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INTERNATIONAL HUMAN RIGHTS AND CULTURAL DIVERSITY: A BALANCING ACT

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Abstract

It is broadly agreed that international human rights law and cultural diversity have a mutually interdependent and beneficial relationship. Many human rights, such as the rights to freedom of expression, freedom of religion, freedom of assembly, as well as the rights to take part in cultural life and to education, play a direct role in the promotion and protection of cultural diversity. At the same time, the enjoyment of human rights is promoted by a pluralistic society. The manner in which this relationship works out in practice is, however, often subject of heated debates at national and international level. These debates often center on religious issues. For instance, portraying of the prophet Mohammed in a film and in cartoons and the violent protests by Muslims stirred up the discussion on the possible conflict between freedom of expression and freedom of religion. Another example is the debate on the (proposed) ban on wearing facial coverage in several Western European States, which was preceded by similar discussions on the wearing of religious symbols, such as headscarves, turbans and kippas in public schools. In Germany passionate debates took place on male circumcision after a German Court ruled that this religious practice amounted to bodily harm. Cultural diversity is of course broader than religion and its relationship and interaction with human rights may raise many other hot topics. These include the use of a minority language in court, education in minority languages, the recognition of non-formal marriage and divorce rituals and land rights for indigenous communities in relation to economic development. The reason debates on these issues are often heated and polarized is because they concern expressions of the culture, identity and dignity of individuals and communities.

One of the main challenges in the analysis of the relationship and interaction between cultural diversity and human rights is formed by the dynamic and complex notion underlying cultural diversity: the concept of 'culture'. Apart from the

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abundance of definitions of 'culture', it is a concept with a dynamic and changeable character, being not only a product but also a process. While culture is generally considered to be important to human beings and to communities, at the same time it is not an abstract or neutral concept and it may be a mechanism for exclusion and control. Some harmful aspects of culture are reflected in cultural practices that are very questionable from a human rights perspective. The broadness, complexity and sensitivity of cultural diversity is a serious challenge in the integration of this concept into human rights law.

At the same time, international human rights law cannot provide a final solution to all issues related to cultural diversity. While the ratification of treaties and the adoption of laws provide a sound legal basis, it is not always the only, best, or most effective way to address situations of cultural diversity, in particular the contentious ones. Other processes, including education, awareness raising and social development are also important. This also implies that research on human rights and cultural diversity demands a multi-disciplinary approach and different research methods. The article will try to show these points by elaborating on the legal approach towards the wearing of facial coverage in several Western European States (The Netherlands, Belgium and France).

Keywords: *international human rights law, cultural diversity, rights to freedom of expression, freedom of religion, freedom of assembly, the culture.*

Résumé

Il est largement agrée que le droit international des droits de l'homme et la diversité culturelle ont une relation d'interdépendance et de bénéfice mutuel. Des nombreux droits de l'homme, tels comme la liberté d'expression, la liberté de religion, la liberté de réunion, ainsi que les droits de participer à la vie culturelle et à l'education, jouent un role direct dans la promotion et protection de la diversité culturelle. En meme temps, le bénéfice des droits de l'homme est promu par une société pluraliste. La manière dont cette relation fonctionne en pratique est, toutefois, le sujet des débats animés au niveau national et international. Ces débats portent fréquemment sur des problèmes religieux. Par exemple, portretiser le prophète Mahomed dans un film et dans des bandes dessinées et les violentes protestations des musulmans ont provoqué la discussion sur le possible conflit entre la liberté d'expression et la liberté de religion. Un autre exemple est le débat sur l'interdiction (proposée) de porter le niqab (voile couvrant le visage) dans quelques pays européens, qui a été précédée par des discussions similaires sur le

