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Cultural Diversity and Cultural Rights

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Introduction: Culture

The premise that culture pervades all areas of human life—from the conventional anthropological perspective of symbolic reproduction of collective and personal identity, to broader understandings of culture's role in economic growth, governance and security—is today a worldwide commonplace. But before elaborating on the use of culture as resource for identity maintenance or its other major application, economic growth, we first have to understand what we mean by culture, of which there are many definitions. Kroeber and Kluckhorn's 1952 book reviews 162 definitions. The following are only a few understandings of the notion of culture, each encompassing numerous variations.

UNDERSTANDINGS OF CULTURE	
Historical-Universal, Evolutionary	Knowledge accumulated by humanity; Civilization.
Idealist-Aestheticist	Culture as a means of uplift, transcendence (Kant; Hegel).
Essentialist/Nationalist	The wealth of human diversity characterizes the genius of each nation (Herder). Culture as worldview.
Civilization vs. Anarchy	"pursuit of our total perfection by means of getting to know, on all matters which most concern us, the best which has been thought and said in the world" (Arnold).
Epiphenomenal	Culture is simply the reflection of class position (Marx).
Anthropological	Culture as a structured set or pattern of behaviors, beliefs,

	traditions, symbols and practices by means of which humans "communicate, perpetuate and develop their knowledge about and attitudes toward life" (Tylor; Boas; Mead; Geertz). Culture as a "whole way of life" (Williams). Reproduction of community through representations of that whole way of life (UNESCO).
Integrational/Assimilationist	Culture is a means of integration of heterogeneous groups (e.g., who come together as a result of immigration: American structural-functional assimilationist theories (Park; Gordon).
	Transculturation into new national formations (Ortiz; Freyre).
Ideological Conflict	Counter-hegemonic opposition to culture of hegemonic groups by the subaltern and residual (Gramsci; Williams).
Culture Industries	Culture is subjected to the commodity logic and industrialized in the 19th and 20th centuries (photography, radio, film, phonography, television). As culture is emptied the citizen becomes a spectator and consumer (Horkheimer and Adorno). Nevertheless, for some, even commodified culture may harbor utopian impulses (Benjamin; Jameson).
Distinction	Dominant classes accumulate "cultural capital" as a means to distinguish themselves from other classes and in the process reproduce themselves (Bourdieu).

Resource	Cultural diversity as a resource whose recognition and empowerment leads to human development, peace, and effective citizenship (Sen; UNESCO; Yúdice).
	Culture, and in particular cultural diversity, is the organized expression of creativity, which in turn drives economic development in the knowledge and information society (Castells; Landry; Florida; Rifkin; Yúdice).

Cultural Studies approaches to culture have emphasized issues of control and conflict. The first focuses on the ways in which institutions discipline populations. In the post-Enlightenment, when sovereignty is posited in the people, civil society institutions deploy the category of culture as a means of internalizing control, not in an obviously coercive manner but by constituting citizens as well-tempered, manageable subjects who collaborate in the collective exercise of power (Miller; Bennett). The universal address of cultural institutions, ranging from the museums to literary canons, tends either to obliterate difference or to stereotype it through racist and imperialist appropriation and scientism, sexist exclusion and mystification, and class-based narratives of progress. Populations that "fail" to meet the standards of taste or conduct, or that "reject culture" because it is defined against their own values, are subject to constitutive exclusion within these canons and institutions (Bourdieu). Challenges to these exclusions generate a politics of representational proportionality such that culture becomes the space of incremental incorporation whereby diverse social groups struggle to establish their intellectual, cultural, and moral influence over each other. Rather than privilege the role of the economic in determining social relations, this process of hegemony, first described by Antonio Gramsci, pays attention to the "multiplicity of fronts" on which struggle must take place (247).

The Gramscian turn in Cultural Studies is evident in Williams' incorporation of hegemony into his focus on the "whole way of life": "[Hegemony] is in the strongest sense a 'culture,' but a culture which has also to be seen as the lived dominance and subordination of particular classes" (108–109). But hegemony is not synonymous with domination. It also names the realm in which subcultures and subaltern groups wield their politics in the registers of style and culture (Hebdige). Indeed, in societies

where needs are often interpreted in relation to identity factors and cultural difference, culture becomes a significant ground for extending a right to groups that have otherwise been excluded on those terms. The very notion of cultural citizenship implies recognition of cultural difference as a basis for making claims. This view has even been incorporated in epistemology to capture the premise that groups with different cultural horizons have different and hence legitimate bases for construing knowledge; they develop different "standpoint epistemologies" (Delgado Bernal; Haraway). The problem is that bureaucracies often establish the terms by which cultural difference is recognized and rewarded. In response, some subcultures (and their spokespersons) reject bureaucratic forms of recognition and identification, not permitting their identities and practices to become functional in the process of "governmentality," the term Michel Foucault uses to capture "the way in which the conduct of individuals or groups might be directed" (21). On this view, strategies and policies for inclusion are an exercise of power through which institutional administrators recognize indigenous peoples, women, sexual minorities and "others" according to a multiculturalist paradigm, a form of recognition that often empowers those administrators to act as "brokers" of otherness (Cruikshank).

For many critics, the use of culture to legitimize the claims of just about any identity group is troubling. While this expansion of legitimation responds to the political desire to incorporate "cultures of difference" within (or against) the mainstream, it often ends up weakening culture's critical value. Especially frustrating for critics working in these fields is the cooptation of local culture and difference by a relativism that becomes indifferent to difference, and by a cultural capitalism that feeds off and makes a profit from difference (Eagleton). If a key premise of modernity is that tradition is eroded by the constant changes introduced by industrialization, new divisions of labor, and concomitant effects such as migration and consumer capitalism, recent theories of disorganized capitalism entertain the possibility that the "system" itself gains by the erosion of such traditions, for it can capitalize on them through commodity consumption, cultural tourism, and increasing attention to heritage. In this case, both the changes and the attempts to recuperate tradition feed the political-economic and cultural system; non-normative behavior, rather than threatening the system in a counter- or subcultural mode, actually enhances it. Such a "flexible system" can make action and agency oriented toward political opposition seems beside the point.

