

4. European and Other Regional Courts of Human Rights

The European Court of Human Rights' s Approach to Cultural Rights and Cultural Diversity

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The classical approach to culture and to its implications, in the field of social sciences, in general, was no, so to speak, "culturally friendly". In the 90s, as Michael Keating put it, "there was something of a rediscovery of culture" and of its relation with all the areas of social life. Cultural approaches in social sciences, in general, have emerged as a response given to methodological individualism and to the rational choice theories. It has been asserted that taking culture into account will help us to better locate individuals, within their social context, in which context their choices can actually have a meaning; it will help us to bring into question forms of action that cannot be easily explained in the calculated language of the rational choice theory.

This type of approach was also reflected in international law and translated, among other things, into: the adoption (first, by UNESCO and then by the UN, in relation with the interpretation of the ICESCR) of an anthropological definition for culture itself; the adoption of the first legally binding document related to cultural diversity (the UNESCO Convention of 2005 on the Diversity of Cultural Expressions); the increased preoccupation for the legal and judicial protection of cultural rights and cultural diversity and the extensive preoccupation for the protection of persons belonging to (national) minorities' identity.

All these evolutions attempt to substantiate and build up a new approach to human rights, calling into question several of their fundamental principles, such as, for instance, the value of individual autonomy - reflected in the liberal, individualistic orientation of the great majority of treaties on human rights - or that of "internal" self-determination.

In line with the above mentioned trends in international law, in my paper I will focus, firstly, on the approach that the European Court of Human Rights took on cultural rights protection and, secondly, on the means it used in order to protect inter and intrastate cultural diversity.

Although the European Convention does not explicitly protect cultural rights, the Court, through a dynamic interpretation of the different articles of the Convention (especially, articles 8, 9, 10 and article 2 of Protocol no. 1), has gradually recognized substantive rights which may fall under the notion of "cultural rights", in the broad sense. The Court also approached cultural rights bearing in mind the anthropological definition of culture, as in its jurisprudence referred to the need to protect a certain way of life, the right to maintain a minority identity or to lead one's private and family life in accordance with the tradition and culture. Although the Court does not always ruled in favor of cultural rights, it certainly

established several principles that could serve as basis for future developments.

When it comes to the protection of cultural diversity, I will analyze the way in which the European Court of Human Rights is using the margin of appreciation doctrine in order to protect inter and intrastate cultural diversity (as it did, for example in cases like *Lautsi I v. Italy*, *Lautsi II v. Italy* or in *Muñoz Díaz v. Spain*).

Coming from the South Eastern Europe, a geographical region where most of the cultural related problems are, in a way, connected with the protection of persons belonging to (national) minorities, bearing in mind the Romanian realities but also the fact that the case-law brought before the ECHR in relation to cultural rights and cultural diversity are, in fact, brought by persons and entities belonging to (national) minorities, considering that the anthropological and sociological resources are valuable and needed as departing point in any legal regulation and indispensable tools when it comes to the interpretation, I will point out in my paper that present human rights systems should not remain "culturally neutral". A culturally sensitive approach to human right, as most of these rights have a cultural dimension, should be allowed to develop/be developed. But, the achievement of such a goal should be the result of the interaction/dialogue between lawyers/judges, anthropologists and sociologists. Theirs combined efforts will bring to the legal regulation the legitimacy that the actual "culturally unfriendly" system of human rights protection, with some exception, still values.