port des symboles religieux, tels comme des voiles, des turbans et des kippas dans les écoles publiques. En Allemagne, des débats passionés ont porté sur la circoncision masculine après qu'une Cour allemande a jugé que cette pratique religieuse provoquait des dommages physiques. La diversité culturelle est certainement plus large que la religion et sa relation et intéraction avec les droits de l'homme pourrait relever plusieurs autres sujets d'actualité, parmi lesquels l'usage d'une langue minoritaire en justice, l'education dans les langues minoritaires, la reconnaissance des mariages informels et des divorces rituels et des droits sur les terres des communautés indigènes en relation avec leur développement économique. Les débats sur ces problèmes sont fréquemment animés et polarisés parce qu'ils concernent des expressions de la culture, de l'identité et de la dignité des individus et des communautés.

L'un des défis majeurs dans l'analyse de la relation et intéraction entre la diversité culturelle et les droits de l'homme se forme autour de la notion dynamique et complexe qui souligne la diversite culturelle: le concept de «culture». A part l'abondance des définitions de la culture, il s'agit d'un concept dynamique et changeable, étant un produit et aussi un procéssus. Tout en étant généralement considerée importante pour les êtres humains et pour les communautés, la culture n'est pas, en meme temps, un concept abstract ou neutre et elle pourrait être un méchanisme d'éxclusion et de contrôle. Certains aspects nuisibles de la culture se reflètent dans des pratiques culturelles tres douteuses d'une perspective droit-de-l'homme-iste. La largesse, la complexité et la sensibilité de la diversité culturelle sont des défis sérieux pour l'integration de ce concept dans le droit des droits de l'homme.

En même temps, le droit international des droits de l'homme ne peut pas offrir une solution finale à tous les problemes liés à la diversité culturelle. Tandis que la ratification des traités et l'adoption des lois fournissent une base légale solide, ce n'est pas toujours le seul, le meilleur ou le plus efficace moyen pour répondre aux situations de diversité culturelle, surtout à celles contentieuses. Des autres procéssus, y compris l'éducation, la sensibilisation et le developpement social sont aussi importants. Cela implique aussi que la recherche en droits de l'homme et diversité culturelle demande une approche multi-disciplinaire et des méthodes diverses de recherche. L'article essaiera de montrer ces points par élaborer sur l'approche juridique du port des voiles couvrant le visage dans quelques pays de l'Europe occidentale (Pays-Bas, Belgique et France).

Mots-clés: *le droit international, droits de l'homme, la liberté d'expression, la liberté de religion, la liberté de réunion, la diversité culturelle, la culture.*

1. Introduction

It is broadly agreed that human rights and cultural diversity have a mutually interdependent and beneficial relationship. Many human rights, such as the rights to freedom of expression, freedom of religion, freedom of assembly, as well as the rights to take part in cultural life and to education, play a direct role in the promotion and protection of cultural diversity. At the same time, the enjoyment of human rights is promoted by a pluralistic society. In the Universal Declaration on Cultural Diversity, adopted by the Member States of UNESCO in 2001 contains that 'the defence of cultural diversity is…inseparable from respect for human dignity' and 'implies a commitment to human rights and fundamental freedoms'. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) states that 'cultural diversity can be protected and promoted only if human rights and fundamental freedoms…are guaranteed'.

The manner in which this relationship works out in practice is, however, often subject of heated debates at national and international level. These debates frequently centre around religious issues. Portraying of the prophet Mohammed in a film and in cartoons and the violent protests by Muslims stirred up the discussion on the possible conflict between freedom of expression and freedom of religion. Another example is the debate on the (proposed) ban on wearing facial coverage in several Western European states, which was preceded by similar discussions on the wearing of religious symbols, such as headscarves, turbans and kippas in public schools.

Cultural diversity is of course broader than religion and its relationship and interaction with human rights may raise many other topics. These include the use of a minority languages in court, education in minority languages, the recognition of non-formal marriage and divorce rituals and land rights for indigenous communities in relation to economic development. The link of these debates with human rights concerns the doctrines on potential conflicts between rights or limitations of rights to protect the rights of others or of society.