Culture as Resource

While these critical responses to corporate and bureaucratic modes of multicultural recognition are useful, they often lack a grounded account of the emergence of the expedient use of culture as resource. Today, culture is increasingly wielded as a resource for both sociopolitical and economic amelioration, that is, for increasing participation in this era of waning political involvement, conflicts over citizenship (Young), and the rise of what Jeremy Rifkin has called "cultural capitalism" (251). The inmaterialization characteristic of many new sources of economic growth (intellectual property rights as defined by the General Agreement of Tariffs and Trade [GATT] and the World Trade Organization [WTO]) and the increasing share of the world trade captured by symbolic goods (movies, TV programs, music, tourism) have given the cultural sphere greater importance than at any other moment in the history of modernity. Culture may have simply become a pretext for sociopolitical amelioration and economic growth. But even if that were the case, the proliferation of such arguments, in those fora provided by local culture-and-development projects as well as by United Nations Educational Scientific and Cultural Organization (UNESCO), the World Bank, and the "globalized" civil society of international foundations and Non-Governmental Organizations (NGOs), has produced a transformation in what we understand by the notion of culture and what we do in its name (Yúdice, *The Expediency of Culture*). Applying the logic that a creative environment begets innovation, urban culture has been touted as the foundation for the so-called new economy based on "content provision," which is supposed to be the engine of accumulation (Castells; Florida; Landry). This premise is quite widespread, with the U.S. rhetoric of a "new economy," the British hype about the "creative economy," and the rise of creative cities echoing in similar initiatives throughout the world.

As should be clear, current understandings and practices of culture are complex, located at the intersection of economic and social justice agendas. Culture is undergoing a transformation that "already is challenging many of our most basic assumptions about what constitutes human society" (Rifkin 10–11). Today, it is nearly impossible to find public statements that do not recruit art and culture either to better social conditions through the creation of multicultural tolerance and civic participation or to spur economic growth through urban cultural development projects and the concomitant proliferation of museums and other venues for cultural tourism.

I raise the complexity of the understandings and uses of culture, not as the basis for the rejection of the desirability of instruments and practices that ensure cultural diversity and cultural rights. On the contrary, they are needed ever more in a context in which traditional cultural foundations become porous and crumble, along with legal and political foundations. This said, there are two poles around which most uses of culture cluster: on the one hand, the anthropological understanding, which prioritizes values,

worldviews, symbolic reproduction, etc., and on the other hand, the creative element in culture which provides the leading edge in innovation and economic growth in the knowledge and information society. The first pole has been more important in the development of cultural rights, particularly of indigenous peoples, minorities and women, while the second has been at the forefront of creative industries and creative cities projects.

Culture and Development

It is not difficult to see why the first would be a major factor in the promotion of cultural rights: some worldviews, values, heritages, and symbolic reproduction become hegemonic or are subordinated, thus putting some communities at risk of assimilation and the loss of their distinctive cultural features. And in an age that prizes cultural diversity, indeed, that understands it as necessary for spiritual, intellectual, social and economic development, assimilation is taken to be a form of dispossession, which in turn can lead to devaluation and even conflict. Hence, it is increasingly accepted in human rights thinking that all these forms of development cannot be safeguarded without the maintenance of cultural diversity.

Since "development" is a goal of cultural diversity and cultural rights discourses, it is important to note that it is just as slippery as the notion of culture. It has been the target of critique in large part because "development schemes," particularly those aimed at agricultural and economic growth, devised in the "developed world" (Western Europe and the U.S.) have turned out to be counterproductive (e.g., have led to environmental degradation and/or the disintegration of sociocultural ecologies [Escobar, *Encountering Development*]) if not an impediment to development in the non-quantitative sense of having the freedom to lead the kind of life people choose, promoted in the 2004 UNDP Human Development Report, *Cultural Liberty in Today's Diverse World*. But even this apparently benign notion of freedom to lead life as one chooses has been criticized by some who interpret the UNDP report, and comparable UNESCO and other international rights instruments, as facilitating the construal of freedom as consumer choice (Albro 17). That of course is not the intention of these instruments, although their use and that of the notions therein, can be bent in this or that direction.

The pliability evident in the use of these terms is consistent with the character of language, and the struggle for hegemony posited by Gramsci, which, when read through Bakhtin's notion of appropriation,[1] can be summarized as the contest of different interpretations of those terms which diverse social groups seek to have society accept. This difficulty is encountered by any term (e.g., "community autonomy," sovereignty, etc.)

invoked to characterize an end toward which policies, strategies or tactics are aimed. Critics of the concepts of culture and development may seek the easy solution: to banish the terms, as if that would solve the problems raised in their usage. Indeed, the elimination of these terms, and the diverse sets of practices that accompany them, would foreclose one of the strategies that subordinated peoples deploy to gain a measure of advantage in a world controlled by others: to rearticulate them to their own ends. Arturo Escobar gives the example of the indigenous and Afrodescendant populations who struggle against state-led development of the Colombian Pacific rainforest: "Aware that 'biodiversity' is a hegemonic construct, activists of these movements acknowledge that this discourse nevertheless opens up a space for the construction of culturally based forms of development that could counteract more ethnocentric and extractivist tendencies. Theirs is the defense of an entire life project, not only of 'resources' or biodiversity" (Escobar, "Whose Knowledge" 61).

What Escobar's example suggests is that the process of positing a cultural identity involves a measure of jockeying for semio-political space in a forest of keywords that have institutional uptake. There is nothing new in acknowledging that identities (and the terms that serve as foundations for them) are constructed; but they are constructed on the basis of practice and local ecologies, as Escobar has argued. Colombian Afrodescendants were able to establish their ancestral rights to land in the Colombian constitution of 1991, in part by articulating the cultural discourse of spiritual ties to land imbricated in agricultural practices characteristic of indigenous peoples. Blacks and indigenous peoples co-habitated the rainforest areas and there was considerable intermarriage. The resulting worldview or *cosmovisión* "emphasized the integration of people and nature, traditional management practices, the role of traditional authorities, and the resulting conservation of the environment. Their declaration of principles focused on the defense of resources and traditional knowledge through strategies articulated around the principles of unity, territory, cultural identity, autonomy and self-sufficiency" (Escobar, *Territories of Difference* 58). Culture, or *cosmovisión*, in this case, is not mobilized to defend the violation of anyone's rights, but on the contrary, to uphold a set of values and the resources that enable their sustainability. Escobar explains that Colombian Afrodescendants' strategy of claiming territorial rights is based on "recognizing that the Pacific is a territory of ethnic groups," and these in turn shape their claims on traditional models of cultural appropriation as a means to resist capital and dominant culture. He quotes a telling passage from a declaration by Afrocolombians:

