



**British Institute of
International and
Comparative Law**



**Arts & Humanities
Research Council**

'Enforcing the Right to Cultural Heritage'

Event Report

Date: 27 October 2016, 17:00-19:00

Venue: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

Speakers:

- **Dr Damien Helly**, European Centre for Development Policy Management
- **Dr Andrzej Jakubowski**, Institute of Law Studies of the Polish Academy of Sciences (Warsaw)
- **Dr Paola Monaco**, University of Trieste
- **Dr Hanna Schreiber**, Institute of International Relations, University of Warsaw
- **Richard Mackenzie-Gray Scott**, British Institute of International and Comparative Law

Chair:

- **Kristin Hausler**, Dorset Senior Research Fellow, British Institute of International and Comparative Law



This special seminar discussed the enforcement of the right to cultural heritage from various legal angles. Access to cultural heritage was first analysed from a human rights perspective, through a discussion of the practice of regional human rights institutions, focusing on European institutions. The role of cultural heritage in the EU's external development policies and foreign relations in general was also presented through a discussion of the landscape of the EU policy framework. The concept of cultural heritage itself was also considered, including in its intangible aspect with a critical assessment of the impact of the 2003 UNESCO Convention for the safeguarding of intangible cultural heritage. The way culture can be measured through the UNESCO indicators was also analysed, as well as the potential impact of BREXIT on cultural heritage in the UK.

Kristin Hausler

Kristin Hausler, as the chair of the Seminar, presented this event as part of the HEURIGHT research project, a 3-year project which focuses on the ways cultural heritage is being defined within the EU and in its external relations, as well as on the manner human rights' guarantees strengthen the access and enjoyment of cultural heritage within the EU. For more information about this project, please see the project's webpage at: <http://heuright.eu/>. As the project completed its first year, this event was an opportunity for some its team members to present its initial findings to a wider audience.

Dr Andrzej Jakubowski

Dr Andrzej Jakubowski started by discussing the right to cultural heritage within international law, European Union (EU) law and human rights law under the auspices of the Council of Europe (CoE). The issue of cultural heritage has recently been mentioned frequently in relation to many issues, including terrorism and armed conflicts. However, its relevance to human rights has been somewhat understated, resulting in the lack of understanding of cultural heritage in the human rights context and the absence of the right to cultural heritage in human rights instruments. This situation combined with no uniform understanding of human rights displays the complex tasks lying ahead of this project.

Under international regime, cultural heritage law or cultural law is mentioned as a separate regime; however, the international legal system for cultural heritage protection is operated in a traditional sense. It conforms to the idea of non-intervention and the relevant institutions are subject to narrow diversified mandates in respect of cultural heritage. Moreover, international law refers to culture as a single and restricted notion, mostly influenced by western tradition of top-down approach management of art and culture. The United Nations Educational, Scientific and Cultural Organization (UNESCO), as the most relevant international institution, focused particularly on the interests of states, which are not limited to the issues of cultural

heritage. This leads to a rather fragmented system of cultural heritage protection, which does not fit well within the system of international human rights protection.

It is worth mentioning that the link between culture and human rights became universally addressed for the first time within the United Nations (UN) system. The Universal Declaration of Human Rights (UDHR) recognises several human rights having a direct connection with culture, such as freedom of thought, freedom of speech and right to education, and rights explicitly referring to culture, such as rights to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. This achievement was however shadowed by the debate over the exclusion of group rights and minority rights, which later influenced the drafting of later human rights instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Despite the fact that cultural rights were mentioned in the name of the ICESCR, “culture” and “cultural rights” are not formally defined and explicitly provided. This creates uncertainty as to the scope and the conceptualization of such terms in international human rights context and therefore makes such rights difficult to be enforced.

Similarly, in the European context, the 1995 Framework Convention for the Protection of National Minorities was adopted by the CoE member states and mentions “culture” as one of the fundamental aspect of minority protection. However, it does not treat the cultural minority rights as truly enforceable. With respect to the competences of the European Court of Human Rights (ECtHR), the cultural protocol to the ECHR has been dropped due to the legal difficulties in defining cultural rights as substantive rights and in identifying the protected person(s) who may claim such rights against states. The same holds true for the cultural rights in the EU legal regime, despite Articles 22 and 25 of the EU Charter of Fundamental Rights guaranteeing the EU’s obligations to respect cultural diversity and the rights of the elderly to participate in cultural life, respectively. Harmonisation of laws and regulations of the member states in cultural matters is excluded, though cultural rights are matters of the EU’s common action. In the cultural dimension of the European integration, the EU institutions adopts non-binding legal acts with the objective to co-ordinate, support and supplement the action of the member states, respecting national, regional and linguistic diversity. Thus, the level of the EU’s involvement in cultural issues is limited by the nature of competences in this area, and in practice, by the defence of member states’ national cultural autonomies and identities.

