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Table of Contents

Articles

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The concept of right to culture in international relations

Abstract

The notions of culturalization of human rights law and the concept of right to culture are fairly new issues, arising from the changes in the area of application and understanding of international law as well as from the signs of growing sensitivity to the sphere of culture, but also the need to take into account the broad cultural context. As a result of these changes international bodies, courts and institutions pay more attention to the role of culture in human rights. Based on this process, we can observe the emergence of the concept of the right to culture as one of the fundamental human rights. This article thus seeks to answer questions as to what the right to culture might be, how is understood, whether it is rooted in international law, and how it might be being given effect to. Considering that this is a very broad and multifaceted issue, the goals here have been limited to a very general indication of the key issues related to the emerging concept of the right to culture. Hence, due to the current debate the article's aims it to highlight the foundation of the right to culture, give overview how the right might be perceived and where we can find elements constituting the right to culture (here e.g. international bodies judgments).

Keywords: right to culture, international law, ECHR judgments, UN, international organizations

The twin notions of the culturalisation of human rights and the right to (a) culture represent new issues arising out of change as regards the application and interpretation of international law and human rights, as well as manifestations of a growing sensitivity in the cultural sphere, but also a demand that the broad context of culture be taken account of.[1] The outcome of all these changes is greater consideration given by international courts, institutions and organisations to the role culture plays in human rights. In turn, on the basis of the changes that have taken place, we are witnessing the onset of a process whereby the concept of the right to culture is clarified by way of becoming fully fledged as one of the fundamental human rights.

The foundation for the article is consideration of culture as a key indicator of state's identity.[2] Thus, right to culture, can be seen as a results of bilateral, constant interaction between the structure and the human agency (i.e. subjectivity, primacy).[3] This article thus seeks to answer questions as to what the right to culture might be, whether it is rooted in international law, and how it might be being given effect to. Considering that this is a very broad and multifaceted issue, the goals here have been limited to a very general indication

[1] In Poland so far on the subject (right to culture) or related to the subject issues wrote already: Młynarska–Sobaczewska (2018); Gierat-Bieroń (2014): 194-195; Młynarska – Sobaczewska (2013); Sobczak (2010). When it comes to international publications there are: Claridge, Xanthaki (2016); Wiesand (2016); Mężykowska (2016); Lenzerini (2014); Laaksonen (2010); Council of Europe (2012); Young (2012); Borelli, Lenzerini (2012); Shaver (2010); Shaver (2009); Stamatopoulou (2007); Wagner (2004); Donders (2002).

[2] Wendt (1996): 48.

[3] The structure has a cultural dimension when participants in international life share understanding of certain concepts. See Wojciuk (2012): 55.

of the key issues related to the emerging concept of the right to culture[4]. Thus, due to the current debate the article's aims it to highlight the foundation of the right to culture, give overview how the right might be perceived and where we can find elements constituting the right to culture (here e.g. international bodies judgments).

1. A right to culture: current debate

The idea of the culturalisation of human rights[5] – relating to the broad context in which cultural elements should be taken account of as human-rights standards are shaped via cultural conditioning – may represent a foundation for the emerging concept of the "right to culture".[6] Answers as to whether the right is operational in international law prove ambiguous. As such, a *right to culture* is not known, and conventions and international agreements arising so far form an area regulating para-cultural dimensions known as cultural rights.[7] It then needs to be recalled how for years these were rights undervalued or underappreciated, and ones whose underdevelopment engendered the perception of their being less important[8].

There is thus no anchoring in law for the right to culture, though there are a whole range of declarations, conventions and recommendations that refer to culture as such,[9]

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4 For a wider-ranging consideration of the definition of the right to culture see: Młynarska–Sobaczewska (2018), and relations between cultural rights and international law see: Franzioni (2018).

5 For broadened analysis see Lenzerini (2014).

6 Donders (2002), Donders (2016): 23-32.

7 Young (2012).

8 Elsa Stamn.

9 See Shaver (2010); Shaver (2009).

to cultural rights, to participation in cultural life, and to rights as broadly recognised from which cultural rights might also arise.

The right to culture may be related to at least two areas, and be understood in at least two ways. In the first place, the right to culture (or perhaps more suitably the right to *a* culture) relates to the free practice and pursuit of family and tribal customs, traditions, language and way of life, in accordance with the standards of the cultural group to which a person belongs, and with which they identify[10]. It is then the role of the state to guarantee freedom of expression, and to make possible the conflict-free coexistence of many cultures. In the second place, the right to culture can be a common denominator and description applying *i.a.* to traditional cultural rights included among the so-called second-generation rights. This would then entail the right to participate in cultural life, to freedom of research, to draw on the achievements of civilisational development, and to freedom of the arts/education/science.[11] Again the consequence

[10] Wiessner (2018): 333-358.

