit Culture 21 Actions in order to complement the Agenda 21 for culture adopted in 2004, 'making it more effective' and to 'to provide an international framework supported by commitments and actions that are both achievable and measurable' (UCLG, 2015: 5). This toolkit has 100 actions, grouped in 9 commitments that 'summarize the cultural dimension of a sustainable city' (UCLG, 2015: 16) and promote the existence of 'the public' as the field in which the state (in this case, the local governments) and the society meet, discuss and interact. Therefore, the connection between culture, cultural rights and sustainable development is not only explicit, but becomes the main purpose of the initiative.

The nine commitments are the following: (1) Cultural rights; (2) Heritage, diversity, and creativity; (3) Culture and education; (4) Culture and environment; (5) Culture and economy; (6) Culture, equality, and social inclusion; (7) Culture, urban planning, and public space; (8) Culture, information, and knowledge; and (9) Governance of culture.

The initial 'commitment', devoted to cultural rights, is composed by an introduction and 10 actions. This commitment proposes that making cultural rights effective involves not only safeguarding every person's ability to access and take part in cultural life, but also devising governance arrangements which integrate diverse voices and allow them to take part in policy-making. Some of the most important characteristics can be summarized as follows:

a. A dynamic conception of the identity, which 'has gone from being a starting point to a negotiable destination'.
b. Human rights are seen as 'the basis and guarantee of the coherence and legitimacy of policymaking' and, therefore, cities are encouraged to explicitly refer to cultural rights as the 'foundation and guarantee of the coherence and legitimacy of [cultural] policies'.
c. Rights, freedoms, and responsibilities are strongly connected.
d. Local public policies are important, but citizens are recognized as the main actors in local cultural life. Local civil society organizations working in human rights should explicitly include cultural rights among their priorities.
e. Local governments should aim to define basic cultural services as basic rights that are afforded to all citizens, especially the most vulnerable groups and individuals, with the purpose of guaranteeing the development of their cultural capacities (rights, freedoms, and responsibilities).
f. Obstacles to citizens' access and participation in cultural life do exist. They cannot be hidden or masked. Obstacles should be identified and addressed.
g. The active involvement in cultural practices and cultural creation by as many citizens as possible is one of the priorities of rights-based cultural policies.

h. Cultural policies should pay special attention to the most vulnerable groups and individuals, including women.

The other 8 commitments of the Culture 21 Actions toolkit are full of interesting statements, sentences and prescriptions related (more implicitly, more explicitly) to cultural rights and have been included in the analysis that will be the focus of the following section.

Cultural rights in the cities: analysing the potential of Culture 21 Actions

This section will focus in the cross-analysis between the Culture 21 Actions and the eight core areas of cultural rights. The aim of this section is to support with objectivity the capacity of the 9 Commitments and the 100 Actions of Culture 21 Actions to be considered as a useful document on the local implementation of cultural rights.

These eight areas are the 'summary' (avoiding overlaps) of the areas covered by cultural rights, as explicitly listed in (a) the five 'core obligations applicable with immediate effect' that appear in the paragraph 55 of the 'General Comment 21', which summarise the right to participate in cultural life; (b) the six areas listed by Karima Bennoune in her initial report (UN - Human Rights Council, 2016, para 9) as the core areas for the understanding of cultural rights; (c) the contents of the Fribourg Declaration (ordered in a preamble, 12 articles and a foreword); and (d) the article written by Baltà and Dragićevic Šešić (2017) on the place of cultural rights in the frame of sustainable development. After a thorough analysis, the total amount of more than 30 possible areas has been reduced to a manageable number of 8 core areas (avoiding the obvious overlaps):

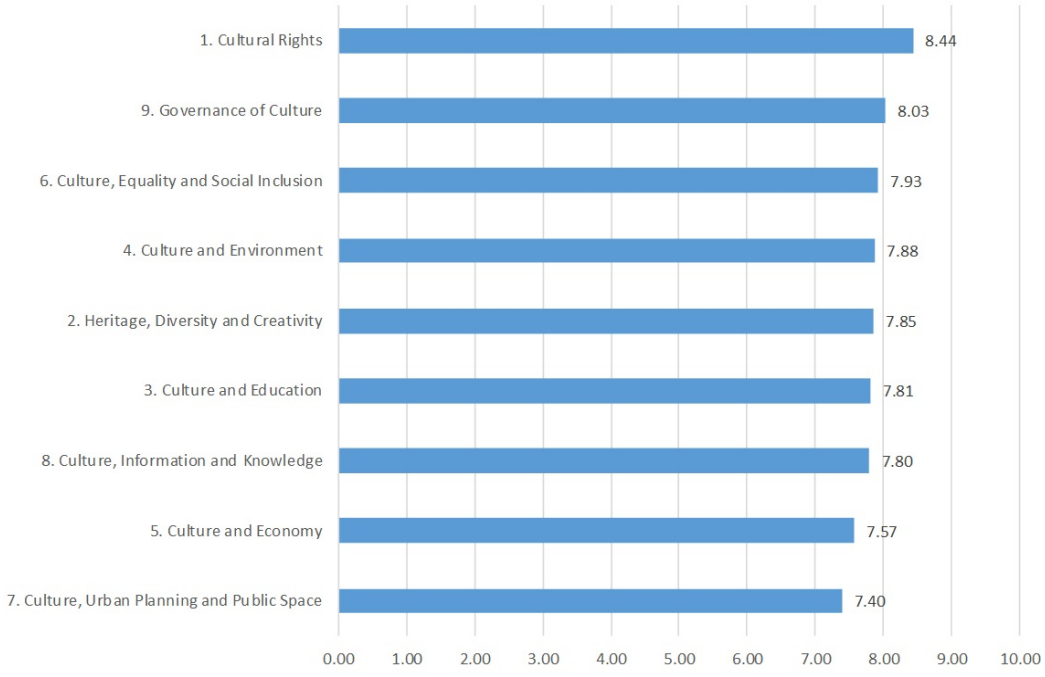
1. Access to and participation in cultural activities, including the rights of individuals and groups to participate – or not to participate – in the cultural life of their choice and to conduct their own cultural practices.
2. Human creativity in all its diversity and the conditions for it to be exercised, developed and made accessible.
3. Participation in the interpretation, elaboration and development of cultural heritage and in the reformulation of cultural identities, including the right to choose not to be a part of particular collective.
4. Participation in policy decision-making and management: governance of cultural policies, cultural institutions and cultural organisations.

Table 1. Analysis of Culture 21 Actions related to the eight core areas of cultural rights.

	Access to and participation in cultural activities	Human creativity in all its diversity	Participation in the interpretation, elaboration and development of cultural heritage	Governance: participation in policy decision-making and management	Addressing the obstacles that prevent participation in cultural life	Protection of minorities and threatened identities and expressions	Guarantee non-discrimination and gender equality	Cultural expressions, human rights and protection from policies in other areas	*average*
1. Cultural Rights	9.40	7.90	7.70	8.50	8.60	8.30	8.20	8.90	**8.44**
2. Heritage, Diversity and Creativity	8.25	8.58	8.25	7.58	7.92	7.83	6.67	7.75	7.85
3. Culture and Education	8.30	7.90	7.70	8.30	8.20	7.50	6.70	7.90	7.81
4. Culture and Environment	8.00	7.30	8.7	7.80	8.10	8.00	6.90	8.20	7.88
5. Culture and Economy	8.08	8.17	7.83	7.33	8.00	7.08	6.58	7.50	7.57
6. Culture, Equality and Social Inclusion	8.33	7.50	7.00	7.92	9.08	7.75	7.67	8.17	7.93
7. Culture, Urban Planning and Public Space	8.00	7.83	8.25	7.75	7.00	6.50	6.33	7.50	7.40
8. Culture, Information and Knowledge	8.73	7.64	7.09	7.82	7.73	7.27	7.18	8.91	7.80
9. Governance of Culture	9.00	7.36	7.36	9.09	8.64	6.91	7.09	8.82	**8.03**
average	**8.45**	7.80	7.77	**8.01**	**8.14**	7.46	7.04	**8.18**	

Source: Own elaboration

Figure 1. The nine commitments of Culture 21 Actions related to the eight core areas of cultural rights



Source: own elaboration

5. Addressing the obstacles that prevent participation in cultural life, including barriers or obstacles to the person's own culture or to other cultures
6. Protection of minorities and threatened identities and expressions
7. Guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life.
8. Cultural resources and activities: alignment with human rights and protection from policies in other areas that may threaten cultural freedoms

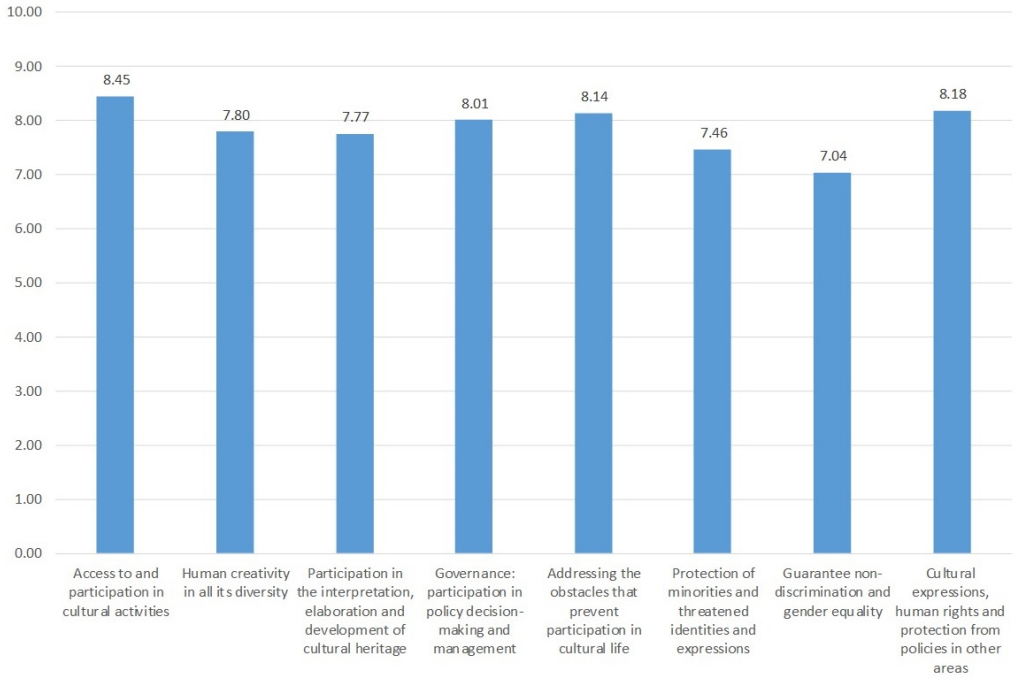
The result of this cross-analysis is shown in the tables and figures below. Table 1 shows the means of the estimate.[20]

When the data of the table are read horizontally, the reader observes the relevance of each one of the nine Commitments to the eight core areas of cultural rights. The analysis of the averages (last column) shows that the Commitment which is better aligned to eight core areas is the first one ('Cultural Rights'), followed by the Commitment on the 'Governance of Culture' (both with a mark over 8), whereas the Commitment which appears to be the weakest are 'Culture, Urban Planning and Public Space' (with a mark of 7.40) and 'Culture and the Economy' (with a mark of 7.50). Figure 1 illustrates, in a hierarchical way, these results.

When the data in Table 1 are read in vertical (last row), it shows which of the eight 'core areas of cultural rights' is better considered in the toolkit

[20] The relevance of the 100 actions of Culture 21 Actions to each one of the 8 core areas on cultural rights in the city has been estimated with a quantitative mark, that is, a figure between 0 and 10. In other words: each 'action' has been marked eight times, once per 'core area'. In this quantitative analysis, a mark of 10 means 'the relevance is explicit and there is complete coincidence in the wording of the core area and the action', a mark of 8 or 9 meant 'the relevance is explicit and there is a direct relation between the core area and the action', a mark of 6-7 meant 'the relevance is implicit and there is a possible relation between the core area and the action', whereas marks 4-5 meant 'there may be an implicit relation, but it is not clear' and marks 0 to 3 meant 'there is no relation at all between the core area and the action'. The resulting 800 marks have been statistically analyzed and the averages are shown in table 1.

Figure 2. Relevance of the eight core areas of cultural rights in the toolkit Culture 21 Actions



Source: own elaboration

of Culture 21 Actions. In this way, the core areas on 'the access to and participation in cultural activities', 'governance of culture', 'cultural expressions and other human rights', and 'obstacles' obtain a result over 8, whereas the core areas related to 'gender' and to 'minorities' obtain the lowest results (respectively, 7.04 and 7.46). Figure 2 illustrates, in a hierarchical way, these results.

Another significant conclusion of this analysis is that all the averages are over 7, a result that indicates that the toolkit Culture 21 Actions is a productive document to advance in the promotion of cultural rights at a local level.

Interestingly, the Committee on Culture of UCLG has designed, and is implementing, a range of capacity-building, learning and connectivity programmes based on Culture 21 Actions. The most relevant programmes are named as 'Leading Cities' and 'Pilot Cities'.[21] Each city is meant to undertake a local implementation of Culture 21 Actions, developing 5 activities with the support of an expert, or a team of experts. Some of the reports are already available, but for the time being, there is not yet an evaluation of the impact of these programmes. In the future, detailed analysis of the reports will be instrumental to assess the actual performance of Culture 21 Actions in the promotion of cultural rights at a local level.

This analysis is coherent with the statements of Philippe Teillet (2017) on the potential on Culture 21 Actions as an instrument to be used to promote the implementation of cultural rights at a local level: 'Culture 21 Actions suggests a series of concrete Commitments. The first is focused on cultural rights and includes ten actions which

[21] The list of Pilot Cities include Baie Mahault, Chefchaouen, Chignahuapan, Ciudad del Carmen, Concepción, Córdoba, Cuenca, Eivissa/Ibiza, Elefsina, Escazú, Esch-sur-Alzette, Gabrovo, Galway, Gijón, Izmir, Konya, La Paz, Leeds, Lisbon, Maastricht, Madrid, Mérida, Muriaé, Namur, Nova Gorica, Puebla, Rijeka, Santa Fe, Sinaloa, Swansea, the island of Tenerife, Terrassa and Timisoara. The list of Leading Cities include Angers, Barcelona, Belo Horizonte, Bilbao, Bogotá, Buenos Aires, Jeju, Lille-Métropole, Malmö, Mexico City, Paris, Porto Alegre, Talca and Vaudreuil-Dorion (UCLG, 2017, 10).

revisit the current cultural policies (…). The other eight suggest with several entry points, several actions that are likely to translate the defence of cultural rights in real acts.'

Cultural rights in cities: the implementation

The work of the Special Rapporteur on Cultural Rights since 2009, as well as the Fribourg Declaration since 2007, and certainly the documents produced by UCLG under the Agenda 21 for Culture process since 2004, have influenced cities around the world in the elaboration of local documents to promote the right to culture in the city, or, in other words, policy documents aiming at operationalising cultural rights at a local level. In this section, some of these documents will be cited, and presented in chronological order.

In Montreal in 2002, a new cultural organisation was created – Culture Montréal. Its mission was to influence, as an independent civil-society network, the elaboration of cultural policies in the new governance of the city/metropolis. The originality of Culture Montréal lies in the fact that it grouped hundreds of people — artists, cultural workers, and citizens — who share the vision that a cultural policy must be people-centred, that is, based on the cultural rights of the people. A critical element is membership: Culture Montreal is open to any citizen that is interested in the progress of local cultural policies. This openness widens any local debate on 'culture', which is not any more restricted to artistic stakeholders. The birth of Culture Montreal was not easy: tensions between the 'professional' cultural sectors (represented by the local arts council) and the more community-based or people-oriented cultural organisations, rapidly appeared as its founder, Simon Brault, explained in his book *Le facteur C* (2009). Since that initial moment, the activities of Culture Montréal have contributed enormously to the cultural policies of the city of Montréal. Officially, Montréal was one of the first cities to endorse the Agenda 21 for Culture (in May 2005) and was the first in the world in 2011, for the Summit Rio+20, to recognize culture as a 4th pillar of sustainable development. More recently, the city has adopted a new cultural strategy (2017).

In France, the independent civil-society association 'ReseauCulture21' was founded by Christelle Blouët in 2009, based on the existence of the Agenda 21 for Culture and the Fribourg Declaration, in order 'to think over the place and the role of culture in society through the development of diversity and cultural rights, the participatory processes and the transversality of culture in all of public policies' (Paideia, 2014: 96). Since 2012, the association focused its work in cultural rights in partnership with the Fribourg Observatory of Diversity and Cultural Rights (led by Patrice Meyer-Bisch, the main promoter of the Fribourg Declaration) and a programme named *Paideia*. During these five years of 'experimentation' (2012-2017), and using the methodology of action-research 'combining the theory with real implementation', the programme has produced more than 80 seminars and 300 case-studies on cultural rights, involving civil society organisations and institutions in several French local governments, including the Departments of Ardeche, Nord, Manche and Gironde, as well as the City of Saint Denis and the 'Territoire de Belfort'. The articles of Blouët (2017) and Meyer-Bisch (2017) provide with complete information of this programme.

Moreover, the analysis and the implementation of cultural rights in France is marked by the approval of two national laws: the Law on the territorial organisation of the Republic (NOTRe Law) and the Law on the freedom of creation, architecture and heritage (LCAP). Article 103 of the NOTRe Law, which is placed in the chapter devoted to the shared competences under the title of 'Solidarity and equality of territories', reads as follows: 'The responsibility on cultural issues is jointly undertaken by the territorial collectivities[22] and the State, in the respect of the cultural rights stated by the [UNESCO] Convention on the Protection and the Promotion of the Diversity of Cultural Expressions'.[23] The impact of these two

[22] The term 'territorial collectivity' is not easy to be translated. It is 'the generic name for any subdivision (subnational entity) with an elective form of local government and local regulatory authority. The nature of a French territorial collectivity is set forth in article 72 of the French Constitution. There are several types of territorial collectivity: municipalities, departments, regions, the collectivities with specific statute and the overseas collectivities.

[23] Own translation.

laws in the discussions on cultural policies of France has been very high. According to Jean-Pierre Saez (2017), the French legislative bodies that approved the laws chose to refer to cultural rights as a suitable notion 'as an interesting leverage to reinforce the participation of inhabitants in the cultural and artistic life, but also (…) as an alert on the noticeable weakening of public cultural policies'. In the same publication Philippe Teillet (2017, 23) identifies the key actors involved in the French debate, analyses the terms of the debate 'cultural rights are accused of spreading three risks: populism, communitarianism and individualism', and provides 4 scenarios for the future; while Jean-Michel Lucas (2017, 48) emphasizes the fact that the implementation of cultural rights is a matter of political will: 'the first challenge is to refocus cultural policies, from offering goods for consumption with miraculous sensitive and civilizational virtues to the relations among free people, in equal dignity (artists or not), which, on account of differences, have to bring their part of diversity along to the progress of our common humanity'.

The Cultural Strategy of Malmö (the most important city in the south of Sweden) was approved in 2014. It is a mid-term plan (the objectives should be valid until 2020), and it is unfolding with biennial plans of action. The Strategy is well aware of the current international frames on cultural rights (the work of UN human rights system) and sustainable development (the drafts of the SDGs and the Agenda 2030) and describes the commitment of Malmö's cultural actors to align their actions with these frames. The strategy states: 'Culture is a human right the city wants to afford all its inhabitants. Art and culture have an impact on every dimension of sustainable development. We endeavour to implement a cultural policy that provides people with a sense of purpose and influence and a cultural policy that reinforces all parts of our city in order to develop Malmö while also combating and diminishing the effects of segregation' (p. 4). Also, the strategy implicitly embraces the narrative of human development: 'Culture improves the ability of individuals and communities to confront life and the changes that come with it. Culture shifts perspectives, gets people to question, re-evaluate and empathise, and it also creates context and meaning' (p. 5). The Strategy places great attention in issues related to (a) freedoms are the basis of policies ('freedom of expression, artistic freedom and everyone's right to culture are fundamental prerequisites of expression as a right and a precondition' (page 4), to (b) addressing the obstacles that prevent the participation of all citizens in cultural activities, including specific work in neighbourhoods ('to make the practicing of and participation in culture more equal throughout the entire city' (p. 11), and to (c) the involvement of the youth population as the starting point (p. 11).

The cultural strategy (namely, the 'Cultural Guidelines'[24]) of Saint Denis, a diverse working-class municipality in the northern metropolis of Paris, France, is explicitly 'articulated around two strong systems of values: cultural rights and the Agenda 21 for Culture' (p. 7). The strategy supports the idea that public policies should aim at 'building the commons', an endeavour that explicitly needs the consideration of the cultural resources needed by each one of the citizens (page 45). The strategy is very critical with top-down policies aiming at the 'democratization of culture' (they have been 'carried out for decades and have failed to reduce inequalities in access to cultural life') and announces a people-centred baseline: 'the starting point for this new policy builds on the recognition of people, their wealth, their intelligence, their ability to develop their resources with others' (p. 8). The Strategy focuses on (a) the governance of cultural policies, programmes and projects (it includes the idea of creating a 'Cultural Rights Council'), (b) the interpretation, elaboration and development of cultural heritages that are meaningful to the citizens living in the area, (c) the involvement stakeholders in the areas of culture, youth, health, education and public spaces not only in the elaboration of the strategy, but also in its implementation by 'cultivating the times and the rhythms', (d) an in-depth analysis of 'challenges, risks and problems' each one of the 7 guidelines needs to take into account to be truly owned by

[24] In French: 'Schéma d'Orientations Culturelles'

all the citizens of Saint Denis, and therefore, successfully implemented.

The City of Merida, the capital of the state of Yucatan, in Mexico, approved a Charter of Cultural Rights in September 2015. The Charter mentions the work of the UN human rights system, as well as the Fribourg Declaration and the documents related to Agenda 21 for Culture. It also mentions the UNESCO Convention on the Protection and Promotion of the Diversity of the Cultural Expressions (2005) as a source of legitimization. The Charter has three main chapters: a long preamble, the chapter of 'Rights' (at its time, with five sections) and a chapter on 'Responsibilities'. Almost all the eight core areas identified in this paper appear under the chapter of Rights, with an interesting emphasis on 'the creation of the conditions for peace', the 'cultural and artistic education', the 'whole city as a cultural space', and 'memories, heritage and spirituality'.[25] In the chapter of 'Responsibilities', the promoters of the Charter invite all actors in the city, including the 'Municipality of Mérida, the residents, the private sector, the promoters, the organisations of the civil society, the cultural and the political organisations, as well as the people in transit', in an interesting sign to involve tourists and visitors (and migrants?) in the dynamics of the city. Another interesting opening of this Charter is that it is jointly signed by the Mayor, the Dean of the University, the director of a theatre company, the President of the Local Chamber of Commerce and the President of the Local Chamber of Radio and Television.

In a similar process, Quito, the capital of the Ecuador, approved in July 2016 a 'Declaration of Principles to Locally Implement Cultural Rights in the City of Quito'. The document also refers to the work of the UN human rights system, to the Agenda 21 for Culture, and to the Fribourg Declaration, but also to the Constitution of the Republic of the Ecuador, one of the few that includes articles (concretely, nine articles) related to cultural rights. Thus, the Charter is presented as a logical local development of the national prescriptions. The Charter has 14 articles and places emphasis in the following areas: (a) inclusion of all citizens in the cultural life of their choice and support to conduct their own cultural practices; the objective of gender equality and the special effort for the involvement of minorities is explicit, (b) the cultural use of public spaces and the importance of harmony between culture and natural areas; (c) the involvement of all in 'creative dialogues', fostering a people-centred and evolving understanding of identity; (d) right to cultural and artistic education and training, and (e) governance of cultural policies and programmes, with interesting mention to international cultural cooperation.

Wrocław, a historic city in Poland, was the European Capital of Culture in 2016. Normally, events related to the heritage, the arts, the communities and knowledge make up an intense year of activities. Capitals of culture do not normally include cultural research within their programme of activities. This is why the 'Culture and Human Rights: the Wroclaw Commentaries' becomes an unprecedented initiative (and now a central handbook on the subject published by De Gruyter), existing because of the leadership of the Mayor, Mr Rafał Dutkiewicz, the agency ARCult Media and a group of academics and researchers. The Wroclaw Commentaries handbook 'addresses legal questions and political consequences related to safeguarding human rights and cultural diversity, including freedom of, or access to, the arts, heritage and (old/new) media, questions of religious and language rights, the protection of minorities and other vulnerable groups'. This major text was commissioned to go beyond the present situation in the European Convention on Human Rights, with its 'declaratory' statements, and promote a way that 'public authorities be charged with specific duties' with regard to guaranteeing 'all citizens be given the opportunity to participate in cultural and artistic life'. The handbook is a compendium with detailed explanation of 123 keywords related to 'Culture and Human Rights', from the most obvious concepts of cultural policies such as 'arts education', 'languages of migrants' or 'press freedom' to other keywords that relate culture to other human rights (such as 'housing' or 'public spaces'). The document is a tool for law-makers

[25] The exception is the lack of explicit references to gender equality, and to minorities.

and policy-makers as well as others working in the field of culture and human rights.

The City of Mexico is also the Capital of a Republic. Both entities, the City and the Federation, have historically been associated to the progress of cultural policies; an example is Mundiacult (1982), perhaps the most influential international cultural policy Conference ever organized by UNESCO. The City of Mexico experienced a remarkable governance leap in 2016 with the elaboration of the first 'Constitution' of the City, marking the new status of the city, which evolved from being the 'federal capital' to a city-state within the federation. The elaboration of the chapter on Cultural Rights in the local constitution took place in 2015 and 2016, and the new constitution was approved in February 2017.[26] The Constitution includes a specific chapter (with 18 clauses) on 'Cultural Rights' within the article devoted to the 'City of Education and Knowledge'. The most remarkable characteristics of this are the following: (a) a strong commitment to guarantee access to and participation in cultural activities to all citizens; (b) the explicit recognition of freedoms of speech, opinion, artistic creation and information, while 'any kind of censorship is forbidden', and (c) the important contribution of communities, collective, autonomous and independent projects to the cultural richness of the city.

Conclusions: Cultural Rights are in the Agenda, but What's Next?

This final section of the paper is an attempt to summarise its main findings, and also become a list of key issues to be considered by actors on 'local cultural policies based on cultural rights'.

a. The current global debate on cultural rights has taken shape with inputs from different actors. Firstly, the UN, with the work undertaken by the Human Rights Council as well as by the Special Rapporteur on Cultural Rights. The General Comment on the 'right to participate in cultural life', issued in 2009, as well as the reports consecutively elaborated by Farida Shaheed and then Karima Bennoune, are fundamental documents. Secondly, civil society organisations and activists have also elaborated key documents (the Fribourg Declaration being principal) and is providing practical substance to cultural rights (Culture Montreal or ReseauCulture21, for example). Thirdly, new institutional actors have forged cultural policies on cultural rights, the best example is arguably the work undertaken by UCLG with the Agenda 21 for Culture. Fourthly, there is an interesting impact of the work on cultural rights of the above mentioned actors in other key institutions with global responsibilities on cultural policies, especially the UNESCO, who has so far provided limited ground to cultural rights (with the exception of the Convention on the Diversity of Cultural Expressions).

b. The current debate on the understanding and the implementation of cultural rights is not disconnected from debates on sustainability or sustainable development. In the documents that have sustained the narratives of cultural rights, as well as in the policies and programmes implemented by cities and local governments, there are explicit connections between cultural rights and other public policies. Probably, the best example is the toolkit 'Culture 21 Actions', as the quantitative analysis performed in this paper shows. These connections will hopefully grow if the localisation, the implementation and the evaluation of the UN 2030 Agenda and the Sustainable Development Goals are explicitly connected to local groups related to culture and human rights.

c. The local implementation of cultural rights is not an easy issue. There are many conceptual misunderstandings and myths that need to be explicitly addressed, with explicit counter-narratives. An analysis of 'myths and counternarratives' on the place of culture in the sustainable development of cities was recently undertaken by Duxbury, Hosagrahar and Pascual (2016) in a paper related to the elaboration of the New Urban Agenda. Also,

[26] Interestingly, some days after the approval of the Constitution of the City of Mexico, the national Parliament began the elaboration of a national General Law on Culture and Cultural Rights, which was approved in July 2017.

the papers written by Saez (2017), Teillet (2017) or Lucas (2017) provide interesting insights on the conceptual difficulties associated with this notion. It would be a good idea that a consortium of global actors involved in the promotion of cultural rights undertake an in-depth analysis of the myths / wicked narratives / difficulties and openly 'dissipates' them, providing constructive and positive counter-narratives and recommendations.

d. Conceptual difficulties are often associated, or are immediately followed by, operational difficulties. Official, optimistic narratives can say that cultural actors may consider cultural rights as an opportunity to connect the key areas related to culture (heritage, creativity, diversity) with wider debates related to human development (capacities and capabilities), to sustainable development (using cultural considerations to reconnect, localize and civilize the current three pillars) and to human rights (understanding that all rights and universal, indivisible, interdependent and interconnected). The reality is a bit more difficult. As Philippe Teillet (2017, 21) has noted, 'advocacy coalitions'[27] are needed, and they have to be very clear in what the objectives are, and what institutional innovation they require: 'public policies are subjected to the influences of several coalitions. Schematically, those that challenge the dominant definition of public action in cultural issues [the 'cultural rights' coalition] are confronted to those that defend the status quo and wish to obtain the protection if not the perpetuation of their position from the public powers' (Teillet, 2017, 21). A good analysis of the 'cultural rights' coalition in France has been undertaken by the same author (Teillet, 2017, 22). The struggle for cultural rights challenges the status quo on cultural policies. The struggle for cultural rights cannot be naïve and imagine that the new arguments will become hegemonic only because of the strength of the narratives.

e. The number of cultural-policy documents recently produced by cities and explicitly addressing cultural rights is growing; it is also likely that this amount will grow in the future with the implementation of Culture 21 Actions around the world. While most of these documents state that existing policies should be adapted to guarantee the active participation of all citizens in cultural activities (that is, reclaim truly 'people-centred' cultural policies) and new governance instruments are foreseen or planned, only time (and independent evaluations) will say if this new generation of policies have transformed the realities. In these documents, some core issues of cultural rights are not fully embraced (the clearest example is gender equality) and bolder governance innovation (a 'Local Special Rapporteur on Cultural Rights', a 'Culture Ombudsman' or a Local Council for Culture mandated to be active beyond sectorial parochialism) only shyly appear.

f. The last issue is related to Molière's play *The Bourgeois Gentleman*, in the conversation between Jourdain and 'the Philosopher'.[28] In the last two decades, thousands of cultural initiatives, committed to co-creating or co-producing the city, cultural democracy, the right to the city, creative place making or active participation of citizens, have emerged in almost all corners on earth. They constitute a formidable quarry of innovation in the concepts and the methodologies. These initiatives often relate culture with social equity, environmental balance, economic vitality, and the digital environment. But, not too often these initiatives refer to cultural rights to legitimise action.[29] Again, it is up to

[27] The 'Advocacy Coalition Framework' has been suggested by Paul A. Sabatier and, according to Teillet (2017, 21) is useful to explain the changes in the public action over periods on ten years or more. A complete (summary) guide on ACF can be found in the paper by Weible and Sabatier (2006).

[28] Jourdain requires support from the Philiospher to write a message to a woman; the Philiospher asks whether he prefers the message 'to be in prose or in verse'; Jourdain discovers: 'Thee forty years now I've been speaking in prose without knowing it!'

[29] Some of the most recent 'cultural struggles' are implicitly connected to this. An example could be the City of New York, with the elaboration of the official 'Create NYC', the city's first-ever cultural plan, and the emergence of a 'Peoples' cultural plan'.

the actors committed to cultural rights to invite these initiatives to their debates, and to elaborate the much-needed reading books that include both verse and prose.

The author of this paper will be more than satisfied if it has created some new enduring connections among actors involved in the elaboration of cultural policies and programmes. The conquest of space for new debate on cultural policies is a joint responsibility of all.

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Chinese Cultural and Creative Industries and the struggle for Rights in Chinese Opera

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Abstract

In the last decade, China's government has been supportive of various cultural trends in creative cities, intangible cultural heritage, and the arts. This paper examines the discourse of Chinese cultural and creative industries (CCI), specifically from the position of traditional Chinese opera. By focusing on the Xi'an *Qinqiang* (Qin opera) cultural industries reform, this article articulates the intimate relationship between Communist Party's (CCP) ideological evolution and the struggle of Chinese opera's development. As Chinese opera has been, and still is, a popular cultural form amongst peasants and workers (the founding base of the CCP), the struggle of the opera market reforms reflects the CCP internal turmoil in gaining its own political (representative) legitimacy. The paper suggests that despite fundamental ideological shifts, the CCP maintains sole legal ruling power over culture because of China's unique regional-central government structure and the 'social mediator' roles occupied by the artists. The continued negotiation between central (ideology), regional (urbanization) and community (artist) levels forms the structure of China's latest art market reform and allows us to understand the struggle of culture within the nation.

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Introduction

The concept of "Rights" may be universally recognised, and universal in its theoretical application, but is always subject to national, regional and cultural political economy. Indeed even where a country is signatory to international treatises (in 1997 China ratified The International Covenant on Economic, Social and Cultural Rights or ICESCR), it does not follow that the terms of the treatises will be self-evident in a regional or local cultural context. The context of this paper is China – as a society whose conditions of development is its recent socio-cultural history. Indeed, China has recently been supportive of the UN's Millennium Development Goals (2000-2015), and the following Sustainable Development Goals (the SDG's, from 2016), and also various cultural trends in creative cities, intangible cultural heritage, the arts and creative industries. Nonetheless, the concept of "cultural rights" in China is only partially intelligible (as is the concept of "human rights" in general – notwithstanding its new National Human Rights Action Plan 2016-2020).

In this article, I do not want to assess the relationship between human rights and culture, or attempt to discern the nature of cultural rights within Chinese society and its political regime. I wish to pursue a subject where the struggle for cultural rights can be identified as *immanent* to the socio-historical development of China's culture – that is to say, in a form whose conditions are the ideological shifts in China's stratified governance, enduring Communist Party (the CCP), and the management of economy and demography. The ideological shifts are vast, and here I can only refer to the arts and creative industries, but it is possible to articulate how the arts and creative industries have become a site for a struggle of legitimacy – for both artists and Communist Party. This article attempts to untangle this interrelated struggle, and with a view to understanding the concept of "rights" in a sense that registered the complexity of a political economy only obliquely related to Western norms. A "right" in China is not a simple self-assertion or self-evident in its application; it is embedded in a complex struggle for identity, legitimacy and authority, and always involves culture.