One of the main challenges in the analysis of the relationship and interaction between cultural diversity and human rights is formed by the dynamic and complex notion underlying cultural diversity: the concept of 'culture'. Apart from the abundance of definitions of 'culture', it is a concept with a dynamic

and changeable character, being not only a product but also a process. It has an objective dimension, reflected in visible characteristics such as language, religion, or customs, and a subjective dimension, reflected in shared attitudes, ways of thinking, feeling and acting. It also has an individual and a collective dimension.[1]

In general, culture is considered to be important to human beings and to communities. Or, to put it in the words of the World Commission on Culture and Development: 'culture shapes all our thinking, imagining and behaviour. It is the transmission of behaviour as well as a dynamic source for change, creativity, freedom and the awakening of innovative opportunities. For groups and societies, culture is energy, inspiration and empowerment'.[2]

At the same time, culture is not an abstract or neutral concept: it is shaped by its instrumentalisation, in which negotiation, contestation and power structures play a role. Culture is not necessarily an intrinsically dignified concept. It may be a mechanism for exclusion and control. Culture may harm people or be oppressive to them and hinder their personal development. Some harmful aspects of culture are reflected in cultural practices that are very questionable from a human rights perspective.

The broadness, complexity and sensitivity of the concept of culture are serious challenges in the integration of this concept into international human rights law. The main purpose of this paper is to outline what international human rights law has to offer for the accommodation of cultural diversity from the perspective of the principle of equality and cultural rights. It also analyses how international human rights law deals with contentious cultural diversity situations in terms of balancing the different interests and limiting rights. It will become clear that laws or treaties alone do not provide a final solution to these type of situations, but that a multi-dimensional approach is needed.

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[1] Yvonne M. Donders, *Towards a Right to Cultural Identity?*, School of Human Rights Research Series, n°. 15 (Antwerp: Intersentia, 2002), pp. 29-32; Will Kymlicka, *Multicultural Citizenship – A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), p. 83; Bhikhu Parekh, *Rethinking Multiculturalism – Cultural Diversity and Political Theory* (Basingstoke: Macmillan Press, 2000), pp. 143-144, 153.

[2] World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO Publishing, 1995), p. 11.

2. Cultural Diversity in International Human Rights Law

International human rights law contains many provisions that directly or indirectly promote and protect cultural diversity. They can be broadly grouped under the principle of equality and within the category of cultural human rights.[3]

A. Diversity within Equality

Respect for cultural diversity has always been part of the human rights discourse. However, in developing international human rights law, states at first mainly emphasised the principle of *equality*. Equality *between* them as sovereign states and equality as the basis for the enjoyment of rights by different individuals and communities *within* states. Although diversity was recognised as a fact, it was maintained that human rights should first and foremost promote and protect equality. This emphasis on equality formed the starting point for the Universal Declaration of Human Rights. While several proposals concerning cultural diversity or the special position of certain cultural communities, such as minorities and indigenous peoples, were discussed, no provision to that effect was included.[4]

During the drafting processes of the various human rights treaties adopted after the Universal Declaration, cultural diversity was increasingly emphasised as a value to be respected and promoted. This was broadly done in two ways: by developing the equality concept, acknowledging that it also implies the right to be different, and by adopting specific rights promoting and protecting cultural diversity.

Firstly, it was recognised that respect for cultural differences can be fully in line with the principle of equality. Having equal rights is not the same as being treated equally. Indeed, equality and non-discrimination not only imply that equal situations should be treated equally, but also that unequal

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[3] This paper focuses on general international human rights instruments, not on the specific instruments adopted for certain peoples or communities, such as indigenous peoples or minorities. Such instruments, for example the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and the UN Declaration on the Rights of Indigenous Peoples (2007), contain several provisions recognising and valuing their specific cultural characteristics and giving them rights to preserve and promote them.