[11] A similar division may be found in the publication by Młynarska-Sobaczewska, who also emphasises the two dimensions to any understanding of the right to culture, in relation to two different interpretations or ways of comprehending the situation. The first of these relates to universal artistic culture (referred to there as prevailing or dominant), while the second is basically a right to have one's own culture preserved, with the interpretation here involving all the elements that come together in creating the identity of a given group, i.e. its unique and specific system of meanings and symbols, beliefs and habits. The author here underlines that the initial perception of the right to culture was concerned with the first of these two interpretations. In a monograph entitled The Right to Culture (2018), that author sought to determine how well-developed that right to culture might be, with the considerations therefore based around dimensions that are policy-related (revolving around state policy), related to lawmaking and legislation, or

of all of these for the state is an obligation to make it possible for the fruits and achievements of culture to be made use of; as well as a guarantee that cultural goods (be these material or non-material) should persist, with cultural undertakings co-financed to this end, museums and cultural centres established and maintained, cultural education and so on offered, and broad access to all of these ensured[12].

A "right to culture" interpreted in line with the first of the above meanings is somehow "dispersed" between many conventions and declarations, and can often be equated with the collective rights of national and ethnic minorities and indigenous peoples, or indeed the right to self-determination[13]. It is mainly a concept characterising multi-ethnic and multicultural states (of South America, Asia and Africa). The idea of a "right to (a) culture" understood in this way applies to groups for whom cultural distinctiveness and identity remain an integral part of their way of life[14].

A second interpretation of the right to culture sees it equated with such issues as cultural life; access to culture; cultural education; the protection of cultural and natural heritage; creative, literary and artistic activity – all having the greatest chance of being achieved in developed states.[15] An element

concerned with application and enforcement (i.e. the judicial protection extended to social rights), see. Młynarska – Sobaczewska (2018): 51.

12 Schreiber, Budziszewska (2014): 194-195.

13 Xanthaki (2000); Donders (2016).

14 Claridge, Xanthaki (2016); IUCN (2000); Donders (2016).

15 This leaves the "right to culture" as an unclear, imprecise and very broad formulation whose comprehension and interpretation are depend greatly on the cultural specifics of given states, and on the perception of the role culture plays in society, and the degree to which it is developed in the ethnic differentiation to which it is subject. It would thus seem that a right to culture understood in the dimension of high culture is to be exercised in the highly-developed states whose culture

to the right to culture understood in this way is the Polish initiative of the National Centre for Culture Poland and the city of Wrocław to have a "right to culture" entered into the European Convention for the Protection of Human Rights and Fundamental Freedoms[16] as well as/or the Charter of Fundamental Rights of the European Union. This Polish idea represented a call to discuss issues surrounding guaranteed access to high culture, as well as participation in cultural and artistic life.[17] In the view of the representatives of the National Centre for Culture and the City of Wrocław, this needed to be affirmed in law[18].

Unfortunately a guarantee of access to cultural goods has its economic aspect also, with questions arising as to the ongoing activity of associations, cultural institutions and local authorities whose ways of operating of necessity entail access to cultural goods being paid for. A further delicate issue

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and cultural life represent factors important enough to merit conditions for its development being put in place at state level. On the other hand, there are states that are less-developed, multicultural and required to struggle with problems that are often of a fundamental and existential nature. For the societies and regions involved in this case, the right to (a) culture will be more in the nature of a right to retain or maintain cultural ties ad identity, the freedom to follow certain given customs or traditions from one generation to the next, and so on. Medda-Windischer (2003): 249-27, see also Michałowska (2008).

16 Compare with *Polska chce zapisania w Europejskiej Konwencji Praw Człowieka prawa do kultury* – an interview with Director of the National Centre for Culture Krzysztof Dudek on the proposal from the Centre and the City of Wrocław to have a "right to culture" added to an Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms http://dzieje.pl/kultura-i-sztuka/polska-chce-zapisania-w-europejskiej-konwencji-praw-czlowieka-prawa-do-kultury [access: 13.12.2018].

17 Mężykowska (2016).

18 See http://wroclaw2016.pl/prawo-do-kultury/ [access: 10.01.2019].

raised here concerns authors' rights and the dissemination of works of culture.[19]

Equally, the idea of the rights set out in the ECHR being joined by a "right to culture" understood as a right of access to high culture has its justification[20], given the way this would confer fundamental-right status, bringing into effect mechanisms by which states as parties to the European Convention would extend guarantees. For it needs to be recalled how the European Court of Human Rights keeps guard over the asserting and exercise in practice of the rights set out in generalised form in the Convention, issuing judgments binding upon states that are party to the Convention, in response to applications brought by citizens of those states.

Nevertheless, account still needs to be taken of the fact that the right to culture goes on being unformulated, undefined, and as such unprotected by any binding instrument of international law. And, alas, there is no mention of it whatever in such key, far-reaching human-rights documents as the Council of Europe's ECHR on the one hand or the EU's Charter of Fundamental Rights on the other. Likewise, no subjective rights of any kind arise out of the other international agreements dealing in any way with cultural rights[21]. It is true that the Council of Europe's 1954 European Cultural Convention sets out certain postulates concerning the protection of the common cultural heritage of Europe, but no right to culture exercisable at the level of the individual is to be found there.

