Cultural human rights in international law: from recognition to realization

Donders, Y.

Publication date
2014

Document Version
Final published version

Published in
Formaçao Jurídica e Juridiciária - Colectânea, tomo X

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
1. Introduction

The categorisation of human rights, including cultural rights, stems from the titles of two international human rights treaties adopted in 1966: the International Covenant on Civil and Political Rights (1966, ICCPR) and the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR). 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’.

For a long time, it was argued that the category of cultural rights was, compared to civil, political, economic and social rights, conceptually and legally underdeveloped and neglected by States, international
supervisory bodies and academics. Cultural rights for a long time received "by far the least amount of serious attention". The main reason behind the neglect of cultural rights was the vagueness and indeterminacy of the concept of culture and the resultant ambiguity of the normative content and corresponding state obligations of cultural rights. Furthermore it seemed that cultural rights were further to be less important than civil, political, economic and social rights. Or they were even considered to be risky, as they might support questionable cultural practices. Some States considered cultural rights to be dangerous, because they could empower cultural communities, which might endanger national unity and lead to instability in society.

In recent years, it can no longer be argued that cultural rights are neglected, at least not by scholars and by international monitoring bodies. Many academic studies have been conducted on cultural rights. At the UN level, the Committee on Economic, Social and Cultural Rights has in 2009 adopted a General Comment on a prominent cultural right, namely the right to take part in cultural life (Article 15(1) ICESCR). Another important development in the further elaboration of cultural rights is the approval of the mandate of the Special Rapporteur in the Field of Cultural Rights in 2009 by the Human Rights Council and the extension of this mandate in April 2012. The current Special Rapporteur, Ms Farida Shaheed, has issued important reports on access to cultural heritage, gender issues and cultural rights and freedom of cultural expressions.

The elaboration of cultural rights by scholars and international monitoring bodies has led to increased recognition of these rights as an integral part of human rights. Recognition does, however, not automatically imply realization and not all (legal) issues surrounding these rights are solved. It is still unclear which rights are cultural rights and what the normative content and scope of these rights is. This is mainly caused by the remaining ambiguity of the concept of culture, including its dynamic character and individual and collective dimension, and the difficulty

---

of translating this dynamic concept into international legal norms. Below cultural rights in international human rights law are explored by mapping and exploring provisions in international human rights treaties. International human rights law contains many provisions that directly or indirectly promote and protect cultural diversity and cultural identities. These rights can be grouped under the category of cultural rights. Then the normative content of cultural rights is analysed, including the object and the subject of these rights, taking the right to take part in cultural life as an example.

2. Cultural Rights in International Human Rights Law: Explicit, Direct and Dimensional

Cultural rights can be broadly defined as 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 identity.

Taking from international human rights law, there are broadly three sorts of provisions that could fall within the category of cultural rights. Firstly, there are provisions that explicitly refer to culture. The prime examples of such provisions are the right of everyone to take part in cultural life, as laid down in Article 15(1)(a) ICESCR and the right of members of minorities to enjoy their own culture, practice their own religion and speak their own language, as laid down in Article 27 ICCPR.

Secondly, there are provisions containing rights that 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 direct link with culture are the right to self-determination (article 1 ICESCR and ICCPR), the rights to freedom of religion (article 18 ICCPR), freedom of expression (article 19 ICCPR) and freedom of assembly and association (article 21 and 22 ICCPR) and the right to education (article 13 and 14 ICESCR).

Thirdly, apart from these rights explicitly or directly related to culture, it appears that many human rights have a 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 (article 12 ICESCR), for instance, may have important cultural connotations as far as certain ways of treatment or the use of certain (traditional) medicines are concerned. Culture also plays a decisive role in sexual and reproductive health. The Committee on Economic, Social and Cultural Rights, the international independent supervisory body of the ICESCR, has recognized 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’.

Another example is the right to adequate food (article 11 ICESCR). The preparation and consumption of food have a clear cultural connotation. The importance of the cultural dimension of food is reaffirmed by the fact that several food traditions, such as the French cuisine, the Mediterranean diet, and the traditional Mexican kitchen, have been recognized as intangible cultural heritage. The Committee on Economic, Social and Cultural Rights has also stated that the guarantees concerning the right to food should be culturally appropriate and acceptable.

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

---

3 Committee on Economic, Social and Cultural Rights, General Comment No. 12, The Right to Adequate Food (article 11) 12 May 1999 para. 7, 8 and 11.
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. 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.

3. The Object of Cultural Rights: Culture and Cultural Life

What is the object of cultural rights? In other words, what is protected and promoted by cultural rights? Broadly speaking, cultural rights protect cultures, or more specifically cultural interests, cultural lives or cultural identities. All these are concepts of which the dynamics and complexity do not easily translate into legal terms.

