

原住民族的文化權*

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摘 要

「原住民族的文化權」，是指原住民族在文化層面所享有的人權，屬於所謂的第三代人權。一般而言，文化可以有「廣義的文化」以及「狹義的文化」兩種；我們進而可以我們根據個人權／集體權、以及文化認同／文化資產兩個面向，將文化權分為四大類。在這裡，我們將從政治哲學的角度，來考察文化權的正當性何在，並進一步歸納一些反對文化權的說法。接下來，我們要從相關國際規約、或是宣言著手，由聯合國、區域性國際組織、到聯合國教科文組織，找出關鍵性的條文、或是文字。當然，我們也要考察文化權如何在原住民族落實。最後，再提出結論。

關鍵字：原住民族、文化權、人權

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That the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern;

That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.

聯合國教科文組織憲章¹ (1945) 前言

壹、前言

就字面來看，所謂的「原住民族的文化權」(indigenous cultural rights)，是「原住民族」(indigenous peoples)與「文化權」(cultural rights、right to culture)這兩個概念的結合。而所謂的「文化權」，是「文化」與「權利」的結合，簡而言之，就是少數族群保有、並發展其文化的權利(Mupaulanga-Hulston, 2002: 35)。因此，我們可以這樣說，原住民族的文化權，是指原住民族在文化層面所享有的人權。

Karel Vasak 根據人權發展的先後，有所謂的「人權三代論」(Baehr, 1999: 6)：(一)屬於第一代人權的公民權、以及政治權(civil、political rights)，(二)屬於第二代人權的經濟權、社會權、以及文化權(economic、social、cultural rights)，以及(三)屬於第三代人權的共同權²(rights of solidarity)。那麼，乍看之下，文化權應該是屬於第二代人權的範疇，與經濟權、以及社會權

¹ *Constitution of the United Nations Educational, Scientific, and Cultural Organization, 1954*。

² Alston (2001: 2) 稱之為「peoples' rights」，Crawford (1988) 稱之為「rights of peoples」；大體而言，第三代人權還包括發展權、環境權、以及和平權(Baehr, 1999)。

為姊妹人權；然而，近年來，一般又習慣將少數族群權利³（minority rights、minority group rights）列為三代人權，那麼，屬於原住民族權利（indigenous rights）之一的原住民族文化權，應該也可以算是這裡所謂的共同權⁴。

另一方面，Patrick Thornberry（1995: 15-16）根據權利負載者／所有者（bearer）的身分，也將人權分為三大類：（一）所有住民的生存權、以及自由權，（二）所有國民的公民權／政治權、以及平等權／反歧視，以及（三）少數族群的認同權／文化權。前兩種權利的出發點是消極的保障，大致可以由個人的公民身分取得；而後者則是因為個人隸屬於少數族群的身分而取得⁵，算是正面推動的權利（Lerner, 1991）。

如果要實踐原住民族的文化權，特別是在法律執行、以及政策發展的層面，就必須先要有明確的定義（Wilson, 2000: 13），因此，我們接下來要問的是，究竟文化權的範圍、或是內容是甚麼？如果要回答文化權的內涵是甚麼，就必須了解文化的意義是甚麼⁶。一般而言，文化可以有「廣義的文化」（culture）、以及「狹義的文化」（Culture）兩種。根據聯合國教科文組織（UNESCO）人權組主任 Janusz Symonides（Häusemann, 1994: 10）的說法⁷，所謂廣義的文化（英文小寫）⁸，是指「人類與自然有所不同的地方，包括社會關係、活動、知識、以及其他作為」；而狹義的文化（英文大寫），是指「人類最高的知識性成就，包括音樂、文學、藝術、以及建築」。聯合國教科文組織於 1982 年召開的世界文化政策會議⁹，所通過了『墨西哥市文化政策宣言

³ Thaman（2000: 1）甚至於將文化權當作是少數族群權利的同義詞。

⁴ 有關於原住民族權是否算是一種三代人權，見 Mary Ellen Turpel（Dalton, 2005: 1-2）。

⁵ Green（1995: 259）認為，少數族群的權利除了說因為（because）有少數族群的身分而取得；另外一種說法是，即使（even when）有少數族群的身分，更不可以加以剝奪。

⁶ 參見 Kymlicka（1995: 76-77）的「社會文化」（societal culture），包括共同的記憶、價值觀、制度、以及習慣，使成員的在社會、教育、宗教、休閒、以及經濟等生活方式，能變得有意義。

