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Cultural Heritage Rights and Rights Related to Cultural Heritage: A Review of the Cultural Heritage Rights System

Abstract: Previous decades have witnessed the widespread use of human rights discourses in explaining cultural heritage issues. The content of the cultural heritage right (a term used interchangeably with "right to cultural heritage" in this text), and the relationship between cultural heritage and human rights are diversely demonstrated in international cultural heritage instruments and previous studies. Some of them may overlap or even contradict each other, causing confusion about the relevant concepts. This article aims to answer the twin question: What is the relationship between the "right to cultural heritage" and "rights related to cultural heritage", which together comprise the cultural heritage rights system? The main feature of cultural heritage is its spiritual significance, which constitutes the basis of the human right to cultural heritage. The core content of the right to cultural heritage is the right to enjoy the intangible value of; meaning of; and interests inherent in cultural heritage.

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The holder of the right to cultural heritage is "everyone" – a concept so vague that it results in the intractable tension between the right and the rights of states, communities, individuals, Indigenous peoples, humanity as a whole, and so on. "Rights related to cultural heritage", which are not cultural heritage rights per se, include public participation rights, the right to education, ownership rights, the rights to a livelihood, development, human dignity, equality, and other basic human rights. Some of them may promote the right to cultural heritage, while some may conflict with or limit the same right.

Keywords: cultural heritage, cultural heritage rights, human rights, community

Introduction

The relationship between cultural heritage and humanity has been highlighted in cultural heritage research in previous decades.[1] Cultural heritage relates to the interests of various subjects, making a human rights approach possible in cultural heritage practice. Human rights discourse is a feasible tool to analyse and bridge gaps in the interests in heritage issues, so that legal scholars are able to touch the fundamental philosophy of cultural heritage.

The human right related to cultural heritage is part of a complex and sometimes chaotic system. Although the concept "cultural heritage" is more specific than "culture",[2] the issue of who enjoys the right to define and enjoy cultural heritage is still unresolved. The tension between "everyone" and "community" still exists, and the state-centered discourse in various Conventions has long been criticized by Indigenous people and scholars.[3] The right to cultural heritage may collaborate with, or conflict with, other human rights: the right to survival and development; the right to education; the right to property/land; the right to self-determination, etc. Even though "it has become a general consensus that human rights and cultural

[1] See J. Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, "Cornell Law Review" 1989, Vol. 74(6), pp. 1179-1227; H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007; F. Francioni, M. Scheinin (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, Leiden 2008; A. Durbach, L. Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses*, Hart Publishing, Oxford 2017, etc.

[2] See W. Logan, *Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection*, in: H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007, p. 44.

[3] See W.K. Barth, *Cultural Rights: A Necessary Corrective to the Nation State*, in: F. Francioni, M. Scheinin (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, Leiden 2008; L. Meskell, *Human Rights and Heritage Ethics*, "Anthropological Quarterly" 2010, Vol. 83(4), p. 849; J. Liljeblad, *The Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) and the Control of Indigenous Culture: A Critical Comment on Power and Indigenous Rights*, "William & Mary Journal of Race, Gender, and Social Justice" 2020, Vol. 26(2), p. 282, etc.

heritage are 'not self-contained, but may overlap […] with each other', leading to an increasing cross-fertilization of human rights and cultural heritage law",[4] we may still question whether these rights are at the same level and have the same relationship to cultural heritage. As a result, the concept of "the right to cultural heritage" or a "cultural heritage right", and the human rights system related to cultural heritage need to be reviewed and analysed.

This article aims to answer the two-pronged question: What is the right to cultural heritage; and what is the relationship between the right to cultural heritage and other rights related to cultural heritage? The first section reviews the current explanations/definitions of the rights related to cultural heritage in international human rights, cultural heritage instruments, and in academic studies. The second section defines the "cultural heritage right" and explains its key elements. The third and fourth sections focus on the interactions related to cultural heritage from the internal and external perspectives. The third section deals with the holder of the cultural heritage right, which shows the main tensions; while the fourth section distinguishes public participation rights, property rights, and some other human rights from cultural heritage rights, and examines the relationship between them. The article concludes that a rights system, including cultural heritage rights per se and other rights related to cultural heritage, is useful for analysing cultural heritage issues.

Development of a Cultural Heritage Rights System

International human rights and cultural heritage instruments have paid much attention to the relationship between cultural heritage and human rights.[5] In its early stages, the human rights discourse was not widely adapted to cultural heritage instruments,[6] while human rights instruments focused more on other cultural rights

[4] S. Maus, *Hand in Hand Against Climate Change: Cultural Human Rights and the Protection of Cultural Heritage*, "Cambridge Review of International Affairs" 2014, Vol. 27(4), p. 709.

[5] See Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, UN Doc. E/C.12/GC/21; Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, 21 March 2011, UN Doc. A/HRC/17/38; United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, UN Doc. A/RES/61/295; Declaration of ICOMOS Marking the 50th Anniversary of the Universal Declaration of Human Rights, 11 September 1998 ("the Stockholm Declaration"), etc.

[6] The Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954, 249 UNTS 240; "the 1954 Hague Convention"), the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970, 823 UNTS 231; "the 1970 UNESCO Convention"), and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (24 June 1995, 2421 UNTS 457; "the 1995 UNIDROIT Convention") mainly deal with property rights in (especially ownership of) cultural property. The UNESCO Convention for the Protection of the World Cultural and Natural Heritage (16 November 1972, 1037 UNTS 151; "the World Heritage Convention") used the term "common heritage of mankind" instead of confirming a human right to heritage by mankind.

rather than rights related to cultural heritage.[7] However, the last twenty years have witnessed a closer connection between cultural heritage and human rights.[8] Scholars have also raised/offered various explanations and definitions concerning rights related to cultural heritage.[9]

International human rights instruments

When reviewing the history of cultural heritage and human rights, almost all experts trace the concept of cultural rights back to Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 2009, General Comment No. 21 on Article 15 ICESCR emphasized that everyone has the right to benefit from the cultural heritage and the creations of other individuals and communities, considering cultural heritage as a significant aspect of cultural resources.[10] Moreover, it paid close attention to the rights of communities and Indigenous peoples, including the "definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights", and especially the "rights of indigenous peoples to their culture and heritage".[11] According to the Comment, all the rights related to cultural life, including the use of ancestral lands and natural resources; taking part in political life; freedom of expression; and the right to education can be accommodated within the framework of cultural rights.

Another international human rights declaration that highlights the rights related to cultural heritage is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[12] Cultural traditions and customs are forms of cultural heritage which fall within "the right to maintain, protect and develop the past, present and future manifestations of their cultures".[13] UNDRIP emphasizes the right of Indigenous peoples to maintain, control, protect, and develop their cultural heritage, traditional knowledge and traditional cultural expressions, and the right to intellectual proper-

[7] The Universal Declaration of Human Rights (10 December 1948, UN Doc. A/RES/217 A (III)) and the International Covenant on Economic, Social and Cultural Rights (16 December 1966, 993 UNTS 3) do not mention cultural heritage or cultural property.