An important turning point for attempts to codify the right to culture came with Recommendation 1990 passed

19 Sobczak (2010).
20 Ibidem.
21 Młynarska – Sobaczewska (2018): 33.

in January 2012 by the Parliamentary Assembly of the Council of Europe, and concerning "The right of everyone to take part in cultural life"[22]. A key assumption underpinning this document is equal and free (in the sense of not paid for) access to culture.[23] The state is thus obliged to guarantee its citizens access to culture. Also noteworthy is the reference to a boom in digital culture and the Internet serving people as they seek to access culture. The obligations of the state and of public bodies are thus new, as is the quality of access and its promotion.[24]

The Recommendation has appended general guidelines[25] that are to serve as a basis upon which domestic policy may be formulated, and new standards set when it comes to participation in culture[26]. The Recommendation furthermore draws attention to two aspects, i.e. the potential group of recipients of the new policy that young people are deemed to represent[27], and cooperation over new policies with

[22] For more on this subject see, e.g.: Laaksonen (2010), Council of Europe (2012).

[23] This theme was also discussed during the 10th Conference of the Ministries of Culture of the Council of Europe, which took place in Moscow in April 2013, entitled: *Governance of culture – Promoting access to culture*. https://rm.coe.int/16806a2de4 [assess: 15.01.2019].

[24] Laaksonen (2010).

[25] Guidelines for developing policies to ensure effective participation in cultural life.

[26] Ibidem.

[27] Art. 7: Access to the arts is especially important for young people, in particular those aged between 15 and 25 who are at a critical time in their lives when they are building a future for themselves as adult citizens. Introducing them to cultural resources is a process that draws on their subjective sensitivity and creative imagination, and gives them considerable freedom of initiative (not sufficiently accorded to members of this age group); Art. 8: "From an intergenerational and social cohesion perspective, one of the main responsibilities of policy makers

non-state (and non-Council of Europe) actors, such as the EU and UNESCO.[28]

A key provision is contained in Arts. 12[29] and 13.3[30], given the explicit reference to the need for the right to participate in cultural life to be taken account of in other international projects, including those associated with human rights[31]. While it is true that the said Recommendation has no force of law, it does represent a further step underlining the (crucial) need for the right to culture to be systematised and protected,[32] with relevant directions of change in this regard indicated.

Indeed, the division of the right to culture into just two concepts is of itself a major simplification, with it needing

is to cultivate – especially among young people – the "desire for culture", without which – however good the cultural offer and whatever the conditions of access may be – young people will not feel engaged. In order to encourage them, policy makers need to involve them more directly in cultural activities, promote ground-breaking initiatives and raise the profile of any practices that create cultural, social and political bonds."

[28] Art. 13.5: "invite the European Union and UNESCO to this committee of experts or transversal working group and to closely involve in its work the Parliamentary Assembly, the Congress of Local and Regional Authorities of the Council of Europe, the Conference of International Non-Governmental Organisations of the Council of Europe and the Advisory Council on Youth";

[29] Art 12: "The right to take part in cultural life is pivotal to the system of human rights. To forget that is to endanger this entire system, by depriving human beings of the opportunity to responsibly exercise their other rights, through lack of awareness of the fullness of their identity".

[30] Art, 13.3.1: "duly incorporate the promotion of the right of everyone to participate in cultural life into current projects (for example, projects on education for democratic citizenship and human rights)".

[31] Ibidem.

[32] Compare with Polymenopoulou (2016).

to be recalled how each has differing component parts and elements. One of these is the aforementioned Polish initiative understood to entail the right to access high culture[33]. However, a broader analysis of the nature of the right to culture would require all international documents and agreements dealing with culture being taken account of; as it is only on that basis that the component elements of the right to culture can be listed properly.

It must be underlined however that the idea of the right to culture is not a results of current discussion. It was discussed already in the 1970s report by Boutros Ghali.[34] It also builds on the previously held debates over the content, scope and future of 'the right to a cultural identity'[35]. The former could be enforced on the basis of already existing human rights and mechanisms[36] while the latter was directly included in the text of the 2005 CoE Framework Convention on the Value of Cultural Heritage for Society (Faro Convention). All these concepts are strongly linked to human rights and disputes concerning cultural rights[37]. They focus mainly, but not exclusively, on its status (a neglected or underdeveloped category of human rights)[38] and character (universal *versus* culturally relative and scope (individual *versus* collective) [39] Despite being the subject of intense polemics, they are all perceived as indispensable for protecting human dignity. The 'right to culture' is discussed mainly here in this latest broadened conceptual perspective.

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33 Gierat-Bieroń (2014).
34 Boutros Ghali (1970).
35 Donders (2002).
36 Ibidem.
37 Borelli, Lenzerini (2012).
38 Symonides (1998).
39 Jakubowski (2016).

