

INTRODUCTION

“Above all it should be noted that we frequently view the same things from a range of perspectives, and that the same events can often generate the most different ideas”

Georg Adam Forster: *A Voyage round the World in His Britannic Majesty's Sloop Resolution, Commanded by Capt. James Cook, during the Years, 1772, 3, 4, and 5*, London 1777

"The more we share, the more we have"

Mohamed Mounir, Egyptian singer, author and actor at the "Salam Ramadan" event, Philharmonic Hall of Cologne, 13 and 14 October, 2007

"ALL THAT IS BANNED IS DESIRED"

Motto of the World Conference on Artistic Freedom of Expression, held on 25 and 26 October 2012 in Oslo, organised by the *Fritt Ord* Foundation and *Freemuse*

"Identities Are Changeable"

Title of the 2014 CD of Puerto-Rican Saxophonist Miguel Zenón

1. Background

The idea for the *Wroclaw Commentaries* emerged from two conferences on 'The Right to Culture as a Human Right' held in Wroclaw (Spring 2013) and Warsaw (Autumn 2013), both co-organised by the City of Wroclaw and the National Centre for Culture (Warsaw). These meetings brought together experts from Poland, as well as from the Council of Europe/ERICarts *Compendium of Cultural Policies and Trends in Europe* and the European Association of Cultural Researchers (ECURES). On both occasions, the participants discussed the desirability and possibility of adopting an Additional Protocol on the right to culture to the *European Convention on Human Rights (ECHR, 1950)*, the most important human rights instrument of the Council of Europe. *Inter alia*, they studied the 'demand that all citizens be given the opportunity to participate in cultural and artistic life' and 'that public authorities be charged with specific duties with regard to guaranteeing such participation', thus going beyond the present situation with its merely 'declaratory' statements (*The Right to Culture as a Human Right – A Call for Action*, Position Paper, Warsaw/Wroclaw, 2014).

Trying to understand the absence of a provision on the right to culture or cultural participation in the ECHR, some speakers found that, on the one hand, a consensus over the precise content of such a right – that could hold public authorities responsible for its breach – would be difficult to determine. On the other hand, they noted that the 'right of everyone to participate in cultural life' already exists in international legal instruments such as the *Universal Declaration of Human Rights* of 1948 (Article 27) and the UN *International Covenant on Economic, Social and Cultural Rights* (ICESCR, Article 15), but has not been spared from doubts about its justiciability, i.e. the opportunity for individuals to invoke this right before courts and semi-judicial bodies. At the same time, they expressed the belief that culture, both in a narrower and broader sense, needs to be protected as a human right. They

also shared concerns over a growing number of incidents, both in Europe and worldwide, violating cultural rights that 'could erode the universal nature of fundamental rights and freedoms that have their basis in human dignity', considering particularly 'freedom of artistic expression' to be 'a cornerstone of liberal democracy' (ibid.).

As these conferences became a new starting point for further debates about the role of culture in human rights law, their organisers must be congratulated for this initiative. Yet, these events revealed the difficulty of translating basic human needs into the language of rights and triggered a number of questions, including, but not limited to:

- Would a 'right to culture' be a new right or is it perhaps an element of the, already recognised, 'right to participate in cultural life'?
- What is the relationship between a 'right to culture' and the notion of 'cultural rights'?
- Is the 'right to culture' a right of access and/or a freedom?

Clearly, each of these views of culture-related rights denote a different aspect of human activity regarding culture, while focusing on the individual or collective dimension, the active or passive role of the rights holder, and a different nature of correlated obligations of duty bearers (the state or other actors). Today we can already conclude that one should probably focus less on a particular 'right to culture' and more on how diverse culture-related human rights and the existing legal instruments could be better understood and effectively enforced, as well as on what human rights standards are still missing or could be considered underdeveloped (e.g. as regards the digital world).

During the past decades, efforts to rectify the lack of clauses related directly to culture in the ECHR had actually been made within the Council of Europe (CoE). For various reasons that will be explained later in the Handbook, these efforts did not result in a 'Cultural Protocol' to the ECHR. Still, in January 2012, the Parliamentary Assembly of the CoE, in its Recommendation 1990 on 'The right of everyone to take part in cultural life', considered this right as 'pivotal to the system of human rights'.

