

Culture, Identity and Language Working Group Meeting, 13 Dec 2007

Paper 1, A General Provision on Cultural Identity

Introduction

Two proposals were discussed at the last meeting. The first was based on s. 31 of the South African Constitution, which is itself an adaptation of Article 27 of the International Covenant on Civil and Political Rights 1966. The second was based on the formulation used in Article 5 of the Framework Convention for the Protection of National Minorities, which contains programme-type provisions rather than directly applicable rights.

A

1. *Persons belonging to a cultural, religious or linguistic (include also 'ethnic?') community (is there agreement on the use of this term?) may not be denied the right, with other members of that community*

- a. *to enjoy their culture, practise their religion and use their language;*
- and
- b. *to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.*
2. *The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.*

B

1. *The Parties undertake to (replace with 'public authorities shall?') promote the conditions necessary for persons belonging to national minorities (replace with 'ethnic, cultural, linguistic and religious communities?') to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.*
2. *Without prejudice to measures taken in pursuance of their general integration policy (omit?), the Parties (replace with 'public authorities?') shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities (replace with 'ethnic, cultural, linguistic and religious communities?') against their will and shall protect these persons from any action aimed at such assimilation.*

Commentary

A preference was expressed at the last meeting for the formulation in Article 5 because it had already been accepted by the UK with its ratification of the Framework Convention. However, it should be noted that the UK has been since 1976 a State Party to the International Covenant on Civil and Political Rights, which includes a right for those belonging to minorities 'to enjoy their own culture, to profess and practise their own religion, or to use their own language.' Working group members need to be clear about whether or not they are intending to confer a right on individuals which might be enforceable in the courts. For example, the Constitution of Ireland draws a clear distinction between fundamental rights and directive principles of social policy and Article 45 therefore provides that: 'The principles of social policy set forth in this Article are intended for the general guidance

of the Oireachtas The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.' A similar distinction is made in the Indian Constitution¹ but the directive principles have been treated as fundamental to the understanding and interpretation of the meaning and content of the fundamental rights.

The Right to Cultural Identity in Other Constitutional Documents

An examination of other constitutional documents reveals a tendency towards the use of rights language. However, the formulations used vary considerably. A useful starting point is perhaps the New Zealand Bill of Rights Act 1990 as this instrument, like the UK Human Rights Act 1998, contains mostly civil and political rights. Like the South African Constitution, it draws upon the language found in Article 27 of the International Covenant on Civil and Political Rights. Meanwhile more elaborate formulations are found in the Constitution of Finland 1999, which confers different rights on the speakers of specified languages, and the Constitution of the Republic of Serbia 2006, which elaborates on the content of the right to cultural identity.

New Zealand Bill of Rights Act 1990, Section 20 [Rights of Minorities]

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

¹ Art 37: 'The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

South African Constitution 1996

30. Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. Cultural, religious and linguistic communities

3. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
 - a. to enjoy their culture, practise their religion and use their language; and
 - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
4. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Constitution of Finland 1999, s. 17

The national languages of Finland are Finnish and Swedish.

The right of everyone to use his or her own language, either Finnish or Swedish, before courts of law and other authorities, and to receive official documents in that language, shall be guaranteed by an Act. The public authorities shall provide for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis.

The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act.

Constitution of the Republic of Serbia 2006

3. Rights of Persons Belonging to National Minorities

Article 79

Members of national minorities shall have a right to: expression, preservation, fostering, developing and public expression of national, ethnic, cultural, religious specificity; use of their symbols in public places; use of their language and script; have proceedings also conducted in their languages before state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units, in areas where they make a significant majority of population; education in their languages in public institutions and institutions of autonomous provinces; founding private educational institutions; use of their name and family name in their language; traditional local names, names of streets, settlements and topographic names also written in their languages, in areas where they make a significant majority of population; complete, timely and objective information in their language, including the right to expression, receiving, sending and exchange of information and ideas; establishing their own mass media, in accordance with the Law. Under the Law and in accordance with the Constitution, additional rights of members of national minorities may be determined by provincial regulations.

