Standing and Collective Cultural Rights

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The procedural question of standing has deep implications for the definition and enforcement of cultural rights. Cultural rights have individual and collective elements that can lead to several entities seeking access to justice when these rights are violated. This chapter focuses on the question of standing to explore the contours of existing cultural human rights and possible reparations flowing from their violation. It considers claims by (1) an individual member of the group who has been wronged because of their membership of the group; (2) a collective action brought by the group; and (3) a representative action on behalf of the group. The re-emergence of cultural human rights through an emphasis on access to justice exposes a multiplicity of rightholders, often with competing and conflicting interests which courts are increasingly called on to resolve.

Introduction

During its gestation phase from the mid-twentieth century until the 1990s, human rights law was dominated by the drive to define human rights. Scholars, preeminent among them being Janusz Symonides, observed that during this period cultural rights were the most neglected and underdeveloped category of human rights.\(^1\) There may be many explanations for this phenomenon – not the least the bias towards the articulation of human rights with individuals as the rightholders. The exception to this bias – including the right to self-determination, the right to development etc (often referred to as ‘third generation’ rights) – have been the most contested rights and their contours the least defined. The 1990s brought with it a new phase in the development of human rights law with an emphasis on implementation and access to justice. This movement was already registered within national and comparative law scholarship,\(^2\) but it only received its push on the international plane and within international law from this time. The lessons of this phase are that whilst questions of access to justice appear decidedly reactive – by responding to an alleged violation of human rights law – the movement to ‘operationalize’ rights and the jurisprudence and state practice emerging from it are having a significant impact on defining our understanding of the content and nature of human rights, including cultural rights. It is argued that the re-emergence of cultural rights is due to this second phase. For this reason, this chapter focuses on a central aspect of access to justice – the question of standing.

Cultural rights have individual and collective elements which can lead to several entities seeking access to justice when these rights are violated. The Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights notes that: ‘Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels’.\(^3\) These Guidelines also record that direct incorporation or application of these international obligations into domestic law ‘significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases’.\(^4\) They also recall the entreaty of the


\(^4\) Maastricht Guidelines, supra note 3, para.74.
International Commission of Jurists’ 1995 Bangalore Declaration and Plan of Action calling on jurists and the legal profession the address violations of these rights.\(^5\) The Bangalore Declaration itself calls for: ‘Reform of the law of standing and encouragement of public interest litigation (such as has occurred in India) by test cases, to further and stimulate the political process into attention to economic, social and cultural rights and to afford priority to the hearing of such cases.’\(^6\)

The procedural question of standing has deep implications for the definition and enforcement of cultural rights. To explore this issue, this chapter considers claims brought by (1) individual members of a group whose cultural rights have been violated because of their membership of the group; (2) the group in respect of the violation of the cultural rights of its members; and (3) individuals or groups as representatives of those whose cultural rights have been violated. The re-emergence of cultural human rights through an emphasis on access to justice exposes a multiplicity of rightholders, often with competing interests which courts are increasingly called on to resolve. While interpretations of cultural rights increasingly recognise their individual and/or collective elements, the translation of this procedurally remains haphazard and inconsistent.

**Individuals**

The standing of individuals is the least problematic from the point of view of human rights law. From the Minority Treaties of the inter-war period which are now seen as precursors for elements of current human rights norms including cultural rights, to the present day there is a preference for recognising the individual as the rightholder with standing to bring a complaint or commence a cause of action concerning any violations.\(^7\) However, this raises a number of issues in respect to cultural rights. In addition, to the complication concerning the relation of individuals with culture and the cultural group when we consider cultural rights, there are the structural and conceptual difficulties faced by individual claims, or indeed any non-state claimants, in the current international legal framework which continues to be overwhelmingly focussed on States.

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\(^6\) Ibid.

This section considers three instances where persons as individuals have brought proceedings for relief following the violation of cultural rights: (a) violation of the cultural rights recognised under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); (b) claims to land rights by an indigenous claimant made pursuant to the principle of non-discrimination and Article 27 International Covenant on Civil and Political Rights (ICCPR) against the dominant legal system; and (c) violation of the right to enjoy one’s own culture and profess one’s own religion in community with others (Article 27 ICCPR) and the clash with the group’s interests in determining its membership.

