

DEFINING THE RIGHT TO PARTICIPATE IN CULTURAL LIFE AS A HUMAN RIGHT

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Abstract

Drawing on Cass Sunstein's theory of incompletely theorized and specified agreements, this article intends to describe, explain and assess the legal regime of the right to participate in cultural life in international law. It offers a redefinition of this human right as an incompletely theorised and specified agreement in order to make this human right suitable for a certain degree of operationalization.

As a first step, this article qualifies the right to participate in cultural life as an incompletely generalized agreement: people do not agree on the theoretical foundations of this human right although there seems to be a loose agreement on the recognition of some component of this human right. As a second step, this article intends to show that the right to participate in cultural life worked and still works as an incompletely specified agreement: monitoring bodies have not yet received much possibility to make clear and operationalise it even if there was an agreement reached on this human right as a low level principle.

This contribution then offered a redefinition of the right to participate in cultural life which aims at authorising an agreement on this human right as a 'mid-level principle' whenever there is still disagreement existing on the foundation of this latter right. Taking into account the dynamic and moving features of cultural life and the general and adaptive nature of international human rights law, this article intends to elaborate a legally relevant definition of the right to participate in cultural life as an incompletely generalised and specified agreement on a low level principle. This definition tries to open a third way between a restrictive definition of the right to participate in cultural life as a right to access a set of definite artworks and the broad 'anthropological' definition given in General Comment No. 21 of the Committee on economic, social and cultural rights.

Keywords: artistic freedom (Article 10 ECHR); cultural policies; cultural rights; definition of 'culture' in international human rights law; General Comment No 21 of the UN Committee on ESCR; right to participate in cultural life (Article 15 ICESCR)

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1. THE RIGHT TO PARTICIPATE IN CULTURAL LIFE: DEVELOPMENTS AND CHALLENGES

The right to participate in cultural life benefits from a broad recognition in international human rights law initiated by Article 27 of the Universal Declaration of Human Rights (UDHR) – which is not legally binding.¹ The most specific formulation of this human right can be found in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 – which mirrors in binding form Article 27 of the UDHR. It reads as follows:

“The States Parties to the present Covenant recognize the right of everyone [...] to take part in cultural life [...] The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture’.²

Civil and political rights instruments, such as Articles 19 and 27 of the International Covenant on Civil and Political Rights (ICCPR), also protect indirectly some of the dimensions of this human right. The Human Rights Committee combines both provisions to protect a right to participate in cultural life for members of minority groups³ and recognizes under Article 19 a universal right to freedom of expression in cultural life.⁴ It has also been listed in the instruments protecting specific groups such as, for instance, the Convention on the Rights of the Child⁵ or the Convention on the Elimination of All Forms of Discrimination against Women.⁶ At the regional level,

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR). The Declaration has only but an interpretative nature. It is a ‘soft law’ instrument (on the question of the degree to which the Declaration is duly taken into account, see Frédéric Vanneste, ‘Le soft law du droit international des droits de l’Homme, dans la jurisprudence internationale et la jurisprudence interne’ in Isabelle Hachez, Yves Cartuyvels, Hugues Dumont, Philippe Gérard, François Ost and Michel van de Kerchove (eds), *Les sources du droit revisitées. Volume I – Normes internationales et constitutionnelles* (Presses de l’Université Saint-Louis/Anthemis 2012) 115.

² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 15. The International Covenant is a ‘hard law’ instrument, imposing legal obligations on States. We do refute the idea that the provisions of the International Covenant are all lacking of clarity and of precision. The Maastricht Guidelines demonstrated convincingly that those rights can be interpreted as inducing legal obligations that ought to be implemented by judges. Judges and other actors of the normative forces must examine each article separately to answer the question of their clear content.

³ UNHRC *Mr. Rakhim Mavlonov and Mr. Shansiy Sa’di v. Uzbekistan*, (Comm no 1334/2004) paras 8.6. and 8.7.

⁴ UNHRC *Shin v. Republic of Korea*, (Comm no 926/2000). See Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (2nd Revised Edition, N.P. Engel 2005) 437–468 (for art 19) and 635–667 (for art 27).

⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (Children’s Convention) art 31.

⁶ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 13.

this human right is partially anchored in the European Social Charter (revised)⁷ and in Article 25 of the Charter of Fundamental Rights of the European Union. It must be noted that in the latter two instruments, the benefit of this human right is limited to specific groups (that is to say the elderly and disabled people in the ESC) with the specific aim of fostering their inclusion into society.⁸

Still at the regional level, the right to participate in cultural life is also recognized in the Framework Convention for the Protection of National Minorities,⁹ Article 17(2) of the African Charter on Human and People's Rights,¹⁰ Article 14(1) of the Additional Protocol to the American Convention on Human Rights,¹¹ and Article 42(1) of the Arab Charter on Human Rights.¹² Regarding the European Convention of Human Rights, it does not clearly recognize a right to participate in cultural life. However, the European Court of Human Rights protects indirectly some of its dimensions by recognising the freedom not to suffer from any interference in the access and participation to cultural life,¹³ artistic freedom¹⁴ and the freedom of association in the cultural sector.¹⁵ The Court also protects cultural interests by integrating cultural considerations in the interpretation of restrictions to the right to property.¹⁶

⁷ European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), 529 UNTS 90 (The Social Charter) art 15 and art 30. The Social Charter as revised in 1996 recognizes the right to participate in cultural life for elderly people (art 23), people with disabilities (art 15 para 3) and people suffering from poverty (art 30).

⁸ Charter of Fundamental Rights of the European Union (adopted 7 December 2000) OJ (C364) 18 December 2000 (EU Charter) art 25. This vision of the right to participate in cultural life indicates that, for the drafters of both texts, this right was not necessary for persons already 'included' in the society. See on the right to participate in cultural life under EU law: Céline Romainville, 'The right to participate in cultural life under EU law' (2015) 2 *European Journal of Human Rights/Journal Européen des droits humains* 145–172 and C. Romainville 'The Effects of EU Interventions in the Cultural Field on the Respect, the Protection and the Promotion of the Right to Participate in Cultural Life', in Céline Romainville (ed.) *European law and cultural policies/ Droit européen et politiques culturelles* (Peter Lang, 2015) 191–231.

⁹ Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) 2151 UNTS 243, reprinted in Heinrich Klebes, 'The Council of Europe's Framework Convention for the Protection of National Minorities' (1995) 16 *Human Rights Law Journal* 92 (Framework Convention). See especially arts 5 and 15.

¹⁰ African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

¹¹ Additional Protocol to the American Convention on Human Rights ('San Salvador Protocol') (adopted 17 November 1988, entered into force 16 November 1999) 28 *ILM* 156, 1898.

¹² League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 18 *HRLG* 151 1997.

¹³ On the latter rights see: *Akdas v Turkey* App no 24351/94 (ECtHR 16 July 2010) para 30; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR 16 December 2008) para 44 and *Autronic AG v Switzerland* App no 12726/87 (ECtHR 22 May 1990). See on this case law: Céline Romainville, *Le droit à la culture, une réalité juridique. Le régime juridique du droit de participer à la vie culturelle en droit constitutionnel et en droit international* (Bruylant 2014) 229–237.

¹⁴ See for instance: *Müller v Switzerland* App no 10737/84 (ECtHR 4 May 1988) para 33.

¹⁵ See for instance: *Gorzelik and others v. Poland* App no 44158/98 (ECtHR, 17 February 2004).

¹⁶ See for instance: *Beyeler v Italy* App no 33202/96 (ECtHR 5 January 2000) para 113.

The legal sources of the right to participate in cultural life are also rooted in international and regional legal instruments on cultural policies. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 embodies, for instance, explicit references to fundamental rights as requirements, but also as limits to cultural diversity.¹⁷ The Council of Europe Framework Convention on the Value of Cultural Heritage for Society recognises that ‘rights relating to cultural heritage are inherent in the right to participate in cultural life’.¹⁸

The right to participate in cultural life is, as well as a great number of human rights, a double-faceted human right. There is, on the one hand, the negative right to participate in cultural life which entails the freedom to participate without interference from the State. On the other hand, there is the positive right to participate in cultural life, which entails positive obligations for the State such as the obligation to develop cultural policies aiming at broadening access and participation in cultural life.

After being long neglected – even forgotten – this double-faceted human right became a popular concept as seen in recent legal documents,¹⁹ in cultural policies’ narratives,²⁰ and, to some extent, in academic research.²¹ This fortune is somewhat

¹⁷ Preamble para 12 and Art 2, 1° and 7°; art 4 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS (Convention on Cultural Diversity). See also Marie Cornu, ‘La Convention pour la protection et la promotion de la diversité des expressions culturelles, nouvel instrument au service du droit international de la culture’ (2006) 133 *Journal du droit international* 934.

¹⁸ Art 1 a), Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS 1999 (Faro Convention). There are also non-binding or ‘soft law’ instruments which recognise this human right such as UNESCO Recommendations and the Universal Declaration on Cultural Diversity (adopted 2 November 2011) art 5.

¹⁹ See for instance the Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 41 *ILM* 40 or the Convention on Cultural Diversity. See also CESCR, *General Comment No 17: 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* (Art 15) 35th session, adopted 12 January 2006, UN doc E/C.12/GC/17 (2006) (Gen Comm No 17).

²⁰ Cultural rights are indeed slowly replacing traditional narratives on cultural policies (such as cultural democracy, cultural democratisation, cultural diversity or creativity). It must however be noted that such a replacement is not univocal.

²¹ For the most recent researches on those question see Amanda Barratt and Ashimizo Afadameh-Adeyemi, ‘Indigenous peoples and the right to culture: The potential significance for African indigenous communities of the Committee on Economic, Social and Cultural Rights’ General Comment 21’ (2011) 11 *African Human Rights Law Journal* 560–587; Mylène Bidault, *La protection internationale des droits culturels* (Bruylant 2010); P.Y.S. Chow, ‘Culture as Collective Memories: Emerging Concept in International Law and Discourses on Cultural Rights’ (2014) 11 *Human Rights Law Review* 611–646; Lisa M Coleman, ‘Creating a Path to Universal Access: The FCC’s Network Neutrality Rules, the Digital Divide & the Human Right to Participate in Cultural Life’ (2011) 30 *Temple Journal of Science, Technology & Environmental Law* 33–50; Alison Dean, ‘Unveiling the Complexities Surrounding the Right to Take Part in Cultural Life: The Effect of General Comment No. 21 on the Legality of the French Burqa Ban under the ICESCR’ (2011) 26 *American University International Law Review* 1437–1476; Yvonne M Donders, ‘Cultural Rights in the Convention on

related to the success-story of the 'anthropological' notion of culture in international human rights, a notion that relies on a holistic conception of culture,²² as well as to the focus in the last decades on the concept of identity and on the right to cultural identity.²³ This success combined with an undetermined and uncertain content implies that this human right seems now to be attractive enough to cover almost everything, as the qualification of what is 'cultural' expands dramatically. It is now invoked as a shield for protective cultural policies, a palliative to the weaknesses of the legal protection of autochthonous rights, an instrument to reinterpret certain classic liberties in a more 'cultural' way, and as a tool to promote a new form of 'cultural' development. However, this rhetorical triumph contrasts with the very low number of cases, at the international or regional level, in which this human right has been examined as such: there is indeed only one case in which the invocation of right to participate in cultural life played a decisive role.²⁴

The interest of an analytical inquiry into the human right to participate in cultural life lies, beyond the self-evident importance of defining legally a universal human right, in the challenge it poses to legal rationality. The challenge is to embed the right to participate in cultural life within legal rationality without neglecting the specific rationality of cultural life, characterized by a permanent working on the sense of human and social experiences through operations such as creation or subversion and

the Diversity of Cultural Expressions: Included or Ignored?' in Toshiyuki Kono, Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: a tale of fragmentation of international law?* (Intersentia 2012) 165–182; Julie Ringelheim, 'The evolution of cultural rights in international human rights law' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran David Harris (eds), *International Human Rights Law* (2nd edn, OUP 2014); Céline Romainville, 'Le droit à la culture: une réalité juridique' (2013) 3 *Annales de Droit de Louvain* 351–377; Céline Romainville, *Le droit à la culture, une réalité juridique* (Bruylant 2014); Romainville, 2015 (n 8); Ben Saul, David Kinley, and Jaqueline Mowbray, 'Article 15: Cultural Rights' in Ben Saul, David Kinley, and Jaqueline Mowbray (eds), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 1175–1232; Evelynne Schmid, 'Socio-Economic and Cultural Rights and Wrongs after Armed Conflicts: Using the State Reporting Procedure before the United Nations Committee on Economic, Social and Cultural Rights More Effectively' (2013) 31/3 *NQHR* 241–270; Elissavet Stamatopoulou, 'Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights' (2012) 34 *Human Rights Quarterly* 1170–1192.