Chinese Opera and Chinese Cultural Industries

On 15th October 2014, after Xi Jinping's inauguration, the President gave *Talks on Literature and Art* at the Beijing People's Congress. In the Speech, Xi articulated that "arts and artists must not lose direction in the wave of market economy, must not be the slave of capital" and that "the future of Chinese cultural industries was to be anchored on traditional art forms" (China News, 2015). After having delivered the Beijing Speech, in December 2014, Xi, along with all six members of the China Central Standing Committee of the CCP – the most powerful decision making group in China – attended a Chinese Opera performance in celebration of the New Year. This extremely rare occasion was broadcast nationally and internationally (Xinhua Net, 2017).

There are two 'firsts' in the above events: this was the first time since Mao Zedong's 1942 Yan'an 'Talks on Literature and Art' that any leading CCP chairman had delivered a speech on the role of arts and artists (using the same title). Secondly, this is the first time since Mao's era that CCP leading members have collectively attended a Chinese opera performance, and which has been repeated annually to this day. This paper explores the significance of Chinese opera in relation to the CCP ideological evolution, contextualised in the broader and significant cultural industries reform.

China market reform was launched in 1978 in selected rural areas under the theme of the "responsibility system". Once it proved successful, in the mid 1980s, it was expanded to urban cities, across material and art sectors. Under this scheme, art institutions take responsibility for their own economic survival, and individual artists are encouraged to create and make profit outside the institutions. Market reform may have accelerated since 1992 (following the Tiananmen Square event) but for the art institutions, it was not until the early 2000s that art market reform was intensified with a newly emerging discourse of Cultural and Creative Industries. In 2004, the

phrase 'Cultural and Creative Industries' first arrived in Shanghai when the Shanghai Creative Industries Development Forum 2004, the first of its kind in China, was held in Shanghai (Li 2011: 13). The discourse follows closely the 1998 UK policy of reviving the post-industrial society through culture and creativity (DCMS, 1998). It was not until 2009, however, that Chinese national policy adopted the term and formed a visible policy discourse. Between the policy synonyms of cultural industries, cultural economy, creative industries and creative economy, China preferred "Cultural and Creative Industries" – hereafter, CCI (White and Xu, 2012). Since 2010, we have seen intensified nationwide art market restructuring under the new name of CCI reform. China's new political and economic ambition is set to make the CCI its pillar economy by 2020 (Zhang, 2017, Ma, 2015, White and Xu, 2012, Su, 2011, Zheng, 2010, Hartley and Montgomery, 2009, O'Connor, 2009, Chang 2009, Kong, 2005, Keane, 2004).

In the monograph, *Urban Politics and Cultural Capital, the case of Chinese opera* (Ma, 2015), the author defines the interrelation between the struggle of Chinese art market reform/CCI reform in the new millennium and the CCPs' struggle in retaining political (representative) legitimacy. This is, as the author argues, because Chinese opera has been, and remains, the popular art form amongst peasants and workers. Under Mao, Chinese opera was institutionalised and Chinese artists were provided unprecedented political capital, and were made the new elite class. This act ensured that the historically repressed social class, and their associated art forms, gained distinction, which in turn provided the CCP with identified representation and legitimacy. In the post-Mao era, opera institutions are placed under dual pressures of gaining economic success whilst supporting CCP ideological legitimacy. Chinese opera companies are forced to abandon the traditional Chinese opera audience of the peasants and workers, who cannot provide the required economic success and legitimacy, whilst struggling to reach the new middle-class audience and nurture their new taste towards traditional opera. In this process, Chinese opera struggles to articulate its value and representation; such struggle mirrors directly the CCP ideological evolution in articulating its own representation and legitimacy (Ma, 2015: 2-10).

This article expands the above argument in relation to China's art market reforms within the latest discourse of cultural and creative industries. Contextualized in the case study of Xi'an *Qinqiang* (Qin opera) institution reform in the early 21st century, this paper argues that Xi Jinping's inaugurated speech on Literature and Art, together with the CCP's leading members collective opera viewing, highlight the urgency of the CCP's re-articulation of its representation and legitimacy. This paper suggests that despite fundamental alterations in CCP ideological representation, the reason for the CCP retaining legitimacy lies in the unique regional-central government structure and the social mediator role of the artists. *The continued negotiation between central (ideology), regional (urbanization) and social community (artists) levels, supporting each other for their own survival and legitimacy, forms the structure of China's latest art market reform, in the name of "cultural and creative industries"*.

This paper consists of two parts. Part one conveys three key concepts of cultural and creative industries: cultural policy, urban development and artists – contextualized in terms of China's political, economic and social conditions. Part two exemplifies the uniqueness of Chinese cultural industries through a case study of Xi'an *Qinqiang* company reform, which took place in the late 2000s and early 2010s. For the completion of this paper, a one month period of field research took place in Xi'an, with the assistance of the Xi'an Arts Research Institution. Around twenty interviews were conducted, including scholars, performers, directors, senior administrators and audience members. The field research data forms the empirical basis of the argumentation.

Part 1: Discourse of Chinese Cultural and Creative Industries

CCP Ideology vs. Cultural Policy

It has been suggested that China does not have a national culture policy. Instead, the CCP has provided systematic direction for political, economic and cultural policy making (Wang, 2017;

Su, 2015; Ma, 2015; Zhang, 2010). In this section, we will focus on the evolution of CCP ideology and how it influences Chinese art market development.

Fei Xiaotong, the founding figure of Chinese sociology, states in his book *From the Soil* (1947/1992) that the foundation of Chinese society emerges from *the rural*. In the creation of Modern China in the early twentieth century, whilst the Nationalist Party relied on economically powerful middle-class entrepreneurs to gain legitimacy, the Communist Party turned to the rural peasants and working class for support, (and which made up over 90 percent of the total population). In 1942, Mao Zedong delivered his famous 'Talks on Literature and Art' from the then CCP's headquarters in Yan'an. In this talk, Mao articulated that "our literature and art are for the workers, the class that leads the revolution; and peasants, the most numerous and most steadfast of our allies in the revolution" (1972: 29). The CCP gained a founding legitimacy and then ruling power through the support of the peasants and workers – with the promise of representing the historically repressed underclass and turning them into the new masters of the new regime, namely the People's Republic of China (Su, 2015; Chang, 2009).

The CCP founding ideology and modes of political representation began to evolve in the post-Mao era. If Deng Xiaoping's call in 1979 to allow "a small number of people to become rich first" was accepted by the mass people as the short-term solution to economic development, Jiang Zemin's 2002 statement of "The Three Represents", welcomed capitalists into CCP membership, cast doubt on CCP representation and legitimacy (Jiang 2002: 177). This ideological evolution continued, and in 2004, only a year after Hu Jintao's succession (2003 to 2012), the President stressed his famous concept of a "unified harmonious society", expressing the need for continuous economic growth in the name of "generating welfare for *all*" (Zheng, 2010: 66, emphasis mine). Then in March 2007, Prime Minister Wen Jiabao made even more explicit references regarding "the party-state representation of *all* different viewpoints and sharing the world in common" (Zheng 2010: 266, emphasis mine). Such blurred ideological representation placed CCP legitimacy under increasing scrutiny (Lu, 2015; Lu, Yang and Li, 2008; Sato and Shi, 2006; Chen, 2001).

The CCP struggle of articulation in the practice of political representation is reflected directly in the struggle of Chinese opera reform. In the post-Mao era, Chinese opera institutions, which were established in the 1950s, began to see the withdrawal of state funding, and were forced to justify their legitimacy through the dual demands of economic profit-making and a continued role in CCP legitimacy-maintenance (Ma, 2015). The challenge, however, was that the base of the opera audience remains the rural population and urban working class. In the last decade, the world has seen China's fast economic rise, but also witnessed a gulf of class division between a small number of elite and the mass underclass, made up predominantly of peasants and workers (Xu, 2014; Keith and Lash, 2013; Wang, 2006; Yao, 2004). In the post-Mao era, these people constituted the lowest economic, social and educational group and are still often referred to as "the disadvantaged group" (Goodman, 2014; Chen and Hamori, 2014; Chung, 2013). They cannot provide opera houses with required financial returns, hence contribute to the opera company's own legitimacy-building, nor does the opulent opera represent the value and identity of the peasants and workers. Increasingly, the opera houses abandoned their traditional audience constituency, nurturing instead young professionals and the new middle class who possessed financial capital. However, these new audience groups possessed the least "habitus" (in Bourdieu's sense) for the appreciation of local opera, and also possessed the least desire to "consume" cultural products that are embedded with CCP ideological values. Chinese opera's alienation from both categories of audience – the peasants and workers and the new middle class – articulates the CCP's own struggle to speak its own legitimacy to society's new constituencies, while continuing to represent "*all*".

The significance of Xi Jinping's 2014 Beijing Talk, addressing traditional art forms as the anchor of Chinese future and its cultural industries, and the

following event where all the members of the China Central Standing Committee joined an opera audience, was not merely cultural or aesthetic. It was a politically symbolic act. It was a re-articulation of the CCP's founding ideology (from Mao's era) involving an unmistakable representation of the CCP's founding constituencies – peasants and workers. Moreover, we can identify the ideological struggle of the CCP and its modes of representation at a regional level, in the growing phenomenon of urban development.

Urban Development

When the People's Republic of China was established in 1949, the Chinese urban rate of growth was from a baseline of 10.6% of the total population; by 2011, the urban population is 51.3%. For the first time in Chinese history, the majority of the population live in urban cities (National Bureau of Statistics, 2007, 2011); and in the past three decades, China's urbanization has been focused on creating city distinction and attractions for both tourists and investors (Fung and Erni, 2013; Chen, 2009). The creation of successful cities is a major national policy objective. The dual pressure shouldered by the CCP – ideological and economic – is therefore further refracted at regional and municipal levels. There are two dimensions of governance, representation and legitimacy-building for regional and municipal government – two distinctive areas of ideological and economic pressure – central-regional management, and local property developers (acting as project executioners). We will consider these both.

Central-regional management structure

In the recent rapid and politically-engineered process of mass urbanisation in China, the country has been following a unique central-regional decentralization management structure. Instead of having regional resources decentralized into the hands of individual entrepreneurs, they are all placed under the management of the municipal government, with certain independent policy-making responsibilities and high-profit attainment as an incentive. If the 'managers' become overly unruly, for political and/or economic reasons, they could be dismissed and replaced by members of the central party-state management. This is what is often referred to in the context of the politically directed, market-oriented strategic framework of China's economic reform (Shirk, 2011; Naughton, 1996).

In *Practical Reason: On the theory of action* (1998), Bourdieu reminds us that in a socialist regime, the government monopolizes the market and effectively functions as a "central bank", where the party-state has the power to redistribute resources and capitals to make new elites as appropriate. In China, the central government not only acts as a central bank but also holds direct managerial power over regional government. Even if this seeming line-management is complex, it makes central government the fulcrum and most powerful player in the game of market development, and ensures that regional (and municipal) government is obligated to support CCP ideological development, for maximized resource allocation, policy development, and therefore the successful growth of its major cities and thus economy as a whole.

Property developers as project executioners

Once in line with the CCP ideological development, the regional government needs to further demonstrate its legitimacy through market economic success. As China's urban development consumes over 50 per cent of its natural resource production (iron ore, steel and coal and so on), the construction industry has become a major driver of economic development and guaranteed economic returns for any municipality (Anderlini, 2011). To ensure a quick profit return (and registered economic development indications) a regional government assigns major public works projects to property developers.

In the process of such profit-led economic reform, the primary groups for which change is registered is the rural peasants and urban workers. Between 1987 and 2001, over 60 million rural residents lost claims to the land on which they had previously worked, generating an unprecedented wave of rural-to-urban migration. Due to a unique two-class *hukou* system – which was introduced in 1958 to manage population distribution – rural *hukou* holders in urban cities have no claim to

welfare systems such as housing, schooling or hospitals and are also awarded limited legal protection. And from the mid 1990s, urban workers have experienced large scale redundancy, with women and the middle aged suffering the worst. Meanwhile, the government property boom and infrastructural development had been focusing on "gated valleys" (security-zoned residential luxury housing), internationally franchised shopping malls, and grand theatres, facilitated by urban planning methods that have effectively dismembered social communities without allowing for the development of new ones (Harvey, 2009; Cai, 2000). Even though regional governments may thus have fulfilled, in the short term, their dual requirements in supporting CCP ideological direction as well as economic development, a by-product is the loss of trust and political clarity in the function of government. This extends to a loss of morality and fundamental political belief in the principles of the State. The national scandal of baby milk contamination after July 2008 – with an estimated 300,000 victims and an international scandal after attracting the World Health Organisation – was symptomatic of a lack of political focus on the non-economic non-governmental aspects of social life. Fundamental questions of value, belief, ideological representation and legitimacy are now routinely directed not only at the regional governments but the CCP (Lu, 2015; Shi, 2015; Goodman, 2014: 44; Shen, 2008).

Xi's Beijing Speech, asserting that "arts and artists must not lose direction in the wave of market economy, must not be the slave of capital", and the CCP leading officials viewing of Chinese opera, can be situated within a reargued attempt to readdress the ideological impact of a hugely imbalanced social development through rapid urbanisation. Moreover, the significant issue remains in the form of the consequent exacerbation of class divisions, and how the CCP are managing and articulating their own legitimacy. This issue pertains at community level.

Chinese Opera Artists and the Political Capital

Following Florida's *The Rise of the Creative Class* (2002), there has been increasing research on Chinese artists, community building and civil society development (Kong, 2014; Fung and Erni, 2013; Lisitzin and Stovel, 2002). Artists as a professional category can be sub-divided into two basic groups: the traditional "scholar artists", and "opera artists" or performers who obtained political distinction under Mao's regime. Both artists' groups act as mediators of central-regional government policy, actively reviving regional art markets and local communities. However, pressure to preserve their own professional identity and distinction means that their role as mediators is collaborative in nature; they do not function independently, and not in a way in which they could challenge the ideological development of regional government market-orientation. Their support of opera art forms and associated local communities may be valuable, but is limited.

1) Historical Elite Scholar Artists

Fei Xiaotong in *China's gentry: essays on rural-urban relations* (1980) asserted that in a traditional agrarian society (such as China), although government rule may be dictatorial, the force of that form of power does not penetrate to community level to any great extent. Instead, the basic unit of society is family, and a truly pervasive power is generated through patriarchal privilege, or what is traditionally called paternalism – the notional rule by elders. In particular, and historically in China, these male elders or rulers were predominantly learned Confucius scholars (*shidaifu*). They maintained a position of respect at the pinnacle of Chinese society, second only to members of the Imperial family. They were the leading figures of the community and took on key roles, such as in negotiating between the imperial rule, local economy management and community building (Yao, 2000, Murck, 1980: 1).

2) New Elite Opera Artists

At the opposite end of the social stratum were the Chinese opera performers. In traditional Chinese society, scholars were certainly at the top of social career scales, whilst opera singers, together with prostitutes and beggars formed the lowest category (Goldman and Leo, 2002; Schwartz, 1996: 38). Kraus in *The Party and the Arty in China* (2004) pointed out that under the People's Republic of China, performers gained a significant professional artistic status. While this is true, but

with the State distribution of political capital and recognition, principally through institutions and titles, the fundamental change is artists were co-opted into the State. Though state patronage, opera singers became part of an elite social class. This change was unprecedented and altered the artists' historical relationship with the State (Ma, 2015: 43).

Evasdottir in *Obedient Autonomy* (2004), argues that the Chinese scholar exists within a constant dilemma, and so struggling to retain a sense of intellectual integrity – between simultaneously fulfilling their obligations to government and to the mass population. Even though scholars are the leading historical figures in any local community, their sense of self-preservation made them reluctant to challenge the limits on their political influence. Before becoming the elite class themselves, opera performers acted for the audiences of their own class, often mocked the State, challenged and questioned injustice on behalf of their audience, which were, of course, the lower classes (Wu, 2006). Upon receiving noble status, opera performers were conscious of that their new found distinction and professional legitimacy was only obtained through a unique historical opportunity. And as with the scholars, opera performers faced the same dilemma of integrity: their obligation to the masses and to serving the state on whose patronage they had received. Their historically liberal spirit, seizing the freedom to challenge and mock authority, with increasingly imposed State censorship, was lost.

In the 21st Century, both scholar artists and opera artists, remain active mediators between community, regional and central governments. They lobby on behalf of the community for resources, and they routinely report on dilemmas emerging in cultural and art market reforms. However, as elite and recognised servants of the State, the political complexion of their lobbying is such that it is entirely compatible with the political protocols of party and State, and no threat to the State's legitimacy. And given how little the community structure (and position of scholars) and social class-basis of opera audiences have changed, the artists' role in mediating between the State and the people remains a significant one, if currently noncontentious. Given the fundamental ideological shifts and changes in governance I outlined above, and the continued need for the CCP to maintain a role as uncontested socio-political authority, the critical juncture of strength that allows this apparent contradiction to be maintained is the juncture between China's unique regional-central government structure and the social mediation roles of the artists. This juncture is a 'trialectical' and dynamic cooperation – between central government (the source of national ideology), regional government (managing urbanisation and economic growth) and local community (where the artists media with the masses through times of profound change). Each of these political spheres co-operate and support each other for their own survival and legitimacy. To understand in more detail how this works, we need to consider the structure of China's latest discourse of art and market reforms – the Xi'an *Qinqiang* (Qin opera) cultural industries reform.

Part 2: Case Study *Qinqiang* Cultural Industries Reform

Few non-Chinese readers will be familiar with *Qinqiang* or *Qin* opera, but will no doubt have heard of the Terracotta Army and the Great Wall of China. *Qin* is the name for the region in today's Shan'xi province; *Qiang* means musical sound. *Qinqiang* is transliterated as the musical sound of *Qin*. *Qinqiang* first emerged around mid-Qin State (770BC – 221 BC) and was evolved into a popular regional song across central China, including Shan'xi, Shanxi and Gansu (Ruan, 2006). In 221BC, Yinzheng, the ruler of the Qin region unified China and crowned himself as the first Emperor of China, with its capital set up at today's Xi'an. This very word *Qinqiang* is associated with the historical Chinese empire (Zhao and Lan, 2014: 11). Developed in the central agricultural landscape of the Yellow Earth, *Qinqiang* is associated with the sound of rural peasants and their way of life. Qi Rushan, Chinese modern cultural critic, claims that: 'in order to understand China, one must know *Qinqiang'* (quoted in Zhen, 2013).

In 1912, amidst China's modernization, a Shan'xi scholar named Li Tongxuan established the first modern *Qinqiang* company in Xi'an, naming it Yi Su Society. The very name symbolized Chinese scholars' ambitions in developing a modern China: to evolve (*Yi*) (peasant audience) traditional way of thinking (*Su*) through revolutionising opera (production and artists). In 1951, two years after the establishment of the People's Republic of China, Xi'an municipal government re-established the Yi Su Society as the first State *Qinqiang* House (Zhen, 2013, Wang, 2011: 33). Yi Su Society rural performers obtained urban status and unprecedented political recognition and benefitted from State patronage. In the post-Mao market era, opera institutions across China experienced market reforms, where, earning their own revenues, their visible economic gain became a political indicator of their artistic legitimacy (through popularity with the masses), on condition they also served to promote CCP legitimacy. The CCP's very latest reforms have changed the fate of *Qinqiang* irreversibly.

From the early 2000s, the CCP had been engaged in extensive strategic economic development, the great New Silk Road project. When US Secretary of State Hillary Clinton proposed a 'New Silk Road' to describe a U.S. Policy in 2011 – an imagined north-south axis designed to make war-torn Afghanistan a regional hub – the CCP reportedly had "sleepless nights" (Fallon, 2015: 141). In 2013, Xi Jinping first announced an east-northwest axis for China – a 'One Road and One Belt' plan, emphasizing both land and maritime Silk roads, with their starting points in China. In this new revision of the concept, Xi'an appeared on the latest geographical mapping as the beginning of the land Silk route. Consequently, on the 27th May 2015, the first One Belt One Road China National Forum was held in Xi'an. In this forum, State strategic infrastructure plans and investment details were announced, with Xi'an being the centre of this new distinction (Xinhua Net, 2016).

Xi'an is a city with layers of symbolic meaning and historical distinction. Since the archaeological discovery of the Terracotta Army in the 1970s, Xi'an city's distinction has been focused on the Qin dynasty (221BC-220AD) and *Qinqiang* as both the preferred community entertainment and distinctive regional cultural capital. However, to support the CCP's new ideological orientation, and to secure maximum central economic investment, Xi'an city shifted its long-established Qin association to the Tang dynasty (644AD-988AD). It was during the Tang period that Monk Xuanzong brought back the Sanskrit from India through the Silk route under the royal Tang mission. This part of history is well documented, and provided Xi'an and China nationally the legitimate claim to establish the starting point of any new land-based Silk route (Zhao and Lan, 2014; Zhen, 2013; Chen, 2011; He, 2010).

From the early 2000s, the Xi'an municipal government had begun contracting the Qu Jiang New District Property Developer (QJ hereafter) for strategic city regeneration. One of the main QJ developments has been the building of the Grand Tang Theme Park, and since 2013, in line with Xi Jinping's 'One Road and One Belt' plan, further investment has been put into the Grand Tang Theme Park, with marketing material focused on the Grand Goose Pagoda – where it is claimed the Sanskrit brought back from India was stored, highlighting Monk Xuanzong's successful completion of the Silk route mission. In the rebranding of Xi'an culture from the Qin Dynasty to the Tang Dynasty, it is to be noted that as there is no specific opera associated with Tang, but now a new cultural industry around Tang dance, manifest in a show produced specifically for visitors. From the early 2010s, in collaboration with Xi'an Dance Company, Xi'an municipal government and QJ co-produced the Grand Tang Performance, and nearly every visitor to Xi'an will be advised at tourist information desks and all hotels to take the Dumpling Banquet with the Grand Tang Performance. Tang culture swiftly developed into a new chain of cultural industry ventures, ranging from theme parks, grand performances and banquets. Tang culture became the latest "invented" Xi'an cultural identity and distinction, supporting the CCP's strategic plan of 'One Road and One Belt', and securing central investment for sketching such a grand blueprint.

In the process of city rebranding, funding originally allocated to *Qinqiang* was reduced

substantially. From the mid 2000s, within a policy announced as the "cultural industries reform", Xi'an municipal government transferred management power of all *Qinqiang* companies from the municipal cultural department to QJ. The most controversial move came on the 10th June 2009, when QJ ordered all *Qinqiang* Houses in Xi'an to change from non-profit to profit-making organizations. Three largest *Qinqiang* Companies were requested to merge into the Yi Su Society, with all performers aged 45 and above being made redundant. All these changes were completed within 90 days. This process was proudly referenced by QJ as to have resolved issues with "one single swing of a machete" (*yidaoqie*) (private communication, 29th January 2015). The rapid dictate was further praised by Xi'an government as "the model example of Xi'an cultural industries reform success" (He 2010: 259-263).

In response to the cultural industries reform, some artists took actions to lobby against the destruction of community, trying to preserve *Qinqiang*. The examples given in this paper are scholar artist Zhong Mingshan and opera artist Dir. Liu.

1. *Scholar Artist and the Qinqiang Museum*

Zhong Mingshan describes himself as an archaeologist, historian and devoted *Qinqiang* lover. To others, Zhong is a nationally renowned scholar-artist, famous for his calligraphy and painting. His work has been admired by many state leaders, with patrons including former president Jiang Zemin. Such connections provide Zhong the best opportunities for lobbying for *Qinqiang*. Since *Qinqiang* cultural industries reform, Zhong has been petitioning directly to his patron Jiang Zemin for "the criminal act" that QJ have caused to the indigenous culture and community life of the locale (private communication, 20th January 2015). Zhong's complaining did not stop the CCP orchestrated Xi'an city rebranding, nor the municipal government contracted property developers fast profit return. What Zhong did obtain from the central government is a *Qinqiang* museum space. In 2013, the first *Qinqiang* museum opened in Xi'an Jiaotong University, located in the suburbs of Xi'an. It is a grand and spacious three-floor building with the basement level contains the performing space of a traditional theatre with around fifty seats. The ground floor displays a variety of cultural items ranging from the first original handwritten *Qinqiang* scripts to ancient musical instruments, costumes and other related pieces. The spiral stairs in the middle of the exhibition room leads to the second floor, which has further collections from the oldest *Qinqiang* scripts to a set of *Qinqiang* leather puppets used in Zhang Yimou's internationally popular film *To Live* (1994). The space is used for University Students Quality Training Base (*suzhi jiaoyu jidi*) – a compulsory training programme involving traditional art forms, imposed on all Chinese university students since the 1989 Tiananmen event. However, during the entire month of my research, the grand space was permanently empty. When I asked Zhong if a city centre space had been explored to attract more visitors, Zhang displayed some agitation:

> Don't ask me why I have the museum in a university instead of the city centre. Of course I know this place is too tucked away and the city centre was the first location I sought after. But nowadays in China everything has been passed onto the property developer. The municipal cultural bureau does not even have a say in cultural space management. This space is the result of my direct contact with "high up". Our own culture is destroyed under the very name of cultural industries (*wenhua chanye*)! I will continue to lobby until the wrong is put right!' (Private communication, 20th January 2015)

Until this day, Zhong articulates the need for *Qinqiang* performing space in the city centre, and the importance of educating the younger generation to learn about *Qinqiang*. Despite the empty museum, Zhong is positive that the current madness of "cultural industries reform" is temporary and local *Qinqiang* as the community people's way of life will return in the future. Until that day arrives, Zhong will continue to work in his

museum space, on a university campus that is tucked away from city visitors and the fast changing urban landscape.

2. *Opera Artist and Qinqiang Troupe*
Director Liu became a member of the Yi Su Society in the 1950s. He was trained in *Qinqiang* performance and later specialised in script writing. When Liu retired in the early 2000s he witnessed the process of cultural industries reform with the large redundancy of middle aged actors and felt a strong sense of duty to bring these performers back onto the stage:

> They are too young to retire from the stage. It is extremely difficult to train opera performers, as it is a highly synthetic art form consisting of dancing, performing, singing and acting, children need to start their training from 4 or 5 years of age in order to achieve the right posture and aesthetic body movements; just when they are able to perform, they are made redundant! They have been well trained and they can offer the best performance to the audience (Private communication, 29th January 2015).

In 2007, Liu established the Xi'an *Qinqiang* Association, with performers consisting entirely of redundant staff from all Xi'an *Qinqiang* companies. No one takes any regular wage, payment is only allocated through performance. The association performs both traditional and new productions. Liu writes scripts and co-directs performances with actors. Because of this, everyone now addresses him with the respectful title of Dir. Liu.

The main challenge that Liu's opera troupe faces is the expensive urban theatre rental fee. According to Dir. Liu, under QJ, Xi'an city's small and medium scaled theatres were cleared for urban development. To ensure the troupe's survival, Dir. Liu takes the team to the rural countryside, where they still perform for community gatherings and are paid collectively by village organizations:

> *Qinqiang* has a very good audience base in both urban cities and in the countryside. However, it is increasingly difficult to obtain affordable space to perform in urban cities and the box office struggles to sell individual tickets. These are no issues in the countryside as the performance is paid for by the organization for everyone to enjoy in a public space – like how opera has been staged for thousands of years in China. The most profitable and popular performance source we are making nowadays is indeed through rural tours (Private communication, 29th January 2015).

However, in the past seven years, Dir. Liu has witnessed entire villages disappear within a fortnight, for various property development projects. This means the disappearance of the rural audience along with performing space. Liu's troupe had to travel further away to seek audiences. To do this, Liu required a Performing Vehicle – a big container truck which, once stationed, can be opened and used as a stage. It is a key investment for a private performing company, however, Dir. Liu's troupe struggled to purchase one. Liu had been writing regularly to the regional government applying for one and it was not until the early-2010s, due to the increasing reputation of Liu's *Qinqiang* Association, that the company was eventually granted one. They are now able to drive further into the countryside and charge around 10,000RMB per performance, which lasts between 4 to 6 hours. With no rental fees and bills met by collective villages funds, Liu's troupe is not only covering its costs, but is also able to pay the actors. By 2015, eight years after its initial set up, Liu's troupe has become self-sustaining and started to recruit young members for the development of the Xi'an *Qinqiang* Association.

Throughout the interviews, neither of the two artists criticised the CCP or government for the impacts of its ideological orientation on opera and its audiences, nor on regional government market management style, such as the contracting of property developers to execute cultural projects. Instead, the criticism is focused on QJ and its way of managing and executing art companies and art markets. Both are proud of their individual achievements in securing a museum space and

performing vehicle, and they are keen to continue collaborating with the regional government and supporting the CCP.

Conclusion

Contextualized in the case study of Xi'an *Qinqiang* cultural industries reform, this article argued that the struggle of Chinese opera house reform in the new millennium exemplifies the evolution of the CCP in gaining legitimacy. Xi's 2014 Beijing Speech and the viewing of Chinese opera by all seven members of the China Central Standing Committee should not be viewed as simply a cultural choice but a crucial step in attempting to re-address CCP's ideological orientation. Whilst obtaining increased economic power, the CCP also faces the challenge of a widening class division, rural and urban uneven development, all of which questions the CCP's founding values, political representation and thus legitimacy. Despite fundamental ideological developments, the CCP managed to maintain legal power relies on China's unique regional-central government structure and the social mediator roles occupied by the artists. The continued negotiation at central, regional and community levels, supporting each other for their own survival and legitimacy, is central to the consolidation of the CCP ruling legitimacy.

However, this article also points out that without questioning the CCP ideological orientation, the regional government's dual economic and ideological pressures and artist 'obedient autonomy', the provision of 'token gestures', such as a museum space outside the city centre and a travel vehicle, provide little improvement to the Chinese opera market struggle and its associated audiences' political, economic and social conditions. Traditional Chinese opera, together with its associated audience of peasants and workers continue to struggle for the right to practice their historical culture, which is bound up with the CCP's internal struggle for re-gaining its own legitimacy. Such struggles highlight the intimate relationship between Chinese Communist Party (CCP) ideological evolution, cultural rights, and the market reforms (in the name of the cultural industries).

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Promoting the Cultural Rights of Refugees in the Context of the Syrian Crisis: the case of the Ideas Box

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Abstract

This article is framed by the legal concept of 'protracted refugee situation' (PRS), and the strategic means by which Cultural Rights has been interjected as a factor in refugee support. With particular reference to the project Ideas Box, developed by the German Goethe-Institut (initiated by Libraries Without Borders (LWB) in 2014), the article attempts to define how the project flags up the centrality of information, education and social interaction with effective strategies for providing a humane and productive refugee support. Access to information and education plays a crucial role in providing a basis for the exercise of Cultural Rights, and where Rights become a precondition for developing strategic long-term planning and responding to the fundamental needs of subjects like refugees in PRS situations.

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Introduction

It has been frequently stated that the multidimensional characteristic of human rights is all too easily ignored in the face of the natural, political, economic or social forces that cause refugee outflows. Most particularly, during a protracted refugee situation (PRS), the full character of cultural rights is not immediately clear, but in relation to refugees and displaced people – consequently resident in either urban centres or refugee camps – it is significant and should be underlined. As the Syrian conflict (commencing in the Spring of 2011) became a refugee crisis, the crisis became a recognised 'PRS' during 2016, a condition that this article will explore; an exploration of the concept of PRS will then be followed by a focus on the characteristics and the changes of the definition of PRS (in a historical perspective), articulating an understanding on the importance of promoting cultural rights. Specifically regarding social cohesion between refugee and host communities, the article will attempt to develop a new perspective on the refugee population both in camps and urban centres pertinent to the socioeconomic contexts of the host countries.

As a result of the refugee influx to neighbouring countries of Turkey, Northern Iraq, Lebanon and Jordan, the socioeconomic challenges of a refugee influx, as much as the political attitudes of the relevant governments, are currently generating the conditions for a lack of permanent and durable solutions. In more concrete terms, the refugees in the aforementioned countries are faced with a lack of durable options themselves because of a broad political unwillingness and/or a socioeconomic incapability on the part of host countries.

It is clear that the access to information plays a crucial role in providing a basis for the exercise of cultural rights. This article argues that conceptualising the access to information as a fundamental human right is a precondition for developing a long-term perspective and responding to the various needs of subjects like refugees in PRS comprehensively.

The Goethe-Institut – as the international representative cultural institution of the Federal Republic of Germany – is conducting various cultural and educational projects with its local, regional and international partners for refugees in primary receiving countries. One project is the 'Ideas Box', launched by Libraries Without Borders (LWB) in 2014 and aims to extent the benefits of libraries to isolated communities, providing access to information in post-disaster contexts. The project Ideas Box is conducted in cooperation with local partners, LWB and the financial support of German Federal Foreign Office. The focus of this article is the Goethe-Institut's response to the Syrian refugee crisis, where the Ideas Box project is an effect object of evaluation. The criteria of evaluation is simply how this project articulates the importance of promoting the cultural rights of refugees in the context of the Syrian crisis.[1]

Protracted Refugee Situation (PRS): definition, approaches and features

Definitions can be problematic as well as explanatory: but it is clear, that a critical-historical understanding of how the changes in a definition occur can effectively lead us to understand which tendencies have been dominated and what conditions, and what enables such a definition (if by definition we mean a consensus of understanding).