> In the same way that it is impossible to separate the territory from culture and ethnicity, thus the knowledge we have about biodiversity is a cultural knowledge that requires particular treatment, including appropriate property regimes. [. . .] It seems to us that in the definition of the relation between the region-territory and the rest of the country it is necessary to be clear about the relation between the organizational processes and the institutional agents [State and NGOs]. [. . .] *The identity that needs to be constructed today at the heart of the black communities is not one based on race but on the defense of the territory*; it underlies our conceptualization of life and the world and a set of cultural aspirations [. . .] that is, the development of our own cultural dynamic from the perspective of a logic of resistance. (Fundación Habla/Scribe 52–54, emphasis added by Escobar, *Territories of Difference* 58)

As the above citation makes evident, the relationship between culture and right is very complex and cannot be reduced to opportunism, as is often argued against the presumed relativism of cultural rights. In fact, it is the fixity of legal and other institutional regimes that does violence to processes such as these, in which rights are defended.

With the above caveats in mind, let's return to the concepts of diversity and cultural rights, and the legal instruments that institutionalize them. The UNESCO Universal Declaration on Cultural Diversity (2002) states:

> [The Convention] raises cultural diversity to the level of 'the common heritage of humanity", "as necessary for humankind as biodiversity is for nature' and makes its defense an ethical imperative indissociable from respect for the dignity of the individual.
>
> The Declaration aims both to preserve cultural diversity as a living, and thus renewable treasure that must not be perceived as being unchanging heritage but as a process guaranteeing the survival of humanity; and to prevent segregation and fundamentalism which, in the name of cultural differences, would sanctify those differences and so counter the message of the Universal Declaration of Human Rights.

Excursus on the Critique of Cultural Rights on the Basis of a Cultural Defense

As is evident in this statement, the ecological principle of cultural diversity is not the relativism that some opponents of cultural rights fear will permit

violation of other human rights on the basis of a cultural defense. At the *Symposium on Human Rights in Latin American and Iberian Cultures* from which this volume emerged, a couple of respondents to the earlier version of this essay objected to the principle of cultural diversity in knee-jerk fashion by pointing to such atrocities as female genital mutilation or foot binding defended by claims to cultural sovereignty, ***as if the discourse of respect for cultural diversity itself were at fault for these problems***. Curiously, there was no protest on the part of these critics of human rights discourse when Walter Mignolo made a defense of the lynching of the mayor of Ilave, Peru in the name of customary law. Why the difference? Here I must make another excursus.

It seems to me that Mignolo and those in agreement with him used the "coloniality of power" framework, according to which Western rights discourse is ultimately an illegitimate defense of Western subjects and at best an implicit rejection of non-Western values. To be sure, there is a colonial legacy that demeans indigenous values, but since the 1990s, there is, in Peru and other Latin American countries, recognition of juridical pluralism that allows for indigenous authorities to adjudicate cases concerning their communities. This pluralism is written into many of the sixteen Latin American constitutions that recognize their countries as pluricultural and multiethnic. It is also present in international legal instruments such as Convention 169 of the International Labor Organization (ILO).[2] Nevertheless, this recognition does not readily translate into enforcement, and customary law still has the disadvantage of being considered irrational by many *mestizo* and *criollo* Peruvians. Lack of enforcement or dismissal of customary law by the national authorities leads to enormous frustration. The abrogation of cultural rights can lead to conflict as in the case of the lynching of the mayor of Ilave. But does this mean that lynching is a bona fide application of customary law? This is what Mignolo argued. Is he correct?

I think not, and this is not to deny the validity of the coloniality of power framework, that is, the ongoing effects of unequal structures of value (racism, civilizationism, etc.) established during the colonial period. Mignolo seems to launch his analysis assuming the diametrical opposition of Western political systems and indigenous customary law. But as Carlos Vilas, in a nuanced and multidimensional analysis of this same case argues, customary law has already been inflected by colonialism as well as by the violent conflicts of the 1980s and 1990s, which had a destructive effect on all institutions in the Andean world. Moreover, scrutiny of myriad cases shows that indigenous customary law did not include the taking of life, but a range of punishments from shaming to beatings commensurate with the misdeeds. The violence and the accommodation of political practice in rival political groups to an ethos of elimination of the enemy instilled both by State agents and by radical teachings in the 1960s and 1970s, affected what

was admissible as justice. Nevertheless, Felipe Quispe, leader of one of the more radicalized tendencies in the Bolivian Aymara context, stated that death was not a legitimate feature of community justice (qtd. in Vilas 13).

According to Vilas, lynchings such as that of the mayor of Ilave are the expression of a political style marked by confrontation and intolerance within the overarching frame of tensions between communities and the State, whose neoliberal institutional reforms of the 80s and 90s led to increasing incapacity to govern and apply rule of law. Also contributing to this failure were the political-military conflicts between the State and popular movements and guerrillas. Adaptation to these circumstances was traumatic and defensive, contributing to a bunkered defense of community in the face of forces that are beyond their control (Vilas 18).

In the specific case of Ilave, the brief description of State failure accounts in part for the difficulty in mediating the conflicts that pitted the mayor's party (Patria Roja) against his major rival's party (Puka Llacta), which were allied in a precarious coalition, Unión Regional, that came apart as allegations of corruption could not be adjudicated. Moreover, and in keeping with Quispe's observation, it seems that the death of the mayor of Ilave was not the direct result of an intention to kill but to physically punish, which is not to say that the infliction of bodily harm should be excused on the basis of customary law. All systems of justice should be subject to the protection of human rights, whether the matter at hand is a lynching presumably carried out according to customary law, or capital punishment codified in U.S. law.