²² See on the anthropological notion of culture: Edward B Tylor, *Primitive Culture* (Murray 1871); Claude Lévi-Strauss, 'Introduction à l'œuvre de Marcel Mauss' in Claude Lévi-Strauss, *Sociologie et anthropologie / Marcel Mauss. Précédé d'une Introduction à l'œuvre de Marcel Mauss* (PUF 1950) 19.

²³ Yvonne M Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002).

²⁴ This case was decided within the specific framework of the African Charter, which clearly states a dual nature for the right to participate in cultural life (both individual and collective) (see African Commission on Human and People's Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International On Behalf of Endorois Welfare Council v Kenya* (Endorois case) 276/2003 AHRLR 75, 4 February 2010). This situation can partly be explained by the fact that the ESC Committee does only recently have a complaints procedure and by the fact that the right to participate in cultural life is not included as such in the ECHR. However, the absence of invocation of this human right remains in sharp contrast with other social rights for instance, which are also not included in the ECHR and which could not be the object of a complaint procedure.

by a permanent redefinition of itself.²⁵ Integrating the notion of culture into a legal reasoning requires, to a certain extent, to conceptualize cultural life univocally with stability and precision while it is characterized by its diversity and by the fact that it permanently works on the sense of experiences and thereby embraces opposing interests.

2. A DEFINITION OF THE RIGHT TO CULTURAL LIFE AS AN INCOMPLETELY GENERALISED AND SPECIFIED AGREEMENT

This article offers a definition of the right to participate in cultural life as a human right, drawing on Cass Sunstein's theory of incomplete theorised and specified agreements combined with the research developed on the distinction between soft and hard law and on the determinacy criterion.

Sunstein's theory relies on the idea that, in diverse societies, people may reach agreements about certain outcomes despite the fact that they disagree deeply on the foundations of such outcomes and that they can reversely agree on some basic principles without agreeing on their implementation.²⁶ Sunstein distinguishes three types of incompleteness, affecting either the high level principles (general theory grounding the law as it stands), the mid-level principles (the norms) and the concrete cases.²⁷ The first category relates to the *incompletely specified agreements*: agreements which are 'incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases'.²⁸ The second category relates to *incompletely specified and generalized agreements* where:

[p]eople may agree on a mid-level principle but disagree both about the more general theory that accounts for it and about outcomes in particular cases [...] The connections are left unclear, either in people's minds or in authoritative public documents, between the mid-level principle and general theory; the connection is equally unclear between the mid-level principle and concrete cases.²⁹

²⁵ See on the necessity for each system to become sensitive to other forms of rationality Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 172–173.

²⁶ Cass R Sunstein, 'Incompletely Theorized Agreements' (1995) 108/7 *Harvard Law Review* 1736.

²⁷ Ibid 1739.

²⁸ Ibid 1739.

²⁹ Ibid 1739. Sunstein exemplifies by reference to the regulation of speech: 'people may think that government may not regulate speech unless it can show a clear and present danger, but fail to settle whether this principle is founded in utilitarian or Kantian considerations, and disagree about whether the principles allows government to regulate a particular speech by members of the Ku Klux Klan'.

The third category regards ‘*incomplete theorized agreements on particular outcomes*, accompanied by agreements on the low-level principles that account for them’.³⁰ In this case, ‘[w]hat is critical is that [people] agree on how a case must come out and on a low-level justification’.³¹ In this third scenario, there is no agreement either on the high level principles or on the mid-level ones, but people can agree on particular outcomes. Those last incompletely specified agreements fail to produce “depth” – full accounts of the foundations of a decision, in the form of attempts to find ever deeper reasons behind the outcome’ and “width” – that is, they do not try to rationalize the law by showing how an outcome in one case fits coherently with particular outcomes in the full range of other cases’.³²

This research intends to define the agreement reached on the right to participate in cultural life as a low-level agreement, drawing on its definition as a *incompletely generalized agreement* and authorising then a specification of this human right in particular situations and a qualification of this human right as an *incomplete specified agreement*. It aims at transforming Article 15(1)(a) of the ICESCR, which currently – and more than ever – risks to be automatically qualified as a ‘legal soft law’ provision,³³ because of its indeterminacy,³⁴ into a more ‘hard law’ requirement.³⁵ This risk does not exist for the *negative* right to participate in cultural life which is already recognised as a ‘hard law’ requirement.³⁶

³⁰ Ibid 1740 (emphasis added).

³¹ Ibid 1741. Those low level justifications are ‘low’ in relationship with ‘high level’ one, i.e. constitutional abstractions and their theoretical foundations.

³² Ibid 1742.

³³ This expression is borrowed to Christine M Chinkin and indicates a provision that has a weak legal force although it is enlisted in a ‘hard law’ instrument. See Christine M Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38/4 *International and Comparative Law Quarterly* 850–866. The latter author distinguishes it from non-legal soft law. This concept is tantamount to the soft negotium of Jean d’Aspremont; see Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’ (2008) 19/5 *EJIL* 1081–1087. Regarding the ‘soft law’ elements of the UN Covenants on Human Rights of 1966, see Jean-François Flauss, ‘La protection des Droits de l’homme et les sources du droit international – Rapport général’ in *La Protection des Droits de l’homme et l’évolution du droit international* (Pedone 1998) 29 and Emmanuel Decaux, ‘De la promotion à la protection des Droits de l’homme. Droit déclaratoire et droit programmatore’ in *La Protection des Droits de l’homme et l’évolution du droit international* (Pedone 1998) 81–119.

³⁴ See on determinacy as a requirement of the legal force/ the normativity Catherine Thibierge, ‘Conclusions’ in Catherine Thibierge (ed), *La force normative. Naissance d’un concept* (LGD/Bruylant 2009) 822; Isabelle Hachez, ‘Balises conceptuelles autour des notions de “source du droit”, “force normative” et “soft law”’ (2010) 65(2) *Revue interdisciplinaire d’études juridiques* 25, 51–52; François Ost and Michel van de Kerchove, *De la pyramide au réseau* (Bruylant 2002) 330.

³⁵ ‘The primary effect of ‘hard law’ is to express a command, a capacitation or a prohibition’ (Julien Cazala, ‘Le soft law international entre inspiration et aspiration’ in Isabelle Hachez et al (n 1) 21. This being said, it is however quite generally recognised that soft law provisions do have legal effects, be it as a source of inspiration of hard law, as a source of interpretation (ibid 21–32).

³⁶ See generally on the distinction between soft and hard law, the references cited in the previous footnote and J Salmon (ed), *Dictionnaire de droit international* (Bruylant 2001), v° ‘soft law’; Alain Pellet, ‘Le bon droit et l’ivraie – Plaidoyer pour l’ivraie (Remarques sur quelques problèmes de

This redefinition and operationalisation of the human right to participate in cultural life is provided in the next two sections. The following section (third part of the article) qualifies the right to participate in cultural life as an *incomplete generalized agreement* seeing that there are disagreements existing among theories of justice whether culture is 'a suitable or appropriate focal variable for assessing social justices and rights'.³⁷ It offers an inquiry into the range of *potential* theoretical justifications for the right to participate in cultural life in order to define it as an ethical claim.³⁸

In the fourth part of this article, the content of the right to participate in cultural life is legally defined. This implies to identify the cultural life to which international human rights law secures a right to participate as well as the concrete prerogative it guarantees to individuals. This part shows that a loose agreement was originally reached on the existence of a *negative right* to participate in cultural life and of a *positive right* – mainly to access major artworks. The developments of the interpretation of that human right materialised in the General Comment No 21 of the Committee on Economic, Social and Cultural Rights (which is a legally non-binding instrument with a high degree of moral authority³⁹) invites States to broaden the content and scope of this human right to reconcile opposing viewpoints on the definition of the right to participate in cultural life. This General Comment weakens the already loose agreement on the right to participate in cultural life as a 'mid-level principle' by diluting the clarity and precision of this human right. In general, General Comments can contribute to reinforce the legal force and justiciability of human rights enshrined in the Covenants if they participate in a better understanding of the scope of those rights, namely by making clear those rights and by giving a general summary of the *opinio juris generalis* based on the existing 'hard law'.⁴⁰ Regarding the right to participate in cultural life, the Committee, in its General Comments and Concluding Observations,⁴¹ remains, however, ambiguous: it still hesitates between two understandings of the human right to participate in cultural life. The fourth part

méthode en droit international du développement)' in *Le droit des peuples à disposer d'eux-mêmes – Méthodes d'analyse du droit international – Mélanges offerts à Charles Chaumont* (Pedone 1984) 465–493; Prosper Weil, 'Vers une normativité relative en droit international?' (1982) *RGDIP* 7.

³⁷ See for a parallel situation about the right to health Jennifer P Ruger, 'Towards a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 *Yale Journal of Law & the Humanities* 312.

³⁸ For a broader discussion on the justification of human rights through the capability approach, see Martha C Nussbaum, 'Capabilities and Human Rights' (1997) 66 *Fordham L Rev* 273 and Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy and Public Affairs* 315.

³⁹ Cazala (n 35) 53; Thomas Buergenthal, 'The U.N. Human Rights Committee' (2001) 5 *Max Planck Yearbook of United Nations Law* 386.

⁴⁰ See Vanneste (n 1) and Wouter Vandenhole, 'Doorwerking in België van de aanbevelingen van de VN-Comités voor mensenrechten' in Jan Wouters and Dries Van Eeckhoutte (eds), *Doorwerking van internationaal recht in de Belgische rechtsorde: recente ontwikkelingen in een rechtstakoverschrijdend perspectief* (Intersentia 2006) 449–478.

⁴¹ Under the ICESCR, States parties are committed to submit reports to the Committee about the implementation of rights in their jurisdiction (2 years after having adopted the Covenant, and every 5 years hereinafter). The examination of each report by the Committee leads to the redaction of

of this article then offers a redefinition of the latter right which aims at providing a certain normative force to this right and thereby at authorising an agreement on this human right as a 'mid-level principle' whenever there is still disagreement existing on the foundation of this latter right. This mid-level agreement remains somewhat loose and fuzzy, to allow flexibility in the interpretation of the dynamic concepts of participation and of cultural life.⁴² This redefinition of the right to participate in cultural life allows the operationalization of this human and can provide a workable framework for cultural policies.⁴³

3. THE RIGHT TO PARTICIPATE IN CULTURAL LIFE AS AN INCOMPLETELY GENERALISED AGREEMENT

There is a vast amount of literature regarding the question of what justice requires in term of the recognition of cultures, cultural identities or the repartition of 'cultural resources'.⁴⁴ Among this literature, disagreements exist on the recognition of culture as a question of justice and rights, mainly among libertarian and liberal authors.⁴⁵ Each theory entails different evaluations of the importance of culture in a society and of the role of the State regarding cultures.⁴⁶ None of those theories, however, treated the right to participate in cultural life as an object of theoretical analysis. But, drawing on the general accounts of those theories about culture and justice, it is possible to understand that each theory entails a different underlying account about the right to participate in cultural life. Thereby, the right to participate in cultural life can be called an incompletely generalized agreement in the sense that existing theories of justice do not agree on the right to participate in cultural life as 'ethical claims'⁴⁷ which should be protected by law. The following sub-section will analyse some of the theories presented in the literature, including: political liberalism (3.1.) multiculturalism (3.2.)