[4] Donders, *op. cit., supra,* note 1, pp. 163-166.

situations should be treated unequally. At the international level, it was understood that 'the enjoyment of rights and freedoms on an equal footing…does not mean identical treatment in every instance'.[5] Consequently, not all difference in treatment constitutes discrimination, as long as the criteria for differentiation are reasonable and objective and serve a legitimate aim.[6] Difference in treatment may also involve affirmative or positive action to remedy historical injustices, social discrimination or to create diversity and proportional group representation.[7]

B. Cultural Rights and the Cultural Dimension of Human Rights

Apart from respect for diversity within the equality principle, many international human rights instruments include rights that specifically promote and protect cultural diversity. These rights are broadly classified as 'cultural rights'. Cultural rights are human rights that directly promote and protect cultural interests of individuals and communities and that are meant to advance their capacity to preserve, develop and change their cultural

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[5] Human Rights Committee, *General Comment nº. 18, Non-Discrimination*, 10 November 1989, para. 8. The European Court of Human Rights has reaffirmed this in many cases, including the cases of *Thlimmenos v. Greece*, Appl. No. 34369/97, 6 April 2000, para. 44 and *D.H. and others v. the Czech Republic*, Appl. nº. 57325/00, 7 February 2006, para. 44.

[6] Legal doctrine generally distinguishes between differentiation, distinction and discrimination. Differentiation is difference in treatment that is lawful; distinction is a neutral term which is used when it has not yet been determined whether difference in treatment is lawful or not; and discrimination is difference in treatment that is arbitrary and unlawful. Consequently, only treatment that results in discrimination is prohibited. See Marc Bossuyt, *Prevention of Discrimination – The Concept and Practice of Affirmative Action*, 17 June 2002, UN Doc. E/CN.4/Sub. 2/2002/21, para. 91, p. 20.

[7] See, also, Article 1(4) of the *International Convention on the Elimination of Racial Discrimination*, adopted by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force on 4 January 1969: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.' The Human Rights Committee has further stated that the principle of equality under Article 26 ICCPR may sometimes require States parties to take affirmative action to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR. Human Rights Committee, *General Comment nº. 18, Non-Discrimination*, 10 November 1989, para. 10.

identity. As such they truly echo the importance of cultural pluralism in international human rights law.[8]

Which rights are cultural rights? The categorisation of human rights, including cultural rights, is based on the titles of two international human rights treaties that were adopted in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[9] However, although cultural rights are mentioned in the title of the ICESCR, the text of this treaty does not make clear which provisions in the treaty belong to the category of cultural rights. In fact, none of the international legal instruments provides a definition of 'cultural rights' and consequently, different lists could be compiled of international legal provisions that could be labelled 'cultural rights'.

There are several international human rights provisions that explicitly refer to 'culture'. One example is the right of everyone to take part in cultural life,

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[8] For a long time, it was argued that cultural rights were a neglected and underdeveloped category of human rights. The last decades, more interest is shown by academics, States and monitoring bodies. See, inter alia: Donders, *op. cit., supra*, note 1; F. Francioni & M. Scheinin (eds.), *Cultural Human Rights* (Leiden: Martinus Nijhoff Publishers, 2008); Stephen A. Hansen, *The Right to Take Part in Cultural Life: Towards Defining Minimum Core Obligations Related to Article 15(1)(A) of the International Covenant on Economic, Social and Cultural Rights*, in A. Chapman & S. Russell (eds.), 'Core Obligations: Building a Framework for Economic, Social and Cultural Rights' (Antwerp: Intersentia, 2002), pp. 279-304; Stephen Marks, *Defining Cultural Rights,* in M. Bergsmo (ed.), 'Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjorn Eide' (Leiden: Martinus Nijhoff Publishers, 2003), pp. 293-324; Patrice Meyer-Bisch, (ed.), *Les Droits Culturels, une catégorie sous-développée de droits de l'homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme* (Fribourg: Editions Universitaires, 1993); Laura Reidel, *What are Cultural Rights? Protecting Groups with Individual Rights*, in (2010) 9:1 *Journal of Human Rights*, pp. 65-80. See, also, the *Déclaration des droits culturels*, drafted by the Fribourg Group of experts and launched in Geneva on 8 May 2007, see (http://www.unifr.ch/iiedh/fr/publications/declaration-de-fribourg). An important development in the further elaboration of cultural rights is the mandate of the Special Rapporteur in the Field of Cultural Rights, which was extended in April 2012 by the Human Rights Council: UN Doc. A/HRC/RES/19/6, 3 April 2012.