In defining PRS, UNHCR indicates that it is "a crude measure of refugee populations of 25,000 persons or more who have been in exile for five or more years in developing countries" (UNHCR, 2004: 2). The quantitative, temporal and territorial criteria of this definition are three conditions of understanding a PRS at a given time. However, in their 2009 publication, *Global Trends 2008*, UNHCR made two considerable changes in the quantitative and territorial criteria, defining a PRS as "one in which 25,000 or more refugees of

[1] The project is evaluated by a contracted company that makes an impact assessment with set criteria. It is aimed to assess the impact of Ideas Box on the participants by carrying out a retrospective collected qualitative data analysis by sex and age groups, nationalities, employment status and the time that the refugee participants spend in the given asylum country. Focus group discussions and face-to-face structured interviews are made with participants, their parents and project implementors.

the same nationality have been in exile for five or more years in a given asylum country' (UNHCR, 2009a: 7). According to the new definition, the refugees in question must belong to the same nationality, and not only in a developing country but a protracted refugee situation in a given asylum country, and as long as they last five years or more. These two revised criteria had a two-sided effect on the conceptual framework of PRS: the scope of the definition of PRS was limited by a "same nationality" regulation as it was extended by the new territorial criterion. In a 2017 publication UNHCR added an adjective to this definition: "Traditionally, a protracted refugee situation has been defined by UNHCR as one in which 25,000 or more refugees from the same nationality have been in exile for five *consecutive* years or more in a given asylum country" (UNHCR, 2017: 22, my italics).

However, regardless of the differences between the aforementioned definitions, a characteristic of PRS was described by UNHCR in 2004 (as Milner emphasized: Milner, 2014: 152) as "one in which refugees find themselves in a long-lasting and intractable state of limbo". UNHCR described the situation of refugees in "a long-lasting and intractable state of limbo" as follows:

> Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance (UNHCR, 2004: 1).

A state of limbo can be considered as "a state of uncertainty" that makes it impossible for refugees in this situation to begin developing a new life or new perspectives on their life. Characterised by uncertainty, PRS may continue for many years without durable solutions that are developed by host countries and/or the international community. The primary reasons for the lack of durable solutions are recognised as a political unwillingness and/or the incapability of host countries to fully recognise the human rights of refugees. In this sense, PRS was defined by UNHCR once again in a document dated 2009 as a situation that millions of refugees are trapped in for 5 years or more after their initial displacement, without immediate prospects for implementation of durable solutions (UNHCR, 2009b).

The time that refugees spend in PRS depends on essentially political decisions and socioeconomic circumstances of the host countries, and it has a tendency to increase because of this dependency. As a commentator stated (Schall, 2013), indeed, not only has the percentage of refugees affected by PRSs increased, the average time they spend in exile has too. UNHCR estimates that the average duration of major refugee situations, protracted or not, has increased from 9 years in 1993 to 17 years in 2003 (UNHCR, 2004). In 2015, U.S. Department of State notified that UNHCR estimated that the average length of a major protracted refugee situations is 26 years.[2] According to UNHCR Report *Global Trends 2016*, in which it is stated that the definition of PRS has limitations as displacement situations are dynamic, there are several situations lasting 20 years or more:

> Based on the existing definition, 11.6 million refugees, representing some two-third of all refugees, were in protracted refugee situations at the end of 2016. Of this number, 4.1 million were in a situation lasting 20 years or more. The situation of Afghan refugees in Pakistan and the Islamic Republic of Iran has involved large numbers of people - combined, more than 2 million - and has lasted more than 30 years. There were 5.6 million people in protracted situations of shorter duration (between five and nine years), most of them Syrian refugees. (UNHCR, 2017: 22).

[2] 'Protracted Refugee Situations' at U.S. Department of State website, https://www.state.gov/j/prm/policyissues/issues/protracted/ [accessed 18th September, 2017].

At this point, it should be noted that Palestinian refugees in Egypt are the longest protracted situation under UNHCR's mandate (UNHCR, 2017) and Palestinian refugees as a whole, who fall under the mandate of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), represent the world`s oldest and largest protracted refugee situation (UNHCR, 2006: 106).

Despite the fact that most PRSs are in Africa, particularly in North and sub-Saharan Africa, PRSs can be found all across the world, such as in Asia and Latin America. Despite the change in territorial criterion of the definition – from "in developing countries" to "in any given asylum country" – a territorial pattern can be observed. According to the statistics, it is remarkable to note that most of the existing PRSs take place in developing and under-developed countries. The main reason for this pattern is that most refugees, in an attempt to escape violence and persecution, flee to neighbouring states (Schall, 2013). It should be pointed out that regardless of the development level of the host countries, PRSs are problematic with regards to sociopolitical, economic and security factors, as well as from a human rights standpoint. The most important challenges that refugees face in this situation are physical and sexual violence, limited access to legal employment and justice systems and the lack of legal protection. Restricted movement is also a fundamental human right challenge not only for refugees in camps but also for urban refugees. In addition to the humanitarian concerns, Milner explained how PRSs can lead to political and security concerns for host countries, the countries of origin, and the international community:

> The long-term presence of large refugee populations has been a source of tensions between states and regional instability, especially through the militarization of refugee camps. Armed groups have used refugee camps as a base to launch attacks against their country of origin. Other security concerns, such as arms trafficking, drug smuggling, human trafficking, and the recruitment of child soldiers, have also been documented in protracted refugee situations. In addition to these direct security concerns, protracted refugee situations also have indirect security implications. Tensions between refugees and the local population often arise as refugees are perceived to receive preferential access to social services such as health and education. Over time, competition between refugees and the host population over scarce resources can also become a source of insecurity. (Milner, 2014: 155).

The Syrian refugee crisis became a PRS – the situation of Syrian refugees qualified as being protracted – in 2016, five years after the outbreak of the Syrian Civil War and the first beginnings of the influx of Syrian refugees forced to flee from the conflict in 2011.

Syrian Refugee Outflow to Neighbouring Countries: the current situation in primary receiving countries

The outbreak of the Syrian Civil War is generally dated to 15th March 2011, the day that protests in Damascus began. Since then, the armed conflict and generalised violence has caused millions of people to flee their homes, and millions of people have been displaced in Syria, as millions have fled to Jordan, Lebanon, Iraq and Turkey. Unlike refugees, who have crossed international borders, numerous internally displaced people (IDPs) have remained inside Syria. In a 2016 document, UNHCR estimated that there were 6.5 million people, including 2.8 million children, displaced within Syria, representing the biggest internally displaced population in the World (UNHCR Syria, 2016). According to this document, 50 Syrian families have been displaced every hour of every day since 2011.

IDPs are among the most vulnerable people in the world, as they stay within their own country and remain under the 'protection' of the government

even if that government is the reason for their displacement (UNHCR, 2014). Syrian refugees have fled for similar reasons as IDPs and they have crossed the international borders to neighbouring countries. Representing the neighbouring countries, Turkey, Lebanon, Jordan and Iraq are the primary receiving countries in the context of Syrian refugee outflow. As stated, refugees in mentioned countries are in PRS as of 2016 and faced with the lack of durable solutions because of political unwillingness and/or incapability of host countries. For the reason, it can be stated that they are extremely vulnerable, as the internally displaced population in Syria.

UNHCR states that 5, 233,712 registered Syrian refugees represent total persons of concern in the region as of 28/09/2017.[3] This number includes more than 120,000 refugees who registered by UNHCR in Egypt, as well as more than 30.000 Syrian registered in North Africa. As neighbouring countries, Turkey, Lebanon, Jordan and Iraq host almost 97% of registered Syrian refugees registered by UNHCR this is except for more than 3 million Syrian refugees living under temporary protection in Turkey, who were registered by the Government of Turkey. According to the Ministry of Interior Directorate General of Migration Management, there have been 3,141,380 officially registered Syrians under temporary protection in Turkey as of 17/08/2017.[4] In Lebanon, 1,001,051 Syrian refugees were registered by UNHCR; however UNHCR Lebanon has temporarily suspended new registration as per Government of Lebanon's instructions as of 06/05/2015, and so accordingly individuals awaiting to be registered are not included in this number. [5]

Jordan hosts more than 650,000 officially registered Syrian refugees, while Minister of State for Media Affairs and government's spokesperson Mohammad Momani states that there are around 1.3 million Syrian refugees in Jordan, representing almost 20 per cent of the country's population (Ghazal, 2017).

According to the UNHCR, 244,235 Syrian refugees were registered in Iraq[6] and it is estimated that 97 per cent of Syrian refugees in Iraq reside in Kurdistan (Kurdistan Regional Government). Several permanent or transitional camps have been built in the primary receiving countries to accommodate the refugee population, however only 9 per cent of registered refugees are registered as in-camp population. The rest of them represent the urban refugees who live in urban, peri-urban and rural areas. Demographically, female refugees constitute more than 48 per cent of the refugee population and nearly half of the total persons of concern are children.

Demographic statistics reveal the vulnerability of refugee communities, and by extension, the urgency of educational and cultural actions to be taken in primary receiving countries. In the next section, conceptualizing the access to information as a fundamental human right and the importance of cultural rights of refugees in PRSs will be theoretically assessed in consideration of the current situation in primary receiving countries.

The Importance of Cultural Rights in Protracted Refugee Situations

As developing countries, neighbouring countries of Syrian Arab Republic already had socioeconomic problems and difficult conditions before the Syrian crisis began. The effects of the Syrian refugee crisis, which has been described by International Labour Organization (ILO) as “one of the largest, most protracted and complex humanitarian emergencies of modern times” is increasingly spilling over into economic and social spheres – leading to stalled economic activity, loss of income, and shrinking access to quality public

[3] ‘Syria Regional Refugee Response’ at Inter-agency sharing portal, http://data.unhcr.org/syrianrefugees/regional.php [accessed 29th September, 2017].
[4] ‘Temporary Protection’, http://www.goc.gov.tr/icerik6/temporary-protection_915_1024_4748_icerik [accessed 22th September, 2017].
[5] ‘Syria Regional Refugee Response’ at Inter-agency sharing portal, http://data.unhcr.org/syrianrefugees/regional.php [accessed 29th September, 2017].
[6] ‘Syria Regional Refugee Response’ at Inter-agency sharing portal, http://data.unhcr.org/syrianrefugees/regional.php [accessed 30th September, 2017].

services in host countries.[7] As mentioned in the first section, one of the most important challenges that refugees face in protracted situations is limited access to public services; and public services are not limited to immediate needs, including food, medical aid and shelter, but are also legal protection, education and healthcare. Conventional definitions of "life-saving" aid refer only to basic needs of survival including "food, medical supplies and equipment, vaccines, water and sanitation items" (UN News Centre, 2016). These needs are, of course, all-important to survive, however an approach based on these needs is inadequate in any significant response the needs of refugees in protracted situations. Not only refugees resident in camps, but also urban refugees, spend five years or – generally – more in receiving countries, largely without access to information or consistent education. This is a critical period, especially for the children and young refugees. In fact, almost half of the registered Syrian refugees in primary receiving countries are under the age of 18, which means that the children and young refugees spend their formative years either in camps or in urban, peri-urban or rural areas without the access to information and consistent education. For this reason, the accessibility of libraries, internet and digital resources – access to information – should be regarded as a critical need in protracted situations. Such an understanding would refer to the significance of public services and the urgency of having access to them. Living in a protracted refugee situation as "a long-lasting and intractable state of limbo" makes such a conceptualisation much more important for refugee communities, to enable them to begin developing new life perspectives but also to promote social cohesion between refugees and between them and host communities. With the challenges caused by refugee outflows, the multidimensional characteristic of human rights can be easily ignored, most particularly during protracted refugee situations it is all important to promote cultural rights.

As a fundamental human right, access to information provides a basis for the refugees to exercise their cultural rights. Access to information is one of the most important pre-conditions of the exercising civil and political rights, as well as economic, social and cultural rights – all of which are formally recognized by the International Bill of Rights (specifically, the International Covenant on Economic, Social and Cultural Rights[8] and the International Covenant on Civil and Political Rights).[9] They both articulate the principle of self-determination, which enables everyone to determine their political status and pursue their economic, social and cultural development freely, and also facilitates the right of freedom of expression (the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media). Regardless of frontiers, access to internet specifically as a cultural right reveals the multidimensional character of human rights and so plays a critical role in social participation. As a central means of being part of a given community, the internet enables an access to culture, education and discourse; it is a basis for social participation (Kettemann, 2015). In a 2012 Resolution, the UN Human Rights Council cited the internet as "an issue of increasing interest and importance as the rapid pace of technological development" and called upon all states "to promote and facilitate access to the internet" (UN, 2012). Two years later, the Parliamentary Assembly of Council of Europe pointed out the relationship between internet access and fundamental rights is internal to democratic development; the resolution stated that:

> The Internet has revolutionised the way people interact and exercise their freedom of expression and information as well as related fundamental rights. Internet access therefore

[7] 'ILO's Response to Syrian Refugee Crisis' at ILO Turkey website, http://www.ilo.org/ankara/projects/WCMS_379375/lang--en/index.htm [accessed 5th October, 2017].

[8] 'International Covenant on Economic, Social and Cultural Rights', http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx [accessed 7th October, 2017].

[9] 'International Covenant on Civil and Political Rights', http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. [accessed 7th October, 2017].

> facilitates the enjoyment of cultural, civil and political rights. Consequently, the Assembly emphasises the importance of access to the Internet in a democratic society in accordance with Article 10 of the European Convention on Human Rights (ETS No. 5). (Council of Europe, 2014).

The accessibility of information-related public services – including internet and libraries – provides a socio-legal basis for a political struggle

against socioeconomic inequalities, and could have a positive impact in contributing to the integration of refugees and host communities – by promoting social participation and emphasising the multidimensional character of fundamental human rights and the importance of exercising them. Particularly in protracted refugee situations caused by refugee outflows to developing countries, these sources can make a crucial difference in education, employment and integration. Despite the change in definition of PRS that not only exile situations in developing countries shall be considered as protracted refugee situations, but also in any given asylum country as long as they last five years or more, most existing cases of PRS take place in developing and under-developed nations since most refugees, in an attempt to escape violence and persecution, flee to neighbouring states (Schall, 2013). It should be noted that in such cases the access to information can play a more critical role, as one commentator states (Hayes, 2016: 236), the accessibility of libraries means they are acutely positioned to combat misinformation as well as socioeconomic inequality (Hayes, 2016: 236).

The Ideas Box is a project that is "acutely positioned" to provide access to information, culture and education for both host and refugee communities and to promote the cultural rights of refugees and development of new perspectives. The Project Ideas Box was launched by Libraries Without Borders (LWB) in 2014 to extend the benefits of libraries to isolated communities and provide access to information for them in post-disaster contexts and is carried out by the Goethe-Institut in cooperation with local partners, LWB and the financial support of German Federal Foreign Office in primary receiving countries for Syrian refugees. The next section will briefly assess the Goethe-Institut's cultural and educational framework and priorities along with Ideas Box as an exemplar in promoting the cultural rights of refugees in the context of the Syria crisis.

Goethe-Institut's Response to Syrian Crisis and Ideas Box Project as an Example to Promoting Cultural Rights of Refugee Communities

As the cultural institute of the Federal Republic of Germany with a global reach, the Goethe-Institut promotes knowledge of the German language, fosters international cultural partnerships and conveys an up-to-date image of Germany. Goethe-Instituts are active in 98 countries worldwide and its network includes more than 1,000 points of contact, consisting of examination Centres, teaching materials centres, German reading rooms, partner libraries and information centres, Goethe-centres, foreign-German learning centres and language learning centres (The Goethe-Institut, 2017). In parallel with the aim to foster international cultural cooperation, the Goethe-Institut encourages intercultural dialogue and contributes to development of structures in civil society, as well as cultural exchange by implementing cultural and educational projects and programmes with its local, regional and international partners in related fields.

Within the institutional framework, and with over 60 years experience in international cooperation in the field of culture, education and language, the Goethe-Institut carries out its projects and programmes in Germany and 12 regions around the world according to various regional concerns. The Syrian Crisis is also one of the mentioned concerns, but it is not limited to be a regional concern in the Southeastern Europe and North Africa/Middle East regions. As a result of the outbreak of Civil War and generalised violence in Syria, millions of people were forced to leave the country and flee to the primary receiving countries. Many of the Syrian refugees live in protracted refugee situations in primary receiving countries as some of them are in exile in Europe. The Goethe-Institut Damascus, which is established in 1955 (and was one of the first institutes worldwide) was closed in 2012 due to the security situation; however, cultural, educational and civil society-oriented projects and programmes carried on. In Germany and other regions, the Goethe-Institut has responded to Syrian Crisis by carrying out several projects: in 2016 it created a symbolic place for cultural encounters in Berlin, a project consisting of discussions, workshops, film series, installations, exhibitions, concerts and performances, as a part of its response to the forced displacement and exile.[10]

Besides its projects in Europe, the Goethe-Institut also implements cultural and educational projects in primary receiving countries for refugee communities both in camps and urban environments. According to UNHCR, over 60 per cent of the world's 19.5 million refugees and 80 per cent of 34 million IDPs live in urban environments and refugees living in urban areas may be vulnerable as well:

> Unlike a camp, cities allow refugees to live anonymously, make money and build a better future. But they also present dangers. Refugees may be vulnerable to exploitation, arrest or detention, and can be forced to compete with the poorest local workers for the worst jobs.[11]

Both urban refugees and refugees living in camps can face the abovementioned problems, most particularly in PRS responding to the needs of refugee communities should be taken into account with a long-term perspective. One of the most important points to be emphasised is that once the immediate needs have been met, communities need to begin rebuilding themselves and too often, the tools to build the future are lacking.[12] In this regard it should be noted that a need for a new model of education emerges in post-disaster contexts to enable refugee communities to begin rebuilding. Hayes states, that Libraries Without Borders is particularly committed to the transformative, lifesaving relief that alternative library spaces can provide in post-disaster contexts:

> As an organization committed to the recognition of education as a human right, as outlined in the United Nation's Universal Declaration of Human Rights, Libraries Without Borders works to bring adaptable, technologically empowered education solutions to the most isolated and under-resourced communities worldwide (Hayes, 2016: 237).

The Ideas Box is one of mentioned solutions which is created by Libraries Without Borders along with the UNHCR and the French Designer Philippe Starck in 2014, a portable multimedia toolkit, a mobile classroom and media centre that fits on two shipping pallets and can be set up in less than 20 minutes. Standardized, easily movable and deployable in the field, energetically self-sufficient, easy to use and solid, Ideas Box is a major innovation for access to culture and

[10] 'Damascus in Exile – Berlin', https://www.goethe.de/en/uun/ver/dix.html [accessed 16th October, 2017].

[11] 'Urban Refugees' http://www.unhcr.org/urban-refugees.html [accessed 16th October, 2017].

[12] 'Discover the Ideas Box' https://www.ideas-box.org/index.php/en/the-ideas-box/discover-the-ideas-box. [accessed 18th October, 2017].

information in crisis situations.[13] As a unique concept of multimedia libraries for people in post-disaster context the Ideas Box includes four appealingly designed boxes full of paper and electronic books, laptops, tablets, cameras, GPS devices, games, a satellite internet connection and a large screen for film screenings. The equipment includes also a preloaded digital server that creates a Wi-Fi hotspot that enables the beneficiaries to connect to the digital educational resources including Coursera, Wikipedia and Khan Academy. Furthermore, Ideas Box contents are customized to the needs, the expectations and the language of the communities. With the equipments corresponding to various needs of communities, Ideas Box's self-paced, diverse contents allow users of all ages to craft a personalized educational experience (Hayes, 2016: 237).

The Ideas Box can be described as a mobile classroom, which can be constructed in less than 20 minutes. Each 'box' is customized for a specific usage, but can also be reorganized as needed. The 'orange' box is the library module and which can contain up to 300 paper books and a dozen board and community games. The 'blue' box houses a video projector with a sound system, a HD television and a generator, all of which make outdoor screenings possible. Laptops, tablets, GPS devices and cameras are in the 'green' box, where all the equipments are protected in foam encasing. The administration module, the 'yellow' box, contains the network and power systems.

The Project is regionally coordinated by a Regional Project Coordinator from Goethe-Institut in Ankara/Turkey and locally coordinated by the Country Project Coordinators in the capitals of Turkey, Kurdistan Region of Northern Iraq, Lebanon and Jordan. In Turkey the project is implemented in cooperation with YUVA Association and the Ideas Box is located in the Community Center of YUVA Association in Hatay, a southeastern city of Turkey. In Northern Iraq the local partner of the project is Terre des Hommes Italy and the Ideas Box is in service in Debaga Refugee Camp. The Goethe-Institut Libanon implements the project in cooperation with InterSOS in Beirut; and in Jordan the project is carried out in the Community Center of Care International in Azraq City.

The Ideas Box activities at all IDB-locations are carried out by the IDB-Managers, who manage the boxes and prepare weekly schedules in consultation with project coordinators and education and livelihood officers of partner organisations. Weekly schedules provides an overview of courses offered and the times when the equipment can be used (Hesen, 2017) and they are updated accordingly to the need-based concerns in each location. According to weekly schedules reading circles, tablet, computer and camera classes, film screenings, groups for community and video games are supervised by IDB-Managers and additionally training courses on various subjects including storytelling, pantomime

[13] 'Libraries Without Borders and Philippe Starck Develop Ideas Box: Multimedia Libraries in Kit Form for the Refugees Populations', http://www.starck.com/en?i=libraries-without-borders-and-philippe-starck-develop-ideas-box-multimedia-libraries-in-kit-form-for-the-refugees-popoulations&q=ideas%20box. [accessed 18th October, 2017].

and radio-workshops are organized. Through the weekly-planned activities and training courses the participants are not only acquiring technical and foreign language skills; in addition, they are taking part in the reading circles and discussions, and thus the boxes help interested persons develop their own ideational spaces (Hesen, 2017).

At this point it should be noted that the Goethe-Institut aims to ensure that the project enables not only refugee communities but also vulnerable populations in any given project country to develop their technical and learning skills and, above all, that the boxes become 'meeting points' for both, refugee and host communities. In this regard it can be stated that one of the main objectives of the project Ideas Box is to strengthen social cohesion between refugee and host communities in urban environments by implementing project activities. This objective is directly linked to the response of international community to socioeconomic problems that increased after the refugee outflow in primary receiving countries. Both in camps and urban environments it is of paramount importance for employment and social cohesion to help people who have not yet had training to integrate into the labour market. As stated in annual report of the Goethe-Institut, the materials of Ideas Box break up the monotony of everyday life in the camp and offer interested people a chance to prepare themselves for modern working life (Hesen, 2017). In urban areas, similarly, the Ideas Boxes are a safe place for informal education, information and training for children, adolescents and adults who have limited or no access to libraries or other sources of informal education, and also offer refugees and disadvantaged groups the opportunity to meet and interact. As Philippe Starck, creator of the Ideas Box stated, breaking up the monotony of everyday life and creating creative spaces for the people who were forced to flee their homes, is all important in the sense that:

> Above all, this project's essence is about dreaming. This dream is particularly important when one loses everything. When you lose everything you had, the only thing you cannot be deprived from is dreaming[14]

Concluding Remarks

There remains an urgency for new approaches to cultural rights as exemplified by the unprecedented situation of refugees during PRS and the response in the form of the Ideas Box. The project is an example of cultural rights through information, learning and communication, and creates an improvised social space for refugees in a state of transience because of the Syrian crisis. In parallel with this aim, the characteristics of PRS need to be subject to further analysis, as the current situation in primary receiving countries for Syrian refugees is expanding and becoming more complex. The Goethe-Institut's response is perhaps a model of implementation and a conceptualisation of the needs of refugees.

The activities carried out within the frame of the project not only help the participants to develop their communicative and technical skills, but also familiarise them with the necessity for cultural diversity (Hesen, 2017). This is particularly true for the children who attend the project activities, learning the value of sharing and solidarity through experience, which is a significant long-term goal. In parallel with the aim to promote social cohesion, the importance of long-term planning should not be ignored.

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China's Political Economy of Public Communication: complexifying a rights approach to information

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Abstract

In China, public information and media is a dimension of political communication and subject to political management. Understanding the function and complexity of information-based public discourse in China is important in understanding the conditions for cultural rights. The aim of this article is to offer an insight into the complex role of information in China, and why 'cultural rights' cannot be assumed to be a single category of inquiry. Indeed, any form of rights in regard to cultural expression, production and distribution, needs to be understood in the context of the changing political imaginary of the Chinese nation-state – an emerging nationalism based not on imperialist militarism and territorial expansion but on cultural self-determination. This article constructs an historical-critical narrative on the emergence, and major instances, of the growing political management of public communication as a strategy of nation-building through cultural revival.

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Introduction

The role of information does not occupy a particularly visible place in the broad spectrum of Human Rights provisions. Unlike freedom of speech, which has a provenance in many ancient political and civil rights and privileges, information as a concept is both multivalent (subject to many meanings and appropriations) and also the object of significant transformation (most notably, the role of communications technology and digital media). In terms of law, legal practice and the 'rights' dimension, information is submerged in a multitude of discourses and debate – on communications and media, regulation, distribution and markets, government, public authorities and governance, political communication and the public sphere. It is in this last discursive arena that this article is situated.

As a generalisation, the subjects of political communication and the public sphere have only concerned human rights to the degree that they are conditions, or facilitate, other rights – principally, of course, the right to freedom of speech and the concomitant public debates and usual Press-based public discourse that free speech implies. Article 19 of the 1948 Universal Declaration of Human Rights (which is reiterated as Article 19 of the International Covenant on Civil and Political Rights of 1966) asserts as follows: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". A self-evident fact all too easily ignored is that this, and most other, articles of the UDHR are either inoperable, insubstantial or of little effect, without shared information (offering, for example, an understanding of facts and procedures, the content of decisions, an understanding of causes and contexts, the ability to make judgements or assume a position in a given debate). Information is central, and makes possible both political communication by government, and public realm discourse by citizens or social institutions. It is one thing to propose a 'right', it is another to know, communicate, access and to claim or exercise that right in political, social or cultural contexts.

Information is central to the empowerment of citizens to know of, and claim, their rights. Other articles of the UDHR arguably assume this: concerning the rights to life and freedom – articles 2-7 – justice and fair public representation – articles 8-12– mobility, belonging and privacy – articles 13-17 – Article 18's crucial 'freedom of thought, conscience and religion' – association, membership and equality up to article 23, and up to article 30 providing the conditions for human fulfillment and flourishing, through work, leisure, education, culture and community). It is difficult to see how these spectrum of rights are substantive at all without the availability of information identified by Article 19.

Aside from the general observations on how information has become a central fulcrum of social and economic life – the 'information society', the 'knowledge economy' and models of globalisation built on these concepts (like Castells' famous 'network society' concept, and so on) – the actual rights to information itself remains problematic. Every society tends to its own privacy, confidentiality and State secrets laws, and moreover all societies have their own approach to informational accuracy, truthfulness, representation, and the conditions of factual, verifiable and evidential sources of information. The policing of information, across political communication, publication, print and broadcast reporting, research and public debate, crosses many spheres of law and order. The interest of this article is in the status of information itself, and the 'rights' to information – particularly where this information is central to the formation of public knowledge on the national body politic, identity, political values and the matrix of perceptions around the relation between one's country and the rest of the world. There is an area of cultural research not altogether developed, and this concerns the relation between information, knowledge and national cultural identity, and moreover, how national cultural identity is constructed through a political management of culture, as a significant dimension of the relation between political communication and the public sphere.

Traditional mass media (radio and TV broadcast

and the Press) as policy areas (subject to law) were usually kept apart from the arts and cultural policies, perhaps obviously because of their centrality to the political relation between State and citizen. Through the history of the Twentieth Century, the perported freedoms of speech, the press and public debate, were crucial to political distinctions between 'liberal' and 'totalitarian' societies. While a few 'totalitarian' still exist (North Korea, for example), the spectrum of political orders has arguably grown; and in the age of the internet and of terrorism, the political management of public media and communication has become complex, and not altogether self-evident to observers or indeed transparent to researchers (whether in democratic societies or others). One cannot simply look at the legal apparatus, or the laws and regulatory frameworks, of a country and blithely proclaim that society posseses 'free speech' as indicated in the second clause of Article 19 of the UDHR. Whatever counts as 'speech' (in the UDHR, opinion and expression) is heavily mediated by social institutions, a communications infrastructure, a range of organisations engaged in representation and distribution, and a highly segmented, stratified, public.

The purpose of this article is a negative one, insofar as it aims to offer an informed and research-grounded insight into the complexity of contemporary information and its role within a politically managed public sphere of communication – how information today is far more complex than the assumption of the UDHR's assertion that "Everyone" must have a right to "to seek, receive and impart information and ideas through any media and regardless of frontiers". As noted above, the presupposition of this article is that rights are contingent upon information, and its argument is that information is less a body of knowledge channelled around through media technology than a context-contingent conflict of discourses all subject to a complex infrastrucure of political management. In this framework, traditional Western assumptions on 'free speech' as a central criteria for a just and fair society is less relevant than the apparatus of the political management of information and the veracity and verifiability of that information as it is made available, represented, distributed and edited (doctored, censored or altered) – and thereby forms a public sphere. The object of this article is the largest and legally most complex information infrastructure in the world – the national media and regulatory bodies of the People's Republic of China. The article will not investigate the political infrastructure itself – the vast Press, media and broadcast industries, or the distinct operations of the twenty or more government ministries, such as the Publicity Department of the Communist Party of China, and the State Council Information Office, or Ministry of Industry and Information Technology, and so on. Rather, this article will adhere to what, arguably, is the biased focus of the UDHR – the 'public' availability, access, circulation, knowledge and debate, in which and with which a citizen can engage and contribute to a substantice public discourse on the world as it really is (and, by implication, for the furtherance of a fair and just society). The article draws on surveys of Press and broadcast reporting of major events of public concern, notably the handover of Hong kong and ongoing political disagreement with Japan. Its purpose, however, is to demonstrate how assumed distinctions between fact and value, information and commentary, can be collapsed or dissolved with a broader national project of self-assertion. Within this project, information is no longer simply conceived as indigested fact or 'data' (and hence we will not make reference to 'freedom of information' or 'right to know'). Equally, the article does not make reference to the rights regime for information, starting with the 1998 Aarhus Convention (UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters). This article is concerned with a more fundamental political reality – the role of information in the rising nationalism of China, where central to 'culture' is public knowledge on one's country, its people, and its relation to its neighbours and the rest of the world. This subject is internal to the values that motivate identification, belonging and allegiance, and the relation between the State and citizen, and the formation of national identity itself. This article argues that the political culture of national identity must be understood through understanding the political management of

informational infrastructure – not as a technical apparatus but as meaning-production and public representation within the broader ideological meta-narratives of moral self-assertion (a nation's fundamental appeals for legitimacy). It is only in understanding this that we will begin to be able to define what 'rights' actually means for individual citizens in China.

The rationales for propaganda, censorship and the political management of public information

Epitomized by the 1989 Tiananmen Square Movement, the fall of the Soviet Union and the collapse of Communism in Central and Eastern Europe, various social and political upheavals that have taken place both within and outside China since 1978 seem to issue a clear warning on the destructive effects of un-managed information (or, the failure to wield the power of propaganda effectively). Keenly aware, also, of flawed past attempts to employ propaganda in promoting class struggle – its role in the personal apotheosis of Mao's era, the phenomenon of 'Western ideological contamination' and 'bourgeois liberalization' (common political phrases) resulting from the first decade of economic reform, and so on – the post-1989 government era in China has been engaged in systematically researching, expanding, upgrading and modernizing a media-based infrastruture of propaganda. In China, 'propaganda' is not, as in the West, a synonym for false or biased and self-interested representation. It is a form of political communication management, encompassing huge realms of available information, intelligence, media and internet, entertainment and culture, national identity, history and memory, social and political solidarity. Propaganda is a central political responsibilty somewhat characterised by a paranoia of counter-revolutionary lies or the spread of misinformation and mis-trust often used by the capitalist West against communism in the Cold War era.

Shortly after 'the June 4th incident' (Tiananmen Square protests), Premier Deng Xiaoping officially criticized the party for being slack in paying attention to ideological and political "work" (si xiang zheng zhi gong zuo) – for the formulation and maintenance of socialist ideology should be regarded as a guiding principle of the party-state and central to its political tasks (Deng, 1989). After Deng's resignation, his successors repeatedly emphasised the development, construction and dissemination of communist values and ideologies as the party's fundamental principle – which has explicitly continued today with Premier Xi Jinping. Drawing specific principles from China's historical achievements and perceived mistakes, with significant comparative research on other countries, China's civil servants, social scientists and propaganda executives have undertaken a systematic research of China's history, culture, and the economic and social conditions of the country, carefully constructing a scientific foundation for the strategic and operations management of the State propaganda system (Zheng, 1999, pp.22-23). The Communist Party (CPC) has been actively absorbing the global lexicon and theoretical discourses of mass communications, public relations, psychology and political communication selectively adopting and integrating them into the new national propaganda strategy (Brady, 2008, p. 69). Propaganda officials are encouraged to "master the theoretical knowledge, employ modern research methods, and spend time among average people to understand the thoughts and feelings of the masses" (Yu & Chen, 2008, pp.35-37). Since 1989, the propaganda system has been largely expanded and upgraded, aiming to maintain and consolidate the legitimacy of the CPC as the ruling party of China.

When propaganda and thought-work are regarded as the life blood of the party-state (Brady, 2008, p. 1), how to effectively implant the party's ideologies into people's minds becomes a major aim and theoretical problematic within the deliberation of propaganda officials. Fully aware of the people's weariness and distrust of blatant political ideologies, the party propagandists' strategy has evolved from forcible indoctrination to instilment and guidance (Chen, 2007). As Liu Yunshan (2017), the Minister of the Central Propaganda Department demanded:

> Media and news workers should be adept in obtaining wisdom and inspirations from people's languages and constantly innovating ways of expressions. [They should] reduce doctrinal approaches, stay away from stereotypical tunes and avoid big and empty words (jiadakong), make affords to form the reporting style of 'telling the truth', using new languages, and speaking short words (shuo shihua, shuo xinhua, shuo duanhua).

The party-state needs an attractive, creditable and influential media sector to be the dominant voice in China's post-WTO era where information and communications technology is exerting heavy global ideological influence and multinational media giants are casting covetous eyes on the lucrative market. The aim is to construct a heterogenous media sector that intrinsically and ultimately serves as the party mouthpiece and 'eyes and ears' and that is able to satisfy heterogeneous consumer needs but compliantly follows the party's propaganda strategies and political values. The Chinese press has itself been transformed from a pure propaganda organ to an audience-oriented sector constructing 'social realities' (Li, 2009; Zhao, 2008, p. 21).

