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AD HOC COMMITTEE FOR THE PROTECTION OF NATIONAL MINORITIES
(CAHMIN)

Preliminary draft protocol
to the European Convention for the Protection
of Human Rights and Fundamental Freedoms
on the recognition of cultural rights,
prepared by the working party
following up the 8th Fribourg Colloquy (Switzerland)
(second revision August 1994)

In the series of colloquies of the Fribourg University Centre for Interdisciplinary Ethical and Human Rights Studies, all devoted to the objectiveness of human rights, the subject of the eighth colloquy was: *Cultural rights, a neglected category of human rights*¹. The meeting produced a set of conclusions and an indicative list of rights.

A follow-up working party was established to put the conclusions, and particularly the list of cultural rights, into proper legal form. The challenge was to define the substance of these rights so that they could be judicially protected, irrespective of the association of an individual, who is the holder of the right, with a recognised cultural community, be it a majority or minority. This consists of defining cultural rights as universal rights in order to provide the necessary framework for their observance in respect of every human being including those who belong to a minority. It is a logical and essential counterpart - if not a prerequisite - to drafting specific instruments on the rights of minorities. The most stringent approach, in order to put the general principle of indivisibility to the test, and the one most immediately effective for developing such rights, consisted of drawing up a draft protocol to the European Convention on Human Rights, which, through the judicial structure established by the Convention, would ensure the effective observance of the rights guaranteed.

The preliminary draft presented here has been favourably received by interested circles; it has, inter alia, been adopted as a working document at the Council of Europe by the Ad Hoc Committee for the Protection of National Minorities (CAHMIN). We hope that the publication of this brochure will encourage as broad a debate as possible. Furthermore, to ensure and publicise the coherence of this approach, the working party is preparing in a second phase a draft declaration within a UNESCO framework; the aim is to propose a complete, coherent list of cultural rights regarded as human rights.

The members of the working party are: Denise BINDSCHIEDLER-ROBERT (a former judge of the European Court of Human Rights, Bern), Sylvie BOITON-PIERRE (Lyon University), Marco BORGHI (Director of the Fribourg University (Centre for Interdisciplinary Studies), Pascale BOUCAUD (Director of the Catholic University of Lyon Human Rights Institute), Emmanuel DECAUX (Paris University X, Director of the CEDIM), Jean-Bernard MARIE (Secretary General of the International Institute for Human Rights, Strasbourg), Patrice MEYER-BISCH (Co-ordinator, Centre for Interdisciplinary Ethical and Human Rights Studies, Fribourg University).

We wish to thank the Directorate of International Law (Swiss Department of Foreign Affairs) and the Swiss National Unesco Committee for their intellectual and material support, as well as the other institutions assisting us.

For the Fribourg University Centre for Interdisciplinary Ethical and Human Rights Studies:

Marco BORGHI, Director
Patrice MEYER-BISCH, Co-ordinator

¹ The proceedings have been published with the title "Les droits culturels, une catégorie sous-développée de droits de l'homme", P. Meyer-Bisch (ed.), 1993, Fribourg, Switzerland. In addition to the various contributions, the volume contains the conclusions, an index and a version of the preliminary draft before it was amended to produce this latest version. It may be ordered from Editions universitaires, pérolles 42, CH1700 FRIBOURG. The cover picture is of a bronze work of art from the UNICEF series by Maja Heller Schucan entitled *De l'eau pour tous*.

**PRELIMINARY DRAFT PROTOCOL
TO THE EUROPEAN CONVENTION FOR THE PROTECTION
OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
ON THE RECOGNITION OF CULTURAL RIGHTS**

The member states of the Council of Europe, signatories to the present Protocol,

Considering the need to have regard more specifically to the cultural dimension of the rights set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms;

Acknowledging that cultural rights no less than other human rights, are a manifestation and requirement of human dignity;

Acknowledging that cultural rights constitute rights to identity, which everyone exercises both individually and collectively,

Pointing out that those rights must be exercised in a manner compatible with all other human rights and fundamental freedoms;

Being resolved to take steps to ensure the collective enforcement of the cultural rights set out below,

Have agreed as follows:

Article 1

Everyone both has as an individual and shares with others the right to respect for and expression of his values and cultural traditions in so far as they are not contrary to the requirements of human dignity, human rights and fundamental freedoms; that right includes:

- a. freedom to engage in cultural activity, whether in public or in private, and more particularly to speak the language of one's choice;
- b. the right to identify with the cultural communities of one's choice and to maintain relations with them; this implies freedom to alter such choice or not to identify with any cultural community;
- c. the right not to be prevented from discovering the whole range of cultures, which together constitute the common heritage of humanity;
- d. the right to knowledge of human rights and to take part in establishing a culture governed by human rights.

Article 2

1. Everyone has the right to an education which allows full and unrestricted development of his cultural identity in a manner recognising and respecting the diversity of cultures.
2. This right includes freedom to teach and be taught one's own culture and language and to set up whatever institutions are necessary for that purpose in accordance with national law.
3. It includes entitlement to public provision, in proportion to needs and resources, of the means necessary to safeguard the right.

Article 3

The rights set forth in this Protocol shall not be construed as allowing any individual, group or public authority to use them in order to harm the physical or spiritual integrity of any individual or impose behaviour on any individual which is incompatible with such integrity.