'Concluding Observations' in which the Committee addresses its concerns and recommendations. The Committee also adopt General Comments which state its interpretation of the provisions of the Covenant.

⁴² The right to participate in cultural life could thereby be qualified as 'fuzzy law'; see Mireille Delmas-Marty, *Le flou du droit: du code pénal aux droit de l'homme* (PUF 2004).

⁴³ On the relationship between cultural policies and human rights and the right to participate in cultural life, see Céline Romainville, 'Droit de participer à la vie culturelle et politiques culturelles' (2014) 1 *RBDC* 7–31.

⁴⁴ See the references cited on footnotes 46, 48, 49, 53, 55, 62, 63.

⁴⁵ See the references cited on footnote 47.

⁴⁶ See especially: Will Kymlicka, 'Dworkin on Freedom and Culture' in Justine Burley (ed), *Dworkin and His Critics: With Replies by Dworkin* (Blackwell 2004) 113–133.

⁴⁷ For a general appraisal of human rights in terms of ethical claims see Sen (n 38) 320–328. The author points out that '[e]ven though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights'. He does not, however, address the specific question of the right to participate in cultural life. Under this conception, the realisation of the right to participate in cultural life is a legal obligation *because* it is a requirement of justice.

communitarianism (3.3.) the capability approach (3.4.), egalitarian theories (3.5.) and democratic theories (3.6.).

3.1. (ORTHODOX) POLITICAL LIBERALISM

Classical political liberalism does not acknowledge the specific importance of culture because it is based on an orthodox idea of neutrality.⁴⁸ Such an orthodox view of neutrality indeed impedes the recognition of the specificity of cultural structures in the construction of the Self. It denies any importance to cultural groups and excludes at the end any positive action of States towards culture.⁴⁹ Under such an understanding of the relationship between culture and justice, only the *negative* right to participate in cultural life can be defined as an ethical claim, in the name of the principle of autonomy. The conclusion would be the same when analysing participation in cultural life under libertarian theories which emphasise individual freedoms and values a 'minimal state'.⁵⁰

Critiques highlight that this default position of liberalism and libertarianism towards culture is however not as neutral as it is supposed to be. It leads States to promote a de facto homogenisation of cultures by leaving minorities' cultures and subcultures to mainstreaming forces (including market ones). If it respects orthodoxly cultural neutrality, the State is meant to support, implicitly and without justification, dominant culture(s).⁵¹

⁴⁸ Kymlicka, 2004 (n 46).

⁴⁹ Any attempt to justify cultural policies within the framework of a liberalist approach based on strict neutrality appears to be slippery whatever arguments are invoked (public goods, primary goods, equality principle or the difference principle). See Harry Brighouse, 'Neutrality, Publicity, and State Funding of the Arts' (1995) 24 *Philosophy and Public Affairs* 36; Noel Carroll, 'Can Government Funding of the Arts Be Justified Theoretically?' (1987) 21 *Journal of Aesthetic Education* 21–35; Kathleen Sullivan, 'Artistic Freedom, Public Funding, and the Constitution' in Stephen Benedict (ed), *Public Money and the Muse. Essays on Government Funding for the Arts* (W.W. Norton 1991) 80–95; Samuel Black, 'Revisionist Liberalism and the Decline of Culture' (1992) 102 *Ethics* 244.

⁵⁰ See Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) and Tim Scanlon, 'Nozick on Rights, Liberty, and Property' (1976) 6/1 *Philosophy and Public Affairs* 3–25.

⁵¹ See the multicultural and communitarian critiques of liberalism Will Kymlicka, *Multicultural Citizenship, A Liberal Theory of Minority Rights* (Clarendon Press 1995) 82–84; Michael J Sandel, 'The Procedural Republic and the Unencumbered Self' (1984) 12 *Political Theory* 81–96; Charles Taylor, 'Atomism' in Alkis Kontos (ed), *Powers, Possessions and Freedom: Essays in honour of C. B. Macpherson* (University of Toronto Press 1979); Jane K Cowan, Marie-Bénédicte Dembour, Richard A Wilson, (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 16. See on modern communitarianism and its critique of liberalism Guillaume de Stexhe, 'La neutralité et la distribution comme justice? Questions au libéralisme solidariste de Philippe Van Parijs' (1995) 93 *Revue philosophique de Louvain* 499–531; Ost and van de Kerchove (n 34) 521.

3.2. MULTICULTURALISM

On the contrary, following multicultural authors, culture and participation in cultural life are clearly acknowledged as a question of justice, because in their view cultural structures allow people to develop their creative possibilities, to build their conception of the 'good life', and to envision the meaning they give to human and social experiences.⁵² Culture helps to develop the 'poi-etic imaginary'⁵³ of individuals and groups. In that view, cultural structures provide individuals with the framework needed to define themselves and the orientation of their life within a diverse framework, to conceive their ideas and express them.⁵⁴ In other words, multicultural authors, among whom Will Kymlicka – reinterpreting Ronald Dworkin –, emphasise the importance of cultural structures as a source of real freedom, and consider that the rationale for cultural policy is a requirement of justice.⁵⁵ The State *must* support a variety of cultural structures because these are the foundations and the means by which the construction of meanings are feasible and without which it is impossible to choose between the conceptions of the good life and achievement of it. This policy does not conflict cultural freedoms; rather, it is a guarantee of its existence, a unique way to enhance and support it, a prerequisite for a genuine political liberalism.

3.3. COMMUNITARIANISM

For communitarian authors, the recognition of the importance of cultural structures helps individuals to feel included in the society.⁵⁶ Charles Taylor especially has strongly underlined that the denial of the importance of cultural structures leads to damages for individual identities as it is the basis of the construction of their identity.⁵⁷ An approach that combines a liberal multiculturalism and a 'modern communitarianism'⁵⁸ also highlights the importance of cultural diversity and of cultural rights.

⁵² See among others Will Kymlicka, 'Dworkin on Freedom and Culture' in Justine Burley (ed), *Dworkin and His Critics: With Replies by Dworkin* (Blackwell 2004) 113–133; Jean-Louis Genard, *Les pouvoirs de la culture* (Labor 2001); Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press 1989); Kymlicka 2004 (n 46); Jean Ladrière, *Les enjeux de la rationalité. Le défi de la science et de la technologie aux cultures* (Aubier-Montaigne/UNESCO 1977). See also in this perspective Ronald Dworkin, *A Matter of Principles* (Harvard University Press 1985) 221–233.

⁵³ Cornelius Castoriadis, *La montée de l'insignifiance. Les carrefours du labyrinthe – 4* (Seuil 1996) 236 at 248.

⁵⁴ Kymlicka 2004 (n 46).

⁵⁵ Kymlicka 2004 (n 46) 113–133; Dworkin (n 52).

⁵⁶ Kymlicka (n 46); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995).

⁵⁷ Charles Taylor, *Multiculturalisme. Différence et démocratie* (Aubier 1994).

⁵⁸ See Alan Patten and Will Kymlicka, 'Introduction: Language Rights and Political Theory: Context, Issues, and Approaches' in Will Kymlicka and Alan Patten (eds), *Language Rights and Political Theory* (OUP 2003) 11; Will Kymlicka, 'Liberal Theories of Multiculturalism' in Lukas H Meyer,

3.4. THE CAPABILITY APPROACH

The ‘capability approach’ can also be mobilised to support the idea that the right to participate in cultural life is an ethical claim because it explains how exactly culture supports and enhances freedom. According to Sen, ‘[i]f the freedoms that persons enjoy constitute a major territory of justice, then [...] [w]e have to examine the capabilities that we can actually enjoy’.⁵⁹ Capabilities can thereby be defined as ‘real opportunities you have regarding the life you may lead’⁶⁰ or ‘freedoms [people] actually enjoy to choose between several ways of living that they can have reason to value’.⁶¹ Following those ideas, participation in cultural life can be seen as being essential for people because it gives them an actual choice regarding their affiliation in cultural life and, consequently, their way of life. Participation in a diverse cultural life enables people to follow a certain cultural heritage, or not. Culture has thereby to be promoted as a source of real freedom for individuals.⁶² In Nussbaum’s view, participation in cultural life can be seen as a ‘combined capability’ which relates to ‘innate powers’ of people as well as ‘external opportunities’.⁶³ It requires positive support that creates possibilities and institutional infrastructure and thereby enables all individuals to actually enjoy that particular capability.⁶⁴ Even if Sen and Nussbaum do not share the same understanding of the relationship between human rights and capabilities, it is possible to reconcile both authors on the fundamental role of culture as a condition for the exercise of various ‘functionings’⁶⁵ and as a capability that must positively be supported.

3.5. EGALITARIANISM

Strongly connected with this idea of ‘real freedom’, egalitarian theories insist on the importance of a just repartition of ‘cultural resources’. The idea is that the institutionalisation of a ‘democratic political community’ rests upon several requirements including equality of rights and of opportunities.⁶⁶ However, sociological research has repeatedly highlighted that access and participation in, as well as contribution to cultural life are matters of crucial importance for equality of opportunities, social justice and cohesion because of the influence of cultural capital

Stanley L Paulson, and Thomas W Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Theory of Joseph Raz* (OUP 2003) 233–234; Ost and van de Kerchove (n 34) 526.

⁵⁹ Amartya Sen, ‘Justice: Means versus Freedoms’ (1990) 19 *Philosophy and Public Affairs* 121.

⁶⁰ Amartya Sen, ‘Standard of Living’ in Geoffrey Hawthorn (ed), *The standard of living* (CUP 1988) 36.

⁶¹ Sen 1990 (n 59) 115.

⁶² Amartya Sen, *L’idée de Justice* (Flammarion, 2009) 292–293.

⁶³ Nussbaum (n 38) 273–300.

⁶⁴ Nussbaum (n 38) 273–300.

⁶⁵ Amartya Sen, *Inequality Re-examined*, (Clarendon Press, 1992) 39.

⁶⁶ Philippe Gérard, *L’esprit des droits. Philosophie des droits de l’homme* (Presses de l’Université Saint-Louis 2007) 134–135.

on cultural classifications, social stratification and on social mobility.⁶⁷ Whereby, a just repartition of cultural resources and ‘cultural capital’ can be seen as necessary to ensure equality of chances.

3.6. THEORIES OF DEMOCRACY

Finally, theorists of democracy demonstrate the importance of the inclusion of individuals in the ‘public space’ for the constitution of a vibrant democracy.⁶⁸ In that perspective, the functioning of a democratic community rests notably on the existence of a public space of discussion ‘in which the diversity of interests and opinions can be expressed’, through which the collective will can be built,⁶⁹ and, ultimately, principles such as equality and autonomy can be discussed.⁷⁰ Here, participation in a diverse cultural life allows individuals to build their conception of the ‘good life’ and the meaning they give to human and social experiences thanks to rich and accessible cultural structures. Under those ‘democratic’ theories, the right to participate in cultural life appears not only as a mere aspirational good but as necessary for the existence of a vivid democracy.