From Mao's Cultural Revolution to Deng's Reform and Opening-up to Jiang Zemin's Three Representatives and Hu Jintao's Harmonious Society, the CCP has transformed itself from a revolutionary party representing the interests of proletariats to a party in power representing the interests of the overwhelming majority of Chinese people and China's economic, technological and social development. Officially introduced in the 18th National Party Congress in 2012, Xi Jinping's 'Chinese Dream' policy vision further defined the party's ultimate aim and ideology as achieving 'the great rejuvenation of the Chinese Nation'. In its 65 years of ruling, the CCP has grown from a Marxist-Leninist party to a party claiming to be the embodiment and defender of China's national interests, the propeller of economic achievement, the inheritor of China's multi-millennium culture and history and the beacon of hope for the nation's future revival (Cong, 2013). Accordingly, the strategy of propaganda work has been transformed from stressing revolution and class struggle to national unity, social stability and political trust, with the semi-commercialised media sector being an indispensable national apparatus. As an important means to achieve these aims, nationalism has been at the top of the CPC's agenda of media propaganda.

The centrality of public media to the new Chinese nationalism

Although it is ideologically misconceived to understand nationalism as a constituent element of a communist nation (at least, since the very concept was firmly rejected by Karl Marx and Friedrich Engels, and "the working class has no country" later became a prevailing slogan of international socialism, chanted by the CPC in its embryonic period). Yet, the party's strategy of calling on the unification of the Chinese people in resisting Japan and saving the nation vis-à-vis the China Nationalist Party's "Pacifying the Interior before Resisting External Aggression" policy is a major reason why the CPC successfully mobilized the masses and expanded from an extremely disadvantaged party with only 70,000 members to a dominant power with 1.2 million allegiances during eight years of the Anti-Japanese War (Jia, 1997, p. 809). After the establishment of the new China in 1949, Mao continued to resort to nationalism as the core component of his anti-imperialist and anti-feudal revolution. Threats posed by the US-led Western imperialist powers, the restoration of capitalism in China, and the Soviet Union's deviation from Communism were frequently propagandized to arouse people's fervour in such movements as the Vietnam War, the Great Leap Forward and the Cultural Revolution to defend the motherland and compete with 'people's enemies'. As a communist party, the CPC's ruling regime is largely built upon nationalism (Chen & Zheng, 2012, p. 77).

After the Cultural Revolution, the early period after China's reform and opening up saw a decrease of the party-state's emphasis on nationalism with paramount importance being attached to economic development and a relatively liberal political environment promoted by the reformists within the central government.

However, the crackdown on the Tiananmen Square Movement and the purge of such high-ranking officials as the CPC's General Secretary Zhao Ziyang impelled the ruling officials to restore the power of nationalism to divert people's attention from the government's brutal suppression. This would be accomplished by transforming people's opinions on the subsequent political isolation and economic sanctions imposed by the Western countries from those actions being a direct response to government excesses to instead being a malicious attempt to suppress China's development. Emphasizing patriotic education and media promulgation simultaneously, China's propaganda since 1989 has been characterized by promoting 'wounded nationalism' by reiterating the nation's history of oppression and humiliation from the end of Qing Dynasty to the end of the civil war and depicting the CPC as the saviour of the Chinese people, protector from foreign invasion and the guide to national prosperity (Guo, 2004, p. 33; Chen, 2017, p. 83). Scholars and media practitioners who successfully orchestrate patriotic and xenophobic reports may win the ruling elites' ears and receive political rewards. He Xin, a researcher at the Chinese Academy of Social Science, launched a self-titled 'Safeguarding National Interests Campaign' and firmly denounced the political reform and liberalism movement in the 1980s as subversive and destructive to China's socialist system and praised government's suppression of the Tiananmen Square Movement as safeguarding China's social stability and people's long-term interests (Li, 2004, p. 72). On December 11th, 1990, the *People's Daily* published a full-page report entitled 'A Dialogue between He Xin and Japanese Economist Professor X' and highly acclaimed his 'patriotic stance'. In the editor's note, the *People's Daily* claimed that He Xin's reports had 'generated a huge response both within and outside China, and created a widespread, comprehensive and prolonged sensational effect among the readers… a phenomenon that has never been seen in the newspaper's 20-year history.' (Sun, 1990). In 1991, He Xin gained an exceptional promotion and became a member of the Chinese People's Political Consultative Conference.

Media outlets are active participants in constructing the political discourse of nationalism, because such reports are not only in line with the government's strategy but are also commercially profitable and frequently attract a large audience (Pan, Lee, Chan & So, 2001). Based on Whiting's (1995, p. 295) and Li's (2004, p.70) studies, we can identify three main forms of nationalism that mainstream broadcast and print media have promoted in China: *affirmative*, *antagonistic* and *corrective*.

Affirmative nationalism centres on 'us' and promotes achievements and national pride under the governance of the CPC. *Antagonistic* nationalism depicts 'them as hostile others who disrupt our national interests, identity or pride vis-à-vis a responsible government and unified people as defenders'. *Corrective* nationalism focuses on the construction of 'correct' and 'rational' sense of allegiance and belonging when domestic antagonism deviates from or goes beyond the government's plan.

Although more than one type of nationalism may be resorted to in one single incident, media reports since the 1990s could easily be subsumed under the three categories. Frequently, affirmative nationalism is orchestrated in major national events such as the return of Hong Kong and Macao, the hosting of the Beijing Olympic Games, and the Kunming and Shanghai Expos. Antagonistic propaganda can be adopted in various international conflicts, such as China's territorial disputes with neighbouring countries; international criticism concerning China's political, social and human rights situations; military conflicts, such as the NATO bombing of China's embassy in Yugoslavia in 1999 and the China-US military plane collision in 2001; and the independence and anti-China movements of Tibet, Xinjiang, Taiwan and Hong Kong – "incited by hostile foreign separatists". Corrective nationalism aims at mitigating public anger and rectifying various grassroots xenophobic movements that are detrimental to China's foreign policies, government legitimacy and social stability, especially under China's recent strategy of 'peaceful development' and improving its international relationships. Governed by the

Central PD, media discourse on nationalism in a certain period is commonly formed and communicated around a main theme, with interconnected and accumulated reports to shape people's perception and guide further media statements and public discourse.

Affirmative nationalism and the handover of Hong Kong

Claimed by the CPC as its 'greatest achievement that will shine through the ages' (Hu, 2007), the 1997 transfer of sovereignty over Hong Kong from the United Kingdom to China was a golden opportunity to disseminate the party's accomplishment in achieving national reunification, triumphing over Western powers and demonstrating China's national power. As early as the first half of 1995, a special preparatory team comprising party officials, diplomats and journalistic veterans, was established under the direct guidance of the Central PD and State Council, to be responsible for designing and supervising the propaganda campaign of the return of Hong Kong and especially the handover ceremony on June 1st, 1997 (Zeng, 2006, p. 261). The overall propaganda work was defined as a major political event, and media outlets at all levels were required to gradually 'preheat' the celebration, beginning on March 23rd, to make sure it reaches a climax on June, 1st. A positive media environment was demanded and any 'negative' news that would 'spoil the atmosphere' was discouraged until the end of the 15th Party Congress, which would be held in September after Hong Kong's handover (Wang, 2000, p. 277). In April and May, the Central PD and SARFT organized two exclusive workshops involving the chief editors of major party papers and managers of all provincial TV stations demanding a positive public opinion atmosphere. Reports concerning political issues that deviated from the 'guiding theme' and interviews of domestic and foreign politicians needed to be vetted by party officials before publication (Zeng, 2006, p. 265). The Central PD and Hong Kong and Macao Office of the State Council gave 16 official media outlets exclusive rights to cover reports from Hong Kong during the handover. Before departure, all reporters were required to receive a two-month special training concerning Deng Xiaoping's 'One Country, Two Systems' policy, Hong Kong basic law, reporting style and wordings. Unsurprisingly, out of more than 600 reporters who were dispatched to Hong Kong, the vast majority were from CCTV, the Xinhua Agency and the *People's Daily*. Granted global exclusivity along with the BBC in the live telecast of the handover ceremony, CCTV sent its 'biggest media team and best equipment in history' consisting of 289 reporters including CCTV President Yang Weiguang, two helicopters, four broadcast vans and over 40 camcorders (Zhu, 1997).

Media represent history and thereby reconceptualise its present meanings (Stocchetti & Kukkonen, 2011, p. 46). Operating in accordance with the needs and boundaries of the party-state's ideology, Chinese media's depictions of historical events and their symbolic significance are frequently systematic and directional in nature (Guo, Cheong & Chen, 2007, p. 471). By examining the handover coverage of seven central party organs and two major provincial official newspapers from June 15th to July 5th, Pan, Lee, Chan & So (2001) identified a clear historical narrative portrayed by media outlets that consisted of two basic lines. The first line depicted a weak China humiliated by Western powers and the colonization of Hong Kong by the British Empire. Although people in Mainland China and Hong Kong were pining for the national reunion, China was unable to take Hong Kong back. The second part of the story praised a revitalized China bolstered by economic development and led by wise and resolute CPC leaders who successfully 'wash away the century-old humiliation' and reclaim the sovereignty of Hong Kong. The narrative ends by looking into the prosperous future of China under the protection and guidance of China's new leaders represented by President Jiang Zemin. In this historical script, the CPC is the national hero that saved the people from untold miseries while Western powers are the villains who humiliate and tread upon China. All governments prior to the CPC were incompetent, corrupt, weak and easily bullied and thus unable to lead Chinese people (Pan, 2000). Apparently, only selected historical fragments had

been extracted and reintegrated. The efforts made by China's Nationalist party to reclaim Hong Kong, and Mao Zedong's abstention from the handover of Hong Kong, were completely unmentioned in the script.

Closely connected to the historical script, the grand celebration of national unity was another focus of the media coverage. Cao (2000) examined nine national official newspapers published on July 1st, 1997, and found nearly 30% of the reports focused on national celebration as the main theme. In order to personify political events, family reunion was fused with the return of Hong Kong to better resonate with the mass Chinese audience. The media presented the convergence of thousands of Chinese people from every ethnic and social background on Tiananmen Square, dancing and chanting their happiness about national reunion, the gathering of Lin Zexu's (a scholar-official of the Qing Dynasty who forcefully opposed the opium trade) descendants pledging allegiance to the CPC and their gratitude for realizing the 'one hundred- year-old dream', the rallies of overseas Chinese celebrating the return of Hong Kong to the 'Chinese family', and President Jiang Zemin announcing his determination to achieve the complete reunification and revitalization of China, a joyful Chinese family united around the leadership of its family head — the CPC and its top leaders.

Although a few scholars have studied how the major party organs covered the handover of Hong Kong, none of the existing literature paid attention to the role played by the then fast-growing, non-official, media enterprises. After an examination of 14 major evening newspapers of 12 provinces across China on July 2nd, 1997, we can find an extremely similar discourse in even more commercially-oriented media outlets. Ten of them published Jiang Zemin's speech in the handover ceremony and praised the CPC's achievements on the front page and two on the second page, a clear indication of a mandatory requirement imposed by propaganda departments to reprint reports from the Xinhua Agency. The historical script appeared in 12 of the 14 papers, but a 'hardship and prosperity in the same boat' approach was taken, emphasizing the region's close connection with Hong Kong. The *Guangzhou Daily* published a story under the headline One Hundred Years of One Heart" describing in detail how people in Guangzhou and Hong Kong fought side by side against Western invasion during the Opium Wars, the close economic, cultural and linguistic relations that tied the two regions together, and the eventual reunion of the two "closest family members" (Yang, 1997). Located much further from Hong Kong, Nanjing's *Jingling Evening News* published a report depicting the common suffering and humiliations that were caused by the Treaty of Nanjing and an interview with 300 Nanjing-born Hong Kongers who "rejoiced with excitement about their return to the Chinese family" (Lu & Li, 1997, p. A2). With a focus on local residents, all of the newspapers used at least two pages in covering the celebration of people from various walks of life and words such as "family reunion", "family celebrations", "mother's arms", "wash away one hundred years shame" were terms repeatedly used. For multi-ethnic regions such as Gansu and Yunnan, the united merriment between Han people and minority groups was clearly a focal point. The *Chun Cheng Evening News*, a subordinate newspaper of Yunnan's provincial party organ, spent the whole fourth page reporting festivities held at Yunnan Nationalities Village where people from Han and other 25 nationalities "singing and dancing like siblings", mingled together to celebrate the return of Hong Kong "to the arms of the motherland" (Chen, 1997, p. A4). The coherence between official and non-official papers clearly indicated that the supervisor-subordinate relationship exists between the leading party organs and their market-oriented subsidiaries. According to the chief editor of the *Chun Cheng Evening News*, a special conference was organized by the Provincial PD and the editor-in-chief of Yunnan's party organs, demanding that every media outlet in the province "follow the Central PD's campaign strategy and use Hong Kong's handover as an opportunity to comprehensively promote patriotic education" (Zhang, 1997).

However, unlike the central party's organs' focus on political events – (which emphasised the CPC's achievements, Hong Kong's new government

policy, and grand national celebrations at such political landmarks as Tiananmen Square) (Cao, 2000, p. 669) – the non-official papers tended to portray the stories of grassroots individuals, which might have resulted from their inability to acquire first-hand information and more consumer-oriented market strategies. All of the notable commercial newspapers devoted at least two papers to interviews with ordinary citizens and to readers' letters and celebrations at the grassroots level to depict a more genuine nationalism, a strategy not taken by major party organs but to which the average readers can easily relate. According an editor of the *Xinming Evening*, a newspaper located in Shanghai, the paper did not give much attention to spectacular scenes but was more concerned with heart-touching stories, such as ordinary citizens' feelings about and reactions to the return of Hong Kong. One of the articles the editor felt most proud of was published on July 2nd when the newspaper covered three middle school students climbing onto the top of a wayside bus at 12:00 on July 1st, "when the big screen on the Shanghai Television building displayed the rise of the fluttering Chinese national flag". The students suddenly took out a white placard saying "Xiaoping, do you see it?" In an instant, the nearby crowd burst into applause and cheers, many with tears running down their faces (Sun, 1997, p. 15).

Antagonistic and corrective nationalism: the Sino-Japanese territorial dispute over the Diaoyu Islands

Coinciding with the prolonged 'wounded' national history that has been widely disseminated through patriotic education and media discourse as an important propaganda strategy, *antagonistic* nationalism has the potential to boost patriotism and improve government legitimacy. However, its side effects, such as xenophobia and even chauvinism, which can be incited by anger and hatred, could obviously tarnish China's international reputation (and at the extreme end of the spectrum effect instigate social unrest, give rise to people's criticism against China's foreign policies, and have an impact on bilateral relationships or even the government's international status. As pointed out by Guo, Cheong & Zhong (2007), there is a difference between what is called 'latent' and 'manifest' nationalism. If the 'latent' is a rooted cognition (that, in this case, the party-state has been consistently implanting into people's minds), the 'manifest' (and concomitant offensive behaviours) may indeed backfire (pp.468-469). Therefore, the Chinese government's decisions on whether to widely promulgate or stringently restrain information on various international disputes in recent decades have been made based on careful planning involving political, social and economic effects and outcomes.

For decades, the sovereignty of the Diaoyu Islands (also known as the Senkaku Islands) has been at the centre of territorial disputes between China and Japan. Consisting of a group of small barren islands in the East Asia Sea, this region offers rich fishing grounds and potential oil and gas reserves (Dixon, 2014, p.1058). Claimed as a part of its territory since the 16th century, China acknowledges Japan's temporary control of the Diaoyu Islands during the Sino-Japanese War from 1894 to 1895. However, for China, Japan should abide by the Cairo Declaration (1943) and the Potsdam Declaration (1945) and return the islands to China. Declared as an integral part of its territory, Japan denied China's ownership of the islands before the first Sino-Japanese War and has since refuted demands to hand over the islands by international postwar statements. Before the 2012 dispute and its gradual escalation into aggressive nationwide protests in China, there had been two major conflicts over the ownership of the islands in the 1990s that also resulted in anti-Japan movements. The 1990 dispute was triggered by the Japanese press reporting the government's decision to renovate a lighthouse on the Diaoyu Islands and recognize them in its official navigation chart. In the same year, a Japanese official member publicly denied the existence of the Nanking Massacre when being interviewed by American media. Large-scale demonstrations later took place in Taiwan and Hong Kong, and the situation was intensified by Japan expelling protesters' attempts to land at the islands (Sha, 2005, p.61). In 1996 Japan declared an exclusive economic zone around the Diaoyu Islands, and right-wing officials decided to build a

much larger solar powered lighthouse, which led to an even larger anti-Japanese movement organized by Chinese communities on a global scale, especially in Taiwan and Hong Kong (Pan, 2007, p.75). However, despite the widespread popular indignation and innumerable petitions for anti-Japanese protests in mainland China in 1990 and 1996, the Chinese government firmly decided to prohibit any demonstrations and black out information concerning the disputes and consequent overseas protests in order to maintain social stability and 'friendly relationships between China and Japan'. Chinese students had to obtain relevant information from the BBC and VOA and resort to foreign media to express their anger (Dong, 2003, p. 197). According to Downs and Saunders (1999), being economically dependent on Japan and seeking to consolidate its unstable international position, the government's approach to the Diaoyu Islands disputes in the 1990s were a trade-off made by the ruling elites to prevent the negative ramifications of nationalism as defined above.

For China's government, the 2012 Diaoyu Islands dispute broke out under a context that was dramatically different from and much more complicated than the situation in the 1990s. Internationally, China had become an influential power and had overtaken Japan as the world's second largest economy. Maintaining a friendly Sino-Japanese relationship was no longer at the top of its agenda. Actively participating in global affairs, the Chinese government had become more proactive to demonstrate its international leverage. However, in accordance with Deng Xiaoping's 'hide one's capabilities and bide one's time' policy, President Hu Jintao formally raised the term 'peaceful development' and continued to portray an 'unthreatening' China and avoid direct international confrontations (Guo, 2006, p.2). Domestically, the polarisation between the rich and the poor, the contradictions between the interests of the government and the general public, as well as the serious official corruption, had aroused great wrath among the general public. The arrest of the high-ranking official Bo Xilai and his subordinates in March also attracted much unwanted attention. In addition, the government's foreign policies had frequently been criticized by Chinese people as being too 'soft' and unable to represent the attitudes of the mass public, which had severely damaged government legitimacy (Zhao, 2004, p. 77). Under this circumstance, employing antagonistic nationalism to divert people's attention and consolidate government legitimacy was a viable option. Coverage of the dispute and its various ramifications throughout the incident indicated a resilient propaganda strategy by the government that constantly modified itself and aimed to employ antagonistic and corrective nationalism to distract attention, bolster patriotism and government legitimacy, mitigate social unrest and use people's demands to legitimise its 'aggressive' foreign policies, military actions and pursuit of natural resources.

Unlike national events such as the handover of Hong Kong, which gave the government sufficient time to orchestrate a campaign strategy, international disputes frequently take place abruptly with unpredictable follow-ups taken by foreign governments, and therefore require prompt decisions in the initial stage. When Tokyo's Governor Shintaro Ishihara triggered the territorial dispute by announcing the local government's plans to purchase the islands on behalf of the central government from their Japanese 'private owner' Kunioki Kurihara on April 16th, the Chinese government reacted in a way that was not unlike its typical response to international disputes. On April 17th, the Chinese Foreign Ministry (2012) remarked that "any actions taken by Japan concerning the Diaoyu Islands and their affiliated Islands are illegal and futile, these [Japan's plans to purchase the islands] cannot change the fact that the Diaoyu Islands belong to China". The next day, the *People's Daily* published a report on page 21 (international news) that stated in detail Shintaro Ishihara's announcement and quoted China's official response, without making any comment (Yu, 2012a). Unlike the *People's Daily*, the *Xinhua Daily Telegraph* and the *Guangming Daily* commented on Japan's announcement as a "farce" that was plotted by 'Japanese right wingers, which hurt the Chinese people's feelings, damaged Sino-Japanese relations (Wu, 2012), and portrayed Ishihara as a "trouble maker" who is

repudiated and widely criticized in Japan (Yan, 2012a). An examination of the coverage of the three most important central party organs from April 17th to the end of May revealed that in the early stage, the Chinese government planned to mitigate the influence of Ishihara's announcement. Over that period, the *Guangming Daily* and the *Xinhua Daily Telegraph* did not publish any report concerning the dispute apart from the foregoing ones on April 19th, which was even less than in March when the two outlets published three articles concerning the islands' sovereignty. Carrying eight articles about the issue, the *People's Daily* focused on the "ambitions" of Ishihara as an individual and the importance of Sino-Japanese relationships. Six of these articles appeared on page 21 where international news is covered, and two on the front page covering China's Prime Minister and Vice Prime Minister meeting Japanese politicians, respectively. On April 20th and May 2nd, the paper published two editorials arguing that 'Ishihara is using the Diaoyu Island as a political 'show field' in order to seek political advantage (Zhong, 2012a) and that he intended to 'directly disrupt the Sino-Japanese relationship by his extreme statements' (Liu, 2012). The *People's Daily* also covered various political meetings between Chinese and Japanese high-ranking officials and quoted their remarks that emphasized solving the dispute to ensure a good bilateral relationship (e.g., Yang, 2012; Tan, 2012). Except for reprinting the government's official response, few local official and non-official newspapers made their own comments on this issue during the period.

No significant announcement or follow-up measures took place on the Japanese side from Ishihara's announcement on April 16th to the end of June, and the Chinese public's reactions remained stable (Zheng, 2014). Nevertheless, there were indications that Japan was very likely to take further measures against China and that the dispute would continue to escalate: Ishihara undertook active domestic canvassing activities aimed at politicians and the general public, Japanese 'netizens' launched the 'buying Senkaku Islands (Diaoyu Islands) movement', and a poll conducted by Yahoo Japan indicated that 92% of respondents supported Tokyo purchasing the islands (Warnock, 2012). It was during this period that the Chinese government decided to deliberate on a propaganda campaign highlighting antagonism and patriotism. Based on a complete examination of the media coverage of the *People's Daily*, the *Guangming Daily* and the *Xinhua Daily Telegraph* from the beginning of June to the end of October, three stages of the campaign can be identified – divided by Japanese Prime Minister Yoshihiko Noda's decision to implement the nationalizing process of the Diaoyu Islands on July 7th and Japan's official declaration to nationalize the islands on September 10th. Four main themes of media coverage are also identified throughout the period. They are China's official response, the grassroots response to Japan's purchase of the islands in the Chinese community, Japan's actions and official announcements, and international reports and opinions. News coverage of national conflicts often tends to adopt a variety of discursive strategies, such as emphasis, omission, authoritative sources, and justifications, that favour the values and actions of the in-group nation and portray a negative evaluation of the out-group nation (Chan, 2014). Attaching importance to different themes in different stages, the propaganda work was aimed to accomplish different purposes. However, throughout the period, a completely positive media discourse was formed on China while the Japanese side was depicted as totally negative.

In terms of sheer numbers, the period from June 1st to July 6th did not witness a significant increase in news coverage of the dispute since the three most important party organs published only 10 articles and local newspapers still rarely touched this topic. However, a clear change in discursive strategy can be observed since, unlike depictions of the dispute as incited by Ishihara and 'Japanese right wingers' for personal political motives, party organs shifted the blame and criticism to the Japanese central government and began to accuse Japan of using the islands to obstruct China's development. Eight out of the ten articles are subjective comments written by newspaper journalists or editors, which indicated a clear intent to guide both media and public opinions. Four of the six articles published by the *People's Daily* appeared on page 3 (the page for important

domestic news), a sharp contrast to the coverage in April and May when the dispute was categorised as 'international news'. Apart from criticizing the Japanese government for 'associating with Ishihara and his ilk' to distract domestic people's attention from Japan's sluggish economy and political chaos by propagating a 'China threat theory' (Zhong, 2012b), the *People's Daily* also mentioned the Japanese people's antagonism by referring to a poll indicating '84% of the respondents either dislike or relatively dislike China' (Zhong, 2012c). The *Guangming Daily* lamented that 'courageous' politicians are unlikely to emerge against Japanese right wingers and accused the Japanese government of supporting Ishihara (Yan, 2012b). The *Xinhua Daily Telegraph* also argued that "Judging from the current situation, people have to suspect that Japan's central government is willingly cooperating with Ishihara and is even resolved to carry on to the end." (Wu, 2012a).

Prime Minister Yoshihiko Noda's announcement on July 7th expressing Japan's central government's intention to implement the nationalizing process of the Senkaku Islands (the Diaoyu Islands) marked a significant escalation of the dispute and an increase in news coverage in China's major party organs. From July 7th to September 9th, a total of 40 relevant articles were published in the three party newspapers (22 were carried by the *Xinhua Daily Telegraph*, 11 by the *People's Daily* and 7 by the *Guangming Daily*). Among these, 17 appeared as 'important domestic news' and one was on the front page, indicating a significant emphasis on the dispute by the media outlets. Eighteen reports paid close attention to Japan's latest "aggressive" actions and announcements, signifying a focus on promulgating various "offences" in the media discourse. Although after three decades of commercialization, professional journalism has become a key word and objective reporting about facts is regarded as an important principle in China's media sector (Zhao & Guo, 2009, pp. 533-534), reports concerning Japan in this period were far from objective. When stating 'facts' about Japan's movements, subjective words such as "plot" (tu mou), "attempt" (qi tu), "presumptuous" (wang cheng), "farce" (nao ju), "threaten" (yang yan) and "so called" (suo wei) were frequently used before and after quoted remarks and activities. When reporting on Noda's announcement on July 7th, the *People's Daily* stated: "In recent days, Japan played a series of 'farces' on the issue of Diaoyu Islands… Noda once again presumptuously claimed in a press conference that the 'Diaoyu Islands are a part of Japan's territory, there isn't any problem concerning their ownership'" (Hua, 2012). Covering Ishihara's movements, the *Xinhua Daily News* reported: "On August 27th, Tokyo's Governor threatened to continue submitting his plans and land on the islands in person… in order to collect evidence for the 'islands purchasing project'" (Guo, 2012). Focused on Japan's actions, 10 of the 18 articles used subjective words to impose writers' doubts, sarcasm or criticism. In sharp contrast, when China's official responses were reported, authors only quoted speakers' remarks in complete sentences without any omission, addition or subjective interpretation, which seemed to indicate the authority of the Chinese government and subordinate journalists with no right to judge. In the five articles focused on China's official response, the Foreign Ministry Spokesman's similar announcements on various occasions were repeatedly quoted: "Diaoyu Dao and its affiliated islands have been an inseparable part of the Chinese territory since ancient times. Nothing can sway China's will and determination in safeguarding its territorial sovereignty. China has expressed its strong dissatisfaction and grave concerns about Japan's highly irresponsible remarks" (People's Daily, 2012).

Among the 18 articles concerning Japan's movements, 12 also contained authors' commentaries on the reported 'offensive activities'. Unlike the dominant discourse in the previous period, only three commentaries continued to ascribe Japan's actions to distracting domestic attention and suppressing China's development. Commentaries in this period frequently connected Japan's announcements and movements to the first and second Sino-Japanese wars (Xu, 2012), the Second World War (Guo, 2012), the Cold War (Ding, 2012; Sun, 2012a) as well as the Gulf and Afghanistan wars (Sun & Liu, 2012), denouncing Japanese right wingers as

extremists who denied Japan's invasion of China during the Second World War and who are attempting to abandon the post-war treaties to regain Japan's military power (Guo, 2012a). The Diaoyu Island dispute was claimed as a sign that the Japanese government 'harbours sinister intentions' (Sun & Liu, 2012), and 'will probably readopt militarism to launch wars abroad' (Sun, 2012b).

Media discourse in this stage also concerned the feelings at the grassroots level and depicted Chinese people as victims of Japan's actions. The phrases "seriously hurt Chinese people's feelings" and "trampled upon Chinese people's dignities" were frequently used and were often followed by reiterating the Chinese government's claim that it had lodged serious concerns and solemn representations and refused any claims made by Japan (e.g., Xu, 2012; Xin & Liu, 2012; Wu, 2012b). For years, this "concern", "representation" and "refuse" form of reaction has been regarded as an ossified official response when dealing with international disputes and has been widely criticized by the public as a sign of 'weakness' since no concrete government countermeasures are mentioned (Ma, 2014, p. 92). In fact, no government plans or measures that aimed to directly confront Japan's actions appeared in the three party organs' news coverage in this period, which was at odds with media's promulgation of Japan's militarism. Since the 'Japan threat' had been an important theme in the media discourse, it is unlikely that the Chinese government still intended to avoid confrontations and suppress people's antagonism in order to protect 'good Sino-Japanese relations'. A possible explanation is that the propaganda apparatus was deliberately portraying 'vulnerable and victimized Chinese' to impel the public to demand a strong foreign policy and to arouse their nationalistic emotions. Party organs in this period paid close attention to protesting activities against Japan at the grassroots level and portrayed the protesters as 'national heroes'. Covering Japan's decision to release 14 Chinese who had landed on the Diaoyu Islands and been detained by Japan, the *Xinhua Daily News* commented that "Chinese people all over the world have been deeply worried about the safety of these 'island protectors', for their actions embody the united purpose and common will shared by all Chinese to safeguard their territorial sovereignty" (Xu & Jiang, 2012). When seven activists returned to Hong Kong, the newspaper reported that 'hundreds of Hong Kong citizens and mainland Chinese tourists witnessed the return of (the ship) Qifeng No. 2 with warm applause. People gave the seven "island protectors' flowers and placed garlands over their necks…".

Since Japan's announcement that it would implement the purchasing process of the Diaoyu Islands on July 7th, propaganda departments no longer discouraged official and non-official newspapers at the local level to report on the dispute. According to statistics provided by Huang (2014, p. 44), after a decrease of relevant reports published by local media outlets from April to early July, the amount of coverage concerning the dispute began to increase sharply from around July 10th. Since China's commercial websites are only allowed to reprint current political affairs news from newspapers (Stockmann, 2011, p. 193), and since Chinese netizens' awareness, attitudes and user-generated content are heavily dependent on information provided by these websites, and since market-oriented media outlets frequently cover netizens' opinions, the government's loosening control over media coverage of the dispute soon created an escalating information circle that significantly bolstered anti-Japanese nationalism across China. From August 16th to 19th, the first nationwide anti-Japanese protest took place and thousands of citizens took to the streets in major cities demanding that Japan leave the Diaoyu Islands (Oi, 2012). There were also protesters who held posters of Mao Zedong to demand that the government take a tougher stand on the issues of national sovereignty (Asian Correspondence News, 2012). Since all demonstrations in China require official approval and nearly all large-scale protests have been suppressed since 1989 as "mass disturbances" (Wang, 2012), the simultaneous protests across China's major cities were clearly approved and supported by the Chinese government. Although the protests were widely covered by foreign media enterprises, none of the three party newspapers reported the

incident, except for the demonstrations in front of the Japanese embassies, to prevent the protests from overheating. The Xinhua News Agency covered the story in its English version with an intention to send the prevalent 'anti-Japanese feelings' and Chinese people's demands to safeguard the national sovereignty to the overseas readers (Zhang, 2014, pp. 90-91).

On September 10th, Japan's central government officially claimed its decision to nationalize the Diaoyu Islands and pushed the dispute to its climax. From this day to the end of October, the three newspapers published 232 articles on this issue (52 by the *People's Daily*, 85 by the *Guangming Daily* and 95 by the *Xinhua Daily Telegraph*), which is more than the coverage during the rest of 2012 combined. On the same day, China's Foreign Ministry immediately issued a statement arguing that "Any unilateral move made by the Japanese side with regard to the Diaoyu Islands and its affiliated islands is illegal and invalid… The time when the Chinese nation allowed itself to be trampled upon by others has gone forever. The Chinese government will not allow China's territorial sovereignty to be offended by others." The media discourse during this period was highly in line with the government's response and put paramount emphases on various government countermeasures: the legitimacy of China's claim over the islands and the invalidity of Japan's, a rising China envied by Japan but supported by the world, and patriotic Chinese people united under the guidance of the CPC to contribute to the continuous development of a powerful China. This correlation between China's prompt official announcement and subsequent media reports indicated a propaganda strategy that had probably been orchestrated even before Japan's announcement on the 10th.

For the Chinese government, the propaganda discourse in September and October was of the utmost importance for a number of reasons. Firstly, the already widespread anti-Japanese emotions among people were further exacerbated by Japan's announcement and the 81st anniversary of the Mukden Incident on September 18th 1931, which marked the beginning of the Japanese War of Aggression against China. It was imperative to transform the antagonism in a way that favoured government legitimacy, suppressing any criticism of the Chinese government and curbing the severe social unrest during the nationwide protests in both August and September. Secondly, since the first trial of the former high-ranking police official Wang LiJun (who triggered a major political scandal and brought down his supervisor Bo Xilai) was arranged on September 18th, nationwide anti-Japanese protests and intensive media coverage of the Diaoyu Island dispute could effectively divert the attention of both the Chinese people and the foreign media. Thirdly, and most importantly, the 18th National Congress of the Communist Party of China was due to be held in early November, and the CPC's new central committee led by Xi Jinping would be elected during the congress. A positive media and social environment was of vital importance both prior to and during the congress. Lastly, for China's new leaders, having strained relations with Japan and its powerful ally America would be an undesirable situation when taking office. Aimed at 'correcting' the widespread antagonism, media coverage of the dispute in this period revealed a clear focus on mitigating and guiding the anti-Japanese emotions in a way that favoured 'insidious patriotism' and the government's various aims.

In contrast to the previous stage, when nearly half of the media coverage paid close attention to Japan's various 'offences', only 20 articles (8.5% of the total coverage) in this period concerned 'offensive' activities and remarks from Japan. Among them, eight articles were published between September 11th to 13th covering Japan's 'islands purchasing' announcement on the 10th. Seven reports concerned Japan's claim over the sovereignty of the Diaoyu Islands in United Nations conferences and its government officials' canvassing activities in Europe. In these articles, Japanese politicians were depicted as either 'schemers' who violated international regulations and were demolished by their Chinese counterparts or 'insignificant' figures whose opinions were left out in the cold. Reporting on Japan's claim over the islands in the General Assembly of the United Nations, the *Xinhua Daily Telegraph* reported in detail how those who

presented Japan's arguments were refuted by 'righteous' Chinese representatives and became 'faltering and speechless' (Gu, 2012). When covering Japan's Foreign Secretary Koichiro Genba's visit to Europe, the *Guangming Daily* described how British, German and French officials either ignored Japan's arguments on the disputed islands or gave irrelevant answers when addressing them (Cai, 2012). The *Xinhua News Telegraph* covered the same story and concluded that "Germany, Britain and France just don't buy it. They neither support nor sympathize with Japan on its most concerned issue… which made the Japanese 'guests' who came with high expectations feel so embarrassed" (Liu, et al., 2012). Apart from the announcement on the 10th, only two articles focused on Japan's newest announcement or activities that were 'directly against China'. The *Xinhua Daily Telegraph* reported the landing of three Japanese right wingers on the Diaoyu Islands and criticized their provocative activities and the 'tacit permission' of Japan's central government. The newspaper also covered Hideo Yamashita's humiliating remarks about China and his proposal to build lighthouses on the disputed islands as well as how his opinions and behaviours were widely criticized in Japan. Other 'aggressive' actions and announcements during this period — such as the Japanese Prime Minister's threat to "arrest any foreigners who dared to land on the Diaoyu Islands", criticism of the Chinese people's morals during the protests (Guo, 2014b), Japanese politicians' accusations that China deliberately distorted history and used the dispute to expand its military power (Phoenix Television, 2012a), and America's affirmation that the Diaoyu Islands were covered by America's security treaty with Japan (Phoenix Television, 2012b) — were ignored by the three party organs during this period.

