



Working Paper Series No. 038

**Cultural Identity, Heritage Protection and
Human Rights In Asia**

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ASLI Young Scholar
(5 December 2013 to 6 December 2013)

August 2015

The **ASLI Working Paper Series** is published electronically by the Asia Law Institute, whose Secretariat is based at the Faculty of Law, National University of Singapore.

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CULTURAL IDENTITY, HERITAGE PROTECTION AND HUMAN RIGHTS IN ASIA

Stefan Gruber*

Abstract

This paper highlights the importance of conserving cultural heritage for the promotion of human rights and, specifically, the right to cultural identity in Asia, and to securing intergenerational justice. It further examines the links between conservation of heritage and human rights in a legal and policy context and takes the position that it is generally not possible to separate conservation of heritage from the concept of human rights protection.

Introduction

In regard to cultural heritage, human rights are taken to include the rights of communities to identify, define, access, manage and control their heritage. Therefore, it is argued that recognising the rights of people to their own cultural heritage and providing adequate conservation for it contributes to the promotion of human rights, both in Asia¹ and in other parts of the world. The paper further underlines the connection between heritage conservation and intergenerational justice. Thus, the rights and interests of future generations must be considered when making decisions regarding heritage assets, as those decisions cannot be reversed once the heritage has been degraded or destroyed. The fact that future generations might have quite different preferences regarding what heritage should be conserved must be taken into account. Given the uncertainty of what future generations might desire with respect to heritage, the application of the precautionary principle² arguably becomes a central

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¹ For example, a general discussion of the specifics and relevance of human rights in relation to China is available in Victor Li, 'Human Rights in a Chinese Context' in Tahirih V Lee (ed), *Chinese Law: Law, the State, and Society in China* (Garland Publishing 1997) 335.

² For further analysis on the Precautionary Principle, see, eg, Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002) 91 ff; Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific*

factor, requiring a conservative approach as to what to retain and what to allow to be degraded or discarded.

1 Heritage protection as a human right

Cultural heritage not only serves as a link within culturally-diverse groups, but it also provides groups of people with elements of specific identities, helps them relate to other groups and constitutes a significant part of collective identity.³ The fact that heritage forms part of a personality of every person implies that all people have the right to the protection of their heritage in its many manifestations as part of their cultural identity.⁴ The strong connection between human rights and the protection of cultural heritage becomes clearer in comparison with the connection between human rights and the conservation of specific aspects of the natural and human-made environment. The conservation of cultural and natural heritage should not be seen as unrelated entities, as often they are not only closely related, but the protection schemes are very similar. Thus, if it is argued that a human right to a clean, healthy and sustainable environment exists,⁵ it is equally the case that there is a human right to a sustainable heritage. This human right is now beginning to be recognised through international legal instruments and by scholars and legislators at a national level. The connection between the protection of human rights and the conservation of heritage has become much stronger in recent decades, particularly through the negotiation and completion

Uncertainty (Federation Press 2005); Brian J Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9(2&3) *Asia Pacific Journal of Environmental Law* 109, 133 ff.

³ See also Ben Boer and Stefan Gruber, 'Human Rights and Heritage Conservation Law' in Peace and Democracy UNESCO Chair for Human Rights (ed), *Proceedings of the First International Conference on Human Rights and the Environment* (UNESCO Chair for Human Rights, Peace, and Democracy, University of Shahid Beheshti 2009) 90.

⁴ Compare Helaine Silverman and D Fairchild Ruggles, 'Cultural Heritage and Human Rights' in Helaine Silverman and D Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer 2007) 3 ff.

⁵ See, eg, the right to live in a healthy environment in Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights [1989] 28 ILM 156, art 11; see further the right to freely dispose of one's natural resources in African Charter on Human and People's Rights [1981] 1520 UNTS 217, art 21.

of international treaties and other instruments relating to heritage, although that connection is not always explicit.

While human rights are regarded as universal, an essential aspect of that equality is the right of all people and human communities to assert individual differences with respect to the way in which they express their cultural identities. The right to sustain exclusivity of cultural traditions, backgrounds, customs or cultural affiliations is crucial to the survival of culturally distinct groups. Such rights to protect one's cultural identity must play a major role when making any political or legal decisions that affect this type of heritage. Removing or abusing heritage constitutes a violation of the right to human dignity and freedom.