To conclude, there is an agreement among theories of justice on the importance of the freedom to participate in cultural life (the *negative* right to participate in cultural life) – for different ethical reasons. However, liberals in particular disagree on the right to participate in cultural life as an ethical claim which would require an enlargement of the actual enjoyment of capabilities to participate in cultural life and the recognition of a *human right* to participate in cultural life. Moreover, while communitarian authors are speaking about cultural structures in the sense of cultural communities and societies and cultural identities, democratic theorists, multiculturalists, Sen, Nussbaum and egalitarian authors would focus on cultural expressions as a way to enable freedom. Beside this disagreement, a majority of

⁶⁷ Tony Bennett, Mike Savage, Elizabeth Bortolaia Silva, Alan Warde, Modesto Gayo-Cal, David Wright, *Culture, Class, Distinction* (Routledge 2009); Bernard Lahire, ‘The individual and the mixing of genres: Cultural dissonance and self-distinction’ (2008) 36 *Poetics* 166; Bernard Lahire, *La culture des individus: Dissonances culturelles et distinction de soi* (La Découverte 2004); Richard A Peterson, ‘Problems in Comparative Research: The Example of Omnivorousness’ (2005) 33 *Poetics* 257–282; Richard A Peterson, ‘Understanding audience segmentation: From elite and mass to omnivore and univore’ (1992) 21 *Poetics* 243–258. Those studies, while reviewing Bourdieu’s classic studies of the ‘distinction’, demonstrate more than ever the complexity and importance of the impact of cultural capital on modern forms of inequality.

⁶⁸ See among others Jürgen Habermas, *The Crisis of the European Union. A Response* (Polity Press 2012) 12–52; Jürgen Habermas, ‘So, why does Europe need a Constitution?’ <www.newleftreview.net/NLR24501.shtml> 2001 (last accessed June 2014) 12; Jürgen Habermas, ‘Public Sphere, an Encyclopedia Article’ in Meenakshi Gigi Durham and Douglas M Kellner (eds), *Media and Cultural Studies. Keywords* (Blackwell Publishers 2001) 102–109; Jürgen Habermas, ‘Les dilemmes de la démocratie: l’exemple de la crise actuelle de l’Union européenne’ Yves-Charles Zarka (ed), *Refaire l’Europe avec Jürgen Habermas* (PUF 2012) 20–21.

⁶⁹ Gérard (n 66) 134–135.

⁷⁰ Gérard (n 66) 5, 131.

theories, however, do converge towards the acceptance of an ethical claim to support cultural diversity and to broaden participation in the work on the meaning of human and social experiences. Nevertheless, it remains unclear whether those theories all validate the recognition of a formal right to participate in a diverse cultural life, beyond the recognition of the freedom to participate in cultural life. The preparatory works of Article 27 of the UDHR and of Article 15 of the ICESCR bear the mark of this agreement on the freedom to participate in cultural life and of the loose agreement on the right to participate in cultural life.⁷¹

4. (RE)DEFINING THE RIGHT TO PARTICIPATE IN CULTURAL LIFE UNDER INTERNATIONAL HUMAN RIGHTS LAW AS A INCOMPLETELY GENERALISED AND SPECIFIED AGREEMENT

The definition of the right to participate in cultural life as an ethical claim is necessary but not sufficient for legal reasoning. The next step is to define it at a legal level⁷² and to identify its content and the range of concrete prerogatives it carries for its holders. First, the definition originally provided for the right to participate in cultural life will be discussed (4.1), and, second, the current interpretation of this human right as it has been materialised in the General Comment No. 21 of the Committee on Economic, Social and Cultural Rights will be assessed (4.2). Finally, this section will conclude on a (re)definition of the human right to participate in cultural life as an *incompletely generalised and specified agreement* resting on a loose agreement on the right to participate in cultural life as a mid-level agreement (4.3).

In order to analyse those definitions, an analytical explanatory framework which classifies four different conceptual levels will be used.⁷³ At the broadest conceptual level, culture is what distinguishes humanity from nature.⁷⁴ In the second level, culture objectifies the human condition in a given society so as to be understood from a more ‘anthropological’ perspective.⁷⁵ It refers to ways of life, cultural identities

⁷¹ The fuzziness surrounding this human right pushed some members of the Committee that prepared the Declaration to ask if the principle on which Art 27 relies should not be better exposed in the Preamble of the Declaration. Commission des droits de l’homme, *Rapport du Comité de rédaction à la Commission des droits de l’homme*, E/CN.4/21 (1st July 1947) Annexe F, Articles proposés par le Comité de rédaction pour la Déclaration internationale des droits de l’homme, art 35, 67.

⁷² Elissavet Stamatopoulou, ‘The right to take part in cultural life. Article 15 (1) (a) International Covenant on Economic, Social and Cultural Rights’ (2008) *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* E/C.12/40/9, 11.

⁷³ See Guillaume de Stexhe and Michel Thomas, ‘La culture comme unité complexe: un enjeu médiatique et politique’ in Hugues Dumont and Alain Strowel (ed), *Politiques culturelles et droit de la radio-télévision* (Presses de l’Université Saint-Louis 1998) 19–48.

⁷⁴ See among others: Ernst Cassirer, *Essai sur l’homme* (Les Editions de Minuit 1975).

⁷⁵ See on the different systems that culture in the second sense comprehends Ladière (n 52).

and to a holistic comprehension of culture. It encompasses, all together, traditional housing, access to lands, legal systems, collective identities, patterns of behaviour, and all subsystems of the society (economic, symbolic and political) into an alleged coherent system. This conception of culture does not differentiate between practices and is seen as a rather static and integrated set of practices. This conception of culture is the one on which most of the above-mentioned communitarian theories are resting. At the third level, culture refers to a system which, within the culture of the society, is working on the meanings of human and social experiences.⁷⁶ This hermeneutic understanding of culture encompasses processes of understanding, expression, learning, communication, creation. This third conception mirrors the essential feature of cultural structures highlighted by multicultural authors and in the capability approach: culture is what enables individuals to exercise real freedom by giving them tools to shape their conception of a good life, to create, to express themselves, to exercise their imagination. Finally, in the fourth and most concrete level, culture refers to the whole set of cultural expressions, practices and artistic works that express and exemplify the work on meaning carried out by culture in the third sense.⁷⁷ The work on meaning (3rd level) is not disembodied exercise. It is contextualised, developed on the basis of a material set of traditions, cultural artworks, expressions and heritages, allowing individuals to think critically and express themselves.⁷⁸ At the fourth level, culture gathers creative expressions and (tangible or intangible) cultural heritages. It relates to the variety of cultural goods and services, to the multiple expressions of cultural heritage, to the richness of various artworks and heritages.⁷⁹

4.1. THE ORIGINAL DEFINITION OF THE RIGHT TO PARTICIPATE IN CULTURAL LIFE

Even if the role of the *travaux préparatoires* in the interpretation of human rights treaties is diminishing under the influence of the living instrument doctrine, it remains interesting and useful to study the original conception of the right to participate in cultural life. The preparatory works of Article 27 of the UDHR show that the right to participate in cultural life had been originally conceived essentially as a freedom to participate in cultural life and as a right to access the set of major artworks of a given

⁷⁶ See on the work on meanings operated through culture Castoriadis (n 53); de Stexhe and Thomas (n 73) 39; Genard (n 52) 7–8; J Habermas, *Sociologie et théorie du langage* (Colin 1995).

⁷⁷ De Stexhe and Thomas, (n 73) 39.

⁷⁸ See on culture as an objectivation of the work on the meaning of human and social experiences de Stexhe and Thomas (n 73) 42; Jürgen Habermas, *L'espace public* (Payot 1986) 42, and its subsequent works on the public space. See on cultural heritage as a specific expression of that work on meanings François Ost, 'Déployer le temps. Les conditions de possibilité du temps social' (1997) 36 *Legal Theory*, available at <www.legaltheory.net> (European Academy of Legal Theory) last accessed 17 April 2014.

⁷⁹ See de Stexhe and Thomas (n 73) 19–48.

community.⁸⁰ It seems moreover that the term ‘community’ referred mainly to the Nation State⁸¹ even if concerns had been expressed for a need of an equal protection of intangible cultural expressions.⁸²

Understood as the confirmation of Article 27 of the UDHR, Article 15(1)(a) of the ICESCR was quite logically defined by reference to artistic creation and heritage, that is to say external manifestations of culture and cultural activities.⁸³ It was perceived as a consecration of the cultural democratisation policy and as an individual right⁸⁴ to access the elitist *œuvres capitales de l’Humanité* (major artworks of Humanity).⁸⁵ In a preliminary draft, UNESCO referred to the obligation to facilitate access for everyone to the manifestations of national and foreign cultural life, to protect and preserve ‘books, works of art and other monuments and objects of historic, scientific and cultural interest’, and to grant artists and scholars with guarantees of freedom and security.⁸⁶ The latter draft also refers already to the necessity to guarantee the free cultural development of cultural lives of ethnic and linguistic minorities (but those proposals were rejected in the discussion).⁸⁷ It is, however, striking that the formulas ‘cultural life’ and ‘participation’ are not defined more precisely in the preparatory works beyond the mere statement of principles. In the same vein, the transformation of the ‘obligation to develop cultural life’ into a ‘right to participate in cultural

⁸⁰ Albert Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l’homme* (Nauwelaerts 1965) 255. See also the five Constitutions which recognised at that time a right to participate in cultural life and which essentially referred themselves to cultural democratisation (Division des droits de l’homme des Nations Unies, *Projet annoté de Déclaration internationale des droits de l’Homme*, E/CN.4/AC.1/3/add.1 (2 June 1947) 356–358) and the American Declaration of Human rights which inspired the Universal Declaration and which clearly referred itself to a restrictive and materialistic conception of culture (Art 13 and §55).

⁸¹ See Donders 2002 (n 23). See however, *a contrario*: Conseil économique et social, 7th session, (19 July–29 August 1948, Genève) 215e séance, *Rapport de la troisième session de la commission des droits de l’homme* (25 August 1948) 647 and 659 (some members of the Commission regrets the inexistence of such a right to the national culture).

⁸² UNGA Third Committee, A/C.3/SR.799 (4 November 1957) 189–190.

⁸³ UNGA Third Committee, A/C.3/SR.797 (31 October 1957) 178; UNGA Third Committee, A/C.3/SR.796 (31 October 1957) 173–174.

⁸⁴ The exclusion of the proposal of UNESCO to include a reference to ‘cultural communities’ is quite revealing of the will to create an individual right to participate in cultural life (see E/C.3/SR 796, October 1957, 173–174, A/OR/12 Annexes, agenda item 33).

⁸⁵ See UNGA Third Committee, A/C.3/SR.799 (4 November 1957) 189–190. The expression “œuvres capitales de l’Humanité” is borrowed from André Malraux, the originator of the “democratisation de la culture” policy.

⁸⁶ Human Rights Commission, UN Doc. E/CN.4/541, 18 April 1951, art e 2.

⁸⁷ UNESCO ‘Rapport sur les travaux du Comité d’experts chargé d’analyser le contenu philosophique et juridique et les principales applications du droit à la culture’ (‘Report on the work of the Expert Committee in charge with the analysis of the philosophical and legal content of the right to culture and its main applications’) 1952, 7C/PRG/10. See also the comments of the Executive Council of Unesco on this report: 7C/PRG/10/Add.

life', which was suggested by the representatives of the United States, was not even discussed.⁸⁸

4.2. THE EVOLUTION OF THE INTERPRETATION OF THE RIGHT TO PARTICIPATE IN CULTURAL LIFE (ARTICLE 15 ICESCR)

The interpretation of the right to participate in cultural life evolves significantly in the last decades. Article 15 of the ICESCR was firstly constructed as a right to participate in the diversity of cultural lives (3.2.1.) before being interpreted as a right to cultural identity (3.2.2.).