Moves towards a more explicit recognition of cultural human rights in European and international standard setting instruments have also been promoted by academic and civil society initiatives, such as the *Fribourg Declaration on Cultural Rights* (2007). 14 years earlier, a CIRCLE Conference on *Human Rights and Cultural Policies in a Changing Europe* in Helsinki had already proposed 7 essentials for the implementation of the right to participate in cultural life.

Moreover, in 2009 two important developments took place in the UN system: the mandate of a UN Special Rapporteur in the field of cultural rights was agreed by the Human Rights Council and the UN Committee on Economic, Social and Cultural Rights adopted a *General Comment on the Right to Take Part in Cultural Life*. Obviously, the times when culture-related human rights had to be considered 'neglected or underestimated' (Symonides, 1998)

have gone, even though they are still not always respected or fully implemented. In fact, it can be argued that we experience a growing 'culturalization' of human rights (Lenzerini, 2013), backed up by international legal instruments, as well as relevant case-law.

However, there remained a definite need to clarify, in greater detail, the relationship and interaction between culture and human rights and, following the 2013 Warsaw conference, one of the later editors of this Handbook proposed a research and stock-taking exercise: The best experts should be asked to identify, and then comment on, the most important culture-related issues, having regard to both already existing rights and jurisprudence in European and international human rights law as well as to remaining deficits. Given the city's previous engagement in this matter, the programme and preparatory work of Wrocław for its term as the *European Capital of Culture 2016* has been identified as an ideal context for conducting this project, which resulted in what are now the *Wrocław Commentaries*.

2. The Relationship between Culture and Human Rights

The main purpose of the *Wrocław Commentaries* is to fill a gap in the existing literature on the relationship between culture and human rights. Yet, like in any research-based work on 'cultural' issues, the editors of this volume had to take a position on the meaning of this term. At the outset of the project it appeared that law, and specifically international human rights treaties, seem to avoid a precise definition of culture. Therefore, it was necessary for the editors, the members of the Scientific Committee, and to some extent also for the authors of this Handbook, to first adopt a common approach to 'culture' in order to analyse its relationship with human rights.

It seems that all humans know what culture is or at least have an intuition how to distinguish culture from nature. Yet, already this distinction may be disputable since the concept of nature can also be understood as a cultural concept (Junker, 1999). Moreover, nature, including landscapes or the underwater world, may fall under the definition of cultural heritage, regardless of whether it has actually been shaped by human activity or natural forces. Notably, the word 'culture' originates from the Latin *cultura* and *colere*, which denotes processes of cultivation, originally used with regard to agricultural development efforts influencing natural growth. In analogy, what culture and human rights share is the preservation of human values and the achievements of humanity, and the orientation to human growth.

However, the meaning of 'culture' appears to be culture-dependent, for many 'cultures' have their own, distinctive understanding of cultural achievements or processes and, of course, their specific languages to express these differences (Blake, 2015). Moreover, their understanding often relates to intangible cultural heritage or some particular aspects of living and interacting together, such as food traditions and dining manners, clothing, family structures, conversation habits and the use of body language, the way of constructing

houses or the use of building materials, etc. Taking into account the cultural differences in the approach to culture, the risk had to be avoided that a definition of culture will settle with a Eurocentric view or restrict the definition of culture to such domains like fine arts, film, literature, music or theatre (which are, nevertheless, important parts of it).

Consequently, this Handbook takes an open-ended approach to culture and tries not to prioritise either 'high culture' or the modes and symbols of daily life. Instead, it tries to assess the relationship between culture and human rights from the position of culture as a basic need of all individuals which includes, but is not restricted to, the canons of artistic creation and encompasses tradition and innovation, conservation and modification, doctrinal purity as well as hybridity and experimentation. While the editors recognise that an institutional approach to culture is often dominating current discussions, the *Wroclaw Commentaries* do not subscribe to the notion of a 'core culture'.