Eight articles also quoted remarks made by the Japanese Prime Minister and other politicians expressing the Japanese government's will to restore Sino-Japanese relations. However, instead of conceding to these "intentions", newspaper commentaries firmly rebutted the "hypocrisy" of the Japanese government offending China's territorial integrity on one hand and trying to rebuild the bilateral relations on the other. Japan was depicted as a less powerful nation that was both threatened by and increasingly dependent on a rising China while the Chinese government was assertive in protecting its national sovereignty. As the party newspapers argued, "Nothing is too strange in the world. After capriciously doing a number of things that offended China's territorial integrity and hurt the Chinese people's feelings, Japan managed to put on a pitiful face and talk about how to cherish the Sino-Japanese relations, seemingly in earnest" (Zhong, 2012d). "After making the decision to 'purchase the islands', Japan is not at all at ease. It pays close attention to and analyses China's reaction. If China takes an assertive stance, it will halt temporarily. If China is lukewarm about it, it will press forward according to plan… However, Japan's wishful thinking is completely wrong because China will never tolerate its disgraceful behaviours." (Zhong, 2012e).

Apart from reducing information on Japan's "offences" and depicting a less "threatening" Japan by covering its "friendly" remarks and how it was given a cold shoulder by Western countries, newspaper commentaries and coverage of government officials' responses also portrayed Japan in a way that was less likely to arouse Chinese people's antagonism. Among the 36 articles expressing authors' opinions on Japan and 11 reports covering China's official foreign responses, a predominant discourse can be identified, which criticized Japan for violating international treaties and challenging the achievement of the World Anti-Fascist War. Postwar statements such as the Cairo Declaration and the Potsdam Declaration are prevalently invoked to demonstrate that Japan's purchase was a violation of the postwar order and was therefore not only an offense against China but also against the international order. In the media coverage, Japan was no longer a dangerous nation that intended to readopt militarism and was likely to launch wars against its neighbouring nations, but a country that was unwilling to examine its past war crimes and aimed to extricate itself from the postwar constraints and become a 'normal country' with corresponding political and military powers. For decades, Japan's unwillingness to acknowledge and repent for its actions during

wars, as well as its 'ambition' to expand and exert its military power, have been repeatedly covered by Chinese media during events such as Japanese officials' visits to the Yasukuni War Shrine, history textbook revisions, politicians' open denials of various war crimes and Japan's involvement in international military actions. Media discourse during this period seemed to subsume the 'island purchase' under the same category as Japan's "prolonged mistakes" to transform the overheated antagonism among Chinese people into an insidious nationalism to perpetuate its 'positive effect' and prevent the negative ramifications.

A main task of the media propaganda in September and October was to transform the burst of antagonistic nationalism into an enduring patriotism that is advantageous to the ruling regime. A similar argument – that 'China has become a powerful nation free from humiliation and bullies and therefore has the strength and confidence to safeguard its national sovereignty, and if China can maintain its political stability, national unity and economic development it will frustrate any international challenging attempts' – was made by 86 articles published during this time, which clearly indicated that the argument was a focal point required by the Central Propaganda Department. As the *Guangming Daily* argued: "China's humiliated history and the constant change in the international situation give us a profound understanding that only a prosperous nation can bring about national dignity, only the rise of a nation can bring about the well-being of all people. Only by adhering to the road of socialism with Chinese characteristics and accelerating our economic and social development… can we forever break the fetters of international disputes". Although past Sino-Japanese wars were reiterated to demonstrate Japan's violation of postwar regulations and its unwillingness to repent for the war crimes, the reason behind Japan's purchase of the islands was not depicted as an attempt to give the impression of a weak and disunited China being invaded, but rather of a powerful China envied and disliked by Japan, which is being surpassed by China (Zhong, 2012f; Chen, Xu & Mao, 2012).

Although the international media widely covered the large-scale anti-Japanese protests that were held in nearly every major Chinese city from September 16th to 20th and the much criticized angry crowds attacking Japanese embassies, factories, restaurants and cars (Zhang, 2014, p. 91; Lu & Hong, 2013, p. 150), the coverage of protests was never a focus of the major party organs: only seven articles either briefly mentioned or alluded to the incidents, and violent behaviours were barely reported or critically commented on. As the only exception, the *Guangming Daily* decried the violence as 'damaging the nation' rather than acts of patriotism and criticized the rioters for "resorting to violence and venting their resentment upon Chinese citizens and their properties" and argued "this kind of ignorant and stupid behaviour will not help to solve the Diaoyu Islands dispute but bring about harmful results" (Guangming Daily, 2012a). During the protests, most reports chose either to cover the "positive patriotic behaviours", such as various peaceful commemorative activities of the Mukden Incident, or to ignore completely the riotous actions by defining the protests as an expression of people's "just stand and patriotic spirits" and argued that "this kind of pure patriotism is so precious, this kind of grassroots expression of justice should be respected and taken extra care of. We should let the masses express patriotism and show the world the power of justice from the Chinese nation". (People's Daily, 2012; Guangming Daily, 2012b; Lin & Liu, 2012; Guangming Daily, 2012c). Apart from the acclaim, however, all of the six articles appealed for "rational patriotism" and highlighted the importance of maintaining national unity, social stability and the guidance of the CPC in safeguarding China's long-term sovereign integrity. To ensure the 'rationalisation' of antagonism among Chinese people, after the protests in September 18th, the government stringently censored information on protests on the Internet and forbade any grassroots requests for demonstrations in China (Ross, 2014).

Another main theme of the media propaganda at this stage was to pacify people's anger, consolidate government legitimacy and construct a united Chinese community by disseminating various government countermeasures taken

directly against Japan and international support for China, as well as the nationalism shared by Chinese all around the world. In sharp contrast to the previous stage, when no articles expressed concern about China's official actions, 57 reports focused on covering various concrete countermeasures taken by the government, including marine patrol vessels sailing near the disputed islands, official announcement of jurisdiction of waters and the publication of a white paper on the Diaoyu Islands claiming China's sovereignty over the territory. Among these articles, 20 appeared on the front pages, indicating a significant emphasis on the depiction of a government that is both responsive to grassroots requests and assertive in safeguarding national interests on behalf of the Chinese people. Although modern journalism requires objective reporting of facts such as government measures, these reports often adopted emotional appeals to boost readers' patriotism, especially when certain actions did not involve authoritative high-ranking officials. When covering marine ships patrolling the Diaoyu Islands, for example, the party newspapers reported: "In this kind of difficult situation, China's marine fleet braves the storm and advances courageously… The beautiful islands gradually appear in front of China's marine fleet, the seabirds flutter from the stern to the bow joyously as if they are welcoming the fleet. Facing the magnificent territorial seas of the motherland, the soldiers of the fleet could hardly contain their excitement and gazed with deep feelings at the islands. They are the guardians of China's blue territory. I look around, lights flicker on the sea. Diligent fishermen are harvesting hope. Being escorted by the marine ships, they must feel so safe and relieved" (Dong, 2012; Sun & Huang, 2012).

The coverage of overseas activities and opinions was also an important constituent part of the media discourse. Although domestic popular anti-Japanese activities rarely appeared in the party organs, demonstrations and protests that took place in Western countries were widely covered, and participants were depicted as patriotic and antagonistic towards Japan. Reporting on protests taking place in Washington D.C., the *Guangming Daily* narrated: "Hundreds of overseas Chinese coming from the mainland and Taiwan took part in the protest that day. The protesters chanted slogans such as: ''Diaoyu Islands belong to China.' 'Taiwan and mainland should protect Diaoyu Islands because we are a family.' 'The wonderland of China never to yield an inch of ground.' and 'Japanese get out of Diaoyu Islands!', and read out the letter of protest." (Yu, 2012b). Protests in such cities as London, Paris, New York, Los Angeles and Berlin were also reported in detail and similar patriotic and anti-Japanese slogans were highlighted. Statements made by overseas Chinese communities expressing patriotism, support for the Chinese government and opposition to Japan were also widely quoted by the party newspapers (e.g., Zhao, Fu & Cai, 2012; Xu, 2012b; Xia, 2012).

Apart from portraying a cohesive and supportive overseas Chinese community to boost national pride and government legitimacy, 51 articles during this period also reported foreign media's coverage of overseas government officials' and scholars' opinions on the Sino-Japanese territorial dispute. Foreign opinions as presented in these articles could be generally subsumed under two categories – those that supported China and those that were against Japan. Opinions expressed by foreign media and individuals were highly in line with the domestic media discourse in China with paramount emphases on acclaiming Chinese government countermeasures, confirming China's legitimacy over the disputed islands and criticizing Japan for violating international regulations and being unwilling to acknowledge its war crimes in the past. Since world-renowned media outlets such as *The Times* and *The Guardian* in Britain and *The New York Times* and CNN in America are unlikely to express biased opinions in favour of China, reports made by these media organizations had been carefully selected and extracted to reiterate China's official announcements and present an impression that global media enterprises valued the dispute and sided with China. As the *Guangming Daily* reported: "Britain's *Daily Telegraph* published articles written by its Beijing and Tokyo correspondents on [September] 12th which covered Japan's 'Islands Purchase' and the strong reaction from China. According to the articles, Japan's decision

to spend 2050 million yen (approximately 16.4 million pounds) on the purchase of the Diaoyu Islands triggered a strong reaction from the Chinese government, which claimed to have sovereignty over the islands. China has sent two capital patrolling ships to the islands to claim its sovereignty. The articles quoted the China Foreign Ministry's announcement that '[T]he times when the Chinese nation was being bullied and humiliated have gone forever. China's government will never tolerate any foreign offences against its territorial integrity. Japan's 'island purchasing' is not only a violent offence to China's territory, but also a humiliation to the 1.3 billion Chinese people." (Dai, 2012b). The *Xinhua Daily Telegraph* also cited reports from global media on Japanese officials' visits to 'war shrines' during the islands disputes. 'America's *The New York Times* published an article on [October] 18th arguing that Japan's former opposition leader and Prime Minister Shinzo Abe's visit to Yasukuni Shrine makes people worry that he may walk the right-wing road if he is elected as the Prime Minister again, which will further exacerbate Japan's relations with its neighbouring nations and intensify the territorial disputes (Wang, 2012. The *Guangming Daily* reported, "According to *The Times*, Yasukuni Shrine honours the memorial tablets of over 2.5 million Japanese who died in battles since the second half of the 19th Century. Because there are 14 Class A war criminals from World War II, it is widely perceived by Japan's neighbouring countries as symbol of Japan's militarism. The Japanese politicians' visits to Yasukuni Shrine reveal that they have no intention to repent of Japan's crimes of aggression against its neighbouring countries" (Dai, 2012c).

Conclusion

The aims of this article were to introduce to the broader debates on cultural rights, the complexity of political communication and the public sphere (principally in China, but by implication in any country whose political discourse is not formed by Western assumptions on the political efficacy of 'free speech'). The complexity of 'information' underscores a central epistemic problem on the distinction between fact and value, and information itself and commentary (or the various meanings that accumulate when subject to interpretation, appropriation and deployment within the context of an event of public interest or concern). Information rights is more than simple assertions of free speech, or upholding free speech as a symbolic model of a free society; rather, it concerns the constitution and status of information itself, which in turn involves an understanding of the formation and political management of public knowledge (generating values and the matrix of perceptions around the relation between one's country and the rest of the world).

Using historicical-critical narrative, this article attempted to demonstrate the necessary historical dimension to any conceptualisation of China's political aims – and the emerging meta-narrative on national self-assertion. Historical narrative serves to identify the moral complexity of China's identity, emerging from centuries of foreign invasion and internal conflict. The original role of propaganda is important to this narrative, followed by what Deng Xiaoping called ideological and political 'work'. It was important to note how China's Press has been transformed from an organ of propaganda to one serving to shape and convey the moral content of broader political aspirations. The CCP has similarly been transformed from a revolutionary party to a force of development – representing the interests of China's economic, technological and social development on a grand scale. In 2012, Xi Jinping's 'Chinese Dream' policy vision consolidated the notion of a national project of 'the great rejuvenation of the Chinese Nation'. The content of public discourse and communication is no longer the repetitive dogma of revolution and class struggle but a tangible national unity, social stability and political trust, with a semi-commercialised media sector contributing to a more inclusive nationalist project. This project is articulated in terms of incontestible national aims, involving the good of the people and their increased prosperity, and the power to repel forced (internal and external) that would hinder or compromise that.

Where for other countries, nationalism asserted itself as part of a bellicose project of territorial expansion, military conflict and assertion of

colonial expanson, in China, it has emerged of late as a deeply cultural project of self-realisation and the assertion of moral will (in part through rectifying past injustice and the exploitation of other, mostly hostile, nations).

The paper has identified in this particular discursive strains of nationalism – affirmative, antagonistic and corrective – perhaps easily related to familiar historical and Western forms of propaganda. However, what is not easily identifiable is how these forms work together and with the otherwise free cooperation of public and private agencies of Press, media and communications. The political management of information entails a situation that has not required direct political control, but an orchestration of cooperation. Moreover, the political management of information was not an attempt to deceive or disseminate untruth, but to manage the truth and to promulgate a series of editorial values (ways of 'editing' the truth so as to make effective broader political aims). The political aims which public information thus served, was the promotion of an incontestible nationalism, where the agents of media and communication (who form the public sphere) achieve unity and a substantive contribution to an emerging meta-narrative. Through the examples of the return of Hong Kong and the conflict with Japan over the Diaoyu Islands, this article has provided an insight into the complexity of the role of information, to the extent to which the distinctions between information (fact, data and so on) and commentary (insight, perception, interpretation, argument) dissolve. This dissolution serves a broader purpose, and that purpose is where fact and (imagined) aspiration become one, and the factual basis of any given situation is one dimension of a political imaginary of national self-assertion.

End note: the Western rights discourse on information emerges from Resolution 59 of the UN General Assembly, 1946; the UNESCO 1945 Constitution, along with its annual World Press Freedom Day, the International Covenant on Civil and Political Rights (1966), are fundamental to our understanding to information rights as cultural rights. Of more recent significance is the framework of the World Summit of the Information Society (2001), the Brisbane Declaration on Freedom of Information: the Right to Know (2010), and the Maputo Declaration on Fostering Freedom of Expression, Access to Information ad Empowerment of People (2008) and the Dakar Declaration on Media and Good Governance (2005).

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NGOs & Cultural Rights: reflections on the Serbian legal framework

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Abstract

Even though the public image of non-governmental organizations in the Republic of Serbia is not wholly positive, a significant number are operating in the cultural field, promoting and protecting cultural rights. Yet the framework in which they operate is restricted, though not directly by the Constitution of the Republic of Serbia or the many other laws relevant to culture identified in this article. This article will therefore offer an analysis of NGOs' operations via a normative analysis of domestic law and specific major legal acts, and then consider the socio-cultural context. The aim of this paper is to present the legal norms regulating NGOs as a means of assessing the conditions for the promotion of cultural rights, and then by extension to identify the conditions for actual development. For cultural rights are, in one sense, guaranteed by the Constitution of the Republic of Serbia, but are not fully manifest in practice. The existence of legal gaps, lack of adequate legal and financial knowledge, and the fact that the existing legal framework does not have an appropriate impact, are all factors that must be weighed and subject to critical insight.

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Introduction

The beginnings of non-governmental organizations (NGOs) in Serbia in late 18th century was a humble one. Nonetheless, today a few thousand can be seen to operate just in the field of culture. Yet the general public perception of these NGOs is far from positive. A cursory assessment of the legal condition of NGOs would identify obvious legal gaps, lack of adequate legal and financial knowledge, and evidence of an insufficient impact in the existing State legal framework itself (adding to which are visible discrepancies between legal norms in different areas, and subtle but common violations of both law and constitutional rights). All of this makes an impact on NGO operations, and specifically relevent, how their work contributes directly to the freedom to exercise cultural rights. This article will offer critical insights into the matrix of legal norms that regulate the work of non-governmental organizations in culture and the arts, and will attempt to provide a perspective of functioning of NGOs on daily basis, specifically regarding its everyday fight for the promotion of cultural rights. There is no shared or common strategy for cultural development in Serbia: the analysis will largely be normative, with reference to major legal acts and their practical impact, using methods common to legal practice and language, prioritising the logical, objective and target interpretation[1].

The early history of cultural NGOs in the Republic of Serbia is related to its Jewish community, starting with the religious charitable organization 'Hevra Kadisa' founded in Novi Sad (the second largest city in the country) in the year of 1729. Given the turbulent history of the nation, consistent and reliable data is not forthcoming. We know that after the founding of Hevra Kadisa, it took almost twenty years to establish another one, in the form of the corporate identity of the Jewish Religious Community of 1748. The very next year, 1749, the first Serbian organization started operating in Vojvodina,[2] after which an incremental expansion of cultural and community organisations increased, attracting either restrictions or support on the part of the authorities. Many organizations didn't last, and only a few from the 18th century are still operating today, albeit funded and supervised by the authorities. These include Matica Srpska (most important Serbian literary, scientific and cultural society, founded in 1826) and is notable in its main purpose that was and remains to preserve Serbian cultural heritage and present it to the world. At the time, cultural independence raised political suspicion, and despite its national interests the organisation was the subject of an attempted ban by the then national ruler, Prince Mihajlo (1839-1842).

Today, there are 15,600 registered NGOs operating in the civil sector generally, with various fields of interest. This article will focus only on the arts and cultural sector, where so many NGOs are perceived to be the product of 'Western countries', and whose sole perceived purpose is to influence the political realm to its detriment. In the last few years, public opinion has changed positively, but not a great deal. Fear, prejudices and ignorance can be identified, not least in relation to the legal basis of such organisations. Article 55 of the Constitution of the Republic of Serbia concerns the regulation of Freedom of Association, a basic human right (1948 UDHR articles 20 and 23). To be precise, Marković has observed that this is more of a "political right, which is part of the very 'first generation' of human rights" (2013: 43). Article 55 is not only guaranteeing freedom of political union and any other form of association, but restricts secret and paramilitary associations. According to paragraph 2 of the same article, the Constitutional Court has the authority to ban associations whose activity is aimed at a violent overthrow of constitutional order, the violation of guaranteed human or minority rights, or the incitement of racial, national and religious hatred (Constitution of the Republic of Serbia, 2006: Article 55, paragraph 2). Modern history has not, for the most part, been witness to such radical measures, but these options were used in the past. Moreover, censorship and even more, auto-censorship, was part of the daily life of artists and cultural workers during Communist Yugoslavia.

[1] These methods originate from legal doctrine.

[2] Today Vojvodina is an autonomous province; at the time it was part of the Austro-Hungarian Empire.

Indeed, as Dragičević Šešić (2011) observed, this wasn't a specifically Yugoslav phenomenon but the life of cultural workers in all totalitarian regimes (2011: 22).

A significant research publication, *Perception and public opinion on non-governmental organizations in Serbia 2009,* was funded by USAID and conducted by the NGO, Civic Initiatives (Civic Initiatives, 2009). The research, now almost ten years old, still offers us valuable insights on how the Serbian general public perceives such organizations. It concludes that the public image of NGOs is somewhat better than during the 90s, though still not wholly positive. A fifth of citizens consulted during the research did not know what an NGO was, or represents. Further, negative patterns of thinking about non-governmental organizations were revealed to bear a tight relation on topics current in the media. Responsibility for their negative public image was, however, also related to NGOs themselves. The report articulates this criticism, including the unwillingness of NGOs to reach out to the general public; in not having specified their target groups of beneficiaries; in not using the media to change how they are being perceived by the public (actively creating a positive public image), along with other notable points of criticism.

This research report offered an opportunity to understand how, in relation to culture, the 'average person' thinks, feels, prioritises, takes an initiative and the reasons if they don't. Almost 80% of population does not have a membership of any civic organisation of any kind. Among those who are active, only 2% are members of arts associations. Membership is also gendered and with a greater number of males. The average participant is educated, aged 30-44, with more spare time than the average person. The main indicators of inactivity are identified as: lack of free time; a (mis)belief that nothing will change; and an indifference to any involvement of this kind. Surprisingly, most of those who said they did not know how to participate were women and youth. Of the those consulted, most of the active 3% decided to participate to help their careers (registering an increasing competition in the labour market). Their support is moreover largely passive (except for signing petitions and participating in polls). Only 2% of the active supporters (out of a total 3% involved in cultural organizations) were willing to invest more time and effort in cultural initiatives. Only 16% of those consulted in total said that they have been actively involved in project of any kind that relates to helping their own local community (Civic Initiatives, 2009, passim).

Having taken account of this general picture of participation, support and membership with regard civic and cultural NGOs, it is instructive to understand the current legal framework in which these organisations (and participants) are operating. A normative analysis focused on the Constitution of the Republic of Serbia of 2006, will allow us to conceptualise the participatory conditions of cultural NGOs in terms of cultural rights, particularly with reference to the Law on Culture (2009), Law on Associations (2011), and Law on Endowments and Foundations (2010).

Prior to an analysis, it is useful to start with a couple of general guidelines considering the legal system of the Republic of Serbia. Significant formal sources of legal thought and activity are the Constitution, national Law(s), International agreements, Sublegal general legal acts, general acts of social organizations, customs, judicial precedent, case law, and last, but not least, legal doctrine. The Constitution is considered to be the supreme legal act, and all the other legal acts must be in compliance with it. According to the hierarchy of legal acts, every single subordinated legal act must be in compliance with the one directly of the higher rank. In addition to this, legal acts provided by State will always be ranked higher than those provided by other institutions, with exceptions including supranational sources of law (such as bilateral or multilateral agreements, international conventions, suitably ratified), or sub-legal acts generated by the executives (President, government, ministries, local government bodies, and so on) and adopted with the purpose to help execution and appliance of higher laws. Even though, in the legal framework of the Republic of Serbia, the State is the key creator of legal acts, it is not the only

one. Various organizations and institutions are involved in legal drafting and creating legal acts for their own purpose and functioning, albeit they remain part of the hierarchy and in compliance with the law and sub-legal acts of State bodies. It must be noted, that among these acts, the statute of each organization is the most important. The reason for this is that the statute defines the very constitution of the organisation -- its defining direction, goals, mission and vision.

In order to understand the role of law in relation to cultural policy, Blagojević emphasises that historically the central role of cultural policy was to create a public cultural sector (2013: 354). However, lately, the role of economy and economics-related laws have emerged (common to countries with well developed creative industries). Fortunately, cultural policy in Serbia has maintained a distinct domain in terms of its legal instruments, and not become integrated with market-based regulation or policies, and yet, according to the same author, it does not entirely define the extent its legal influence, so as to maximize its effect on society (Blagojević, 2013: 354). Legally, it is the State who is under obligation to arrange all available means and rules, so cultural life within its borders can freely develop, yet there remain some fundamental ambiguities on the relation between the legal and political dimensions of cultural policy, and the relation between the legal and the political as they both impact on cultural policies (Blagojević, 2013: 355) and so determine the impact of the cultural sector on society more broadly.

With regard to the specific influence of legal acts on cultural policy in Serbia, Blagojević (2013) asserts that there are two distinct spheres of culture and law that must be observed: the first is the direct influence of laws, i.e. legal regulative acts defining the direction and creation of cultural policies nationally; the second is the realm of legal acts that regulating certain situations important in achieving the realisation of cultural rights, often relating to everyday life (Blagojević, 2013: 361). The most important legal act any country produces is its constitution, and not least in the Republic of Serbia, whose constitution is relatively recent (8th November 2006). To quote:

> Article 73 provides Freedom of scientific and artistic creativity:
> Scientific and artistic creativity shall be unrestricted.
> Authors of scientific and artistic works shall be guaranteed moral and material rights in accordance with the law.
> The Republic of Serbia shall assist and promote development of science, culture and art.

This specific article belongs to the second chapter of the Constitution, which regulates human and minority rights and freedoms. Marković notes that this guaranteed freedom of artistic creativity represents a basic human right, i.e. rights guaranteed to the citizens of a state in relation to obligations of a state toward citizens (Marković, 2013: 43). If we understand human rights historically, it is clear that they were not all created at the same time or even defined in relation to each other. In the human rights community of legal scholars it is common to refer to a first 'generation' of human rights (which revolve around liberty, civil and political rights), a second 'generation' (which revolve around equality and are largely social, economic and cultural), and a third 'generation' (featuring new legal conceptions of collective rights, such as right of development, environmental resources, humanitarian aid, identity, heritage and self-determination: see Marković, 2013: 44). Yet we also need, in respect of all rights, to register the role of 'passive' rights, or 'freedom from' restriction, interference or repression -- all very relevant to freedom of artistic creation.

If we consider Article 73 of the Constitution, we can see that freedom of artistic creativity actually consists of two components, namely:
(i): The freedom of creation and publishing (of art and art works)
(ii): The moral and material rights of creators, in accordance with other laws and to copyright.

Marković remarks that intellectual freedom, generally, is closely related to related rights of freedom of thought and public expression of opinion; it is also highly subject to being formed in the process of its implementation (Marković, 2008: 463). Freedom of thought, as such, involves the right to stand by one's belief or to change one's belief according to choice. As Marković has asserted, the Constitution is guaranteeing freedom of thought and expression, side by side with the freedom to seek, receive and impart information and ideas through speech, writing and/or art (Marković, 2008: 466).

Using the systematic method for the interpretation of legal norms[3] we can draw a a preliminary conclusion that the Republic of Serbia shall assist, on one side, and promote, on the other, the development of the arts and culture. When it comes to position of this Article in the Constitution, it is positioned well. If an individual is not guaranteed a right to life, dignity, free development or of the inviolability of their physical and mental integrity, etc., artistic expression would not be able to exist. In a way, the absence of the former precludes the existence of the latter; i.e. they are all prerequisites for the freedom of artistic creativity. While speaking of a cultural right, as one of the basic human rights, it is important to emphasise that Article 20 of the Constitution of Republic of Serbia (2006) provides us with the following *Restriction on human and minority rights*:

"Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right."

Yet human and minority rights may not be lowered. To continue:

> When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means (Constitution of the Republic of Serbia of 2006, Article 20).

In this particular Article, we can see that certain restriction can exist, but only via special procedures, conducted by courts. Judicial precedents related to this restriction are almost impossible to find. Moreover, cultural rights in the Republic of Serbia are vulnerable violation in more subtle ways. It is not uncommon that exhibitions, theatre plays, screenings of certain movies, are suddenly cancelled. The reason later evident for this is that they are considered too socially or politically dangerous or provocative. As the Belgrade Pride march needs to be secured by police officers (due to many incidents of violence that occur), the same situation transpires with certain openings of exhibitions, considered to be controversial. The Opening of 'Ecce homo' in 2012, by Swedish photographer Elisabeth Ohlson Wallin, is an example: it needed to be secured by police forces due to serious threats provided by several different groups[4]. The LGBT community in Serbia was, at the time, proud of their achievement, and put a great deal of effort into the opening and exhibition. While it cannot be said that something substantive has changed since then, or that exhibitions such as 'Ecce homo' are now part of Serbian's everyday cultural life, neverthless, these are without doubt a step forward in promotion of overall cultural rights. Further, the Museum of Contemporary Art Vojvodina in Novi Sad during 2017 featured an opening of an exhibition entitled 'New Religion', featuring British contemporary artist, Damien Hirst[5]. This exhibition is remembered mostly for

[3] Systematic method is used to determine the accurate meaning of legal norms via links between the factual norm and any other norm that is part of the legal system. In this particular case, since only one article has been analysed, that particular article represents a legal system on its own.

[4] Mostly political and sport-based supporter groups.

[5] Novi Sad is capital of Autonomous province of Vojvodina.

the scandal during the grand opening ceremony, not the exhibition content. Members of various art organizations, art associations, artists and activists for human rights, were brutally expelled from the Museum on account of their wearing black eye patches and protesting against the corporatisation of the arts. The cost of this exhibition was around 1,1 million dinars (approximately 9.000,00 Euros). A week-long exhibition in an art gallery for a Serbian artist will cost approximately 100 Euros by comparison – indicating the contrasting economies, effaced by how the opening ceremony was largely provided politicians and ambassadors (and only on the first floor of the Museum, where actual artworks of Hirst were exhibited). Regular visitors could only watch it live on screens provided downstairs. Eventually, security intervened and turned out the protesters, calling the police. In this case, what was violated was the basic access or availability of a central cultural event (one of the basic principles drafted in Article 3 in Law of Culture). This transired without a substantive reason except perhaps the cultural capital of the socially elite class for whom the ceremony was, in reality, organised.

Even though the national Constitution is the most significant legal act within Serbian legal framework, it is not the only one. There are others, such as international agreements and conventions. The European Cultural Convention was adopted in Paris on December 19, 1954, and at the time as Yugoslavia, the Communist party recognized its importance, and ratified it in 1987. Clause 3 of this act provides us with the following:

> The Contracting Parties shall consult within the framework of the European Council, in order to harmonize their actions for the implementation of cultural activities of European interest. (Law on ratification of the European Cultural Convention of 1987, clause 3)

Using the accepted language of legal norms[6], we must conclude that Serbia will cooperate with other State Parties[7] in order to promote cultural activities of European interest. In this context, it is both important and appropriate to cite the Stabilization and EU accession agreement, signed on the April 29, 2008 (since Republic of Serbia is still not member of EU this legal act is considered to be international and not supranational: the agreement regulates the rights and obligations of States that acceded to the EU accession process). The Article 103 of the Agreement is crucial, since it anticipates the requisite cultural cooperation. Both of these legal acts are positioned above all laws other than the Constitution itself. They are to be applied equally, without exception, in all areas of artistic creativity and cultural life. We may consider these regulations in relation to cultural cooperation with countries Albania or Croatia (knowing that diplomatic relations can, from time to time, become pernickety). Thanks to these standards, NGOs, development agencies and other cultural institutions are trying to increase capacity and attain to an EU level in all activities. Their influence on the arts and cultural sector is palpable, and there are more international projects, cooperation with countries from the Balkan region, and other EU states. Further, there are more and more non-governmental organizations established by young people, entrepreneurs, even students. They all have aimed to promote Serbian culture abroad, get in touch and combine forces with similar-minded people from different parts of the world, and so participate in an overall cultural exchange (until recently dictated by the government).

We must also consider the more direct impact of domestic law. The Law on culture (adopted in 2009, with amendments in 2016) represents *lex generalis*, i.e. general law-type of law that is regulating general matters. The public had high expectations of this Law, but which haven't been fulfilled. An arguable cultural chaos existed long after it was adaopted and started to be applied, and after seven long years, dozens of public discussions, polls and propositions, a change in the law was proposed and the Amendment took place. Yet, its substantive impact remains

[6] One of the methods of the interpretation of legal norms used to reveal its true meaning or the standard of norm.

[7] Total number of State parties is 50. Nevertheless, the Convention remains open for signaturies, so at any time any interested state can accede.

indeterminate. The opening of the original Law, the Article 1, states:

> This Law shall regulate the general interest in culture, the ways of fulfilling the general interest in culture and performing cultural activities as well as the rights, obligations and responsibilities of the Republic of Serbia, autonomous provinces and municipalities, towns and the City of Belgrade (hereinafter referred to as: local self-government units) in culture and the conditions for functioning of all cultural operators. (Law on Culture of 2009, Article 1)

Further on, Principles of cultural development are defined (in Article 3):

> The Republic of Serbia shall ensure the fulfilment of general interest in culture and the implementation of cultural policy as a set of goals and stimulating measures for cultural development based on the following principles:
>
> 1: the preservation of cultural and historical heritage
> 2: freedom of expression in cultural and artistic creation
> 3: the stimulation of cultural and artistic creation
> 4: openness and availability of cultural events for the public and citizens
> 5: respect for cultural and democratic values of the local, regional, national, European and world tradition and variety of cultural expressions and intercultural dialogue
> 6: integration of cultural development into social-economic and political long-term development of democratic society
> 7: democratic cultural policy
> 8: equality of operators in the establishment of institutions and other legal entities in the field of culture and equality of all cultural institutions and other cultural operators
> 9: decentralisation in decision-making, organising and financing of cultural activities
> 10: autonomy of cultural operators
> 11: encouragement of sustainable development of cultural environment as an integral part of environment (Law on culture of 2009, Article 3)

Three of these eleven principles already appeared (more or less) in the Constitution -- freedom of expression in cultural and artistic creation; stimulation of cultural and artistic creation; and openness and availability of cultural events for the public and citizens. There was no unnecessary repetition in this case, and we can say that adopting cultural rights within the Constitution built a qualitative foundation for these interdependent principles. Further on, these principles are providing a solid basis for non-governmental organisations, associations, state organisations and cultural operators in general. The autonomy of their work is legally guaranteed, equality (considering different background of cultural operators) and last, but not least they are all being encouraged to find a way to finance themselves[8]. Public finance for cultural programmes and projects still exists, though far from sufficient. The efficacy of self-financing, when it comes to cultural operators, is highly dependent upon the cultural manager(s) of the particular organization, and their skills. Thus, there are organizations that have thrived and others who are struggling to cover basic expenses. On the other side, there are financial implications in relation to the cultural product or artistic activity itself. By way of example, the European Centre for Culture and Debate[9] obtains more visitors per event[10] than the award winning ceremony organized by the *Jelena Šantić Foundation*[11].