However, the human rights monitoring bodies, such as the Committee on Economic, Social and Cultural Rights (CESCR), have taken a different stance and contributed to the development of cultural heritage as a human right. CESCR, for example, directly referred to cultural rights and issued its General Comment No.21 (2009) on the right to take part in cultural life. This contribution gave effect to the evolving conceptualization of cultural rights as elaborated in the 2007 Fribourg Declaration on Cultural Rights and in turn concretised positive obligations arising out of Article 15(1)(a) of the ICESCR.

In the context of the European Court of Human Rights (ECtHR), the enforcement of cultural rights has been dependent on the interpretation of ECHR as a living treaty. By invoking the relevant Articles (i.e. Articles 8, 9 and 10 of the ECHR and Article 2 of the Protocol No.1 to the ECHR), the ECtHR has identified several substantive rights that can be labelled as cultural rights or rights with a cultural content. Moreover, the ECtHR has also adopted a certain relativist notion of culture balancing its distinct, though parallel, conceptualisations within the CoE system, such the value a common heritage of Europe, diversity and autonomy of national cultural and individual cultural rights. In some cases, the ECtHR has also used the cultural argument to limit the enforcement of individual rights in favour of the legitimate interest of the wider society. For example, the ECtHR has decided that the existence of a community interest in the protection of cultural heritage may be used as a legitimate ground for a state to interfere with an individual's property rights. This dynamic practice of the ECtHR is sometimes labelled as "culturalisation of human rights" or an attempt to advance the effectiveness of human rights standards by interpreting them within a given cultural and societal context.

Andrzej concluded that the major concerns with regard to the enforcement of the right to cultural heritage are (i) the access to international justice; and (ii) the participation of cultural rights' holders in international decision-making. To date, these two fundamental aspects are still underdeveloped and call for more concrete solutions, which would facilitate a better governance of cultural matters, reconcile cultural and social conflicts, and contribute to the continuous development of all humankind.

Hanna Schreiber

Hanna Schreiber added to the discussion the concept of the safeguarding of the intangible cultural heritage in the context of the EU and how the right to intangible cultural heritage can be enforced in such context. According to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (the '2003 UNESCO Convention'), the intangible cultural heritage is defined broadly as "practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage", under Article 2 of the 2003 Convention (the so-called people-centered approach). With its emphasis on the intergenerational transmission, the definition also focuses on the constant recreation of the intangible cultural heritage in response to the environment and, more importantly, requires the sense of identity and continuity attached to such heritage. In this regard, the intangible cultural heritage includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.

Historically, it was proposed that the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (the '1972 UNESCO Convention') include the protection of intangible cultural heritage; however, such proposal was rejected. Following the adoption of

the text, the protection of cultural heritage has been subject to discretionary power of states to legitimize and de-legitimize some aspects of cultures, what resulted in the creation of the Authorized Heritage Discourse – AHD, as defined by Laurajane Smith. In this light, the World Heritage List has started to be criticized as being westernized (49% of inscriptions coming from the region of Europe and North America) and undermining the holistic and supra-regional concept of cultural heritage.

Hanna pointed out the three main differences between the cultural heritage protection in the 1972 UNESCO Convention and the concept of safeguarding in the 2003 UNESCO Convention, namely that (i) the focus of the 1972 UNESCO Convention was on the authenticity of material, tangible form of heritage, whereas the 2003 UNESCO Convention focused on the constant re-creation of diverse practices in the process of intergenerational transmission; (ii) the value underlying the 1972 UNESCO Convention was the “unique, outstanding and universal value”, whereas, as mentioned, the feature of intangible cultural heritage under the 2003 UNESCO Convention was invaluable since it rests upon the representation of the identity of local communities; and that (iii) the aim of the 1972 UNESCO Convention is to protect the cultural heritage elements, representing the “great history”, the past, chosen and hierarchized by states authorities, whereas the 2003 UNESCO Convention aims to safeguard intangible cultural heritage living in the present, belonging, defined and chosen by communities, groups and individuals themselves for the sake of keeping these practices alive in the future.

