Introduction

Cultural rights constitute one of the most exciting new frontiers of human rights research and practice. Cultural rights are also the ultimate law and humanities topic. These are good enough reasons for making these rights the main focus of a book. But there are other reasons, too. Cultural rights are both transformative and empowering rights. They enable people to aspire to a better future for themselves, their families, and the society in which they live, and they play a key role in realizing all other human rights. Furthermore, they provide a much-needed discourse or common forum in which we can explore, negotiate, and come to new cross-cultural understandings. All of this is supremely important today, at a time when respect for cultural diversity is a key concern worldwide, and when migration and advances in technology are increasing the level of cultural exchange but also fostering cultural clashes and incompatibilities previously masked by distance.

Human rights have already been dealt with as a law and literature topic.[1] Cultural rights, however, have rarely been at the center of attention, as scholars have tended to focus on other parts of the human rights spectrum. "Too many people still think of cultural rights as a luxury, which can be compromised when priorities must be set," writes Farida Shaheed, the first United Nations (UN) Special Rapporteur in the field of cultural rights (2009–15). But "nothing could be further from the truth," she continues, "for cultural rights are essential to people's sense of self as well as future aspirations; they are markers of a vibrant and democratic society and a key ingredient in overcoming conflicts."[2]

[1] See, for example, Ian Ward (ed.), *Literature and Human Rights: The Law, the Language and the Limitations of Human Rights Discourse* (Boston, MA, and Berlin: De Gruyter, 2015); Elizabeth S. Anker, *Fictions of Dignity: Embodying Human Rights in World Literature* (Ithaca, NY, and London: Cornell University Press, 2012).

[2] Farida Shaheed, "The United Nations Cultural Rights Mandate: Reflections on the Significance and Challenges" in Lucky Belder and Helle Porsdam (eds.), *Negotiating*

All the reports that Shaheed wrote during her tenure as Special Rapporteur display her trust in the rich possibilities for the field of cultural rights. These rights "include freedoms and entitlements ... [for] all persons, without discrimination based on their particular identity(ies), and in a way that enhances the enjoyment of all human rights."[3] Shaheed's message that cultural rights are for everyone and not only for certain groups or minorities is an important one; no more so than today. The British voters who decided in favor of the United Kingdom leaving the European Union (Brexit) and the American citizens who voted Donald Trump into power in 2016 seem to feel that they have been left behind by globalizing economic, social, and cultural forces. They share this sentiment with populist groups across the Western world that seem to be motivated, at least in part, by a feeling that (human) rights are not for them but only for minority groups, and that their problems are of no concern to the international (human rights) community. We see this reflected in the paradigm shift of the UN 2030 Agenda for Sustainable Development. Whereas the eight Millennium Development Goals ranged from halving extreme poverty rates to halting the spread of HIV/AIDS and providing universal primary education to meet the needs of the world's poor, all by the target date of 2015, the 2030 Agenda aspires to ensure prosperity and well-being for *all* women and men.[4] The conception of cultural and other human rights as universal and not relative (though sometimes still context dependent), as rights to be relied on in practice and not just in theory, is once again a timely and important one to develop and refine.

Karima Bennoune, Shaheed's successor as UN Special Rapporteur in the field of cultural rights, in her first report continues Shaheed's line of thinking on cultural rights. This particular report concerns the intentional destruction of cultural heritage as a violation of human rights, and Bennoune follows her predecessor in seeing cultural heritage as encompassing the resources that support the cultural identification and development processes of both individuals and groups. Building on Shaheed's holistic and inclusive definition of cultural rights, Bennoune views the areas of cultural rights and cultural heritage law as crucial to the general implementation of universal human

Cultural Rights: Issues At Stake, Challenges and Recommendations (Cheltenham: Edward Elgar, 2017), pp. 21–36.

[3] Report of the Special Rapporteur in the field of cultural rights, A/HRC/14/36, para. 23.

