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The Cultural Dimension of Human Rights

Edited by

Ana Filipa Vrdoljak

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Edited by
Professor Loïc Azoulai,
Professor Marise Cremona, and Professor Francesco Francioni

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This book is dedicated to Florence, long may its humanist flame burn, and to the Academy of European Law, long may it be a forum for dialogue and deliberation.

Ana Filipa Vrdoljak
Sydney

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Introduction

Ana Filipa Vrdoljak

The manifestations of culture are ever present and cultures themselves are diverse. These characteristics have rendered culture a difficult fit for international law. It has either largely ignored culture, as is typified by the underdevelopment of cultural rights, or has promoted its exclusivity, as exemplified in the rules governing state succession or state immunity. As understandings of culture have evolved in recent decades beyond the realms of so-called high culture to encompass culture as ways of life there has been a shift in emphasis from national cultures to cultural diversity within and across states. This has entailed a push to more fully articulate cultural rights within human rights law. A renewed academic focus on this area of international human rights law has thus grown, in particular, with the evolution of Article 15 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) (the right to participate in cultural life) and Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (Minorities). While fundamentally important to the theme of this volume—*the cultural dimension of human rights*—it is not its driving force. Instead, the intersections between culture and human rights are shown to have engaged some of the most heated and controversial debates across international law and theory, broadly testing their boundaries and fostering their evolution in response to these challenges.

Despite the diversity of contributions to this volume, they are clearly tied by one unifying thread—that culture is understood, protected, and promoted not only for its physical manifestations. Rather, it is the relationship of culture to people, individually or in groups, and the diversity of these relationships which is being protected and promoted; hence, the overlap between culture and human rights.

The significance in this shift in outlook that has occurred in international law in the last half century is clearly evident in its interaction with states, the international community and individuals. For states, where Article 15 ICESCR was previously defined as the right to participate in national cultural life and Article 27 ICCPR was drafted on the premise that the state would determine the existence of minorities within its territory, they are today required to report on positive measures they have implemented to enable minorities and indigenous peoples to maintain and develop their distinct cultural identities. For the international community, where previously the importance of culture and its manifestations was promoted largely on the basis of its role in the arts and sciences, today its promotion is based on its importance in ensuring the contribution of all peoples to the cultural heritage of humanity. For the individual, where cultural rights were interpreted to harmonize with civil and political rights designed to foster their integration within the state, today there is a greater cognizance in human rights law that we carry within us a

multiplicity of identities, whether they be cultural, religious, or other communal affiliations, and equally defining, immutable characteristics like gender, ethnicity, age, sexual orientation, or disabilities. The shift and its impact should not be overstated. The preeminence of the state and the scaffolding created for it by modern international law has not dissolved. But what this volume seeks to do is at the very least register how this shift is occurring.

The two contributions in Part I provide an overview of the tensions between culture and human rights in law from a political and social theory perspective and legal perspective. They serve as a backdrop for the remaining discussions contained in this volume. Both chapters focus on the interplay of religion, culture, and human rights in defining relations between individuals and groups within states and the broader international community. They take a wider historical view and hit similar thematic notes of contention, narrowing in on questions of compromise and consensus.

In *Human Rights between Religions, Cultures and Universality*, Olivier Roy and Pasquale Annicchino focus on the questions and concerns raised by contemporary societies which expose the tensions and clashes between human rights, cultures, and religions. They explore how the totalizing and universalizing mythology of each renders this conflict inevitable and necessary. Yet they point out that that which brings them into conflict—that they occupy the same space (relations between individuals, groups, and society) and employ the same strategies (normative source)—is also a possible ground for consensus and their compatibility. They examine the intersection between human rights, Christianity, and secularism in Western societies through time, noting that the link made between human rights and secularization has received push back from religious conservatives and from those opposing the imposition of a supranational system of values and norms. Those in the latter camp who reject the universality of human rights law either adopt a relativist view which embraces an anthropological notion of culture and argue that it is a product of one particular (Western) cultural tradition; or conversely, hold the view that universal values can only be formulated by a divine being and are above individual will. Roy and Annicchino observe that both positions and their various manifestations today are highly politicized, as reflected in the response of certain religious or religiously dominated states to the Convention on the Elimination of Discrimination Against Women (CEDAW) and the United Nations resolutions on sexual orientation and gender identity. Yet, they note that migration and the resultant cultural and religious diversity have required secular countries themselves to revisit and re-evaluate the relationship between religion, culture, and human rights within their states. Human rights are used to impose a set of common values internally within a state and externally it has led to a loss of state sovereignty through the judicialization of international relations. Roy and Annicchino argue that a consensus on human rights is not possible for political reasons and, in any case, these debates are irrelevant. Rather, the current disconnection of religions from culture has allowed religious groups to engage new tools to respond to changes in the contemporary political sphere. This has led diverse religious and cultural groups towards a 'common paradigm of legal norms and

principles', which will result in a 'common political culture, but not a common secularization process'.