[8] This notion emerged in relation to the economic condition of the country along with trends in cultural management internationally.
[9] Mostly known as KC GRAD, located in the city centre, it represents a creative space that gathers artists and introduces new artistic practices.
[10] Despite the given name, mission and vision, most of their events are market-oriented.
[11] The NGO started with the intention of financially supporting individuals and associations working in the field of culture and promoting basic human rights. It was *named after late ballet dancer, one of the most important peace activist in the ex-Yugoslavia and winner of Pax Christi International Peace Award. The Jelena Šantić Foundation continues her work and now it is encouraging others to follow their example.*

The principle of preservation remains a central one, in part as cultural and historical heritage is not only related to cultural policy but also the cultural diplomacy of the Republic of Serbia. Cultural policy and cultural diplomacy are interrelated when it comes to churches, monasteries and promotion of medieval historical landmarks. Whatever the culture, the policy framework offers incentives to channel one's work in that direction. Yet, we must ask, should this be a priority given how, in actual fact, the cultural diplomacy of the Republic of Serbia is almost non-existent, at least in terms of the creative individuals who are promoting country abroad. It is the case, that artists who have achieved significant success without government support are nonetheless being used to represent or promote the country internationally.

Another, unrelated example – Belgrade's district of Savamala – is equally relevant. On the riverside yet within walking distance of the city centre, the run-down district was referred to as a creative hub and artistic district over a decade ago. Moreover, it became a cultural phenomenon attracting the research of sociologists and art critics. It began with creative individuals, associations and non-governmental organizations seeing potential in what was a range of hangars, old buildings and warehouses. Transformed into cultural centres, multidisciplinary event spaces, and places where festivals, workshops and lecturers were held on daily basis, it escalated into a popular urban creative district, even beginning to make money. However, municipal authorities envisaged a larger 'Belgrade Waterfront Project'[12], whose design did not accommodate the improvised development of a creative hub, and which has prioritised commercial profitable urban development.

Understanding the relevance of the Law on Culture (2009) then, precisely in relation to the relevant Article 21, Savamala might have been a location for the support of certain types of organizations and cultural operators, given how the emergence of cultural orgnanisations must be understood as interrelated with a place or location and not just a set of cultural aspirations:

> Cultural activities can be performed by cultural institutions, cultural associations, artists, cultural associates and/or cultural experts as well as other cultural operators. (Law on culture of 2009, Article 21)

Furthermore, Article 73 of the same Law gives us a definition of 'other cultural operators':

> Other cultural operators shall be:
> 1: cultural endowments and foundations;
> 2: companies and entrepreneurs registered for performing cultural activities;
> 3: other legal entities in culture and cultural operators.' (Law on Culture of 2009, Article 73)

Such legal drafting leads us to the Article 12 of Law on culture (2009) which underlines importance of foundations and endowments in cultural activities:

> The funds for the financing of cultural activities can be secured through the establishing and functioning of endowments and foundations, in accordance with law. (Law on Culture of 2009, Article 12)

Using both objective and systematic method of analysis for this legal norm, it is clear that these two forms of legal entities are allowed to participate in cultural life, exercising cultural rights to the same extent. Furthermore, this Article is at the same time making reference to the Law on Associations (2009) and Law on Endowments and Foundations (2010), two Laws are representing *lex specialis* in a given area. They are tightly connected. Yet, the Law on Business Companies (2011) is considered to be lex generali.

The opening of the Law on Associations (2009), Article 1, provides a valuable detail: this Law will be regulating the establishment and legal status of associations, their entry and deletion from the Register, membership and bodies, associations' status changes and termination as well as any

[12] One plan of the authorities is to build a new city hub with elegant and luxury apartments.

other issues of importance to their activities. Further, the aforementioned Law (2009) will also be regulating the status and operations of foreign associations.

The Law on Associations is applicable in relation to all sorts of Associations (not just art organizations). Yet, they are in compliance not just with the Constitution and international agreements, but also with the norms regulated in Law on Culture. Restrictions of associations are in compliance with the Constitution. So, Article 3, Clause 2, of the aforementioned Law is regulating the way that an association's goals and operations may not be aimed at, for example, the violent overthrow of the constitutional order, or the breach of the Republic of Serbia's territorial integrity violation, or incitement and instigation of inequalities, hatred and intolerance based on racial, national, religious or other affiliation or commitment as well as on gender, race, physical, mental or other characteristics and abilities. Further, Clause 3 of the same article states that this provision shall be applied to the associations not holding the status of legal entity. In order to direct the activities of (arts) associations without difficulty, lawmakers ensured to define their activities as public, as regulated in the Article 5, Clause 1, of the same Law (2009). Registration according to the Article 4, Clause 1, of the Law on Associations (2009) is made on voluntary basis, but one can still operate as a non-formal group in the field of culture (with certain limitations) as long as the current provisions are followed. However, it is the case that according to the Civil Procedure Act (2011), a court can formally acknowledge the existance of an association (as a legal entity) even if it is not officially registered in the Associations Register (only as required by a specific legal process related to the court).

It is a widely known fact, that during the process of the establishment of an association or cultural organisation, statutes and other legal acts can be intentionally incorporated by artists and members of the organizations, without the advice of professionals, as a form of legitimacy. It is not uncommon that organizations with a sole aim of earning money, take on registration, thereby enabling them to apply for the local and international funds and develop short terms projects (albeit without any long term influence nor contribution to the cultural community or public). On the other hand, young entrepreneurs and even students are able to 'start-up' an art associations or NGO, and it has become common for such, after a period of time living abroad to return and start their own enterprise. Entrepreneurs are generally aware of risk and think strategically before launching their projects, while for students the development of an enterprise can be fraught with obstacles and despite initial enthusiasm, many give up. Many independent orgnisations 'live' for less than a year, nor develop during the early phase[13]. This opens many questions on the relation between law, cultural policies and public funding. The aims of a given law or article can be clear, yet disempowered by the relation (or lack of) between public funding and cultural policies.

No wonder that many statutes of these organizations betray numerous legal gaps, a lack of clarity and even a confusion between the mission and vision of the organization itself. The Business Registers Agency is not very helpful in this case, since the process of registration only requires examining if the form itself is valid (the application contains all necessary documents; if data from the application match with those of the documents; if the organization has already been registered, and so on.). After checking the form, the Business Registers Agency makes a decision on whether it will register the organization or not, which is even defined by the Article 14 of the Law on the Procedure of Registration with the Serbian Business Registration Agency (2011). This procedure of registration is swift and open that one could even register an organization with the sole purpose of denying human rights, or in our case, denying cultural rights. Afterwards, only a court could prevent the work of such an organization. With this in mind, it is clear why there is a vast number of art associations and NGOs on the one hand, yet on the other very few devoted to promoting cultural right specifically, or even fighting for the preservation of freedom of artistic creativity and expression.

[13] According to the Adizes Corporate Lifecycle.

There are a few notable foundations whose positive practice in the field of culture and the promotion of cultural rights are exemplary and allows us to focus more clearly on the Law on Endowments and Foundations. The subject of regulation in this law is its establishment and legal status, assets, internal organisation, entry in and removal from the Register, activities, statutory changes, monitoring the work of endowments and foundations, dissolution and other issues pertaining to legal status and activity of branch offices of foreign endowments and foundations (Law on Endowments and Foundations 2010). Further, main difference between these two types of organizations, is that there is no need for foundations to have assets or a budget in order to be registered, while at the same time capital assets are needed if you want to start endowment. To be precise these assets may be in kind, rights and money and the minimum value shall be 30.000€, as it is predicted by the Article 12 of the Law on Endowments and Foundations (2010). Just like Law on Associations, Law on Endowments and Foundations is also applicable on all forms of endowments and foundations and not just those related to culture and art. Having that in mind, it is clear why legal norms that can be found in this Law are of a more general nature, applicable to other organizations operating in the field of culture and trying to promote cultural rights. When it comes to the procedure of registration, it is similar to associations and the demands of the Business Registration Agency. Young entrepreneurs and artists, while thinking of registering their own NGO can choose between a foundation and association. Due to the fact that the registration process is prompt and simple, they can undertake it themselves and in most cases do not require a legal professional (always needed when legal drafting or the process of registration itself). However, this openeness can exact a price: often only realised later, the organisation has defined certain severe restrains articulated in the statutes and founding acts, unknowingly. Professionals might not be consulted, but depending on the nature of the organisations work they could alert the Press, make complaints to state organs, and raise questions. Many NGOs face internal problems in this way, and are distracted from their core mission and vision activities. There are, of course, cases whereby large firms and public personalities have established their own foundations, supporting projects that they consider important. These are usually specific in terms of their criteria and aims, and only work within a limited orbit of activity. While they certainly contribute to the public sphere of rights and cultural production, and they sponsor or commission the arts and culture, they nonetheless are too tightly defined to maintain a significant impact on cultural development more broadly.

The Serbian Development Agency is dedicated to the promotion of national exports, facilitating investments and overall economic and regional development in the country. However, it remains a pending judgement (and a matter for cultural policy) whether cultural NGOs, arts enterprises, art associations, and foundations have benefited from its activities. The Agency is for the most part dependent on the Ministry of Culture and Information (or large corporations) for such appropriate funding. The Law on culture (2009), in fact, predicted in its articles no. 19 and no. 20, that the Government of the Republic of Serbia will devise a new strategy for cultural development for 2017-2027, and this will be born out of an analysis of the current situation, the basis, direction as well as the instruments of cultural development, so as to plan the realization, through criteria, indicators and an evaluation process, as it is determined by the aforementioned law (Law on culture 2009). However, this strategy remains forthcoming. The abovementioned organisations have to continue with their work of participating in Serbian cultural life, extending the legal framing of cultural rights through practice (or not) with little empowerment or national coordination for cultural development.

Cultural rights are human rights, but we can also say that in relation to a cultural sector, it is as much a practical requirement as a ‘right’. Even though it is proclaimed by the legal instruments

of Serbian cultural policy[14] its practice is inconsistent and questionable as to its strategic value in cultural development. As mentioned before, the fact that cultural rights are explicitly guaranteed by Constitution, does not prevent cultural suppression and the conditions for artists practicing self-censorship, such as cutting public funds, cancelling exhibitions, and the continued closure of the National Museum (now for more than 10 years). Many NGOs Serbia, some significant cultural operators, have been drawing attention to this situation to little effect. The National Museum is proclaimed to be under 'renovation' but this is evidently not justified, nor is preventing its collection from being used for other exhibitions – one example was the exhibition of works by Edgar Degas from the collection of the National Museum, hosted by Gallery SANU from 15th July – 15th September of 2017.

Organizations operating in the field of culture are rarely funded with significant financial support, and so turn to the market and competing with each other in order to survive. Given that the average consumer in Serbia has limited financial means, participating in the cultural life of the country is so often dictated by price, and only secondly determined by cultural content. A situation pertains where organisations are usually only partly funded by the state or local government, and so are compromised by their need for the market. Cultural managers and the fight for cultural rights in such an economic situation involves not only a fight for freedom and the full exercise of rights, but the right to public resources, space and the means of providing art and artistic creativity for a general public, whether controversial or not. It is also fight for practicing and developing the culture of the country. 'Inter arma silent musae'[15] and this war in Serbia lasts for too long. It remains to be seen if the forthcoming strategy for the cultural development of the Republic of Serbia, will bring any changes, and fully activate the right to culture as access, participation and development. There are many aspects to be considered by creators and researchers, and NGOs and art associations are just one area. But in understanding their context of formation, incorporation and activity, it becomes clear that cultural rights remain weak if only inscribed within law and legal frameworks. Cultural rights is contingent upon policies and public infrastructure, providing for an active participatory public. As Albert Camus famously stated:

> Without culture, and the relative freedom it implies, society, even when perfect, is but a jungle. This is why any authentic creation is a gift to the future.

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[14] As Dragičević Šešić (2011: 24) observes, the three types of cultural policy instruments are the legal, financial and organizational.

[15] In the times of war the muses are silent.

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Cultural Rights, Sustainability and Development: are they related? If so, how?

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Abstract

This article examines the relationship between the often separated ideas of rights, development and sustainability. While accepting that each is a contested term, the paper argues that the three elements can be brought together into a holistic model of positive social transformation, and in which each informs the other in creative ways. The article expands this triangulation by exploring in some detail the notion of Cultural Rights as an expansion and re-application of more classical understandings of human rights, and then links this exploration to contemporary debates in the field of culture and development. It argues that cultural rights provide the best vehicle for clarifying and applying the 2005 UNESCO *Convention on the Protection and Promotion of Cultural Diversity* and suggests concrete ways in which, on the one hand, culture can be more effectively integrated into holistic development discourse and practice, and, on the other, by which cultural as well as ecological sustainability can be foregrounded.

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Introduction

The notions of Rights, Development and Sustainability are now very much part of the contemporary discourses of politics (both national and global), environmental policy (like managing the effects of climate change), and society (social or community movements, calling for justice, equality and recognition). Yet, these three notions vary and are often contested as to their meaning and viability, but all three (perhaps along with a fourth notion, 'globalization') now frame the way in which both social scientists and policy makers approach the world which they attempt to both understand and influence. But leaving aside for a moment the question of their precise definition, and of the ideological baggage that these (as with most social science concepts) carry . A significant issue also arises – whether they are related, and if so, how? Are they three quite separate *approaches* to the contemporary social, political and economic aspects of the world, each valid in its own sphere, but with no organic links between them? Or can a case be made that a more holistic approach to positive social transformation (and hence potentially a more powerful and effective one) might be envisaged – if these three primary terms are brought into a working relationship? This paper will take the latter as its starting point, for an approach that will argue that by identifying their interconnection, and by strengthening them where they are currently weak, a new theoretical model and a workable policy framework can be created and utilized.

But first, so as to briefly comment on the semantics of the debate: the notion of 'development' has of course attracted a vast literature and many voices contesting its nature, and indeed contesting whether it is a good idea at all (or simply the latest phase of Western imperialism in a more attractive package). One area of agreement is that its relative failure still very much exist – (given many of the problems that development purports to address, such as poverty, inequality and social exclusion) – and one reason for this has been the neglect of the cultural aspects of development in favour of over emphasis on economic aspects. The somewhat belated recognition of this lacuna has begun to give rise to a burgeoning literature to bring culture and development back into fruitful dialogue with one another (Schech and Haggis, 2000; Radcliffe, 2006; Clammer, 2012). Likewise the recognition of the unsustainable nature of contemporary patterns of 'development' (and their historical and continuing patterns of industrialization, consumption, transport, energy use and urbanization), and the growing acknowledgement that these cannot continue without courting disaster for the eco-systems on which all life depends, has rightly become a major preoccupation. But what of Rights? While as a recognition of certain inalienable dimensions of the relations of human beings to one another, the principles set out in the 1948 Universal Declaration of Human Rights, are not widely contested (even if some of the details are). In fact, it was quite quickly recognized by the UN and many of its constituent agencies and adhering governments that the scope of the UNHR was not wide enough, and in 1966 two additional treaties were adopted – the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). But although the latter does indeed contain the word 'culture' in its title, it does not clearly indicate which of its provisions specifically relate to cultural rights, nor does it actually define such rights. The relationship between human rights and cultural rights, if such there be, is consequently left vague in the principle international legal instruments.

Yvonne Donders attempts to clarify this confusion by both defining cultural rights and indicating their scope: 'Cultural rights can be broadly defined as human rights that directly promote and protect cultural interests of individuals and communities and that are meant to advance their capacity to preserve, develop and change their cultural identity' (Donders, 2015: 117). She expands this minimal definition by arguing that such rights not only include those that specifically mention culture (e.g. the rights of minorities to practice and enjoy their own culture), but also those broader human rights that have a direct link to cultural freedom, such as the rights to self-determination, to education, to free expression and freedom of religion, and to those principles

embodied in such international instruments as UNESCO's 2001 *Universal Declaration on Cultural Diversity* – in which cultural rights are noted as required for the full expression of cultural diversity. Seen in this light, cultural rights can be identified as a sub-section or extension of general human rights. At one level, of course, it is odd to talk about culture as being a 'right' at all: everyone already has a culture (or a mixture of several of them). The key issues are not those of a 'right to' or by logical inference of 'possession', but of the tragic fact that in so many cases cultural rights are threatened by censorship, suppression, erosion, exclusion or displacement. This is the case with those who desire to practice their culture, but find themselves, for example, in refugee situations (Balfour, 2013). The question then becomes, how are cultural rights related to either or both of development and/or sustainability?

Culture and Development Revisited

As noted above, there has been a considerable swing towards the idea of systematically relating culture and development. This has taken a number of forms. One has been the more familiar argument that culture contributes to the 'delivery' of development goods. Examples indeed abound of the necessity of taking culture into account in many contexts – health provision (where local ideas of the body, gender, disease causation and witchcraft and magic may have a large impact on the successful implementation of well-meaning but culturally inappropriate health care plans – see Samson, 2004), agriculture (including the adoption of crops that are new to indigenous diets), housing and architecture (for example post-disaster reconstruction – for examples see Aquilino, 2011), and many other situations (for a slightly dated but still excellent set of case studies see Dove, 1980).

In these cases, culture has a primarily instrumental role: it is not necessarily valued for itself. This weakness implies a more comprehensive approach in which culture itself is seen as an intrinsic value, and hence what might be called not so much 'development and culture' as the 'development *of* culture. This again has a number of possible dimensions, including the encouragement by UN agencies such as UNESCO and UNDP of 'creative industries' – particularly drawing on indigenous cultural production (music, performance, crafts, visual arts) as an important economic resource for income generation in 'developing' communities (UNESCO/UNCTAD 2008; Kabanda 2014). This approach is different again from the older 'human needs' approach, in virtually every list of which aesthetic needs and the needs for expression and leisure are always prominent (Dube, 1984). This is reflected in recent discussions of the role of the arts in development, which not only argue for the utility of the arts in income-generation, but for their essential role in actually constituting culture as well as their role in establishing dignity, identity, imagination and creativity (Clammer, 2015). All this points to a holistic conception of development that takes into account sociological, economic, political and cultural elements, not only as parts of the totality of a rounded image of development, but also as defining the *goals* of development. What should development look like? What are its ends and what kind of future society do we envisage that is the outcome of the whole process?

But what then of sustainability? Does it relate in any coherent way to the notion of cultural rights? Here again, I will argue that it does, if we consider four possible dimensions of the relationship between culture and sustainability. The first is the relationship between cultural diversity and bio-diversity. Here two levels are relevant. One is that local notions of ecology are encoded in local languages and cultural practices (including methods of farming, foraging, hunting and conservation, embodied in turn in symbolic practice such as systems of taboo), and with the loss or erosion of such cultures and languages, such knowledge is lost. Societies that have maintained sustainable relationships with their environments have obviously got something right, and the loss of their 'know-how' weakens the whole body of human knowledge and experience when dealing with the crucial issue of the environment which we are so rapidly despoiling. The second is that it is widely recognized that biodiversity strengthens the entire biosphere. We often do not know the role that a creature or a

plant plays in this total system, and how it contribute to the maintaining of the whole. But when we do, we see the principle clearly at work: the humble bee for instance, populations of which are becoming seriously depleted (probably because of human over-use of insecticides), are the major pollinators of many plant species, and without them many such species could not reproduce; and without bees themselves reproducing, human food supplies will greatly diminish.

It is not unreasonable to extend the same line of reasoning to human cultures: that the loss of cultural diversity diminishes the whole as knowledge, alternative lifestyles, long sustained relationships with the environment and forms of music, performance, cuisines, language, technologies, cosmologies and kinship structures, are lost for ever. Even such an arguably staid body as UNESCO recognizes this, and in the preamble to the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* recognizes 'the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situation where cultural expressions may be threatened by the possibility of extinction or serious impairment'.

The second element is that of the emergence (in the affluent societies) of consumption cultures that are inherently unsustainable. Buy-and-throw-away, binge flying, dependence on the motor car, un-necessary packaging, rapid changes of fashion in clothing, huge amounts of food wastage (some estimates suggest that 50% of all food grown is wasted), and energy wastage in many forms, all contribute to unsustainability, especially when scaled-up to a global level. Linked to this is the third factor of what might be called 'cultural performances' – the many ways in which our culture has itself has contributed to, or indeed created, the planetary crisis in which we now find ourselves. Its propensity for generating conflict (and militaries by the way are among the world's biggest polluters and energy users, and much of their pollution is highly toxic), its dependence on high-tech medical procedures, destruction of the soil through over use of artificial fertilizers and pesticides and weed-killers, its excessive resource extraction, over-urbanization, reliance on energy guzzling (but inefficient means of transportation and massive air pollution deriving from the same), are all examples of the ways in which our 'civilization' is actually self-destructive. Even small-scale actions and activities can contribute to this situation: cruise liners are among the most polluting and waste-generating things ever afloat, and as ecologically-minded theatre producers have in some cases come to recognize, a theatrical production can be highly unsustainable in its short term use of non-recyclable sets and costumes, huge usage of electricity, waste generation by the audience (many of whom used unsustainable modes of transportation to get to and from the theatre), something that until recently rarely occurred to practitioners in the theatrical world (Garrett, 2012).

The fourth element is the relationships between culture and economy. One does not have to be a Marxist to recognize that the economy is the dominant element in modern society. It not only creates the material and immaterial goods, but it also creates the desire or the 'need' for them; it shapes our subjectivities, our use of time, the possibilities of our leisure, our patterns of movement and structure of time, our ways of moving and what we wear, eat, drink. This has a number of important implications. One is that cultural critique alone rarely in itself reshapes society. It certainly provides the imaginative engine, but without addressing its relationship to, and often complicity in, the economic system, it cannot in itself be a lever of fundamental change. Yet cultural critique can supply the ammunition in many forms: reimagining the future, engaging in what a generation ago, Herbert Marcuse called the 'education of desire', formulating forms of cultural practice that are sustainable and discouraging those which do not. Sustainability and culture are intimately connected, and so then necessarily is development, desirable or undesirable forms of development being precisely the outcome of that intersection.

There are a number of major implications of the foregoing, and certainly four that immediately spring to mind. The first is obviously the expanding of the notion of human rights to

include cultural rights, and to ensure that such rights are not subordinated to others in the classical list of the UDHR. The second is encouraging the cultivation of cultural practices that are both sustainable and just. It might indeed be here that we are broaching the question of the *rights of nature* – the link in other words between human rights and the protection of the biosphere. The third is to link the idea of rights to that of responsibilities, since a culture of only entitlements is likely to be destructive of both the rights and liberties of others, and of the environment. The fourth is to expand the notion of social justice to include *cultural justice*, and to include in the latter what I have elsewhere called 'visual justice' – the right to beauty, or at the very least to the reduction of ugliness, bad design, visually unattractive architecture and city planning (Clammer, 2014, Schwartz and Krabbendam, 2013). As the message on a T shirt spotted on a suburban train in Tokyo (a very functionally efficient, but not visually attractive mega-city) 'Good design may not save the world, but it sure makes it more attractive'.

If these principles are correct then *cultural activism* is required. This will entail a pro-active stance, which promotes cultural rights and cultural production, extends legal and copy-*right* protection to indigenous cultural products, and pressures governments to meet their obligations under the various UNESCO conventions and declarations. It will also encourage a broad and concretized notion of human rights (i.e. rooted in actual cultural practices and manifestations), which encompasses both cultural and ecological rights. In other words, it will construct a genuinely holistic conception of development.

Interrogating Cultural Rights

The argument of this article so far, has been that indeed cultural rights are closely connected to development and to sustainability through many intimate links – sustainable cultural practices in consumption patterns, transport, urban planning, and very much in the arts, architecture and design (Kagan, 2011). Cultures are both expressions of and sources of imagination, including what we might term 'social imagination' – ideas that promote new patterns of social change and transformation. The development *of* culture is in a very real sense 'development' – the creation of spaces of meaning and freedom (often beyond politics or economics in their narrow sense), the source of alternatives, the watering of the roots of identity, and the generator of cultural and aesthetic pluralism that constitutes the diversity that, as we have suggested, parallels in significance the bio-diversity on which the web of life depends. But more than one approach can be taken to this – certainly an anthropological one. This examines the actual manifestations of culture, but also a more formal one as expressed in international legal instruments, and in particular in the various declarations and conventions that UNESCO, as the UN body specifically charged with the protection and promotion of culture, is so keen on issuing.

The most recent of these is the 2005 *Convention on the Protection and Promotion of Cultural Diversity,* and the ways in which it conceptualizes culture and its relationship to development is significant and contestable (UNESCO, 2005). The preamble to the Convention, while never attempting to define its operative concept of culture, sets out, in typical UN-speak, a series of propositions. Having stated that it regards cultural diversity as a normal characteristic of humanity, and that it is a global common heritage and should be cherished, the Convention develops these propositions: *'Being aware* that cultural diversity creates a rich and varied world, which increase the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations'; *'Recalling* that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels'; and '*Celebrating* the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments'. Having set out these claims, the Convention goes on to argue (without any specific evidence or suggestions of how to do so) for the

need to incorporate culture into national and international development policies, to protect cultures from erosion, particularly under the impact of globalization. The subsequent Articles reaffirm the importance of the link between culture and development, and specifically asserts in Article 2, subsection 6 (the Principle of sustainable development) that 'The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations', and again repeats itself in Article 13: 'Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions'; and it then suggests a number of means of doing this, including strengthening cultural industries, allowing fair access to global markets for developing country cultural products and services, cultural capacity building, and the promotion of the mobility of artists from the developing world. Very woolly in its language, without sanctions or concrete methods for promoting its aims (left specifically up to the good will of signatory governments), and without actually defining the concept of cultural rights, the Convention is clearly a well-meaning, but ineffective instrument for promoting those rights and the broader field of social justice which they are supposed to embody. But this weakness in turn points to where the lacunae exist, and hence to potentially strengthening and more clearly defining the links between culture and development.

There are, of course, many aspects of the Convention, and of its predecessors including the various human rights declarations such as the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*, earlier UNESCO documents such as the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972) and the 2001 *Universal Declaration on Cultural Diversity*, together with debates about the circulation and protection of cultural products arising from moves to liberalize global markets through the GATT (General Agreement on Tariffs and Trade) and its successor, the World Trade Organization (WTO), which cannot detain us here (for a systematic study see De Beukelaer, Pyykkonnen and Singh, 2015). The aspect that specifically concerns me here is the link between culture, sustainability and development, which now needs drawing out in more detail.

Significant in the Convention is that it specifically relates cultural rights to human rights, and culture to sustainability. Whether the logic that links these things in the Convention itself is very clear, is another question, but at least this important triangulation has been put on the table for debate, and the question now is to operationalize and strengthen it. To do this I would suggest that several steps have to be made. The first of these is the recognition that all people's 'have' a culture, and that all cultures are in principle equal. Debate about this arises primarily in relation to such issues as, classically, female genital mutilation, cannibalism and perhaps today in relation to non-sustainable cultural practices, such as excessive waste generation. But the principle remains as all cultures are dynamic and change over time. As Foucault and others have pointed out, in Western cultures disciplinary regimes have evolved from the brutality of violent and bloody public executions towards, for the most part, much more psychological-based forms, and from the infliction of pain on the body towards rehabilitative work on the 'soul'. What this principle also points to is the dissolution of any distinction between so-called 'high' and 'popular' cultures. In practice these draw on each other, 'quote' each other, and interact in numerous ways (in forms such as advertising for example), and many forms of 'craft' are, in terms of workmanship and aesthetic qualities, often far superior to many manifestations of contemporary art. Furthermore, many forms of performance arts are rooted in ritual, religious practices or ecological/agricultural practices that are an integral part of a local culture, not something just 'put on' for purely entertainment purposes.

While an instrumental approach to culture – whether as seeking culturally appropriate ways of conceiving or delivering development policies, or as the encouragement of creative industries – is

important, it should not obscure the fact that culture runs much deeper – in fact, very deep indeed. It represents world-views and forms and expressions of meaning (often embodied in religion as much as in art), the ways in which a group of people express themselves verbally, visually, architecturally, in performance and in self-representations. It is also holistic and encompasses such themes rarely discussed in the development literature as food, costume, bodily decoration, music, body language, hair, sexuality, sport and design, and intersects in fundamental ways with economy, kinship and indigenous legal conceptions and practices. The notion of the development *of* culture points to the idea that the recognition of 'culture' not as some abstract idea, but in its concrete manifestations, and the active strengthening and encouragement of these manifestations, is real development and reflects in a very practical way the 'capabilities' approach recommended by scholars such as Martha Nussbaum (2011) and Amartya Sen (2009). This, in other words, constitutes 'cultural rights' at work, in their concrete expression. If attempts to define 'development' point towards ideas both of social justice (freedom of expression and the creation of a context in which cultural rights can be actually exercised) and to some concept of an abundant life, or even to a utopia, and certainly to a future in which creative cultural expression is an organic part of everyday life. Indeed one could argue that the poverty of many development practices is precisely that they point to an image of life dominated by the economic and by work, rather than to a picture in which creativity and imagination are given full play. Simple evidence of this can be found in the fact that few aid agencies actually fund cultural work, and that when governments decide that they need to cut budgets, the first to go is usually funding for the arts and for such valuable, indeed essential cultural institutions as libraries and museums.

Martha Nussbaum and others have cogently argued that cultural development (and its expression in forms of education and particularly the humanities) is essential to the creating and maintaining of democracy and civilised forms of governmentality in general (Nussbaum 2012). The notion of cultural rights may then be extended to encompass not only the protection of existing forms of cultural diversity, but also to the right to be exposed to such forms: in other words the entitlement to a humanistic education, whether in itself, or as a component of an education in other technical fields – management, engineering, medicine, law and so forth, or may one dare to say so, in development studies – as an essential part of a rounded upbringing and as the mechanism through which forms of imagination, creativity and the search for alternatives is best pursued. Such imagination and creativity need not be confined to the arts themselves, but spills over into any number of adjacent fields, providing the tools to rethink such socially fundamental categories as gender, ethnicity or sexual and subcultural differences. It also allows local conceptions of 'heritage' to be embraced, and, as UNESCO itself has done, to extend this notion from purely material remains to what it is calling 'intangible cultural heritage' which includes folklore, oral traditions and stories, local musical traditions, folk dances and many other 'popular' but non-material expressions of culture. And it allows the expansion of ideas of what constitutes a 'social movement', it being evident that many cultural movements are also social movements – say, Surrealism in the West, or the Mayan Rights movement in Latin America, in which rights were seen not only as political and economic but also very much as cultural (Davis 2004), and in which the struggle for cultural rights was part of a holistic conception of identity and development.

Cultural Rights, Multiculturalism and the Cosmopolitan

An essentialist or 'anthropological' definition of culture tends towards the static, but yet stasis can hardly be taken to be the condition of culture in the contemporary world situation. Here we can not only invoke globalization, but also seemingly non-cultural events such as climate change, which in fact have profound effects on cultural practices and conceptions of the world in which such practices might flourish (or not.) Such a view of culture is what, in critiquing the work of the anthropologist Jonathan Friedman, Nikos Papastergiadis calls a 'residentialist' conception of culture – notably one that denies hybridity and

mobility and which assumes that 'Symbolic practices were supposedly confined to the physical and territorial boundaries of a given place' and which has the corollary that someone uprooted from or disconnected from the original place of belonging and 'severed from the cultural system that holds together the whole set of identifications' (Papastergiadis, 2012: 125). Such a view of culture, which is very close to the ones embodied in the UNESCO documents cited, makes at least three important and contestable assumptions. Firstly, that cultures are spatially rooted (presumably in only one place); secondly, that identity is tied to such a specific location (a kind of cultural nationalism) such that mobility destroys that vital connection; and thirdly, consequently, that hybrid cultures are inauthentic. And so a cosmopolitan subjectivity equals rootlessness.

However, these three assumptions can be contested both theoretically and empirically, and have significant consequences for both the notions of cultural rights and of cultural diversity. The UNESCO understanding of culture does appear to be highly 'residentialist' in assuming that culture exists in particular spaces; but not between them. This is why they need to be 'protected' from globalisation. It seems hardly necessary to even argue against this view: it is glaringly obvious that cultures, like people, 'travel', that they recompose themselves in dialogue, conflict, merger or influence with one another; that there are no 'pure' cultures, that hybridity is more the norm than the exception; that migrants successfully reconstitute a variety of their original culture in ways that interface with the new host culture (modifying habits of food, dress, body language, housing and so forth, while retaining religious identity and many aspects of kinship and marriage customs); and that very many such persons do not feel any problem with their 'identity' (itself a very conceptually unclear term) but formulate new subjectivities appropriate to and quite comfortable with, their new spatial and cultural situation.

The notion of cultural rights then cannot be tied to a static conception of culture. On the contrary, it might be argued that the notion of rights needs to be recast as, as it were, an 'hybrid' one – that is to say, that is open ended and contextualised. This does not dissolve the idea that cultural rights can refer to the preservation and the right to practice the 'original' culture, but expands it to allow for the rights of hybrid cultural forms to be equally respected, particularly when they are quite normal. The political dimensions of this need to be recognized: claims for the special protection of (only) original cultural rights, often masks, at best, a form of nationalism and at worst, a barely disguised forms of fundamentalism. There are, alternatively, strong voices suggesting that what is emerging on a global scale is a new form of *cosmopolitanism*, fed by the internet and reflecting new was of 'belonging' or asserting identity (Creed, 2003), or Paul Gilroy's claim that what we are seeing is a new 'planetary humanism' emerging from and fed by new forms of urban conviviality and transnational human rights movements (Gilroy, 2004: 28). These are optimistic voices, but they do point to the real possibility of new forms of cosmopolitan identity, no longer necessarily rooted in a place, or in the spaces 'in between', but in a new space, constituted exactly out of the processes of globalization and cultural transnationalism, that are the contemporary planetary reality. This has important implications, including that universalism can exist at some levels (for example, in the ideals of the UDHR), while diversity can be celebrated at others, whether in local cultures or in the many hybrid forms that cultural dynamism takes. It also suggests that *cultural translation* becomes an important tool – perhaps the basis of a new anthropology – as mediation between cultural forms takes place and as interpretation is constantly needed, between what used to be called nations, between generations, between one culture of origin and others, and between one culture of origin and its own emerging transformations.