2. A right to culture in practice – selected examples of case-law

Awareness of the role culture plays in human rights finds its reflection in the individual judgments (and ultimately in the developed case law) of international institutions, courts and advisory bodies, which are all aware of the need for cultural conditioning to be taken account of. Given the now-extensive nature of the relevant case law internationally, the teasing-out of the separate elements of the right to culture that they contain is something that will necessitate separate studies and analyses.

All this Chapter is able to offer are a few selected, if highly pertinent, examples, one listed from Human Rights Committee, second from European Council of Human Rights, what gives universal and regional – European perspective, and the aim here is to show how cultural foundation affects judgments.

The Human Rights Committee offers a good example of an institution in which pursuit of a developed right to culture can be found[40], given the broad interpretation ascribed to Art. 27 of the International Covenant on Civil and Political Rights[41]. A review of HRC Recommendations in this

[40] Stryjkowska (2017).

[41] See also Communication 42/1977, 6 June 1983, Sandra Lovelace v. Canada; Ivan Kitok v. Sweden, Communication 197/1985, 27 July 1988; Lubikon Lake Band v. Canada, Communication 167/1984, ILMAREI Lansman et al. v. Finland, Communication 671/1995, 22 November 1996; UN doc. CCPR/C/58/D/671/1995, 22 November 1996; Apirana MAHUIKA ET AL. v. New Zealand, Communication 547/1993, 27 October 2000, UN Doc. CCPR/C/70/D/547/1993, 15 October 2000; Francis Hopu and Tepoaitu Bessert v. France, Communication 549/1993, 29 July 1997, UN Doc. CCPR/C//60/D/549/1993/Rev.1, 29 December 1997; Leonod Raihman v. Latvia, Communication 1621/2007, 28 October 2010, UN Doc. CCPR/C/100/D/1621/2007, 30 November 2010.

sphere leads in the direction of cultural rights (i.e. defined traditions and customs) of minority-status indigenous peoples being protected. A similar direction has also been taken by the Committee on Economic, Social and Cultural Rights in its commentaries[42]; as well as by such regional institutions as the Inter-American Commission on Human Rights or the African Commission on Human and Peoples' Rights. Given the considerable ethnic diversity in its region, the case law of the Commission concerns the protection of – and respect for – indigenous peoples[43], with their specific traditions and history being invoked[44].

In turn, the protection of cultural rights and culture within the European human-rights system relates

[42] *General Comment 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, E/C.12/1999/5), *General Comment 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10), *General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11), *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4).

[43] See also Michałowska (2006), as well as Schreiber (2007): 141-160.

[44] Case law of the African Commission on Human and Peoples' Rights, *i.a.*: Communication 150/96, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, 1999, AHRLR (2000) 235; Communication 279/03, *Sudan Human Rights Organisation and another v. Sudan*, 2009 AHRLR (2009) 153; Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, AHRLR (2009) 75. Case law of the Inter-American Commission on Human Rights, see *i.a.* the case *Marry and Carry Dann*, 11.140 v. United States (Report 99/99, 27 December 1999); *Maya Indigenous Communities of the Toledo District*, case 12.053 v. Belize, Report 40/04 of 12 October 2004; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) 79 (2001).

mainly to the protection of minorities' rights[45]. It emerges that the stance taken by the ECtHR in its judgments vis-à-vis culture is far more restrained than those of the Human Rights Committee or the bodies associated with the regional instruments, even though culture is known to be a key sphere of European policy[46]. In the view of Lenzerini, the restraint referred to may arise out of fearfulness surrounding the conferment upon culture of a key determining role of fundamental significance; given the way that would denote an "opening of the floodgates" to a whole host of claims, including in respect of the recognition of collective rights[47]. A second cause may lie in problems of a political and social nature – with which a large number of European states are dealing (or perhaps struggling)[48]; all the more so given that the cultural diversity present in Europe may prove a source of antagonism[49]. In this context, a marginalisation of the role of culture may offer states a way of keeping the lid on multicultural societies, with a view to potential conflicts being kept in abeyance.

1.1. The Human Rights Committee and the case of Angela Poma Poma[50]

The family of Angela Poma Poma owned the "Parco-Viluyo" farm, located in the province and region of Tacna (Peru).

45 See Lenzerini (2014): 193, Popelier, Lambrecht, Lemmens (2016).
46 See Michałowska (2003): 307-325.
47 See Lenzerrini (2014): 203.
48 Ibidem.
49 Ibidem: 204.
50 Angela Poma Poma v. Peru, Communication 1457/2006, UN Doc. CCPR/C/95/D/1457/2006, 27 March 2009. This example also gained fuller presentation in the article by Schreiber, Budziszewska (2014).