These cases, like those of female genital mutilation, are extreme cases sometimes defended by recourse to a "cultural defense." But cultural diversity and cultural rights instruments are quite explicit about rejecting such a defense. As stated in the Convention for the Protection and Promotion of the Diversity of Cultural Expressions,

> Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof. (UNESCO, *Convention* 3)

The focus of cultural rights discourse on the expansion of options by promoting the diversity of cultural expressions, freeing them from restrictions and encouraging intercultural relations and understandings is conducive to dialogue across cultures rather than hardening of positions. Of course, there are situations like the lynchings referred to above, which are

difficult to reconcile with this view, but it is the objective of cultural diversity and cultural rights instruments to contribute to overcoming such impasses and the violence they spawn. Deconstruction of the Enlightenment rationality at the origin of human rights that excluded the non-European from the values of reason and civilization, while important in pointing to their shortcomings, are nevertheless insufficient for curtailing further violence. A better avenue is working through the messiness of competing legitimation strategies within the framework of rights. In other words, and to respond to the critics of cultural rights, the fact that violations like female genital mutilation are committed in the name of cultural identity and cultural sovereignty does not mean that these are legitimate defenses. What is required is hard political work to delink the notion of cultural rights from such violations. Deconstruction does not do that work.

While the discourse of cultural rights is complex, due precisely to its liability to exploitation of the cultural difference defense, its formulators have nevertheless spelled out quite clearly that justifications on the basis of cultural diversity for the violation of human rights are not legitimate. "[A]ppeals for cultural sensitivity and engagement [. . .] are sometimes wrongly interpreted as acceptance of harmful traditional practices, or a way of making excuses for noncompliance with universal human rights [. . .]. Such relativism provides no basis for action and produces only stalemate and frustration" (UNFPA 2). The sustainability of cultural rights means that they are embedded ecologically in all human rights. The point is to not throw out the baby of important cultural rights with the bathwater of faulty arguments on behalf of relativisms that violate human rights, but rather to find ways of ensuring that such rights as defined in international agreements are respected. This takes ***political work*** across a range of institutions, which together with the crafting of discourse is the *modus operandi* of the struggle for hegemony. We can invoke Escobar's Colombian Pacific rainforest example again: the indigenous and Afro-Colombian populations do not protect their ways of life simply by uttering the principles of biodiversity. They seek alliances with a set of other discourses and practices that are consistent with their goals. For example, biodiversity initiatives have a discursive legitimacy and it is possible to maneuver to have these principles (e.g., conservation) trump those that serve to justify leveling the forest, which violate Afro-Colombians' way of life. Cultural rights discourse, as part of a more general human rights discourse, provides a ***framework*** in which groups and individuals can struggle to defend their preferences and ways of life.

A Brief History of Cultural Rights Instruments

The first international statement regarding cultural rights appears in the United Nations Universal Declaration on Human Rights or UDHR:

> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (Article 27)

There was no elaboration of the notion of cultural rights at this time. What is clear, however, is that the "community" to which these rights attached was the national community. Moreover, "culture" was largely understood as the fine arts (indeed, one important area of US-USSR competition pivoted symbolically around the fine arts, just as the Olympics were another occasion for symbolic competition, [Saunders]) and although the first French Minister of Culture, André Malraux, would soon develop the idea of the democratization of culture and the museum without walls, the arts were still a source for distinction in the Bourdieuan sense. Indeed, for Malraux democratization meant extending France's sophisticated artistic culture to all classes, in the process giving them uplift and leveling a distinction inherited by birth and wealth.[3]

The other right included in the 1948 UDHR, to right to the moral and material protection of intellectual property, did not get full elaboration within the framework of the protection of individual and collective cultural identity and access, although it has emerged as a major issue as "culture" (especially the products of the culture and creative industries) within the context of trade policy and technological innovation, especially digital reproduction technologies and the Internet, has become a major resource for accumulation. As we shall see, these two largely distinct notions of culture—the anthropological and the economic—have come together as "culture" emerged as the lynchpin of a renewed sense of development, a "socioecological" sense of development.

The next important international instrument to affirm cultural rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR),[4] adopted by the UN General Assembly in 1966 and entered into force in 1976. It is important to point out that the ICESCR was adopted as part of a binary approach to the elaboration of the integrated human rights affirmed in the declaration of 1948: on the one hand, the International Covenant on Civil and Political Rights (ICCPR),[5] also adopted in 1966, spelled out the negative rights, which require the State to refrain from specific actions that might curtail civil and political rights; on the other, the enforcement of economic, social, and cultural rights requires the State to "take a proactive role involving funds, time and processes" (Niec). While the ICCPR were understood to be immediately applicable, the ICESCR was

subject to "progressive realization," a deferment due either to lack of resources or to further specification of the rights in question. Of all of the rights in the ICESCR, cultural rights were in greatest need of elaboration, which was not provided in 1966.

Article 15 of the ICESCR basically restates Article 27 of the UDHR with respect to the rights: "to take part in cultural life"; "to enjoy the benefits of scientific progress and its applications"; "to benefit from the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author." Moreover, it stipulates that States Parties to the Covenant have to take specific steps "to achieve the full realization of this right, which include the conservation, development and diffusion of science and culture." State Parties also have to guarantee "the freedom indispensable for scientific research and creative activity," and to "recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."

Examination of the discussions concerning Article 15 show that UNESCO sought to have the article make reference to the communities that take part in cultural life, shifting the terrain from the exclusive focus on the national framework. While this proposal to expand the understanding of participation was turned down by the General Assembly, in subsequent discussions such as the 1990 meeting of the Committee on Economic, Social and Cultural Rights, references to the collective dimension of cultural participation were included and information was requested on "the promotion of awareness and enjoyment of the cultural heritage of national ethnic groups, minorities and indigenous peoples" (Donders 249). At the 1992 meeting of this Committee, Samba Cor Konaté prepared a special report on participation in cultural life in which he proposed expanding the concept of culture beyond the expression of knowledge or cultural goods and activities to the more anthropological notion of a way of being and feeling. This process of expanding the concept of culture and including the communitarian scope of participation in the definition of the right to culture was continued at the 2002 meeting of the committee and the 2004 Congress on Cultural Rights at the Universal Forum of Cultures in Barcelona, where the ICESCR was further made compatible with the elaboration of development undertaken by UNESCO since the 1980s.

