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Integrating Cultural Concerns in the Interpretation of General Individual Rights – Lessons from
the International Human Rights Case Law*

Background paper submitted by Ms. Julie Ringelheim**

* Reproduced as submitted.

** The views expressed in the present document are those of the author and do not necessarily reflect those of the United Nations. Ms. Julie Ringelheim is a Senior Fellow, National Fund for Scientific Research, Centre for Legal Philosophy at the University of Louvain (UCL), Belgium. PhD, European University Institute; LLM, Cambridge University (Trinity Hall College).

Integrating Cultural Concerns in the Interpretation of General Individual Rights – Lessons from the International Human Rights Case Law¹

Julie Ringelheim

Senior Fellow, National Fund for Scientific Research, Centre for Legal Philosophy at the University of Louvain (UCL), Belgium. PhD, European University Institute; LLM, Cambridge University (Trinity Hall College).

Introduction

It is often assumed that classical civil and political rights are unsuitable to address the specific concerns of cultural minorities. These rights are commonly seen as relying on an abstract conception of the individual, ignoring collective and cultural affiliations. They are said to be individualistic and universalistic whereas minorities supposedly claim for collective and special rights. The debate over minority rights thus tends to turn on the question whether or not traditional individual rights should be supplemented with a new and presumably distinct category of rights specifically designed to enable minority members to preserve their own separate identity.

Yet if instead of looking at the way rights are defined in legal texts, one attends to the manner in which they are interpreted and applied in the practice, the relationship between traditional individual rights and cultural specificities reveals more complex than this common picture suggests. When courts or other institutions apply a right to a concrete case, they often have to specify its content and implications in light of the particularities of the situation at stake. Various sorts of considerations can be taken into account in this process, including, as will be shown, circumstances related to the religion, language or traditions of the people concerned, all phenomena which are of a cultural nature. The term culture is used here in its anthropological sense, as referring to the language, norms, values, beliefs and practices specific to a certain human group, which bind the group's members together and distinguish them from others.²

This paper proposes to explore the different ways in which cultural concerns can permeate the realm of classical individual rights, so as to enable them to contribute to ensure respect for cultural specificities.³ Through the analysis of a sample of cases drawn from the jurisprudence of

¹ A first draft of this paper was presented at the workshop *Cultural and Minority Rights* organised at Oxford University in June 2005 by the Research Training Network « Applied Global Justice », 5th Framework Programme, European Commission, # HPRN-CT-2002-00231. A shorter version of this article is to be published in L. Foisneau and J.-Ch. Merle (eds), *Proceedings of the workshop Cultural and Minority Rights*, Dordrecht, Kluwer (forthcoming). I thank all the participants to the workshop for their useful comments on an earlier draft of this paper. I am also grateful to Stephen Humphreys for his valuable observations on this paper.

² On the different meanings of the term culture, see Abercrombie, N., Hill, S., Turner, B. S. (eds), 2000, *The Penguin Dictionary of Sociology*, Penguin Books, London, p. 83.

³ This aspect of the relationship between culture and human rights must be distinguished from the question whether circumstances pertaining to a society's cultural traditions may provide a justification for restricting the exercise of a right. For an examination of this issue in the European Court of Human Rights' case law, see Brems, E., 2001, *Human Rights: Universality and Diversity*, Martinus Nijhoff, The Hague, Boston, London; Hoffmann F. and Ringelheim, J., 2004, *Par-delà l'universalisme et le relativisme : la Cour européenne des droits de l'homme et les*

two major international human rights institutions, namely the European Court of Human Rights and the United Nations Human Rights Committee, Part I highlights the diverse modalities through which cultural considerations can impact on human rights' interpretation. As will be discussed in Part II, these observations shed new light on the relation between classical individual rights and minority rights: rather than forming a separate category of rights, it is argued, the latter should be seen as deriving from and extending the former.

I. Cultural concerns and human rights' interpretation

The European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC) were both established to supervise a specific human rights instrument, respectively the European Convention on Human Rights and Fundamental Freedoms (1950)⁴ and the United Nations International Covenant on Civil and Political Right (ICCPR) (1966).⁵ Both institutions are entitled to receive complaints from individuals alleging to be the victim of a violation, by a state party, of one of the rights set forth in the relevant convention.⁶ Unlike the ECtHR, however, the HRC is not a judicial institution and its findings are not legally binding on contracting states. Nonetheless, given that it is the sole body entitled to make authoritative interpretations of the ICCPR, the views it expresses on the meaning and scope of the rights enshrined in it are endowed with considerable authority.⁷

One of the most notable differences between the two conventions lies with the fact that the ICCPR contains a specific minority provision while the European Convention does not.⁸ In the latter convention, the sole reference to minority groups is found in article 14, which prohibits all discrimination in the enjoyment of the rights set forth in the Convention on the ground *inter alia* of "association with a national minority." The ICCPR, by contrast, provides in its article 27 that "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." However, since the aim of the present analysis is to cast light on the potential cultural implications of general human rights, which are not *a priori* designed to address minorities' particular situation, the case-law related to this provision will not be considered here.⁹ For the

dilemmes de la diversité culturelle, *Revue interdisciplinaire d'études juridiques*, 52:109-142, available at <http://www.dhdi.free.fr/recherches/droithomme/>.

⁴ The European Convention on Human Rights was opened for signature in 1950 within the Council of Europe and entered into force in 1953. By October 2005, it has been ratified by 45 States. See <http://conventions.coe.int/>

⁵ The ICCPR was opened for signature on 19 December 1966 in the United Nations and entered into force on 23 March 1976. By October 2005, it counted 154 states party. See UN High Commissioner on Human Rights report "Status of ratifications of the principal international human rights treaties," available at <http://www.ohchr.org/english/countries/ratification/4.htm>.