3.1. The Concept of Culture

Culture still remains a concept of which the dynamics and complexity do not easily translate into substantive rights. Culture is not an inactive notion, but something that can develop and change over time. It is not static, but dynamic; it is not a product, but a process, which has no well-defined boundaries and is influenced by internal and external interactions. Culture can refer to many things, varying from cultural products, such as arts and literature, to the cultural process or culture as a way of life. Culture has an objective and a subjective dimension. The objective dimension is reflected in visible characteristics such as language, religion, or customs, while the subjective dimension is reflected in shared attitudes, ways of thinking, feeling and acting. In addition, culture has an individual and a collective dimension. Cultures are developed and shaped by communities. Individuals identify with several of these cultural 

1 See Article 14 ICCPR and Article 6 ECHR and ECHR. Konosinski v. Austria, Appl. No. 9783/82, 19 December 1989, para. 74.

communities – ethnicity, nation, family, religion, etc. – and in that way shape their personal cultural identity.

In general, culture is considered to be important to human beings and to communities. In the words of the World Commission on Culture and Development: "... culture shapes all our thinking, imagining and behavior... a dynamic source for change, creativity, freedom, and the awakening of innovative opportunities. For groups and societies, culture is energy, inspiration and empowerment." 13

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. Examples of such harmful practices, which often affect women, include female genital mutilation, widow cleansing and forced marriage and forced prostitution.

The broadness, complexity and sensitivity of the concept of culture are serious challenges in the integration of this concept into international human rights law. This challenge is well-shown in the elaboration of the right to take part in cultural life.

3.2. Taking Part in Cultural Life

The object of the right to take part in cultural life contains two elements: taking part and cultural life. The scope of both of these concepts has broadened over the years.

At the time of its adoption, the right to take part in cultural life, as included in Article 15(1)a ICESCR was mainly meant to make the ‘high’ material aspects of culture more broadly available. No reference was made to cultural communities, instead the emphasis lay on participation in the national cultural life. Moreover, the drafters did not have in mind the ‘popularization’ of culture. The right to take part in cultural life did not imply the right of all people to enjoy these cultural activities that they themselves found worthwhile. Cultural access did not mean that the masses could rule on which cultural activities should be available and accessible.

The intention was to increase access mainly to aspects of ‘high culture’, in other words the classic concept of culture, or culture with a capital C, as referring to arts, literature, theatre and museums.

In its General Comment on the right to take part in cultural life, adopted in 2009, the Committee on Economic, Social and Cultural Rights adheres to a very broad concept of culture and cultural life, not at all restricting these to (aspects of) ‘high culture’. It describes culture, for the purpose of implementing this right as encompassing “…ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence...” This list is non-exhaustive and shows how broad the scope of the right to take part in cultural life is.

As regards the concept of “taking part”, the Committee in its General Comment distinguished three different components of this notion: participation in, access to and contribution to cultural life. These dimensions reflect both the passive and the active side of the right to take part in cultural life. Participation implies inter alia the freedom to identify or not with one or several cultural communities or to change that choice, to engage in one’s cultural practices and to express oneself in the language of one’s choice. Access implies inter alia through education, information and training to be able to know and understand one’s own culture and that of others and to learn about forms of expression and dissemination. Contribution means inter alia the right to be involved in creating the spiritual, material, intellectual and emotional expressions, as well as the right to take part in the development of the community, including in the elaboration and implementation of policies and decisions on cultural matters.

The distinction between participation, access and contribution appears to be relevant when it comes to define the types of measures that States should adopt in order to ensure the enjoyment of the right to take part in cultural life. Indeed, the paragraphs devoted to clarify special protection measures for specific groups seems to have in mind some of these distinctions: for some groups – such as indigenous peoples or minorities – the emphasis is on allowing them to develop and participate in their own cultural life without interference, while for other persons

---


---


17 Idem, para. 15.
and groups – such as women, older persons, persons living in poverty or persons with disabilities – emphasis is placed removing different obstacles that prevent access to cultural life.\(^{18}\)

The Committee has further elaborated several elements of the right to take part in cultural life necessary for its full implementation\(^{18}\). These are:

- **Availability**, which means that the object of the right, in this case cultural goods and services, has to be available in sufficient quantity, including operational aspects such as buildings, facilities and materials.

- **Accessibility**, which means that cultural goods and services have to be accessible to everyone, on the basis of non-discrimination. They should also be geographically and economically accessible (affordable) and there should be access to information.

- **Acceptability**, which means that the policies and strategies adopted by the state have to be acceptable to individuals and communities and that they should be consulted.

- **Adaptability**, which means that the policies and strategies should be flexible and relevant to be able to adapt to the needs of individuals and communities.

- **Appropriateness**, which refers to the obligation to advance and realize other human rights, in particular the rights to food, health, housing, water and education, in a way that is appropriate to the cultural context and respectful of the culture of individuals and communities.