However, with regard to EU policy in the field of intangible cultural heritage, the EU’s involvement has been insignificant in comparison to the other areas of its activities in the field of international cultural heritage, such as world heritage under the 1972 UNESCO Convention or especially the 2005 UNESCO Convention on Cultural Diversity, where the EU, as an organisation, played a decisive role. In the light of research based on documents but also on interviews with stakeholders involved, this is because of the EU’s: (i) lack of understanding of what intangible cultural heritage is and how it differs from the tangible heritage; (ii) lack of funding to support the safeguarding of intangible cultural heritage; and (iii) lack of concrete policy to address the issue of intangible cultural heritage. Instead, there is a simple addition of the wording “intangible cultural heritage” in different EU policy and legal documents. For example, the 2014 EU Commission’s Communication ‘Towards an integrated approach to cultural heritage for Europe’ expressly mentions the importance of both tangible and intangible cultural heritage as a common wealth and a valuable resource for economic growth, employment and social cohesion. However, the communication does not define the meaning or scope of intangible cultural heritage, which leaves an empty space in this field for EU action. It refers to cultural heritage as a tool to secure economic goals but it does not promote cultural heritage on its own as one of their policy goals. The EU’s 2016 Joint Communication entitled ‘Towards an EU strategy for international cultural relations’ (the ‘2016 EU Joint Communication’) also expresses similar concept and understanding of cultural heritage, including intangible cultural heritage.

Another concern for the safeguarding of intangible cultural heritage in the EU is the existing confusion between the terms “common European heritage” and “common European cultural heritage”. Whereas the former refers mainly to human rights, democracy and the rule of law, as a field belonging to a certain political culture and experiences familiar to political elites, the latter intends to address the idea of common historical experiences, symbols and memory in a broad anthropological sense and can be referred to the ethnosymbolic domain, created and re-created on the local, regional or national levels by large parts of diverse European societies. In this perspective, it is difficult, if not impossible, to identify the commonality of intangible cultural heritage in the EU Member States. Combined with the results of recent EU referendum and Brexit, as well as the discussion on the crisis of the EU concept and identity, it is still uncertain as to how intangible cultural heritage will and can eventually be sensibly “unlocked” and addressed by the EU.

Damien Helly

Damien Helly further discussed the role of culture in EU development policies and external action by laying out the landscape of the EU policy framework and the position of culture in the framework. The EU has included culture in its external policies and substantively engaged in interdisciplinary and cross-culture projects for many years. However, its policies with regard to culture have been framed in a fragmented way because culture remained primarily a competence of Member States. As a progress in EU external action with respect to culture, the recent 2016 EU Joint Communication, initiated by the EU Commission (following the EU preparatory action on culture in external relations requested by the European Parliament), has marked a policy shift for EU external action writ large. Although at first glance the substance of the 2016 EU Joint Communication may look to some rather disappointing as it does not go beyond what has already been achieved in EU frameworks, its very existence signals that culture is back on the EU external action agenda more widely and therefore allows culture to be part of the EU’s collective discussion (including in development policies). This shift of policy focus also marks the change of priority with regard to culture, namely from being considered as a “negative priority” to a “positive priority”.

Despite the development on the EU external action in this area, it should be recalled that the EU, as a separate entity from its member states, does not possess cultural heritage in its own name (except for some common EU identity (e.g. the Jean Monnet chairs and the EU flag)) and culture is the area which falls under the competence of the EU member states. Thus, the EU only assists its member states in responding to different needs and implementing various policies with limited coordination or cohesive vision. Still, member states request EU intervention in numerous culture-related policy fields, including cultural heritage. Therefore, the topic of the discussion should be shifted from “what is the common EU identity or EU cultural heritage?” or “what are the EU’s roles with regard to EU cultural heritage?” to “what EU institutions, member states and societies can do together to protect the cultural heritage of European peoples and communities?”.

The 2016 joint communication on international cultural relations signals three priorities along which EU may engage on, with potential implications for action on cultural heritage. First, the communication links cultural relations with the current socio-economic challenges in the EU: culture is expected to contribute to “growth and jobs”. In this regard, the EU views cultural heritage as a tool to job creation and to increased market access abroad through support to EU’s export promotion and cultural branding (such as city, regional, national or European branding). Second, cultural heritage is approached through the lens of EU crisis management policies in response to armed or violent conflicts. Such “crisis response mode” is quite prominent in the 2016 joint communication. This includes the protection of cultural heritage overseas and in the so-called European neighbourhood region (with a focus on the Middle East and North Africa in particular). Third, recent migration shocks have an impact on the EU’s cultural heritage policies: there are concerns about the trafficking of cultural heritage goods, pushing towards some linkages between cultural heritage policies and border control.