In other words, the editors of this Handbook want to emphasise that human rights are indivisible and apply to everyone alike, independent of his or her profession. If artists and intellectuals, writers and journalists, publishers and Internet bloggers are more frequently involved in disputes about culture and fundamental rights or their status is even taken as an 'indicator' of the freedom enjoyed in a particular society, this has less to do with an accentuated role attributed to them in European and international human rights law. It rather has to do with their stronger presence in public life and related 'communicative action' (Habermas, 1984), often paired with individualistic mindsets, with more independent ways of thinking off the beaten track or with their disposition towards passion and compassion. To name just one example: Well-known artists like Hans Haacke, Walid Raad or Ashok Sukumaran are among the organisers of the *Gulf Labor Artist Coalition* (<http://gulflabor.org/>), raising awareness about the poor living and working conditions of migrant workers involved in the construction of the Guggenheim Abu Dhabi, the Louvre Abu Dhabi and other arts and education facilities in the Gulf region.

Most importantly, the approach to culture adopted in this volume is inclusive in terms of subjects, contents and forms. The inclusive approach to culture implies that any particular category of persons may not by definition be excluded from active or passive participation in culture (Laaksonen 2010). Moreover, this approach aims to promote equal access to culture of persons belonging to minorities or other vulnerable groups, facilitating their cultural activity and recognising their 'culture(s)'. For this reason, one of the focal points in this Handbook is the analysis of social and socio-cultural groups such as children, youth, older persons, indigenous peoples, national minorities, migrants, refugees, persons with disabilities, women, LGBT, and their culture-related rights or right-claims. Yet, while including these categories of subjects in the broad concept of culture, the Handbook does not predetermine which culture-related rights need to be protected. Rather it recognises these categories of persons as potential authors or participants in culture.

For the same reason, the *Wroclaw Commentaries* do not exclude any particular content or forms from the definition of culture. For example, we recognise the relevance of 'social

media', blasphemy, defamation, obscenity, trolling or 'shitstorms', or even hate crimes for current and future debates about culture and human rights. While the Handbook, in its overall approach, does not establish which specific content or forms deserve legal protection, it aims to pose questions for law and policy-makers about implications of laws and policies which do not take the cultural aspects of such activity into account.

Last but not least, the Handbook recognises the role of new technologies and, particularly, digital media for cultural development, while being aware of the challenges they bring for the protection of traditional authors' rights/copyright, and for the status of artists, journalists and publishers or other media producers. However, this example should remind us that while human rights law underlines basic values, sets standards for law making and other actions of public authorities and provides tools to settle severe conflicts, it is as such not the proper instrument to solve concrete professional issues or problems of specific groups of the population. Indeed, the latter require effective and transparent policies, be it in the arts and media, in social security and cohesion, in education, or in many other domains reflected on in the contributions of the authors of this Handbook.

The *Wroclaw Commentaries* take an open and inclusive approach to the relationship between culture and human rights. There seem to be at least three understandings of this relationship:

First, culture can be considered as an *area of human activity*, which falls in the scope of human rights protection. In this regard, it is put on the same plane as education or sports – even if, in a broader understanding, they could also be considered to be part of 'culture'. And yet, like health or social security, culture requires an active role of the public authorities with regard to providing institutions, infrastructure, and funding. At the same time, culture and particularly the arts and media denote an area of freedom, which needs to be protected against unjustified interference of the state and third parties. While the social dimension of culture necessitates state regulation, the personal aspects of culture imply freedom from state intervention. In this meaning, the relationship between culture and human rights refers to the norms and relevance of legal and policy instruments in the area of culture.

Second, the relationship between culture and human rights could suggest that, generally, the *interpretation of human rights is culture-dependent*. This approach follows the universalism and cultural relativism debate which gains significance in times of ideological crusades led by states, religious authorities and political groupings trying to dictate their particular interpretation of human rights standards and norms. Recognising the importance of cultural pluralism, there is increasing consensus among states, legal practitioners and scholars that the, necessary, universal application of human rights does not imply their uniform implementation, leaving room for what has been called a 'localisation' of human rights (De Feyter, 2006) that takes specific historical, cultural, social and economic conditions into account.