⁶ In the case of the HRC, only states party which have ratified the Optional protocol to the Covenant may be the object of an individual complaint (G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966). By October 2005, 105 States were party to the Optional protocol. See <http://www.ohchr.org/english/countries/ratification/5.htm#N1>.

⁷ Conte, A., Davidson, S. and Burchill, R., 2004, *Defining Civil and Political Rights, The Jurisprudence of the United Nations Human Rights Committee*, Ashgate, Aldershot (UK), Burlington (USA), p. 6; Henrard, K., 2000, *Devising an Adequate System of Minority Protection – Individual Human Rights, Minority Rights and the Right to Self-Determination*, Martinus Nijhoff, The Hague, Boston, London, p. 175.

⁸ The insertion of a minority provision had in fact been proposed during the drafting of the Convention but the proposal was eventually discarded. See Hillgruber Ch., et Jestaedt, 1994, M., *The European Convention on Human Rights and the Protection of National Minorities*, Verlag Wissenschaft und Politik, Cologne, pp. 13-21.

⁹ This case law has already been extensively analysed elsewhere. See in particular Burchill, R., 2004, Minority Rights, in A. Conte, S. Davidson, R. Burchill (eds), 2004, pp. 183-204 ; Pentassuglia, G., 2003, Minority Issues as a

same reason, the notion of ‘minority’ is used here in a broad sense, as designating a group of people united by distinct cultural, religious or linguistic traits, who are in the minority in a country or at the level of a region when such a region disposes of important autonomous powers. Since the rights examined in this paper do not themselves refer to the minority concept, it is not necessary to enter within the well-torn debates surrounding the question of its legal definition.¹⁰

Instances of culturally-sensitive interpretations discernible in the ECtHR and the HRC’s case-laws may seem at first sight very scattered, if not coincidental. Neither the European judges nor the HRC’s members appear to follow a clear line when deciding this type of cases. Yet a careful examination of their reasoning reveals that three distinct rationales buttress the integration of cultural considerations in the interpretative process: (a) the effectiveness principle; (b) the recognition of a cultural dimension inherent to the right at stake; (c) the promotion of substantive equality as opposed to formal equality.

a. The effectiveness principle

The principle of effectiveness has been especially insisted upon by the ECtHR.¹¹ The Court has repeatedly stressed that “the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective.”¹² Accordingly, it must be interpreted in such way as to ensure that the rights and freedoms guaranteed do not remain merely formal but are of effective use to the individuals concerned. This implies that “the Court is inclined to look beyond appearances and formalities, and to focus on the realities of the position of the individual.”¹³ Thus, in *Airey v. Ireland*, the Court took into account the fact that the applicant came from a humble economic background to conclude that by failing to provide her with the possibility to obtain free legal aid, the state had deprived her of effective access to court to seek separation from her husband. Indeed, she did not have the means to afford the costs of legal aid and, given the complexity of the case, neither could she realistically present her case without the assistance of a lawyer.¹⁴

While in *Airey* the applicant’s ability to effectively enjoy her right was affected by her economic situation, in other contexts, this capacity may be impaired by circumstances of a cultural nature. Language, in particular, can impact on the individuals’ ability to draw a real benefit from certain rights. Significantly, both the European Convention and the ICCPR expressly guarantee, as part of the right to a fair trial, the right for a person charged with a criminal offence who does not understand or speak the official language to be freely assisted by an interpreter.¹⁵ Similarly, both conventions recognise the right of all persons arrested to be informed promptly of the reasons of

Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee, *German Yearbook of International Law*, Duncker & Humblot, Berlin, 46:401-451; Pentassuglia, G., 2002, *Minorities in International Law*, Council of Europe Publishing, Strasbourg, pp. 97-111 and Henrard, K., 2000, pp. 156-185.

¹⁰ On the question of the legal definition of the minority concept, see Pentassuglia, G., 2002, 55-72 and Henrard, K., 2000, pp. 17-30.

¹¹ See Mowbray, A., 2005, The Creativity of the European Court of Human Rights, *Human Rights Law Review*, 5(1):57-79; van Dijk, P. and van Hoof, G.J.H., 1998, *Theory and Practice of the European Convention on Human Rights*, Kluwer, The Hague, pp. 74-80.

¹² See, for instance, Eur. Ct. H. R., *Airey v. Ireland* (Appl. No. 6289/73), 9 October 1979, *Serie A* 32, para. 24 ; Eur. Ct. H. R., *Soering v. the United Kingdom* (Appl. 14038/88), 7 July 1989, *Serie A* 161, para. 87 ; Eur. Ct. H. R. (3d section), *Čonka v. Belgium* (Appl. No. 51564/99), 5 February 2002, *Rep.* 2002-I, para. 46.

¹³ van Dijk, P. and van Hoof, G.J.H., 1998, p. 74.

¹⁴ *Airey v. Ireland*, para. 24-28.

¹⁵ Article 6.3(e) of the European Convention on Human Rights; Article 14.3(f) of ICCPR.

his or her arrest *in a language that he or she understands*.¹⁶ But the ECtHR has also taken into account language-related circumstances when applying provisions which do not contain an explicit linguistic clause. In *Chishti v. Portugal*, it found that banning a Pakistani detainee from writing to his family in Urdu constituted an interference with the applicant's right to respect for correspondence, guaranteed by article 8 of the Convention, even though this provision does not refer to the language of correspondence: Urdu being the only language that his relatives understood, the challenged measure in practice deprived him of any effective possibility to communicate with them.¹⁷ In *Čonka v. Belgium*,¹⁸ asked to review the compatibility under the Convention of the conditions of arrest and expulsion from the Belgian territory of a group of Slovak Roma migrants, the Court emphasised the fact that information on available remedies provided to them were printed in Dutch, a language they did not understand. Although an interpreter was present at the police station, he was alone to assist the large number of Roma families in understanding the communications addressed to them. Moreover, he did not accompany them when they were transferred to a closed centre near the airport before being expelled from the country.¹⁹ These elements, together with other circumstances,²⁰ contributed to persuade the Court that the applicants did not have a *realistic possibility* to use the remedies theoretically available to them.²¹ Hence, it found a breach of article 5(1) of the Convention, which protects individuals against arbitrary arrests.