Damien in the end raised several points and questions with regard to the EU’s role in the protection of cultural heritage. First, he noted that the 2016 EU Joint Communication, as a document drafted by diplomats, is in fact very short and mainly addresses cultural heritage from an economic diplomacy and pro-growth perspective, in addition to a political or security-related perspective (in which one may sense the drafting influence of the European External Action Service). He also encouraged the consortium to reflect on ways to capitalise on the knowledge produced by its various partners, in the view to contributing effectively to the upcoming 2018 EU year of cultural heritage. Cooperation with EU institutions in that realm might create new funding opportunities for follow-up research work on cultural heritage. Lastly, he identified a number of themes on which ECDPM intends to work, to support the implementation of the joint communication on international cultural relations: policy adjustments in North Africa and the Middle East, technical, financial and educational support for local communities in armed conflicts and situations of fragility and cultural heritage management in developing countries.

Paola Monaco

Paola Monaco discussed the role that UNESCO plays in strengthening the relationship between culture and development, especially by means of its Culture for Development Indicators (CDIS), as part of its mission to preserve and manage culture, which is a complex, problematic and multifaceted concept. To pursue this objective, UNESCO, according to its constitution, uses various legal tools, including the so-called “hard” law (e.g. international conventions) and “soft” law (e.g. recommendations adopted by member states in a conference or international declarations). It must be emphasised that, although the recommendations and declarations do not have a legally binding force, they are usually held in high regard by the member states and may harden throughout time. A good example was the transformation of the legal tools in the field of cultural diversity, from the 2001 UNESCO Universal Declaration on Cultural Diversity to the 2005 UNESCO Convention on the

Protection and Promotion of the Diversity of Cultural Expressions (the “2005 UNESCO Convention”).

With regard to the 2005 UNESCO Convention, Article 13 highlights the specific links between the protection of diversity in cultural expressions and sustainable development. It basically sets out obligations for the state parties to integrate culture in their development policies to create conditions conducive to sustainable development and promote the diversity of cultural expressions. Based on this obligation, UNESCO CDIS is created as a “quasi-legal” tool with legal significance to guide member states in their national efforts to collect statistics and draft indicators, i.e. data purporting to represent the part or the projected cultural performance of a country. In other words, it allows the state parties to self-assess the contribution of culture to the development at a national level.

In spite of being alleged as “purely” descriptive, statistics and indicators contribute to strengthening UNESCO’s grip on States’ management of cultural resources. By deciding what should be measured and how, UNESCO explicitly and implicitly conveys a set of targets, best practices or legal standards that reinforce the obligation of States to include culture in national plans and policies and help normalize particular visions of what should be attained, by whom, and through what means. In this light, the collection of statistics and the drafting of indicators under the guidance of UNESCO can be best understood as a tool for the socialisation of States within UNESCO’s global community, as opposed to a neutral data reporting. Moreover, statistics and indicators can be seen as a form of “technology of global governance” since it can be used as a common language in the field of culture between states, international organizations, civil societies, minorities and non-governmental organizations.

Based on Article 13 of the 2003 UNESCO Convention, the CDIS proposes a novel methodology to measure the role of culture in national development processes, especially for middle and low income countries. In addition, through the implementation of the CDIS, UNESCO is trying to document culture’s contribution to development in economic and non-economic terms, and to raise global awareness of the virtuous cycle between culture and development. Through the key seven policy dimensions of culture (i.e. economy, education, governance, social participation, gender equality, communication and heritage) and the 22 core indicators (so-called ‘CDIS Matrix’), CDIS allows states to assess the impact of culture on development process and understand the role that culture plays in creating an enabling environment for development.

With regard to its methodology, the drafting of the indicator is a country-led process, which requires the participation of relevant national stakeholders both to ensure the efficiency of data collection and analysis, and to strengthen the long-term impact of the initiative on the national policy landscape. To assist countries in the implementation of the CDIS, UNESCO designed a Methodology Manual and a Toolkit. The Methodology Manual is a guide for the construction of the 22 core indicators, which give detailed instructions to the states on how to

process the CDIS in their national context, whereas the Toolkit focuses more on the sequence of actions for constructing the indicators and the advices on logistical, administrative and institutional arrangements for the implementation of CDIS for each particular country as opposed to a common methodological framework. The common features shared between the Methodology Manual and the Toolkit are pragmatism and adaptability, which allow states to tailor the data collection as appropriate and they may propose alternative or additional indicator if such indicator is not covered by the CDIS.