[9] *International Covenant on Civil and Political Rights*, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976; *International Covenant on Economic, Social and Cultural Rights*, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

as laid down in Article 27 UDHR and Article 15(1) (a) ICESCR. Another example is the right of members of minorities to enjoy their own culture, practise their own religion and speak their own language, as laid down in Article 27 ICCPR. The scope, normative content and state obligations of these rights have evolved over the years. For instance, the right to take part in cultural life was originally aimed at making culture available and accessible to all people, whereby culture was considered in its narrow scope as referring to national culture and as equivalent to cultural material(s), such as arts and literature. Other aspects of a broader concept of culture, such as language, religion and education, were dealt with in separate provisions in the ICESCR and the ICCPR. Nowadays, it seems that the right to take part in cultural life is broader, incorporating a broad notion of culture, as well as a wide range of corresponding rights and positive and negative state obligations.[10] The dynamics and complexity of the right to take part in cultural life are reflected in the General Comment of the Committee on Economic, Social and Cultural Rights on this right. This General Comment became the longest general comment so far. Its 18 pages contain 76 paragraphs, outlining in detail what the right to take part in cultural life entails in terms of scope, normative content and state obligations and its relationship with other human rights.[11]

Apart from rights explicitly referring to culture, many human rights have a direct link with culture. It might be defensible to claim that almost every human right can be linked to culture. However, the rights with the most obvious link with culture are the right to self-determination, the rights to freedom of religion, freedom of expression and freedom of association and the right to education. It has, for instance, been recognised that artistic expressions such as novels, poems

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[10] Yvonne M. Donders, *The legal framework of the right to take part in cultural life*, in Y. Donders & V. Volodin (eds.), 'Human Rights in Education, Science and Culture: Legal Developments and Challenges' (Paris: UNESCO/Ashgate Publishing, December 2007), pp. 231-272.

[11] Committee on Economic, Social and Cultural Rights, *General Comment n°. 21 on The Right of Everyone to Take Part in Cultural Life* (Article 15 para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21, 21 December 2009. The Council of Europe Parliamentary Assembly adopted a Recommendation on the right of everyone to take part in cultural life, Recommendation 1990, adopted by the Assembly on 24 January 2012 (4th sitting).

and paintings fall within the scope of freedom of expression[12] and that the right to freedom of association also protects cultural organisations.[13]

Apart from rights explicitly or directly related to culture, it appears that many human rights have a strong *cultural dimension*. Although some human rights may at first glance have no direct link with culture, most of them have important cultural implications.

The right to health, for instance, may have important cultural connotations as far as certain treatments, the use of certain (traditional) medicines or the availability of male and female doctors is concerned. Culture also plays a decisive role in sexual and reproductive health, in which information and education are crucial. The Committee on Economic, Social and Cultural Rights has recognised that the right to health includes that 'all health facilities, goods and services must be … culturally appropriate, *i.e.*, respectful of the culture of individuals, minorities, peoples and communities'.[14] What does this mean in practice? Should the state offer language facilities in all public hospitals? Are women entitled to be treated by a female doctor upon request? Should minority women be allowed to bring a traditional midwife when giving birth to a child? Most probably, individuals do not have such rights under international human rights law and states do not have such far-reaching positive obligations, but it cannot be precluded that states may have to find ways to accommodate certain cultural interests as part of the right to health.