[8] See the Stockholm Declaration; the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3 ("the 2003 UNESCO Convention"); Human Rights Council, *Report…*, UN Doc. A/HRC/17/38, etc.

[9] See I. Hodder, *Cultural Heritage Rights: From Ownership and Descent to Justice and Well-Being*, "Anthropological Quarterly" 2010, Vol. 83(4); Y. Wang, *On the Rights to Cultural Heritage*, "Journal of Renmin University of China" 2011, Vol. 25(2), p. 21; K. Sikora, *The Right to Cultural Heritage in International Law, with Special Reference to Indigenous Peoples' Rights*, "Santander Art and Culture Law Review" 2021, Vol. 2(7), p. 159, etc.

[10] Committee on Economic, Social and Cultural Rights, op. cit., paras. 15(b) and 48.

[11] Ibidem, paras. 15(c) and 49(d).

[12] 2 October 2007, UN Doc. A/RES/61/295.

[13] Ibidem, Art. 11.

ty over them.[14] It mainly lists rights that Indigenous peoples should enjoy, instead of establishing a legal category of "rights of Indigenous peoples".

Reports submitted by United Nations Human Rights Council (UNHRC) Special Rapporteur in the field of cultural rights have significantly deepened the understanding of cultural heritage rights. In 2011, Farida Shaheed's Report stated that the right of access to and enjoyment of cultural heritage includes the right of individuals and communities to, *inter alia*, know, understand, enter, visit, make use of, maintain, and exchange cultural heritage, as well as to benefit from the cultural heritage and the creations of others. It also includes the right to participate in the identification, interpretation, and development of historical heritage, and in designing and implementing practices to safeguard it.[15] This Report is a comprehensive expression on the right to cultural heritage in UNESCO instruments, providing a framework for researching the right to cultural heritage. According to the definition contained in this Report, the right to cultural heritage encompasses both the right to **enjoy** and to **manage** cultural heritage. The Report submitted by Special Rapporteur Karima Bennoune emphasized this definition again in 2016.[16]

Another noteworthy report is the 2016 study by the Expert Mechanism on the Rights of Indigenous Peoples. It claims that "[t]he right of access to and enjoyment of cultural heritage […] includes the right to take part in cultural life, the right to enjoy their own culture, and the **right to self-determination**. The right of indigenous peoples to self-determination implies their right to maintain, control, protect and develop their own cultural heritage".[17] Since Indigenous peoples have a closer connection to their own cultural heritage, the emphasis on the right to self-determination is reasonable on this issue. Besides, this report highlights the right of Indigenous peoples to their **lands, territories, and resources** when facing violations of their rights in implementing the World Heritage Convention.[18]

Due to the promotion of rights to cultural heritage by the UNHRC Special Rapporteurs, cultural rights and cultural heritage have become key issues in UNHRC Resolutions in recent years.[19] However, the definitions of the right to cultural heritage are still based on the framework provided by Farida Shaheed, without further explanations or innovations.

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14 Ibidem, Art. 31.

15 Human Rights Council, *Report…*, UN Doc. A/HRC/17/38, para. 58.

16 United Nations General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights, K. Bennoune*, 9 August 2016, UN Doc. A/71/317, para. 6.

17 Human Rights Council, *Promotion and Protection of the Rights of Indigenous Peoples with Respect to Their Cultural Heritage: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, 19 August 2015, UN Doc. A/HRC/30/53, para. 4.

18 Ibidem, paras. 6 and 38.

19 See Human Rights Council, *Resolution 33/20: Cultural Rights and the Protection of Cultural Heritage*, 6 October 2016, UN Doc. A/HRC/RES/33/20; Human Rights Council, *Resolution 37/17: Cultural Rights and the Protection of Cultural Heritage*, 9 April 2018, UN Doc. A/HRC/RES/37/17, etc.

International cultural heritage instruments

Although human rights issues are not always the main concern in most UNESCO cultural heritage conventions, cultural heritage instruments have always highlighted the rights and interests of human beings. The Athens Charter for the Restoration of Historic Monuments (1931) emphasizes the importance of public **education** on cultural heritage.[20] The Recommendation on International Principles Applicable to Archaeological Excavations (1956) states that: "In order to encourage the public to **visit** these sites, Member States should make all necessary arrangements to facilitate access to them",[21] which may be regarded as the protection of the right to access cultural heritage. However, UNESCO conventions on cultural heritage mainly provide for obligations between states, and do not directly confer rights upon individuals or communities, even though they are the beneficiaries.[22] This situation changed in the late 1990s, when ICOMOS published the Declaration of ICOMOS Marking the 50th Anniversary of the Universal Declaration of Human Rights ("the Stockholm Declaration") in 1998, which raised the concept "the right to cultural heritage" as an integral part of human rights. It lists five components of the right, including:

> the right to **have the authentic testimony** of cultural heritage; the right to better **understand** one's heritage and that of others; the right to wise and appropriate **use** of heritage; the right to **participate in decisions** affecting heritage and the cultural values it embodies; and the right to **form associations** for the protection and promotion of cultural heritage.[23]

Compared with the definition by Farida Shaheed, this puts the right to use (instead of enjoy), make decisions, and form associations into the right to cultural heritage, which seems broader than "access and enjoy". The 2017 ICOMOS Delhi Declaration on Heritage and Democracy ("the Delhi Declaration") reiterates that heritage is a fundamental human right.[24] The 2018 ICOMOS Buenos Aires Declaration ("the Buenos Aires Declaration") also underlined the "right to enjoy and partake of cultural heritage" and a "right-based approach to world heritage".[25] These two declarations specially emphasize the whole process of participation by the public and community, including in the identification, selection, classification, interpretation, preservation, safeguarding, stewardship, and development of cultural heritage.[26]

[20] The Athens Charter for the Restoration of Historic Monuments, 1931 ("the Athens Charter").

[21] UNESCO, *Recommendation on International Principles Applicable to Archaeological Excavations*, 5 December 1956, Section II, para. 4.

[22] Y. Donders, *Cultural Heritage and Human Rights*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020.

[23] The Stockholm Declaration.

[24] Delhi Declaration on Heritage and Democracy, December 2017, Preamble.

[25] Buenos Aires Declaration Marking the 70th Anniversary of the Universal Declaration of Human Rights, 5 December 2018, para. 2.

[26] See the Delhi Declaration, para. 2; the Buenos Aires Declaration, para. 4.