The right to culture is understood to intersect transversally with the right to development, interpreted not only in material terms but in a range of intangible forms associated with culture. At the World Conference on Cultural Policies, or Mondiacult, in Mexico City (1982), culture is defined as "the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only arts and letters, but also modes of life, the *fundamental rights of the human being*, value systems, traditions and beliefs" (UNESCO "Mexico

City Declaration"). UNESCO's World Decade for Cultural Development (1988–1997) culminated in the World Report, *Our Creative Diversity*, which undertook to rethink development in terms of a broad concept of human well-being, replacing the more limited focus on economic progress. The report acknowledged the cultural dimension of development; affirmed the need to affirm and support cultural identities; adopted a broader notion of participation in culture; and promoted international cultural cooperation. The report extended the notion of cultural rights to the diversity of cultural communities outside the purview of dominant Western values. Javier Pérez de Cuéllar stated in the Preface:

> By 1988, it was already clear to us that development [. . .] could no longer be seen as a single, uniform, linear path, for this would inevitably eliminate cultural diversity and experimentation, and dangerously limit humankind's creative capacities [. . .]. To counter this hazard, a vigorous cultural diversification had already taken place across the world [. . .]. This [. . .] had led people to challenge the fame of reference in which the West's system of values alone generated rules assumed to be universal and to demand the right to forge different versions of modernization. (UNESCO, "Convention on the Protection and Promotion of the Diversity of Cultural Expression")

The sustainability of the world depended, on this view, on the maintaining a rich diversity of cultures, whether they be Western, non Western, hybrid, etc. An analogy with environmental sustainability can be discerned in this new approach, and indeed, in particular new approaches to development in the Brundtland Report of the World Commission on Environment and Development of 1987, the Rio Environmental Summit of 1992 and UNESCO's Stockholm 1998 conference The Power of Culture: Intergovernmental Conference on Cultural Policies for Development, whose charge was to transform the ideas contained in *Our Creative Diversity* into policy and practice. The Stockholm conference pretty much touched on all the areas in which cultural rights continue to be discussed today: cultural diversity, world heritage, tangible heritage, intangible heritage, normative action, intercultural dialogue, cultural industries, arts and creativity, copyright, museums, and cultural tourism. The interconnection among these issues is evident. The sustainability of a broader conception of development depends on nurturing a diversity of cultures, many of which have elaborated intangible forms such as music, dance, oral expressions, craft designs, etc. In turn, these forms may depend on environmental conservation, as in the case of artisans who need certain kinds of wood or plumages. They may also depend on the circulation in markets and museums, thus also providing a livelihood for these artisans, without subordinating the forms to an economic imperative. The question of sustainability, moreover, has be carefully

balanced when these forms of expression are inserted in cultural tourism markets, where they are often separated from their traditional contexts and staged for the consumption of exoticist desires.

In this regard, the insights of cultural activists like Eduard Delgado are key in understanding the connection between cultural rights and other areas of social life, like security. Delgado, a major animator and participant at the Stockholm conference, developed the idea of cultural security as a right precisely as a means to negotiate the subordination of people and their expression to exoticist desires. For him, a secure society is one in which all citizens not only have the right to information but also to be heard. That is, security inheres where there is a public sphere open to a diversity of languages and expressive modalities. Moreover, a secure society is one in which no one uses the cultural space of an individual, group or community without permission for the purposes of advertising or business or tourism. A secure society implies a public sphere permeable to all, one which includes everyone's heritage. Only thus can quality of life be ensured for all (Delgado, D.).

Creativity, Copyright, and the Right to Culture

Delgado's insights are also relevant to development policies that put economic development ahead of sociocultural well-being. This is the case of the culture-based urban development. There are two types. On the one hand, lavish investment in cultural infrastructure (revitalization of heritage sites, particularly in historic city centers, and construction of high-profile museums) and community-based development of creative resources to deal with exclusion, marginalization, and lack of opportunities. Examples of the former are the "starchitect" designed buildings that consume hundreds of millions of dollars and that in many if not most cases require securitization of the neighborhood resulting in the exclusion of poorer social sectors, often those who lived in such areas before they were gentrified. New York, Miami, Rio de Janeiro, Salvador da Bahia, Buenos Aires, and other cities throughout the Americas have all expelled the poor and migrants from areas designated for redevelopment.

Since the late 1990s culture-based urban development has been given a makeover in the creative cities trend, which seeks to develop the creative potential of citizens and turn significant profits by promoting the creative industries: in addition to the traditional culture industries (publishing, recording, film, radio, and others) they include architecture, design, publicity, television, that is, all those industries that profit from the sale or licensing of copyright. The problem with this model is that it has generally emerged and been promoted from an exclusively market-oriented perspective. The creative class described by Richard Florida (*The Rise of the*

Creative Class [2002]) may be interested in diversity, but it is limited to consumption of that diversity (as in cuisine, clothing design, and music) and is segregated by the high price of housing from the classes that provide that "diversity" (the ones who cook, clean, and entertain). In *The Flight of the Creative Class* (2005), Florida acknowledged that neo-liberal policies, increased inequality, and anti-immigrant attitudes are some of the reasons why American cities are in decline. The same could be said, with a few exceptions, for cities around the world. Moreover, Florida has also acknowledged that his earlier focus on a highly-skilled creative class is ultimately limited, especially in providing solutions for today's divided cities. Low-skilled workers also add value and help propel the economy (Florida, *The Flight* 266); hence, investment in the creative infrastructure must be conceived broadly, with "massive increases in spending—from both the private and public sectors—in the arts, culture, and all forms of innovation and creativity" (250).

The right to the city and to public space is a cultural right, as argued by Delgado. This is the right promoted by low-budget culture-based urban development, designed to benefit local residents. In Rio de Janeiro, local networks and cultural groups are seeking to transform the city neighborhood by neighborhood, harnessing the creativity of local residents as well as professionals and celebrities who participate in their networks. They make use of policies oriented to empowering disadvantaged groups that can make use of their cultural resources to buttress self esteem as well as to project themselves publicly, along the lines promoted by Delgado.