4.2.1. *From a Right to Participate in the Diversity of Cultural Lives ...*

Due to the influence of UNESCO instruments and scholarly literature, the object of the right to participate in cultural life has been extended to access and participation to the diversity of cultural expressions, including popular cultural lives and cultural lives of migrants, minorities and indigenous peoples. This extension enables the right to participate in cultural life to be connected to cultural democracy policy and cultural diversity.⁸⁹

Since the 1990s, the Committee on Economic, Social and Cultural Rights has required States Parties to provide information on measures to promote participation in film, sporting events or folklore.⁹⁰ Henceforth, when analysing States' reports, the Committee asks for information on support for and access to popular culture

⁸⁸ Commission on Human Rights, 'Draft of International Covenant', (27 May 1952), E/CN.4/SR.294, 3–5; Economic and Social Council, Report of the Commission on Human Rights, 8th session, (April–June 1952), Un Doc. E/2256, 19. The major part of the debate focused on the relationship between the right to a protection of moral and material interests of the author and the right to participate in cultural life and on the 'aim' of the scientific research.

⁸⁹ See on this extension of the object of the right to participate in cultural life, that at the same time is legitimate and necessary, the commentaries of the UN Committee on Economic, Social and Cultural Rights, the Revised Guidelines for the redaction of State reports and the following papers Yvonne M Donders, 'Cultural life in the context of Human Rights', *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* (2008) 2–3; Donders 2002 (n 23) 231–272; Christian Groni, 'Right to take part in cultural life (article 15 (1) (a) of the Covenant)' *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* (2008) E/C.12/40/3 46; Dominic Mc Goldrick, 'Culture, Cultures and Cultural Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP 2007) 447–473; Roger O'Keefe, 'The "right to take part in cultural life" under article 15 of the ICESCR' (1998) 47 *International and Comparative Law Quarterly* 904–923; Rodolfo Stavenhagen, 'Cultural Rights and Universal Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 1995) 85–109.

⁹⁰ CESCR 'Guidelines on Treaty-specific Documents to be submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' 5th session (18 November 2008) UN doc E/C.12/2008/2 para 67 (a) (2008 Guidelines).

(media, television, sport, leisure activities)⁹¹ as well as access to Internet.⁹² In 1991, in relation to Colombia, the Committee asked for information on ‘funds to promote cultural development and the participation of everyone in cultural life, including public aid to private initiative’ and on ‘the institutional infrastructure established to apply measures to promote the participation of everyone in culture – cultural centres museums, libraries, theatres, cinemas, and handicrafts centres’.⁹³ Regarding Brazil, the Committee recommended that State party take measures to promote a broader participation of citizens in cultural life in particular by ‘ensuring the wider availability of cultural resources and assets, particularly in smaller cities and regions, and ensuring, in this regard, special provision through subsidies and other forms of assistance for those who lack the means to participate in the cultural activities of their choice’.⁹⁴

In the same perspective, the Committee also asks specific questions on funding of cultural activities, resources allocated to artists and creators, educational facilities for cultural careers and international cooperation in the cultural field.⁹⁵ It leads inquiries on questions such as protection and restoration of cultural heritage,⁹⁶ protection of linguistic cultural heritage,⁹⁷ and of the cultural heritage of minorities and indigenous groups.⁹⁸ This opening to the diversity of cultural lives and heritages is reflected in some elements from General Comment No. 21.⁹⁹ This Comment namely requires ‘the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sport stadiums’ and, in

⁹¹ See for instance CESCR ‘Report on the Sixth Session’ 6th session (25 November-13 December 1991) UN doc E/1992/23 310, Columbia; CESCR ‘Report on the Fifth Session’ 5th session (26 November-14 December 1990) UN doc E/1991/23, 79–80, Jordan; CESCR ‘Report on the Sixth Session’ 6th session (25 November-13 December 1991) UN doc E/1992/23 248, Sweden.

⁹² CESCR ‘Concluding Observations: China’ 34th session (13 May 2005) UN doc E/C.12/1/Add.107.

⁹³ CESCR ‘Report on the Sixth Session, 6th session (25 November-13 December 1991) UN doc E/1992/23 310, Columbia; 284, Spain.

⁹⁴ CESCR ‘Concluding Observations: Brazil’ 42nd session (12 June 2009) UN doc E/C.12/BRA/CO/2 para 33. See also CESCR ‘Concluding Observations: Mauritius’ 44th session (8 June 2010) UN doc E/C.12/MUS/CO/4 para 31.

⁹⁵ CESCR ‘Report on the Sixth Session’ 6th session (25 November-13 December 1991) UN doc E/1992/23 247–248, Sweden and 284, Spain; CESCR, 2008 Guidelines (n 90) 69; CESCR ‘Report on the Sixth Session’ 6th session (25 November-13 December 1991) UN doc E/1992/23 249, Sweden; CESCR ‘Report on the Third Session’ 3rd session (6–24 February 1898) UN doc E/1989/22 207, Trinidad and Tobago.

⁹⁶ CESCR ‘Concluding Observations: Afghanistan’ 44th session (7 June 2010) UN doc E/C.12/AFG/CO/2–4 para 44; CESCR ‘Concluding Observations: Iraq’ 10th session (30 May 1994) UN doc E/C.12/1994/6 para 12; CESCR ‘Concluding Observations: Angola’ 41st session (1 December 2008) UN doc E/C.12/AGO/CO/3 para 40.

⁹⁷ CESCR ‘Concluding Observations: Benin’ 28th session (5 June 2002) UN doc E/C.12/1/Add 78 para 27 and 40th session (9 June 2008) UN doc E/C.12/BEN/CO/2 para 28; and CESCR ‘Concluding Observations: France’ 40th session (9 June 2008) UN doc E/C.12/FRA/CO/3 para 51.

⁹⁸ See CESCR ‘Concluding Observations: France’ 40th session (9 June 2008) UN doc E/C.12/FRA/CO/3 paras 29 and 50.

⁹⁹ See subpara 52 (regarding cultural infrastructures).

relation with cultural heritage, 'care, preservation and restoration of historical sites, monuments, works of art and literary works, among others'.¹⁰⁰

What the negative right to participate in cultural life regards, the Committee is concerned with 'censorship' but also with 'criminal prosecutions' of intellectuals and artists,¹⁰¹ indirect measures affecting creative freedom,¹⁰² the measures taken to promote broadcasting and other diffusion of cultural lives.¹⁰³ It asks also which measures are taken to protect and promote 'national cultures' in the face of the perceived threat of globalisation and the accompanied alleged risk of homogeneity.¹⁰⁴ General Comment No. 21 also recognises the freedom 'to create [...] which implies that States Parties must abolish censorship of cultural activities in the arts and other forms of expression, if any'.¹⁰⁵ The attention paid to this element of the right to participate in cultural life is confirmed by the work of the Independent Expert in the field of cultural rights.¹⁰⁶

4.2.2. ... To a Right to Cultural Identity

Going a step further, a construction of the right to participate in cultural life, notably promoted by UNESCO,¹⁰⁷ has extended the objective of this human right to cultural identity issues, to the protection of 'ways of lives'. In sum, it is extended to rights relating to culture understood as a 'worldview representing the totality of a person's encounter with the external forces affecting his life and that of his community'.¹⁰⁸ An important

¹⁰⁰ See subparas 16 and 50.

¹⁰¹ CESCR 'Concluding Observations: Republic of Korea' 26th session (21 May 2001) UN doc E/C.12/Add 59 para 32.

¹⁰² CESCR 'Concluding Observations: Australia' 13, 15 and 20th session (3 June 1993) UN doc E/C.12/1993/9 para 12.

¹⁰³ CESCR 'Concluding Observations: Iraq' 10th session (30 May 1994) UN doc E/C.12/1994/6 para 13.

¹⁰⁴ CESCR 'Report on the Third Session' 3rd session (6–24 February 1989) UN doc E/1989/22 188 (Rwanda); CESCR 'Report on the Fifth Session' 5th session (26 November–14 December 1990) UN doc E/1991/23 80 (Jordan); CESCR 'Report on the Sixth Session' 6th session (25 November–13 December 1991) UN doc E/1992/23 248 (Sweden); CESCR 'Concluding Observations: Mexico' 9th session (5 January 1994) UN doc E/C.12/1993/16 para 11; UNHRC 'Report of the Independent Expert in the field of cultural rights' UNGAOR, Human Rights Council, 14th session (22 March 2010) UN doc A/HRC/14/36, 44.

¹⁰⁵ CESCR 'General Comment No 21: Right of everyone to take part in cultural life (art 15)' (21 December 2009) 43rd session, UN doc E/C.12/GC/21 (2009); 17 IHRR 608 (2010) (Gen Comm No 21) 49.

¹⁰⁶ See namely UNHRC 'Report of the Independent Expert in the field of Cultural Rights on the issue of cultural heritage' UNGAOR, Human Rights Council, 17th session (21 March 2011) UN doc A/HRC/17/38 and the Report of the Special Rapporteur on the right to freedom of artistic expression and creativity: UNHRC 'Report of the Special Rapporteur in the field of cultural rights. The right to freedom of artistic expression and creativity' UNGAOR, Human Rights Council, 23rd session (14 March 2013) UN doc A/HRC/23/34.

¹⁰⁷ Donders 2002 (n 23) 150.

¹⁰⁸ See CESCR 'Report on the Seventh Session' 7th session (23 November – 11 December 1992) UN doc E/1993/22, 213. See for the inspiration sources of that new interpretation Patrice Meyer-Bisch, 'Le droit de participer à la vie culturelle. Contenu et importance pour la réalisation de tous les droits de

part of the literature noticed the changes of interpretation of the right to participate in cultural life towards a right protecting cultural identities.¹⁰⁹ States regularly report to the Committee on Economic, Social and Cultural Rights information concerning protection of minorities' cultural identities (and not only minorities' cultural lives) and ways of life.¹¹⁰

In addition to its *Concluding Observations* and General Comments, the Committee includes a really broad and vague reference to cultural identity in the 1991 Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the ICESCR.¹¹¹ However these Revised Guidelines leave it open as 'to whether the mere participation of minorities and indigenous groups in the classical cultural life is protected or, more comprehensively, their culture as a way of life'.¹¹² Moreover, there is a hesitation on the question of whether those Guidelines are addressing the cultural lives of those minorities and indigenous groups in terms of cultural expressions (creative practices and cultural heritages, 3rd and 4th level) or in terms of 'ways of lives' and identities (2nd level). This hesitation is also patent in the 2008 Revised Guidelines. The 2008 Revised Guidelines, despite a reference to 'cultural identity', obviously focus on the question of 'cultural activities', 'cultural heritage', 'cultural goods, institutions and activities' and on 'participation in' and 'access to' this cultural life.¹¹³

In its *Concluding Observations*, the Committee refers sometimes to cultural identity and to an anthropological concept of culture but not specifically on the basis of Article 15 of the ICESCR. Referring to a combination of legal provisions, the Committee recommends that States Parties take appropriate measures to protect the general capacity of minorities and indigenous groups to maintain and practice

l'homme' *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* (2008) UN doc E/C.12/40/8, 6; Fribourg Declaration, Commentary of the Fribourg Declaration.

¹⁰⁹ Groni (n 89) at 4; Donders (n 23); Matthew Craven, 'The right to participate in cultural life in the ICESCR' in Rod Fisher and al. (eds), *Human Rights and Cultural Policies in a Changing Europe* (CIRCLE Publications 1994) 161–171; Asbjørn Eide, 'Cultural Rights as Individual Human Rights' in Asbjørn Eide et al (eds), *Economic, Social and Cultural Rights* (n 89) 293; Stephen A Hansen, 'The Right to Take Part in Cultural Life: Towards Defining Core Obligations' in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) 285; O'Keefe (n 89) 916; International Commission of Jurists, 'Submission of the International Commission of Jurists on the right to take part in cultural life convened by the Committee on Economic, Social and Cultural Life', *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* (2008), E/C.12/40/7, 2; Alexandra Xanthaki, 'Multiculturalism and International law: Discussing Universal Standards' (2010) 32 *Human Rights Quarterly* 26–27.