⁷ Kymlicka（1995: 18）甚至於將文化視為民族（nation、people）的同義詞，也就是一般所謂的族群。

⁸ 一般又稱之為「全盤的」（holistic）定義（Wilson, 2000: 16）。

⁹ World Conference on Cultural Policies。

¹⁰ 』，對於文化作了廣義的定義：

that in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs;

在這樣的脈絡下，Elsa Stamatopoulou 與 Joanne Bauer (2004) 檢視了聯合國相關文獻，將文化分為生活方式 (way of life)、藝術暨科學創造 (creation)、以及物質資產 (capital) 三大類¹¹，可以說兼顧廣義、以及狹義的文化。

聯合國發展計畫¹²在『2004年人類發展報告書¹³』裡頭，提出「文化自由」的概念，兩大重點是自我認同／生活方式的選擇權、以及不能因為文化差異而被排除參與 (UNDP, 2004: 14)，其實就是指文化權。Stephen P. Marks (2003) 提出一份清單，嘗試將文化權分為六大類¹⁴：文化認同及文化多元、參與文化生活、文化保存及傳播、文化合作、文化資產保護、以及文化創造者／傳遞者／傳譯者的保護。Jacob T. Levy (1997) 則依文化權的性質分為八大類：免除、扶助、自治、外規 (限制外人)、內規 (規範成員)、承認、代表、以及象徵。Margalit 與 Halbertal (2004) 又依據文化權實踐的程度，由淺到深，分為維持生活方式的權利、一般社會大眾的承認、以及政府出面支持；同樣地，Stamatopoulou 與 Bauer (2004)、以及 Craven (1994) 則從作為人權責任者 (duty holder、duty bearer) 的國家著手，從尊重 (不干預)、保護 (防止他者侵犯)、到實踐的進程。

比較特別的是，Lyndel V. Prott (1988: 96-87) 歸納了相關國際規約、以及

¹⁰ *Mexico City Declaration on Cultural Policies, 1982*。

¹¹ Asbjørn Eide (Marks, 2003: 296) 也有類似的說法；參考 Koivunen 與 Marsio (2007: 8-9)。

¹² United Nations Development Programme，簡寫為 UNDP。

¹³ *Human Development Report 2004: Cultural Liberty in Today's Diverse World*。

¹⁴ Stamatopoulou 與 Bauer (2004) 的清單包括教育權、文化生活參與權、享受科學進步的好處、享有道德暨物質利益的保護、以及科學研究暨創意活動的自由。請參考 Koivunen 與 Marsio (2007: 21-22)、以及 Harvey (1996)。

宣言，將文化權分為個人權（individual rights）、以及集體權¹⁵（collective rights）兩大類：前者包括表達的自由、受教育權、父母的教育選擇權、參與社群文化權、以及藝術／文學／科學作品的保護權；後者包括文化發展權、文化認同被尊重的權利、少數族群的認同／傳統／語言／文化資產被尊重、擁有藝術／歷史／文化資產的權利、不接受外族文化的權利、以及平等擁有人類共同資產的權利。依照這份文化權的清單，Prott（1988: 87）認為文化權又可以分為文化認同、以及文化資產兩大類。我們根據個人權／集體權、以及文化認同／文化資產兩個面向，以2×2的方式，將文化權分為四大類（表1）。

表1 文化權的分類

	文化認同	文化資產
個人權	表達自由 受教權 教育選擇權 參與社群文化	藝文作品保護
集體權	文化發展 尊重文化認同 尊重文化資產 不接受外族文化	擁有藝文財富 享用人類資產

在下面，我們先將從政治哲學的角度，來看文化權的正當性何在，並歸納一些反對文化權的說法。再來，我們要從相關國際規約、或是宣言著手，由聯合國、區域性國際組織、到聯合國教科文組織，找出關鍵性的條文、或是文字。接下來，在提出結論之前，我們要考察文化權如何在原住民族落實。

¹⁵ 又稱為「團體權」（group rights）、或是「社群權」（community rights），也就是前面所謂的共同權。在這裡，權利所有者是指少數族群。不過，也有一些國家主張，為了防止強權的文化侵略，國家應該享有文化權（Stamatopoulou & Bauer, 2004; Robbins & Stamatopoulou, 2004）。

貳、政治理論／哲學中的文化權

在多數國家都有族群多元現象的情況下，少數族群權利的保障，被當作是實現民主、以及促進和平的先決條件；譬如歐洲理事會在 1995 年通過的『保障少數族群架構條約¹⁶』，便把對於少數族群的保護，當作是歐洲穩定、民主安全、以及和平的前提：