One argument that needs to be mentioned in this context is the discussion of 'Asian values', which contests the universality of rights and opts for a recognition of regional differences. Some call for the acceptance of regional diversity in human rights frameworks and, particularly in the Asian context, for the rights of states to be put before those of individuals.⁶ Xiaorong Li sums the main points of the argument up in the following way:

- 1) Rights are culturally specific.
- 2) The community takes precedence over individuals.
- 3) Social and economic rights take precedence over civil and political rights.
- 4) Rights are a matter of national sovereignty.⁷

Whether or not the 'Asian values' theory is based on valid arguments and should be supported has been subject to a heated debate, but such a debate is beyond the scope of this paper. Regardless, it is useful to bear these arguments in mind, particularly when dealing with cultural rights in Asia, which range from individual to communal rights. However, especially the point regarding the priority of national sovereignty over rights would be highly problematic in this context. As Francioni argues, particularly in relation to the protection of

⁶ Xin Chunying, 'Can the Pluralistic World Have a Unified Concept of Human Rights' in Peter R Baehr et al (eds), *Human Rights: Chinese and Dutch Perspectives* (1996) 43, 55-56.

⁷ Xiaorong Li, "'Asian Values' and the Universality of Human Rights' (1996) 16(2) Report of the Institute for Philosophy and Public Policy, 130.

intangible cultural heritage, “the object of safeguarding is not a State interest, or a purely material item, but rather the human value of creative autonomy, of the freedom of manifestation of one’s own beliefs and convictions, either individually or in community, in public or in private, of peoples, groups or minorities”.⁸

Cultural heritage is recognised by the international human rights regime even though its protection largely depends on nationally based public laws seeking to ensure the continuation of cultural practices (for instance, through Indigenous land rights regimes), the protection of the human right to culture and the prohibition of discrimination against people, who belong to a distinct cultural group. This is reflected in Article 22 of the 1948 *Universal Declaration of Human Rights*,⁹ which states that:

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

In addition, Articles 26 and 27 of the 1948 *Universal Declaration of Human Rights* mention the right to education and to participate in the cultural life of the community, such as enjoying the arts. Of further importance, particularly in the context of intangible cultural heritage, is the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005,¹⁰ the preamble of which emphasises the right of people to their own heritage and its protection:

[...] Celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments, [...]

⁸ Francesco Francioni, ‘The Evolving Framework for the Protection of Cultural Heritage in International Law’ in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff Publishers 2012) 3, 23.

⁹ Universal Declaration of Human Rights [1948] GA Res 217A (III), UN GAOR, 3rd sess, 183 plen. mtg, UN Doc A/810.

¹⁰ Convention on the Protection and Promotion of the Diversity of Cultural Expressions [2005] 2440 UNTS 311 .

The *Universal Declaration of Human Rights* may not include extensive provisions on the protection of cultural rights and heritage, but its concept and underlying spirit provide unambiguous guidance on how human rights should be employed in such a context. The *Universal Declaration of Human Rights* clearly recognises that states and the international community are responsible for guaranteeing and providing resources for the cultural rights of any individual as these are of great importance to human dignity. The protection of human rights also incorporates the duty to provide resources to safeguard heritage and uniqueness of people as part of their cultural identity. Consequently, any heritage conservation instrument, whether UNESCO's heritage treaties, such as the *Convention Concerning the Protection of the World Cultural and Natural Heritage* of 1972¹¹ ('*World Heritage Convention*') and the *Convention for the Safeguarding of the Intangible Cultural Heritage* of 2003¹² ('*Intangible Cultural Heritage Convention*'), or other related legal instruments at the international level, as well as any legal regimes of heritage conservation at the national and sub-national levels, should be read and understood as part of the protection of human dignity and related human rights.¹³ Of particular significance in this context is the definition of 'intangible heritage' in the *Intangible Cultural Heritage Convention*:

[...] For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.¹⁴

¹¹ Convention Concerning the Protection of the World Cultural and Natural Heritage [1972] 1037 UNTS 151.

¹² Convention on the Safeguarding of the Intangible Heritage [2003] 2368 UNTS 1 ('*Intangible Cultural Heritage Convention*').

¹³ On the interaction between human rights and the protection of intangible heritage, see generally Lucas Lixinski, 'Intangible Cultural Heritage in International Law' (2013) Oxford University Press, 145-173.

¹⁴ Intangible Cultural Heritage Convention (n 12), art 2 (1).