¹¹⁰ Donders (n 89) 5.

¹¹¹ CESCR, *Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, 5th session, 26 November–14 December 1990, UN doc. E/C.12/1991/1, 108–110 (1991 Guidelines).

¹¹² Groni (n 89) 5.

¹¹³ 2008 Guidelines (n 90) paras 67–69.

their way of life.¹¹⁴ The Committee also focuses more specifically on the issue of language combining Articles 13 and 14 of the ICESCR and referring to a wide range of instruments related to languages and *not automatically and specifically* to Article 15¹¹⁵ and on the issue of the rights of indigenous peoples to ancestral lands and natural resources (citing Article 1 and 2 of the ICESCR and, sometimes, Article 15 ICESCR).¹¹⁶

This extension of the object of the right to participate in cultural life culminated in General Comment No. 21 of the Committee, which constitutes an international interpretative document aimed at elaborating the rights enlisted in the Covenant. Those interpretative instruments are not binding but they can contribute to reinforce the legal force and justiciability of human rights when they contribute to a better understanding of the scope of those rights. This is especially the case when General Comments make clear the content and scope of human rights based on the existing 'hard law'.¹¹⁷

¹¹⁴ See: CESCR, *Concluding Observations: Kenya*, 8th session, 3 June 1993, UN doc. E/C.12/1993/6, paras 19–21; CESCR, *Concluding Observations: Austria*, 11th session, 14 December 1994, UN doc. E/C.12/1994/16, para 9; CESCR, *Concluding Observations: Peru*, 20 May 1997, UN doc. E/C.12/1/Add.14, para 10; CESCR, *Concluding Observations: Slovenia*, 35th session, 25 January 2006, UN doc. E/C.12/SVN/CO/1, para 11; CESCR, *Concluding Observations: Morocco*, 36th session, 4 September 2006, UN doc. E/C.12/MAR/CO/3 paras 32 and 58; CESCR 'Concluding Observations: Hungary' 38th session (15 May 2007) UN doc E/C.12/HUN/CO/3 para 53; CESCR 'Concluding Observations: Belgium' 39th session (15 May 2007) UN doc E/C.12/BEL/CO/3; CESCR 'Concluding Observations: Argentina' 47th session (15 May 2007) UN doc E/C.12/ARG/CO/3 paras 25–26; CESCR 'Concluding Observations: Ethiopia' 48th session (18 May 2012) UN doc E/C.12/ETH/CO/1–3 paras 27–28. It must also be noted that the Human Rights Committee does refer itself to a broad understanding of the notion of culture and has dramatically extend the scope of this notion but without referring itself to article 15 of the ICESCR (See HRC, *Sandra Lovelace v Canada* (Communication no 24/1977, formerly 6/24) UN doc CCPR/C/13/D/24/1977; HRC, *Lubicon Lake Band v Canada* (Communication no 167/1984) UN doc CCPR/C/38/D/167/1984 and the following legal instruments: UNHRC 'General Comment No 23: The rights of minorities (art 27)' 50th session (8 April 1994) UN doc CCPR/C/21/Rev.1/Add.5; 1 at 3 IHRR 1 (1994).

¹¹⁵ See for instance CESCR 'Concluding Observations: Canada' 36th session (19 May 2006) UN doc E/C.12/CAN/CO/4 para 33; CESCR 'Concluding Observation: Iraq' 10th session (19 – 20 May 1994) UN doc E/C.12/1994/6; CESCR 'Concluding Observations: Cambodia' 42nd session (12 June 2009) UN doc E/C.12/KHM/CO/1 para 34 and Saul, Kinley and Mowbray (n 21) 1196–1198.

¹¹⁶ On the latter issue, the Committee does not seem to have adopted a clear appraisal of the legal basis of its observations. See CESCR 'Concluding Observations: Chad' 43rd session (18 November 2009) UN doc E/C.12/TCD/3 paras 35–36 (the Committee read this question as linked with Articles 1 and 15); CESCR 'Concluding Observations: the Democratic Republic of Congo' 43rd session (17 November 2009) UN doc E/C.12/COD/CO/4 para 36 (the Committee does not link formally this question with Article 15); CESCR 'Concluding Observations: Sweden' 41st session (17 – 18 November 2008) UN doc E/C.12/SWE/CO/5 (citing Articles 1, 2.2. and 15 on the issue of the preservation of Sami way of life). From 2009, concluding observations link more clearly access to ancestral lands and natural resources and the right to participate in cultural life is made clear without any combination with other provisions: CESCR 'Concluding Observations: Madagascar' 43rd session (18–19 November 2009) UN doc E/C.12/MDG/CO/2 para 33 (the Committee linked the question with article 15 to the extent that the deprivation of ancestral lands will affect cultural and social links with their environment) and CESCR 'Concluding Observations: Australia' 42nd session (20 May 2009) UN doc E/C.12/AUS/CO/4 para 32. Those two concluding observations have followed the adoption of the General Comment No 21 in 2009.

¹¹⁷ See Vanneste (n 1) and Vandenhoe (n 47).

The drafters of General Comment No. 21 decided to not leave open the question of the definition of culture and to address it head on – a step which was not *prima facie* necessary seeing that Article 15 does not refer to ‘culture’ but only to ‘cultural life’. The Committee gave a broad and so called ‘anthropological’ definition of culture as ‘a broad, inclusive concept encompassing all manifestations of human existence’, relying thereby on a holistic conception of culture.¹¹⁸ Moreover, it refused to give an autonomous meaning and scope to the Covenant concept of ‘cultural life’ and decided to define it as an explicit reference to culture as ‘a living process, historical, dynamic and evolving, with a past, a present and a future’.¹¹⁹ Citing, as main inspiration, sources such as the Fribourg Declaration (a text devoted to the progress of cultural rights emanating from a group of scholars and associations) and the UNESCO Declaration on Cultural Diversity,¹²⁰ the General Comment defines the right to participate in cultural life as entailing three main components. The first is ‘participation’ and covers in particular

‘the right of everyone – alone, or in association with others or as a community – to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice’.

The second is ‘access’. This entails the right to everyone

‘to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities’.

The third component is ‘contribution to cultural life’. This entails the ‘right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. [...]’.¹²¹

¹¹⁸ This conception has been deeply renewed in cultural anthropology for at least two reasons. First, this conception of culture relies on a simplistic vision of the ‘primitive and integrated societies’ in which cultural life could not be separated from other activities. Second, this so-called ‘anthropological conception’ is seen as not paying enough attention to individuals (See Kathryn Anderson-Levitt, ‘Complicating the Concept of Culture’ (2012) 48 *Comparative Education* 441 at 454; Alan Patten, ‘Rethinking Culture: The Social Lineage Account’ (2011) 105 *The American Political Science Review* 735–749; Lisa Wedeen, ‘Conceptualizing Culture: Possibilities for Political Science’ (2002) 96 *The American Political Science Review* 713–728; Joseph E Davis, ‘Culture and Relativism’ (2008) 45 *Society* 270–276).

¹¹⁹ Gen Comm No 21 (n 105) subpara 11.

¹²⁰ The fact that the Committee refers to those sources is confusing, as both do not necessarily reflect the development of the Covenant, which is what the Committee should deal with.

¹²¹ Gen Comm No 21 (n 105) subpara 15.

Because of its broadness and its lack of clarity, the actual definition of the right to participate in cultural life as provided by General Comment No. 21 will be difficult to operationalise.¹²² As such, the definition of cultural life and of participation in cultural life is so broad that it cannot reasonably constitute the object of a human right or the matter of a policy without further considerable elaboration.¹²³ It is hard to imagine that such a concept can orientate practices and can be interpreted as having a certain normative force. It remains almost impossible to implement and assess its progress and regression: such operations would require clarifying the content of the right to participate in cultural life, to identify States' obligations and then allow the identification of indicators to measure the progress of the implementation of this right.¹²⁴

The right to participate in cultural life as defined by General Comment No. 21 could be qualified under Sunstein's theory as an *ungeneralised and unspecified agreement*, or as, a *complete disagreement*. Because of its broadness, it does not fulfil the classic demands of legal formalism. According to the latter requirements, the specific regulating function of the legal system implies that law represents the world in a certain way through, as Kant said, operations of perception,¹²⁵ but also of construction, unification and simplification.¹²⁶ In that perspective, a certain degree of precision and clarity is thereby part of the 'normative value', which is a decisive component of the 'normative force'¹²⁷ of a legal norm. Indeed, 'the ability of a norm to be a "model for action" and to orientate actions' is a key component of the definition of a 'legal norm'.¹²⁸ This implies to a certain degree that '[f]rom a conceptual point of view, a juridical conceptualization that embraces opposing interests is problematic, since legal rationality requires that opposing poles be conceptualized by different notions'.¹²⁹ Regarding the right to participate in cultural life, the risk is that, because of this indeterminate, broad and unclear definition, law makers, judges and others qualify this human right as a 'legal soft law' provision or

¹²² For a parallel with the right to health, see Lawrence O Gostin, 'The Human Right to Health: A right to the "Highest Attainable Standard of Health"' (2001) 31 Hastings Ctr Rep 29.

¹²³ For a similar opinion relating to the right to health, see Ruger (n 37) 312.

¹²⁴ Audrey Chapman, 'Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of Science' in Yvonne M Donders and Vladimir Volodin (eds), *Human Rights in Education, Science and Culture. Legal Developments and Challenges* (UNESCO Publishing/Ashgate 2007) 132.

¹²⁵ Emmanuel Kant, *Critique de la raison pure* (2nd ed, PUF 1962).

¹²⁶ Agnès Rabagny, *L'image juridique du monde. Apparence et réalité* (PUF 2003).

¹²⁷ See Thibierge (n 34) 822. The author speaks about the 'normative value' which is composed of three poles: a hierarchical pole (linked with the quality of its author), a deontic pole (linked with the formulation of the norm and its content) and an axiological pole (linked with the legitimacy of the norm); Hachez (n 34) 51, 52.

¹²⁸ See Ost and van de Kerchove (n 34) 330 and the references cited.

¹²⁹ Armin von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship' (2008) 19/2 *EJIL* 241–275.

a ‘*soft negotium*’,¹³⁰ even if this human right is enlisted in a ‘*hard law*’ instrument (the ICESCR).

This conclusion is however not unsurpassable: the positive right to participate in cultural life can be interpreted as having a certain normative force, if redefined. Indeed, justiciability is gradual and dynamic.¹³¹ ‘Soft law’ elements can become ‘hard law’ requirements when they are recognised by judges, non-jurisdictional organs or by law makers who can, on the basis of a workable definition of this human right, define its content and scope and make it function as an ‘incompletely generalized agreement’. Moreover, this workable definition can remain to some extent flexible and adaptive – which is necessary when speaking about culture, a very dynamic phenomenon – without losing its ‘hard law nature’.¹³²

4.3. TOWARDS A REDEFINITION OF THE RIGHT TO PARTICIPATE IN CULTURAL LIFE

Taking into account the dynamic and moving features of cultural life and the general and adaptive nature of international human rights law, this section intends to elaborate a legally relevant definition of the right to participate in cultural life as an *incompletely generalised and specified agreement on a low level principle*. This definition tries to open a third way between a restrictive definition of the right to participate in cultural life as a right to access a set of definite artworks and the problematic ‘anthropological’ definition given in General Comment No. 21. This redefinition tries to canalise the fashionable attempts to ‘modernize’ cultural rights which lead them to be included as much as possible although the definition of what is ‘cultural’ diverges dramatically. For other human rights, cultural identities and cultural considerations in the broad sense of the word are adequately taken into account as a fertile dimension of the interpretation of these human rights.¹³³ Regarding the right to participate in cultural life, cultural identities are said to be not only a *dimension* but the *main object* of this right. Notwithstanding the fact that this process is unsatisfactory from a legal point of view, it is moreover unnecessary. The recognition of the consideration of cultural identity in the interpretation of all human rights guarantees its overall respect, in the interpretation of each right. Moreover, there are other instruments already protecting the various facets of cultural identities – beyond cultural lives – such as

¹³⁰ Those are: ‘règles qui, en dépit de l’instrument contraignant qui les porte (*hard law*) présentent une forme normative affaiblie en raison de l’indétermination de leur contenu’ (Hachez (n 34) 52). See also d’Aspremont (n 30) 1084.