一個多元的真正民主社會，不只應該尊重每個少數族群其成員的文化、語言、以及宗教認同，更應該要開創妥適的條件，讓這些認同能夠表達、保存、以及發展。

大體而言，我們可以看到，國際上對於少數族群權利的保護，先是由消極的平等／反歧視著手，進而作積極的認同權／文化權確認，特別是語言權／教育權的保障；再來，少數族群權利的範圍擴及土地權（原住民族）、以及政治權／自治權；再來，我們也可以觀察到對於推動少數族群權利的趨勢，已從消極的限制歧視，逐漸發展為政府促進平等的責任（施正鋒，2004）。

Will Kymlicka（1995）將少數族群權利¹⁷分為自治權、特別代表權、以及多元族群權（polyethnic rights）三大類；前者是指地域的自主性治理、以及政治參與權，而後者就是指文化權。他進一步提出三種支持保護少數族群權利的理由（頁 108-23）¹⁸：首先是以平等（equality）作出發點，因為少數族群遭受不平等的待遇，因此，有必要透過這些權利的保障來加以匡正不公平的劣勢；再來，有些少數族群權利是基於歷史因素而來的，包括先前的主權、條約、或是其他協定；最後，多元文化本身也是一種珍貴的價值，因此，值得透過少數族群權利的保障來獲致。

¹⁶ *Framework Convention for the Protection of National Minorities, 1995*。

¹⁷ 他的用字是「團體差異權」（group-differentiated rights）（Kymlicka, 1995: 26）。

¹⁸ 反對的看法，見 Kukathas（1992）、以及 Waldron（1995）。

Kymlicka (1989、1995) 從自由主義著手¹⁹，認為對於少數族群文化權的保障，是有助於少數族群的成員作有意義的決策，因為，文化／文化結構 (cultural structure)／文化共同體 (cultural community) 能提供少數族群的「選擇脈絡」 (context of choice)，決定甚麼是自己的基本利益 (essential interest)、甚麼是美好的生活 (good life)、以及如何來達成。也就是說，一個少數族群如果失去了文化，就宛如喪失了自我判斷的能力²⁰；因此，少數族群光有自由是不夠的，國家還必須賦予他們足夠的選擇能力，因此，文化權的享有是保障其自主性的必要條件²¹。

比喻來說，如果讓我們選擇吃披薩、或是麵食，光是披薩就有各種不同的口味，而麵食也可以分為日本拉麵、義大利麵、牛肉麵、或是什錦麵；甚至於就麵條而言，除了有油麵、意麵、還是外省麵，後者還可以再細分為粗麵、中麵、細麵、甚至於刀削麵。表面上看來，上述菜單上的選項眾多，就看自己要不要吃；然而，如果就一個習慣米食的人來說，尤其是勞動工作者，第一選項當然是吃飯，那麼，這些琳琅滿目的選項，即使價格在高、營養在多，並沒有多大的意義。

儘管文化權有其規範上的支持，不過，相較於其他人權的範疇，各國政府似乎在推動上顯得意態闌珊。我們歸納各家的看法如下 (Symonides, 1998; Hunt, 2000; Robbins & Stamatopoulou, 2004; Stamatopoulou & Bauer, 2004; UNDP, 2004; Abro & Bauer, 2005; Koivunen & Marsio, 2007)：

一、缺乏整合式的國際規約、或是宣言

在國際人權法的發展過程，通常是先要經過一段時間的醞釀，才會先出現沒有約束力的國際宣言；經過一段時間的推動，國際社會 (聯合國、或是區域組織) 有了起碼的共識，最後才會有正式的國際規約。到目前為止，有關文化

¹⁹ Yael Tamir (1993) 雖然也是由自由主義出發，不過，她對於少數族群文化權的重視，強調的是個人有權決定其文化上的歸屬，也就是認同的建構。請看 Levy (2001) 對於兩者觀點的比較。

²⁰ Tamir (1993: 37) 稱之為「父權式的陷阱」 (paternalistic trap)。

²¹ Tamir (1993: 36) 直言稱之為工具性。

權的依據，還四處散佈在不同的地方，尚難有全盤性的框架。

二、大家對於文化的定義沒有定論，導致文化權的實踐有困難

聯合國教科文組織的對文化採用鬆散的定義，也就是「生活方式」；由於範圍過於寬廣，文化權的概念化就因此免不了含混不清，那麼，規範執行的標準化工作就很難進行。

三、有其他比文化權更迫切的目標

對於一些人來說，文化權是一種奢侈品，只有在達到相當的發展程度，才有能力去的推動；相對地，如何讓大家滿足起碼的溫飽，對於不少政府而言，可能才是更切實際的目標。

四、政府擔心國內違反文化權的事跡被揭露

除非這些國家本身願意面對自己內部多元族群的現實，否則，一旦簽署了相關規約，一定會被要求定期提出人權報告之際，屆時，很可能要被迫自挖瘡疤，這在國際舞台將是一件相當尷尬的事。

