

## Reshaping identity and memory: balancing competing human rights in the participatory archive

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A peoples' right to preserve their culture is recognised in the United Nations human rights treaty system. Individual and collective cultural identity within government and private archives can be enabled through a participatory approach which acknowledges record subjects as record co-creators. This paper examines the rights of "subjects" of the record to add their own narratives to records held in public archives and other institutions, and to participate as "co-creators" in decision-making about appraisal, access and control thus reshaping the archive from their perspective. It analyses cultural human rights instruments that support a participatory archive; some recent examples of competing rights of forgetting and remembering and their potential impact on cultural identity and memory, and finally proposes ways archivists can adopt the participatory approach.

### Introduction

The memory of societies preserved in national archival institutions reflects the viewpoint of those in power. In Valderhaug's words:

This privileging of public records originates from the assumption that the state and other public bodies are neutral expressions of society and that the records created by such entities will be impartial by-products of administration. But, as Verne Harris notes, "[r]ecords always already express relations of power and invite the exercise of power" (Valderhaug 2011:19 quoting Harris 2007: 241).

The power of state institutions has been modified with a statutory right to know the dealings of government, codified in 20<sup>th</sup> century freedom of information or transparency laws which have provided, albeit with significant exemptions, access to the records of government. Rights to records—public and private—have not always been associated with a right to culture and specifically, a right to culture as a human right; yet a right to *protection* and *promotion* of one's culture is recognised in international human rights instruments and case law. Culture as a living thing is inclusive of cultural heritage. Cultural heritage in international law includes intangible heritage, and therefore includes archives and records in whatever format. Cultural identity is a specific aspect of cultural rights. It has a personal as well as a collective dimension. Individual and collective cultural identity can be enhanced through a participatory approach which acknowledges rights of "subjects" of the record to add their narratives to records held in public and private archival institutions, and to participate as co-creators in decision-making about appraisal, access and control. The participatory model is supported by international and in some cases domestic human rights. The right to cultural identity must be balanced with the right to forget actions that may cause extensive harm or hate to those concerned. Retrospectively reshaping the archive to allow for individuals and groups to have their voices heard either through digital annotations or a virtual community space is of specific benefit to minorities and Indigenous groups as records were often tools of or witnesses to discrimination. Equally, in an online context, a participatory archive has a prospective value in that it captures the identity of those taking part in its formation and can enhance cultural identity.

### Cultural rights as human rights

Cultural rights have been the least explored of human rights (Francioni 2008: 3). Human rights are classed as universal individual rights; cultural rights are the only human rights that are not. Cultural rights in the international human rights discourse have been linked with traditional or customary practices which may in themselves violate human rights such as non-discrimination or uphold violence in the family or towards women. As they empower communities, they are often regarded as

a threat to the nation state (Barth 2008). Cultural rights require an acceptance of cultural pluralism which has been marred by politics.

Unlike other human rights such as civil, political, economic and social rights, which are premised on the fundamental notion of shared humanity and dignity among all members of the human family, cultural rights hinge on the perceived uniqueness of the legacy that binds a group or community to a *shared memory* upon which the powerful sentiment of *belonging and identity* is built (Francioni 2008: 3).

The Australian Law Reform Commission recognised that a human right can attach to a group of people united by, ethnic origin or religion, and that the individuals comprising certain groups may have needs that are peculiar to those groups. These needs may result from a group suffering discrimination or disadvantage, or it may flow from the particular cultural beliefs or requirements of a group (Australian Law Reform Commission 2006: 44). There is no precise definition of a cultural group in the case law of the European Court of Human Rights or the UN Human Rights Council.

### **International human rights instruments and cultural rights**

International human rights instruments are weak in the area of cultural rights. Nonetheless, Indigenous peoples are claiming recognition of their status and role as cultural subjects of international law, and minorities invoke international law to stop discrimination and gain a right to autonomy of language, religion and a way of life (Francioni 2008). Thus there has been an incremental evolution in cultural rights and recognition that diverse cultures are the common heritage of all humanity.