\(^{18}\) Idem, section E.

\(^{19}\) Idem, para. 16.

4. The Subject of Cultural Rights: Individual, Community or Both

Who are the subjects of cultural rights? In other words, who can enjoy cultural rights? As stated above, the concept of culture has an individual and a collective dimension. Accordingly, cultural rights demand not only an individual, but also a collective approach. This leads to the question: Are cultural rights individual rights, or collective rights, or both?\(^{20}\)

It should first be noted that the term “collective rights” is not very clear and has formed a basket in which different sorts of human rights with some kind of collective dimension could be contained. The terminology used in academic literature to describe human rights with a collective dimension is very inconsistent. Terms such as collective rights, peoples’ rights, minority rights, group rights and community rights are used intermixed to describe: rights for collective entities as such, rights for individuals as members of such collective entities, and rights with a collective interest or object.\(^{21}\)


\(^{21}\) See, for an overview of usage, including a distinction between subjects, beneficiaries and legal persons: Corsín Bisar, The Concept of Group Right in International Law –
Taken from international human rights law, generally speaking, collective rights come in three forms: as community rights, as communal rights and as individual rights with a collective dimension.

4.1. Community Rights

Community rights are international human rights provisions of which the subject or rights-holder is a collective entity, such as a people or a community.

One of the first community rights adopted in international human rights law was the right of peoples' to self-determination, incorporated in the ICCPR and the ICESCR as the common first Article. This right has an important cultural component, linked to the internal dimension of self-determination. A proper implementation of the right to internal self-determination, including a peoples' right to preserve its cultural, ethnic, historical and territorial identity, may imply some form of self-government or autonomy in the economic, social and/or cultural field. Indigenous peoples mainly use the right to (internal) self-determination to demonstrate their desire to exist freely and to develop as distinct communities. They wish to live according to their own values and beliefs, to be respected by states and other communities.

Based on the importance of the right to self-determination, indigenous peoples have always demanded to be recognized as a collective entity and advocated for community rights. The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007, indeed includes community rights. The title of the Declaration, as well as several provisions, gives rights to indigenous peoples as such, at the same time

---


recognising that individual members also have these rights. As stipulated in article 1: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”

Apart from the right to self-determination, the Declaration includes several community cultural rights. Article 5 for instance contains that “[I]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.” Article 8(1) stipulates that “[I]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture”. The Declaration as soft law instrument is not legally binding upon states.

4.2. Communal Rights

The second form of collective cultural rights are communal rights, which are international human rights provisions of which the subject or rights-holder is an individual recognized as a member of a collective entity, whereby this membership is often explicitly referred to.

Article 27 ICCPR is the main example of a communal cultural right. It guarantees the right of members of minorities to enjoy their culture, explicitly referring to the right to do so ‘in community with other members of their group’. A similar provision is provided for in Article 30 of the Convention on the Rights of the Child (CRC, 1989). Another example is Article 12 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Family (CRMW, 1990), containing the right to manifest religion for migrant workers “either individually on in community with others”.

Communal rights can also be found in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in 1992. The title, as well as most provisions, speaks of rights of members of minorities. Article 3(1) of the Declaration stipulates, however, that “[p]ersons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.” In some provisions the minority as such is mentioned, for instance in article 1(1): “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.” This provision is not drafted as a substantive right, but as a recommendation to states. Although such provisions recognize the minority as a collective entity, the community is not the subject of a right, but more its beneficiary. The Declaration, unlike article 27 ICCPR, is not legally binding.

4.3. Individual Rights with a Collective Dimension

The third form of collective cultural rights are individual rights with a collective dimension, which are human rights provisions of which the subject or rights-holder is an individual and no explicit reference is made to a collective entity, but whereby the enjoyment of the right has a clear collective dimension.

Most cultural rights in international human rights instruments are defined as individual rights. These rights are, however, for a large part enjoyed in connection with other individuals or within the context of communities. Examples of such provisions are the rights to freedom of assembly and association (articles 21 and 22 ICCPR), freedom of religion (article 18 ICCPR), freedom of expression (Article 19 ICCPR) and the right to education (articles 13 and 14 ICESCR). All these rights have a strong collective dimension in relation to the object of the rights as well as their enjoyment. Formally speaking, however, these rights are defined as individual rights.
Another example is the right to take part in cultural life, as included in Article 15(1) of the ICESCR. This provision is drafted as an individual right, not containing a reference to shared enjoyment, but can merely be enjoyed together with other members of a cultural community. This approach is confirmed in the General Comment on this provision. The Committee on Economic, Social and Cultural Rights stated that ‘everyone’ as subject of the right to take part in cultural life refers to the individual or the collectivity: “[c]ultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such”. As indicated above, several groups are specifically mentioned in the General Comment: women, children, older persons, persons with disabilities, minorities, migrants, indigenous peoples and persons living in poverty.