¹³¹ Hachez (n 34) 54.

¹³² See Delmas-Marty (n 42).

¹³³ Julie Ringelheim ‘Integrating Cultural Concerns in the Interpretation of General Individual Rights – Lessons from the International Human Rights Case Law’ *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* (2008) E/C.12/40/4, 1–2, 14–15.

religious rights, linguistic rights, minority's rights, indigenous rights, right to self-determination, and so on.

The idea defended here is that it is possible to understand the right to participate in cultural life as dealing with cultural identities only within the specific circle of cultural life. 'Cultural life' is understood in reference to the 3rd and 4th levels of the word 'culture'. In other words, it refers to cultural expressions and heritages and to the processes of understanding, expression, learning, communication, and creation, which are based or linked with those cultural expressions and heritages. Cultural life, within the right to participate in cultural life, can therefore be defined as referring to cultural expressions, artistic creations and elements of cultural heritages, as well as the intellectual operations and methods linked with the creation of, the familiarisation with and the initiation into these cultural expressions and heritages. These expressions and heritages embody the work on meaning operated by the culture in a broad sense. In return, cultural life is the concrete material from which the abstract work on meanings can take place.

This redefinition is grounded on several arguments. First, this definition is congruent with international cultural instruments, and especially with the concept of cultural diversity as promoted in the Convention on the Protection and Promotion of Diversity of Cultural Expressions.¹³⁴ Indeed, if it were true that the 2001 UNESCO Declaration on the Diversity of cultural expressions was more related to an 'anthropological' conception of culture,¹³⁵ then the 2003 Convention mainly refers to cultural expressions in the sense of the results of the creative activities¹³⁶ that only, but also incidentally, express cultural identities.¹³⁷ Second, this redefinition is directly connected with the only agreement that all above-mentioned theories reached at some point: the recognition of artistic and creative freedom and the importance of participation in cultural life for democracy, real freedom and equality (while those theories differ dramatically on cultural identity issues). Third, this interpretation is also consistent with the concrete steps to measure and promote the implementation of the right to participate in cultural life, which have been rooted in a sterner definition of cultural life. The Council of Europe Parliamentary Assembly, after having broadly discussed the right to participate in cultural life, has opted for a stricter approach, focused on cultural policies and creation.¹³⁸ Similarly, it is quite remarkable that the significant action of the Independent Expert in the field of cultural rights, Ms. Farida Shaheed, while officially embedded in a very broad comprehension of cultural rights

¹³⁴ See 2010 Report, 11–13.

¹³⁵ Universal Declaration on Cultural Diversity 2001 (2 November 2001) UNESCO Doc CLT.2002/WS/9 (2002).

¹³⁶ See Convention on Cultural Diversity; Cornu (n 17).

¹³⁷ See Céline Romainville, 'Cultural diversity as a multilevel and multifaceted legal notion operating in the law on cultural policies' (2014) *International Journal of Cultural Policy*.

¹³⁸ See European Parliamentary Assembly 'Recommendation 1990 on the right of everyone to take part in cultural life' (adopted 24 January 2012) and 'Report on the right of everyone to take part in cultural life' (adopted 9 January 2012) Council of Europe Doc 12815 paras 11–12.

and of the right to participate in cultural life (notably expressed in General Comment No. 21), finally leads to a focus on circumscribed precise issues, like the right to have access to cultural heritage or freedom of artistic expression.¹³⁹ Finally, the proposal to focus on a more precise definition of the right to participate in cultural life helps to highlight the importance of that right for social justice (and issues such as equal access and participation for all in culture and equal access to cultural education)¹⁴⁰ and its important role in such debates as the one on the integration, or restriction, of copyright and *droit d'auteur* in the name of the public interest and other human rights.¹⁴¹ This importance was indeed somewhat overshadowed by cultural identity claims.¹⁴²

This redefinition of the right to participate in cultural life, which brings this human right beyond pure incantation, allows to identify six exact prerogatives that this human right implies for individuals. Such an operationalization of the right to participate in cultural life is based on a reconstructive analysis of the treaties, the jurisprudence and other reports. It is thereby grounded on an analysis of legal discourse, including scholarly discourses, currently available on the question of the normative content of the right to participate in cultural life, but limited to the specific question of 'cultural life' (creative expression and cultural heritages) and not extended to the question of ways of life as such.

4.3.1. *Creative Freedom*

The first prerogative induced from the right to participate in cultural life is freedom of artistic and creative expression. This freedom is implicitly protected by Article 15(1) of the ICESCR¹⁴³ and more explicitly by Article 19 of the ICCPR and Article 10 of

¹³⁹ See UNHRC 'Report of the Independent Expert in the field of cultural rights' UNGAOR, Human Rights Council, 14th session (22 March 2010) UN doc A/HRC/14/36, 44 (2010 Report).

¹⁴⁰ Ephraim Nimni, 'Collective Dimensions of the Right to take Part in Cultural Life' *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* (2008), UN doc E/C.12/40/4, 3; Annelise Oeschger, 'Pauvreté et accès à la culture' *Background papers from Experts gathered for the General Discussion Day on the Right to take part in cultural life organized by the Committee on Economic, Social and Cultural Rights* (2008), UN doc E/C.12/40/14, 1. This is patent in the latest Concluding Observations of the Committee, which focus on question of cultural identity.

¹⁴¹ See on the latter debate the current work of the Independent Expert.

¹⁴² See notably on economic policy discourse and human rights Philip Harvey, 'Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously' (2001–2002) 33 *Colum Hum Rts L Rev* 364–370. The problem is reinforced in Common law countries, by the fact that copyright is intrinsically founded on utilitarian justifications related to its importance for the diffusion of culture and access of all to culture. See Lea Shaver, 'The Right to Science and Culture' (2010) *Wisconsin Law Review* 121–184; Orit Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2004) 14 *Fordham Intell Prop Media & Ent LJ* 498–565.

¹⁴³ Gen Comm No 17 (n 19).

the European Convention on Human Rights.¹⁴⁴ Regarding this overlapping of legal instruments concerning freedom of artistic expression, the – refined – right to participate in cultural life plays an important role. First, the right to participate in cultural life highlights the positive obligations regarding the specific nature of artistic expression and the need to develop these obligations.¹⁴⁵ Second, it revitalises the cultural and artistic dimension of freedom of expression while this specific dimension is often neglected in the interpretation of Article 10 of the European Convention or Article 19 of the ICCPR (see *below*). Indeed, even if a *positive* right to participate in cultural life is not included in those two latter instruments, a correct interpretation of freedom of artistic expression – which henceforth has two different foundations in two different ranges of legal instruments – has to conciliate the requirements of Article 15 ICESCR and of Articles 10 ECHR and 19 ICCPR, in the name of the coherence of international human rights law and of an harmonious interpretation of those rights.¹⁴⁶

This would imply changes in the case law of the European Court based on Article 10 of the Convention. Indeed, the latter case law shows, for instance, that judges tend to assimilate art with information or with ideas – and negate thereby the specificity of cultural life.¹⁴⁷ Moreover, the theoretical basis of freedom of expression such as marketplace of ideas or the idea of watchdogs of democracies favour a certain type of expression which is of a political, rational, linear and written nature. In that framework, it is rather difficult for the Court to properly value the specific function of cultural life in the life of individuals and democracies. Artistic creation is rather melted into the general regime of freedom of expression instead of being protected for its specific function. For instance, in the *Apocalypse* judgment, the leading case of the European Court of Human Rights on this question, the Court did not protect artistic freedom per se but only because it assimilated the painting to a parody or a satire and to the expression of a political idea.¹⁴⁸ The inherent mechanisms of

¹⁴⁴ *Müller v Switzerland* (1988) 13 EHRR 212; *Otto Preminger v Austria* (1994) 17 EHRR; *Vereinigung Bildender Künstler v Austria* (2007) 19 EHRR 34; *Ulusoy and other v Turkey* App no 34797/03 (ECtHR, 3 May 2007).

¹⁴⁵ See Part 4 of this article on these obligations.

¹⁴⁶ See on the importance in the interpretation of the ECDH of other sources of law Françoise Tulkens, Sébastien van Drooghenbroeck and Frédéric Krenc, 'Le soft law et la Cour européenne des droits de l'homme: questions de légitimité et de méthode' (2012) 91 *Rev trim dr h* 436.

¹⁴⁷ See for instance the case about the novel 'Le procès de Jean-Marie Le Pen' where the ECHR applies rules regarding defamation without paying attention to the specific nature of the litigated text (a novel) (*London, Otchakovsky-Laurens et July c. France* (2007) 46 EHRR 35 paras 54–55. See for an extensive commentary of this case law assimilating artistic works to informations or ideas Céline Romainville, *Le droit à la culture, une réalité juridique* (Bruylant, 2014) 559–611.

¹⁴⁸ *Vereinigung Bildender Künstler v Austria* (2007) 19 EHRR 34. In this case, a member of an Austrian extreme wing political party (FPÖ) – who had previously heavily criticised the artist – was represented by the latter in highly suggestive sexual positions on a large scale painting. The Court considered that this representation in the paintings was not falling under the rules of defamation. It defined the painting as satire (see especially subpara 33 and D Lefranc, 'L'affaire "Apocalypse": un revirement dans la jurisprudence de la CEDH en matière de liberté d'expression artistique?' (2007) 4 *Auteurs et média* 332–336).

artistic expression such as fictions, non-linear and irrational narratives do not enjoy an appropriate legal regime, especially towards defamation rules. This conclusion is notably drawn from the *Lindon* case, where the Court assimilates fictional characters to the author to apply defamation rules and refuses to acknowledge the specificity of the fictional narrative.¹⁴⁹ In a general way, the legal apprehension of images – whether paintings, pictures, movies – is highly paradoxical as law seems at the same time to fear images by allowing restrictive measures in the name of their great impact in society while not recognising their important cultural value.¹⁵⁰ By promoting the specificity of creative and artistic freedom, the added value of the right to participate in cultural life on the question of artistic freedom could be to underline the need for a recognition of artistic freedom of expression per se and of its specificity. This implies the creation of a specific status for fiction, better legal protection of images, and recognition of the important value of artworks that add mainly to the aesthetic debate.

4.3.2. *The Right to Conservation, Development and Diffusion of the Diversity of Cultural Heritages and Expressions*

The right to conservation, development and diffusion of cultural heritage and cultural diversity is the second aspect of the right to participate in cultural life. Recognised in Article 15(2) of the ICESCR, this prerogative is also implicitly protected through convergent legal instruments related to cultural policies. While it is true that heritage protection instruments do refer to human rights only marginally (for multiple reasons that are notably linked to the great difficulty of defining the concept of heritage¹⁵¹ and therefore of defining the objective of the right to cultural heritage¹⁵²), there is now an uncontested willingness to explore the main dimension of the right to conservation, development and protection of cultural heritage and cultural diversity in cultural policy instruments.¹⁵³ Some non-binding instruments

¹⁴⁹ *Lindon, Otchakovsky-Laurens et July v France* (2007) 46 EHRR 35. See also *Aguilera Jimenez and other v Spain* App no 28389/06, 28955/06, 28957/06, 28959/06, 28961/06, 28964/06 (ECtHR, 8 December 2009) paras 25, 37.