Regional cultural heritage instruments also play significant roles in promoting cultural rights theory. A typical example is the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society ("the Faro Convention"). It firstly confirms that the existence of rights relating to cultural heritage derived as a consequence of the right to participate in cultural life. In Article 4, it explains the content of "right to cultural heritage", which includes "the ability to **be involved with** the heritage, helping to **enrich** it or **add to** it, and also to **benefit from** activities linked to it".[27] Compared with other instruments, the definition in the Faro Convention attaches greater importance on contributing to cultural heritage. It also urges Parties to permit and guarantee the exercise of the rights to heritage, including promoting dialogue and public participation.[28] The 2000 ASEAN Declaration on Cultural Heritage also applies a rights discourse towards cultural heritage, which protects cultural heritage and people's rights to their own culture.[29]

Previous research

Some scholars follow the traditional route of a cultural human right, which puts the rights to access, to enjoy, and to participate as the main components of the right to cultural heritage. Ian Hodder defines the right to cultural heritage as establishing that "everyone has a right to participate in and benefit from cultural heritage that is of consequence to their well-being, and everyone has a duty towards others with respect to that right".[30] Francesco Francioni emphasizes that "it is axiomatic that members of the group, individually and collectively, must be entitled to access, perform and enjoy such cultural heritage as a matter of right".[31] Anthony Connolly defines "cultural heritage rights" as "the legal rights of individuals, peoples, nations and even humanity at large, to the recognition, preservation, and enjoyment of certain distinctive elements of human culture".[32] Wang Yunxia defines the rights to cultural heritage as "the rights owned by subjects, such as persons, communities and countries, to enjoy, pass on, and develop the cultural heritage".[33]

Other scholars try to broaden the extent of the cultural heritage right. They put the right of self-determination, the right of expression, the property right, etc., into the cultural heritage right. Mo Jihong classifies the right to cultural heritage as encompassing rights to material cultural heritage, including property rights, and spir-

27 Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS 199, Art. 4.

28 Ibidem, Art. 12.

29 ASEAN Declaration on Cultural Heritage, 25 July 2000, paras. 1 and 3.

30 I. Hodder, op. cit., p. 876.

31 F. Francioni, *Culture, Heritage and Human Rights: An Introduction*, in: F. Francioni, M. Scheinin (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, Leiden 2008, p. 7.

32 A.J. Connolly, *Cultural Heritage Rights*, Routledge, London 2017, Introduction.

33 Y. Wang, op. cit., p. 21.

itual cultural heritage, including freedom of thought and expression, and intellectual property.[34] Lynn Meskell uses the term "heritage rights", which includes "rights of self-determination and expression, rights of access and management, rights of veto, and rights to accrued benefits, whether social, economic, spiritual, and so on".[35] Hu Shanchen claims that the content of "cultural heritage rights" contains a special property right, certain negative liberties, and the positive rights to participate in activities relevant to cultural heritages in various forms and to benefit from the participations.[36] Yvonne Donders posits that "rights to cultural heritage also imply active participation in the decision-making process on cultural heritage".[37]

No one would deny that the right to cultural heritage contains a range of different rights and content with rich connotations. Janet Blake claims that "cultural rights may include a set of rights of people (or a people) to their cultural heritage, a corollary to the rights of the cultural heritage to protection and preservation generally provided for by cultural heritage texts".[38] Some scholars have cautioned that these above-mentioned rights are not on the same level and should be classified. William Logan uses the terms "heritage as a cultural right", "rights in heritage" (identification, management, and monitoring), and "human rights as heritage".[39] Karolina Sikora separates the right to cultural heritage into two categories. The first relates to the identification, interpretation, and development of cultural heritage and respective policies; the second involves follow-up activities associated with knowing, understanding, entering, visiting, making use of, maintaining, exchanging, and developing cultural heritage, as well as benefitting from the cultural heritage and creations of others.[40]

Problems

Key elements of the right to cultural heritage have been extracted by cultural heritage instruments and experts. It seems that the rights to access, enjoy, participate in, and benefit from cultural heritage are the main contents of the right to cultural heritage. However, such concepts are still vague and can be easily extended. All kinds of rights related to cultural life can be subordinated to cultural human rights, and may overlap with each other. For example, "have access to, enjoy, participate in, benefit from" can cover all kinds of the above-mentioned rights,

[34] J. Mo, *Legal Protection for Rights to Cultural Heritage*, "Social Sciences in China" 2003, Vol. 24(1), pp. 138-139.

[35] L. Meskell, op. cit., p. 842.

[36] S. Hu, *From Ownership to Human Rights: Developments and Reconstruction of the Concept of "Cultural Heritage Rights"*, "Journal of Political Science and Law" 2015, Vol. 167(4), p. 73.

[37] Y. Donders, op. cit.

[38] J. Blake, *On Defining the Cultural Heritage*, "The International and Comparative Law Quarterly" 2000, Vol. 49(1), p. 77.

[39] W. Logan, *Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-Based Cultural Practice*, "International Journal of Heritage Studies" 2012, Vol. 18(3), p. 242.

[40] K. Sikora, op. cit., p. 159.

like the right to property, land, management, development, identification, self--determination, public participation, free expression, and so on. The nature, holder, and character of cultural heritage are not clear in human rights discourses. Although the right to cultural heritage is considered as "a set of rights", it is still necessary to clarify what are the core rights; what are the sub-rights; and what are *not* cultural heritage rights in order to put the right to cultural heritage into its proper place and status in the human rights system and to reduce confusion during discussions thereon. Otherwise, the term "cultural heritage right" (or "the right to cultural heritage") would be an ambiguous and confusing legal concept which can be easily dismantled into other rights and challenged by human rights theory. The following sections will try to clarify the above-mentioned problems under my proposed definition of a cultural heritage right.

What Is a Cultural Heritage Right?

This section will use the term "cultural heritage right" as the core concept of the rights system related to cultural heritage. It firstly examines the essential features of cultural heritage – the object of the right. Next it analyses why cultural heritage should be considered as a human right. Lastly, it attempts to clarify the normative meaning of the content of a cultural heritage right. It should be noted that the holder of the right is the most controversial issue in this scheme, as will be demonstrated in the next section.

The intrinsic nature of cultural heritage

It is initially worthwhile to ponder the following questions: Why are we dedicated to protecting cultural heritage? What is the difference between cultural heritage and ordinary property? If there is no essential difference, it is not necessary to build a unique legal system for cultural heritage.

Perhaps no one would deny that the core value of cultural heritage relies on its intangible value. It is built on the spiritual resources created by our ancestors and passed on to future generations. Cultural heritage plays a key role in the construction of cultural identity, at the levels of the local community, region, and nation,[41] becoming the representative and emotional support of a specific community, region, or nation. Cultural heritage conveys a truth of history; it forms the basis of cultural memory; pathos is delivered in cultural objects; and it nourishes the sense of community.[42] Tourists visit historical sites, monuments, and buildings largely because they appreciate the tremendous views and profound history, more than

[41] J. Blake, *Taking a Human Rights Approach to Cultural Heritage Protection*, "Heritage & Society" 2011, Vol. 4(2), p. 204.