The family engages in the rearing of alpacas, llamas and other smaller livestock (as its only source of upkeep). The farm covers over 350 ha of pastureland, the greater part of this located along the River Uchusuma[51]. Poma Poma is an indigenous person, as a member of the Aymara tribe living in this part of Peru for more than 2000 years now, and she joins with the rest of her family in running the farm and engaging in the raising of llamas, thanks *inter alia* to the irrigation of the land and the presence of the Uchusuma. However, following implementation of government projects to dig wells, a consequence – in the view of Poma Poma – was the onset of a process of desiccation of wetlands and degradation of the natural environment more widely, that held out the prospect of livestock-rearing by Aymara families becoming more and more difficult[52].

In the wake of a wave of protests by the Aymara[53], and following the exhaustion of domestic remedies[54], Poma Poma turned with her complain to the Human Rights Committee, invoking in that way: a) Art. 1, par. 2[55]; b) Art. 2, par. 3 (a)[56];

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51 Ibidem, par. 2.1.

52 Ibidem, par. 2.2 and 2.3.

53 Ibidem, par. 2.4 and 2.5.

54 See par. 2.6-2.13.

55 (*See par. 1.3.1. of the Complaint*): Poma Poma alleged that the State party had violated Art. 1, par. 2, because the diversion of groundwater from her land had destroyed the ecosystem [...] and caused the degradation of the land and the drying out of the wetlands. As a result, thousands of head of livestock had died and the community's only means of survival – grazing and raising llamas and alpacas – had collapsed, leaving them in poverty. In this way, it was stated, the community had been "deprived of its livelihood" (or "own means of subsistence" as the Covenant has it).

56 (*See par. 2.3.2.*): The applicant also claimed that she had been deprived of the right to an effective remedy (an alleged violation of Art. 2, par. 3(a) of the Covenant). She noted that the Criminal Code contained

c) Art. 14, par. 1[57]; and d) Art. 17 of the International Covenant on Civil and Political Rights[58].

Having acquainted itself with the case, the Committee opined that the facts presented therein raised issues associated with Art. 27 of the Covenant above all[59]:

> Art. 27 of the International Covenant on Civil and Political Rights
>
> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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no provision for the offence of dispossession of waters used by indigenous people for their traditional activities, and stated that she had exhausted domestic remedies.

[57] (*See par. 3.4.*): invoking Art. 14, par. 1 of the Covenant, Poma Poma maintained that the political and judicial authorities had not taken into account the arguments put forward by the Aymara community and its representatives. Given that they enjoyed the right to equality before the courts, as an indigenous people, that right had – in the view of the complainant – been violated.

[58] (*See par. 3.3.3*): According to Poma Poma, the activity of the government forming the subject of the case constituted interference in the life and activities of her family, in violation of article 17 of the Covenant. The lack of water had seriously affected their only means of subsistence, i.e. alpaca- and llama-grazing and raising. The applicant further suggested that the state party could not require a change of way of family life, or engagement in an activity that was not their own, or interfere with any desire to continue to live on traditional lands. Private and family life consists of customs, social relations, the Aymara language and methods of grazing and caring for animals. It was asserted that that had all been impeded by interference in regional water relations.

[59] Ibidem, par. 7. 1.

In its extensive opinion, the Commission indicated that certain aspects to the rights of peoples protected by virtue of that article (for example the rights to cultivate and preserve their cultures) – can be interpreted as a way of life linked closely to a given area of territory and its resources. This finds its application in the case of members of communities of indigenous peoples that constitute minorities. The comments make it clear that culture is made manifest in many forms, including in a particular or specific style of life associated with the utilisation of the land[60]. The right in question may therefore encompass such activity as traditional methods of hunting and fishing, and a right to live in a Nature Reserve. It was stressed that the exercise of such rights required particular legal remedies, with effective participation by members of a minority in decisions of relevance to them needing to be protected and assured by law.[61] In this context, the protection of rights is to ensure the persistence and further development of cultural identity[62].

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[60] Ibidem, par. 7.2.

[61] However, in the opinion of Katje Gocke, the recommendation of the Human Rights Committee in the matter of Angela Poma Poma is not an unambiguously positive one, given what he sees as an unclear definition of the minority as referred to in Art. 27 of the International Covenant. Gocke nevertheless sees the Poma Poma case as the first to entail the wording *free, prior and informed consent of the members of the community*, as well as *measures which substantially compromise and interfere with the culturally significant activities of the minority or indigenous community.* See K. Gocke, The case of Angela Poma Poma v. Peru before the Human Rights Committee. The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights, http://www.mpil.de/files/pdf3/mpunyb_08_goecke_14.pdf (accessed 18.01.2019), p. 357.

[62] Angela Poma Poma v. Peru, Communication , *Ibidem*, par. 7.2.

The Committee also referred to earlier opinions in which it was held that the rights protected by virtue of Art. 27 are also rights to engage in economic and social activity forming part of the culture of a given community of society[63]. It was emphasised that Poma Poma was a member of an ethnic minority, and that the way of raising livestock practised through to that time was an important element of the culture of Aymara society, it being the source of their upkeep and a tradition handed down for generations[64]. The Committee emphasised that economic development could not infringe the rights enjoying protection under Art. 27[65] - something that had happened in the case under consideration, in the view of the Committee[66].

