

原住民族的文化權*

摘 要

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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.

¹ 1945

indigenous peoples
culture
Hulston, 2002: 35

Karel Vasak
6
cultural rights

indigenous cultural rights
cultural rights right to
Mupaulanga-
Baehr, 1999:
civil political rights
economic social
² rights of solidarity

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

² Alston 2001: 2 peoples' rights Crawford 1988 rights of peoples
Baehr, 1999

minority group rights
rights

³ minority rights
indigenous
4

Patrick Thornberry 1995: 15-16

bearer

5

Lerner, 1991

Wilson, 2000: 13

6

culture
UNESCO

Culture
Janusz Symonides Häusemann, 1994: 10

7

8

1982

9

³ Thaman 2000: 1

⁴

Mary Ellen Turpel Dalton, 2005: 1-2

⁵ Green 1995: 259

because

even when

⁶ Kymlicka 1995: 76-77

societal culture

⁷ Kymlicka 1995: 18

nation people

⁸

holistic

Wilson, 2000: 16

⁹ World Conference on Cultural Policies

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;

Elsa Stamatopoulou Joanne Bauer 2004

way of life

creation

capital

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¹²

2004

¹³

UNDP, 2004: 14

Stephen P. Marks

2003

¹⁴

Jacob T. Levy 1997

Margalit Halbertal 2004

Stamatopoulou Bauer 2004

Craven 1994

duty holder duty bearer

Lyndel V. Prott 1988: 96-87

¹⁰ *Mexico City Declaration on Cultural Policies, 1982*

¹¹ Asbjørn Eide Marks, 2003: 296 Koivunen Marsio 2007: 8-9

¹² United Nations Development Programme UNDP

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

¹⁴ Stamatopoulou Bauer 2004

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）。

1995

16

2004

Will Kymlicka 1995

17

polyethnic rights

108-23 ¹⁸

equality

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

¹⁷ group-differentiated rights Kymlicka, 1995: 26

¹⁸ Kukathas 1992 Waldron 1995

Kymlicka 1989 1995

19

cultural structure

cultural community

context of choice

essential

interest

good life

20

21

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

¹⁹ Yael Tamir 1993

²⁰ Tamir 1993: 37

²¹ Tamir 1993: 36

Levy 2001

paternalistic trap

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

三、有其他比文化權更迫切的目標

四、政府擔心國內違反文化權的事跡被揭露

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

六、商業市場的考量

七、可能與其他人權的實踐相互抵觸

22

八、認為為化權是文化帝國主義的工具

23

22

essentialized

Das 1994: 123

23

cultural relativism

Niezen 2003

Benhabib

2002

一、聯合國規約

1948

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(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.

22

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.

1966

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²⁴ *Universal Declaration of Human Rights, 1948*

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

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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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.

1979

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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

1989

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1992

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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.

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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

1948

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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.

1988

31

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.

1981

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³¹ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social And Cultural Rights, 1988* *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.

2000

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The Union shall respect cultural, religious and linguistic diversity.

1992

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1995

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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.

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(1996)

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(1998)

³³ *Charter of Fundamental Rights of European, 2000*

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

³⁵ 1954 *European Cultural Convention, 1954*
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

UNESCO, n.d.

1960

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(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.

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⁴⁰ 1966

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1978

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.

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⁴²

2001

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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.

5

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.

⁴³ 1957

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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.

1989

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⁴³ International Labor Organization ILO

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

⁴⁵ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989* 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;

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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.

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1993

47

ethnocide

cultural genocide

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⁴⁶ UN Working Group on Indigenous Populations UNWGIP

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

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.

12-14

15-18

⁴⁸ 1997

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7-13

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2007

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⁴⁸ Inter-American Commission on Human Rights IACHR

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

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

5	8	9	
			11
	12	13	14
	15	16	
		cultural heritage	51
		cultural and intellectual property rights	
1993	52	8	

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;

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7 1994

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...

1997

10

⁵¹ Daes 1993

⁵² *Convention on Biological Diversity, 1992*

2000

...

1998

2001

2005

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1 2

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.

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