[42] J.H. Merryman, *The Public Interest in Cultural Property*, "California Law Review" 1989, Vol. 77(2), pp. 346-349.

being concerned with their monetary value. Collectors pay high prices for antiques because they recognize the aesthetic value they contain. Indigenous peoples treasure their traditional customs, which sometimes may seem outdated, just because they symbolize their own culture. Under "heterodox heritage" discourse, the value of heritage "is based on the contemporary social, cultural, and personal beliefs, perceptions, and feelings of a wide range of stakeholders".[43] Its significance consists of "cultural practices, person-place relationships, and emotional bonds with place".[44] All these features jointly point to the intangible value of cultural heritage in the human rights perspective. It is true that cultural heritage may also have a historical or architectural value, but when they have a connection with human rights their values can be considered as intangible. Since the intangible value is invisible and elusive, we cannot simply apply the precepts of property law to cultural heritage. Although tangible heritage is a kind of property, we still rely on stricter regulations to combat its theft, illicit excavation, and trafficking, etc., and thus place restrictions on trade in cultural property, because it is the physical carrier of intangible value. The intangible value of cultural heritage constitutes the basis of the cultural heritage right.

Cultural heritage as a human right

In line with the above analysis, it may be said that the recognition of a cultural heritage right is aimed at protecting the public interest in the intangible value in cultural heritage. So in what way is the ownership of the intangible value of cultural heritage considered as a human right? The popular human rights discourse refers to "cultural heritage and human rights", making cultural heritage and human rights a parallel set of terms. However, as Francesco Francioni and Lucas Lixinski pointed out, "This view [...] falls short of recognizing cultural heritage as being a full member of the human rights legal framework, and instead instrumentalizes cultural heritage and the legal regimes around it as a factual element [...] of a human rights case".[45] As has been pointed out, cultural heritage plays a central role in the construction of cultural identity, at the levels of the local community, region, or nation.[46] This perspective bridges cultural heritage and human rights. Farida Shaheed emphasizes that cultural heritage is linked to human dignity and identity, so accessing and enjoying cultural heritage is an important feature of being a mem-

[43] J.C. Wells, L. Lixinski, *Heritage Values and Legal Rules: Identification and Treatment of the Historic Environment via an Adaptive Regulatory Framework (Part 1)*, "Journal of Cultural Heritage Management and Sustainable Development" 2016, Vol. 6(3), p. 351.

[44] Ibidem, p. 352.

[45] F. Francioni, L. Lixinski, *Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage*, in: A. Durbach, L. Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses*, Hart Publishing, Oxford 2017, p. 32.

[46] J. Blake, *Taking a Human Rights Approach*..., p. 204.

ber of a community, a citizen, and a member of society.[47] Meanwhile, some legal instruments have acknowledged that all people have the right to enjoy the cultural heritage of humanity.[48] The destruction of cultural heritage not only harms the interest of the specific group to own their culture, but also harms the right of all people to enjoy the common heritage of humanity. UNESCO declares that "cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights".[49]

The inner logic of the right to cultural heritage looks similar to the right to a healthy and safe environment, since the right to enjoy a healthy environment is also considered as a basic human right. The environment is a natural resource; heritage a cultural resource. However, the right to cultural heritage is associated with more complex issues than the environmental right. Cultural heritage relates to ideological issues in terms of identification, explanation, enlightenment, and interpretation, which means that the state-centered power structure and the interests of a community must interact with each other.

The content of the cultural heritage right

Since the cultural heritage right is a right and interest in the intangible value of cultural heritage, the key component should be the right to enjoy cultural heritage. Let's take the issue of ownership as an example. Ownership is an exclusivity right to one's property, which includes the rights of possession, use, benefit, and disposition. All these facets of ownership jointly point to the core concept "own". Likewise, the right to cultural heritage is a kind of ownership interest in the intangible value of cultural heritage. "Enjoy" may be considered as the core concept which covers both the rights arising from ownership and those arising from the right to cultural heritage.

Insofar as concerns tangible cultural heritage, to enjoy cultural heritage mainly means gaining access thereto. All people have the right to access state-owned cultural heritage, especially immovable cultural heritage, in different forms and to enjoy their intangible value. For privately-owned tangible cultural heritage, the owners of the cultural objects concurrently enjoy their intangible value. The right of common people to enjoy their intangible value may be inferior to the ownership of the possessors, since the intangible value is attached to non-public objects. At the same time, the right to interpret, maintain, and develop the intangible value

[47] Human Rights Council, *Report...*, UN Doc. A/HRC/17/38, para. 2.

[48] See Fribourg Declaration on Cultural Rights, 7 May 2007, Art. 3; African Charter on Human and Peoples' Rights, June 1981, Art. 22.

[49] UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, para. 6.

of privately-owned cultural heritage falls within the scope of the public right to enjoy cultural heritage, which can give rise to conflicts of interest.

It is hard to say that intangible cultural heritage has a clear attribution of ownership. However, compared with tangible cultural heritage, intangible cultural heritage has a closer link with cultural tradition and the cultural identity of a specific nation or community. The nation or community, and its people, have the right to enjoy their own heritage, including using, performing, interpreting, developing, and so on. This cultural heritage right can be an effective tool to protect the intangible cultural resources of nations and communities, which is superior to intellectual property rights. In addition, the right to access is included in the cultural heritage right of all people to access their intangible cultural heritage. Thus, insofar as concerns privately-owned cultural objects, the rights of the legal owners may in some instances be inferior to the rights of nations and communities to enjoy their own cultural heritage.

The limitations on the cultural heritage right lie in the authenticity and integrity of cultural heritage, as regulated by the Venice Charter,[50] the Nara Document,[51] the Operational Guidelines for the Implementation of the World Heritage Convention,[52] and so on. The rights of the public to enjoy cultural heritage should not harm its authenticity and integrity. In other words, the right to enjoy cultural heritage means that the cultural heritage enjoyed by all people should be authentic and integrated; otherwise the aim of the right fails to be realized. To harm the authenticity and integrity of cultural heritage, including its destruction, is thus a kind of violation of the cultural heritage right.

In summary, I would like to define the cultural heritage right as follows: "Right-holders have the right to enjoy the authentic and integral intangible value of cultural heritage".

Whose Right? Tensions Inside Cultural Heritage Right

The theory of a cultural heritage right faces tensions from many aspects. Some are caused by clashes with other human rights or property rights. Others arise from elements of the cultural heritage right itself. These tensions need to be explained and addressed in order to enhance the theory.

[50] ICOMOS International Charter for the Conservation and Restoration of Monuments and Sites, 1964 ("the Venice Charter"). It requires that the use of monuments must not change the lay-out or decoration of the building. The conservation implies preserving a setting which is not out of scale, and is inseparable from the history to which it bears witness and from the setting in which it occurs.

[51] The Nara Document on Authenticity, 1994. It states that "Conservation of cultural heritage in all its forms and historical periods is rooted in the values attributed to the heritage. Our ability to understand these values depends, in part, on the degree to which information sources about these values may be understood as credible or truthful".

[52] UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, 31 July 2021, paras. 79-95.