Culture in the international human rights discourse has been defined by its uniqueness, exclusivity, shared memory, language, religion, conventions/mores/traditions, sense of belonging and self-identification. A separate right to cultural identity developed from both cultural rights in general and in collective rights (Donders 2008: 318). Thus the right to cultural identity as a human right has been defined as the right to freedom of cultural identity as an individual and as a collective experience (Donders 2008: 324). No international human rights instrument defines cultural rights but there are legal provisions that relate to cultural rights, from freedom of expression and religion, to cultural products, and to the means of preserving, developing and having access to cultural identity (Donders 2008: 319).

A peoples' right to preserve their culture is recognised in the United Nations human rights treaty system (Barth 2008: 81). For example, the Universal Declaration of Human Rights (UDHR) 1948 Art 18, Art 22 and Art 27 include cultural rights that are re-confirmed in the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 Art 15 and the International Covenant on Civil and Political Rights (ICCPR) 1966 Art 27 (Francioni 2008: 8-9). International human rights law recognises that certain ethnic and cultural groups within a community may have particular needs that require protection. For example, ICCPR recognises the need to protect the cultural, religious and language rights of certain ethnic and cultural groups. Art 27 states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

ICCPR Art 27 was the first provision for the protection of minorities. There is also a negative obligation on states not to undertake actions that destroy or interfere with cultural objects and a positive obligation to protect cultural practices and the group itself (Francioni 2008: 9). While Indigenous human rights were originally submerged in minority rights, their unique elements eventually led to separate human rights instruments. A right to enjoy one's culture carries specific connotations when applied to Indigenous peoples because their status as peoples entails the right to

self-determination. ICESCR specifically refers to culture in Art 15. This Article articulates every person's right to take part in cultural life, and enjoy the benefits of scientific progress, and benefit from the protection of moral and material interests resulting from scientific, literary or artistic production of which he or she is an author. In order to realise these cultural rights, nations must conserve and develop culture and science.

The UNESCO Universal Declaration on Cultural Diversity 2001 reiterates existing human rights related to culture. UNESCO instruments that are Declarations are not legally binding on Member states but many UNESCO Declarations, like this one, reference Conventions that are binding. Art 5, Cultural rights as an enabling environment for cultural diversity states:

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights.

The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003 (not ratified by Australia) reflects the incremental expansion of the concept of cultural heritage in international law and has strengthened its link with cultural rights. It expanded "cultural heritage" beyond the material products of creativity to include practices, traditions, and skills of a community as components of a living culture (Francioni 2008: 15). If cultural heritage represents social structures and processes which permit the production, evolution and transmission of cultural heritage from one generation to another, archives would contain evidence of these traditions.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 (Australia originally abstained; US and Israel voted against it, but Australia became a party to the Convention in 2009), covers minorities and Indigenous peoples in the preamble and in Principle 3. It does not include substantive cultural rights for individuals or communities but rather for states.

The World Intellectual Property Organisation's provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (WIPO 2010) apply to Indigenous and minority groups but have been attacked by some archivists as interference in the concept of public domain (SAA 2010).

### **Human rights instruments and cultural rights: Australia**

The most advanced jurisdiction in relation to human rights legislation in Australia is the State of Victoria. Cultural rights are specifically articulated in the Victorian Charter of Human Rights and Responsibilities Act 2006. Section 19 (1) states

All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

S 19 (1) replicates ICCPR Art 27 and provides a definition of "culture" in terms of human rights law. Art 27 protects the rights of minorities, that is, individuals who belong to minority groups, which in international law includes Indigenous peoples. S 19 (2) of the Charter is specifically directed to the distinct cultural rights of Indigenous peoples of Victoria. In the Victorian context, Indigenous and minority rights are recognised in the Charter. The Victorian Human Rights Community Consultation Committee stated that:

... the Charter should contain specific cultural rights for minority groups, recognising that it is particularly important in Victoria's multicultural society to ensure that cultural heritage and cultural practices are respected and protected (Human Rights Community Consultation 2004: 40).