Cultural rights instruments today emphasize access to cultural goods and services as well as the dissemination of one's own cultural production, which is a version of Delgado's principle of the right to be heard. This is the right that is most threatened by the intellectual property regime promoted by the developed countries, which is also included in all cultural rights instruments, thus providing the occasion for contradictory policies. The right to knowledge, for example, is seriously threatened when photocopying of copyrighted books is proscribed, for in all Latin American contexts, students cannot afford to purchase expensive books, especially those published in the U.S. or Europe, and often even in their own countries. The right to knowledge in the context of the information and knowledge society is akin to the right to pharmaceuticals, for they both sustain human life: one in the labor sphere and the other in the biological sphere. Why has the intellectual property regime been fortified along with other cultural rights?

The answer lies in the role that intellectual property plays in international trade. It is precisely in the 1980s and 1990s, during the Uruguay Round of the GATT that the U.S. and other developed powers sought to treat culture as any other tradeable commodity within the purview of trade in services. The French and the Canadians argued that cultural goods and services were more than mere commodities; they carry

perspectives and values of diverse communities, who need to have a place in public spheres that should not be monopolized by for-profit distribution and exhibition systems. Moreover, the U.S. and Britain moved quickly at this time to support and defend their "creative industries," which extend the principle of creative development beyond the traditional arts and culture industries like music recording, book publishing, and television programming. According to Argentine filmmaker and cultural policy advisor Octavio Getino, the culture industries constitute the centerpiece of the convergence of the cultural sector in the creative industries. This is because they were the first to bring together the creation of cultural texts (narratives, sounds and images) with authors' rights, which together with other forms of intellectual property law comprise the foundation of economic growth in the cultural sector. The Creative Industries, as defined by the Creative Industries Task Force of the U.K., created in 1997, are "[t]hose industries that have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property" (CITF). In addition to the high arts, the performing arts, heritage and crafts, they include the culture industries (publishing, TV, film, radio, music recording, etc.) and textile design, architecture, photography, fashion, advertising and leisure software (videogames, etc.). Moreover, the Task Force's document explains, "the cultural heritage, tourism and museum industries are identified as being closely related to the creative industries; particularly in the provision of services which often fall within the definition of creative industries." The premise in developing the creative industries is that they provide returns that further strengthen the sector as well as other linked sectors by encouraging creation and invention.

A major problem is that those industries located in cities and countries that give them a competitive advantage virtually banish all other content from the airwaves, theaters, and bookstores. New reproduction technologies and the Internet, of course, provide potential outlets for those who do not enjoy such comparative advantages. But that is precisely why major creative corporations have sought to police intellectual property rights throughout the world, with uneven results. The fact is that the majority of world residents to do not accept this property regime, not only for ethical reasons, but also because it is outmoded and inconvenient.

The Convention for the Protection and Promotion of the Diversity of Cultural Expressions was devised precisely to deal with these problems. It was conceptualized as a counter-WTO Convention, which would neutralize the WTO's monopolization of laws relating to cultural production and dissemination. In 1994, the WTO was created to further liberalize the GATT (General Agreement on Tariffs and Trade), GATS (the General Agreement on Trade in Services), and TRIPS (Trade-related Aspects of Intellectual Property Rights). Without going into detail, it can be said that the WTO made it easier for transnational corporations to dominate trade via the

diplomatic services of their home governments' representatives. Gone were the concessions that the GATT gave to non-governmental and not-for-profit organizations in matters of environmental protection and other public interest. Transnational corporations would now be regarded as local firms in their host countries, and Third World agriculture production was further opened up to foreign ownership (Lang and Hines 48–50; Dobson 573–76).

Under this system, subsidy for a country's local cultural production would be considered a transgression of trade. France and Canada were able to negotiate a cultural exception that would permit nations to subsidize and protect cultural products and services through screen quotas and the like. But the exception was approved for only ten years when, presumably, cultural goods and services would be fully liberalized, unless a new mechanism was devised to protect them. Hence the Convention on Cultural Diversity, which although legislated through UNESCO is meant to be a legally binding Convention that will shield culture from the free-trade rules of the WTO. Nevertheless, fearing for the profitability of its audiovisual, new media and other creative industries, the U.S. rejoined UNESCO—after having withdrawn, together with the UK, in the Reagan-Thatcher years, charging the organization with undo communist and Third World influence—, lobbied to water down the protection of culture and then voted against the Convention. Under U.S. insistence, the following provision was included in Article 20: "Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties." This statement, of course, weakens the Convention in its use for countering the treaties made under the WTO. Now it will take legal acrobatics to defend local sovereignties.

On October 20, 2006, representatives of 154 nations voted on the UNESCO-sponsored Convention. 148 voted in favor of the Convention; predictably, the U.S. and Israel voted against it; 4 countries abstained, among them Nicaragua and Honduras. All other Latin America and Caribbean nations adopted the Convention. To date, 95 countries have ratified it; 30 were needed for it to go into effect, a number which it surpassed when it went into effect in March, 2007. The ratifications are proceeding at a reasonably brisk pace; they will have to come close 150 for the Convention to have full force.

Embracing the premise that cultural goods cannot be treated as mere commodities, the Convention grants nations the sovereign right to protect and promote the diversity of cultural expressions within their territory against the sweeping tide of globalization (Articles 5 and 6). It recognizes, moreover, that special situations may arise where cultural expressions (movies, music, magazines and other cultural industries) in a State's territory are at risk of extinction, are under serious threat, or are otherwise in need of urgent safeguarding. In such cases, State parties may take "all appropriate

measures" to protect and preserve cultural expressions in a manner consistent with the provisions of the Convention (Article 8).