My chapter, *Liberty, Equality, Diversity: States, Cultures, and International Law* covers similar terrain from an international law perspective. I explore how culture is engaged by contemporary international law, particularly human rights law. As with Roy and Annicchino, the state remains my central focus as its relations with individuals and groups are defined and refined through law and rights discourse. A structure based on the remodelled republican cry of *liberté, égalité, fraternité* highlights the various strategies employed over almost 400 years, from tolerance, non-discrimination, and solidarity, to address relations between majority and minority groups within societies, whether that affiliation be religious or cultural. The first and most narrow phase arose with the move to reconfigure relations between the church and state, through the adoption of official tolerance and acceptance of religious pluralism, and the articulation of the right to religious freedom. These and related freedoms (like freedom of expression, association, assembly) defined relations between the state and the individual but also between the individual and other individuals within society. These freedoms were limited so that their enjoyment did not harm others or offend public morals. This template was extended to encompass cultural groups and the notion of non-discrimination. Strict equality between individuals could not feasibly be attained through civil and political rights alone. It had to encompass the cultural realm and ensure that public resources and spaces were available to all groups and individuals. Non-discrimination has been pivotal in the breakdown of segregation between groups within states and to ensuring the participation of all individuals in political processes regardless of their religious, cultural, or racial affiliation. Yet, conversely, the right to culture was no longer simply defined as a right to a culture (usually the national culture), but a right to one's own culture. There was an opening up of the numerical breadth of participation and depth in the diversity of views and values. Cultural diversity is promoted in contemporary international law not because of the principle of equality but because it is viewed as a common good of the international community. Yet, there is awareness that diversity is only sustainable with the recognition that cultures and religions are not static, homogeneous, or apolitical and there is a vital need to ensure effective participation and dialogue within groups themselves. Such processes would lead to consensus on the core values of a common culture in which the majority and minorities can co-exist.

Part II contains contributions which extrapolate the influence on international law of two distinct groups, minorities and indigenous peoples, which have pursued recognition of collective cultural rights through human rights law. Both chapters speak to the evolutionary potential of human rights law in responding to such claims.

In *Protecting Minority Groups through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence*, Gaetano Pentassuglia compares and contrasts the jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (I/ACtHR) concerning cases brought by minorities and indigenous peoples respectively. In his detailed account,

Pentassuglia initially reviews how recognition of collective rights has influenced the substantive and procedural aspects of each jurisdiction. Under the European Convention, this has been driven by the principle of non-discrimination and claims by minorities. Under the American Convention, it is propelled by claims by indigenous peoples and positive obligations concerning land rights. Pentassuglia details how the European jurisprudence is driven by the principle of 'special vigilance' in respect of racial discrimination. So while the ECtHR usually promotes negative obligations, it is prepared to circumscribe state discretion through positive obligations in order to promote pluralism. By contrast, the American Court works from the starting point of a framework of positive obligations arising under the ACHR which limit state sovereignty. Pentassuglia argues that despite this divergence in approaches there is a convergence on procedural aspects which recognizes the collective characteristic of these actions. He also notes that both Courts are open to developments beyond their own jurisdictions in human rights law relating to minorities and indigenous peoples. But again, the European Court has shown itself to date to be more reticent and cautious than its American counterpart. A telling example of this difference is typified in their respective stances on self-identification. Where the ECtHR has indicated that subjective determination by the group itself was not enough (while indicating that it would exercise a degree of oversight over the state's margin of appreciation concerning internal definitions and recognition mechanisms), the I/ACtHR has adopted a more fluid interpretation revolving around historical links to land. Pentassuglia makes the telling point that the jurisprudence of both Courts is important not so much for these definitional aspects but because of the malleability of the judicial readings of human rights law which renders it responsive to the claims of groups made vulnerable because of their group identity. He rightly suggests that the divergent judicial responses are inevitable with distinct instruments and the socio-political contexts of the states parties, but equally that increased convergence is likely in the future as supranational and domestic courts open themselves up to developments in other jurisdictions.