[4] In her Foreword to "UNESCO moving forward the 2030 Agenda for Sustainable Development," then Director-General of UNESCO Irina Bokova writes that, "the Sustainable Development Goals represent the most universal, ambitious and comprehensive agenda ever seen, to leave no one behind. This is a paradigm shift that requires us all to act in new ways," available at: http://unesdoc.unesco.org/images/0024/002477/247785e.pdf

rights and as a very important part of the responses to many current challenges, from conflict and post-conflict situations to discrimination and poverty.[5] Regretting that "the discourses on cultural heritage are selective," she maintains that "cultural heritage is not a weapon: it is an issue concerning universal human rights. We must come together to defend the heritage of all, for all."[6]

Bennoune's report follows a preliminary report that works as a transitional document of sorts – a document in which the new Special Rapporteur acknowledges the various ways in which she builds on the thinking of her predecessor, and in which she signals areas of special concern to her. Writing against the background of the destruction of the Baalshamin Temple and the Temple of Bel in Palmyra in 2015, Bennoune, in her preliminary report, states that this kind of "cultural warfare" and "cultural cleansing" takes "the terrorization of a population to a new level by attacking even its history."[7] Legal frameworks and relevant definitions may still need to be fleshed out, she intimates, but the controversies over the use and protection of cultural heritage are real and raise key problems for law, as for politics, at all levels.

Following both Special Rapporteurs, I will argue in the following that if we wish to prevent such cultural warfare, lawyers and cultural specialists must cooperate. Culture and law are inseparable: Culture underpins the interpretation and adoption of legal rules, while law formalizes cultural norms and rights, and conditions cultural expressions.[8] Human rights – and here most people would surely agree – are by no means perfect. But they constitute one of the few (semi)-universal ethical discourses that we have today. Some of our most urgent problems – climate change and the widening gap between rich and poor, to mention just two examples – constitute global challenges that can be addressed only through a global discourse.

This book is about how cultural rights can possibly become such a discourse – about working with law not only as a technical practice for ensuring social control, but also as a cultural vocabulary that enables a common discussion among diverse communities who have no other common vocabularies. Or, as Bennoune puts it,

> In a world of increasing sectarianism, we need a vocabulary that respects diversities and recognizes power differentials and historical injustices, while still promoting the idea of living together in harmony or *vivre-ensemble*.

[5] Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59, para. 5.
[6] Report of the Special Rapporteur in the field of cultural rights, A/71/317, para. 9.
[7] A/HRC/31/59, para. 67.
[8] James A. R. Nafziger, Robert Kirkwood Paterson, and Alison Dundes Renteln (eds.), *Cultural Law: International, Comparative, and Indigenous* (New York, NY: Cambridge University Press, 2010), p. 64.

> Diversity must be inscribed in equality and solidarity and vice versa. Indeed, cultural rights are vital in this regard.[9]

How can we move toward a human rights talk or discourse that recognizes the importance of cultural diversity without sliding into cultural relativism? Is it possible to incorporate cultural differences and conflicts of interest into a universal human rights discourse – and can cultural rights help us to do so? These are among the main questions addressed in this book.

Cultural rights are empowering rights that make it possible to pursue dreams and aspirations – especially for the weaker members of communities. Like all human rights, cultural rights are universal rights. Both individual and collective, they focus on human knowledge and creativity, on making it possible for everyone to unleash and develop their creativity. They are not about defining culture as such, as the protection of culture and cultural heritage is the responsibility of the United Nations Educational, Scientific and Cultural Organization (UNESCO).[10] Cultural rights, I will argue, are a promising field for law and humanities scholars. I will not suggest that cultural rights are the only way for law and humanities to go – merely that they constitute one possible direction into which law and humanities might evolve.

THE BOOK'S STRUCTURE AND CHAPTERS

The book consists of seven chapters and is divided into three parts. Part One is the introductory part of the book, in which the main arguments are presented, setting the scene for the rest of the chapters. It comprises the first two chapters. Part Two, consisting of Chapters 3 through 6, is dedicated to the four core cultural rights: the rights to education, culture, science, and authors' rights, respectively. And in Part Three, Chapter 7 and my Conclusion attempt to pull together the various thematic threads and to argue for the relevance of the cultural rights discourse for law and humanities.

[9] A/HRC/31/59, para. 18.