The Committee further opined that the choice (permissibility) of the means applied by Peru – which interfered with the pursuit of a community's core economic activity – was dependent on whether members of that community had or had not had the chance to participate in the decisionmaking process leading to the said choice; as well as whether they will still be able to pursue their traditional way of life. The Committee held that neither Poma Poma nor her community had been consulted over the project to develop wells. Furthermore, the state had not considered the impact of the well-digging on the traditional economic activity of the tribe, nor taken action to ensure that negative consequences

[63] See *inter alia* Communications Nos. 167/1984, Lubicon Lake Band v. Canada, 26 March 1990, par. 32.1; 547/1993, Mahuika et al. v. New Zealand, 27 October 2000, par. 9.2; see also: Lanzerini (2014): 116-209.

[64] Par. 7.3.

[65] See par. 7.2.

[66] See par. 8.

were minimised, and incurred damage in some way rectified or compensated for.

There are things that need to be paid attention to here. In the case she brought, Poma Poma did not invoke Art. 27 of the Covenant (minorities' enjoyment of their culture), instead asserting that civil rights arising out of other articles had been infringed. Only after it had studied the case did the Committee rule that the source of the violation lay in lack of respect for the cultural traditions of the Aymara tribe. Furthermore, it results from the Committee's opinion that the definition of culture and cultural rights is a very broad one[67] (dealing in the case in question with the way in which livestock are raised and a concrete lifestyle associated with the use of land resources). Finally, the state's overriding obligation is seen to be to protect minorities and the customs and traditions their culture is associated with.

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[67] A similar direction was followed by the Committee on Economic, Social and Cultural Rights in its remarks. For example, in General Comment 4, *The right to adequate housing*, of 13 December 1991, as well as other Comments of the Committee, including above all General Comments Nos. 12 (*The right to adequate food*), 13 (*The right to education*), 15 (*The right to water*), 14 (*The rights to the highest attainable standard of health*), 17 (*The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literacy or artistic production of her or she is the author*), 11 (*Indigenous children and their rights under the Convention*). In each of these Comments, the Committee makes reference to cultural rights. Also interesting in this context is General Recommendation 23 on *Indigenous people*, dated 18 August 1997. In the latter, the Committee recommends that state should i.a. assure such people of the conditions needed for them to develop economically, albeit at the same time in line with specific aspects and features of their cultures; as well as assuring rights to cultivate and also revitalise cultural traditions and language.

Similarly broad conclusions were drawn by the Committee as it gave other opinions[68], e.g. in the case of Lubikon Lake Band v. Canada, wherein par. 32.2 again makes reference to the right of the individual to engage in economic and social activity if this arises out of the culture that individual belongs to[69].

Then there was the Apirana Mahuika *et al.* v New Zealand case[70]. There, in par. 9.9 of its judgment, the Committee also emphasised indirectly a duty on the part of a state to guarantee that a cultural minority can pursue its customs and traditions freely[71], *i.a.* by way of members of that minority being involved vis-à-vis decisionmaking of concern to it[72], with a view to the traditions of its own culture being further engaged in and upheld (in this case the way of catching fish)[73].

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[68] Together with the description of the judgment v. Angela Poma Poma, see also Communication 42/1977, 6 June 1983, Sandra Lovelace v. Canada; Ivan Kitok v. Sweden, Communication 197/1985, 27 July 1988; Lubikon Lake Band v. Canada, Communication 167/1984, ILMA-REI Lansman et al. v. Finland, Communication 671/1995, 22 November 1996; UN doc. CCPR/C/58/D/671/1995, 22 November 1996; Apirana Mahuika et al. v. New Zealand, Communication 547/1993, 27 October 2000, UN Doc. CCPR/C/70/D/547/1993, 15 October 2000; Francis Hopu and Tepoaitu Bessert v. France, Communication 549/1993, 29 July 1997, UN Doc. CCPR/C//60/D/549/1993/Rev.1, 29 December 1997; Leonod Raihman v. Latvia, Communication 1621/2007, 28 October 2010, UN Doc. CCPR/C/100/D/1621/2007, 30 November 2010.

[69] Lubikon Lake Band v. Canada, Communication 167/1984, par. 32.2.

[70] Apirana Mahuika *et al.* v. New Zealand, Communication 547/1993, 27 October 2000.

[71] Par. 9.9. Ibidem.

[72] Par. 9.5. Ibidem.

[73] Ibidem.