Siegfried Wiessner, in his chapter entitled *Culture and the Rights of Indigenous Peoples*, explores the cultural rights claims of indigenous peoples through various international law instruments, not only human rights treaties. He explores in depth why and how these claims have been instrumental in transforming our understanding of the relationship between land, culture and identity, and between cultural rights and other human rights. Indigenous peoples' claims centre on preserving and promoting their unique collective cultural identities which have been further hewn in recent centuries by losses visited upon them by foreign and colonial occupation. Weissner shows that by framing their actions within human rights discourse, indigenous peoples have effectively challenged the existing parameters concerning cultural rights and collective rights. They have always made clear that their claims concerning culture are intimately tied to other rights, including to land, to life, and to self-determination. It is an approach exposed not only by Weissner but also by Pentassuglia. The centrality and interconnectedness of culture with other human rights, rather than its siloing, is significant not only in more

fully appreciating indigenous claims but also for better understanding the role of culture in the field more generally for all. As Weissner ably details, this way of understanding the culture is reflected in the various strategies used by indigenous peoples seeking recognition and realization of these rights across a range of international law instruments—not only human rights treaties. The culmination of these efforts to date has been the 2007 UN Declaration on the Rights of Indigenous Peoples, which he shows is already having a symbiotic impact upon the development of customary international law concerning the interface between culture and human rights.

Part III focuses upon ways in which cultural rights can be realized beyond specialist human rights law frameworks. Both contributions consider the interplay between culture, human rights, and international law within the context of legal frameworks governing trade between states. The ability and indeed suitability of specialist legal regimes governing trade or investment disputes in addressing human rights violations remains a focus of intense intellectual debate. For our purposes, this debate is further intensified because it covers a category of human rights which has often been sidelined. These are important contributions because they build on the characteristic highlighted by Weissner concerning the creativity and breadth of strategies deployed to protect culture and promote cultural rights.

In her chapter entitled *The European Union and Cultural Rights*, Evangelia Psychogiopoulou explores how the European Union facilitates the protection and promotion of these rights through the cultural dimension of other human rights, including civil, political, economic, and social rights and non-discrimination, and through its mandate in respect of religious, cultural, and linguistic diversity under the latest iteration of its constitutive treaty. The European project was not about human rights when it started; its focus was and remains the common market. However, with the 1992 Maastricht Treaty and its reference to the European Convention of Human Rights and more recently the Charter of Fundamental Rights which was rendered binding with the 2009 Lisbon Treaty, human rights has come to the fore. But not cultural rights per se. Key provisions of the ECHR and Charter have been interpreted by the ECtHR and European Court of Justice (ECJ) respectively in support of a cultural dimension. Also, the ECJ has indicated that international treaties like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights as well as other multilateral human rights treaties to which member states are signatories, point the way for the protection of human rights under EU law. The Charter also provides specifically for cultural diversity not only as it pertains to national cultures but also to peoples, that is, within member states. However, as Psychogiopoulou points out, its power is negatively conferred, with no positive rights articulated in respect of individuals or groups. She explains that not only is the Charter found wanting in its lack of substantive provisions specifically covering cultural rights, but its limited enforcement regime is likewise problematic as the focus yet again remains on other human rights. Under the powers granted to the EU concerning culture, the primary responsibility for cultural matters remains with member states. However,

the EU is required to respect and promote cultural diversity in its actions under its constitutive treaties. The EU's negotiation and promotion of the ratification of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, is the leading example in this arena. It is telling that this instrument morphed substantially from an initiative centred on the articulation of cultural rights to a treaty designed to promote cultural diversity through the circulation of cultural goods and services. Psychogiopoulou highlights how efforts by the EU internally through initiatives in the field of equality, citizenship, and immigration policies have had a distinct and explicit cultural dimension to their design and operation. She ends on a positive note explaining that the EU cultural policy endeavours to promote cultural engagement and cross-cultural dialogue across and within member states through financial assistance.

