

CULTURE AND LAW

CULTURE ET DROIT

Ius Comparatum – Global Studies in Comparative Law

Founding Editors

Jürgen Basedow, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany

George A. Bermann, Columbia University, New York, USA

Former Series Editors

Katharina Boele-Woelki, Bucerius Law School, Hamburg, Germany

Diego P. Fernández Arroyo, Institut d'Études Politiques de Paris (Sciences Po), Paris, France

Series Editors

Giuditta Cordero-Moss, University of Oslo, Oslo, Norway

Gary Bell, National University of Singapore, Singapore

Series Assistant Editor

Alexandre Senegacnik, IACL, Paris, France

Editorial Board Members

Ewa Baginska, Gdansk University, Gdansk, Poland

Vivian Curran, University of Pittsburgh, Pittsburgh, PA, USA

Nicolás Etcheverry, Universidad de Montevideo, Montevideo, Uruguay

Makane Moïse Mbengue, Université de Genève, Geneva, Switzerland

Marilda Rosado de S. Ribeiro, Universidade do Estado do Rio de Janeiro, Rio de Janeiro, Brazil

Marilyne Sadowsky, Université Paris 1 Panthéon-Sorbonne, Paris, France

Dan Wei, University of Macau, Macau, China

CULTURE AND LAW

An Inescapable Encounter

CULTURE ET DROIT

Un rendez-vous incontournable

Edited by

Jorge SÁNCHEZ CORDERO



INTERSENTIA

Cambridge – Antwerp – Chicago

Intersentia Ltd
8 Wellington Mews
Wellington Street | Cambridge
CB1 1HW | United Kingdom
Tel: +44 1223 736 170
Email: contact@larcier-intersentia.com
www.larcier-intersentia.com

*Distribution for the UK and
Rest of the World (incl. Eastern Europe)*
NBN International
1 Deltic Avenue, Rooksley
Milton Keynes MK13 8LD
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe
Lefebvre Sarut Belgium NV
Hoogstraat 139/6
1000 Brussels
Belgium
Tel: +32 (0)2 548 07 13
Email: contact@larcier-intersentia.com

Distribution for the USA and Canada
Independent Publishers Group
Order Department
814 North Franklin Street
Chicago, IL 60610
USA
Tel: +1 800 888 4741 (toll free) | Fax: +1 312 337 5985
Email: orders@ipgbook.com

Culture and Law. An Inescapable Encounter
© The editor and contributors severally 2023

The editor and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Artwork on cover: Art 4 Homes / Alamy Stock Photo

ISBN 978-1-83970-326-3

ISSN 2214-6881

D/2023/7849/9

NUR 820

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

CONTENTS

<i>About the Authors</i>	vii
PART I. INTRODUCTION TO THE CONFERENCE	
Highlights of the Culture and Law Conference in Mexico	
Katharina BOELE-WOELKI	3
Le rendez-vous entre la culture et le droit au Mexique	
Diego P. FERNÁNDEZ ARROYO	7
Forum Culture et Droit : une rencontre inévitable	
Luis Antonio MONTES DE OCA MAYAGOITIA	11
PART II. DISCUSSIONS ON THE RELATIONSHIP BETWEEN CULTURE AND LAW	
Culture and Family Law	
Katharina BOELE-WOELKI	15
Droit d'auteur et savoirs traditionnels : une impossible réconciliation ?	
Marie CORNU	19
Savoirs traditionnels et protection de la nature : interaction avec le droit de l'environnement	
Jérôme FROMAGEAU	37
Le fantasme de la censure : arts visuels, littérature et musique	
Javier GARCÍA FERNÁNDEZ	45
The Public and the Private in Art Collections: Access by the General Public, Cultural Exchange, and Heritage Protection	
Andrzej JAKUBOWSKI	73
Food as Culture: Framing, Legal Harmonization, and Transnational Law as a Regulatory Gateway	
Lucas LIXINSKI	89