[10] In the 2001 UNESCO Universal Declaration on Cultural Diversity, culture is defined as "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs," available at: http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

PART ONE: SETTING THE SCENE

The first two chapters show my professional background within American Studies – and also my more personal background as a native of Denmark who did her Ph.D. in the United States. It is from American Studies that I have my cultural studies training and my interest in the importance of law as a cultural discourse. My first book, *Legally Speaking: Contemporary American Culture and the Law* (1999), concerned the role of law and lawyers in American culture and society.[11] What is distinctive about the role of law in the United States, I argued, is not simply the prevalence of legal language and practice in everyday life, nor the fact that people go to court more often on more matters than do citizens of other countries. It is that Americans appeal to the law with a singular faith and hope deeply rooted in the culture. For all their complaints about excessive litigiousness, greedy lawyers, and the shortcomings of the adversarial system, when conflicts occur, it is to jurists rather than to politicians or the clergy that Americans turn in their search for solutions.

Law figures prominently, and has often been, as Mary Ann Glendon once put it, "the terrain on which Americans are struggling to define what kind of people they are, and what kind of society they wish to bring into being."[12] What Glendon termed "rights talk" in the American context shows certain similarities to what may be called "human rights talk" in other parts of the world, especially Europe. In my second book, *From Civil to Human Rights: Dialogues on Law and Humanities in the United States and Europe* (2009), I compared American rights talk to European human rights talk.[13] I argued that European intellectuals and politicians have developed and used a human rights discourse to emphasize a political and cultural vision for a multi-ethnic Europe that looks familiar from the American context. Intended as a discourse of atonement – as a way to signal to the rest of the world that Europeans have learned from their many horrible mistakes in the past – such a human rights discourse also has the potential, European intellectuals and politicians hoped, to function as a cultural glue of sorts.

From Civil to Human Rights represents the transatlantic, comparative perspective that also informs several chapters of this book.

[11] Helle Porsdam, *Legally Speaking: Contemporary American Culture and the Law* (Amherst, MA: University of Massachusetts Press, 1999).

[12] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, NY: Free Press, 1991), p. 3.

[13] Helle Porsdam, *From Civil to Human Rights: Dialogues on Law and Humanities in the United States and Europe* (Cheltenham: Edward Elgar, 2009).

Chapter 1, "Law and Humanities: A Cultural Rights Perspective," presents my basic argument that cultural rights are a promising field for law and humanities scholars. It starts by offering a brief outline of the history of the law and literature movement. As many other scholars have written extensively on this, I reflect only briefly on those events and discussions that are of relevance to the development of law and literature into law and the humanities and/or law and culture – and to the cultural rights agenda. Next, I examine the conceptual and legal foundations for cultural rights, as well as identify key issues. The chapter ends with a discussion of cultural rights as aspirational rights, paving the way for the argument that working with cultural rights allows scholars to argue for the importance of hope and aspiration while still maintaining a more detached critical attitude.

Chapter 2, "Television Judge Shows: Rights Talk and Popular Culture," offers an example of a more traditional law and humanities approach. It explores how people use legal discourse to negotiate acceptable behaviors and values in a globalizing and multicultural society without common values and traditions. We see this played out in popular cultural forums such as judicial television dramas. In the American context, television judge shows are virtually synonymous with reality courtroom TV. There have been a few television judge shows, but these have been completely overshadowed by the success of reality courtroom TV shows. The first reality courtroom show was *The People's Court*, and its history and early success are discussed in Part One of this chapter. Part Two looks at the TV judge show landscape in the United States, from the first incarnation of *The People's Court* to the present day. Part Three is dedicated to a discussion of TV judge shows outside the United States, chiefly in Europe. The focus is on German and Dutch productions, and on the ways in which they both differ from the original shows in the United States. Part Three also looks briefly at the effects of modern digital technology on the judicial genre and asks whether enhanced viewer engagement and crowdsourced justice in the near future will force judges to bow to the popular will, on and off the small screen.

The analysis of American courtroom shows introduces a cultural–legal discourse that is somewhat similar to the one used, in the international human rights context, in discussions concerning the rights of everyone to education, culture, and science, as well as of authors' rights.

PART TWO: CULTURAL RIGHTS

Chapters 3 through 6 are dedicated to cultural rights. Together with Article 26 of the 1948 Universal Declaration of Human Rights (UDHR) and Article 13 of

the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which both focus on the right to education, Articles 27 UDHR and 15 ICESCR make up the core of cultural rights as they are currently understood worldwide. Other legal instruments and paragraphs are also important – and may become even more so in the future – but, at present, these particular articles are what we primarily have to work with. It is no coincidence, for example, that the reports written by Shaheed largely follow the structure of Article 15 ICESCR. My discussion of cultural rights is consequently based on these particular rights.