### **Cultural rights in privacy and its collective context**

Cultural rights have also been found in rights to privacy, family and reputation. In Australia, personal information covers *sensitive information* that includes race, ethnic or national origins; political, social or religious beliefs or affiliations which provide some protection of cultural identity (Privacy Act (Cth) 1988, s6, Interpretation). Internationally, ICCPR Art 17 (1) and UDHR Art 12 focus on privacy, and ICCPR Art 23 and ICESCR Art 10 and 15 on family. The European Convention on Human Rights (1950) Art 8 and the Convention for the protection of individuals with regard to automatic processing of personal data (1981) Art 3, 2 (b) focus on family privacy which could potentially be extended to groups. The Australian Law Reform Commission did consider the possibility of extending privacy to groups but in its final report it did not support a collective right to privacy on the basis that it could conflict with the privacy rights of individuals within a group (Australian Law Reform Commission 2008 Vol 1: 343). From cases heard before the UN Human Rights Committee, it has been possible to find that the protection of cultural expression and heritage may be derived from the protection of privacy and family rights. Rather than an ICCPR Art 27 matter, privacy (ICCPR Art 17) and family rights (ICCPR Art 23) have been invoked successfully to make cultural claims (Castan and Debeljak 2012: 221).

### **Cultural rights and the right to be forgotten**

Communication technologies and increased surveillance in the 1980s prompted a call for a “right to forget”, or a “right to be forgotten”, that is the right to have personal data that has served its purpose destroyed or anonymised which needs to be balanced with a “right to know”, that is the right to access personal data about oneself, and the related collective right to remember. A collective right to know and its corollary a “duty to remember” have been recognised in the United Nations Commission on Human Rights, the Joinet Report (1997), (United Nations, Economic and Social Council, Commission on Human Rights 1997: 4). In the European Union both access and privacy rights are recognised not only as fundamental rights essential to good governance and accountability but more importantly that they apply at the same time (European Data Protection Supervisor 2005: 4).

The recent European Union proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data (General Data Protection Regulation) (European Commission 2012) to update the 1995 Directive 95/46/EC was prompted by privacy regulation harmonisation failures amongst EU Member States. A Regulation is directly binding on EU countries. The proposed Regulation focuses on implementation and enforcement, rights of data subjects, erasure in social networks and explicit consent. The proposed “The right to be forgotten” (Article 17) is couched in much the same terms as previous EU Directives on privacy. Art 17 (3) has a number of limitations: “Exemption from erasure if necessary, where personal data is needed for exercising the right of freedom of expression in accordance with Article 80; for reasons of public interest in the area of public health in accordance with Article 81;(c) for historical, statistical and scientific research purposes in accordance with Article 83; (d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;” ... Similarly to a right to culture, the right to be forgotten is clearly not absolute.

An example of the potential impact on community memory, if an individual is given control over records in which he/she is the subject, is exemplified in the Hungarian government’s intention of returning the records from the communist era archives to the victims of surveillance. Permission to access the files would be granted by the subjects of the files, instead of the institution where the files are currently stored. The arguments in favour of retention by the State put forward by archivists focus on preserving the evidence and memory in an institutional context which is more likely to ensure that informers could be brought to account rather than the individual’s right to control access to or potentially destroy “their record” (SAA 2011). Some members of the post communist

government were informers or friends of informers in the earlier regime and have good reasons to want to disperse the records. Therefore it is important to analyse why the right to forget is being invoked but equally it should be noted that Hungary has argued that human rights require the records to be returned to the victims. The public interest to know as well as the need to preserve the collective memory of the events in question need to be balanced with the victims' rights, which could be addressed by a compromise of joint control between the government and the victims, which was not proposed by the Society of American Archivists.