Relations between Law and Culture	
Ricardo LORENZETTI	119
La culture en droit international public : une approche systémique	
Makane MoïSE MBENGUE	135
The Two Faces of Collectors, Reconciled by Common Sense	
James A.R. NAFZIGER.....	171
Changement climatique et culture	
Diego PRIETO HERNÁNDEZ	179
Nature and Culture: The Scaffolding of Latin American Heritage	
Jorge SÁNCHEZ CORDERO	183
Aesthetic(s) of the Law: Room for Comparisons?	
Alexandre SENEGACNIK	233
Culture and Human Rights in Times of Crisis	
Ana Filipa VRDOLJAK	257
<i>Index</i>	269

ABOUT THE AUTHORS

Katharina Boele-Woelki is President of Bucerius Law School in Hamburg, Germany, where she also serves as the Claussen Simon Foundation Professor of Comparative Law. Until September 2015, she was Professor of Private International Law, Comparative Law and Family Law at Utrecht University, the Netherlands. She was President of the International Academy of Comparative Law (2014–2022) She is a member of the Curatorium of The Hague Academy for International Law and was awarded honorary doctorates from Uppsala University, the University of Lausanne, the University of Antwerp, and the University of Pretoria, as well as the Anneliese Maier-Forschungspreis from the Alexander von Humboldt Foundation. She is an elected member of the Akademie der Wissenschaften in Hamburg.

Marie Cornu est directrice de recherches au CNRS (ISP, Institut des Sciences sociales du politique, UMR 7220, ENS Paris Saclay, Université Paris Nanterre). Ses thématiques portent sur le droit de la culture et du patrimoine, sur les rapports entre langue et droit et sur l'évolution des figures de la propriété. Elle a publié *Droit, œuvres d'art et musée* avec Nathalie Mallet-Poujol (CNRS ed., 2006), *Dictionnaire de droit comparé du patrimoine culturel* avec Jérôme Fromageau et Catherine Wallaert (CNRS, 2012), *Dictionnaire des biens communs* avec Fabienne Orsi et Judith Rochfeld (PUF, 2e édition, 2021) ; et avec Noé Wagener, « Ni droits culturels, ni droits à la culture, la brèche ouverte par la Déclaration des droits de la culture de 1987 » dans *Faire Cité : du partage des chefs-d'œuvre à la garantie des droits culturels, ruptures et continuité dans la politique culturelle française* (Comité d'histoire du ministère de la Culture, 2020).

Jérôme Fromageau est Doyen honoraire de la Faculté Jean Monnet de l'Université Paris Sud, professeur à l'Ecole du Louvre, chercheur associé de l'Institut des Sciences du Politique de l'Ecole Normale Supérieure de l'Université Paris Saclay, conseiller pour la culture de la Commission Nationale Française de l'UNESCO (CNFU), Président de la Société Française pour le Droit de l'Environnement (SFDE) et Président de la Société Internationale pour la Recherche en Droit du Patrimoine Culturel (ISCHAL).

Javier García Fernández est Professeur émérite de droit constitutionnel à l'Université Complutense de Madrid. Dans l'administration espagnole, il a occupé, entre autres, les postes suivants : Secrétaire général de la Culture, Sous-secrétaire de la Culture et des Sports, Directeur général du recrutement et de

l'éducation militaire, Secrétaire général technique des Ministères du logement, de la Présidence et des relations avec les tribunaux et du Secrétariat du Gouvernement, Membre du Conseil d'administration du Patrimoine national, et Membre des Conseils d'administration du Musée national du Prado, du Musée national Tyssen-Bornesmiza, du Musée national Reina Sofia, du Musée national d'Arte de Catalogne, du Musée d'art contemporain de Barcelone et de la Bibliothèque nationale d'Espagne. Ses principaux livres publiés sont : *L'origine de la municipalité constitutionnelle* (1983) ; *Législation sur le patrimoine historique* (1987) ; *Le gouvernement en action* (1995) ; *Études sur le droit du patrimoine historique* (2008) ; *Vingt-cinq militaires de la République* (coord.) (2011, 2e éd., 2020) ; *Études sur l'histoire du droit public* (2019) ; *Réglementation juridique et action politique du gouvernement en Espagne* (2020) ; et *Nouvelles études sur le droit du patrimoine historique* (2020). Il est fondateur et directeur de l'annuaire *Patrimoine culturel et droit*. Jusqu'en 2018, il a été Vice-président d'*Hispania Nostra*, Association pour la défense et la promotion du patrimoine historique.