The right to participate in cultural life under Article 27 of the Universal Declaration of Human Rights (UDHR), and Article 15 ICESCR, was originally interpreted as the right to participate in national cultural life – that is, the dominant culture – and not one’s own culture. This interpretation has evolved in recent decades – to the point that reporting guidelines issues by UN bodies align this right closely with the minority protection afforded under Article 27 ICCPR. General Comment No.21 notes that States Parties must provide effective mechanisms and institutions to investigate violations, identify those responsible, publicize findings and provide remedies to victims. Unlike the ICCPR complaint procedure, the complaints under Optional Protocol to the ICESCR can be brought both by individuals and ‘groups of individuals’.

However, Article 15 ICESCR remains bias towards individual rightholders. This is particularly the case in respect of paragraph (1)(c) which provides that individuals have a right: ‘(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’ This understanding of artistic and cultural production in isolation and the focus on the fruits of individual labour has been criticised as being imbued with an idiosyncratically ‘Western’ understanding of culture and cultural production. It is a bias which still defines intellectual property legal regimes. But it is a framework that is being challenged particularly by indigenous communities through

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11 CESCPR, General Comment No.21 Right of Everyone to Take Part in Cultural Life (art.15, para.1(a) of the ICESCR), 21 December 2009, UN Doc.E/C.12/GC/21, para.72.
litigation. The clash of these two worldviews and the shortcomings of individual standing for such actions is exemplified in a series of landmark cases brought before Australian superior courts in the 1990s. For example, in *Yumbulul v. Reserve Bank of Australia*, the applicant, a north eastern Arnhem Land man brought an action concerning the unauthorized reproduction on the Australian one dollar banknote of a ‘Morning Star’ Pole. Elements of the ‘Morning Star’ ceremony performed by his community were represented on the pole, which is held by the Australian Museum. The respondent, the Bank, had reproduced and circulated this image without his permission – as an artist – which was significant under intellectual property law. But, even more importantly for the applicant, consent for reproduction and circulation of this information which emanated from the community had not been obtained. This collective element of prior, informed and free consent concerning dealings with indigenous cultural heritage has been detailed in the guidelines prepared by the Chairperson for the Working Group on Indigenous Peoples in the 1990s, is reflected implicitly in the 2007 UN Declaration on the Rights of Indigenous Peoples, and has been the subject of work by the UN Permanent Forum on Indigenous Issues. General Comment No.17 provides that: ‘States parties in which ethnic, religious or linguistic minorities exist are under the obligation to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures’.

An individual member of a cultural group may bring a cause of action for violation of cultural rights which is informed and defined by his or her membership of that community as


16 CESCR, General Comment No.17(2005). The Right of Everyone to Benefit from the Protection of the Moral and Material Interests resulting from any Scientific, Literary, or Artistic Production of which He or She is the Author (article 15, paragraph 1(c), of the Covenant), 12 January 2006, UN Doc.E/C.12/GC/17, para.33. Further it provides violation of the obligation to fulfil in this context, para.46:

*Examples include failure to provide administrative, judicial, or other appropriate remedies enabling authors, especially those belonging to disadvantaged and marginalized groups, to seek and obtain redress in case of their moral and material interests have been infringed, or the failure to provide adequate opportunities for the active and informed participation of authors and groups of authors in any decision-making process that has an impact on their right to benefit from the protection of the moral and material interests resulting from their scientific, literary or artistic productions.*
an individual and not as a representative of that community. This latter scenario will be
explored more fully in Part 3 below. However, an example of such an action is the historic
land rights claim brought by Mabo against the State of Queensland and determined by the
Australian High Court in 1993.\textsuperscript{17} Together with two other claimants, he challenged existing
Australian property law and the application of the principle of \textit{terra nullius} which denied his
ownership of land on Murray Island in the Torres Strait according to indigenous law and
custom which predated European settlement of Australia. Pursuant to the principle of non-
discrimination and more specifically, the prohibition against racial discrimination, the court
upheld Mabo’s claim of title to his traditional, ancestral lands. It found that he had
demonstrated continuous cultural links with the land which had not been severed by
European settlement. Although this was an individual claim over land, it was manifestly
couched in communally held laws and customs of the Murray Islander community.\textsuperscript{18} The
claim was grounded in his membership of this cultural group. Conversely, this judgment had
fundamental implications for recalibrating relations between the dominant European
culture and indigenous communities within Australia over land that continues to be negotiated to
date.