The reasoning held by the Human Rights Committee in *Hopu and Bessert v. France*²² may be seen as another form of application of the effectiveness principle. The case was brought by native Tahitians who complained about French authorities' decision to allow construction of a hotel complex on a land encompassing an ancestral Polynesian burial ground, which had an important place in their history, culture and life. This decision, they alleged, violated their right to respect for family life and privacy, guaranteed by article 17(1) and 23(1) of ICCPR.²³ The French government contended that no issue could arise with regard to their right to family and privacy, because they had not established any kinship link between the remains discovered in the burial grounds and themselves. But the Committee repelled France's argument: given the Covenant's objectives, i.e. ensuring universal enjoyment of fundamental rights and freedoms, the term "family" has to be interpreted broadly, "so as to include all those comprising the family *as understood in the society in question*. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation."²⁴ The Committee stressed that

¹⁶ Article 5(2) of the European Convention on Human Rights; Article 14.3(a) of ICCPR. See also Article 6.3(a) of the European Convention on Human Rights.

¹⁷ Eur. Ct. H. R. (3d section), *Chishti v. Portugal* (Application No. 57248/00), 2 October 2003 (admissibility decision). The ban was grounded on security reasons. The Court noted that a solution had been proposed to the applicant with the agreement of the prison authority: the U.S. embassy had found a translator willing and able to translate from English into Urdu and vice-versa all incoming and outgoing mail, without costs to him. This arrangement was refused by the applicant, for reasons the Court deemed unconvincing. Given these circumstances, the Court concluded that the interference was proportionate to the legitimate aim pursued and the application was declared manifestly ill-founded.

¹⁸ Eur. Ct. H. R. (3d section), *Čonka v. Belgium*, 5 February 2002 (Appl. No. 51564/99), *Rep.* 2002-I.

¹⁹ *Čonka v. Belgium*, para. 44.

²⁰ *Čonka v. Belgium*, para. 45.

²¹ *Čonka v. Belgium*, para. 46.

²² Human Rights Committee, *Hopu and Bessert v. France*, Communication No. 549/1993, *U.N. Doc. CCPR/C/60/D/549/1993/Rev.1*, 29 July 1997.

²³ Article 17(1): "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Article 23(1): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

²⁴ *Hopu and Bessert v. France*, para. 10.3.

the people concerned considered their relationship to their ancestors to play an important role in their family life and to represent an essential element of their identity. Their inability to establish a direct kinship link could not be held against them, since it was established that the grave site pre-dated the arrival of European settlers and included the forbears of the present Polynesian inhabitants of Tahiti. Given these circumstances, the contested decision amounted to an interference with their family life and privacy. French authorities having failed to demonstrate that such interference was reasonable and that the burial grounds' significance for the complainants had been taken into account in the decision-making process, they were found to be in breach of articles 17(1) and 23(1) of ICCPR.

Although the notion of effectiveness is not expressly referred to in this decision, the idea underlying the Committee's reasoning seems to be that in order for a right to have a real and concrete meaning for those concerned, the terms defining its scope – in this context the concept of 'family' – must sometimes be interpreted in light of the cultural traditions of those affected.

b) The recognition of a cultural dimension inherent to certain rights

As a matter of fact, the attention afforded to cultural specificities through the effectiveness principle is merely indirect: cultural elements are not protected for their own sake; they are susceptible to be taken into account only insofar as they affect an individual's ability to effectively enjoy his or her right. By contrast with this instrumental logic, in other circumstances the HRC or the ECtHR have construed some rights as directly protecting certain forms of cultural expressions. Three rights in particular have yielded such interpretation: the right to freedom of expression, the right to respect for private and family life and the right to education.

In *Ballantyne, Davidson and McIntyre v. Canada*,²⁵ the HRC had to determine whether Quebec's legislation prohibiting commercial expression and advertising in another language than French was compatible with freedom of expression, protected by ICCPR article 19(2). By ruling that it was contrary to article 19(2), the Committee implicitly admitted that freedom of speech guarantees not only the right to express ideas and opinions, but also the right *to choose* the language in which to express one's ideas and opinions.²⁶ It must be stressed that the violation found by the Committee did not stem from the fact that the complainants were *unable* to speak or understand Quebec's official language, as a reasoning based on the effectiveness principle would have presupposed: rather, the mere fact that they were prohibited from expressing themselves *in the language of their choice* was deemed to constitute a breach of freedom of speech.

But the most striking illustration of the recognition of a general universal right as having an inherent cultural dimension is to be found in the right to respect for privacy and family life-related case law. In *Coeriel and Aurik*, the HRC defined the notion of privacy under article 17 of the Covenant as referring "to the sphere of a person's life in which he or she *can freely express his or her identity*, be it by entering into relationships with others or alone."²⁷ Accordingly, the Committee held that the right to privacy includes protection against arbitrary or unlawful

²⁵ Human Rights Committee, *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1, 5 May 1993.

²⁶ "A State (...) may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice." (*Ballantyne, Davidson, McIntyre v. Canada*, para. 11.4).

²⁷ Human Rights Committee, *Coeriel and Aurik v. The Netherlands*, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991, 9 December 1994, para. 10.2, my emphasis.

interference with the right to choose and change one's own name, given that a person's name represents an important component of his or her identity. *In casu*, it held that by refusing without reasonable grounds to allow two Dutch citizens converted to Hinduism to have their surnames changed into Hindu names in order to be able to become Hindu priests, the Dutch authorities had violated their right under article 17(1) of ICCPR.