Another example is the right to adequate food. The preparation and consumption of food have a clear cultural connotation. The importance of the cultural dimension of food is also shown by the fact that several food traditions, such as the French cuisine, the Mediterranean diet, and the traditional Mexican kitchen, have been recognised as intangible cultural

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[12] ECtHR, *Müller and others v. Switzerland*, Appl. nº. 10737/84, 24 May 1988; ECtHR, *Vereinigung Bildender Künstler v. Austria*, Appl. nº. 68354/01, 25 January 2007; ECtHR, *Ulusoy and others v. Turkey*, Appl. nº. 34797/03, 3 May 2007; ECtHR, *Kar and others v. Turkey*, Appl. nº. 58756/00, 3 May 2007; ECtHR, *Ekin Association v. France*, Appl. nº. 39288/98, 17 July 2001; ECtHR, *Akdas v. Turkey*, Appl. nº. 41056/04, 16 February 2010.

[13] ECtHR, *Sidiropoulos and others v. Greece*, Appl. nº. 26695/95, 10 July 1998; ECtHR,*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Appl. Nos. 29221/95 and 29225/95, 2 October 2001 and ECtHR, *Gorzelik and others v. Poland* , Appl. nº. 44158/98, 20 December 2001.

[14] Committee on Economic, Social and Cultural Rights, *General Comment nº. 14, The Right to the Highest Attainable Standard of Health (Article 12)*, 11 August 2000, para. 12c.

heritage, which has to be promoted and protected by states.[15] The Committee on Economic, Social and Cultural Rights has stated that the guarantees concerning the right to food should be culturally appropriate and acceptable.[16] Here, also, states may have to find ways to accommodate cultural diversity, while at the same time balancing different interests. The issue of (non-anaesthetised) ritual slaughtering is illustrative in this respect.[17]

Civil and political rights may also have a cultural dimension. For instance, the right to a fair trial includes the right to be informed of the charges in a language that one can understand, as well as the right to free assistance of an interpreter if a person cannot understand or speak the language used in court and such translation needs to be adequate[18]. Specific ways of living related to culture, such as living in a caravan, which is the traditional way of living of gypsies, may fall within the scope of the right to respect for private life and home.[19] Although states may not necessarily have positive obligations, they have to respect the cultural dimension of these rights and have to balance the different interests involved.

3. Balancing Cultural Rights and Interests

As shown above, international human rights law offers norms to promote and protect cultural diversity. At the same time, it is not blind to the challenges posed by cultural diversity. As stated above, culture may have negative effects as well. It has often been argued that cultural rights should not be promoted nor protected, because they could justify questionable

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[15] These have been added to the list of intangible heritage in 2010 under the *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted on 17 October 2003, entered into force on 20 April 2006, UNESCO Doc. MISC/2003/CLT/CH/14. See: http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011.

[16] Committee on Economic, Social and Cultural Rights, *General Comment nº. 12, The Right to Adequate Food (Article 11)*, 12 May 1999, paras. 7, 8 and 11.

[17] ECtHR, *Chaáre Shalom ve Tsedek v. France*, Appl. nº. 27417/95, 27 June 2000. In this case the European Court argued that ritual slaughtering falls within the scope of article 9 (freedom of religion) and that interferences have to be assessed by the limitation criteria of Article (2) ECHR.

[18] See Article 14 ICCPR and Article 6 ECHR and ECtHR, *Kamasinski v. Austria*, Appl. nº. 9783/82, 19 December 1989, para. 74.