The "right to forget" includes anonymous transactions or permanent de-identification of identifiable data which may diminish record identity. Re-constructing personal narratives from anonymised or permanently de-identified records is not possible unless anonymisation or de-identification methods are reversible. For example, the Court Information Act 2010 (NSW) has been criticised in terms of its privacy provisions which appear to counter its intention to more open justice. It will be a breach of the privacy provisions in the Act if NSW courts do not ensure that all personal information is deleted from court documents before they are released to the public.

In determining whether to grant leave to access "restricted" information, the court may consider a range of factors. Anything defined in the Act as 'personal identification information' is not available. This includes things like bank account numbers, passport and drivers licence numbers, and material of that sort. News media organisations, as defined, have much wider access to information than members of the public, relating to their proceedings, unless a court orders otherwise (Biber 2010: 580-581).

An analysis of the principles of justice might involve a broader consideration of the meaning of privacy in the context of open justice.

Privacy and data protection schemes may diminish collective memory by limiting the processing of personal data to its primary purposes. Individual and collective accountability for past actions in post colonial and post surveillance societies has been an important archival theme. While human rights have centred on the individual, cultural rights are collective rights that place the individual within a group they have chosen to identify with. A shared memory in terms of social memory construction, a collective right to the truth and the right of reply to redress historical injustices are relevant to cultural rights and cultural identity.

### **Archival implications**

If cultural rights require the participation, preservation and promotion of distinct cultures that do not necessarily coincide with the nation state, are archival institutions obliged to collaborate with cultural groups about the preservation, appraisal and access to records that form part of their living cultural heritage? In terms of their national legal mandates they may not; but under international law there is a strong case that they have a legal and moral mandate to do so. As discussed, in the case of Victoria, s 19 of its human rights Charter and international law on protection of culture to which Australia has acceded could provide for archival mandates for a "participatory archive" for cultural groups. Castan and Debeljak suggest that:

Under international law the enjoyment of cultural rights may require positive legal measures of protection, and measures to ensure the effective participation of members of minority communities in decisions that affect them (Castan and Debeljak 2012: 221).

In this context, archivists have an obligation to consult with members of minority communities to ensure records are made and kept that protect and promote their culture. Cultural rights like other rights are not absolute. Each right should be maximised in individual cases in which they apply rather than seen as "competing rights". The *maximisation principle* goes beyond the immediate parties to wider interests. It recognises that each party has a right to have their interest identified and taken account of and has been recognised in EU case law (Bailey 2009: 110-120; 220-221).

### **Participatory Archive**

In order to involve cultural communities in actively preserving their cultures online, an archive can be conceptualised as a memory space that exists by virtue of a community's or an individual's intent to use and preserve; it is constantly in the process of formation and contributes to collective memory. Archival institutions are repositories of "archives" as collective memory. As Hans Hofman states:

....Archive is not a static conceptual notion but rather a more dynamic entity, always in the process of becoming and thus the result of deliberate action and decisions (Hofman 2005:136) The archive is located in the transition area from the inner organisation to the outer world....(Hofman 2005:154).

A recordkeeping participant is an individual or group who takes part in the formation and continuing management of the record. Archival and other information systems have the capacity to capture all the participants in the creative process as shared "owners" with multiple identities and roles. A participatory archive is one that acknowledges all parties to a transaction as immediate parties-co-creators -with negotiated rights and responsibilities in relation to ownership, access and privacy (Iacovino 2010). These records may be maintained on a community's server or by a trusted authority. A participatory archive is a useful tool for preserving diverse cultures whether it is for the purpose of setting the record straight for past wrongs or for preserving and promoting cultural identity.

### **The "Participative web"**

Web 2.0 refers to the participative web and is an umbrella term that refers to the framework of ideas underpinning social media applications and the technologies that have produced them....The term Web 2.0 is often used synonymously with social media and social networking technologies that facilitate a more social and participative Web... (Shaffer 2011:119-120).