A similar trend can be observed in the ECtHR's case-law on article 8 of the European Convention, which guarantees the right to respect for private life, family life and home.²⁸ In a decision dated 3 October 1983, the European Commission of Human Rights²⁹ observed that "a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being 'private life', 'family life' or 'home'".³⁰ The applicants were a group of Saamis from Norway who contested the government's decision to construct a dam and a hydraulic plant on a land they had traditionally used for reindeer herding, fishing and hunting. In the Commission's view, these activities did come within the scope of their right to respect for private life, family life and home, because they were part of the Saami minority's traditional lifestyle. The interference with their right however was deemed justified under article 8(2) as being necessary to the economic well-being of the country and the application was declared inadmissible³¹.

After long ignoring this interpretation of article 8, the Court eventually confirmed it in a 2000 decision.³² It was then mainly applied in relation to Roma's traditional way of life. Several cases were brought by Roma's who complained of the British authorities' refusal to grant them the planning permission required to live in a caravan on their own plot of land. In fact, in the first case of the sort it was faced with, the Court contented itself with asserting that the impugned measure affected the applicant's right to respect for home, declaring it unnecessary to determine whether her right to respect for private and family life had also been affected.³³ By so doing, it avoided considering the issue of respect for Roma traditional lifestyle and approached the case as a common planning conflict.³⁴ In a remarkable move, the Court later reversed its position in its five judgments dated 18 January 2001:³⁵ stressing that "the applicant's occupation of her caravan

²⁸ "Everyone has the right to respect for his private and family life, his home and his correspondence." (Article 8(1)).

²⁹ In the initial system, cases brought before the ECtHR were first reviewed by an organ called the European Commission of Human Rights which had to decide on their admissibility. This organ was suppressed pursuant to the reform of the supervisory system under the Convention introduced by Protocol No. 11 to the Convention, which entered into force on 1 November 1998. See van Dijk, P. and van Hoof, G. J. H., 1998.

³⁰ Eur. Comm. H. R., *G. and E. v. Norway* (Appl. Nos. 9278/81 & 9415/81), 3 October 1983, *D.R.* 35, p. 30.

³¹ Article 8(2): "There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

³² Eur. Ct. H. R. (4th Section), *Noack and others v. Germany* (Appl. No. 46346/99), 25 May 2000 (admissibility decision), *Rep.* 2000-VI.

³³ Eur. Ct. H. R., *Buckley v. United Kingdom* (Appl. No. 20348/92), 25 September 1996, *Rep.* 1996-IV, p. 1271, para. 55. Unlike the Court, the Commission had stated in its report that not only the right to respect for home but also the right to respect for private and family life were affected by the contested measure. It concluded to a violation of article 8. (Eur. Comm. H.R., Report of 11 January 1995, para. 64).

³⁴ O. De Schutter, 1997, Observations: Le droit au mode de vie tsigane devant la Cour européenne des droits de l'homme: droits culturels, droits des minorités, discrimination positive", *Rev. trim. dr. h.*, 64-93.

³⁵ Eur. Ct. H. R. (Grand Chamber), *Chapman v. United Kingdom* (Appl. No. 27238/95); *Beard v. United Kingdom* (Appl. No. 24882/94), *Coster v. United Kingdom* (Appl. No. 24882/94), *Lee v. United Kingdom* (Appl. No. 25289/94), *Jane Smith v. United Kingdom* (Appl. No. 25154/94). Judgments and decisions of the ECtHR can be consulted on the Court's website: <http://cmiskp.echr.coe.int/>.

is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle,” it asserted that the impact of measures bearing upon the stationing of her caravans go beyond the right to respect for her home: “They also affect *her ability to maintain her identity as a Gypsy* and to lead her private and family life in accordance with that tradition.”³⁶

The difference between the approach followed in this context and a reasoning based on the effectiveness principle needs to be emphasised: the Court here does not simply observe that measures restricting the stationing of the applicant’s caravans hinders her right to respect for home because in practice she uses her caravan as a house. It also underscores the special significance that caravan life holds for a person of Roma origin, given its central place in the culture and history of this community. It infers from there that the applicant’s right to respect for private and family life has also been affected. It thus implicitly recognises that the private and family life’s guarantee directly protects the freedom to live in accordance with one’s traditions and to maintain one’s cultural identity.³⁷

Such interpretation of Article 8 may be related to the general evolution of the understanding of the right to respect for private life in the ECtHR’s case law. Although the Court does not consider it possible nor necessary to formulate an exhaustive definition of the concept of “private life,”³⁸ it has progressively recognised that notions of personal autonomy and respect for identity are core principles underlying the interpretation of Article 8’s guarantee.³⁹ In the Court’s words, the rights protected by this provision are “rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.”⁴⁰ This evolution echoes the views expressed by numerous authors who consider the principle of individual self-determination to be at the centre of the concept of privacy⁴¹. According to this line of thought, the fundamental idea on which privacy is based is that people should be free to make choices on issues of essential importance to their life and self-understanding without external interference. Admittedly, the

³⁶ *Chapman v. United Kingdom*, para. 73, my emphasis.

³⁷ Yet, as will be seen below, while admitting that the freedom to lead a family and private life in accordance with one’s majority traditions did come within the scope of Article 8, the Court’s majority eventually concluded that the interference with the applicant’s rights could be deemed necessary in a democratic society to attain a legitimate aim and therefore did not amount to a violation of the Convention.

³⁸ Eur. Ct. H. R., *Niemietz v. Germany* (Appl. 13710/88), 16 December 1992, *Serie A* 251-B, p. 33, para. 29.