Article 4

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order, for the protection of health or morals or for the protection of the rights and freedoms of others. In no circumstances may they be invoked for the purpose of restricting any other right set forth in this Convention or the Protocols to it.

Article 5

The States Parties shall regard Articles 1 to 4 of this Protocol as additional to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve the Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7

1. This Protocol shall enter into force on the first day of the month after the date on which five member States of the Council of Europe have expressed their consent to be bound by it in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Article 7.

Brief commentary

1. *Purpose*
2. *Definitions*
3. *Comments on the provisions of the Protocol*

1. Purpose

A protocol of this kind is aimed at dealing with the question of cultural rights in a comprehensive framework, while at the same time stressing their judicial nature. The present draft is based on two premises:

- cultural rights are seriously neglected as human rights;
- they are viewed almost exclusively in the context of the rights of minorities.

However, the concept of minority rights inevitably carries a risk of discrimination, as it is profoundly unjust to regard an individual as belonging exclusively to one community on account of his language, ethnic origin or religion: there needs to be the possibility of a number of reference communities and it is essential to recognise the individual's freedom of choice. Furthermore, the minority/majority relationship is variable and cannot be used as a criterion for defining the obligations of a law-based state as regards the right of all its nationals to live in dignity and freedom. It implies that the situation of a state with a single or a majority culture is the norm, whereas current political events are resulting in increasing recognition of multicultural states, in which it is inappropriate to identify a majority or minorities. Indeed, since the majority/minority relationship is a factor for discrimination, it is highly undesirable. The purely quantitative and relative nature of the concept of minority is a frequent pitfall in the debate on such rights.

These remarks in no way alter the need to frame and implement a body of law concerning individuals belonging to communities in minority situations and to lay down measures of positive discrimination to restore the fundamental equality of individuals and communities.

Nevertheless it appears to be of central importance to assert the fundamental and individual character of cultural rights, that is the possibility for every individual, whether belonging to a community or not, to claim his rights before a judicial authority. This approach makes it necessary to define the scope of these rights, in order to enable their judicial application.

2. Definitions²

"Cultural" embraces all aspects of culture - not only values, starts, sciences and languages but all the attitudes and traditions which determine lifestyles. The idea is to avoid the confusion created by numerous texts which simply append "cultural" to a list of other adjectives (eg artistic, scientific and cultural).

A **"cultural community"** may be ethnic, linguistic, religious or national as well as artistic and scientific or based on proximity or work: it is a community with similar manners of living and thinking. It is essential for the cultural dimension to preserve its generality here, as individuals are not confined, or indeed capable of being confined, within a single sphere of influence.

"Cultural identity" is defined both by membership of specific cultural communities and by reference to universal values. It is thus asserted not just by claiming the right to be different from others but also by claiming the right to resemble others and not to be discriminated against. Cultural identity necessarily includes both these facets.

"Cultural rights" as human rights, imply the right for everyone, without distinction, to base his cultural identity on references chosen according to the various cultural communities and heritages to which he freely acknowledges his attachment. Thus cultural rights should be interpreted in terms of the indivisibility of all human rights; this not only protects them from any misinterpretation but also supplements and clarifies the definition of the already recognised human rights and fundamental freedoms.

The possessor of cultural rights

Cultural rights are possessed by everyone, whether in an individual capacity or on a shared basis. There is no reason to bring in a distinction between individual rights and collective rights.

3. Comments on the provisions

Article 1

The right to respect for and expression of one's cultural traditions and values, as one of the fundamental freedoms, is exercisable immediately by everyone, subject to the limitations in Article 4.

Sub-paragraph a. The right to one's language is not separate: it makes sense to view it as one of the cultural activities. By cultural activity is meant any activity which sustains and develops not only arts, sciences, languages and values but anything pertaining to way of life (such as skills, technologies, housing or mode of dress).

² The definitions and comments that follow have been largely gleaned from the colloquy itself; the page numbers in parentheses refer to the proceedings.

The right to one's language is exercisable immediately since there is no question here of defining a right to use one's language in dealings with the authorities.

Sub-paragraph b. This applies freedom of association to matters of cultural identity in order to ensure that the identification process is subject to freedom of the individual, at all times and however many identifications are involved. The individual is thus free to identify with more than one cultural heritage or community.

However, the right does not entail any obligation on a community to accept anyone as one of its members.

Sub-paragraph c. This places a negative obligation on States in order to protect the right from any sectarian or nationalistic interpretation.

Sub-paragraph d. This right has been amply defined by the CSCE (Copenhagen, section 10). There is no explicit reference to it in the ECHR although implementing it does not pose any problems in principle. The state is not only not allowed to hinder knowledge of human rights and of how to protect them, but has a duty to make absolutely sure it is properly included in the compulsory school curriculum and in all vocational training in whatever form is appropriate to the particular type of education or training.

The right to a culture governed by human rights is an extension of the right to political participation: no-one may be prevented from observance of human rights or promoting such observance within his culture.

Article 2

This supplements the right to education as laid down in Article 2 of the Protocol to the Convention. It affirms that the teaching of cultural values, whether group-specific or universal makes a contribution both to freedom and tolerance.

The second sub-paragraph lays down a negative obligation which is essential to respect for the rights of minorities.

The third sub-paragraph lays down positive requirements such as the Court accepts for purposes of effective compliance. Otherwise the specified freedom would be available only to wealthier language communities and would afford no protection to communities which genuinely needed it.