Manifestations of tensions

State power vs community right

The state-based governing system over cultural heritage issues means that the designation, listing, and management of cultural heritage are controlled by governments using some criteria created by the governmental authorities themselves. The terms "common heritage of humanity" or "outstanding universal value" mean that the value of cultural heritage is based on universal standards rather than the standards of local nations. This has led to criticism of some international cultural heritage instruments, especially the World Heritage Convention.[53] It indeed seems hard to ignore that the safeguarding measures in some cultural heritage instruments demonstrate the tendency toward "governance" by authorities instead of conferring rights upon individuals or communities, making it an acute problem reflecting the tension between public power and local communities.[54] The heavily bureaucratic governmental framework for heritage protection decreases its efficiency as a human rights tool.[55] Some Indigenous peoples even "categorically reject the interpretation by some states that their cultural heritage (whether on the World Heritage List or not) forms part of the common heritage of mankind (or common domain)".[56] Although some scholars call for moving the 2003 UNESCO Convention "away from a state-centric power structure through alteration of the convention text",[57] it is hard to promote cultural heritage issues without the resources and powers of a state. At the same time, state power is deemed to burden the obligation to guarantee all kinds of cultural heritage rights. The Operational Guidelines for the Implementation of the World Heritage Convention have, however, given rise to excellent progress on finding the right balance between state power and communities.[58]

Individual right vs collective right

Traditionally, the right to culture is considered as an individual human right in international human rights instruments. Article 15 of the International Covenant on Economic, Social and Cultural Rights[59] declares that "everyone" has the right to take part in cultural life. Article 27 of the International Covenant on Civil and Political Rights[60] proclaims that persons belonging to minorities shall not be denied

53 See I. Hodder, op. cit., p. 862; A.F. Vrdoljak, *Indigenous Peoples, World Heritage, and Human Rights*, "International Journal of Cultural Property" 2018, Vol. 25(3), p. 251, etc.

54 Y. Donders, op. cit.

55 K. Sikora, op. cit., p. 161.

56 A.F. Vrdoljak, op. cit., p. 251.

57 J. Liljeblad, op. cit., p. 295.

58 See UNESCO, *Operational Guidelines…*, paras. 64, 111, 117, 123.

59 16 December 1966, 993 UNTS 3.

60 16 December 1966, 999 UNTS 171.

the right, in community with the other members of their group, to enjoy their own culture. Although Farida Shaheed's Report considered the cultural heritage right as both an individual and a collective human right,[61] the tension between the individual right of everyone and the collective right of a nation or community still exists. It is embodied in the concentrated reflections on the conflict between the right of everyone to access cultural heritage and the right of local communities to maintain their own cultural heritage, which has a close relationship with heritage tourism. Many international cultural rights instruments protect the right to access and enjoy cultural resources for all individuals.[62] However, cultural heritage encompasses not only public cultural resources, but also the cultural identity of a specific group. When conflicts of interests occur among different right-holders, the current human rights discourse limits social negotiation and collaboration and emphasizes a legally binding approach instead of an individual approach to cultural heritage.[63] While the universal right to equally enjoy the cultural heritage of mankind and the specific right of one people to a special relationship with their cultural heritage are both key components of the right to cultural heritage, it is every hard to set a definite and universal standard to deal with the conflict. Some scholars pessimistically believe that there are fundamental conflicts between them which are not entirely resolvable.[64]

Cultural nationalism vs cultural internationalism

Another related issue is the discussion on cultural nationalism and cultural internationalism, raised by John H. Merryman.[65] The 1954 Hague Convention and the World Heritage Convention reflect cultural internationalism in their cultural heritage protection, since "preservation of the cultural heritage is of great importance for all peoples of the world and it is important that this heritage should receive international protection", apart from any national interest,[66] and "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".[67] The 1970 UNESCO Convention is considered as "cultural nationalism", since it declares that "cultural property constitutes one of the basic elements of civilization and national culture", and "it is essential for every State to become increas-

61 Human Rights Council, *Report…*, UN Doc. A/HRC/17/38, para. 61.

62 See the Stockholm Declaration; ICOMOS International Charter for Cultural Heritage Tourism, November 2022, Preamble; ICOMOS Charter for the Interpretation and Presentation of Cultural Heritage Sites, 2008, Principle 1, etc.

63 I. Hodder, op. cit., pp. 865-866.

64 H. Silverman, D.F. Ruggles, *Cultural Heritage and Human Rights*, in: H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007, p. 6.

65 J.H. Merryman, *Two Ways of Thinking About Cultural Property*, "The American Journal of International Law" 1986, Vol. 80(4), pp. 831-853.

66 The 1954 Hague Convention, Preamble.

67 Ibidem.

ingly alive to the moral obligations to respect its own cultural heritage and that of all nations".[68] Insofar as regards the return of looted cultural relics, the problem lies in whether the right for everyone in the world to directly access cultural heritage should be prioritized over the right of a certain nation to occupy and maintain its own cultural heritage. The problem is similar to the conflict between universal and individual heritage and rights. All three aspects of tensions deal with the complex relationship among states, nations, communities, and individuals.

Causes of tensions

All the tensions with respect to the cultural heritage right can together give rise to the ambiguity of the right-holder. Who enjoys cultural heritage? In other words, who may enjoy the intangible value of cultural heritage? Undoubtedly, people who create or inherit it should have a cultural heritage right. They surely have the right to keep, maintain, and develop their cultural heritage, and determine what should be considered as cultural heritage. They can exercise their rights individually, or collectively. However, unlike ordinary property, the cultural heritage right protects the interest in the intangible value of cultural heritage, which means that it is not an exclusive right enjoyed only by the owners of cultural property. Since cultural heritage conveys a public value and common interest, "everyone" may enjoy the intangible value of cultural heritage. "Everyone" includes individuals of different identities, including stakeholders like residents, archaeologists, scholars, volunteers, tourists, and other ordinary people.

Tensions occur when the right of the public to access cultural heritage conflicts with the right of a group to maintain their own cultural heritage. When governments manage domestic cultural heritage issues, they theoretically reflect the interest of the public instead of that of the local community. For example, cultural heritage tourism ensures that the public can enjoy and partake in its value, while at the same time it both enriches and encroaches upon the living conditions of the local people. Global museums collect looted cultural relics, allowing people all over the world to appreciate various ancient civilizations at close quarters, at the cost of the right to maintain cultural heritage by the original owners. All the rights mentioned are justifiable components of cultural heritage rights. However, the current research only defines the subject of the cultural heritage right as "everyone",[69] which is useless to resolving the conflict among various right-holders.

A reasonable standard?

A challenging task for theory of cultural heritage rights is to set a reasonable standard to evaluate and balance the conflicts among different stakeholders and guar-

[68] The 1970 UNESCO Convention, Preamble.

[69] See the Faro Convention, Art. 4; I. Hodder, op. cit., p. 871, etc.

antee their cultural heritage right. Certainly it is hard to propose a solution right now. However, several aspects may be included and addressed in seeking a resolution of this issue.