五、一些政府擔心文化權的推動會影響國家團結、甚至會鼓勵分離主義

由於文化與集體認同的建構息息相關，一旦少數族群的文化獲得繁衍，可能會進一步進行政治化；即使這些少數族群未必要求分離，多數族群可能還是會有相當的威脅感。

六、商業市場的考量

站在跨國公司的立場，一旦文化權的意識抬頭，免不了要面對文化資產如何使用的問題，到時候，不但是紛爭不斷，而且一定會造成營運成本大量提高。

七、可能與其他人權的實踐相互抵觸

有些社會運動人士擔心，萬一文化權的推動被無限上綱，不只是可能會把認同綁死²²，也有可能導致大家盲目地遵循傳統，甚至於侵犯到其他被一般公認的人權，特別是婦女人權的保障。

八、認為為化權是文化帝國主義的工具

一些持文化相對主義者認為²³，如果有所謂的文化權的話，站在尊重文化差異的立場，應該是採取因地制宜的方式；而目前推動的普世人權規範，最終會消滅文化多元性。

大體而言，這些保留的看法，要不是停留在執行上的技術問題，再不就是出自非普世的考量，因此，並不敢正面大聲反對。唯一比較費心面對的，是文化相對主義的論調，基本上，這是站在國家的立場來看文化權；然而，拋開國家是否具有文化權不說，到目前為止，我們看到對少數族群文化最大的破壞，國家機器的威脅，恐怕不會小於來自國家外的文化威脅。

²² 這是一種本質化 (essentialized) 的認同意義；參見 Das (1994: 123) 所謂「文化的雙重生命」，一方面賦予自我認同，另一方面，卻有將認同綁死的危險。

²³ 有關文化相對主義 (cultural relativism) 的批判，見 Niezen (2003)、以及 Benhabib (2002)。

參、國際規約中的文化權

對於文化權的保障，最重要的國際法依據聯合國的規約、或是宣言。一些區域性的國際組織也有相關的條文，包括美洲國家組織、非洲團結組織、歐洲理事會、歐洲安全暨合作組織、以及歐洲聯盟。另外，聯合國教科文組織也有一些相關的宣言。

一、聯合國規約

聯合國大會在 1948 年通過『世界人權宣言²⁴』，在第 27 條首度正式而明確地指出個人的文化權：

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

另外，第 22 條也說明文化權（以及經濟權、社會權）對於個人尊嚴、以及人格發展而言，是不可或缺的：

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

接下來，聯合國在 1966 年通過『國際公民暨政治權公約²⁵』，在第 27 條

²⁴ *Universal Declaration of Human Rights, 1948*。

²⁵ *International Covenant on Civil and Political Rights, 1966*。

間接提到少數族群的文化權：

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.

在這同時通過的『國際經濟、社會、暨文化權公約²⁶』，在第 15 條規範了國家在保護文化權上面所應盡的義務：

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

另外，聯合國在 1979 年通過的『消除各種婦女歧視規約²⁷』（第 13

²⁶ *International Covenant on Economic, Social and Cultural Rights, 1966*。

²⁷ *Convention on the Elimination of All Forms of Discrimination against Women, 1979* :

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality

條)、以及在 1989 年『兒童權利規約²⁸』(第 31 條),也有敦促國家保護文化權的文字。在 1992 年通過的『個人隸屬民族、族群、宗教、或語言性少數族群權利宣言²⁹』,在第 2 條則具體指出少數族群的文化權:

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and

of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

²⁸ *Convention on the Rights of the Child, 1989* :

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

²⁹ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, 1992* .

maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

另外，該宣言在第 4 條則規定國家保護少數族群語言文化的義務：

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

二、區域性國際組織規約

美洲國家在 1948 年通過『美洲人權宣言³⁰』，在第 13 條揭櫫參與社群文化權利：

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that

³⁰ *American Declaration of the Rights and Duties of Man, 1948*。

result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

美洲國家組織在 1988 年通過的『美洲社會、經濟、暨文化權規約附加議定書³¹』，除了承認個人的文化權，同時，也規範了國家保護文化權的義務：

1. The States Parties to this Protocol recognize the right of everyone:
 - a. To take part in the cultural and artistic life of the community;
 - b. To enjoy the benefits of scientific and technological progress;
 - c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.
3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