There are many points of contact between debates about the possibility and nature of cosmopolitan identities and debates about multiculturalism, although the two should not be confused. Multiculturalism suggests a situation in which a number of cultures co-exist together, without achieving any degree of integration, while

cosmopolitanism suggests either a melding of cultural identities or a transcending of cultural differences in favour of a more universalised sense of identity. But even the concept of multiculturalism undermines any essentialist or 'residentialist' notion of culture, or at the very least posits the spatial and temporal coexistence of multiple residential cultures, aware of each other's existence, although not necessarily interacting. For philosopher Kant, for whom the development of appropriate political formations is a pre-requisite, it follows that, as Papastergiadis rightly points out, 'Cosmopolitanism is thus not a virtue that is to be pursued for its own qualities, but is dependent on the developments within a political process that seeks to control the destructive drives in human nature, as well as to temper the tyrannical abuses of power' (Papastergiadis, 2012: 83). The simple diversity of cultures does not guarantee that all of those cultures are benign or committed to the integrity or autonomy of other cultures in the world-order. Far from it: some cultures may be predatory, colonialist or assimilative of others in the total cultural ecology. Some might argue that this is a natural evolutionary or historical process. But even if it is, it demonstrates the role of power in cultural relationships. All cultures may be born equal, but they certainly do not necessarily remain so.

So while what Papastergiadis calls a 'Cosmopolitan Imaginary' is certainly possible and desirable (unless one is a hard-core residentialist), it, along with UNESCO like concepts of culture, must be framed in relation to a complex understanding of hybridity – as the inevitable incorporation of 'foreign' elements into identity, as the process of the assimilation or attempted neutralization of such elements by the receiving culture, or the recognition of the inevitability of socio-cultural change, of individual and communal strategies of openness while still retaining attachment to earlier dimensions of identity (such as one's religion of birth), and the existential and social process that emerge in diasporic situations (which in many ways are now the norm, whether through physical migration or the consumption of globalized cultures via the media and other pervasive sources of influence). The nature of the public sphere is thus transformed and becomes a (culturally) fluid space in which all the partners involved are, if not transformed, certainly influenced by the process of 'culture contact' within which they are necessarily involved, and which can lead to new group formation or, and this is crucial, to new forms of social exclusion (Nederveen Pieterse, 2001). Cultural rights, then, have not only to recognise the dynamic nature of culture/cultural change, but also to grasp that cultural interaction is not equal, but an aspect of power relations. 'Diversity' in itself tells us nothing about the actual dominance of some cultures and the marginalization of others (and hence of their members) in the total global cultural ecology. Cosmopolitan cultures have always existed and the collaborative methodologies now become widely employed among artists, scientists, ethnic groups, co-religionists and in many other spheres are witness to this process. But without recognition of culture as a primary site of struggle, the notion of 'cultural rights' is hollow. Like all notions of rights (and indeed of all systems of law and jurisprudence), the notion is unnecessary where justice prevails. Its salience comes precisely from the fact that such justice (and ecological responsibility) does not yet do so, making the pursuit of cultural rights an even more urgent and sustainability-promoting process than ever before.

Deepening Development: Culture and Social Justice

Development itself then is a highly plural project, one that necessarily includes culture and in which for developmental processes to last, must be sustainable. Cultural policies as a result enter the field of development discourse every bit as much as economic ones. It must be rooted in the local soils of cultures or it withers, and the many development failures that litter the landscape are testimony to this, as the anthropologist James Scott and others have so pointedly indicated (Scott, 1998). This is, in many cases, because of the failure to adequately triangulate culture, development and sustainability. To make that relationship a creative reality, I will suggest a number of factors that ideally need to be incorporated into the model.

The recognition that we live on one shared planet, and one of remarkable complexity and beauty, (and on which, leaving aside science fiction fantasies, we are happily condemned to live), points to some of the ways in which the C-S-D triangle needs to be both filled in and modified in the light of emerging global issues. All three terms share the quality of being implicated equally in all these factors: they form their constant field or horizon. The recognition of shared Earth-boundness has at least two implications. One of these we have already suggested, notably the necessity of orienting culture, sustainability and development towards the environment and its protection and improvement – the fostering of 'ecological cultures' as a basis for truly sustainable development, without which merely temporary band-aid solutions are likely to predominate (and ultimately fail). The second is the rethinking of the concepts of citizenship, multiculturalism and the cosmopolitan in the context of a shared and globalized world. Earlier concepts of citizenship have been tied to the notion of the nation-state. But in a world of inter-connections (signalled most significantly by global warming and climate change) no socio-political unit stands alone. As a result the suggestion has been emerging that new and more globally inclusive concepts of citizenship are required, including what some commentators are calling 'ecological citizenship' (Davidson, 2004). This implies a global ethics, and one of mutual responsibility rather than either an individualistic one or a purely local or politically rooted one. The very word 'cosmopolitan' means to be linked to a larger whole. Some scholars of multiculturalism have suggested that the kind of 'cultural diversity' embodied in the UNESCO document represents a form of 'liberal multiculturalism' (Kymlicka, 2005) – a well-meaning, but hardly pro-active concept that does not uncover the radical implications of such a notion, which would include a culturally multi-polar world, one in which globalization rather than homogenizing cultures supports genuine difference and hence the existence of many epistemologies and cultural ontologies. Culture is not only what is, but also what might be -- the very notion of literary fiction being exactly the creation of alternative visions, as Mario Vargas Llosa so cogently argues (Vargas Llosa, 2007).

The C-S-D triangle also has to be contextualized within those contemporary processes of globalisation that throw up constant new challenges to all three. The list is long and can never be inclusive, but certainly contains the relationship between the C-S-D holism and globalization itself as an economic and social phenomenon, containing such elements and migration and migratory cultures, new global social networks supported and made possible by the internet and social media, emerging issues of food security, of global health, of the impact of new technologies and their relationship to the appearance of a 'digital world' and the functional and dysfunctional (for example cyber-crime) that this generates, new forms of often violent fundamentalisms, new subcultures, patterns of travel, and new concepts of identity among not only the displaced (refugees and asylum seekers) but also among those who chose to be multicultural and have the means to be so. Slowly, yet another area rarely discussed in development thinking is merging partly in response to these issues – notably new forms of international law, which have themselves to negotiate their relationship with local legal codes. As transnationalism increases, legal systems rooted in a single culture become less and less applicable, not only in relation to local legal pluralism (say in India with Hindu, Muslim, tribal and British colonial law all occupying the same national space), but precisely to issues of international trade, copyright, space (as perhaps a logical extension of the existing law of the sea?), new technologies, and basic religious and cultural differences.

This discussion then points to a number of propositions, which can be summarized as follows:

1. That cultural rights, sustainability and development form a triangle of necessarily related elements.
2. That cultural rights are an integral part of human rights, and both are related to the rights of nature.
3. Critiques of the supposed universalism of human rights as they are embodied in the UDHR have largely taken the form of arguing

that there are cultural variations that mean that human rights should be contextualized in relation to particular cultures. Leaving aside the self-serving motives of some governments that have argued this position (in order to water down their commitment to particular rights, for example), the incorporation of cultural rights as an aspect of human rights goes a long way to meeting this objection.

4. Cultural rights must recognise the autonomy of particular aesthetic expressions, a recognition that gives cultural rights a critical edge by not simple acknowledging diversity (a patronizing position), but recognising them as genuine alternative and equal epistemologies and ontologies – of ways of seeing the world and of being in that world. No one culture can then claim a monopoly as having *the* correct world-view. There is no such thing.
5. All cultures evolve and change, but should, except when clear violation of fundamental human rights occur behind the smokescreen of claims to cultural exceptionalism, be allowed to evolve at their own pace. The alternative is a kind of cultural colonialism, in which the more economically and politically powerful societies seek to impose their own culture on the rest of the world,(often today in the name of 'soft power'), leading to forms of cultural homogeneity quite at variance with the goal of the protection and promotion of cultural diversity.
6. Given the imbalances in power, politically, economically, technologically and culturally in the contemporary world, imbalances enhanced rather than diminished by globalisation. Pro-active cultural policies should seek to not only protect, but to actively support indigenous cultures in all their variety, to encourage cultural experimentation and new forms of art, and aid agencies should see it as part of their duty to support culture as an essential part of a holistic approach to development.

We are in a situation in which development fails without culture, as does any realistic notion of sustainability, in which it is now recognized that culture is a 'pillar of sustainability' (Hawkes, 2001).

The bottom line then is an expanded notion of human rights that not only includes cultural rights, but which sees the fulfilment or achievement of a rights-based world as constituting the nature of sustainability and the purpose or end of development. Social justice is the non-negotiable project, but in the recognition that social justice must now include both cultural and ecological justice in the recognition of development as a holistic and life-enhancing process.

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Cultural Rights and Cultural Policy: identifying the cultural policy implications of culture as a human right

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Abstract

This article explores the parameters of 'culture' as a Human Right – Cultural Rights – and culture in the Human Rights system of international law and its now globally-pervasive set of axioms. The article attends to definitional issues on the use of culture to determine critical loci of human identity formation and fundamental ethics, and the use of culture to conceptualise the scope and scale of human freedom. Its aim is to define Cultural Rights in direct relation to the interests of cultural policy making and more importantly in relation to the scholarly field of cultural policy research. This will involve defining the legal-institutional sphere of Human Rights and range of applications but only insofar as to focus on issues central to current cultural policy research and its contingent questions of interpretation (such as the meaning of a 'cultural right' in particular social contexts). The secondary aim of this article is to define how cultural policy research (historically invested in particular historical evolution of national arts traditions and heritage management) could be central to the study of 'rights-based' global development.

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Introduction

Cultural Rights, in their various iterations as precepts, principles and ultimately internationally-recognised laws, are clear and specific, and to be found in varying form all nine of the international Human Rights treatises. Clarity and specificity, however, is less forthcoming in the application and implementation of Cultural Rights, and there arises a consequent challenge in determining how cultural policy can delimit and reinforce a realm of rights within the cultural sphere. The challenge is in some ways a mirror image of the challenge facing sociologists when attempting to delimit a specific sphere of social life called "the cultural". The characteristics of "culture" are subject to interminable debate, interpretation and contestation, and do not apparently adhere to the usual coordinates of social life – as self-evidently framed by the private, the civil, political or economic realms. Culture is of course a "realm" of social life and yet permeates (and thus faces demands from) all other realms.

Thus, culture has traditionally been regarded by scholars as the most pervasive expression of social identity and collective self-determination, tradition and heritage, but is also noted by its facility for differentiation (or seemingly endless mutability). Moreover, while culture is intrinsically "collective", it provides for the means of profound individualisation, dissent, protest and the self-representation of 'particular' interests. Culture, as defined by UNESCO, ranges from the historical-intellectual traditions of the arts and philosophy, to the everyday utilitarian design of shelter, clothing or making food, to media, design, technology and small-scale industrial production (Huxley, 2010; Singh, 2011; UNESCO, 2015b). In its entirety, culture is therefore not a single object of law or public policy, and so its relation to universal Human Rights is particularly intriguing. All seven UNESCO Conventions offer a robust assertion of culture as an object of international law, the last of which – the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (UNESCO, 2005) – attracted an almost unprecedented unanimity in passing through the UN Assembly. Yet its legal force in the realm of Human Rights remains muted (Donders, 2015).

The hope that the multivalent, multidimensional and endlessly differentiated phenomenon of culture could be made specific through the creative industries and concomitant policies for creativity is somewhat disappointing (O'Connor, 2016). But this, it must be said, is less of a concern in the Global North, where culture is institutionalised and professionalised (where rights to and in "the arts" or "cultural sector" is defined and protected by other legal frameworks); beyond the North and into the Global South, the question of rights are somewhat more urgent and complex. Though, even in Europe, with the rise of multiculturalism under mass migration, the "right" of, or to, culture is becoming less obvious. There is, in fact, altogether little research on the jurisprudence of Human Rights as a "hermeneutics" of the cultural – how international law defines what culture is, and *could* be, under radically changing social conditions (Lury, 1993; Borelli, Lenzerini, 2012; Goonasekera, Hamelink, Iyer, 2003). Of consequent interest to this article, therefore, is how the legal appropriation of culture as an object of international law has in turn defined what counts as culture itself, particularly for policy makers. It is the purpose of this article to chart the various semantic, epistemic and hermeneutic implications of culture as an object of human rights law – exposing the areas of lack in cultural policy research.

The aims of this article are therefore necessarily expansive, and will involve broaching a theoretical account of the landscape of Cultural Rights as a cognitive discourse on culture – as a way of understanding culture and its potential appropriation in a global (i.e. universal) social or "public" realm. The term "public" cannot be assumed to be universal, of course, but can be used as a political metaphor for a putative social realm of self-determination outside the orbit of the State and even supra- or inter-state systems (McGuigan, 2005; Rao and Walton, 2004). The central trajectory of this article therefore works towards making Cultural Rights explicit in their relevance to the scholarly field of cultural policy research, and this will involve defining the legal-institutional sphere of rights and their range of applications only insofar as to focus on cultural

policy issues and questions of interpretation. The assumption underlying this direction of inquiry is that all too often public policies for culture avoid certain areas of culture or activity; as noted above, they are perhaps too diffuse a subject – culture is subject to endless variables, contextual and environmental conditions. The task of cultural policy is to make the diffuse specific, if all too often culture is defined principally in terms of established historical categories ("the arts", for instance) or is framed by another category of policy (social policies on access for marginalised people, for example). This article will not attempt to explain how Cultural Rights have emerged historically from human rights (which is a task left to other articles in this special issue, and see Stamatopoulou, 2007; Barth, 2008; and Orgad, 2015), but will indeed remark upon the institutional apparatus of UN Human Rights system and what it teaches us about how Cultural Rights become human rights by their operation with the "field" of culture or within, say, the range of competencies afforded an institution like UNESCO.

The secondary aim of this article is to define how cultural policy research (historically invested in particular historical evolution of national arts traditions and heritage management) could be central to the study of global development. If culture is indissolubly bound up with the interface of society and environment, then it is strategically relevant to the politics of sustainable development – as promoted and applied by the UN, its agencies and the vast development community of development, aid and relief INGOs, and also regional courts and member state institutions (Ghai, Emmerij, and Jolly, eds., 2004). The challenge of Cultural Rights is to frame the shifting relation between universal and particular – the global and the local, between UN-level legal terminology and its specific (and fair and just) application to local, often very traditional, places and situations.

A summary of the spectrum of literature and research on the subject of Cultural Rights is not altogether possible here, although it is necessary to refer to the sources of inspiration as much as information on the part of this particular article: the UNESCO discourse known as 'Culture and Development' remains a huge if neglected resource. Significant publications that define this discourse feature below, but a preliminary reference must be made to the collection of papers published as the book *Cultural Rights and Wrongs* (Institute of Art and Law and UNESCO, 1998). While focussing on the challenges for cultural policy in the face of indigenous peoples, the book is animated by reflections on the 1948 Universal Declaration of Human Rights and underscores its continued relevance. A latter publication, *Exploring Cultural Rights and Cultural Diversity*, has also been important in scoping this subject (Blake, 2014).

The preparations for Wroclaw (Poland) European Capital of Culture 2016, gave rise to two conferences that featured notable representatives from European universities and cities – the Council of Europe, European Institute for Comparative Cultural Research (ERICarts) and the European Association of Cultural Researchers (ECURES) – concerned with cultural research and Cultural Rights. Informed by the significant EC/ ERICarts collaboration on the Compendium of Cultural Policies & Trends in Europe, a monumental publication emerged, Culture and Human Rights: the Wroclaw Commentaries (Wiesand, Chainoglou, Sledzinska-Simon, and Donders, 2016). This, arguably more than any publication before it, has consolidated the subject of Cultural Rights as a research sub-field for cultural policy. Reference must also be made to the position paper and declaration 'The Right to Culture as a Human Right – A Call to Action' (Warsaw/Wroclaw, 2014) as well as a reminder of the historic European Cultural Convention (Paris, 1954), which it echoes and which remains a necessary reference point for all dialogue on culture and rights (including the European Convention on Human Rights of 1950, The European Social Charter of 1961, and The European Framework Convention for the Protection of National Minorities of 1995).

The Council of Europe, over the years, has built on the 1954 Cultural Convention to provide for numerous research projects and publications relevant to our subject. This includes ongoing

citizenship studies (Laaksonen, 2010; cf. Bîrzéa, Kerr, Mikkelsen, Froumin, Losito, Pol, Sardoc, 2004), the design of democratic competencies (cf. the recent three volume Reference framework of competences for democratic culture (Council of Europe, 2018), and the evolving Indicator Framework on Culture and Democracy (IFCD: Council of Europe, 2018). Other notable areas of research literature closer to the subject of the arts-and human rights include the edited volume *Music & Cultural Rights* (Weintraub and Yung, 2009), the few research articles on cultural policies and cultural rights (Baltà and Dragicevic Šešic, 2017) and the very many on law and international treatises (a particularly helpful volume being *Economic, Social and Cultural Rights in Action* edited by Baderin and McCorquodale in 2007. In each example of the diversity of literature on this subject, a central problematic one encounters is interpretative – how we locate an indissoluble interconnection between the abstractions of legal universality (international legal principles) and the specific realms of cultural actions, objects and agency.

The Conundrum of the Cultural

Cultural policy is, de facto, a matrix of value propositions. Functioning as the political management of cultural discourse, organisation and production, the role of policy (national and local) is intrinsically normative and often prescriptive on the local functioning of culture in society and economy. The complexity of cultural policy as a research field is, at least in part, because political authority is rarely effective in achieving hegemony and most cultural production only occurs as power is devolved to professional or expert agents and actors (institutions, funding bodies), and the fact, of course, that large realms of 'culture' always remain outside policy governance altogether – a central if often neglected task of cultural policy research is, therefore, to step outside the continuum of policy and politically authorised management in order to examine the broader politics of that continuum: the outcomes, people, places and processes, by which culture inhabits broader realms of social, civic and economic life. Indicative of this is the proliferation of research involving the relation between cultural participation and social justice – principally for the arts (Wilson, Gross and Bull, 2017), urban development (Mould, 2015) and museums and institutions (Sandell, 2016).

There are also many objects of cultural policy that are already inflected with rights-based assumptions and even terminology. These commonly include disability policy, equality and diversity policies, widening access, education, outreach (community) policy, information and communications policy, and so on. These are all interconnected, of course, and are often enforced by funding agencies without explicit reference to their legal origin or their international legitimacy. It is easy to see human (and cultural) rights simply through the context of their incorporation into domestic or national law (and applied in a range of directives and procedures into institutional life). Museums and other national institutions of culture can often appear to be rights-driven, in terms of their approach to marketing, access or "audience development" policies (Arts Council England, 2018; cf. Home, 2016). Assumptions on the "right" of a public to both access and enjoy public institutions in UK has its origins in the nineteenth century, but has evolved into a more explicit legal mandate for communication and information, often according to pre-identified market segments or other categorisations. Since Bourdieu's now famous studies on French society (Bourdieu, 1979/1984), the notion that culture is a condition of both individual social mobility and economic opportunity has formed a set of normative principles for museums and public galleries, whose perceived responsibilities are often discharged (with mixed impact) in terms of education or 'outreach' programmes (Jensen, 2013).

Moreover, with regard public institutions of culture, the attribution of rights cannot be assumed to prioritise the citizen or human subject: an institution can exercise rights, indeed culture itself is awarded rights – to be preserved, protected from people or their physical environment. The recent work of the International Committee of the Blue Shield (ICBS: 'Blue Shield International') in Syria is a reminder that culture cannot be assumed only to be public property or

an endless resource to be used at will (even in the perceived interests of a given public, such as a society steadily conforming to religious conservatism). Heritage is no longer defined in terms of patrimony, as the early UN *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (The Hague Convention of 1954) underlined.

Common assumptions on the cultural function of rights are also evident in policy trends that have emerged from 'identity politics' or the privileged recognition afforded to minority groups who 'self-identify' with a set of sectorial interests. Identity politics is often confused with the sprawling set of political principles identified as multiculturalism, and multiculturalism is often confused with pluralism or other concepts attempting to set out how a given country or place can maintain cohesion and unity while admitting radical cultural difference (cf. Charles Taylor's classic statement: Taylor, 1994). While Western liberal democracies are themselves currently in a state of flux as to the conditions of belonging, allegiance and citizenship, the role of culture in national and local membership remains an open debate (Phillips, 2007). This is perhaps why rights and culture together find a specificity in the realm of protest, resistance or oppositional politics – such as the Right to the City movement, or the less radical (but no less important) Agenda 21 for Culture, or even UNESCO and its crusading rhetoric in using science, culture and education to transform the world in the cause of justice (cf. the current issue of *The UNESCO Courier*, October-December 2018). Rights discourse tends, of course, to appear as an ethically-charged political campaign, and is now deeply embedded within global policy innovations, like the UN's Sustainable Development Goals (SDGs) and more explicitly as in UNESCO's two 'global priorities' as Africa and Gender Equality, where gender equality is often defined as a solution to poverty or economic development but nonetheless motivated by human rights (UNESCO, 2014). Rights discourse can transform terminology, or motivate a range of neologisms promoting a form of justice and recognition.

Rights activism has been attributed less to the realm of citizen-based protest or resistance than the operation of regional courts, legal professionals and NGOs. The low-key but enduring influence of the European Court of Human Rights (ECHR), for example, has provoked political consternation in the UK but its evolving history of case law on Cultural Rights is considerable (if yet to be fully assessed by research scholarship (Council of Europe/European Court of Human Rights research division, 2011). There is a sense in which the concept of rights should not need extensive research at all as it is legally self-evident (as any other regulation, statute or law). After all, rights have been around a long time: if defined in terms of protections and the empowerment to represent, express or assert one's own interests, we can trace a lineage of human rights from time immemorial (aside from legal traditions of philosophical thought, of the Greeks or Romans for example) from the Babylonian Code of Hammurabi (c. 1750 B.C.E.), the Torah of Israel (c 1500), Analects of Confucius (c. 480 B.C.E.), the Quran (600 A.D.), the Magna Carta (1215 A.D) and so on and on (cf. Ishay, 2008). Pre-modern rights, however, in almost every case, assume or posit a giver of rights or absolute authority from whom rights are revealed or awarded (and on specific bases, including conditions of class, gender and kinship). It is English Bill of Rights (1689) that arguably begins to conceptualise a 'right' as an essentially political (historical and evolving) relation to distinct and separate powers and mechanisms of representation – and to an authority whose power is placed in question by virtue of the 'right', and therefore limited by this political condition of legitimacy.

A further leap can be found in the 1776 US Declaration of Independence, 1787 Constitution and the 1789 French Declaration on the Rights of Man and the Citizen. These declare an absolute distinction between an individual and a corporate authority, and define their relation in contractual terms. But where all previous iterations of general rights were but one component on a spectrum of sovereign-awarded competencies, responsibilities and duties, it was the post-War Universal Declaration of Human Rights (UDHR) that first set out the features of a non-awarded right (an assumed right) that remain formative of our

concept of human rights today. Proclaimed by the United Nations General Assembly in Paris on 10 December 1948, its rights do not derive from an authority but are assumed to be already possessed by every human individual. As universal and inalienable, rights were not, in fact, defined in terms of a contractual relation to any authority – even the authority of a putative international community of nations. Article 1 of the UDHR states that human beings are "born free and equal in dignity and rights". While it is true that the 1945 UDHR echoes the natural law traditions of the seventeenth century, it nonetheless appeals to a new political reality (Danieli, Y., Stamatopoulou, E., Dias, C., 1999). This reality is that rights provide an incontestable legitimacy and mission for a global political sphere of united nations, but not issuing forth from that sphere. Rights are recognised, and then allowed to be actualised by the consensual provision of social, civil and political conditions required. And these tasks are ethical in the sense that they emerge deductively from an assessment of the basic conditions of human development before they are inflected by partisanship and political ideology.

It is with the United Nations and its global political discourse of rights, that a transformation in the conception of basic “human life”, and even of culture, is still being developed and developed according to an ever-proliferating interpretation and application of rights-based ethical thought. The UDHR Article 19 states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". Notwithstanding the problematic concept of "expression", the qualification "regardless of frontiers" is not immediately apparent in the political economies of UN member states, East or West. It is certainly characteristic of the highly strategic, agenda-driven political discourse of international relations since the post-War era. Its meaning, rather is to be found in the ethical content internal to the “right”. The distinction between ethics from rights is never wholly explicit; indeed it is this ambiguity that ensures that rights are equated with ethics and rights maintain the normative force of a universal and mandatory obligation. This became explicit with the emergence of “rights-based development” and approach to International development aid, which was initiated by the 1993 UN World Conference on Human Rights in Vienna (and its subsequent Vienna Declaration). If provoked by the dissolution of the Soviet Bloc after 1991, the rights-based approach to development has served to integrate the three historic UN responsibilities of development, security and rights to create a more holistic "good society" narrative of global progress as applicable to the Global North as to so-called "developing" countries of the South. Against past classical modernisation theories (Walter Rostow's 1960 anti-communist *The Stages of Economic Growth* being one of the most influential), society does not necessarily "develop" around the dynamics of economic "growth" (Rostow, 1960). Rather – in the formulation of the *UN Declaration on the Right to Development* proclaimed in 1986 – the order of priority begins with an entitlement to "participate in, contribute to, and enjoy economic, social, cultural and political development" (Article 1), and where this takes place, human rights and fundamental freedoms are fully realised. The UN's rights-based approach to global development is, theoretically (in terms of how policy is conceptualised) grounded in organised participation aiming for the full expression of individual human capability and aspiration – a formulation shaped by Amartya Sen's concept of Human Development (Sen, 2000; cf. Sen, 2004) now central to the working ethos of the UNDP.

There is a strong sense in which cultural policy can be fruitfully framed as a species of development policy (Maraña, 2010; UNESCO, 2013a). It promotes activities around "common" and inherited social practices, whose spatial, collective, institutional and legal conditions are embedded with profound powers to confer identity, stimulate belonging and allegiance, enhance or denigrate, include or exclude. A rights-based approach to culture as development – a general orientation that this article promotes – will imply a range of obligations generally absent from traditional cultural policy and established post-War frameworks of international development (UNESCO, 2015a; Vlassis, 2015). It

implies accountability and a potential framework of ethical evaluation as pertaining to the people involved. It prioritises individual beneficiaries and the individuals who bear the cost of development (in the sense of a cost for the imposition of change in their common socio-economic environment). It awards attention to social exclusion, disparities and injustice. It offers a way of interconnecting social, economic and cultural factors in a civil and political context – not just the practical aims of development. It underlines the rule of law, and by implication opposes impunity and corruption. It promises access to justice outside disadvantageous local or national contexts. Finally, a rights-based approach to culture as development, theoretically at least, can be used to challenge power structures – the agencies and actors whose role involves being the neutral, independent or devolved media responsible for providing the conditions for both culture and development.

Navigating the Conceptual Landscape of Cultural Rights

Cultural Rights only became a substantive legal phrase with the *International Covenant on Economic, Social and Cultural Rights* (UN, 1966). The Constitution of UNESCO (1945) remains a surprisingly relevant document in the historical evolution of a concept of a right to culture; the *Universal Declaration on Cultural Diversity* (UNESCO, 2001), and then UN *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (UNESCO 2005), are the most recent and explicit articulation of cultural policies as "rights-based" policies. The Fribourg Declaration (UNESCO, 2007) is a landmark statement, based on a research project that consolidates the rights-based cultural content of all human rights treatises (from the 1948 UNDHR). To this short list we could add two other categories of treatise. Intellectual Property Rights (IPRs) are seminal, quite obviously: from the historic *Berne Convention for the Protection of Literary and Artistic Works* (1889) to the 1996 WIPO Copyright Treaty, which has now been adapted to the digital age of reproduction, internet curation and endless sampling, editing or appropriation. Secondly, the discourse of sustainability emerged with a tacit assertion of "rights" conferred on nature – material nature not just human nature. The 1987 Brundtland Report and the Agenda 21 "Earth Summit" on sustainable development (UN, 1992; WCED, 1987) presented an attempted democratisation of our relationship with nature and its resources, favouring the reproductive autonomy of material nature. The cultural implications of this are to some degree expanded in the Agenda 21 for Culture (UCLG, 2004) – an innovation of the United Cities and Local Governments (UCLG). Agenda 21 for Culture devise and negotiate frameworks of cultural governance for cities, integrating Cultural Rights, participatory cultural democracy and environmental sustainability.

These two categories of treatise (IP law weighed in favour of the individual, for sustainability, 'the collective') remind one on how the spectrum of rights-based cultural policies necessarily appeal to either moral norms or fundamental ethics. Aside from the anthropological substrate of rights discourse – concerning essential human integrity and optimal developmental potential of the individual subject – a 'right' presupposes a benefactor of rights (the one in need of identity and recognition, the minority subject, victim, citizen, one belonging) or a normative 'good' (e.g. the good life; a society where freedom and self-determination, respect and integrity, are central). In designing and implementing cultural policies, the two axes of moral imperative and social good should be explicit.

For UNESCO, this is achieved, as noted above, through redefining culture as inherently "diverse" (in analogical comparison with biodiversity and natural reproduction) (UNESCO, 1995; UNESCO, 2001; De Beukelaer, Pyykkönen, Singh, 2015). The essential diversity of culture is, by implication, always threatened by monoculture or the homogenising demands of nationalism and political authoritarianism. Political pluralism, as the 2001 UNESCO Declaration goes, provides for the social, economic and environmental conditions of diversity, by implication diversity does not evolve without collective, public or governmental rights to resources. A robust rights regime is the most significant protection by which

a diverse cultural realm can survive and flourish within the homogenising and disorientating impact of political and economic globalisation.

Institutionally, the concept of diversity is not central to the UN Human Rights system as such, but that system often appeals to fundamental ethics or moral norms in its deliberations and negotiations (Li, 2006; Koivunen and Marsio, 2007). When not acting specifically against a regime in the act of human rights infringement, the ethical-moral dimension of human rights provides a rhetoric of care and concern seemingly free of partisanship (i.e. a universality allied to basic human welfare and not specific political, cultural or religious alliances). This is to some extent why human rights law seems interconnected with Humanitarian law (on the lawful conduct of conflict) even though it is not. It is difficult to argue that UN member states are less prone to human rights abuses because of the work of, for example, the UNHRC; but, what is certain is that the wide range of human rights 'instruments' – mainly the nine conventions but also the declarations and 'optional protocols' (treaty additions, largely for procedures of inclusion or exemption) – provide an effective and reflexive sphere to develop international consensus (Lee and Lee, 2010). The condition of consensus can be understood as discourse, for UN treatises function as semantic authorities (establish the definition of terms), epistemic frameworks (facilitate the process of making a situation intelligible to a rights-based judgement, or a rights-based analysis), an appending mechanism for cognate legal terms (such as self-determination, discrimination, freedom and enjoyment) and further provide fields of eligible scrutiny (from practices of slavery, servitude, forced labour, to press or media communications, marriage, family and youth, to statelessness, asylum and refugees) (Ghai, and Cottrell, 2004; Leckie, Gallagher, 2006; Senyonjo, 2009; Riedel, Giacca, and Golay, 2014; Schmid, 2015).

The multivalent and multi-dimensional character of rights therefore demands a multi-facetted approach – particularly given how rights always pertains to an embodied subject in a dynamic social relation to collective cultural, civil and political life generally. To gain any measure of force they need to be supported by multiple conditions. For member states, being both signatory (and ratification – its observance in domestic law) the formal obligations of a rights treatise demand three fundamental Obligations of Action – to respect (do not interfere), to protect (uphold and facilitate), and to fulfil (work toward their realisation) (from OHCHR, 2012a: Part II; OHCHR, 2012b: 18). They also demand four Obligations of Process – of non-discrimination (between groups or types of right), of adequate progress (political commitment), of participation (citizen collaboration), and of effective remedy (or substantive responses by authorities to the hindering of any of the above). For cultural policy research, rehearsing the Obligations of Action and Obligations of Process in a cultural arena (arts policy, or public galleries, for example) can be instructive.

Concerning Obligations of Action, respect (non-interference) afforded to contemporary artists, for example, might be an obvious application. What is perhaps not obvious are the boundaries of rights of response to art works that intentionally offend, ridicule or oppose other agents, groups or belief systems. The latter could be so adverse as to make the former redundant. Under the Obligations of Process – non-discrimination (between groups or types of right) might order, for example, an equal distribution of financial resources for art. Yet, this in itself may only serve to entrench established (and expensive) interests and promote the exclusionary practices that raise rights-issues in the first instance. Interpreting a cultural "right", therefore, is only the first stage of implementation – and might subvert the intended aim of that implementation. It instantiates, nonetheless, how a rights-based approach to cultural policy must not be understood simply in terms of an implementation of rights terminology, empirically and incrementally. Rather, it calls for the grounding of cultural policy in a systematic analysis of the multivalent and multidimensional embeddedness of rights in the overlapping realms of social and cultural life.

In UN OHCHR methodology, rights can be identified as a quantitative and objective

phenomenon (by a numbering of cases of blatant abuse, for example) or a quantitative and subjective phenomenon (a numbered of testimonials, reports, attitude surveys, on cases of abuse, for example: OHCHR, 2012: Part II). Rights can also be identified as qualitative and objective phenomenon (representing the force of political activity in support of rights, for example) or qualitative and subjective phenomenon (how public discourse in a given place reinforces discrimination; or the extent to which minorities can represent their interests in the public sphere, for example). These four categories of research data preferred by the UN system are articulated across three registers (in which rights as a practice emerges in any given social system or country): in (i) structural frameworks – legal, policy, institutions and resources programmes, and so on; (ii) policy supported processes and procedures of representation – reporting, record-keeping and official archiving and scrutiny of reporting, procedure-supported responses, and so on; and (iii) in outcomes – articulated by the range of indicators (common to policy evaluation and assessment) that make available official recognition of how rights are working or not, for individual, places and groups.

The significance of the UN matrix methodology is that it allows for a thorough analytically comprehensive research, where agency, institution and programme (actions) are made distinct and responsibility can be apportioned. More importantly are the extra-bureaucratic function of this matrix – how it can prevent the direct conflation of rights and ethics (and so the ideological oppression that comes with the institutional use of “rights” as a means of power, or where rights can be used by one group to garner extra resources, or cast aspersions on another group). The extra-bureaucratic implementation of rights can also empower institutional activism – where it is revealed that institutions do not possess the resources or control over their own environment of operation because of state failings, market encroachment, or lack of regulatory protection, or many others. The implementation of rights is subject to multidimensional conditions that can involve tradition, customs and norms; infrastructure or resources and capacity in other cultural agencies; civil society and resistance groups; and other non-state actors (such as religious groups or community authorities). Such a multi-dimensional analysis is critical when assessing the cultural rights of minority or migrant groups (Marks, 2003; Barth, 2008; Orgad, 2015; Guild, Grant and Groenendijk, 2018).