Firstly, is there a common benefit basis for all holders of cultural heritage rights? The common benefit may form a consensus on related issues which are prerequisites for successful negotiation and collaboration. No matter what the claims of interests of various subjects are, all right-holders should agree that the intangible value and the physical expression of cultural heritage should be protected and promoted. When the authenticity and integrity of cultural heritage are destroyed, the ownership of the cultural heritage right will become meaningless. It is important to note that the people or groups which create or own the specific cultural heritage have the right to interpret its true value, which is one of the aspects of the cultural heritage right. Any misinterpretation of the value of cultural heritage infringes upon the right to it.

Secondly, the connection between certain groups and cultural heritage may determine the extent of the right to enjoy it. Farida Shaheed's Report classified four categories according to their relationship with specific cultural heritage:

> (a) originators or "source communities", communities which consider themselves as the custodians/owners of a specific cultural heritage, as people who are keeping the cultural heritage alive and/or have taken responsibility for it; (b) individuals and communities, including local communities, who consider the cultural heritage in question to be an integral part of the life of the community, but may not be actively involved in its maintenance; (c) scientists and artists; and (d) the general public accessing the cultural heritage of others.[70]

In some cases when the cultural heritage has a special spiritual connection with a certain local group, involvement in cultural heritage may be so fundamental for them that the interests of cultural tourists or archaeological scholars may rightly be seen as secondary.[71] In some other cases when the cultural heritage is considered as public tourism resource, the right for archaeologists to have access to cultural heritage should be prioritized over other rights.

Thirdly, the connection between cultural heritage and the public interest should also be considered, analysed, and made as clear as possible. Cultural heritage not only conveys the values of a certain group, but also conveys historical, scientific, artistic, aesthetic, and economic values as part of the larger public interest. Ideally, the promotion of cultural heritage rights should be beneficial to the public interest in every aspect. When cultural heritage is created, exercised, and maintained by a certain group over a long term and is rarely influenced by the outside world, the right for the certain group to develop the cultural heritage should be respected

[70] Human Rights Council, *Report…*, UN Doc. A/HRC/17/38, para. 62.

[71] I. Hodder, op. cit., p. 873.

by the public. However, when the cultural heritage site has "Outstanding Universal Value" vis-à-vis the world, it may have a closer relationship with the public interest.

Certainly, these above-mentioned aspects are vague and difficult to determine when facing complex cultural heritage cases. It is hardly possible to conclude a universal standard by which to assess all kinds of circumstances. Tensions among states, the public, and local communities will always exist. What we can do is promote negotiation and collaboration under the basic consensus, instead of exaggerating the conflicts and thus aggravating the contradictions.

The Cultural Heritage Right and Other Related Rights

The following discussion focuses on some other human rights that are mentioned frequently in relation to cultural heritage and human rights issues. Some related rights should not be classified as a cultural heritage right. We may separate the key elements of "heritage as a human right" from other human rights, i.e. the enjoyment of cultural heritage's value, which has an independent scope in the rights' system. Many related human rights are not specifically designed to protect the value of cultural heritage, and current human rights frameworks or legal systems contain them in other categories. If these rights are included in the cultural heritage right, the cultural heritage right will overlap with various concurrent rights. The broader is the scope of such a right, the more ambiguous are the connotations.[72] However, their close association with cultural heritage makes it impossible to ignore their significance in protecting cultural heritage and promoting sustainable development.

Rights to protect the cultural heritage right

Public participation is an effective tool to promote democratization processes in cultural heritage protection. The three pillars of public participation rights – access to information, public participation in decision-making, and supervision[73] – enhance the negotiation and collaboration among states, right-holders, stakeholders, and the general public. Many cultural heritage instruments emphasize the significance of public participation in protecting cultural heritage, especially in issues associated with Indigenous peoples.[74] The right to access and participate in decision-making on heritage matters is a possible vehicle to mutually reinforce cultural heritage and human rights.[75] The Stockholm Declaration puts "the right to participate in decisions affecting heritage and the cultural values it embodies" as part

[72] Z. Yang, *On Nature of Environmental Right*, "China Legal Science" 2020, Vol. 37(2), p. 300.

[73] See the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998.

[74] See the Burra Charter: The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance, 1999, Art. 12; ICOMOS International Charter for Cultural Heritage Tourism, Principle 4; The Paris Declaration on Heritage as a Driver of Development, 1 December 2011, Point 3, etc.

[75] F. Francioni, L. Lixinski, op. cit., p. 11.

of the right to cultural heritage.[76] Farida Shaheed's Report states that: "Effective participation in decision-making processes relating to cultural heritage is a key element of these concepts"; "Information access, which refers to the right to seek, receive and impart information on cultural heritage, without borders"; and "Access to decision making and monitoring procedures, including administrative and judicial procedures and remedies" are also parts of the concept of access.[77]

Although public participation rights play an essential role in cultural heritage issues, it is important to note that it is inappropriate to consider public participation rights as a kind of cultural heritage right itself. Public participation rights aim to ensure that the citizens can engage in political life, and not at protecting cultural heritage value. These rights are thus political rights which can be exercised in order to protect the cultural heritage right. They are included in Article 25 of the International Covenant on Civil and Political Rights and Human Rights Conventions concerning participation in public affairs, but can be adapted in other similar fields. In the field of environmental law, the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention") is a specialized document on public participation rights in environmental law, which also provides a model for other areas. Some conventions, like the Faro Convention, set out participation rights separate from the cultural heritage right. The Faro Convention puts "shared responsibility for cultural heritage and public participation" in Section III, distinguishing it from the definition of the right to cultural heritage in Section I.[78] Accordingly, if local communities or minorities manage or develop "their own" cultural heritage, this right should not be considered as a participation right. Local communities and minorities are the right-holders of cultural heritage, instead of stakeholders.

A similar situation can be seen in the right to education. Many international instruments emphasize how important it is to ensure that heritage communities, armies, and the public are fully educated to realize the value of heritage and to protect it.[79] For example, the Athens Charter points out the role of education with respect to monuments by "urging children and young people to abstain from disfiguring monuments of every description" and "teaching them to take a greater and more general interest in the protection of these concrete testimonies of all ages of civilization".[80] Obviously, the right to education is essential and beneficial to protect the cultural heritage right. Still, the right to education is an independent human right which should not be included in cultural heritage rights per se, for the same reasons as the public participation right.

[76] The Stockholm Declaration.

[77] Human Rights Council, *Report*..., UN Doc. A/HRC/17/38, para. 60.

[78] The Faro Convention, Arts. 4 and 11-14.

[79] See the 1954 Hague Convention, Art. 7; the World Heritage Convention, Art. 27, etc.

[80] The Athens Charter, Art. 7.