在非洲方面，非洲團結組織在 1981 年通過『非洲人權憲章³²』，也提到個人的文化參與權、以及國家保護文化權的義務：

³¹ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social And Cultural Rights, 1988*，又稱為『美洲公約之聖薩爾瓦多議定書』（*San Salvador Protocol to the American Convention*）。

³² *African Charter on Human and Peoples' Rights, 1981*。

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

至於歐洲聯盟，在 2000 年通過的『歐盟基本權利憲章³³』，只在第 22 條簡短提到文化多樣性的保護：

The Union shall respect cultural, religious and linguistic diversity.

倒是在歐洲理事會方面，於 1992 年通過『歐洲區域或少數族群語言憲章³⁴』，首度針對少數族群語言權利作詳盡的規範³⁵。而在 1995 年通過的『保障少數族群架構條約³⁶』，除了列舉少數族群的認同權、媒體權、語言權、命名權、以及教育權，並在第 15 條規範國家在促進文化參與權的義務：

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

另外，歐洲安全暨合作組織的『海牙有關少數族群教育權建議書³⁷』(1996)、以及『奧斯陸有關少數族群語言權建議書暨說明³⁸』(1998)，對於少數族群教育權、以及語言權有相當詳細的規範。

³³ *Charter of Fundamental Rights of European, 2000*。

³⁴ *European Charter for Regional or Minority Language, 1992*。

³⁵ 請參考歐洲理事會在 1954 年公過的『歐洲文化規約』(*European Cultural Convention, 1954*)、以及『文化多樣性宣言』(*Declaration of the Committee of Minister on Cultural Diversity, 2000*)。

³⁶ *Framework Convention for the Protection of National Minorities, 1995*。

³⁷ *Hague Recommendations Regarding the Linguistic Rights of National Minorities, 1996*。

³⁸ *Oslo Recommendations Regarding the Linguistic Rights of National Minorities and Explanatory Note, 1998*。

三、聯合國教科文組織

對於文化權的保護，聯合國教科文組織當然是責無旁貸，因此，也有不少訂定標準的規約、建議書、以及宣言（UNESCO, n.d.）。首先，在 1960 年通過的『反對教育歧視規約³⁹』中，規定了少數族群的教育權，特別是母語的使用、以及教導：

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

(i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;

(ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and

(iii) That attendance at such schools is optional.

到目前為止，聯合國教科文組織已經通過了 20 多個大會宣言。在第 14 屆大會通過的『國際文化合作原則宣言⁴⁰』（1966），於第一條就開宗明義提到每個人的文化發展權。在第 20 屆大會通過的『種族暨種族偏見宣言⁴¹』（1978），同樣的是在第一條宣示文化差異權、以及文化認同權：

2. All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such.

However, the diversity of life styles and the right to be different may

³⁹ *Convention against Discrimination in Education, 1960*。

⁴⁰ *Declaration of the Principles of International Cultural Co-operation, 1966*。

⁴¹ *Declaration on Race and Racial Prejudice, 1978*。

not, in any circumstances, serve as a pretext for racial prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever, nor provide a ground for the policy of apartheid, which is the extreme form of racism.

3. Identity of origin in no way affects the fact that human beings can and may live differently, nor does it preclude the existence of differences based on cultural, environmental and historical diversity nor the right to maintain cultural identity.

在第 31 屆大會通過的『世界文化多樣性宣言⁴²』（2001），第 4 條說明文化多樣性的保障是對人權的尊重：

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

該宣言也在第 5 條主張以文化權來促進文化多樣性，並列舉母語權、教育權、以及選擇參與文化生活的權利：

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and cultural Rights. All persons should therefore be able to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons should be entitled to quality education and training that fully respect

⁴² *Universal Declaration on Cultural Diversity, 2001*。

their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

肆、原住民族文化權的實踐

國際勞工組織⁴³在 1957 年通過『原住暨部落人口保障暨整合公約⁴⁴』，除了一般性提到政府必須採取措施來確保原住民族的社會、經濟、及文化發展（第 2 條），還特別在第六部分規範了原住民族的教育權，尤其是在第 23 條規定政府對於住民族母語教學、以及保存的責任：

1. Children belonging to the populations concerned shall be taught to read and write in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong.
2. Provision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country.
3. Appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language.