The third example involves a claim heard by the Human Rights Committee which
serves as an example of the clash between the individual and collective aspects of cultural
rights and particularly the notion of self-identification and group membership. The Optional
Protocol to the ICCPR only provides standing to individual claimants. In \textit{Lovelace v. Canada},
the Committee found the State Party in violation of Article 27 ICCPR because the relevant
national legislation had stripped the complainant of her Indian status following her marriage
to a non-Indian, which continued even after the relationship ended and meant that she was
prevented from returning to her tribal land. The Committee accepted the ‘need to define the
category of peoples entitled to live on a reserve, for such purposes as … preservation of the
identity of its people.’\textsuperscript{19} However, it concluded that the denial of Ms Lovelace’s right to
access her culture and language ‘in community with other members’ of her group was not
‘reasonable or necessary’ in order to achieve this aim.\textsuperscript{20}

\textsuperscript{17} \textit{Mabo & Ors v. Queensland (No.2)} (1992) 175 CLR 1, 107 ALR 1. See also \textit{Wik peoples v. Queensland}

\textsuperscript{18} Cf. \textit{Members of the Yorta Yorta Aboriginal Community v. State of Victoria & Ors}, (2001) 110 FCR
244, FCA 45(8 February 2001); affd (2002) 77 ALJR 356, 194 ALR 538, HCA 58 (12 December 2002).


\textsuperscript{20} UN Doc A/36/40 (1981), paras 15 and 17.
Groups

The provision of standing to groups as a collective (rather than a group of individual claimants) remains the exception in human rights law. It most overtly reinforces the collective aspect of such claims and thereby challenges the ongoing emphasis in human rights discourse on the individual rightholder. So, for example, the Optional Protocol to the ICCPR provides standing to States or individuals but not to ‘communities’. The Human Rights Committee has reaffirmed consistently that the right to self-determination is held collectively, and that effective participation in decisions relating to land and resources may be integral to protecting the right to a ‘way of life’ under Article 27 ICCPR. It held that individuals cannot bring a claim under the Optional Protocol alleging that he or she was a victim of the denial of the right contained in Article 1 ICCPR, because self-determination was a right conferred upon peoples collectively.

But examples do exist. During the inter-war period, procedures were established under an agreement reached between Germany and Poland to govern minorities in Upper Silesia which remained in place for fifteen years. Under Article 147, the Council of the League of Nations was competent to determine individual and collective petitions relating to these minority provisions. The act of filing the petition triggered the powers of the Council. Under this conventional procedure, petitioners had to approach relevant administrative officials first, if they were dissatisfied with the result, then they could appeal to the Minorities Offices established in German and Polish Upper Silesia and represented the respective States Parties. From there, they could forward their petitions and comments to President of the Upper Silesian Mixed Commission. The procedure followed thereafter was equivalent to that of other petitions under the League. George Kaeckenbeek noted that while the scheme was

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21 Optional Protocol to the ICCPR, supra note 12, Art.1. Nonetheless, the Human Rights Committee has noted that ‘in principle, [there is] no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about the alleged breaches of their rights’: Howard v. Canada No.879/1999 Doc.CCPR/C/84/D/879/1999, para.8.3; Lubicon Lake Band (Bernard Ominayak) v. Canada, No.167/1984, UN Doc.A/45/40, Pt.2, p.1 (1990), para.32.1.

22 Lubicon Lake Band (Bernard Ominayak) v. Canada, supra note 21, para.13.3; and HRC, General Comment No.23: Article 27 (Rights of Minorities), 8 April 1994, UN Doc.CCPR/C/21/Rev.1/Add.5, paras.3.2 and 7.