The cultural heritage right and property rights

Cultural heritage, especially tangible cultural heritage, is considered as a special kind of property. The protection of the physical form of cultural heritage has long been emphasized in international instruments, using the terms "historical monuments", "sites", or "cultural property".[81] At present, cultural heritage seems to still depend largely on ownership for its legal operation.[82] However, the property right in tangible cultural heritage itself may not be considered as a cultural heritage right. Property rights and the cultural heritage right are rights with different characteristics and values. The cultural heritage right protects the intangible value of cultural heritage, while the property right protects the physical carrier of cultural heritage. When we go back to the history of cultural heritage protection, we can find that international law demonstrates that the treatment of cultural property has shifted from a focus on individual ownership; to a focus on government ownership; to recognition of the global value of cultural heritage; to the idea that a right to cultural heritage exists independently from ownership concerns and derives from the human right to culture.[83] Although the 1970 UNESCO Convention and the 1995 UNIDROIT Convention focus on property rights in cultural property, the reason for establishing special rules to limit the transfer of ownership lies in the protection of the spiritual interests of the nations and people that cultural heritage belongs to. The property right in cultural heritage is regulated by thorough contemporary laws, while the intangible value of cultural heritage still needs to be emphasized.

Thus, cultural heritage rights and property rights are different rights, largely because the property right is sometimes in contradiction to, or even in conflict with, the right to cultural heritage. The promotion of property rights in cultural heritage law would seem to run counter to the idea of heritage as a broader public interest.[84] This is because property rights, especially ownership, are exclusive rights, while cultural heritage rights can be practiced by "everyone". In some cases, the ownership of privately-owned cultural property may clash with the cultural heritage right of the public. Owners of ancient buildings are not allowed to knock down or repair "their own" property without permission, since the buildings are listed as cultural heritage. If they do so they can be punished by law. In order to protect the intangible value conveyed by cultural heritage, international conventions and domestic laws place strict restrictions on the right to dispose of and transfer rights to cultural heritage. In appropriate circumstances, the ownership of an old

[81] The World Heritage Convention is the first international convention that uses the term "cultural heritage" in the title. Other terms can be found in the Athens Charter, the Venice Charter, the 1954 Hague Convention, the 1970 UNESCO Convention, etc.

[82] F. Francioni, L. Lixinski, op. cit., p. 32.

[83] K.L. Alderman, *The Human Right to Cultural Property*, "Michigan State University College of Law International Law Review" 2011, Vol. 20(1), p. 76.

[84] F. Francioni, L. Lixinski, op. cit., p. 32.

building may be trumped by the right of everyone to enjoy cultural heritage, for example if the owner of the building refuses to allow the public to visit the building. To balance the interest of the public (their cultural heritage right) and the individual (the ownership right) is a challenging issue in the field of cultural heritage.

It is worth noting that to separate the property right from cultural heritage right does not mean that the cultural heritage right does not contain property interests. Cultural heritage holders enjoy the right to use the value of their cultural heritage to gain profit, as a form of the enjoyment of cultural heritage.

The cultural heritage right and other human rights

The cultural heritage right has from the beginning enjoyed the closest relationship with cultural human rights in the human rights system. Although a few scholars claim that the right to culture cannot cover all aspects of the cultural heritage right (especially the property right),[85] I still prefer to put the right to cultural heritage under the cultural human right. However, one reason for my attempt to clarify the cultural heritage right lies in the drawback of the cultural right theory. Cultural rights are the least understood and respected of all human rights,[86] largely because the meaning of cultural rights remains ambiguous and contested, and the meaning of culture itself is not clearly defined.[87] If the cultural right is considered as all rights related to culture, it will become a concept that can contain everything, which undermines its value. The cultural heritage right is subordinate to the right to culture, but may have a clearer extension.

The relationship between cultural heritage and other human rights – like the right to livelihood and development – is often discussed by scholars.[88] Some kinds of cultural heritage are accused of violation of basic human rights, including the right of equality and right to personal dignity.[89] The cultural heritage right may also clash with the right to development, since cultural heritage is often considered as an obstacle to economic development by governments and sometimes communities.[90] Indigenous peoples may choose to embrace a modern lifestyle instead of inheriting

[85] S. Hu, op. cit., p. 73.

[86] J. Blake, *Taking a Human Rights Approach…*, p. 215.

[87] A.-L. Kraak, *Human Rights-Based Approaches to World Heritage Conservation in Bagan, Myanmar: Conceptual, Political, and Practical Considerations*, "International Journal of Cultural Property" 2018, Vol. 25(1), p. 118.

[88] See F. Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, "Michigan Journal of International Law" 2004, Vol. 25(1209), pp. 1212-1213; Human Rights Council, *Promotion…*, para. 4, etc.

[89] See W. Logan, *Cultural Diversity…*, pp. 239-240; L. Lixinski, *Religious Heritage in International Law: Nationalism, Culture, and Rights*, "Pravovedenie" 2020, Vol. 64(1), p. 148, etc.

[90] See J. Lu, L. Xiaolong, P. Zhang, *Rights, Values, Interests: The Conflict between World Cultural Heritage and Community. A Case Study of the West Lake Cultural Landscape Heritage in China*, "Sustainability" 2019, Vol. 11(17), p. 13.

traditional lifestyles which are dying out gradually. Therein lies the potential for clashes between the right to cultural heritage and another new "third generation" right, that of development.[91]

As a brand-new cultural human right theory, the practice of cultural heritage rights may face challenges from other human rights. Some scholars are worrying that "heritage rights are indeed secondary to the more pressing claims of land, livelihood, healthcare, and education, and that for heritage to justify its place it must answer these needs first and foremost",[92] and most likely "would tend to lose out more often".[93] However, we should bear in mind that as a matter of ideology, the value of cultural heritage is not always paramount compared with the basic human rights – life, liberty, and security of person. It is unwise to protect the cultural heritage right at the expense of the rights to liberty, equality, and development. Human rights should be an essential limitation on cultural heritage and cultural diversity. As Yvonne Donders pointed out,

> Cultural practices that are clearly in conflict with human dignity and international human rights norms cannot be justified with a plea for cultural (heritage) rights. Only sites, objects, expressions, and knowledge that are deemed worth preserving for future generations and that are in line with human dignity and international human rights law should be considered part of cultural heritage rights.[94]

Conclusions

In accordance with the above-mentioned discussion, the rights systems concerning cultural heritage contain a core right – the right to cultural heritage and rights related to cultural heritage, including the rights to public participation, education, property, freedom of expression, self-determination, and other basic human rights. The cultural heritage right is the right to enjoy the intangible value of cultural heritage held by individuals, communities, nations, and the public. Such a system may provide an analytical path for human rights issues in cultural heritage. Still, unless it is tested in practice it is a purely philosophical construction. Moreover, it is an onerous task to clarify all the theoretical issues included in this system, including the distinction between legal rights and moral rights; its position in the human rights system; the distribution of interests among right-holders; and some other more in-depth philosophical issues surrounding cultural heritage.

