

The culture problematic in EU law

by Paul Kearns



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The author considers the advent of cultural concerns in EU law in the light of the lack of an explicit EU cultural policy, and the problems that have subsequently arisen from the haphazard development of EU cultural law as a new legal category.

It is unsurprising that culture did not arise as a primary concern when EU law was in its infancy since the EEC's eponymous concerns were purely economic. However, with the development of the EC, then EU, incorporating not just economic objectives as the remit, culture emerged as a growing new area of European interest, notably post-Maastricht. Allied, more substantive initiatives were the foundation of EU citizenship and the increased EU development of human rights, both of which areas had legal precedents for the EU to follow within or outside the EU.

Cultural protection did not fit easily within the ambit of either of these related concerns and there was a conceptual difficulty as to in what established legal zone culture could be regulated. This need to fit culture under another umbrella was because there was originally no legal autonomy granted to cultural provisions in EU law. As a result, cultural aid, for example, thrived as a matter of state aid, whereas cultural rights were very slow in developing in the EU context because there was no comparable established route for their regulation even though certain human rights were protected as a matter of EU law. This fracturing of the cultural area was to be remedied at Maastricht, and current Cultural Title XII, originally conceived at Maastricht, promised a more pronounced independent role for culture within EU competence. The principal dramatic development was the coming into force of what is now Article 151, which is set out as follows:

'Article 151 (1) EC. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.'

2. *Action by the Community shall be aimed at encouraging co-operation between Member States and, if necessary, supporting and supplementing their action in the following areas:*
 - *improvement of the knowledge and dissemination of the culture and history of the European peoples;*
 - *conservation and safeguarding of cultural heritage of European significance;*
 - *non-commercial cultural exchanges;*
 - *artistic and literary creation, including the audiovisual sector.*
3. *The Community and the Member States shall foster co-operation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.*
4. *The Community shall take cultural aspects into account in its action under other provisions of this Treaty. [In particular in order to respect and to promote the diversities of its cultures.]*
5. *In order to contribute to the achievement of the objectives referred to in this Article, the Council:*
 - *acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251;*
 - *acting unanimously on a proposal from the Commission, shall adopt recommendations.'*

OBSERVATIONS ON ARTICLE 151

There is a lot to observe about these provisions. In Article 151(1) there is the practical appeal to note that within the EU there are both common and individual cultural phenomena in the Member States. The homogeneity proposed is not a bland EU conformism but, rather, a complex holistic picture that has EU membership as a parameter. Article 151(2) indicates Community action in respect of the nature of cultural activities that are to be developed between Member States when they interact; the Article also anticipates Community action beyond these objectives but the specific character of such extra action seems to be restricted to the activities already given in the Article paragraph. Article 151(3) is an outward-looking provision that urges co-operation between the Community and Member States, presumably disjunctively and conjunctively, and third countries and apposite international entities. The Council of Europe is given special mention as one such body. This is not surprising because the Council of Europe is immersed in cultural concerns and is informally a sister supra national European organisation.

Article 151(4) is difficult to interpret. It foresees the Community taking cultural issues into account when acting under other provisions of its treaty law, with the additional stress that such measures must respect and promote the whole range of its cultures. The subsidiarity principle, by which decisions are to be taken at a national local level, will be highly significant in this context. Article 151(5) is a principally procedural provision that involves in part consultation with the Committee of the Regions to achieve the substantive aim of incentive measures. Taken together, Articles 151(4) and 151(5) promote much cultural action at a domestic level in keeping with the subsidiarity principle and the nature of the work of the Committee of the Regions, which too has local issues as its primary concern. This dissolves irrational fears that the EU's programme of cultural law has EU undifferentiated cultural homogeneity as its objective.

CASE LAW

Whether Article 151 embodies a EU policy is a highly controversial subject as some maintain that a policy must be explicit not inferred. What is more, from case law, it is national policy that is more prominent in relation to culture, as a permitted vehicle for derogation from the EU principle of free movement. In *Cinetheque v Federation National Des Cinemas Francais* [1985] ECR 2605 it was said that cultural aims may justify certain restrictions on the free movement of goods provided that those restrictions apply to national and imported products without distinction, that they are appropriate to the cultural aim which is being pursued and that they constitute the means of achieving them which affects intra-Community trade the least. From this case, it is evident that the protection

of at least motion visual art can be added to the *Cassis De Dijon* [1979] ECR 649 list of mandatory requirements which facilitate legitimate derogations from the free movement of goods principle.