The four chapters have the same basic structure. In order to illustrate what human rights that are cultural rights look like, which of these rights are central and why, and how they overlap, each chapter starts with an outline of the historical development of the right in focus. The second part of these chapters then looks at what this right is, legally as well as conceptually speaking. And finally, some of the most contentious issues relating to the right in question are discussed. In all four chapters, a literary or cultural text is used as a prelude to introduce topics of relevance to the thematic discussion of the particular cultural right in question.

Chapter 3 concerns the "right to education." This particular right is the "queen" of human rights, as it is essential for the exercise of all others. It promotes individual freedom and empowerment and yields important development benefits.[14] Malala Yousafzai's autobiography *I Am Malala: The Girl Who Stood Up for Education and Was Shot by the Taliban* (2013), used as the prelude to the chapter, shows this very clearly. In her book, Yousafzai writes that "I don't want to be thought of as 'the girl who was shot by the Taliban' but 'the girl who fought for education.'"[15] For this fight for education, she was awarded the Nobel Peace Prize in 2014, together with Kailash Satyarthi.

I outline the historical development of the right to education as well as its legal and conceptual meaning. Two contentious issues are then explored: the status of "soft" versus "hard" skills; and the importance of the right to a quality education versus the right to a human rights education. Neither of these issues is as contentious as some of the issues to be discussed in the following chapters, as there seems to be a more or less universal agreement around the world that education is a very positive thing. It is more a relative relationship between the two elements involved that is up for discussion, and the question of

[14] See e.g. https://norad.no/en/front/thematic-areas/education/right-to-education/
[15] Malala Yousfzai with Christina Lamb, *I Am Malala: The Girl Who Stood Up for Education and Was Shot by the Taliban* (London: Weidenfeld & Nicolson, 2013), pp. 152–53.

whether one of these elements should be emphasized more than it currently is. Malala Yousafzai's 2014 Nobel Lecture and her 2013 book are sincere pleas for both "soft" and "hard" learning. They remind us about the importance of facilitating access to knowledge, and they entreat us to provide more than basic literacy for people everywhere. Yousafzai's lesson that human rights education, important as it is, should not trump quality education is one that we should take to heart, I argue.

Chapter 4, "The Right to Take Part in Cultural Life: On Cultural Heritage, Identity and Orhan Pamuk's Museum of Innocence," opens the discussion of Article 15(1) ICESCR, the article that repeats almost verbatim Article 27 UDHR and is particularly important for cultural rights. Within the cultural rights context, the right to engage with cultural heritage is seen as an aspect of the right freely to participate in cultural life, laid out in the first part of Article 15(1).[16] Relevant legal documents reflect, more or less directly, the view that it is important when talking about cultural heritage also to look at the cultural meanings and practices that individuals and collectivities associate with it. This is the case, for example, with the Council of Europe Framework Convention on the Value of Cultural Heritage for Society from 2005, which recognizes "the need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage."[17]

In Chapter 4, Orhan Pamuk's thoughts and arguments on the role of museums and museumgoers, as expressed in *The Museum of Innocence* (2009) and especially in *The Innocence of Objects* (2012) with its "A Modest Manifesto for Museums," will form the backdrop for an exploration of the right to participate in cultural life and of access to cultural heritage. The story of the Museum of Innocence reflects a number of the complex concerns and negotiations of power, worldviews, and identity issues, both personal and geopolitical, that typically accompany the issue of cultural heritage. Among these concerns, ownership issues and issues of participation figure very prominently, as does the question of whether cultural rights are individual or collective, or both. These topics are explored in the three thematic clusters of contentious issues that follow my historical introduction to and analysis of the legal content of the right to participate in cultural life.

Chapter 5, "The Right to Science: Issues, Challenges, and Pernille Rørth, *Raw Data*," investigates the right to science, protected by Article 15(1)(b)

[16] See, for example, Preamble, Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Faro, 2005, available at: https://rm.coe.int/1680083746

[17] Ibid.