5. Harmful Cultural Practices and Limitations of Cultural Rights

As stated above, it has often been argued that cultural rights should not be promoted nor protected, because they could justify questionable 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. International law is, however, quite clear on the relationship between cultural diversity and human rights. 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. This approach is also confirmed in the General Comment on the right to take part in cultural life.

International human rights law is also clear on the fact that 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 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...”

Such limitation clauses can be found in most human rights instruments, sometimes in general terms, sometimes attached to a particular provision. Article 4 ICESCR, for example, gives States the possibility to limit the enjoyment of the rights in the Covenant, but only on the condition that these limitations are “...determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” This limitation clause is not meant to provide States with a simple excuse not to implement the provisions of the ICESCR. Limitations may not be in contradiction with the nature of the rights in the Covenant, otherwise the provisions would no longer have any value and substance.

The Committee on Economic, Social and Cultural Rights also stated that limitations to the right to take part in cultural life may be necessary, "...in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights" 24.

Two remarks should be made. First, cultural practices are very diverse, which makes it impossible to make general statements about their acceptability in relation to human rights. The scope of their possible conflict with human rights depends on the particular context of the case. Second, it should be noted that many cultural practices broadly considered to be harmful are often formally prohibited by law. Even so, they may be practised, and sometimes even condoned by States. This also shows that law alone 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 human rights 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" 25. The Convention on the Rights of the Child 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".

Several treaty monitoring 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 26. In its General Comment on the equal enjoyment of rights, the Human Right Committee 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 equality before the law and to equal enjoyment of all Covenant rights" 27. 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 28.

6. Concluding Remarks: Realizing Cultural Rights

The mapping of cultural rights shows that there are many provisions in international human rights law that can qualify as cultural rights. These


25 See on this provision Rikki Holmnaat and Joukeke Naber, Women’s Human Rights and Culture-From Deadlock to Dialogue (Intersentia 2011) 9-50.
rights reflect that cultures and cultural identities are important to human beings and form an important part of human dignity to be protected by human rights. The broad concept of culture, including not only cultural products, but also process-oriented aspects such as association, language, religion and education, implies that the category of cultural rights includes many different human rights. Cultural rights are the rights to create and enjoy cultural products and the rights to have access to and participate in culture, as well as the rights to freedom of association, expression, religion and the right to education. Cultural rights may also refer to the cultural dimension of human rights, such as the rights to private life, family life and health. In other words, the category of cultural rights covers many different human rights. They are more than merely those rights that explicitly refer to culture, but include all human rights that protect or promote components of the cultural identity of individuals and communities as part of their human dignity. Cultural rights further reflect the individual as well as the collective dimension of human rights. The collective dimension of cultural rights can refer to the subject of the right, a group, community or people, and/or to the object of the right, being a collective interest. As such, cultural rights have a multidimensional character and embody the indivisibility, interdependence and interrelation of all human rights.

The last decades, important progress has been made in the rise of awareness and appreciation of cultural rights. Cultural rights are now recognized as true human rights that protect an essential part of human dignity. Cultural rights are no longer seen, at least in theory, as an “extra” after other human rights have been implemented. Cultural rights, including the cultural dimensions of human rights, are to be enjoyed by individuals and communities, and States have legal obligations in this regard. These legal obligations may also include limiting the enjoyment of cultural rights to protect the general welfare of the society and/or the rights of others, including against harmful cultural practices.

There are, however, several remaining challenges. In order to encourage states to improve the implementation and realization of cultural rights, the normative content and scope of these rights should be further elucidated. This does, however, require that cultural rights are not approached as a whole, but that the analysis focuses on one or more substantive provisions. Treating cultural rights as a whole creates the false impression that cultural rights form one comprehensive category of rights and that it is clear which rights belong to this category. As shown above, it is not fully clear which rights belong to the category of cultural rights. Moreover, some human rights, for instance the rights to freedom of religion and freedom of expression, are cultural rights, but they could also be considered political or civil rights. If the aim is to improve the promotion and protection of cultural rights, this can best be done by the further analysis and elucidation of specific cultural rights provisions. They differ too much in terms of scope, normative content and corresponding state obligations to consider them all together.

Finally, it should be noted that although international human right treaties provide an important international legal framework, these rights need to be implemented and enforced at national level by the different branches of the State. Enforcement at international level is generally rather weak. It is based on the premise that, as Eleanor Roosevelt put it at the time of the adoption of the Universal Declaration of Human Rights, human rights protection starts close to home. It is important that the State involves cultural communities themselves in the implementation of cultural rights. Moreover, the development of cultural rights should not be an exercise of lawyers only, but should involve specialists from other disciplines as well. Only concerted efforts can bring cultural rights from general recognition to true realization.