Similarly, in *Groener v Minister For Education* [1989] ECR 3967, in the context this time of the free movement of persons, it was adjudged that the EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State that is both the national language and the first official language. The court said, however, that discrimination against nationals of other Member States in the course of the free movement of workers was prohibited, and that any disproportionate measure to the object pursued was unacceptable. In the context of the related area of free movement of services, it was pronounced that a national cultural policy might constitute an overriding requirement relating to the general interest, which justifies a restriction on the freedom to provide services. It was also held in this case that restrictions might be imposed in order to protect consumers against excessive advertising or, as an objective of cultural policy, in order to maintain a level of programme quality.

Again in the context of the provision of services, the European Court has held, in *Commission v Italy* [1991] ECR I-709, that the general interest in consumer protection and in the conservation of the national historic and artistic heritage can constitute an overriding reason justifying a restriction on the freedom to provide services. Variations on this approach emerged in two subsequent cases: first, in *Commission v France* [1991] ECR I-659, where it was said, somewhat differently, that the general interest in the proper appreciation of places and things of 'historical interest' and the widest possible dissemination of knowledge of the artistic cultural heritage can also underpin an overriding reason justifying a restriction on the freedom to provide services; and, second, in *Commission v Greece* [1991] ECR I-727, where it was considered in broadly similar terms to those adopted in *Commission v Italy*, above, and *Commission v France*, above, and perhaps conflating the two, that the general interest in the proper appreciation of the artistic and archaeological cultural heritage of a country and in consumer protection can comprise an overriding reason justifying a restriction on the freedom to provide services.

From this stream of related case law, we discern a narrow focus on national cultural policy without an accompanying explicit reference to EU cultural policy, if one indeed exists. There is no obvious relation between Article 151 and any such policy. We are left, therefore, with a somewhat disjointed picture of EU cultural regulation. Only the EU Commission has addressed cultural policy directly, and that body treats it as a mediator for integration rather than on its own terms. This is perhaps explained by the proposition that the inclusion of culture in the Treaty on European Union was

at the relevant time generally agreed to have been an implicit part of a more general strategy to more closely involve the citizens of Europe in the process of European integration.

SCOPE OF CULTURAL INITIATIVE

The scope of a specific cultural initiative in EU law can therefore be seen as very narrow. The text of Article 151, set out above, confines the competence in the audio-visual realm to artistic and literary creations, *including* in the audio-visual sector, rather than opening the whole of the audio-visual sector to Community intervention. Additionally, the Article's provision that the Council shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, indicates the lack of availability of what can be termed hard law. This arguably results in the European Union being essentially confined to the establishment of financial incentives in the area of culture.

A further potentially limiting factor is that Council decisions in the cultural area are to be taken unanimously as opposed to by qualified majority voting. Another inhibiting factor is that although cultural rights have gained importance within public international law in particular, they have not acquired the same status in European Union legal vocabulary and instruments, perhaps because they are normally viewed as group rights rather than individual rights; this is the case despite being cultural issues which fall within Community competence. Such difficulties for cultural development in the European Union are clearly problematic but they can,

nevertheless, be cast in relief by the following observations. Until Maastricht, there was clearly no policy for culture but, even within the strictly economic competences of the Community, matters of cultural concern periodically surfaced. This was most apparent when the derogation to the free movement of goods for the protection of national treasures possessing artistic, historic or archaeological value was spasmodically invoked. Regulation 3911/92 on the export of cultural goods and Directive 93/7 on the return of cultural goods and objects exported illegally, though running in the opposite direction to the treasures derogation, also pointed up culture as a Community concern. In addition, it was introduced into the EC Treaty by the Treaty of European Union that state and to promote culture and heritage conservation may be compatible with the common market as long as the aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

Such irregular positive cultural developments in EU law form a placebo for the more general tortuous culture problematic that has accrued within it. European Union organs must combine to tackle culture in a less incidental way and address its growing importance as an autonomous concern within EU competence in accordance with the independent, if rather incomplete, profile of Article 151. 

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