The participatory archive can benefit from social media technologies which in a government context makes the citizen a first party in a record transaction, not just a record subject—a co-creator and record author. The ability to co-create and share content has a dramatic impact on record creation but makes many powerful organisations fearful of losing control over ownership of content. Accompanying the Australian government's announcement of its policy response to the Report of the Government 2.0 Taskforce, a declaration of open government recommended using technology to increase citizen engagement to achieve a more consultative, participatory and transparent government, and to encourage the re-use of government information (Australian Government 2010). In the EU, E-government has also been defined in terms of policy focused on citizen interaction with government rather than specific web tools (European Union 2009). E-government or more appropriately E-governance shifts from a technology focus on websites to sharing and re-using online government information by public officers and citizens. Governments provide blogs for citizens to comment on public issues, and to provide an alternative to the official viewpoint, substantially altering the way citizens interact with their elected representatives.

E-governance should empower the citizen but has it changed the conventional understanding of the relationship between record subjects as third parties and record creators as the principal parties to the record transaction, thus limiting the rights of those captured in and by the record? What is a national collection? Is it inclusive of special interests? Who controls and own the records created by government on line or for that matter in the private domain where personal information is held on commercial clouds that may be subject to a jurisdiction that does not protect personal information? There is no clarity as to whether Web 2.0 contributions form part of the record and will be retained, or how appraisal rules will be applied. Government archival authorities could guarantee the authenticity of the records, but they do not appear to be prepared to share control with their users or record contributors. The Australian government wants to ensure that records created by interactions

with citizens using social media remain their records (Government 2.0 Taskforce 2009: xxiii Recommendation 12.1). As Adrian Cunningham states:

Ultimately, harnessing the potential of Archives 2.0 is all about being able to relinquish control in order to build value through collaboration” (Cunningham 2010: 28).

The archive being formed online may not be within an archival institution; its long term preservation may depend on the status accorded to it by law or policy. From a legal, moral and technological perspective, an archive that is under the control of a government authority can be reshaped by allowing alternative narratives to that of the record “creator” to complement the same events. Given that many countries are encouraging the use of collaborative social Internet tools to interact with citizens, narratives from the participants’ points of view can be added to existing records using these tools. The value of a participatory approach in which a community can provide its version of events has been associated with past injustices but is equally relevant to the protection and promotion of the cultural rights of groups. The right of a cultural group to have greater control over records that hold its knowledge and practices or to which it has contributed through social media is a right to cultural identity, on the basis of cultural-collective rights and as human rights.

The notion of a participatory archive exists independent of new social media technologies. Social media - the participative web - are tools that may be used to implement the approach. There are also managerial and other policy and procedural aspects that are independent of technology. The participatory archive challenges traditional views of ownership already significantly eroded by the internet. But can it in fact shift ownership rights to record participants either individually or collectively, paralleling moves to greater participatory democracy? From a government and organisational perspective, maintaining control over records that may be generated from the participative web is a major issue (Shaffer 2011).

Rights of record subjects have in part been addressed in freedom of information, privacy and archival laws but they have limitations. For example, data protection and freedom of information legislation in Australia entitles the record subject to a right of correction of inaccurate data via annotation. An applicant needs to provide evidence as to why the personal information is incorrect and why the correction should be added to the file. The annotation right is not as extensive as “setting the record straight” or a “right of reply” as expressed in the Joinet-Orentlicher, Principle 17 “by virtue of their right of access, to challenge the validity of the information (in archives) concerning them by exercising a right of reply” (United Nations, Economic and Social Council, Commission on Human Rights 2005). An emerging concept is the right of the record subject to amend his/her record beyond correction to contributing to the record itself. For example, in the health context in Australia, the Personally Controlled Electronic Health Record (PCEHR) which is currently being implemented will allow the patient to “to contribute to your own information and add to the recorded information stored in your PCEHR” (NEHTA 2012). Ownership of the PCEHR by the patient has been a significant barrier to the participation of medical practitioners in the scheme.