Of course, the Convention does not in itself solve all the problems of support for and trade in culture. It is a framework within which nations can seek the appropriate measures "to create, produce, disseminate, distribute and have access to their own cultural expressions" (ξ7), without subordinating intra-national local cultures to the national scope. Moreover, it clearly advocates "paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples" and obliges signatories to ensure that all citizens "have access to diverse cultural expressions from within their territory as well as from other countries of the world," giving preferential treatment to developing countries (ξ16). In this way, it seeks to compensate for, if not eliminate the virtual monopoly that the large conglomerates of the developed countries have in film distribution and which large Latin American countries like Mexico and Brazil have in television distribution. The biggest difference with respect to the protectionist policies of the GATT era is that the principle of cultural diversity promoted by the Convention is conceived as a global ecology based on public service (ξ6.2.h), and affirmative action for developing countries, minorities, indigenous peoples within nations (ξ2 & ξ7). The Convention also promotes extending public action through public-private partnerships (ξ12 & ξ14), advocates special support for micro, small and medium media and other cultural enterprises (MSMEC) (ξ14), which are, as developed below, the *sine qua non* of diversity. The Convention includes the promotion of support for informal enterprises (ξ6), which in the developing world comprise the majority of production and dissemination of cultural goods and services.[6]

The Convention recognizes the aesthetic, spiritual, social, historical, symbolic, and identitarian values that cultural goods and services have, above and beyond their economic value. These values are of importance to all citizens, and hence have a public relevance. Yet there is a schizophrenia in the treatment of cultural goods and services. On the one hand, they are considered important for a range of benefits, from civilizing humanity to enabling collective identities to facilitating the learning process; on the other, since the rise of mechanical reproduction, culture has become a big business and corporations have found the means to acquire copyright from creators and to dominate distribution, thus creating something akin to a very expensive toll collection (the current price of CDs and DVDs) or market failure (leaving an enormous amount of cultural production out of the distribution system because it is not profitable on the current model of the bestseller and blockbuster). Culture has many characteristics of a public good or service, which would require governments to regulate its distribution, as it does for water, electricity or air quality. Yet governments'

modes of ensuring that right are antiquated. On the one hand, they still subsidize elite culture (e.g., opera houses) while making limited funds available for community culture. And in most cases, they leave the culture industries completely within a free market system, regulating at best questions of morality, although the prevalence of reality shows nowadays renders that regulation ineffective. In most countries, free-to-air television is a public good, but private cable systems seriously endanger that public good.

There are many other questions to raise with regard to culture as a public good or service, but in connection with human rights, what is crucial is that all groups get the opportunity not only to buy a ticket or turn on a channel, but to take part in the decision-making regarding which cultural goods and services are made available. Currently, with the exception of feeble public media systems, those decisions are made by the corporations that control the market. The prevailing logic is that consumers will decide what they want to see or hear by their purchasing tickets and CDs or turning on radios and TVs, and accessing websites. Ratings companies measure the "will of the people." However, the majority of cultural production never makes it anywhere near to a producer's office, for only certain kinds of expression are appropriate for this kind of market. This is the case of local community festivals vis-à-vis high budget film, TV programs and recorded music. But even professional work does not make it to or through the producer's office. This is the case, in the U.S., with English-language or bilingual Latino television. Despite the interest on the part of numerous Latino production companies and a huge market, a larger one than for Spanish TV, they do not fit the profile of profitability. Or they are not understood, as most Latino media makers complain (Yúdice, *Culturas emergentes* 50). The point is that they cannot disseminate the views and values of this group, nor use that expression to legitimize the pursuit of their social and political interests. The case is similar with many groups, and not only indigenous, Afrodescendant, and minority groups throughout Latin America.

There is a connection between the heritage that is recognized nationally and the ability to make claims on the basis of that heritage. As already mentioned above, micro, small and medium enterprises are the life blood of cultural production. According to cultural economist Ernesto Piedras, MSMECs constitute 95% of all cultural enterprises in Mexico, and the figure is similar in other Latin American countries.[7] The vast majority of production by MSMECs never sees the light of day on TV or in movie houses, or in national beaux arts proscenia (what Latin American country does not have a national or municipal theater in the style of the Teatro Colón in Buenos Aires, Teatro Solís in Montevideo, Teatro Municipal in Rio de Janeiro, Teatro Nacional in san José, etc.?). All of the distribution venues are associated with connotations of value, prestige, popularity, etc., which provide social leverage. Yet while much of the cultural production of

MSMECs does have a substantial audience and participation, they do not enjoy this leverage. This is a clear case of negative discrimination, of which most people are not even aware, taking what they hear and see on the airwaves or presence in beaux art theaters to be "naturally" what is to be valued.

Cultura paralela

In some contexts, governments have provided support for cultural initiatives protected by alternative to the copyright regime. Some of these initiatives operate in the informal sphere, like funk music in Rio's favelas, *tecnobrega* in Belem do Pará, *champeta* in Cartagena de Indias, *cumbia villera* in Buenos Aires, and so on. What makes them interesting, aside from their repudiation of mainstream norms, is their defiance of copyright laws and their adoption of what anthropologist and TV and Internet producer Hermano Vianna has called "música paralela."

In his travels over 80,000 kilometers and 82 cities in Brazil to document the musical diversity of the country, Vianna came across tecnobrega in the northern city of Belem do Pará, a techno form of brega music. Brega in Portuguese means corny and the label was used to refer to the sentimental pop music of Roberto Carlos and his followers. Vianna found that over 3000 parties and 849 concerts were held each month, that the music had a thriving business without the participation of major recording studios and without using copyright to protect the CDs. In fact, musicians used local pirates to distribute their music because that is where most people get their music. But even more important is the fact that most of the money to be made from music was in the concerts and not in the sales of CDs. Recordings were part of a social commons, to which people felt committed. That is, virtually no one believed in music as a form of property. It was either a community service, for which someone could be paid, or it was simply part of what everyone shared, the commons.

Vianna was inspired by this model of music production and dissemination to invent a new format, the Internet portal in which people throughout the country could upload their music, or their literature, art, film and video, in networks around which specific publics were created. Overmundo was patterned after YouTube and Orkut, but as a national portal that would enable the vast diversity of cultural production to be exchanged and commented on. In other words, each different form generated its own counterpublics that revolved around aesthetically or socially critical discourses. They also challenged any notion of expert gatekeeping. The critics are the participants in the networks. And finally, users became authors; it is mostly user-generated content that one finds in Overmundo.