³⁹ See in particular Eur. Ct. H. R. (4th Section), *Pretty v. United Kingdom* (Appl. No. 2346/02), 29 April 2002, *Rep.* 2002-III, para. 61 (“Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”) and Eur. Ct. H. R. (Grand Chamber), *Christine Goodwin v. United Kingdom* (Appl. No. 28957/95), 11 July 2002, para. 90 (“Under Article 8 of the Convention (...), where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings”).

⁴⁰ Eur. Ct. H. R. (1st Section), *Connors v. United Kingdom* (Appl. No. 66746/01), 27 May 2004, para. 82.

⁴¹ See *inter alia* Gutwirth, S., 2002, *Privacy and the Information Age*, transl. by R. Casert, Rowman & Littlefield Publishers, Lanham, Boulder, New York, Oxford; De Schutter, O. 1999, *La vie privée entre droit de la personnalité et liberté*, *Rev. trim. dr. h.*, 827-863; Rigaux, F., 1990, *La protection de la vie privée et des autres biens de la personnalité*, Bruylant, LGDJ, Bruxelles, Paris; Rubinfeld, J., 1989, *The Right to Privacy*, *Harvard Law Review*, 102:737-807; Richards, D. A.J., 1979, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, *Hastings Law Journal*, 30:957-1018; Eichbaum, J. A., 1979, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, *Harv. C. R.-C.L.L.Rev.*, 14:361-384.

decision to continue or not following the traditional lifestyle of the community one feels he or she belongs to appears as a choice which bears upon a basic aspect of one's identity.

A final example of how an implicit cultural component can be read into a general individual right pertains to the right to education, enshrined in article 2 of the European Convention's first protocol.⁴² In the well-known 1968 Belgian Linguistic case,⁴³ the Court held that such provision, alone or in conjunction with article 14, does not guarantee the right to be educated in the language of one's choice. It merely entitles those subject to the state's jurisdiction to avail themselves of the means of instruction existing at a given time.⁴⁴ This stance was significantly qualified in the *Cyprus v. Turkey* case (10 May 2001).⁴⁵ The Court was asked to decide whether by refusing to provide mother-tongue education at the secondary level to Greek Cypriots living in Northern Cyprus, the 'Turkish Republic of Northern Cyprus' (TRNC)'s authorities had impinged on their right to education. According to the Turkish government, the Greek Cypriots' right to access education could not be said to have been affected since they were allowed to attend Turkish or English-language schools. While conceding that there was no denial of the right to education "in the strict sense,"⁴⁶ the Court nevertheless found that the circumstances at issue were such that the TRNC's attitude amounted to a violation of the substance of the right under article 2 of the First Protocol. It emphasised that the possibility for Greek-Cypriot children to continue their education in Turkish or English speaking school was both *unrealistic*, given that they had received their primary education in Greek, and contrary to the *wish* of Greek-Cypriot parents to have their children completing their education in their mother tongue.⁴⁷ Interestingly, the Court here combines an argument based on the right's effectiveness – by compelling Greek Cypriots children to study in a language other than their mother tongue at the secondary level, the authorities hampered their ability to draw a real benefit from their education – with an argument grounded on the idea of respect for cultural identity – the TRNC's authorities also disregarded the Greek Cypriot's wish to transmit their language to their children. The Commission's report is even more explicit: it notes that education in Turkish- or English-language schools "does not correspond to *the needs* of the persons concerned who have *the legitimate wish to preserve their own ethnic and cultural identity*."⁴⁸

To be sure, the Court's ruling was heavily influenced by the particular situation prevailing in Northern Cyprus. The facts that the Turkish-Cypriot authorities had abolished previously existing Greek-language secondary schooling and that Greek-Cypriots attending schools in the southern part of the islands were prevented from returning to their home in the North certainly had an important impact on its decision. Nonetheless, it is noteworthy that the Court considered the denial of education in a minority language as likely to amount to a violation of the substance of the right to education. This points towards the recognition of an obligation for states to take

⁴² "No person shall be denied the right to education. (...)."

⁴³ Eur. Ct. H.R., *Case relating to certain aspects of the laws on the use of language in education in Belgium*, 23 July 1968, *Series A* 6 (hereinafter: *Belgian Linguistic case*).

⁴⁴ Noting that article 2 does not specify the language in which education must be conducted, the Court assumed that it only protects the right to have access to instruction in the national language or in one of the national languages as the case may be (*Belgian linguistic case*, pp. 31-32, paras. 3-5). It transpires from the judgment that in case of plurality of official languages, the choice of the language in which public education will be provided is left to the state's discretion. See De Witte, B., 1992, *Surviving in Babel? Language Rights and European Integration*, in Y. Dinstein and M. Tabor (eds), *The Protection of Minorities and Human Rights*, Martinus Nijhoff, Dordrecht, pp. 277-300, p. 284.

⁴⁵ Eur. Ct. H. R. (Grand Chamber), *Cyprus v. Turkey* (Appl. No. 25781/94), 10 May 2001, *Rep.* 2001-IV.

⁴⁶ *Cyprus v. Turkey*, para. 277.

⁴⁷ *Cyprus v. Turkey*, para. 278.