Also relevant in this regard is Article 15 of the *International Covenant on Economic, Social and Cultural Rights* of 1966¹⁵, which explicitly mentions the duty of states to recognise the right to take part in cultural life:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life; [...]
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

In a similar manner, Article 27 of the *International Covenant on Civil and Political Rights* of 1966¹⁶ underlines the right of members of ethnic, religious or linguistic minorities “to enjoy their own culture, to profess and practise their own religion, or to use their own language” in community with other members of their group. Those rules oblige states to provide adequate protection for cultural groups concerning all property and intangible heritage that they require for their continued existence as culturally distinct communities.¹⁷ These provisions affect cultural heritage in two ways. On the one hand, they prohibit states from engaging in the destruction, damage, or desecration of objects or sites of importance to the cultural life of people, while on the other hand obliging states to take appropriate steps for their protection from destruction or damage.¹⁸ This applies even more when such objects or sites are indispensable for the practice of people’s culture.

1.1 Wilful destruction of cultural heritage as a violation of human rights

Generally, the conservation of cultural heritage in its various forms is inseparable from the protection of human rights, while the enjoyment of and access of any individual or community to its cultural heritage is to be considered a fundamental human right.¹⁹ This

¹⁵ International Covenant on Economic, Social and Cultural Rights [1966] 993 UNTS 3.

¹⁶ International Covenant on Civil and Political Rights [1966] 999 UNTS 171.

¹⁷ Francesco Francioni, 'Culture, Heritage and Human Rights: An Introduction' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff 2008) 9.

¹⁸ Ibid.

¹⁹ Boer and Gruber (n 3), 101.

point is starkly illustrated where societies, communities and groups are dispossessed of their land, culturally significant buildings and important heritage objects by the processes of colonization, armed conflict, looting of museums, ethnic discrimination and so on.²⁰ The same applies to the destruction of negative heritage and places of remembrance and grief in order to remove particular events from or to alter the collective memory of communities.

A particularly devastating example in recent years, where the concept of human rights has been used as one of the main vehicles to condemn wilful destruction of cultural heritage, was in the aftermath of the destruction of the Buddha statues of Bamiyan in Afghanistan by the Taliban in 2001, in an attempt to erase any evidence of pre-Islamic culture in that country.²¹ The 13th General Assembly of States Parties to the World Heritage Convention labelled this barbaric act rightfully a “crime against the common heritage of humanity” and called on all States Parties to the World Heritage Convention to also become members of other international legal instruments dealing with the protection of cultural heritage.²² The notion of heritage destruction amounting to human rights infringements was adopted by UNESCO, which highlighted the impact of the Taliban actions on human rights and human dignity in its *Declaration concerning the Intentional Destruction of Cultural Heritage* of 2003²³ very clearly:

²⁰ Ben Boer and Stefan Gruber, 'Heritage Discourses' in Kim Rubenstein and Brad Jessup (eds), *Environmental Discourses in International and Public Law* (Cambridge University Press 2012) 375, 101.

²¹ See further Francesco Francioni et al, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14(4) *European Journal of International Law* 619.

²² UNESCO, 'Summary Record of the Thirteenth General Assembly of States Parties to the Convention concerning the Protection of the World Cultural and Natural Heritage (UNESCO Headquarters, Paris, 30-31 October 2001)' WHC-2001/CONF.206/8 Rev (29 July 2003) Annex 3 ('Resolution on the Protection of the Cultural Heritage of Afghanistan, adopted by the General Assembly of States Parties to the World Heritage Convention at its Thirteenth Session (Paris, 30–31 October 2001)'). See further UNESCO, 'Records of the General Conference, 31st Session, Paris, 15 October to 3 November 2001, vol 1: Resolutions' 31C/Resolutions (2002, adopted 2 November 2001) Resolution 26 ('Acts Constituting a Crime against the Common Heritage of Humanity').

²³ UNESCO, 'Records of the General Conference, 32nd Session, Paris, 29 September to 17 October 2003, vol 1: Resolutions' 32C/Resolutions (2004, adopted 17 October 2003) Resolution 33 ('Declaration Concerning the Intentional Destruction of Cultural Heritage').

Mindful 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.

As Boer and Gruber argue, “[i]ntentional destruction of cultural heritage must be judged as an offence against humankind, as it violates the dignity of those whose heritage it is, as well as those *identifying* with it for cultural or religious reasons. As heritage forms part of the cultural identity of people, its intentional destruction is clearly contrary to the basic foundations of human rights law and is a further important aspect of the way international legal principles impact on culture and heritage”.²⁴

As discussed, heritage is inseparable from any person’s and community’s identity and dignity. Consequently, the destruction of certain types of heritage, such as the Buddha statues of Bamiyan, is often aimed at destroying identities.²⁵ That fact was reflected in the intention of several member states of the United Nations to include the term ‘cultural genocide’ in the drafts of the *Convention on the Prevention and Punishment of the Crime of Genocide*²⁶ and in the *Universal Declaration of Human Rights* by the General Assembly in 1948.²⁷ Although it was not included in either of the final versions of the two documents,²⁸ the concept of ‘cultural genocide’ is of great importance when dealing with the protection of cultural heritage. Its definition in the *Draft Convention on the Prevention and Punishment of the Crime of Genocide*²⁹ provides excellent guidance in the discussion of organised destruction of cultural heritage:

²⁴ Boer and Gruber (n 20), 389 and 390.