¹⁵⁰ See notably Amy Adler, 'Post-Modern Art and the Death of Obscenity Law' (1990) 99 *The Yale Law Journal* 1359–1378; Amy Adler, 'What's left? Hate Speech, Pornography, and the Problem for Artistic Expression' (1996) 84(6) *Cal L Rev* 1499, 1572.

¹⁵¹ This difficulty has to be put in perspective with the suggested redefinition of culture. The definition of cultural heritage is also hesitating today between 2nd, 3rd and 4th circle. As for cultural life, cultural heritage should be defined in relation with 3rd and 4th circle, for the reason exposed above.

¹⁵² Some scholars consider that it is impossible to define a priori the object of this right to cultural heritage. See Bidault (n 21) 479–482; William S Logan, 'Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection' in Helaine Silverman and D Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer 2007) 33–52.

¹⁵³ See UNHRC 'Report of the Independent Expert in the field of cultural rights, Addendum Preliminary note on the mission to Austria' (4–15 April 2011) UNGAOR, Human Rights Council, 17th session (16 May 2011) UN Doc A/HRC/17/38Add.2 (2011) (2011 Report).

dedicated to the protection of cultural heritage mention individual rights.¹⁵⁴ The latest binding instruments on heritage protection set rights for individuals and communities¹⁵⁵ amongst which procedural rights.¹⁵⁶ In addition, the right to participate in cultural life is more and more often invoked and analysed in light of, and in combination with, instruments linked to cultural policy.¹⁵⁷ Finally, the practice of international bodies tends to explicitly recognise rights on cultural heritage and on cultural diversity, both notions understood as common goods. Accordingly, the Council of Europe, convinced of the importance of the links between cultural heritage and human rights, has reinforced those links in several instruments and reflections¹⁵⁸ while the Independent Expert in the field of cultural rights has decided to analyse access to cultural heritage as a human right in a report exclusively devoted to this matter.¹⁵⁹ It can moreover be stated that there is an obligation for States to act to conserve, develop and diffuse the heritage and cultural diversity notably deduced from Article 15, (1) and (2), of the ICESCR and from the set of Council of Europe and UNESCO instruments related to cultural heritage (see for instance the Faro Convention¹⁶⁰ and the instruments relating to cultural diversity or cultural heritage).¹⁶¹ Going a step further, some scholars induced from those instruments a right to cultural heritage.¹⁶²

4.3.3. *Access to Cultural life and Cultural Informations*

The third prerogative derived from the right to participate in cultural life is access to culture and cultural information. This prerogative has been central to the historical proponents of the right to participate in cultural life in international law.¹⁶³ It has two different dimensions: a material and an intellectual one. The material dimension relates

¹⁵⁴ See for instance UNESCO 'Recommendation on the Safeguarding of Traditional Culture and Folklore' (adopted 15 November 1989) UNESDOC, Records of the General Conference, 25th Session, I/B, 238 <<http://unesdoc.unesco.org/images/0009/000926/092693mb.pdf>> accessed 15 April 2014.

¹⁵⁵ 2011 Report (n 153) 8.

¹⁵⁶ See Bidault (n 21) 495.

¹⁵⁷ See Convention on the Protection of the Underwater Cultural Heritage 2001, 41 ILM 40.

¹⁵⁸ Janet Blake, 'On defining the cultural heritage' (2000) 49 *International and Comparative Law Quarterly* 73.

¹⁵⁹ 2011 Report (n 153).

¹⁶⁰ See Faro Convention (n 18) and UNESCO 'Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone' (adopted 14 December 1960) UNESDOC, Records of the General Conference, 11th session, B/III, 125 <<http://unesdoc.unesco.org/images/0011/001145/114583e.pdf>> accessed 15 April 2014 (Museums Recommendation).

¹⁶¹ See for instance Declaration of Principles of International Cultural Co-operation (4 November 1966) UNESDOC, Records of the General Conference, 14th Session, A/IV, 86.

¹⁶² See for instance Janusz Symonides, 'Cultural Rights' in Janusz Symonides (ed), *Human Rights: Concept and Standards* (UNESCO Publishing/Ashgate 2008) 218.

¹⁶³ Indeed, the preparatory works of Article 15 and Article 27 do prominently cite access to culture as a component of this right. See the preparatory works cited above (on the original definition of the right to participate in cultural life).

to the right to access to culture, implying more affordable performances, activities and cultural institutions, while paying special attention to the poorest in society.¹⁶⁴ It also implies that cultural infrastructures offer equal access to opportunities, especially regarding people with disabilities¹⁶⁵ and the elderly.¹⁶⁶ Culture must also be accessible from a geographical point of view, therefore involving some cultural decentralisation and adaptation of schedules.¹⁶⁷ The ‘intellectual’ dimension of accessibility focuses on three elements: access to cultural information and to media,¹⁶⁸ access to culture with respect to the linguistic diversity of the country,¹⁶⁹ and finally access to, and enrichment of, cultural capital and cultural references. In this sense, the right of access to culture is closely linked to the right to education and can be understood as a ‘right to knowledge of cultural resources’.¹⁷⁰ It is also strongly connected with freedom of expression, which includes the right to seek and receive information.

4.3.4. *Contribution to Cultural Life*

The importance of access to culture cannot be understood without being connected to the fourth prerogative derived from the right to participate in cultural life: contribution to cultural life. This refers to the opportunity to participate actively in the diversity of artistic creation, to contribute to the creation and enhancement of cultural expressions, to participate in the identification and protection of cultural heritage and in the familiarization with the diversity of creations, expressions and heritage. Participation includes all ‘concrete guarantees of opportunities for everyone to express themselves freely, to communicate, to interact and engage in creative processes with the goal of the full development of his personality, projects, and progress in society’.¹⁷¹ Active participation in cultural life is deployed on two main fronts.¹⁷² First, it implies the recognition of all humans being worthy of consolidating their participation in cultural life. Second, it implies the right to participate in activities and cultural practices and to receive, when needed, help and concrete assistance (such

¹⁶⁴ Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (adopted 26 November 1976) UNESDOC, Records of the General Conference, 19th Session, I para 14 (b) UNESCO doc 19C/Resolution, I, 29 (Participation by the People at Large Recommendation); Museums Recommendation, (n 160) 125–126 para 7.

¹⁶⁵ CESCR ‘General Comment No 5: Persons with Disabilities’ 11th session (9 December 1994) UN doc E/1995/22 para 36 (Gen Comm No 5).

¹⁶⁶ CESCR ‘General Comment No 6: The Economic, Social and Cultural rights of Older Persons’ 13th session (24 November 1995) UN doc E/1996/22 para 39.

¹⁶⁷ Museums Recommendation, n 160 para 5.

¹⁶⁸ Gen Comm No 21 (n 105) para 49 (b). See also, on the links between the right to participate in cultural life and the so-called ‘right to media’ Lorie Graham, ‘A Right to Media?’ (2010) 41 *Colum Hum Rts L Rev* 429.

¹⁶⁹ Groni (n 89) 17; Gen Comm No 5 (n 165) para 37.

¹⁷⁰ See on the cultural dimension of the right to education Bidault (n 21) 359, 437.

¹⁷¹ Participation by the People at Large Recommendation (n 164).

¹⁷² See Gen Comm No 21 (n 105) para 15 (a) (c).

as financial help or institutional support) in order to be able to participate in cultural life, especially for a nonprofessional artist.¹⁷³

4.3.5. *Freedom of Choice*

Freedom of choice is the fifth prerogative derived from the right to participate in cultural life.¹⁷⁴ It entails that individuals have the possibility to choose to participate in cultural life or not to participate and that they also have the choice to determine which cultural lives they want to be involved in. This prerogative recalls that cultural life is protected only because it allows the individuals to define and exercise their freedoms. Freedom of choice increases the demand for cultural diversity since it postulates the existence of a rich and diverse cultural environment.

4.3.6. *Participation in the Decision-making in Cultural Matters: the Procedural Facet of the Right to Participate in Cultural Life*

The sixth prerogative derived from the right to participate in cultural life is the right to contribute to decision-making in cultural matters. This right extends somewhat to participation in culture by making people partners of a larger project, the ‘definition and implementation of policies and decisions that have an impact on the exercise of a person’s cultural rights’.¹⁷⁵ This participation can for instance result in the creation of adequate consultative bodies in the development and implementation of cultural policies, in fostering the participation of citizens and associations in the management of public cultural services and in enhancing citizen participation in the evaluation of cultural policies.

This redefinition of the right to participate in cultural life allows a qualification of this right as an *incompletely generalised and specified agreement*. Indeed, an agreement on a mid-level principle can be identified when a limited but dynamic approach of cultural life is endorsed.

5. CONCLUSION

This article defined the content of the right to participate in cultural life. It intends to unravel the paradoxes and the challenges this right raises in terms of legal rationality. This article also shed light on the pertinence of the concept of ‘incompletely theorized

¹⁷³ Study of the Right to participate in cultural life under Resolution 4.52. of the UNESCO General Conference (2 May 1952) UNESDOC UNESCO/CUA/42, available at: <http://unesdoc.unesco.org/images/0012/001272/127221eb.pdf> (last accessed 14 September 2015) See also 1991 Guidelines (n 111) paras 248–249.

¹⁷⁴ See O’Keefe (n 89) 910; Bidault (n 21) 281; Gen Comm No 21 (n 105) para 15 (a).

¹⁷⁵ Gen Comm No 21 (n 105) para 15 (c).

agreements' to understand the very nature of some human rights such as the right to participate in cultural life. This theory has been used throughout the article as an analytical framework and helps to redefine the human right to participate in cultural life.

As a first step, this article qualified the right to participate in cultural life as an *incompletely generalized agreement* (people do not agree on the foundations of this human right although there seems to be a loose agreement on the recognition of some component of this human right). An inquiry into the range of *potential* theoretical justifications for the right to participate in cultural life shows that theories of justice have largely neglected the right to participate in cultural life as an object of analysis as such. More importantly, it shows that there are disagreements among those theories as to whether culture constitutes a matter of justice, even if authors seem to agree on the importance of the freedom to participate in a diverse cultural life.

As a second step, it has been proved that the right to participate in cultural life works, to a certain extent, as an *unspecified agreement*: international and national judges as well as law makers have not yet received much possibility to make clear and operationalise. A loose agreement was originally reached on the existence of a *negative right* to participate in cultural life and of a *positive right* – mainly to access major artworks. The developments of the interpretation of this human right materialised in the General Comment No. 21 of 2009 from the Committee on Economic, Social and Cultural Rights suggests that the content and scope of this human right should be broadened in order to reconcile opposing viewpoints on the definition of the right to participate in cultural life. This General Comment weakens the – already loose – agreement on the right to participate in cultural life as a 'mid-level principle' by diluting its clarity and precision. But, the Committee, in other General Comments and Concluding Observations, remains ambiguous: it still hesitates between two understandings of this human right.

Drawing on those findings, the last part of this article offered a redefinition of the right to participate in cultural life which aims at authorising an agreement on this human right as a 'mid-level principle' whenever there is still disagreement existing on the foundations of this latter right. The dynamic redefinition proposed intends to requalify the right to participate in cultural life as an *incomplete theorized agreement* which could be suitable for a certain degree of operationalization. This definition tries to open a third way between a restrictive definition of the right to participate in cultural life as a right to access a set of definite artworks and the broad 'anthropological' definition given in General Comment No. 21 of the Committee on economic, social and cultural rights.

The elaboration on the right to participate in cultural life suggested here opens up great possibilities to reorient cultural policy, at both legal and philosophical levels, and to rethink the conflict between economic law and cultural policy laws. The right to participate in cultural life releases new ways to think about the public law on culture and cultural policies. These latter policies could indeed, thanks to the substantial and procedural elements of the legal regime of the right to participate in cultural life, get a new lease of life, after having run out of steam a long time ago.