3.2. The European Court of Human Rights and the case of Sidiropoulos and Others v. Greece

Taken together with the aforementioned opinion of the Human Rights Committee, the activity of the European institutions can also be considered noteworthy. A justifiably key role is here assigned to the Council of Europe, which has the protection and promotion of cultural rights as one of its objectives.[74] Equally, a key place in the said mosaic of many and varied documents is taken by the case law of the European Court of Human Rights, given the role the Court plays in the European dimension to rights protection.[75]

Hence, the example offered by Angela Poma Poma can be supplemented by a landmark judgment of the Strasbourg-based European Court of Human Rights in respect of the case Sidiropoulos and Others v. Greece (57/1997/841/1047)[76]. These proceedings revolved around six members of the Macedonian community resident in Greece, who applied to the ECtHR maintaining that the right to freedom of association enshrined in the European Convention had been violated in their case, given a denial of their application to have registered a non–profit association and organisation under the Greek name *Stegi Makedonikou Politismou*[77]. The applicants asserted that this organisation would have dealt with the development of Macedonian culture and the preservation of the traditions

[74] See more in: Wółkowska (2014).

[75] See Viljanen, *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, (http://www.corteidh.or.cr/tablas/r26759.pdf) [assess: 05.01.2019].

[76] Case 57/1997/841/1047, Sidiropoulos and others v. Greece, judgment of July 1998.

[77] Ibidem, see par. 7 and 8.

and cultural identity of the Macedonian minority in Greece[78]. However, even after the application to Strasbourg had been lodged, the Greek court continued to refuse to register the organisation in question, referring to the political situation in the region at the time to suggest that the association would use the pretext of cultural activity to in fact engage in propaganda activity and the consequent perceived undermining of Macedonia's Greek identity. Ultimately, that was considered to call into question the very integrity of Greece from a political point of view[79].

Having heard the case, the Court of Human Rights held that a violation of Article 11 of the Convention had indeed taken place[80]. The Court notes that the aims of the association were to preserve and develop the traditions and folk culture of the Florina region[81]. "Such aims appear to the Court

[78] In point 2 of the Association's Statute: *The association's headquarters were to be at Florina. According to clause 2 of its memorandum of association, the association's objects were "(a) the cultural, intellectual and artistic development of its members and of the inhabitants of Florina in general and the fostering of a spirit of cooperation, solidarity and love between them; (b) cultural decentralisation and the preservation of intellectual and artistic endeavours and traditions and of the civilisation's monuments and, more generally, the promotion and development of [their] folk culture; and (c) the protection of the region's natural and cultural environment"*, Ibidem par. 8.

[79] See par. 42.

[80] See par. 47.

[81] See par. 44. (*The Court notes, in the first place, that the aims of the association called "Home of Macedonian Civilisation", as set out in its memorandum of association, were exclusively to preserve and develop the traditions and folk culture of the Florina region. Such aims appear to the Court to be perfectly clear and legitimate; the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics, for historical as well as economic reasons.*

to be perfectly clear and legitimate; the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics, for historical as well as economic reasons". In the justification for its judgment, the Court also noted that: "the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November – which Greece has signed – allow them to form associations to protect their cultural and spiritual heritage"[82].

Obviously, this is only an example. Thus, according to Council of Europe report, some elements of right to culture might be found in a selection of the Court's main jurisprudence in the context of cultural rights.[83] To simplify greatly, elements of the right to culture might be found in judgments of the ECHR[84] related to the right of access to culture[85], rights

[82] Ibidem. (*Even supposing that the founders of an association like the one in the instant case assert a minority consciousness, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November 1990 – which Greece has signed – allow them to form associations to protect their cultural and spiritual heritage*).

[83] Council of Europe report from 11 January 2017, pt. *Cultural rights in the case-law of the European Court of Human Rights*, downloaded from the following website: www.echr.coe.int (Case-Law / Case-Law Analysis / Research Reports), p. 3.

[84] See *Cultural rights in the case-law of the European Court of Human Rights*, Council of Europe/ECHR, January 2017, http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf [access: 11.01.2019].

[85] See cases Akdaş v. Turkey (41056/04, 16 February 2010, Khurshid Mustafa and Tarzibachi v. Sweden (23883/06, 16 December 2008), (Jankovskis v. Lithuania, 21575/08), Enea v. Italy [GC], 74912/01, §106, 17 September 2009), Boulois v. Luxembourg, 37575/04, §64, 14 December 2010.

to artistic expression[86], the right to cultural identity[87], linguistic rights[88], the right to the protection of cultural and natural heritage[89], the right to academic freedom[90], and the right to seek historical truth[91]. "Although neither the Convention

[86] See case of Müller and Others v. Switzerland (24 May 1988, Series A 133), *Otto-Preminger-Institut* v. Austria (20 September 1994, Series A 295-A), Karataş v. Turkey case ([GC], 23168/94, ECHR 1999-IV), Alınak v. Turkey (40287/98, 29 March 2005), Judgment in *Vereinigung Bildender Künstler* v. Austria (68354/01, 25 January 2007), Lindon, Otchakovsky-Laurens and July v. France ([GC], Nos. 21279/02 and 36448/02, ECHR 2007-IV).