不過，由於此規約的精神在於「整合」，譬如說，上述條款的精神是由母語的使用過渡到國家語言、或是官方語言的學習，因此，飽受抨擊。國際勞工組織從善如流，於 1989 年通過修正版的『原住暨部落民族公約⁴⁵』，在第 2 條規範政府採取措施保護原住民族權利的，正式提到文化權的概念：

⁴³ International Labor Organization，簡稱為 ILO。

⁴⁴ *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957*，簡稱 *ILO Convention 107*。

⁴⁵ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989*，簡稱為 *ILO Convention 169*。

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

同樣地，在第六部分規定了原住民族的教育權，包括設立自己的教育機構（第 27 條）、以及母語受教權（第 28 條）。比較特別的是在第 29 條，要求國家必須在歷史教科書、以及其他教材裡頭，公平而正確地提供有關原住民社會文化的介紹，以消除社會上原有的偏見：

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

聯合國防止歧視暨保護少數族群小組委員會下轄的「原住人口工作小組⁴⁶」，在 1993 年通過了『原住民族權利宣言草案⁴⁷』，除了提及原住民族有免於族群滅種（ethnocide）、以及文化滅種（cultural genocide）的集體、以及個人權利（第 2 條），並規範政府必須有具體的作為（第 7 條），來保障其文化的完整

⁴⁶ UN Working Group on Indigenous Populations，簡稱 UNWGIP。

⁴⁷ *United Nations Draft Declaration on the Rights of Indigenous Peoples, 1993*。

性 (cultural integrity) :

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- a. any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b. any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c. any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- d. any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- e. any form of propaganda directed against them.

另外，宣言草案的第三部分（第 12-14 條）規範了原住民族的文化、宗教、以及語言權，而第四部分（第 15-18 條）則規定原住民族的母語受教權、以及媒體權。

美洲國家組織的「人權委員會⁴⁸」在 1997 年，也通過了一份類似的『美洲原住民族權利宣言草案⁴⁹』，除了列舉包括文化權、宗教權、以及語言權在內的原住民族集體權（第 2 條），並在第三部分詳細規範原住民族的文化發展（第 7-13 條），尤其是要求國家應該承認、並尊重原住民族的生活方式、習慣、傳統、社會經濟暨政治組織、制度、風俗、信仰、價值、服飾、以及語言（第 7 條）；另外，母語受教權也被提到（第 7 條）。

聯合國大會終於在今年（2007）通過『原住民族權利宣言⁵⁰』（見附錄 1），包含原住民族有權維持獨特政治、司法、經濟、社會、以及文化制度（第

⁴⁸ Inter-American Commission on Human Rights，簡稱 IACHR。

⁴⁹ *Proposed American Declaration on the Rights of Indigenous Peoples, 1997*。

⁵⁰ *United Nations Declaration on the Rights of Indigenous Peoples, 2007*。

5 條)；反同化的權利(第 8 條)；認同權(第 9 條)；有權綁有文化傳統，包括考古地點、史跡、藝品、設計、儀式、技術、藝術、以及文學(第 11 條)；宗教權(第 12 條)；文化復育權(第 13 條)；教育權(第 14 條)；文化尊嚴權(第 15 條)、以及媒體權(第 16 條)。

另外，在文化資產(cultural heritage)方面，「文化暨智慧財產權⁵¹」(cultural and intellectual property rights)是原住民族亟需保護的文化權。在 1993 年通過的『生物多樣性公約⁵²』，特別在第 8 條規範國家必須尊重原住民族的傳統知識：

Each Contracting Party shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

在國內，『中華民國憲法』在總綱，有提到「各民族一律平等」(第 5 條)；此外，在有關人民權利義務的第二章，也有「不分男女、宗教、種族、階級、黨派，在法律上一律平等」的用詞(第 7 條)。不過，一直要到 1994 年的三次修憲，增修條文(第 10 條)才明確地提及原住民的地位：