Andrzej Jakubowski is a lawyer and art historian, affiliated with the UNESCO Chair in Cultural Property Law at the University of Opole (Poland). He has served as Chair of the ILA Committee on Participation in Global Cultural Heritage Governance. He is also appointed to the pool of mediators and conciliators of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP), and to the Arbitrator Pool of the Court of Arbitration for Art (CAfA). He is the author of numerous publications on diverse intersections between law, heritage and human rights, including *State Succession in Cultural Property* (Oxford University Press, 2015). Currently, he acts as co-editor (with Ana Filipa Vrdoljak and Alessandro Chechi) of *Commentary on the 1970 UNESCO and 1995 UNIDROIT Conventions* (under contract with Oxford University Press).

Lucas Lixinski is Professor at the School of Global and Public Law, Faculty of Law and Justice, UNSW Sydney (Australia). He researches, teaches, and publishes primarily in the areas of cultural heritage law, international human rights law, and comparative public law (the latter normally with a focus on Latin America). He holds a PhD in Law from the European University Institute (Italy), an LLM in Human Rights from Central European University (Hungary), and an LLB from the Federal University of Rio Grande do Sul (Brazil). He sits on the Boards of Editors of the *International Journal of Cultural Property* and the *International Journal of Heritage Studies*, among others. His latest monograph is *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice* (Cambridge University Press, 2021).

Ricardo Luis Lorenzetti is a Justice of the Argentinian Supreme Court, President of the Drafting Civil and Commercial Code Committee now in force,

Member of the UNIDROIT's Governing Council and Professor at the University of Buenos Aires, and has been awarded doctorates honoris causa by numerous national and foreign universities. He is the author of several books on private and environmental law.

Makane Moïse Mbengue est Professeur ordinaire à la Faculté de droit de l'Université de Genève et Directeur du Département de droit international et organisation internationale (INPUB). Il est également Professeur affilié à l'Ecole de droit de Sciences Po Paris. Il exerce comme conseil et arbitre devant différentes juridictions internationales et agit comme consultant pour plusieurs organisations internationales dont notamment l'Union africaine. Il est l'auteur de nombreuses publications en droit international général, en droit international de l'environnement, en droit international économique et en règlement des différends internationaux. Depuis 2017, il est Président de la Société africaine pour le droit international (SADI). En outre, il est Membre du Curatorium de l'Académie de droit international de La Haye et Membre associé de l'Institut de Droit International (IDI).

James A.R. Nafziger holds the Thomas B. Stoele Chair as Professor of Law and Director of International Law Programs at the Willamette University College of Law. He was also a Fulbright lecturer at the National Autonomous University of Mexico and the National and Otgonjenger Universities in Mongolia as well as a visiting faculty member at several universities in the United States. He is Vice Chair of the International Law Association and a member of its Management Committee, having formerly served for many years as rapporteur and chair of the ILA's committee on cultural heritage law and as president of the ILA's American Branch. He is also Secretary of the American Society of International Law. Professor Nafziger's extensive scholarship includes many published articles as well as sole and co-authored or edited books on cultural heritage law as follows: *Handbook on the Law of Cultural Heritage Law and International Trade; Cultural Heritage Law; Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce; The Cultural Heritage of Mankind* for the Hague Academy of International Law; and the seminal *Cultural Law: International, Comparative and Indigenous*. His most recent book (2021) is *Frontiers of Cultural Heritage Law*.