Third, the relationship between culture and human rights could be explained in terms of a *culture of human rights*, which denotes a legal culture based on human rights. This approach follows the main tenet of democracies which not only recognise the fundamental value of rights, but also accept that rights set the limits for state actions, and establish a set of obligations such as the duty to respect, protect, and fulfil human rights. Clearly, human rights, and in particular, human right instruments entail a specific language, which is used by monitoring bodies, including international human rights courts or committees, as well as National Human Rights Institutes, human rights defenders, NGOs, and human rights activists. Moreover, there are human rights discourses, 'dialogues' between courts, and other channels of human rights communication like strategic litigation, social campaigns, street protests, etc. All these activities produce 'artefacts' of a culture of human rights. To the most important ones among these artefacts count judicial decisions which, similar to pieces of art, are subject to interpretations of legal experts, as well as to commentaries in other than legal fora.

The *Wroclaw Commentaries* do not favour any of these approaches, but try to elaborate on all of them and show the interaction between them. Therefore, the Handbook emphasises the multiple dimensions of the relationship between culture and human rights, rather than endorsing cultural relativism. It also aims to advocate openness rather than dogmatism; and increase freedom rather than restraint. Last but not least, the *Wroclaw Commentaries* provide many examples demonstrating the interrelatedness and interdependence of human rights, rather than their hierarchy. In any case, they should not be read as a promotion of a particular worldview or interpretation. Instead the intention of the editors and members of the Scientific Committee was to summarise the state of art in the protection of culture-related human rights and to discuss its future challenges and developments.

3. Aims, structure and methodology of the *Wroclaw Commentaries*

The importance of culture for individuals and communities, and its presence in all aspects of human lives, providing an essential part of individual and collective identities, is no longer underscored in legal research. As well, questions of how to better understand the relationship between culture and human rights are broadly discussed among legal experts, while efforts to 'translate' culture into law and policy making – including international processes such as development, conflict prevention and conflict resolution – receive growing attention among politicians, arts and media professionals and civil society organisations. Yet, while the dialectic relationship between culture and human rights is appreciated among specialists, it often remains neglected in practice.

There is still limited understanding and knowledge about how to source culture within human rights law; how to guarantee the universality, the interdependence, and the indivisibility of human rights while acknowledging that a variety of cultural issues come into play in relation to their scope of protection; and how to assure that culture does not become

an excuse for the denial of fundamental human rights, either individual or collective, at national, regional and international levels.

The international community has come a long way since the adoption of the UDHR. Since 1948, international human rights law has greatly expanded and domestic legal orders have accordingly been largely influenced by the transformative impact of international human rights standards. At the same time, this transformative potential has been limited in practice due to political tendencies, unavailability of public policy space, economic crises or cultural and religious barriers. Within this setting, the intersection between culture and human rights has not only invited debates over their boundaries regarding their scope and enforcement, but has clashed with issues of state sovereignty and political legitimacy, policy priorities and institutions, judicial proprietary and resource allocation.

However, the current political practice to address global challenges, for example the refugee crisis, with short-term solutions that do not capture the complexity of the issues and lack sustainability is not without danger, because it tends towards diminishing diversity instead of promoting it. Indeed, if this trend would continue, it could one day put the whole European project of 'unity in diversity' into question. In that context, the editors do not wish to be considered naïve: They are well aware of the time and efforts it takes to transform human rights principles into sustainable policies and practices. They also know about the difficulties to open up narrow mindsets or to give clear answers to vague fears. In fact, we could even consider and debate the controversial thought of anthropologist Claude Lévy-Strauss (in his last work *Le regard éloigné*, 1983) that, in order to sustain cultural diversity and creativity, it can be perfectly legitimate 'to feel little drawn to other's values' as long as such a 'relative incommunicability' is not taken as a pretext for 'oppression or destruction'. In that regard, human rights instruments can be seen as an important, if not the main, barrier against all kinds of abuses of power, be they of a political or a commercial nature, as well as – to be further developed – tools to safeguard the culture(s) and dynamic identity of Europe.

Against this background, the *Wroclaw Commentaries* intend to serve as a basic guide to culture-related issues (in the wider sense) and their significance in the domain of human rights. The aim of the Handbook has been to provide, on the one hand, a user-friendly tool for the daily needs of policy- or law-makers at various juridical, administrative or political levels and, on the other hand, an introductory reference for other stakeholders working, researching or teaching in the field of culture and related domains.