國家對於自由地區原住民之地位及政治參與，應予保障；對其教育文化、社會福利及經濟事業，應予扶助並促其發展。…

要到 1997 年的四次修憲，透過增修條文第 10 條的修訂，才終於出現真正對於多元文化主義的宣示：

國家肯定多元文化，並積極維護發展原住民族語言及文化。

⁵¹ 有關這些名詞的釋意，見 Daes (1993)。

⁵² *Convention on Biological Diversity, 1992*。

國家應依民族意願，保障原住民族之地位及政治參與，並對其教育文化、交通水利、衛生醫療、經濟土地及社會福利事業予以保障扶助並促其發展，其辦法另以法律訂之。…

當然，在 2000 年通過的『大眾運輸工具播音語言平等保障法』，算是直接有關族群語言權保障的特別例立法；由行政院文化建設委員會所主推的『國家語言發展法』，是目前唯一與族群文化發展比較有關的草案。由於原住民族權利運動的努力，政府漸次訂定相關文化權保障的『原住民族教育法』（1998）、『原住民身分法』（2001）、以及『原住民族基本法』（2005）⁵³，規範原住民族的教育權、身分權、傳統知識暨智慧創作保護權、語言權、以及媒體權；另外，『姓名條例』（第 1、2 條）規定原住民可以依據文化慣俗命名。行政院原住民族委員會此刻也正在推動下列與文化權保障相關的草案，包括『原住民族認定法』、『原住民族生物多樣性保障法』、以及『原住民族語言發展法』。

伍、結論

到目前為止，文化權可以被廣義解釋為少數族群的集體權利，因此，幾乎是包括所有層面的權利；當然，如果是把定義縮小到容易操作的情況，又可能把文化權矮化為文化資產、甚至於是有形的文化資產；折衷的方式，應該是至少要包括自我認同、生活方式、以及文化資產。在過去，對於原住民族文化權的侵犯，主要是來自國家的同化政策、以及其他族群對於文化差異的敵視。現在，在多元文化主義的理想下，不管是國家、還是其他族群，大致於不敢公開排斥原住民族的文化特色；不過，畢竟還是停留在物化欣賞的層次。真正要實踐原住民族的文化權，必須由國家主動出面推動，來補償四百多年來墾殖社會的文化剝奪。

⁵³ 值得一提的是，不少現有法律也涉及原住民族的文化權，譬如『公務人員考試法』、『教育基本法』、『國民教育法』、『終身學習法』、『有線廣播電視法』、以及『文化古蹟保存法』。

附錄 1：『原住民族權利宣言』（2007）

Article 5

Indigenous 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. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of

such a right.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing

systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

參考書目

Albro, Robert, and Joanne Bauer.

- 2005 "Introduction," in Robert Albro, and Joanne Bauer, eds. *Cultural Rights: What They Are, Why They Matter, How They Can Be Realized*, pp. 2-3. New York: Carnegie Council on Ethnicity and International Affairs.

Alston, Philip.

- 2001 "Introduction," in Philip Alston, ed. *Peoples' Rights*, pp. 1-6. Oxford: Oxford University Press.

Baehr, Peter R.

- 1999 *Human Rights: Universality in Practice*. Houndmills, Basingstoke, Hampshire: Palgrave.

Benhabib, Seyla.

- 2002 *The Claims of Culture: Equality and Diversity in the Global Era*. Princeton: Princeton University Press.

Craven, Matthew.

- 1994 "The Right to Culture in the International Covenant on Economic, Social and Cultural Rights," in Rod Fisher, Brian Groombridge, Julia Häusemann, and Ritva Mitchell, eds. *Human Rights and Cultural Policies in a Changing Europe: The Right to Participate in Cultural Life*, pp. 161-71. Helsinki: Arts Council of Finland.

Crawford, James, ed.

- 1988 *The Rights of Peoples*. Oxford: Clarendon Press.

Daes, Erica-Irene

- 1993 “Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples.” (E/CN.4/Sub.2/1993/28).

Dalton, Jennifer E.

- 2005 “International Law and the Right of Indigenous Self-Determination: Should International Norms Be Replicated in the Canadian Context?” *Queen’s Institute for Intergovernmental Relations Working Paper*, No. 1 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932467#PaperDownload) (2007/ 10/28).

Das, Veena.

- 1994 “Cultural Rights and the Definition of Community,” in Oliver Mendelsohn, and Upendra Baxi, eds. *The Rights of Subordinated Peoples*, pp. 117-58. Delhi: Oxford University Press.

Green, Leslie.

- 1995 “Internal Minorities and Their Rights,” in Will Kymlicka, ed. *The Rights of Minority Cultures*, pp.256-72. Oxford: Oxford University Press.

Harvey, Edwin R.

- 1996 *Implementation of Cultural Rights of Minorities in Latin America*. UNESCO (http://www.puentes.gov.ar/educar/servlet/Downloads/S_BDPOLITICASCULTURALES/UNESCO05.PDF) (2007/10/28).

Häusemann, Julia.

- 1994 “The Right to Participate in Cultural Rights,” in Rod Fisher, Brian Groombridge, Julia Häusemann, and Ritva Mitchell, eds. *Human Rights and Cultural Policies in a Changing Europe: The Right to Participate in Cultural Life*, pp. 109-60. Helsinki: Arts Council of Finland.