[87] See Chapman v. the United Kingdom ([GC], 27238/95, ECHR 2001-I), (Muñoz Díaz v. Spain, 49151/07, 8 December 2009), Ciubotaru v. Moldova (27138/04, 27 April 2010), Sejdić and Finci v. Bosnia and Herzegovina [GC], Nos. 27996/06 and 34836/06, §43, 22 December 2009), Sinan Işık v. Turkey (21924/05, 2 February 2010), Cyprus v. Turkey [GC], 25781/94, §§241-247, ECHR 2001-IV, Cha'are Shalom Ve Tsedek v. France [GC], 27417/95, ECHR 2000-VII, Dogru v. France, 27058/05, §72, 4 December 2008, Ahmet Arslan and Others v. Turkey, 41135/98, 23 February 2010), Sidiropoulos and Others v. Greece (10 July 1998, Reports of Judgments and Decisions 1998-IV.

[88] See Senger v. Germany ((dec.), 32524/05, 3 February 2009), Baybaşın v. The Netherlands (dec.), 13600/02, 6 October 2005), Ulusoy and Others v. Turkey (34797/03, 3 May 2007), İrfan Temel and Others v. Turkey (36458/02, 3 March 2009), Catan and Others v. Moldova and Russia (Nos. 43770/04, 9 June 2009, Podkolzina v. Latvia (46726/99, ECHR 2002-II), Birk Levy v. France ((dec.), 39426/06, 21 September 2010).

[89] See Beyeler v. Italy ([GC], 33202/96, ECHR 2000-I), Debelianovi v. Bulgaria (61951/00, 29 March 2007), Kozacıoğlu v. Turkey ([GC], 2334/03, 19 February 2009), Hamer v. Belgium, 21861/03, ECHR 2007-V, Turgut and Others v. Turkey, 1411/03, §90, 8 July 2008; Depalle v. France [GC], 34044/02, §81, 29 March 2010); Hingitaq 53 and Others v. Denmark ((dec.), 18584/04, ECHR 2006-I).

[90] See Sorguç v. Turkey, 17089/03, §35, 23 June 2009), Cox v. Turkey (2933/03, 20 May 2010), Lombardi Vallauri v. Italy (39128/05, 20 October 2010).

[91] See Chauvy and Others v. France, 64915/01, § 69, ECHR 2004-VI), Monnat v. Switzerland, 73604/01, § 64, ECHR 2006-X); Lehideux and

nor the Court explicitly recognise the "right to culture" or the right to take part in cultural life, the Court's case-law provides interesting examples of how some rights falling under the notion of "cultural rights" in a broad sense can be protected under core civil rights (the right to respect for private and family life (Article 8 of the Convention), the right to freedom of expression (Article 10) and the right to education (Article 2 of Protocol 1)."[92] Thus, solid analysis of it needs further deeper case - law studies. Taking into account high number judgments of ECHR from area of cultural rights and dual definition of the concept of the right to culture, speaking very generally we can divide the judgments as below.

Isorni v. France, 23 September 1998; Garaudy v. France (dec.), 65831/01, ECHR; Orban and Others v. France, 20985/05, 15 January 2009); (Dink v. Turkey, Nos. 2668/07 and others, 14 September 2010); Kenedi v. Hungary (31475/05, §43, 26 May 2009).

[92] Ibidem. Council of Europe report. p. 3.

Elements of right to culture in ECHR judgments*

Right to culture understood as 'artistic culture'	Right to culture from 'anthropological point of view'
Right to artistic expression (including Visual arts, literary creation, satire) Access to culture (including access to culture through the Internet and television, access to culture for prisoners) Right to the protection of Cultural Heritage Right to Education Right to academic freedom	Right to cultural identity (including religious identity, freedom of association with a cultural purpose) Linguistic rights Migrants rights Right to seeking historical truth

*prepared on the basis of the Council of Europe report from 11 January 2017, pt. *Cultural rights in the case-law of the European Court of Human Rights,* downloaded from the: www.echr.coe.int (Case-Law / Case-Law Analysis / Research Reports)

Summary

The status of the right to culture in international law remains opaque, and where it is finding itself exercised this is very much down to states/public authorities, as well as international case law – which may not in fact protect the right to culture in the most direct way, but rather set certain standards that may mark the beginning of a certain foundation[93] how right to culture should be understood[94].

[93] See Brems (2007).
[94] Młynarska- Sobaczewska (2018): 207.

Elements to the protection of the right to culture are to be found in international conventions, though also in the more practical dimension of the case law of international courts, as well as in quasi-judicial institutions that quite often assign to culture a decisive role where the outcome of a case is concerned. The legal sanctioning of a right to culture is held back by a very complex mosaic of diverse interpretations of the concept itself, and the rights arising from it. The chances of a "right to culture" coming to be exercisable and enforceable, and the form in which this is so, are matters solely within the purview of the will of given states and their public authorities, who may – or may not – be inclined to attribute the role of fundamental right.

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