The Handbook addresses – in 7 comprehensive overviews and over 120 keyword-entries – legal questions, as well as 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, and further pertinent issues. Specialists from Europe and around the world define issues at stake (in the alphabetic entries abbreviated as DEF), summarise or comment core messages of legal instruments (INSTR), the essence of case-law (CASES) as well as prevailing

and important dissenting opinions in the literature (VIEWS), ending with conclusions and/or proposals for future reforms (CONCL). Literature references for further reading are included.

The title of the handbook: “Wroclaw Commentaries” reflects that it differs from a dictionary or a more neutral encyclopaedia. The authors of the commentaries were asked to not only outline the issues at stake, but to reflect upon them and put them in perspective. The plural term ‘Commentaries’ also implies that in this handbook different authors have written on related subjects and issues whereby different interpretations and opinions are possible - and sometimes necessary, depending on the issue at stake (visible, for example, in entries dealing with intellectual property/copyright issues). Clearly, the *Wroclaw Commentaries* involve the work of specialised authors who are both experienced in their field and able to discuss their topic with an open mind. In order to assist readers in their uptake of the keyword entries, the editors ensured that the authors follow a certain technical order of argumentation and referencing, but they were not asked to abandon their individual writing style or sacrifice their approach to a specific subject. The resulting diversity of viewpoints and expressions has been more than welcome and is by all means intentional: It should stimulate needed debates and should be considered the strength of 'cultural worldviews' in times of globalisation.

In terms of methodology, preparatory research, including a comprehensive annotated collection of bibliographical resources, a selection of topical case-law and a first concept for the Handbook, had been carried out by ARcult Media experts in 2014 and discussed with the Mayor of Wroclaw and his team. This concept could best be sketched with two principles:

Thematically: A legal handbook on culture-related issues in the domain of human rights that is open to other relevant disciplines;

Geographically: A primarily European approach that is open to the world and, particularly, to global issues affecting all of us.

The editors and the Scientific Committee agreed on adopting a vertical and horizontal structure for the Wroclaw Commentaries. To set out the horizontal structure, a preliminary research was carried out based on the available international and European case-law (mainly coming from the European Court of Human Rights and other European judicial mechanisms) as well relevant provisions in the international human rights instruments. This research resulted in identifying the overview subject areas upon which the long, medium and short-sized keywords would then be selected.

With regard to the number of cases in particular areas, e.g. freedom of expression, the recent recognition of the human rights dimension of certain issues such as cultural heritage, or the vulnerability of social/socio-cultural groups, seven overview areas were identified and dealt with by the members of the Scientific Committee in their overview articles in the first part of the Handbook:

- Culture and Human Rights: Concepts, Instruments and Institutions (Andrzej Jakubowski);
- Freedom of Expression in the Arts and Media (Annamari Laaksonen);
- Cultural Diversity and Cultural Identity (Yvonne Donders);
- Access to Culture, Media and Information in the Digital Age (Paul de Hert);
- Rights and Protection of Social/Socio-cultural groups (Federico Lenzerini);
- Freedom of Religion or Belief (Heiner Bielefeldt);
- Cultural Heritage in the Human Rights System (Janet Blake).

During eight meetings between editors and, since 2015, members of the Scientific Committee in Wroclaw and other places, about 150 relevant culture-related keywords were identified, the great majority of which led to articles that can now be found in the Handbook. The keywords had been categorised into long, medium or short-sized keyword-entries and some 'brief references' based on their legal value in the context of culture and human rights as recognised by jurists, scholars and practitioners in the field and on the availability of standard-setting instruments and relevant case law. A few keywords that lacked substantial case law background were nevertheless included in the *Wroclaw Commentaries* as it was agreed that their political, economic or social relevance could help to clarify legal issues at stake. Finally, certain entries were added based on their topicality and relevance to European societies as reflected in academic fora, conferences, international research projects and the media. Nevertheless, the relevance of the content of the *Wroclaw Commentaries* for global culture-related issues and particularly for those faced by European societies – which definitely includes learning from international experiences! – remained a criterion for the inclusion of all new entries. This concept and main issues dealt with in the Handbook were first publicly presented and discussed at a research forum held November 2015 in connection with the 14th Council of Europe/ERICarts *Compendium* Experts' Assembly in Wroclaw.