Diego Prieto Hernández est anthropologue social, diplômé de l'ENAH, titulaire d'une maîtrise en sciences anthropologiques de l'UAM-Iztapalapa. Il est actuellement Directeur général de l'INAH depuis janvier 2017 et il a également été son Secrétaire technique, Coordinateur national d'Anthropologie et Directeur du Centre INAH de Querétaro. Il est professeur chercheur à l'INAH et professeur à l'Université Autonome de Querétaro. Il a publié plus d'une centaine d'ouvrages dans des revues spécialisées et des livres, en tant qu'auteur et co-auteur, sur l'ethnographie, les mouvements sociaux, le patrimoine culturel et les politiques

culturelles. Il a été Président du Collège des Ethnologues et des Anthropologues sociaux, A.C. Il a notamment reçu les distinctions suivantes : Prix national INAH Miguel Covarrubias 2012 ; Prix national INAH Manuel Gamio 2010 ; Prix national INAH Fray Bernardino de Sahagún 2010 Prix national INAH Francisco de la Maza 2005 ; et Prix national INAH Miguel Covarrubias 2000.

Jorge Sánchez Cordero is a Member of the American Law Institute and fellow of the European Law Institute. He is a Member of the Governing Council and of the Permanent Committee of the International Institute for the Unification of Private Law (UNIDROIT), and President of its General Assembly (2020–2021). He served three times as Vice President of the Governing Council and was appointed for the fourth time for the period 2023–2024. He is also a Member of the Committee on Participation in Global Cultural Heritage Governance of the International Law Association (ILA) and a Member and former Vice-President of the International Academy of Comparative Law (IACL). He is Vice-President of the Executive Committee of the International Association of Legal Science of UNESCO (IALS). He is a Member of the Board of Directors of the International Cultural Property Society, an Honorary Member of the Royal Spanish Academy of Legislation and Jurisprudence, and Director of the Mexican Center of Uniform Law. He is a scientific member of the Société Internationale pour la Recherche sur le Droit du Patrimoine et le Droit de l'Art (ISCHAL). He was awarded a Silver Medal the Henri Capitant Association, and awarded the rank of chevalier by the French Government under the l'Ordre National du Mérite for his contributions to human cultural heritage, as well as the 2022 Gold Medal awarded by the Mexican Endowment of Arts. He is recognized by the IACL as a distinguished comparatist. He is the author and editor of various books penned and translated in various languages, and of several articles and essays published in Mexican and international reviews. He is also a member of several editorial boards in international reviews.

Alexandre Senegacnik, PhD, is a researcher and lecturer at Sciences Po Law School. He is actively involved in the practice of international arbitration. His research interests include (private and public) international law, comparative law and inter/transnational dispute resolution. He has been a visiting scholar at Columbia Law School, the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Kyoto University, the National University of Singapore, and the Max Planck Institute for International European and Regulatory Procedural Law in Luxembourg. He participates as an observer for ASADIP in the sessions of the Working Group III of the UNCITRAL on reform of Investor-State Dispute Settlement. He is Deputy Secretary-General of the International Academy of Comparative Law.

Ana Filipa Vrdoljak is the UNESCO Chair in International Law and Cultural Heritage and Professor at the Faculty of Law, University of Technology Sydney.

She is the author of *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, 2006, 2nd ed. forthcoming) and editor of the *Oxford Handbook on International Cultural Heritage Law* (Oxford University Press 2020), *The Cultural Dimension of Human Rights* (Oxford University Press, 2013), *International Law for Common Goods: Normative Perspectives in Human Rights, Culture and Nature* (Hart Publishing, 2014), and the *Oxford Commentary on the 1970 UNESCO and 1995 UNIDROIT Conventions* (Oxford University Press, forthcoming). She is a General Editor, with Francesco Francioni, of the *Oxford Commentaries on International Cultural Heritage Law* (Oxford University Press) and the book series *Cultural Heritage Law and Policy* (Oxford University Press). She is President of the International Cultural Property Society (U.S.) and Chair of the Management Committee of the *International Journal of Cultural Property* (Cambridge University Press). She has been the Fernand Braudel Senior Fellow, Marie Curie Fellow and Jean Monnet Fellow at the Law Department, European University Institute, Florence. She holds a Doctor of Philosophy (in Law) from the University of Sydney.