23 UN Doc.CCPR/C/21/Rev.1/Add.5, para.13.3.

24 German-Polish Convention relating to Upper Silesia, 15 May 1922, 9 LNTS 466.
designed to preserve the identities of the minorities, by the end of the fifteen year period their numbers had depleted in Poland and Germany.\textsuperscript{25}

Respective regional human rights systems in the Americas and Africa also provide standing to groups. The Inter-American human rights system has a dual institutional structure that was established pursuant to the 1948 Charter of the Organization of American States (OAS Charter),\textsuperscript{26} and 1969 American Convention on Human Rights.\textsuperscript{27} The OAS Charter enumerates few human rights. The 1948 Declaration on the Rights and Duties of Man,\textsuperscript{28} and 1969 American Convention articulate cultural rights in aspirational terms.\textsuperscript{29} The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights elaborates cultural rights, first articulated in the 1948 OAS Declaration (Article XIII), and in line with the ICESCR.\textsuperscript{30} The Inter-American Commission on Human Rights receives communications from individuals and groups alleging a violation of human rights contained in the various OAS instruments (except the Convention on Persons with Disabilities). Collective actions must refer to individual victims, but they do not need to submit separate applications or authorize the petition. All complaints are considered by the Commission, which determines admissibility.\textsuperscript{31} After the Commission’s procedure is completed, a case will be referred to the Court if there has been a finding by the Commission that there is a violation and the relevant State has not complied with the its recommendations. The Commission appears in all cases referred to the Court. While individuals do not have standing to bring a case before the Court, the Court’s Rules enable them to participate in all phases of the proceedings in person or through their representative.\textsuperscript{32} The Commission and Court allow for the filing of \textit{amicus curiae} briefs.

\textsuperscript{25} Kaeckenbeeck, Upper Silesia under the League of Nations, (1946) 243 Annals of the American Academy of Political and Social Science 129 at 133.
\textsuperscript{26} 30 April 1948, entered into force 13 December 1951, 119 UNTS 3.
\textsuperscript{27} 21 November 1969, entered into force 18 July 1978, OASTS No. 36, 1144 UNTS 123.
\textsuperscript{31} Arts 44-47, American Convention, supra note 27.
Judge Cançado-Trindade observed that the Commission’s role is as ‘defender of the “public interests” of the system, [and] as the guardian of the correct application of the American Convention’, rather than defending the interests of alleged victims. The Inter-American Court has developed a substantial jurisprudence concerning the violation of cultural rights of indigenous peoples. In *Awas Tingi Mayagna (Sumo) Indigenous Community v. Nicaragua*, the Court considered harm arising from the failure of a State Party to consult the Awas Tingi prior to the granting of a logging permit over their traditional lands. It was alleged that this action violated their rights to equal protection and participation in government, cultural integrity, and religion. The Court found that the State Party had violated the right to judicial protection and the right to property. It made Orders that the government to adopt laws demarcating land in accordance with the applicant’s customary laws and values and pay them reparations for non-material injury.

The African Charter on Human and Peoples’ Rights was the first binding international human rights instrument to integrate civil, political, economic, social and cultural rights into the same treaty. The African Commission on Human and Peoples’ Rights in *Social and Economic Rights Action Center v. Nigeria* when considering the justiciability of collective cultural rights, observed that ‘there is no right in the African Charter that cannot be made effective’. However, the Charter provides great latitude for States Parties to limit the scope of application of the rights with the use of qualifying wording, like ‘in accordance with the provisions of the law’. The Commission can receive communications from individuals, non-governmental organizations or other entities. The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights enables the Commission, a Complainant State or a Respondent State to submit cases to the Court on the interpretation and application of the African Charter, the Protocol or ‘any other applicable African Human Rights instrument’. States can also declare that they accept the competence of the Court to receive complaints from individuals or non-governmental

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33 *Castillo Paez Case* (1997) 34 IACtHR (ser.C), Separate Opinion of Judge A.A. Cançado Trindade, para.16-17.
organizations with observer status in cases that are urgent and allege serious, systematic or massive violations of human rights.\textsuperscript{40}