ICESCR. The second part of Article 15 requires States Parties to conserve, develop, and disseminate science. In addition, Article 15(3) and (4) obligate States to respect the freedom indispensable for scientific research and recognize the benefits of international contacts and co-operation in the scientific field, respectively. Divided into three parts, this chapter explores, in its first part, how the right to science was developed, including the importance given to the link between science and culture. The next two parts outline what the right to science is and what some of the most debated issues are today. The latter include the relationship between the right to science and intellectual property (IP), private versus public goods, and traditional knowledge. As in previous chapters, a cultural text will help us to approach some of the more complicated issues involved. Here, the text used is Pernille Rørth, *Raw Data: A Novel on Life in Science* (2016).[18]

Rørth is herself a scientist with a Ph.D. in cell biology and genetics, who has led research laboratories in top institutions in the United States, Europe, and Singapore. Her novel, as well as the interview with its author that follows the fictional narrative, gives us a rare insider's perspective on and description of a life in science. In Chapter 5 I argue that that there are a number of interesting parallels between the rights to culture and science, and that Article 15(1)(c) on authors' rights is as important in the context of science as we saw it was, in Chapter 4, in the context of the right to participate in cultural life. Recalling, furthermore, the fact that the rationale behind cultural rights is to further human creativity, I also argue that the issue of academic and scientific freedom is in need of more attention. Much human rights literature tends to focus on the public's right to the benefit of science only, and to forget that there will be no path-breaking scientific results from which the public can benefit without basic scientific freedom. Likewise, it is important to remember that scientific and technological research can be of a dual nature: it can benefit mankind tremendously, but it can also lead to innovations that are bad for human beings. If we pursue a way of thinking that sees the three parts of Article 15(1) ICESCR as linked, this can pave the way to make ethical and human-centered deliberations a more integral part of the scientific endeavor.

Chapter 6, "Copyright, Patents, Authors' Rights, and the Right to Culture and Science," explores copyright and authors' rights issues as they relate to cultural and scientific creation. The first part of the chapter outlines the history behind the third part of Article 15(1) ICESCR that concerns authors' moral and material interests. This historical background is crucial for

[18] Pernille Rørth, *Raw Data: A Novel on Life in Science* (Cham, Switzerland; Heidelberg; New York, NY; Dordrecht; London: Springer International, 2016).

understanding what the main issues are in debates concerning authors' rights as human rights, and why this part of Article 15(1) is so heavily contested. In the second part, I look into what authors' rights are, legally and conceptually speaking. This part of the chapter includes a discussion of the relationship between IP and authors' material and moral rights. I end, as I have done in previous chapters, by looking at two much-debated issues. The first of these concerns the clash between the fight for open access and strong commercial interests that wish to privatize and commodify information and data through IP; the other is about the issue of the protection of traditional cultural knowledge and expressions, and whether such protection can be offered within the existing legal system.

As these two examples show, it is in the area of IP that some of the most intense cultural and scientific fights are currently going on. This is where much of the action is, so to speak, and unless the tensions that have developed with regard to the relationship between IP and cultural rights are resolved, cultural rights will never be taken seriously. In my opinion, the way forward is to use a cultural rights approach to negotiate and to find sensible solutions within the existing legal framework.

PART THREE: CONNECTING MAIN THEMES AND ARGUMENTS

Chapter 7 is dedicated to the issue designated as one of two global priorities of UNESCO and as a focus area for the mandate of the UN Special Rapporteur in the field of cultural rights: gender.[19] Entitled "A Global Human Rights Priority: On Gender and Chimamanda Ngozi Adichie, *We Should All Be Feminists* and *Dear Ijeawele, or A Feminist Manifesto in Fifteen Suggestions*," this last chapter explores what happens when human rights come into conflict with traditional and cultural forms of association and family structure, and how we can address that conflict. Much like education, gender is an issue that runs through all cultural rights – and in which all cultural rights come together. It is therefore a good topic with which to end this book. I engage with the topic through Chimamanda Ngozi Adichie's essays *We Should All Be Feminists* (2014) and *Dear Ijeawele, or A Feminist Manifesto in Fifteen Suggestions* (2017). The structure of the chapter is somewhat different from the one used in the chapters outlining the four core cultural rights. The chapter is

[19] See UNESCO Priority Gender Equality Action Plan, 2014–2021 (37 C/4-C/5 – Compl. 1), available at: http://unesdoc.unesco.org/images/0022/002272/227222e.pdf