As a new branch and emerging legal subject, cultural heritage law needs to find its basic philosophy, position, and methodology. As a legal field, cultural heritage law issues should be analysed under the discourse of rights and duties. What is the

91 J. Blake, *On Defining the Cultural Heritage…*, pp. 79-80.

92 L. Meskell, op. cit., p. 842.

93 K. Sikora, op. cit., p. 167.

94 Y. Donders, op. cit.

fundamental concept of cultural heritage law? Is the "cultural heritage right" the proper foundation for cultural heritage law? Can the rights system of cultural heritage – including the "cultural heritage right" and other rights related to cultural heritage – constitute the basic analytical framework for dealing with cultural heritage issues? There remains a long path to reconcile the various contradictions inside and outside this system, and thus promote the synergetic development of cultural heritage and human rights.

References

African Charter on Human and Peoples' Rights, June 1981.

Alderman K.L., *The Human Right to Cultural Property*, "Michigan State University College of Law International Law Review" 2011, Vol. 20(1).

ASEAN Declaration on Cultural Heritage, 25 July 2000.

Barth W.K., *Cultural Rights: A Necessary Corrective to the Nation State*, in: F. Francioni, M. Scheinin (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, Leiden 2008.

Blake J., *On Defining the Cultural Heritage*, "The International and Comparative Law Quarterly" 2000, Vol. 49(1).

Blake J., *Taking a Human Rights Approach to Cultural Heritage Protection*, "Heritage & Society" 2011, Vol. 4(2).

Buenos Aires Declaration Marking the 70th Anniversary of the Universal Declaration of Human Rights, 5 December 2018.

Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, UN Doc. E/C.12/GC/21.

Connolly A.J., *Cultural Heritage Rights*, Routledge, London 2017.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240.

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998.

Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS 199.

Declaration of ICOMOS Marking the 50th Anniversary of the Universal Declaration of Human Rights, 11 September 1998.

Delhi Declaration on Heritage and Democracy, December 2017.

Donders Y., *Cultural Heritage and Human Rights*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020.

Durbach A., Lixinski L. (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses*, Hart Publishing, Oxford 2017.

Francioni F., *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, "Michigan Journal of International Law" 2004, Vol. 25(1209).

Francioni F., *Culture, Heritage and Human Rights: An Introduction*, in: F. Francioni, M. Scheinin (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, Leiden 2008.

Francioni F., Lixinski L., *Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage*, in: A. Durbach, L. Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses*, Hart Publishing, Oxford 2017.

Francioni F., Scheinin M. (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, Leiden 2008.

Fribourg Declaration on Cultural Rights, 7 May 2007.

Hodder I., *Cultural Heritage Rights: From Ownership and Descent to Justice and Well-Being*, "Anthropological Quarterly" 2010, Vol. 83(4).

Hu S., *From Ownership to Human Rights: Developments and Reconstruction of the Concept of "Cultural Heritage Rights"*, "Journal of Political Science and Law" 2015, Vol. 167(4).

Human Rights Council, *Promotion and Protection of the Rights of Indigenous Peoples with Respect to Their Cultural Heritage: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, 19 August 2015, UN Doc. A/HRC/30/53.

Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, 21 March 2011, UN Doc. A/HRC/17/38.

Human Rights Council, *Resolution 33/20: Cultural Rights and the Protection of Cultural Heritage*, 6 October 2016, UN Doc. A/HRC/RES/33/20.

Human Rights Council, *Resolution 37/17: Cultural Rights and the Protection of Cultural Heritage*, 9 April 2018, UN Doc. A/HRC/RES/37/17.

ICOMOS Charter for the Interpretation and Presentation of Cultural Heritage Sites, 2008.

ICOMOS International Charter for Cultural Heritage Tourism, November 2022.

ICOMOS International Charter for the Conservation and Restoration of Monuments and Sites, 1964.

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

Kraak A.-L., *Human Rights-Based Approaches to World Heritage Conservation in Bagan, Myanmar: Conceptual, Political, and Practical Considerations*, "International Journal of Cultural Property" 2018, Vol. 25(1).

Liljeblad J., *The Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) and the Control of Indigenous Culture: A Critical Comment on Power and Indigenous Rights*, "William & Mary Journal of Race, Gender, and Social Justice" 2020, Vol. 26(2).

Lixinski L., *Religious Heritage in International Law: Nationalism, Culture, and Rights*, "Pravovedenie" 2020, Vol. 64(1).

Logan W., *Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection*, in: H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007.

Logan W., *Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-Based Cultural Practice*, "International Journal of Heritage Studies" 2012, Vol. 18(3).

Lu J., Xiaolong L., Zhang P., *Rights, Values, Interests: The Conflict between World Cultural Heritage and Community. A Case Study of the West Lake Cultural Landscape Heritage in China*, "Sustainability" 2019, Vol. 11(17).

Maus S., *Hand in Hand Against Climate Change: Cultural Human Rights and the Protection of Cultural Heritage*, "Cambridge Review of International Affairs" 2014, Vol. 27(4).

Merryman J.H., *The Public Interest in Cultural Property*, "California Law Review" 1989, Vol. 77(2).

Merryman J.H., *Two Ways of Thinking About Cultural Property*, "The American Journal of International Law" 1986, Vol. 80(4).

Meskell L., *Human Rights and Heritage Ethics*, "Anthropological Quarterly" 2010, Vol. 83(4).

Mo J., *Legal Protection for Rights to Cultural Heritage*, "Social Sciences in China" 2003, Vol. 24(1).

Moustakas J., *Group Rights in Cultural Property: Justifying Strict Inalienability*, "Cornell Law Review" 1989, Vol. 74(6).

Sikora K., *The Right to Cultural Heritage in International Law, with Special Reference to Indigenous Peoples' Rights*, "Santander Art and Culture Law Review" 2021, Vol. 2(7).

Silverman H., Ruggles D.F., *Cultural Heritage and Human Rights*, in: H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007.

Silverman H., Ruggles D.F. (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007.

The Athens Charter for the Restoration of Historic Monuments, 1931.

The Burra Charter: The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance, 1999.

The Nara Document on Authenticity, 1994.

The Paris Declaration on Heritage as a Driver of Development, 1 December 2011.

UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003.

UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, 31 July 2021.

UNESCO, *Recommendation on International Principles Applicable to Archaeological Excavations*, 5 December 1956.

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.

United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, UN Doc. A/RES/61/295.

United Nations General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights, K. Bennoune*, 9 August 2016, UN Doc. A/71/317.

Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/RES/217 A (III).

Vrdoljak A.F., *Indigenous Peoples, World Heritage, and Human Rights*, "International Journal of Cultural Property" 2018, Vol. 25(3).

Wang Y., *On the Rights to Cultural Heritage*, "Journal of Renmin University of China" 2011, Vol. 25(2).

Wells J.C., Lixinski L., *Heritage Values and Legal Rules: Identification and Treatment of the Historic Environment via an Adaptive Regulatory Framework (Part 1)*, "Journal of Cultural Heritage Management and Sustainable Development" 2016, Vol. 6(3).

Yang Z., *On Nature of Environmental Right*, "China Legal Science" 2020, Vol. 37(2).