The inclusion of collective rights and cultural rights in the African Charter means that African Commission jurisprudence provides important guidance on the collective aspect of cultural rights. Also, in respect of standing, it has addressed the issue of how one determines who is able to represent the group in any action concerning violations of such rights. In \textit{Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya}, the Commission considered violations of the African Charter following the removal of the Endorois from their ancestral lands by the Respondent State to establish a game reserve.\textsuperscript{41} It observed that action went to the core of indigenous rights, namely, ‘the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems’.\textsuperscript{42} The Respondent challenged the categorization of the Endorois as an ‘indigenous people’, to whom specific, permanent rights attached. The African Commission noted that the African regional human rights regime specifically encompasses collective rights and recognizes that indigenous peoples are distinguished by the link between people, their land and culture and their self-identification as a distinct community.\textsuperscript{43} It observed that their continued existence as a ‘people’ was tied to their ability to determine ‘their own fate’ and live according to ‘their own cultural patterns, social institutions and religious systems.’\textsuperscript{44} The Commission agreed that the Endorois considered ‘themselves to be a distinct people, sharing a common history, culture and religion’ and therefore constituted a ‘people’, and were entitled to the protection of their collective rights under the African Charter.\textsuperscript{45} Who has authority to assert communal rights on behalf of the group was to be determined by the Endorois in accordance with their laws and customs and not by the Respondent State.\textsuperscript{46}

\textsuperscript{40}Art.6, Protocol to African Charter, \textit{supra} note 38.

\textsuperscript{41} \textit{Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya}, ACHPR, Comm. No. 276/03, 4 February 2010.

\textsuperscript{42} \textit{Centre for Minority Rights Development and Anor v. Kenya}, \textit{supra} note 41, para. 157.


\textsuperscript{44} Ibid.

\textsuperscript{45} Ibid.

\textsuperscript{46} \textit{Centre for Minority Rights Development and Anor v. Kenya}, \textit{supra} note 41, para. 162.
Representative actions

The development of human rights law in recent decades with its emphasis on access to justice has generally recognised the standing of individuals or groups to mount representative actions on behalf of the cultural group as a whole or members of cultural group. The final part of this chapter considers representative actions brought by individuals or groups of individuals, States, non-governmental organisations and third party representatives on behalf of a group for violation of cultural rights.

The standing of an individual or group of individuals is recognised by international and regional human rights instruments. General Comment No.21 on the right to participate in cultural life states that Article 15 ICESCR is held individually or collectively, explaining that ‘cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group’.

The Optional Protocol to the ICESCR provides standing to individuals and groups of individuals. Similarly, The Council of Europe’s European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the first legally-binding multilateral human rights agreement, permits Contracting Parties and “any person, non-governmental organisation or group of individuals claiming to be the victim of a violation” of a right enunciated in the Convention to bring communications against States Parties.

With the entry into force of Protocol No. 11, the individual complaint mechanism has become compulsory for Contracting Parties.

47 General Comment No.21, supra note 11, para.9.
49 4 November 1950, entered into force 3 September 1953, ETS No.5; 213 UNTS 221. The Charter of Fundamental Rights of the European Union, 7 December 2000, entered into force 1 December 2009, OJ 2000/C 324/01, , p.1ff, does not have a specific reference to minorities, but the Preamble and Article 22 do acknowledge the cultural, religious and linguistic diversity of Europe. While the European Union does not have a specialist human rights court, the European Court of Justice (ECJ) considers human rights issues. The Court has exclusive and unlimited jurisdiction. It is extremely difficult for individuals and groups of individuals to bring an action directly to the ECJ because of its restrictive interpretation of Article 230 Treaty establishing the European Community (Nice Treaty or EC Treaty), 26 February 2001, entered into force 1 February 2003, OJ C80/1, 2001, for actions brought before 1 December 2009. After that date, natural or legal persons may bring actions against ‘a regulatory act which is of direct concern to them and does not entail implementing measures’: Article 263 Treaty on the Functioning of the European Union (Rome Treaty or TFEU) OJ C326, 26 October 2012. In Inuit Tapiriit Kanatami and Others v European Parliament and Others T-18/10 [2010] All E.R. (EC) 183 at paras 51-53, the ECJ rejected the call by the Applicants for the Art.263 TFEU to be interpreted broadly and in line with Art.47 CFREU and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 28 June 1998, entered into force 30 October 2001, 2161 UNTS 447.