[19] ECtHR, *Buckley v. the United Kingdom*, Appl. nº. 20348/92, 25 September 1996 and ECtHR, *Chapman v. the United Kingdom*, Appl. No, 27238/95, 18 January 2001.

cultural activities, such as the discriminatory treatment of women, examples of which are forced marriages, bride price, female genital mutilation, widow cleansing, and less rights compared to men with regard to land ownership or inheritance. The legal issues playing a role here are conflicting human rights and limitations of human rights. Indeed many human rights are inherently capable of clashing in certain situations. Well-known examples are the tension between freedom of religion and freedom of expression or between freedom of religion and the right to education. These situations cannot be solved by rejecting either one of these rights. One can also not privilege *a priori* one right over the other. States are to balance different cultural rights and interests, to be supervised by independent supervisory bodies at national and international level.

Furthermore, cultural rights, just as other human rights, cannot be enjoyed unlimitedly. The general framework of such limitations is outlined in Article 29(2) of the Universal Declaration, in which it is stated that "…in the exercise of his rights and freedoms, everyone shall be subject to only such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society…" Similar limitation clauses can be found in most human rights instruments. Sometimes they apply to the instrument as a whole, sometimes they are linked to a particular provision. Limitations should always be provided by law and pursue a legitimate aim. States are for instance allowed to limit the enjoyment of the right in question for reasons of morality, security, health, public order and the rights and freedoms of others. Cultural and religious particularities may well be part of these reasons. Indeed limitation clauses have been used as a vehicle for protecting cultural differences.[20]

Limitations should furthermore be necessary and proportionate to the aim pursued, meaning that the least restrictive measures must be taken when

[20] Kinley has argued that the limitation clauses were originally not meant to reflect or allow for cultural pluralism. They were included for political pragmatic reasons, to ensure that States kept their competence to curtail or suspend rights if necessary. David Kinley, *Bendable Rules: The Development Implications of Human Rights Pluralism*, in B. Tamanaha, C. Sage and M. Woolcock (eds.), 'Legal Pluralism and Development – Scholars and Practitioners in Dialogue' (Cambridge: Cambridge University Press, 2012), pp. 52-53.

different types of limitations may be imposed. Furthermore, limitations of one right should take into account the enjoyment of other rights. For instance, limitations of the right to take part in cultural life should not lead to illegitimate limitations of rights that are intrinsically linked, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.[21]

The main aim of limitations is to prevent that the unlimited exercise of cultural rights seriously endangers the rights of others or of society as a whole. For example, freedom of expression can be limited in that creative expressions should not harm the cultural life of society as a whole or of specific groups, such as children. The right to take part in cultural life can be limited in cases where cultural activities use racist or discriminatory expressions.

The question remains how to deal with cultural activities or practices that are questionable from a human rights point of view. Culture can for instance be used as a justification for harmful practices that are in conflict with or limit the enjoyment of human rights. Cultural practices are very diverse, which makes it impossible to make general, abstract statements about their acceptability in relation to human rights. However, it should be emphasised that cultural practices that are clearly in conflict with international human rights law cannot be justified as a reflection of cultural diversity. Respect for cultural diversity cannot be an argument to systematically or grossly deny international human rights law. In the Universal Declaration on Cultural Diversity and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions it was clearly laid down that no one may invoke cultural diversity in order to infringe upon human rights as guaranteed by the UDHR and by international law, or to limit the scope thereof.[22]

It should be noted that harmful cultural practices are often formally prohibited by law. Even so, they may be practised, and sometimes even

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[21] UN Doc. E/C.12/GC/21, Committee on Economic, Social and Cultural Rights, *General Comment nº. 21, Right of everyone to take part in cultural life* (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, para. 19.

[22] *Universal Declaration on Cultural Diversity*, UNESCO, 2001, Article 4; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, UNESCO, 2005, Article 2(1).

condoned by states. This also shows that law alone cannot solve all issues and cannot by itself change cultural practices. Changes in cultural practices are most successful if they arise within the cultural community itself and are not imposed from outside, by law or by the state. This does of course not relieve states from the responsibility to find ways to promote such changes.