From a juridical point of view, it is important to understand that these counterpublics were experienced as outside the intellectual property regime. Instead of copyright, participants used Creative Commons licenses to protect their work from becoming a source of profit for businesses that had nothing to do with the network. As Ronaldo Lemos, Vianna's associate in Overmundo and director of Creative Commons Brazil observed, música paralela blurred the boundary between the legal and the illegal. Much of the music created drew on sequences from other recordings, but there was no sense that the pieces borrowed, as in any intertextual composition, required holding to an intellectual property regime. The genius is not in the small sampled sequences but in the way of putting them together. And that genius should not be copyrighted.

Brazil is probably the country in which the intellectual property law has become a matter of activism. In part, the issue stems from Fernando Henrique Cardoso's government's refusal to honor copyright law in the production of generic versions of patented AIDS drugs. I won't go into the details of the case, but suffice it to say that the Swiss transnational pharmaceutical company, Roche, reduced the price of the drug even below the cost of producing the generic version in order to salvage the intellectual property regime. But the case mobilized many people, not only in relation to health issues but to copyright issues as well, relating to access to information (such as the photocopying of textbooks) and the reproduction of CDs and DVDs. This resistance to the intellectual property regime even became a quasi-governmental policy in certain ministries, such as the Ministry of Education and the Ministry of Culture, under Gilberto Gil, who tried to put his own music online for free download, only to be sued by his record company.

Not many countries have generated public debate on these issues. In Spain, nearly two million people have signed petitions to do away with the canon, which is a tax on blank media to compensate for revenues presumably lost due to peer to peer file sharing. In Sweden, a political party was created, the Anti-Copyright Party, and ran in national elections. In Brazil, the most important site for discussion of these issues is Cultura e Mercado, the online forum of a set of local NGOs and think-tanks dedicated to promoting the possibility of exercising creativity without barriers. To this end Cultura e Mercado monitors government laws and policies and critique of the any action on the part of government, business or institutions to limit the access to culture, digital, or analogical.

Conclusion

This essay has moved from conventional to expanded notions of culture and rights. Not only is culture limited to the arts or even to the anthropological notion whereby communities reproduce themselves symbolically, it has become a widespread practice of affirmation of creativity, especially as consumers engage in productive practices through new technologies. In this context, the notion of right has also changed. People's notion of the right to communicate and to disseminate texts and images now trumps the concept and policing of intellectual property rights in the case of an emerging cohort of activists. It is in this spirit that anti-copyright futurists have coined the idea of "music like water," to characterize the free flow of culture (Kusek and Leonhard). Actually, it is not free in the sense of not paying at all. One interesting proposal is for the State to regulate the flow of digital culture as it would any other utility, say water or electricity. The proceeds from the minimal fees to use the information highway to download culture would be distributed to rights holders, most likely the creators themselves, rather than the entertainment conglomerates that have controlled the flow of culture. Culture, in this sense, is returned to the idea of a commons.

A cultural right then is also a right to a heritage commons. This is also the idea of the World Digital Library, which "will make available on the Internet, free of charge and in multilingual format, significant primary materials from cultures around the world, including manuscripts, maps, rare books, musical scores, recordings, films, prints, photographs, architectural drawings, and other significant cultural materials. The objectives of the World Digital Library are to promote international and inter-cultural understanding and awareness, provide resources to educators, expand non-English and non-Western content on the Internet, and to contribute to scholarly research" (World Digital Library).

While this arrangement will not necessarily ensure that everyone is heard, along the lines proposed by Delgado, it will eliminate the gatekeepers that favor market-oriented contents, that is, those which are promoted by publicity because they presumably reach the greatest number of consumers. The goals of the Convention for the Protection and Promotion of the Diversity of Cultural Expressions will be furthered by the availability of these myriad contents, enabling everyone and anyone to make use of this commons. Communities can easily project themselves among themselves, but will have to devise platforms and strategies if they desire to be heard and seen by others. These platforms, like Overmundo, can be developed to offer the maximum exposure to those who want it. Those who want to hear their neighbors will be able to make good on that desire as a right, unlike the current situation whereby virtually no Costa Rican music is played on the airwaves even though they belong to the people and are licensed to radio stations. The Association of Musical Composers and Authors (ACAM) of Costa Rica monitors all music played and distributes royalties to collection societies. Ninety-five percent of these royalties go to ASCAP (USA), SACM

(Mexico) and SGAE (Spain). Only five percent of music played on Costa Rican radios is by Costa Rican musicians. The situation is even worse on television.

The Convention for the Protection and Promotion of the Diversity of Cultural Expressions also seeks to ensure that national venues do not monopolize dissemination as they still do. The Convention promotes both the access by local communities of all sizes to national and international public spheres, and also seeks to guarantee that local communities have access to cultural content produced anywhere in the world. This doubly oriented access is key, not only for visibility and knowledge, but also for intercultural relations. As stated above, the Convention is only a framework for negotiating and ensuring cultural rights. The hard work of struggling for these rights is taking place in myriad situations, many more than I have the space to analyze here. The point is that as cultural rights instruments gain a greater foothold in juridical regimes and are accepted socially, the myriad struggles for these rights has greater legitimacy.

While cultural diversity and cultural rights do not provide solutions for all problems, they do expand the options for legislating measures to bolster them. And for those worried about the "cultural defense" for atrocities, cultural rights instruments eschew formulations that allow for violations of any human rights.

Notes

1. "The word in language is half someone else's. It becomes "one's own" only when the speaker populates it with his own intention, his own accent, when he appropriates the word, adapting it to his own semantic and expressive intention" (Bakhtin 293).
2. What is unusual is the reverse: the transformation of Western law through incorporation of customary law. Even in New Zealand, where some strides have been made in laws regarding water and land resources, the family, and minor criminal offenses involving Maori persons, the ***form*** of law continues to be the one bequeathed by colonization (Dawson 58).
3. When Jack Lang became Minister of Culture in 1981, he applied a broader conception of culture—sensitive to regional social ecologies and to the mass media and entertainment industries—rooted in people's lifestyles. (See Miller and Yúdice).
4. www.unhchr.ch/html/menu3/b/a_cescr.htm.
5. www.unhchr.ch/html/menu3/b/a_ccpr.htm.
6. Piedras uses the term "enterprises" rather than companies or corporation in order to include economic entities such as informal producers and distributors that are usually left out of economic calculations. Indeed, Piedras' study supports the call to create enabling policies for the informal sector.
7. See note 6 above.

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