50 Art.34, ECHR, supra note 49.
specifically refer to cultural rights or minority protection, the Council of Europe does have the most developed articulation of minority rights in the *Framework Convention for the Protection of National Minorities*.\(^{52}\) However, the Framework defines the rightholder as the *individual* members of the group and implementation of the instrument is through political, rather than judicial, oversight. By contrast, the Council of Europe’s Additional Protocol to the European Social Charter Providing for System of Collective Complaints gives standing to international organisations, non-governmental organizations and representative national organisations.\(^{53}\)

Class actions led by an individual or group of individuals typify this mode of standing. Leading civil rights cases brought in a number of jurisdictions serve as important examples.\(^{54}\) For instance, the European Court of Human Rights found in the case of *D.H. and Others v. The Czech Republic*, that the Respondent State had engaged in de facto or indirect discrimination and violation Article 14 ECHR and Article 2 of Protocol No.1.\(^{55}\) The Grand Chamber found that despite various legislative and policy interventions to integrate Roma children into the mainstream school system, they still represented 70% of enrolments in special schools for children with intellectual disabilities. It observed that there was an emerging consensus within Europe which recognized: ‘[T]he special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve cultural diversity of value to the whole community’.\(^{56}\)

Representative actions by a group (including non-governmental organisations and States) are also permitted by certain multilateral human rights regimes. Recognition of the standing of a State Party to the relevant human rights convention to bring an action on behalf of a cultural group is in effect recognition of the rights flowing under the law of treaties and state responsibility generally. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights provide that States Parties

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are accountable to their own people and the international community concerning their obligations under the treaty.\textsuperscript{57} It further notes that:

\begin{quote}
In accordance with international law each State Party to the Covenant has the right to express the view that another State Party is not complying with its obligations under the Covenant and to bring this to the attention of the State Party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes.\textsuperscript{58}
\end{quote}

The limitation of such a mode of standing is exemplified by the scarcity of its use. Not only are States generally not predisposed to bring actions against another violating State Party to a human rights treaty to which they are a party; they are even more averse to commencing an action on behalf of a cultural group whose rights have been violated by a State Party.

While the Inter-American and European systems enable non-governmental organisations to facilitate actions brought by individuals as representatives of affected cultural groups;\textsuperscript{59} the African human rights system permits representative actions by non-state groups including non-governmental organisations to bring actions on behalf of affected cultural groups or their individual members.\textsuperscript{60} This form of representative actions brings to the fore the issue of whether and how the NGO obtains consent to mount such a representative action. This question is particularly acute in respect of organisations representing indigenous communities in voluntary isolation and initial contact. The High Commissioner Human Rights the Inter-American Court and UN Office of the High Commissioner for Human Rights have provided guidance in such circumstances.\textsuperscript{61} The role of NGOs has increased with the growing recognition of significance of cultural heritage for


\textsuperscript{58} UN Doc.E/CN.4/1987/17, para.73.

\textsuperscript{59} For European Court of Human Rights see Art.34 ECHR, \textit{supra} note 50; and Inter-American Court see Rules of Procedure of the Inter-American Court of Human Rights, OAS Doc.OEA/Ser.L/III.25 doc.7, at p.18.

\textsuperscript{60} See Arts 102-120, African Charter, \textit{supra} note 35.

the effective enjoyment of (individual and) collective cultural rights.\textsuperscript{62} Informed by developments in environmental law,\textsuperscript{63} the Council of Europe’s Faro Convention requires Member States to ‘encourage non-governmental organizations concerned with heritage conservation to act in the public interest’.\textsuperscript{64} Providing standing to NGOs also enable the rights of future generations to be considered. While the Faro Convention outlines obligations concerning consultation and participation of individuals and groups, it does not encompass detailed access to justice obligations like those in the Aarhus Convention, which also cover NGOs.\textsuperscript{65}

Arising from this link between cultural heritage and the enjoyment of cultural rights, is a series of cases brought before British courts concerning the standing of custodians of cultural or religious objects or sites which could inform cultural rights not only of present-day rightholders but also those of future generations. In \textit{Pramatha Nath Mullick v. Pradyumma Kumar Mullick} (1925),\textsuperscript{66} the Privy Council, in a case on appeal from the High Court of Calcutta, considered a challenge to the relocation of religious idols. Lord Shaw recognised that Hindu law and customs afforded the idols ‘juristic entity’, and that their custodian attended to their interests.\textsuperscript{67} Custody passed through the family of the founder who had established and endowed the idols. The claim was brought by female worshippers who wanted to prevent the custodian removing the idols from its original house of worship and relocation to his own home. The Privy Council found that: ‘The interests of the female [worshippers], especially in view of the fact that they [were] excluded from the management of the idols, might need special protection. They are entitled to participate in the worship … without obstruction or inconvenience’.\textsuperscript{68} The Court therefore joined the female worshippers


\textsuperscript{64} Framework Convention on the Value of Cultural Heritage for Society (Faro Convention), 27.X.2005, entered into force 1 June 2011, CETS No.199, Art.11(e).