### **Archival initiatives**

Beyond existing statutory rights, the rights of record subjects to add their narratives to records about them held in public and private archival institutions, to participate online as co-creators in decision-making about appraisal, access and control, have been limited by competing rights of forgetting and remembering and their potential impact on collective memory, as well as reliability and authenticity issues. However, the requirements derived from cultural human rights and related instruments place responsibilities on archivists to capture information about record formation in archival descriptive systems and recordkeeping metadata, to take account of cultural rights in appraisal and disposal practices, and to involve communities in the management of records that form part of their cultural identity on an ongoing basis. Records management standards require that the regulatory environment be captured in record systems (ISO 15489-1: 2001, Clause 5). Cultural human rights should be registered in archival description as recordkeeping metadata as they fall within the area of mandates,

business rules, policies and procedures (ISO 23081-1:2006, clause 9.3.1). In addition, archival description and recordkeeping metadata should capture all context entities involved in record formation. Rights to records created by social media would need to be negotiated including collective authorship.

Implementing archival annotation systems as a right of reply and providing rights to control third party access by the “subjects” of the record or their descendants requires a fundamental shift in the way archivists work with traditional “subjects”. Social media applications by archival institutions have included narrative comments by users, for example the National Archives of Australia’s *Mapping Our Anzacs* (National Archives of Australia 2010). The Public Record Office Victoria’s wiki allows anyone to add descriptive information to a document that has been opened to the public, but it remains unclear as to who owns or preserves these “annotations” (PROV 2012). Annotations should take account not only of records in archival institutions but also those created from Web 2.0 technologies. Preserving and promoting a living culture requires a proactive approach. Social media could be used to target specific cultural groups, but archival institutions would need to move away from an open access model to nuanced access protocols based on community needs.

### **Participatory Models**

A participant model that recognises record subjects as co-creators requires substantial re-thinking of archival services. Some possible models include the personal health record in which all contributors have ownership rights. A community archives may want to share a space with an archival authority or it may want to have its own non-commercial cloud. A very innovative example of a participatory archive is the Koorie [Victorian Indigenous peoples] Archiving System which is using web-based technologies to create a *shared space* for the Public Record Office of Victoria, the Koorie Heritage Trust Inc, the National Archives of Australia, and Koorie communities and individuals to work collaboratively as equal partners to create an archive that:

...will create a shared, collaborative archival space to bring together and make accessible records relating to Koorie communities and individuals, including written records, oral testimony, photographs, audio and video recordings from government, community and personal sources.

The project will pioneer a model for archival institutions to work in equal partnership with communities to negotiate rights in the records, and to arrange, describe, and interpret them. The project will also pilot separating the ownership and control of the content of the records from the technical tasks of storing and accessing them (Monash University 2010).

### **Conclusion**

Social networking tools can be used both to redress past injustices and to promote distinctive cultures, in particular those of Indigenous peoples and minorities, an approach that fits comfortably in countries which have a rich multicultural heritage, but are equally important in countries which have a history of repressing minorities. A human right to cultural identity is grounded in human dignity that promotes a living culture without taking away the right of individuals to participate in more than one cultural group and in their mainstream culture. The right to privacy based on human dignity must take account of the right to know when it is in the public interest but each right must be maximised. Archives and records capture and preserve evidence and memory of cultural groups relevant not just to the past but to the continuity of a culture. The Indigenous case is a special one but ethnic, religious and other community groups need to have their voices added to the official record. From an access perspective, cultural rights of groups challenge the open access model of archival and other cultural institutions; the management of records, archival description and appraisal, and notions of record formation and associated rights. Recordkeeping metadata must reflect the new realities of the range of contributors to the record’s formation and the regulatory environment of human rights in relation to the capture, preservation, use and access in or outside archival institutions. Archival organisations can now provide for alternative narratives that focus on an

inclusive national and ultimately global cultural heritage but one that respects diversity. The challenge is the ownership and control of records created from web-based tools.

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