Several treaties emphasise this role of the state in eradicating harmful cultural practices. The UN Convention on the Elimination of All Forms of Discrimination Against Women, for example, states in Article 5 that "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[23] The CRC contains in Article 24(3) that "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children".[24]

Several treaty bodies have also emphasised the role of the state in abandoning cultural practices that are against human rights. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has adopted a specific recommendation on female circumcision, urging States to eradicate this practice harmful to the health of women.[25] In its General Comment on the equal enjoyment of rights, the HRC has also stated that "States Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to

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[23] A similar provision can be found in Article 2(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005): 'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men…with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes…' See, also, Rikki Holtmaat and Jonneke Naber, *Women's Human Rights and Culture-From Deadlock to Dialogue* (Antwerp: Intersentia, 2011), pp. 9-50.

[24] Although 'traditional practices' are not defined, it becomes clear from the drafting documents that this provision was targeted against FGM. See Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural relativism and the UN Convention on the Rights of the Child*, in (2003) 25:1 *Human Rights Quarterly*, pp. 136-137.

[25] Committee on the Elimination of All Forms of Discrimination Against Women, *General Recommendation nº. 14, Female Circumcision*, ninth session, 1990.

equality before the law and to equal enjoyment of all Covenant rights".[26] It has also listed a number of harmful cultural practices as violations of human rights. It maintains that female infanticide, widow burning and dowry killings are violations of the right to life, that forced abortion, forced sterilisation and forced genital mutilation are violations of the right not to be subjected to inhumane and degrading treatment, and that forced male guardianship is a violation of the freedom of movement.[27]

UN treaty bodies further systematically encourage states to promote changes in harmful cultural practices in their dialogue with states under the periodic reporting procedure. Studies have shown that states during this dialogue often – at least formally – agree on the harmfulness or unacceptability of such practices, which is why they are prohibited by law. These states point out, however, that changing the deeply rooted cultural convictions of certain communities is difficult and requires time and patience. Formal legislation prohibiting harmful practices and culturally motivated violence is not sufficient to eliminate the practice altogether.[28]

While the ratification of treaties and the adoption of laws prohibiting harmful cultural practices provide a sound legal basis, it is not always the only, best, or most effective way to address situations of cultural diversity, in particular the contentious ones. Other processes, including education, awareness-raising and social development – which are also human rights – are important to address such cultural diversity situations. Cultures are not static. Change is possible and human rights can in fact be instrumental in such change.

4. Concluding Remarks

International human rights law provides many possibilities for individuals and communities to enjoy, maintain and develop their culture, either via the equality principle as well as via cultural rights and the cultural dimension of

[26] Human Rights Committee, *General Comment n°. 28, Equality of Rights Between Men and Women (Article 3)*, 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add. 10, para. 5.
[27] *Ibid.*, paras. 10, 16.
[28] Harris-Short, *op. cit., supra,* note 24, pp. 140-145; 164; Michael Ado, *Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights*, in (2010) 32:3 *Human Rights Quarterly*, pp. 631-635.

rights. It is an international legal framework for promoting and preserving not only the diversity *between* cultures, but also the diversity *within* cultures. It provides rights to promote and protect culture, but it can also protect against harmful practices or stereotypes. As shown above, cultural rights cannot be enjoyed unlimitedly. They cannot be invoked or interpreted in such a way as to justify the denial or violation of other human rights and fundamental freedoms. The system of balancing and limitations based on the principles of equality, non-discrimination, as well as the rights of others, could safeguard cultural diversity from being misused for the protection of cultural practices that infringe upon human rights.

At the same time, tackling contentious diversity issues should not be limited to the adoption of treaties and laws by states alone. It requires a multidimensional approach. Apart from legislation, human rights policies and measures in the field of education, awareness-raising and social development should be taken. The preparation and implementation of such policies should not only involve state authorities, but as much as possible the cultural communities concerned. Human rights and cultural diversity may often imply a difficult balancing act. A steady outcome can only be ensured by invoking different instruments and tools and by involving the different stakeholders concerned in this process.