Most of the keyword entries of the *Wroclaw Commentaries* review the relationship between culture, human rights, governmental policies and measures, practices or societal attitudes. The Handbook intends to develop a normative and interpretive context of the legal framework on culture and human rights, thus bridging the gaps between dispersed, partly unspecific, references to 'culture' (in the wider sense) in the human rights literature, in legal instruments or in court cases. While the Handbook deals with its subjects mostly from a legal point of view, multidisciplinary elements are also part of the methodological approach, particularly as regards definitions and conclusions. The book aims to shed light on disputed points regarding the current normative framework of human rights protection (*de lege lata*) as well as to raise some crucial points for future law- and policy-making in the area of culture (*de lege ferenda*).

As the original starting point for the Handbook has been the perceived absence of a 'right to culture' in the ECHR, the editors found that assessing existing legal sources as well as the case law of the ECtHR and the Court of Justice of the European Union or quasi-judicial or

expert bodies within the Council of Europe such as the European Committee of Social Rights should play an important role in the preparation of articles. However, the authors were also asked to look beyond the European jurisprudence and include messages from the UN treaty bodies and international courts and tribunals, e.g. American or African human rights courts as well as national courts where appropriate.

While the majority of invited authors come from the European continent, this structure has been frequently amended following discussions with the Scientific Committee: A number of non-European authors were invited to contribute on keywords which are of interest to the broader international community. In all cases, the editors and reviewers of the Handbook aimed at securing accurate and fair texts. However, still remaining factual errors brought to their attention will be corrected as soon as possible, e.g. in the next edition of the Handbook and/or on the related web site.

The editors value the *Wroclaw Commentaries* as an ongoing research process which, due to its originality, will continue evolving. The team set up by ARCult Media has developed a website that will serve as an interactive platform building on the scaffolding created for it by the *Wroclaw Commentaries* – many of the specialists involved in the Handbook already agreed to contribute to this information and debate space (www.culture-rights.net). In addition, the Internet platform offers some exclusive content related to the Handbook, such as abstracts prepared by the authors for their keyword entries.

Both the editors and the members of the Scientific Committee are aware of the fact that this stock-taking of existing culture-related human rights instruments and jurisprudence and, in particular, the choice of issues that led to the Handbook's keywords are by no means exhaustive: As could be expected in a domain as multi-faceted as 'culture', some issues are missing in the *Wroclaw Commentaries*, so there is clearly room for extensions in future editions and online. For example, the "Burkini" controversy in France (Summer 2016) could not be reflected upon in this volume. Moreover, a handbook with relatively concise entries cannot, and does not intend to, replace the relevant literature, documentary evidence and numerous advocacy initiatives in the field. The many references provided in this publication and in the related website should, nevertheless, invite the readers to using the *Wroclaw Commentaries* as a starting point for further inquiry, scientific research, political or civil initiatives and policy design.

The editors and the chair of the Scientific Committee wish to thank the City of Wroclaw, in particular its Mayor Rafał Dutkiewicz and his support team managed by Jan Wais, for making the *Wroclaw Commentaries* possible. They are grateful to the other Patrons of this Handbook: Gabriella Battaini-Dragoni (Council of Europe), Gerhart Rudolf Baum (Human Rights lawyer, Cologne/Berlin) and Farida Shaheed (former UN Special Rapporteur in the field of cultural rights) for their encouragement of a complex project that had to start from scratch. They are deeply indebted to the authors of the Handbook articles for their valuable contributions, often delivered at short notice, and to the members of the Scientific Committee for their conceptual advice and their engagement in the reviewing process.

Special thanks go also to supporting organisations and networks and to the very cooperative specialists at De Gruyter publishing house, Berlin. Last but not least, the undersigned would like to congratulate the project team set up by ARcult Media, especially the editorial assistant during the final project phase, Hans Fischer-Kerrane, and the Web developer Jörg Torkler.

Amsterdam / Cologne / Thessaloniki / Wrocław, August 2016

The Editors:

Andreas Joh. Wiesand
Kalliopi Chainoglou
Anna Śledzińska-Simon

The Chair of the Scientific Committee:

Yvonne Donders

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