According to the Toolkit, the implementation of CDIS will result in the national “Culture for Development DNA”. As the human DNA represents the sequence of information for building and maintain an organism, the CDIS DNA contains, in a single but complex picture, the entire range of data about the relationship between culture and development in a given country. In this regard, the CDIS DNA visualisation provides a snapshot of the situation of implementing countries, and thus may reveal correlations and trigger national and global debates. Moreover, the CDIS DNA also facilitates the comparability of results among countries, but at the same time does not end up in a global ranking, which promotes states’ rank-seeking behaviour, rather than encouraging states to improve its actual performance. Where the CDIS have been totally implemented, it has been noted that there was a change in the perception of culture that helped justify budgets on cultural activities and a reinforcement of states’ capacities of data collection and analysis in the formulation and implementation of informed cultural policies and development strategies. The use of CDIS is not technically limited to developing countries; however, there is a questionable assumption that developed countries, mainly Western European states which are the funders of the project, do not need the CDIS because they already have fully functional links between culture and development.

Although it may be too soon to assess the long-term efficacy of the CDIS in the collection of relevant data and in the promotion of culture as a development enhancer, the initiation of CDIS itself contributes to the raising of states’ awareness about the relationship between culture and development. The success of the CDIS, as indicators based on a bottom-up approach, in the long run would much depend on a compromise between the need for uniformity and neutrality of data and the consideration for local specificities and participation.

Richard Mackenzie-Gray Scott

Richard Mackenzie-Gray Scott began by referring to the result of the EU referendum, which created significant impact in several areas, including cultural heritage. In spite of the UK government having expressed its confidence in new opportunities arising out of BREXIT, the overall response from the UK cultural sector has been negative, especially with respect to the financial support that the UK cultural institutions has obtained from the EU and the government. From a private sector standpoint, taxes on individuals in the UK may rise post-BREXIT meaning art collectors in Britain could leave for other states with lower taxes – taking



their collections with them. On the public side, museums may start charging visitors for entry in order to sustain themselves in the wake of any budget cuts from the government.

BREXIT has cast doubt over the future of funding for cultural heritage since the loss of financial support to the UK cultural sector can be substantial. For example, the Creative Europe Programme has spent about 40 million Euros on the UK since 2014 and the funding for many initiatives is tied up to the UK membership to the EU. However, the UK could still obtain funding from the Programme after BREXIT, but only if specific conditions are satisfied under EU Regulation 1295/2013. This cannot be said for the European Regional Development Fund, which focuses on conserving, protecting, promoting and developing cultural heritage. Ironically, this Fund was proposed to be set up by the UK in 1972, but it is unlikely that the UK will be involved in it in the future since it is currently available for EU Member States only. Whilst policy collaboration continues to develop among EU Member States, it is challenging to envisage how the UK is going to improve itself in this area, without the substantial financial resources of the EU to draw from in the future.

Although the UK's legal system does have a number of safeguards protecting cultural heritage, some of these safeguards have been established through the implementation of EU law and have heavily benefited from the cooperation among states, especially EU Member States. This makes it more difficult for the UK to strengthen the legal protection of cultural heritage without constructing agreements with foreign entities. Moreover, thus far the UK has not entered into any bilateral or multilateral agreements on the protection of cultural heritage, emphasizing the lack of progress in this area from an international law standpoint. Altogether, there is a regulatory uncertainty as to how EU law is going to be transposed and how cultural heritage will be protected under domestic legislation after BREXIT.

According to the UK government, EU law will be transposed into domestic law "wherever practical" on exit day. However, cultural heritage has not been a focal point of BREXIT-based discussions and it would be logical to infer that transposing EU law in this area might not be "practical" in the government's view. This is particularly true when considering that the UK does already have a number of its own rules stemming from domestic legislation – at least this is the side of the argument for not transposing EU rules relating to cultural heritage in the course of BREXIT. Richard personally hoped that legal gaps do not arise in the event of BREXIT, but he emphasized that no one can guarantee that at present.

This Report was prepared by **Jedsarit Sahussarungsi**, Volterra Fietta – BIICL Intern in Public International Law.

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