Hunt, Paul.

- 2000 “Reflections on International Human Rights Law and Cultural Rights,” in Margaret Wilson, and Paul Hunt, eds. *Culture, Rights and Cultural Rights: Perspectives from the South Pacific*, pp. 25-46. Wellington: Huia Publishes.

Koivunen, Hannele, and Leena Marsio.

- 2007 *Fair Culture? Ethnical Dimension of Cultural Policy and Cultural Rights*. Helsinki: Ministry of Education.

Kukathas, C.

- 1992 “Are There Any Cultural Rights?” *Political Theory*, Vol. 20. No. 1 (EBSCOhost Full Display).

Kymlicka, Will.

1995 *Multicultural Citizenship*. Oxford: Oxford University Press.

Kymlicka, Will.

1989 *Liberalism, Community and Culture*. Oxford: Clarendon Press.

Lerner, Natan.

1991 *Group Rights and Discrimination*. Dordrecht: Martinus Nijhoff.

Levy, Geoffrey Brahm.

2001 "Liberal Nationalism and Cultural Rights." *Political Studies*, Vol. 49, pp. 670-91.

Levy, Jacobs T.

1997 "Classifying Cultural Rights," in Ian Shapiro, and Will Kymlicka, eds. *Ethnicity and Group Rights*, pp. 22-66. New York: New York University Press.

Margalit, Avishai, and Moshe Halbertal.

2004 "Liberalism and the Rights to Culture." *Social Research*, Vol. 71, No. 3, pp. 529-48.

Marks, Stephen P.

2003 "Defining Cultural Rights," in Morten Bergsmo, ed. *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, pp. 293-324. Leiden: Martinus Nijhoff Publishers.

Niéc, Halina.

1994 "The Concept of Culture in the Context of Human Rights," in Rod Fisher, Brian Groombridge, Julia Häusemann, and Ritva Mitchell, eds. *Human Rights and Cultural Policies in a Changing Europe: The Right to Participate in Cultural Life*, pp. 172-89. Helsinki: Arts Council of Finland.

Niezen, Ronald.

2003 *The Origins of Indigenism: Human Rights and the Politics of Identity*. Berkeley: University of California Press.

Prott, Lyndel V.

1988 "Cultural Rights as Peoples' Rights in International Law," in James Crawford, ed. *The Rights of Peoples*, pp. 93-106. Oxford: Clarendon Press.

Robbins, Bruce, and Elsa Stamatopoulou.

2004 "Reflections on Culture and Cultural Rights." *South Atlantic Quarterly*, Vol. 103, Nos.2-3, pp. 419-34.

Stamatopoulou, Elsa, and Joanne Bauer.

2004 "Why Cultural Rights Now." (transcripts from Carnegie Council on Ethnicity and International Affairs) (<http://www.cceia.org/resources/transcripts/5006.html>) (2007/10/16).

Symonides, Janusz.

- 1998 "Cultural Rights: A Neglected Category of Human Rights." *International Social Sciences Journal*, Vol. 50, No. 158, pp. 559-72.

Tamire, Yael.

- 1993 *Liberal Nationalism*. Princeton: Princeton University Press.

Thaman, Konai Helu.

- 2000 "Cultural Rights: A Personal Perspective," in Margaret Wilson, and Paul Hunt, eds. *Culture, Rights and Cultural Rights: Perspectives from the South Pacific*, pp. 1-11. Wellington: Huia Publishes.

Thornberry, Patrick.

- 1995 "The UN Declaration on the Rights of Person Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update," in Alan Phillips, and Allan Rosas, eds. *Universal Minority Rights*, pp. 13-76. Turku: Åbo Akademi University Institute for Human Rights.

United Nations Development Programme (UNDP).

- 2004 *Human Development Report 2004: Cultural Liberty in Today's Diverse World*. New York: United Nations Development Programme United Nations Educational, Scientific, and Cultural Organization (UNESCO). n.d. "General Introduction to the Standard-setting Instruments of UNESCO." (http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html) (2007/10/23).

Waldron, Jeremy.

- 1995 "Minority Cultures and the Cosmopolitan Alternatives," in Will Kymlicka, ed. *The Rights of Minority Cultures*, pp. 93-119. Oxford: Oxford University Press.

Wilson, Margaret.

- 2000 "Cultural Rights: Definitions and Contexts," in Margaret Wilson, and Paul Hunt, eds. *Culture, Rights and Cultural Rights: Perspectives from the South Pacific*, pp. 13-23. Wellington: Huia Publishes.