⁴⁸ Eur. Comm. H. R., *Cyprus v. Turkey* (Appl. No. 25781/94), report of 4 June 1999, para. 478, my emphasis.

into account when implementing this right, as far as possible, the wish of a minority's members to have their children educated in their mother tongue.⁴⁹

c) The promotion of substantive equality

The principle of equality understood in a substantive sense appears as a third basis for integrating cultural concerns in the realm of general human rights. While formal equality guarantees individuals the right to receive identical treatment, regardless of their sex, race, religion, language, national origin, or other prohibited grounds, the pursuance of substantive equality may sometimes require making distinctions between people in view of their differing situations in order to achieve equality in fact. Now, in certain contexts, if a measure has an unequal impact on two categories of people, it may be due to the fact that they practice different religions, speak different languages or follow different traditions.⁵⁰ This was already pointed out by the Permanent Court of International Justice (PCIJ) in its 1935 Advisory Opinion *Minority Schools in Albania*.⁵¹ At issue was the Albanian government's decision to abolish all private schools. According to Albanian authorities, since the decision concerned all citizens alike, it could not be deemed contrary to their obligation to respect equality between citizens belonging to national, religious or linguistic minorities and other Albanian nationals. But as the Court underscored, given that public education was delivered in the Albanian language, abolishing private schools amounted in practice to depriving minority members of access to mother tongue education. Although the measure was equally applied to all, it had a different effect on people, depending on whether they belonged to a linguistic minority or to the majority. Hence, the PCIJ concluded that it was discriminatory. In its view, if 'equality in law' "forbids discrimination of any kind," 'equality in fact' "may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."⁵²

Despite this ancient ruling, until the end of the 1990s the ECtHR confined itself to a restrictive understanding of the non-discrimination rule enshrined in article 14 of the European Convention. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention⁵³ was considered to be violated only when states were treating differently persons in analogous situations without providing an objective and reasonable justification. By contrast, affording similar treatment to individuals placed in different situations could not be deemed as potentially discriminatory. Thus, the fact that general official holidays in a country reflect

⁴⁹ See Thornberry, P. and Estébanez, M. A. M., 2004, *Minority Rights in Europe*, Council of Europe Publishing, Strasbourg, p. 62; G. Pentassuglia, 2003, pp. 420-421 and Henrad, K., 2003, Devising an Edequate System of Minority Protection in the Area of Language Rights, in G. Hogan-Brun and S. Wolff (eds), *Minority Languages in Europe – Frameworksm Status, Prospects*, Palgrave Macmillan, New York, pp. 37-55, p. 47.

⁵⁰ See Henrad, K., 2000, pp. 58-62 ; Pentassuglia, G., 2002, pp. 90-93.

⁵¹ *Advisory Opinion regarding Minority Schools in Albania*, 6 April 1935, *PCIJ Reports, Series A/B*, No 64, 1935.

⁵² *Minority Schools in Albania*, p. 19. The PCIJ also asserted that "there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority." (*Minority Schools in Albania*, p. 17).

⁵³ Article 14 does not have an independent existence: it does not prohibit discrimination in general but only in the enjoyment of the rights and freedoms guaranteed by the Convention. Hence, it must always be invoked in conjunction with a substantive right. However, according to the Court's case law, for article 14 to be applicable, it is sufficient that the challenged facts be part of the field of application of one of the Convention's provision, even if they do not disclose a violation of this main provision. See van Dijk, P. and van Hoof, G.J.H., 1998, pp. 710-716, and, more generally, Arnadottir, O. M., 2003, *Equality and Non-Discrimination under the European Convention on Human Rights*, Martinus Nijhoff, The Hague, London, Boston. Designed to remedy to the limitations of Article 14, Protocol No. 12 to the Convention (ETS No. 177), which contains a general non-discrimination clause, was adopted in 2000 by the Committee of Ministers of the Council of Europe. It entered into force on 1 April 2005.

majority religious traditions, and that followers of minority religions are forbidden from absenting from their work on their own religious holidays, was not viewed as raising an issue with regard to non-discrimination in the field of religious freedom.⁵⁴

The 6 April 2000 *Thlimmenos v. Greece* judgment marks a turning point in this regard. For the first time, the Court acknowledges that the right protected in Article 14 presents another facet than the one to which it was so far restricted: it is also violated “when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”⁵⁵ In other words, discrimination may sometimes flow from the application of a facially neutral norm, which in practice entails a particular disadvantage for a group of people, characterised by their religion, sex, national origin or another prohibited ground. In the case at stake, the applicant challenged the state authorities’ refusal to appoint him to a post of chartered accountant, despite the fact that he had passed the required examination. The measure resulted from the fact that five years earlier he had been convicted of serious crime, having refused to serve in the armed forces because of his religious convictions as a Jehovah Witness. This conviction made him ineligible for the profession of chartered accountant, since national law prohibited the appointment to this position of any person convicted of serious offence. While admitting that, as a matter of principle, excluding such persons from the profession of chartered accountants could be said to pursue a legitimate aim, the Court stressed that the rule’s justification did not hold in the case of the applicant because “unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender’s ability to exercise this profession.”⁵⁶ In such circumstances, by treating the applicant similarly to other persons convicted for serious crime, without objective and reasonable justification, the state impinged upon his right not to be discriminated against in the enjoyment of his right to religious freedom. The Court is not convinced by the government’s argument that given the generality of the law, the prohibition had to be absolute and no distinction could be made on a case-by-case basis. In its view, the state, when enacting the legislation, had to introduce *appropriate exceptions* in order to avoid discriminating against individuals in the situation of the applicant.⁵⁷

The Court therefore acknowledges that in certain contexts, non-discrimination may require the application of a different treatment to people placed in essentially distinct situations, when similar treatment would adversely affect the enjoyment of their right by one category of individuals. When necessary, this may take the form of an exception to a general rule. The principle asserted in this judgment bears important consequences for cultural minorities. It implies that non-discrimination can require the adaptation of certain general norms in order to avoid barring minority groups from enjoying their right to freedom of religion or their right to lead a family life in accordance with a traditional lifestyle. It points therefore towards the

⁵⁴ See Eur. Comm. H. R. *X. v. United-Kingdom* (Appl. No. 8160/78), 12 March 1981, *D.R.* 22, 45 ; Eur. Comm. H. R., *Konttinen v. Finland* (Appl. No. 24949/94), 3 December 1996, *D.R.* 87-B, p. 68.

⁵⁵ Eur. Ct. H. R. (Grand Chamber), *Thlimmenos v. Greece* (Appl. No. 34369/97), 6 April 2000, para. 44.