\textsuperscript{65} Aarhus Convention, \textit{supra} note 63, Art.9.


\textsuperscript{67} \textit{Pramatha Nath Mullick v. Pradyumma Kumar Mullick} (1925) LR 52 Ind. App. 245.

\textsuperscript{68} (1925) LR 52 Ind. App. 245 at 247.
to the proceedings and appointed a neutral third party to establish a scheme for the worship of the idols.\textsuperscript{69}

Later in the 20\textsuperscript{th} century, in \textit{Bumper Development Corporation v. Commissioner of Police of the Metropolis and Others} (1991),\textsuperscript{70} the U.K. Court of Appeal considered competing interests in a 12\textsuperscript{th} century bronze statute of the Hindu god Siva illicitly removed from a ruined temple in Tamil Nadu, India. The temple has been abandoned for centuries. After the idol was unearthed, it gradually made its way to London where the plaintiff company had purchased it from an antiquities dealer. It was sent to the British Museum for appraisal and restoration where it was seized by the Metropolitan Police pursuant to a policy of returning stolen cultural and religious artefacts to the owners. The plaintiff company sued for its return. However, a further five other claimants interpled to recover the idol including the Union of India, the State of Tamil Nadu, Thiru Sapagopan as the ‘fit person’ for the temple and on behalf of the temple itself, and Sivalingam (being a personification of the temple) as the fifth claimant. The Court of Appeal upheld the earlier findings that under Hindu law the temple had juridical personality and therefore that it ‘is acceptable [was] a party to these proceedings and that it [was] as such entitled to sue for the recovery of the Nataraja [Siva].\textsuperscript{71} It added that: ‘[The decision] avoids the danger of there being any fetter of an artificial procedural nature imported from the lex fori which might otherwise stand between a right recognized by and enforceable under lex causae’.\textsuperscript{72}

\textbf{Conclusion}

In recognising competing interests in cultural heritage and its importance to cultural rights, the UN Special Rapporteur on Cultural Rights in 2011 cautioned about the need to distinguish between the ‘source communities’ who are owners or custodians with responsibility for maintaining it, individuals and communities for whom it is an integral part of their lives but are not actively involved in its maintenance, scientists and artists, and the general public accessing others’ cultural heritage.\textsuperscript{73} She observed that being attuned to the

\begin{itemize}
  \item \textsuperscript{69} Ibid.
  \item \textsuperscript{70} \textit{Bumper Development Corporation v. Commissioner of Police of the Metropolis and Others} (C.A.) [1991] WLR 1362 (6 December 1991).
  \item \textsuperscript{71} [1991] WLR 1371 and 1373.
  \item \textsuperscript{72} [1991] WLR 1373.
  \item \textsuperscript{73} UN Doc.A/HRC/17/38, pp.16-17.
\end{itemize}
interests and concerns of these various individuals and groups is important when ‘States, or courts, are required to arbitrate conflicts of interests over cultural heritage’.74

Similar caution must be exercised in respect of cultural rights generally. The operationalization of human rights norms through ensuring access to justice for rightholders whose rights have been violated has provided standing to a range of individuals and groups. Significantly, this procedural development has enabled actions to be brought for violation of cultural rights held individually and collectively. They have also highlighted that such rights and interests can often compete or conflict. Nonetheless, the ensuing practice of human rights bodies and the jurisprudence of courts points to a need to distinguish between the human rights (including cultural rights) of individual members of vulnerable groups (e.g. women, children, persons with disabilities, etc), minorities and indigenous communities, the human rights (including the right to participate in cultural life) of individuals generally, and the human (and cultural) rights of future generations. The range of standing recognised at the international, regional and national levels is reflective of the cognisance of this diversity of rightholders and interests, their right to be heard by the relevant court or tribunal, and the increasing need for them to distinguish and arbitrate between them. For this reason, this is proving to be at the cutting edge of contestations between individual and collective rights; while the resulting jurisprudence is helping to provide contours and substance to cultural rights – long considered an afterthought in human rights discourse.

74 Ibid.