Cultural Rights and a Right to Cultural Identity before the European Court of Human Rights: Present Approaches and Future Challenges

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Introduction

In the 90’s, as Michael Keating put it, “there was something of a rediscovery of culture” and of its implications on all the areas of social life. Cultural approaches in social sciences, in general, have emerged as a response given to methodological individualism and to the rational choice theories. It has been asserted that taking culture into account will help us to better locate individuals, within their social context, where their choices can actually have a meaning; it will help us to bring into question forms of action that cannot be easily explained in the calculated language of the rational choice theory. As a main result, rational choice became just one of the culturally determinant modes of action, among the others.

This type of approach was also reflected in international law, in particular in human rights law, where it has materialized in concerns such as: the desire to improve the minorities or indigenous peoples’ systems of protection, the wish to “translate” several cultural aspects into legal terms—for example, by formulating and regulating certain principles, such as the respect for cultural diversity—to better explain and clarify the content of cultural rights or to enhance the latter mechanism of protection.

There were several international legally binding and soft law documents adopted immediately after 1990: at the Council of Europe level, the Framework Convention for the Protection of National Minorities (FCNM); at the UN level, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

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2 Idem.

Rights (OP-ICESCR)\textsuperscript{4} and the UN Declaration on the Rights of Indigenous Peoples;\textsuperscript{5} at UNESCO level, the Declaration on Cultural Diversity\textsuperscript{6} and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.\textsuperscript{7}

All these instruments attempt to substantiate and build up a new approach to human rights, calling for a reevaluation of some of their fundamental principles, such as, for instance, the value of individual autonomy—reflected in the liberal, individualistic orientation of the great majority of treaties on human rights—or the one of “internal” self-determination.

One of these developments was also aimed at establishing a distinct legal right, namely the right to cultural identity.\textsuperscript{8} The existence and the legal consecration of such a right represents a real challenge, at least from two points of view: firstly, translating culture into legal terms or conceptualizing a right that relates to culture and secondly, taking due account of the collective dimension such a right entails. The latter aspect makes it rather “dangerous” in the eyes of states, which are concerned about the impact of such an approach on the exercise of their traditional functions. The difficulties and the implications of the encounter between culture and law have been illustrated by professor Emmanuel Decaux, from whom we quote: “descended from the absolute sphere of art, culture enters legal relativism and the logics of conciliating the private and the general interest”.\textsuperscript{9}

This chapter will be structured in the following manner: firstly, the theoretical resources, which might lie the foundations of a distinct subjective right to cultural identity and the arguments/advantages supporting its legal consecration, will be discussed; it will also be pointed out the disadvantages and the practical consequences or difficulties that such a demarche entails (Section 2).

\textsuperscript{4} Opened for signature on the 10th of December 2008 and entered into force on the 5th of May 2013.

\textsuperscript{5} Adopted, on the 13th of September 2007, by the UN General Assembly, through Resolution no. A/RES/ 61/295.


\textsuperscript{8} See, for more details, Y.M. Donders, Towards a Right to Cultural Identity? School of Human Rights Research (Antwerp/Oxford/New York, Intersentia/Hart, 2001).