Tania Voon's contribution, entitled *Culture, Human Rights and the WTO*, considers the continuing limited response of the WTO to cultural rights across its treaties. This is to be expected because unlike the European Union which has evolved into a regional organization covering concerns beyond trade, the WTO remains a specialist legal regime with an ever-expanding membership. Indeed, as Voon points out, it is the growth in the diversity of its membership which has necessarily brought questions of culture to the fore, though not cultural rights. This underdevelopment, she suggests, may in part be explained by member states' reluctance to venture beyond WTO law to other fields of international law, like human rights law, when resolving disputes. Voon explores the impact of culture on WTO law through two case studies: cultural products and food safety. She notes that the question of cultural products has been an ongoing source of tension between the United States and the European Union which has often proved intractable. Instead, what has transpired is the relocation of this contestation to another forum, namely, UNESCO and its adoption of the Cultural Diversity Convention. The United States and the European Union have also clashed in the area of food technology and safety regulation. The lengthy history of such contests, particularly concerning genetic modification, reveals a cultural divide between Europe, favouring less intervention and manipulation of food, and the United States, which is more open to taking up new food technologies. Voon queries whether the WTO rules favouring science-based findings and trade liberalization betray the organization's own cultural bias. The most obvious intersection between culture, human rights, and trade in this context is the regulation of intellectual property rights and its impact on cultural rights. The right to participate in cultural life (Article 15 ICESCR) explicitly recognizes the rights flowing to the creators of scientific, literary, and artistic works from intellectual property regimes. The boundaries of this right are being pushed by indigenous peoples towards greater recognition of collective cultural rights through their efforts to have intellectual property protect traditional knowledge. Voon explains that the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its coverage of 'geographical indicators' likewise has the potential to protect and preserve cultures and ways of life associated with traditional methods of food and wine production encompassed by this provision. Yet, she observes that all these interventions into

the WTO framework are limited. Despite some analysis by UN human rights bodies concerning the impact of the WTO and particularly the TRIPS Agreement on cultural and property rights, the WTO itself rarely contemplates the interplay of its rules with human rights norms. Voon suggests it is this reluctance to go beyond the regime's framework which has stymied its ability to address areas relating to culture and human rights, like traditional knowledge and genetic resources.

Part IV covers procedural aspects rather than substantive aspects of the intersection between culture, human rights, and international law. Yet, as was noted by other contributors to this volume, the procedural components are intrinsic and vital; both for using culture as a vehicle for hindering human rights, and as a mode for the effective realization of reparations in the face of gross violations of the human rights of individuals or communities.

Yvonne Donders in her chapter entitled *Cultural Pluralism in International Human Rights Law: The Role of Reservations* provides a detailed analysis of the reservations and responses to those reservations entered in respect of CEDAW. This becomes a case study for the use of reservations as a mode of cultural pluralism, that is, a vehicle for the realization of cultural diversity. But it is also important because it serves to highlight that culture can be used by states to justify reading down or avoiding human rights obligations altogether in respect of vulnerable individuals and groups. Donders outlines the debate concerning the special nature of human rights treaties as going beyond contractual agreements between states to agreements on common norms and behaviour of a state towards individuals within it. This distinguishing characteristic has had a knock-on effect in how reservations are interpreted in respect of such treaties, including whether international monitoring bodies, and not just other states parties, can assess the reservation's compatibility with the object and purpose of the treaty; and whether they can then sever the offending reservation from the remaining obligations of the relevant state party. Donders' case study of the CEDAW reservations centres on the use of culture as a source of justification, which is invariably attached to substantive rather than procedural treaty provisions. Her survey reveals that most reservations pertain to justifications based on incompatibility of the Convention with Islamic law and Sharia. These are either blanket reservations covering the treaty generally or are attached to specific provisions (usually concerning equality between men and women). She notes that other states have made reservations on cultural or religious grounds which point to cultural pluralism within states and not just between states. Responses to these reservations by other states parties to the Convention range from challenging the relevant countries' commitment to the instrument, objecting because the reservation is deemed contrary to its object and purpose, or objecting to a provision of a fundamental nature. The majority of states parties did not object to these reservations. Those that did clearly indicated that they viewed the reserving state as being bound, but without the benefit of the reservation. Donders, however, notes that perhaps the most effective mechanism for states to withdraw or strictly define the operation of such reservations is through the work of the Committee on the Elimination of Discrimination Against Women, which has required states to justify and detail the operation of such reservations in their