⁵⁶ *Thlimmenos v. Greece*, para. 47.

⁵⁷ “...the Court considers that it was the State having enacted the relevant legislation which violated the applicant’s right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.” (*Thlimmenos v. Greece*, para. 48).

recognition of an obligation to accommodate wherever possible the needs of religious or cultural minority groups.⁵⁸

2. Reconsidering the relationship between general human rights and minority rights

From this brief survey of the international human rights jurisprudence, it emerges that the individualist and universalistic character of traditional civil and political rights does not bar them from contributing to ensure respect and protection of minority cultural identities. Cultural considerations can be taken into account on various grounds in the interpretative process. They can thus play a role in the elucidation and development of the rights' scope. Similarly, although the rights holders are individuals, characteristics pertaining to a collectivity an individual belongs to may be found relevant to clarify a right's implications in a concrete case.

Yet it does not follow that classical individual rights are necessarily sufficient to fully guarantee minority members the faculty to preserve and express their specific cultural traits. While the emphasis in the above analysis has been on cases where cultural considerations did receive attention in the interpretative process, the aim being to challenge the common assumption about individual rights' insensitivity towards cultural diversity, the HRC and ECtHR's attitude in this respect is by no means uniform. The ECtHR in particular has long proved reluctant to interpret the Convention's provisions in a way favourable to ethnic, religious or linguistic minorities' demands directed towards the preservation of their own identity. As demonstrated by the aforementioned cases, its case-law has evolved and since the mid-1990s, it appears more inclined to give regard to minorities' situation. Many authors however deplore what they see as the persistent weaknesses of the Court's case law with regard to the protection of minorities' aspirations and needs.⁵⁹ Even when the Court acknowledges that the freedom to maintain an aspect of a cultural identity enters within the scope of a Convention's right, it may still conclude that the measure restricting the exercise of this right is necessary in a democratic society to achieve a legitimate aim, pursuant to the conditions set forth in article 8 to 11 of the Convention. And when balancing minorities' claims with the interests invoked by governments, the Court tends to show great deference to the latter.⁶⁰ The Roma cases are especially telling in this regard. After admitting that the rights guaranteed in article 8 entail the right to follow a minority's traditional lifestyle, the majority of the Court held that the restrictions placed by the state on the applicants' right to live in a caravan in accordance with Roma traditions could be deemed necessary to the preservation of the environment, having regard to the State's margin of appreciation.⁶¹ On the other hand, it must be stressed that this conclusion was adopted at a

⁵⁸ See Arnadottir, O. M.: "The Thlimmenos v. Greece case is a landmark judgment in which positive obligations in the form of accommodating differences were acknowledged for the first time." (2003, p. 101).. Compare with the notion of "reasonable accommodation" developed in the field of religious freedom by the Supreme Court of Canada. See Woehrling, J., 1998, L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse, *Revue du droit de McGill*, 325-401.

⁵⁹ See Thornberry, P. and Estebanez, M. A. M., 2004, p. 68 ; G. Pentassuglia, 2003, p. 451 ; Marko, J., 2003, Minority Protection Through Jurisprudence in Comparative Perspective: an Introduction, *Journal of European Integration*, vol. 25(3), pp. 175-188, p. 185 ; Henrard, K., 2000, pp. 141-146 ; Fenet, A., 2000, Le droit européen et les minorités, in Fenet, A., Koubi, G., Schulte-Tenckhoff, I., *Le droit et les minorités – Analyses et textes*, Bruxelles, Bruylant, 2e ed., pp. 115-291, pp. 143-148.

⁶⁰ See Henrard, K., 2000, pp. 143-144.

⁶¹ Furthermore, the majority seems to set aside the view taken in *Thlimmenos* that discrimination may flow from the application of similar treatment to differently situated individuals, when it states that to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to any individual who has established a house in that place would raise substantial problems under Article 14 of the Convention. (*Chapman v. United Kingdom*, para. 95).

narrow majority, with 7 judges dissenting.⁶² The high number of dissenting opinions is an indication that the Court might be in a state of transition on these issues.

As a matter of fact, unfolding the potential implications of the general individual rights for the protection of minority identities expressions requires an effort of interpretation. It presupposes adopting a dynamic and contextual approach, and recognising the importance of cultural ties for individuals' identity and relation to the world. As long as those concerns are not expressly referred to in the relevant legal text, the interpreter may choose to eschew them and restrict himself to a formal understanding of the rights guaranteed. Yet what the exploration of the international jurisprudence shows is that there is no conceptual obstacle to the development of a culturally-sensitive interpretation of classical individual rights. Such a reading does not imply any departure from the ideals human rights are intended to serve. On the contrary, guaranteeing individuals the opportunity to express, preserve and develop various aspects of their cultural identity, may be seen as further actualising the fundamental principles of freedom and equality human rights are based on: it both enlarges the liberty of individuals to live in accordance with their own conception of the good life, and promotes equality between different groups of people in their ability to access, express and transmit their cultural heritage.