A most significant moment in the policy relation between culture and human rights was UN resolution 10/21 in March of 2009, for the appointment of a Special Rapporteur in Cultural Rights. Article 1 of the resolution affirmed that "Cultural Rights are an integral part of human rights, which are universal, indivisible, interrelated and interdependent" (UNHRC, 2009: 2). The significance of the Special Rapporteur in this area is primarily intellectual – human rights becomes a subject of cultural analysis and hermeneutics ("translated" into cultural terms); conversely, culture becomes an object of special human rights protections and promotions. The position of Special Rapporteur was occupied by Pakistan's Farida Shaheed (2009—2015) and is now Karima Bennoune (USA, since 2015). The work of this role remains significant, as they are effectively mobile, in dialogue with both the Office of the High Commissioner of Human Rights and the UN Human Rights Council, and in doing so they are not only pivotal to the contemporary discourse of culture and human rights but mandated to create dialogue with countries, NGOs and other agents of change. Their intellectual approach is "holistic", and so find the conceptual means of extending the discourse of Cultural Rights into topical areas, such as gender, religion and the rise of fundamentalism, and the negative responses to mass migration. The UN cannot routinely “enforce” human rights, but rather uses the pressure, persuasion and negotiation made possible by discourse and dialogue, notably in the context of integrating a rights-based development programme or rights-based security policy (made attractive to the member state through funding and assistance, such as training).

In the Special Rapporteur’s (Farida Shaheed) Fifth thematic report (UNHRC, 2013: A/HR/23/34)] artistic freedom is positioned as a central issue for

human rights. Artistic expression – (to define art as "expression" situates it in the orbit of individual rights) – embodies fundamental norms of freedom and dignity and while individual artistic works can be interpreted in various ways, and even legitimately opposed, the opposition to artistic production and public display *per se* is a Cultural Rights matter. Moreover, opposition can emerge from unexpected places, for example, from limited uses of public space, or threats of litigation from commercial actors or copyright agencies for communications ancillary, to the artists' work. Harassment and self-censorship are also cultural realities often under the radar of political inquiry. The now well-known example of artist Nadia Plesner (Denmark) starting in 2008, is cited in the Fifth thematic report (UNHRC, 2013: 12), where the object of contention was an Audra handbag (a favourite of the socialite and media celebrity Paris Hilton) launched in 2003. Displaying Louis Vuitton's 'Multi colore Canvas Design' (by designer Takashi Murakami), Plesner created an image of a starving black child holding a small dog and the said handbag, imprinted on T-shirts that were sold as ancillary to her art project and subsequent exhibitions. In obvious imitation of Hilton, but more contentiously, where the brand identity of the handbag was evident, design owner Louise Vuitton exercised legal action. Plesner's project was motivated by the injustice of global media neglect of human suffering (at the time, the Darfur genocide) in the face of media fascination with celebrity (Paris Hilton). She observed: "'[t]he point was never originally about Louis Vuitton … [it] was about celebrity obsession at the expense of things that matter. But it became about rights and artistic freedom" (Rigby, 2011; cf. Plesner, 2018).

The T-shirts and posters sold alongside art work were "retail" and yet whose proceeds were donated to the campaign Divest for Darfur (an activist NGO). In 2008 Louis Vuitton successfully sued at the Tribunal de Grande, Paris, where a subsequent €5000 a day fine was marshalled against Plesner for further use of the image. The legal basis of Louis Vuitton's case was the common "Community Design right" (ownership of the design and its unregulated use by others damaged its reputation). Yet Plesner's later appeal (at the Court of the Hague, May 2011) saw Louise Vuitton referring to Article 1 (1stProt) of the European Convention on Human Rights (ECHR) – the right to property. This was in relation to Plesner's legal defence appealing to ECHR Article 10 – the right to artistic freedom. The Court weighed the two articles in relation to the actual complainant's assertion of "damages" to reputation and brand and ruled the superiority of the right to artistic freedom. This was on the basis that it was (in relation to 'democracy') more fundamental (and where no damages could be quantified). The case is interesting, as where Louise Vuitton was, technically, correct in its appeal to brand protection, the right to culture was given the weight of the right to democracy itself. A portion of the ruling is as follows: "…the fundamental right of Plesner that is high in a democratic societies' priority list to express her opinion through her art. In this respect it applies that artists enjoy a considerable protection with regard their artistic freedom, in which, in principle, art may "offend, shock or disturb" [here quoting a previous ruling in which the rights of an artist to offend was ruled as inviolable: European Court of Human Rights 25 January 2007 RvdW 2007 452 Vereinigung Bildener künstler v Austria ground for the decision 26 and 33]." (Court of the Hague, 2011: 8).

A legally defensible alliance between art and democracy within EU human rights law provokes the question, does "art" itself have rights (i.e. apart of the artist), and to what extent? 'Art' may be cast as the product of the artist (for the most part a commercial product, often for sale), the property of an owner (where its sale is incidental; its character embodies another, artistic, rationale), or expression, and therefore symbolic of the agency of the citizen and their possession of rights. The exercise of freedom of speech is deemed inherent to citizenship and thus democracy itself. In human rights law, "expression" is assumed, and yet it is not clear why, or whether, the agency of expression is essential to the conferring of a right (what of a work of art without an identifiable producer?) or whether the object is not democracy but the civil order (of citizens) that is the precondition of a functioning democracy. It may be that artistic

expression is a constitutive component of public communication and debate that is the public sphere (and the public sphere is the fulcrum of all democratic societies). Yet legal rulings re-state points of codified law and not theoretical assertion – and our questions here indicate that latent in the ruling on Plesner seems to appeal to an internal theoretical rationale – a theory of expression (or democratic expression) (cf. Mercer, 2002; Tomka, G. 2013).

The point here is that where law is a sphere of conceptual activity assumed to be explicit, literal and acting on a rigorous scrutiny of empirical reality, it nonetheless requires an intellectual reflexivity that betrays how far it inhabits a broader public discourse of civil and political scale. The EU Charter of Fundamental Rights (2000) Article 13 on Freedom of the Arts and Sciences states that "The arts and scientific research shall we free of constraint". The European Convention on Human Rights (1950/1953) is similarly generous in its awarding of the arts and culture rights and protections, but, for example, Article 10 in providing the right to freedom of expression at the same time subjects this "in accordance with law" and what is "necessary in a democratic society". While this right includes the freedom to hold opinions and to receive and impart information and ideas, it also allows restrictions for interests of State – which are commonly understood to be (principally) as follows: national security, territorial integrity or public safety, the prevention of disorder or crime, protection of health or morals, protection of the reputation or the rights of others, and preventing the disclosure of information received in confidence and maintaining the authority and impartiality of the judiciary.

The tension between an assumption on artistic freedom in the face of an ever increasingly complex and sprawling State regime, is highlighted by the now established (if largely ineffective) discourse on the rights of the artist, first exemplified by the 1980 UNESCO 'Recommendation on the Status of the Artist'. Based on the UDHR, Art. 22, 23, 24, 25, 27, 28, and the ICESCR Art. 6 and 15, is asserted a recognition of artists as professionals (i.e. in legal and financial systems), welfare, social, union and institutional supports (as other workers), and the obligation for their participation in both cultural policy making and international exchange mechanisms.

The immediate problem facing the use of the concept 'artist' as a legal term to be awarded rights, is the fact that the designation itself is unstable – who decides and on what criteria? While the discourse has evolved a criteria based on self-representation (UNESCO, 1980; EUDGIP, 2006), such as professional associations and other supportive agencies, a principal challenge is, as noted above, the role of the State as mediator of internationally recognised rights – and doing so in terms of "local" or specific freedoms. Where the State is the principal agency in recognising rights situations, it will conceivably only do so in proportion to its own sovereignty. A right to culture implies the right to ways of life, values and practices outside – and even against – the interests and cohesion of the nation state. A "right" to culture can imply that individuals or groups outside official or national culture have a right to separate themselves and live differently, and in relation to its politically defined management of identity and allegiance (a nation state depends on its citizens for its own defence, e.g. in security forces and civil society cooperation – compromised by non-participation or non-identification). All of this can add up to a crisis of 'justiciability', which is probably the largest challenge facing Cultural Rights in relation to artistic freedom – What rights can be articulated and acted on within the human rights regime (at whatever level) and therefore legitimised by the power of UN rulings.

The Special Rapporteur reports consistently, if incrementally, aids the boundary extension of the justiciability of Cultural Rights. What requires further investigation is how the 'cultural' extends the complexion of a 'right' itself, as in the Special Rapporteur reports a 'right' is more than a self-evident legal concept (of literal and explicit semantics, formed to be utilised by lawyers in legal deliberation). It is an ethical imperative for the recognition of the self-assertion of sub-cultural expression or dissent in general – or any

forms of self-representation on behalf of minorities; it is a literary metaphor, validating the otherwise undefinable character of artistic expression; it is a theoretical concept deployed for hermeneutic purposes – for identifying the relation between institutionally-recognised cultural value and the needs, benefit or welfare of individuals. Political philosopher Michael Freeden might see cultural rights as an ideological phrase, indicating the validation of culture by legal institutions who incorporate the realm of culture for its use in social and economic institutions (Freeden, 1996). Rights, as a term, plays a significant discursive function within a matrix of other terms circulating within the evolving international (now global) discourse that is based on international treatises yet extend into media representation, national and local politics and so-called identity politics or the politics of recognition. These terms include diversity, equality, multiculturalism, and where the integration of culture will allow for the extension of the role of law in the broader political management of social life.

The Sources and Conceptual Resources of Cultural Rights

The two UN covenants of 1966 – the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* (both ratified ten years later) – can be understood in a purely historical context as articulating a political aspiration animating increasing demands for civil liberties in the West and world decolonisation everywhere else. They embodied the emergence of a substantive Left (specifically Communist) critique of the Western individualism embedded in the 1948 UDHR. By the end of the 1970s, Cultural Rights was consolidated as a legal and policy concept (albeit understood largely as contingent upon civil, economic and social rights), but underlined how these different species of rights were "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and Cultural Rights, as well as his civil and political rights" (ICESCR, preamble). The function of "conditions" here remains imprecise, nonetheless it's clear that, theoretically, economic, social, cultural, civil and political rights provide the material conditions (resource, labour, organisations, and so on) for the realisation of "human" rights, which as human (categorically distinct from the economic, social, cultural, civil and political) are consequentially elevated to a quasi-ontological or existential level (cf. Odello, and Seatzu, 2013; Giacca, 2014).

Two years later (July 1968) UNESCO convened a symposium, the report of which has become a seminal document in the field: 'Cultural Rights as Human Rights' (1970). Published as part of a visionary but truncated publication series ('Studies and Documents on Cultural Policies'), it stated that (to quote an introductory passage) "Cultural Rights is a relatively new concept. Culture was, in the past, taken for granted. It was frequently discussed within the framework of individual political rights, religious liberty or the freedom of opinion and expression" (UNESCO, 1970: 9). However, as the report points out, there are new and major threats to the realisation of Cultural Rights. These can be paraphrased as follows, as they remain relevant almost half a century later: science and technology are fundamentally changing human mechanisms of understanding and communication, and even human experience itself; information and knowledge are becoming more complex; industrialisation and mechanisation are redefining what we mean by 'culture'; poverty and inequality of resource can disempower culture; consumer society and consumer choice generates cultural homogenisation (and so does the centralisation of the State and the political force of nationalism). And the obsolescence of tradition and distinctions between groups remains a serious concern.

This list of issues were, then, basic observations on evolving modern society, indicating a huge dilemma. Culture was an effective register of these changes, yet did not (and still does not) possess either the means of participating in these changes or protecting itself against them. While acknowledging the historical 'autonomy' of artistic and intellectual traditions, it becomes obvious in the course of the report's debates, that culture

itself is not autonomous in any meaningful sense of the term (i.e. as in a cultural polity, self-governance or cultural management of a cultural realm, at least outside specific institutions).

In 2010, in the first report of the new UN Special Rapporteur for cultural rights, Farida Shaheed stated that "There is no official definition of Cultural Rights" (UNHRC, 2010: 4). Notwithstanding the work of UNESCO since the post-war period, or the UN Millennium Development Goals (MDGs: 2000-2015) or current Sustainable Development Goals (2017-2032), culture has at no time been defined as a specific "goal" or discrete self-sustaining sphere of global development policy.

Yet, as we have noted, culture's multivalent permeability allows the Special Rapporteur to marshal a distinctive cultural analysis to diverse areas of social, institutional and economic life, for example, copyright, which (according to the website press release) "can have a profound effect on the lives of communities if not properly managed"; and also public space, as "Protecting Cultural Rights from excessive advertising: States should … increase the space for not-for-profit expressions"; and also memorialisation processes in post-conflict societies – "the importance of culture in transitional justice" (UNHRC, 2018). The multivalent character of culture might mean methodological vagueness on one level but on another can also allow one to extend rights related to culture into all other spheres of social life. Indeed, a milestone project that resulted in the UNESCO sponsored Fribourg Declaration (UNESCO, 2007) served to redefine all standing Human Rights conventions in terms of their cultural content, and in so doing devise six principle spheres of "cultural" human rights (and therefore rights-based policy making): 1: identity and cultural heritage; 2: cultural communities; 3: access to and participation; 4: education and training; 5: information and communication; and 6: cultural cooperation. While these were already established areas of rights-based activity, and the Declaration equally notes that "Cultural Rights have been asserted primarily in the context of the rights of minorities and indigenous peoples and that it is essential to guarantee these rights in a universal manner, notably for the most destitute" (UNESCO, 2007: 2), it also implicates more recent concerns over governance, economy and public administration.

Indeed, many Cultural Rights have been fulfilled by other means. Other social or development policies or other treatises, such as the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), can facilitate Cultural Rights. Where race inevitably involves culture, and culture is an indissoluble part of identity and belonging, communal conduct and tradition, Cultural Rights can be supported effectively (if inadvertently) (cf. Auweraert, Pelsmaeker, Sarkin and Vandelanotte, 2002).

It is a surprise to some that UNESCO possesses human rights violation complaints procedures, specifically with regard Cultural Rights (known as the '104 procedure' of 1978: UNESCO 2009). As Weissbrodt and Farley have noted, UNESCO's competence in Human Rights is extensive, yet has not evolved as the human rights system in general has evolved (Weissbrodt and Farley, 1994). Its Committee on Conventions and Recommendations (CR) is responsible in the first instance for processing complaints but the process there and thereafter quite deliberately uses confidentiality and privacy as a strategy – making its deliberations, actions and outcomes for the researcher difficult to evaluate. Its breadth of competency, on paper at least, is based on the UDHR 1948, for example, the right to education (Article 26 – and today, with the OHCHR, it is responsible for the world programme on human rights education, initiated by the UN General Assembly in 2004). It adjudicates in relation to rights to participate in cultural life and to share scientific advancement (UDHR Article 27), the Right to information, including freedom of opinion and expression (Article 19), the Freedom of thought, conscience and religion (Article 18) and the Right to freedom of association (Article 20).

The UNESCO Constitution of 1945 still remains a seminal document in the history of Cultural Rights. It is effectively a global cultural policy for Cultural Rights through intercultural dialogue and the promotion of peaceful coexistence. It famously begins: "That since wars begin in the minds of

men, it is in the minds of men that the defences of peace must be constructed", and where its diagnostic is articulated as "..ignorance of each other's ways and lives... of that suspicion and mistrust.. [of].. differences". UNESCO's traditional cultural policy fields evolved throughout the 1950s in terms of the institutions and the places of symbolic national traditional allegiance and identity (heritage, historical sites, museums, and so on). By the late 1960s its interests had extended to protections and regulations on trade; on conflict; copyrights and IPRs; cultural diversity and intercultural dialogue and its originary concern for International Cultural Relations (ICR). The policy area of Creative Economy (including an emphasis on digital and crafts) has hitherto become a central priority under the 2005 Convention, though previously charted by UNCTAD. Whatever the policy area, the "rights-based" approach animates all of them, including an explicit Gender Equality priority, which is a de facto Cultural Rights policy.

The seven UNESCO cultural conventions are well-known as distinct treatises, but can also be understood as significant historical-critical moments of an evolving political discourse on Cultural Rights. If considered in terms of rights, some important features stand out. The 1952 *Universal Copyright Convention* principally outlines "the rights of authors and other copyright proprietors"; the 1954 *Protection of Cultural Property in the Event of Armed Conflict*, asserts a "right" of cultural heritage itself as belonging to humankind, to be the object of protections, safeguards and respect. The 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, articulates the rights of places to be identified as the principle location of any given cultural heritage – of "origin, history and traditional setting". The 1972 *Protection of the World Cultural and Natural Heritage* ostensibly gives a right of heritage professionals and institutions to draw on international resources and challenge any force that prevents heritage capacity building; the 2001 *Protection of the Underwater Cultural Heritage* charters a new sphere of cultural policy: the geo-political geometry of territoriality, which is challenged as to its assumption that territory is property – underwater heritage is a 'commons'. The 2003 *Safeguarding of the Intangible Cultural Heritage* is a recognition of the rights of non-professional, community, ethnic and religious cultural actors and agencies, often outside institutional frameworks or other legal protections; and lastly, the 2005 *Protection and Promotion of the Diversity of Cultural Expressions* defines the relation between culture and policy in a framework of economic globalization where rights are oriented to place-based cultural production.

We can also see that animating each of the seven UNESCO cultural conventions is a legal strategy in "protection", of which the sovereign member state is steward but also accountable. Culture is also a sphere of international cooperation, professional standards and mechanisms of reporting, assessment and accountability. While UNESCO's powers of sanction or intervention are weak, it does possess diplomatic influence (the 1960 Save the Monuments of Nubia campaign in the face of Egypt's Aswan Dam project remains its most famous triumph). As with its work in human rights, UNESCO's self-imposed principle of confidentiality is effective to the extent of the nature of member state cooperation and the promotion of rights through educational, informational and development projects (Mukherjee, 2009). Its organizational aims supplement its cultural diplomacy and are research, education, combatting discrimination, encouraging cooperation and promoting democracy. It remains a question, however, why UNESCO has not made more use of Cultural Rights as a sphere of the human rights system (promoted at the UNHRC), or played an increasing role now activated by the Special Rapporteur. Perhaps this is indicative of a realpolitik at the heart of UNESCO's "ethos" – articulated most explicitly perhaps in its 1966 *Declaration of Principles of International Cultural Co-operation* where (Article 1) stated that "Each culture has a dignity and value which must be respected and preserved". While on the level of political theory this may be subject to some critique, UNESCO seems to be reticent to impose a global value system that denigrates some cultures despite their pre-Enlightenment understanding of the social order,

gender, individuality and expression. Indeed, a global cultural view might understand rights as a legal term that appeals to a sphere of language, litigation and authority so often alien to the cultural realms of many countries in the Global South. In fact, to define cultural life at all in legal terms raises a range of questions on the autonomy of culture. This, for UNESCO, is an enduring socio-philosophical conundrum: how far can we assert cultural policies in the face of hostile or incompatible social, economic or religious belief systems?

As noted above, the legal specificity of Cultural Rights as human rights pertains primarily to individuals (as it the UDHR itself). This does not necessarily make rights hostile to so-called collectivist societies but can indeed make the assertion of rights problematic. While 'intersubjectivity' is a research thematic throughout the Humanities in the West, there is little theoretically-useful research on the impact of rights-based cultural policies on the realm of the subject – on the enduring collective identification of individuals in collectivist societies. How do we understand if cultural change generates alienation, existential confusion, or just social disharmony? Even in the 'individualist' USA, the divisive impact of the so-called "culture wars" were, and remain, notorious (Hartman, 2015). If the principal aims of Cultural Rights are identity, recognition and empowerment, then it remains an open question whether these can be achieved outside any substantive material conditions of change (i.e. society and its reproduction) but are relevant universally. Or, perhaps they may be achieved more effectively by informal means, not involving institutional means but local self-determination, sub-cultures, resistant or militant organisation, religion, or "underground" associations.

The UN *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005) is, for UNESCO, a central vehicle of Cultural Rights in its most expansive (non-specific) form – rights for cultural producers, for culture and heritage practices, for places and people groups, and for developing countries in the markets of international trade. Moreover, it extends legal legitimacy to the concept of "cultural diversity" and "interculturality" as necessary expressions of the freedom defined by rights, and where the notion of "cultural expressions" is broad enough to encompass all or most of UNESCO's principle concerns, from "way of life" tradition and heritage to contemporary arts and creative industries. This coverage of course, is largely conceptual, as there are no direct mechanisms of implementation for the Convention outside member states' own systems of implementation, and accordingly rights do not explicitly feature as a clause or article of the Convention itself (Donders, 2015). This is registered by the Convention insofar as the Convention appeals primarily to economic interest, as in the adverse impact of economic globalisation on culture and the opportunities for cultural goods and trade within the new marketing opportunities offered by globalisation. Its central principle of "diversity" has an interesting provenance we cannot explain here, but at the time of the Convention's drafting was related to the emerging policy discourse (and ethical implications) of sustainability: Article 1 asserts "...cultural diversity is as necessary for humankind as biodiversity is for nature"; for diversity is a "common heritage of humanity". In the terms of the Convention, it exceeds previous heritage protections and requires "promotion" and not just protection. This promotion is, firstly, the assertion of human rights as proclaimed in the 2001 *Universal Declaration on Cultural Diversity*. Its general principle 1 asserts how it is "Committed to the full implementation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized legal instruments, such as the two International Covenants of 1966 relating respectively to civil and political rights and to economic, social and Cultural Rights" (cf., Article 2, principle 1 in the Convention).

The 2001 Declaration was, ostensibly, the origin of the 2005 Convention. While one expects revisions given the complex process of consensus required during any passage through the General Assembly, there arguably emerged a subtle shift in political orientation. In the Declaration, the first five articles are a veritable thesis on cultural policy

for an age of profound social complexity: the articles are entitled, Cultural Diversity: the Common Heritage of Humanity (Article 1); From Cultural Diversity to Cultural Pluralism (Article 2); Cultural Diversity as a factor in Development (Article 3); Human Rights as guarantees of Cultural Diversity (Article 4); and Cultural Rights as enabling environment for Cultural Diversity (Article 5). Article 7 posits culture as "well-spring" of creativity, generating unique form of economic goods and services (Article 8), and then Article 9 asserts that only Cultural Policies can act as catalysts of creativity.

The principle subject of the Declaration is the "culture" itself (and its inherent "diversity"), while asserting "pluralism" as the political discourse and governance practice most able to facilitate diversity. The concept of pluralism was a potentially powerful way out of the growing conundrum of multiculturalism (and the growing popular political objections and resistance to it) and the concurrent need for forms of government and governance able to facilitate an increasing social complexity in the face of dissolving national or colonialist monoculture (UNESCO, 1999). Moreover pluralism, as a cultural project, afforded cultural organisations and the arts a specific political mission and political agency – an agency whose parameters had arguably been defined in earlier landmarks of cultural deliberation, the 1996 Report of the World Commission for Culture and Development, *Our Creative Diversity* (UNESCO, 1995). The 2005 Convention, however, while significant in its own terms, shifted the legal axis of this discourse towards national (member state) policies for culture and creative industries (with particular attention to detail pertaining to international trade – a concern of the Convention's sponsors). Cultural policies oriented to globalisation remain necessary; but all sense of explicit political agency for culture became weakened, and with it an explicit framework in which to work for Cultural Rights.

UNESCO's central concept of "diversity" has remained emphatic, but to this day suffers from a lack of political agency in the organisations inclined to use it. This is perhaps apparent when situating cultural diversity as a policy concept in a now well-known critique of global neoliberalism and the recent tendency to orient all social or cultural policies to the market, trade or any other economic context of meaning. In reading, for example, David Harvey's *A Brief History of Neoliberalism* (Harvey, 2005; 2007), a paradox emerges whereby "diversity" in and of itself presents very conducive conditions for a society governed by market principles. After all, neoliberalism favours societies where culture and civil society provide the conditions for collective values and behaviour outside of the orbit and influence of the State; for individual liberty and freedom are a neoliberal political aim and virtue (expressed most powerfully in the individual consumer and actor in the free market), and a strong civil society independent of State can more easily favour private property rights and free trade protections. While the 2005 Convention is without doubt an attempt to assert policies for protection and promotion within this "marketisation" of society scenario (as civil society is arguably always dominated by the market and its ruling corporations), it is something of a rear-guard action. It is an attempt at protecting culture from something it tacitly endorses. The Convention is not an attribution of political agency to those actors (civil society and cultural organisations) that could effectively combat marketisation (as the market begins to affect governance over the institutions of society and culture themselves: see also O'Connor, 2016).

Neoliberalism is less an economic theory than a series of social theories on how the construction and imposition of 'economic' values on society and culture demonstrably affects a reduction in social and public values, projects and support systems. Public assets and goods pushed into the market, FDI (foreign direct investment) is prioritised, and the mediators of the 'economic' (whether bureaucrats or corporations) become more powerful actors than local government, and who assert the 'rights' of economy as fundamental (as the operational basis of) all other rights. Indeed, give how 'the individual' is the fundamental social category of human rights per se, it is not difficult to understand how human rights in themselves have not been a bulwark against neoliberalism – and its erosion of the

collective foundations of social life, which in turn promote and protect cultural diversity or the right to culture (cf. Peck, 2010).

By way of conclusion, as the International Bill of Human Rights (including the 1966 conventions) only tend to feature culture as a dimension of the civil, social and economic, the 2005 UNESCO Convention arguably remains the principle vehicle for the assertion of rights to culture. However, as noted, the articles of the Convention, while making explicit reference to cultural producers and civil society actors, are largely directed at 'sovereign' member states. The actual role of individuals and civil organisations in participation in the formation or implementation of cultural policies for promotion and protection of cultural diversity (Article 11) is vague – and so, the role of cultural self-determination and freedom in relation to a concurrent appeal to human rights, is not concrete. The right of each state to its own cultural policy (Article 6) is potentially at odds with the demand for international cooperation (Article 5); and lastly, the "dual nature" of cultural goods and services as both commodity (and export) and socio-ethnic media of identity and value (Article 1) only serves to acknowledge the expanse of the problem.

Concluding Reflections and Implications for Cultural Policy Research

Cultural Rights as a legal concept emerged explicitly in the 1960s, but for reasons we discussed above was not implemented in ways that allowed for its extension in relation to a growing international human rights regime of law. The following historical shifts in the relation between the nation state and culture, national policy governance and economy, and the growing role of the UN forming a global discourse on development and rights, has made for a complex terrain of thought and action. While ostensibly the responsibility of UNESCO, an arguably greater advance in our comprehension (and thus strategic use of) Cultural Rights is the reporting of the UN Special Rapporteur for Cultural Rights. UNESCO uses 'rights' as the basis of all its work, but is not explicit in its contending for rights (except perhaps in the Gender Equality agenda). Diversity has become a radical concept – but was separated from its origins in the emerging discourse (in the 1990s) on Pluralism and the political agency afforded by an international legal framework on pluralism.

It is a concluding contention of this article that while a sufficient conceptual apparatus exists in the legal sphere informing us on how human rights (or other kinds of right) are applied in a given cultural realm, we are lacking a theoretical discourse on how rights 'are' cultural (in an ontological but also epistemic sense), and can be defined and defended on cultural grounds by cultural actors (not on civil, social or economic grounds by parties who regard culture as one dimension of their political interests). This article, of course, cannot now begin to undertake that task. It will conclude, however, by indicating the areas or judiciable spheres that Cultural Rights should operate within – and the issues that emerge from that and directly involve cultural policy.

The first is the matter of the ruling assumptions on the moral integrity of the arts, the otherwise benign character of all culture, and internally related to these assumptions, the persistent claim that the arts and culture are exempt from social norms of moral integrity, observance and offense. With some irony, the arts, historically, have arguably flourished more or as much under authoritarianism as liberalism (or earlier variants thereof), though this was in part as art is evidently stimulated by resistance to authority. Nonetheless, the arts also obviously involve hubris, individualism and intense competitiveness, and we might note how the arts tend to the realm of highly professional, education, specialised, by implication socially elite. It is not contentious to point out that artists, even today, tend to the necessarily single-minded, self-interested and self-absorbed, and other patterns of behaviour not associated with collective cooperation and consensus. Rather, challenging all consensus and socially binding norms – and in way that do not themselves make them obvious candidates for creating social cohesion – remind us of the historical exceptions that current rights discourse makes on behalf of culture (Ivey, 2008).

Cultural policy since the 1960s have largely by-passed the problem of art's intransigent individualism (or, rather, depicted it simply as a time-limited feature of European romanticism). French and British policy trends in 'cultural democratisation' (largely for widening participation and the means of production) and in 'cultural democracy' (largely for social access to arts and culture – to produce as well attend) did not generate substantive new conditions of artistic practice. With decades of economic and cultural policies (and not least public, community-based funding) the dominance of Western artistic individuals and policy trends for MOMAs, biennales and cultural festivals all celebrating the ascendant artistic ego, continues apace. Given how the UN promotes Western-style democracy as the basis of human rights, and with it, individualism per se is posited as the fundamental political category of human society, while non-individualist forms of cultural agency are not so easily acknowledged (Melzer, 1999; Smiers, 2003).

Second, the legal complexion of the social space of collective cultural self-determination is not easy to understand. Most of the time, cultural activity purposively avoids critical, confrontational or resistance positions against authority (at least where the 'authorities' in question are the funders of culture). Nonetheless, the legal sphere determining the boundaries of social representation and activity are contracting, and with it the spatial dimension of culture (places, actions and discourse). The laws of the land may now routinely include the following, all of which have implications for rights: Obscenity (all countries, most liberal of which are EU countries); Libel, Defamation and Slander (all countries); Offending the State (e.g. Turkey and many Middle East countries); Blasphemy (common to all countries where religion has constitutional political status); Offending the Church (e.g. Greece; Islam has its own version); Confidential information (e.g. state security and military); Theft or appropriation (e.g. Nazi confiscated art); Hate speech (EU; USA) and Terrorism offenses (that may include the nebulous actions of glorifying terror) (most countries have adopted these). Lastly, we may think of Copyright and IP laws as almost wholly benign but, as the case of Nadia Plesner (above) illustrates, it can be motivated against, as well as for, creative freedom.

Thirdly, cultural organisations in Europe – particularly the UK – are very good at using the rhetoric of rights and justice (particularly access and participation – enforced by law, in the UK with the Equalities Act 2010, Human Rights Act 1998 and previous iterations of both these areas of law and policy), but they are arguably not so effective at understanding or challenging the political and legal powers that issue such legislation (the role of that rhetoric in ideology and formations of political discourse). Governments can use rights as a form of patronage and a discursive means of promoting political ideology, and this needs to become a subject of cultural analysis alongside the proposed research avenues on policy and Cultural Rights. In the UK, the incorporation of policy directives for citizen minorities in mainstream cultural life and institutions, the elimination of discrimination, and the recognition of interest groups, is conducted by political fiat of national, local government and funding bodies – not involving much public deliberation. Consequently, arts and cultural organisations are not actually involved in any deliberative thinking on rights – or indeed act as, in the UN's terms, Human Rights Defenders in the cultural sphere. What would it mean then for arts and cultural organisations to be activist or official Human Rights Defenders in culture?

By extension, Rights (as an individualisation of political behaviour and self-assertion) is instrumentally important to the global neoliberal order, which has arguably co-opted democracy and 'liberty' (as noted above, an appeal to the supremacy of civil society, access and participation as condition of free markets, the individual's right to choose fundamental to consumerism, and so on). Critical thinking needs to maintain a reflective apprehension on the way 'rights' based thought, legislation and activity, can serve, compliment or even provide the social conditions for greater economic interests.

We should not necessarily assume a harmony between Cultural Rights and the international human rights legal regime – even as the UN Special Rapporteur is currently fighting hard for

both, particularly in relation to women's rights, the specificity and autonomy of the cultural realm must be theorised and recognised – culture does not always provide for a harmonious or constructive society. Culture can be used for dissent and an attack on social assumptions, widely held values, taboos and collectively accepted political ideals or practice. An early study from 1974 by Hungarian Imre Szabó and entitled *Cultural Rights* suggested that the very philosophical conditions of human rights (individual, universal, inalienable and indivisible) can only be applied to culture by robbing it of its specificity, and moreover its agency for collective anti-individualism (Szabó, 1974). Following this, we may investigate how Human Rights could rob culture of its intellectual and social facility for opposing all authority and power (not as an old-style 'autonomy of art', or of the avant-garde even, but a contemporary policy theory of culture's autonomy from all institutionalised value systems). Cultural Rights may play a more effective role outside of human rights altogether, if its potential political agency is fully realised – a rights seized and deployed, not conferred and gratefully received (bottom-up, as the cliché goes).

Fourthly, the human rights regime inadvertently situates arts and cultural organisations as agents of the State, not simply clients or beneficiaries. Culture becomes another institutional means of State management, bureaucratisation, and the means by which the State (and its national agendas) finds moral legitimacy. Following this, research is needed on how states co-opt the ethics of human rights – the acknowledgement of the Other, of difference, of tolerance and respect, and so on – as internal to the political management of public discourse. We are all familiar with the character of overt censorship (from social intimidation to direct prohibition) but less so the self-censorship generated by a fear of offending or upsetting the individuals or state sponsored groups protected by special rights. More objectively, the rise of Hate speech and terrorism prevention laws have generated new claimants to the guardianship of public speech and expression – to which we all to easily assume a benign or necessary intent. There is all too little cultural policy research representation in broader debates on security, extremism, fundamentalism (although Karima Bennoune has made that one of her areas of focus: UNCGR: 2017).

How both censorship and security permeate the strategic management of cultural funding systems (priorities, limits, conditions, paucity, competition) – as well as access to public space, to non-state actors (e.g. religious groups; NGOs; terror groups), market agencies (e.g. sponsors; distributors; landlords) is a topic directly related to how the arts define a discrete sphere of freedom that is identified as cultural. What this article has attempted to demonstrate above all is that the cultural sphere exceeds (cannot be comprehensively defined by) the legal terminology of rights, whether civil, social, economic, or even Human.

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