These observations also shed light on the nature of minority rights themselves. They underscore the fact that 'the rights of persons belonging to national or ethnic, linguistic or religious minorities', at least as they are presently recognised in international instruments, most notably the Framework Convention on National Minorities (1995),⁶³ do not constitute an essentially distinct category of rights. Rather, they appear to specify the particular consequences of generally recognised rights for members of minorities⁶⁴ – more especially freedom of expression, freedom of religion, the right to respect for private and family life and the right not to be discriminated against. They clarify the content of minority members' entitlements as well as the nature of the measures required to safeguard their freedom to express and preserve their own identity. In so doing, they reinforce the protection of minorities by making explicit certain

⁶² See the joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Straznicka, Lorenzen, Fiesbach and Casadevall. The dissenting judges also express their disagreement with the majority's approach to the issue of discrimination: "This approach ignores the fact, earlier acknowledged by the majority, that in this case the applicant's lifestyle as a Gypsy widens the scope to Article 8, which would not necessarily be the case for a person who lives in conventional housing, the supply of which is subject to fewer constraints. The situations would not be likely to be analogous. On the contrary, discrimination may arise where States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different (...)." (joint dissenting opinion, para. 8). The Court's ruling was heavily criticized by many authors. See *inter alia* Benoit-Rohmer, F., 2001, La Cour de Strasbourg et la protection de l'intérêt minoritaire : une avancée décisive sur le plan des principes ? (En marge de l'arrêt Chapman)", *Rev. trim. dr. h.*, **47**:905-915 ; Henrard, K., 2004, The European Convention on Human and the Protection of the Roma as Controversial Case of Cultural Diversity, Eurac research, European diversity and autonomy papers, EDAP, 2004/5 ; Ringelheim, J., 2001, La Cour européenne des droits de l'homme et la défense du mode de vie tsigane : le choix de l'immobilisme, *Revue du droit des étrangers*, **114**:410-425.

⁶³ Opened for signature in the framework of the Council of Europe in 1995, it entered into force on 1st February 1998. Other significant international instruments on minorities include the European Charter for Regional and Minority Languages (opened for signature in 1992, entered into force in 1998) ; the 1990 final document of the Copenhagen Summit on the Human Dimension of the CSCE; the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by UN General Assembly Resolution 47/135 of 18 December 1992. Note that the two later instruments are not legally binding.

⁶⁴ See F. de Varennes, 2001, Language Rights as an Integral Part of Human Rights, *International Journal on Multicultural Societies*, **3**(1):15-25, p. 16.

requirements which are only implicit in traditional individual rights, therefore subtracting them to the uncertainties of interpretation.⁶⁵

Besides, once recognised, the rights of persons belonging to minorities can have a feedback effect on the interpretation of general individual rights. Significantly, in the 18 January 2001 judgments in the Roma cases, the ECtHR acknowledged the emergence of an international consensus recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle.⁶⁶ Accordingly, it stated that given the vulnerable position of Roma's as a minority, "some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases (...)." This, in the Court's view, implied that Contracting states have a positive obligation by virtue of Article 8 "to facilitate the Gypsy (sic) way of life."⁶⁷ Although the final ruling was not favourable to the applicant, the principles asserted on this occasion are likely to lead to a different stance in the future, as the international protection of minorities continue to develop and the requirements of the European Framework-Convention are further clarified by its monitoring institutions.⁶⁸ Previously, in the *Sidiropoulos v. Greece* case (10 July 1998), the Court already referred to the Document of the 1990 Copenhagen Meeting of the Conference for Security and Cooperation in Europe (CSCE), to assert that people belonging to minorities were entitled to form associations to protect their cultural and spiritual heritage.⁶⁹ Increasing recognition of the idea that minority cultures should be respected also transpires from the evolution undergone by the notion of pluralism, which the Court considers as a defining criteria of a 'democratic society' pursuant to the Convention: in *Gorzelik v. Poland*, the Court makes clear that 'pluralism' does not only refer to the acceptance of a diversity of ideas and opinions; it "is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion."⁷⁰

Conclusion

The examination of the HRC's and the ECtHR's case law indicates that through various modalities, cultural concerns can play a role in the process of determining what a right entails in a specific situation. First, the principle of effectiveness may require taking into account the linguistic skills or the cultural background of the person affected, when these elements have an impact on his or her ability to genuinely enjoy the right at stake. Second, the freedom to express or preserve certain aspects of a cultural identity has been recognised as being directly protected by some general individual rights, in particular the right to respect for private and family life.

⁶⁵ Note that Article 1 of the Framework Convention on National Minorities states that "protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights (...)."

⁶⁶ *Chapman v. United Kingdom*, para. 93. The Court however adds that in its view the consensus does not seem sufficiently concrete to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. (para. 94).

⁶⁷ *Chapman v. United Kingdom*, para. 96.

⁶⁸ On the work of the Framework-Convention's monitoring bodies, see Weller, M. (ed.), 2005, *The Rights of Minorities in Europe – A Commentary of the European Framework Convention for the Protection of National Minorities*, Oxford University Press, Oxford.

⁶⁹ Eur. Ct. H. R., *Sidiropoulos v. Greece* (Appl. No. 26695/95), 10 July 1998, *Rep.* 1998-IV.

⁷⁰ Eur. Ct. H. R. (Grand Chamber), *Gorzelik and others v. Poland* (Appl. No. 44158/98), 17 February 2004, para. 92. See also Eur. Ct. H. R. (1st Section), *Ouranio Toxo and others v. Greece* (Appl. No. 74989/01), 20 October 2005, para. 35.

Third, the promotion of substantive equality may sometimes call for a different treatment of individuals belonging to different religious, linguistic or traditional groups so as to avoid discriminating against one of these groups in the enjoyment of a right.

General individual rights thus have the potential to provide the ground for addressing at least some minorities' needs and aspirations. This does not mean that institutions entrusted with the task of interpreting those rights have actually developed a fully-fledged protection of minorities which would render superfluous the international instruments specifically dedicated to this aim. But it helps to create a better understanding of the relationship between traditional individual rights and the rights of persons belonging to national or ethnic, religious or linguistic minorities. It suggests that they do not constitute two autonomous categories of rights. Rather, minority rights can be seen as deriving from general universal rights, specifying their particular consequences in the case of people belonging to national or ethnic, religious or linguistic minorities. Moreover, even if they are stated in separate legal provisions, these two types of rights remain closely related and susceptible to impact on each other. While minority rights can enrich and extend the scope of general individual rights, the basic tenets of individual human rights should always be kept in mind when interpreting the rights of people belonging to minorities.