²⁵ Marie-Theres Albert, 'Culture, Heritage, and Identity' in Monika A Murzyn and Jacek Purchla (eds), *Cultural Heritage in the 21st Century: Opportunities and Challenges* (International Cultural Centre 2007) 49, 53-56.

²⁶ Convention on the Prevention and Punishment of the Crime of Genocide [1948] 78 UNTS 277.

²⁷ See further John B Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate 2006).

²⁸ The reasons for that outcome are discussed in Johannes Morsink, 'Cultural Genocide, the Universal Declaration, and Minority Rights' (1999) 21(4) Human Rights Quarterly 1009.

²⁹ Draft Convention on the Prevention and Punishment of the Crime of Genocide [26 June 1947] UN ESCOR, 2nd sess, UN Doc E/447, art 3.

Article I: Definitions

I. [Protected groups] The purpose of this Convention is to prevent destruction of racial, national, linguistic, religious or political groups of human beings.

II. [Acts qualified as Genocide] In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development.

Such acts consist of:

[...]

3. [Cultural genocide] Destroying the specific characteristics of the group by:

(a) forcible transfer of children to another human group; or

(b) forced and systematic exile of individuals representing the culture of a group; or

(c) prohibition of the use of the national language even in private intercourse; or

(d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or

(e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

1.2 Destruction of heritage and cultural identity

In many cases, the destruction of cultural heritage is not a random act but is motivated by a political agenda. Historic monuments are sometimes destroyed in an attempt to erase certain elements of public memory, while in other cases actions targeted at cultural heritage serve to indoctrinate or suppress people, to foster obedience or to promote political and cultural agendas and changes. For instance, Albert argues that the destruction of cultural heritage and identities “is a constituent part of the establishment of political systems”.³⁰ Referring to the examples of the cities of Warsaw and Dresden, she argues that “[d]uring the Second World War, the warring countries destroyed significant cultural heritage. They obliterated monuments and entire cities to force their respective ideologies and political strategies on

³⁰ Albert (n 25), 53.

people”.³¹ Although most of Warsaw’s historic centre was destroyed in 1944, she describes its reconstruction between 1945 and 1947 “as one of the major cultural achievements of the post-war era” and claims that “the city's renewal is a major source of inspiration for Poland's cultural identity”.³² She further points out that “the main objective [of the bombing of Dresden by the Allied Powers in 1945] was to destroy material cultural heritage in order to destroy the enemy's cultural identity”.³³

1.3 Cultural uniformity and minorities

One of the most important steps in creating a national identity and fostering cultural unity is the implementation of a uniform written script and language. One example in the history of China where the destruction of culture was employed to enforce cultural uniformity for political purposes was the large-scale annihilation of heritage and cultural identities by Emperor Qin Shi Huang³⁴ as part of his strategy for unifying China³⁵ at the end of the Warring States Period.³⁶ In order to rule the country more efficiently, he ordered the standardisation of the writing system, weights and units of measurement to simplify trade, communication, construction projects, calculation and tax collection, among many other benefits.³⁷ The uniform written script not only allowed for written communication of speakers of different dialects throughout China but also facilitated the spread of the national culture.³⁸ Although the Qin and Han Dynasties broke with many practices from the past, the

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ 259-210 B.C.E.

³⁵ For a historic overview on the early imperialism in China, see Chun-shu Chang, *The Rise of the Chinese Empire, Vol 1: Nation, State, and Imperialism in Early China, ca. 1600 B.C.-A.D. 8* (University of Michigan Press 2006).

³⁶ 475-221 B.C.E.

³⁷ Shouyi Bai, *An Outline History of China* (Foreign Languages Press 2002) 114.

³⁸ James L Watson, 'Rites or Beliefs? The Construction of a Unified Culture in Late Imperial China' in Lowell Dittmer and Samuel S Kim (eds), *China's Quest for National Identity* (Cornell University Press 1993) 80, 98.

idea of a united empire could, of course, not have been implemented without the accomplishments, lessons and methods of the statecraft from the past.³⁹

However, despite the positive effects of such policy, it could be argued that in some cases the promotion of an official language in a country with several languages spoken can violate the cultural rights of the members of other language groups. This is a significant issue also in contemporary China as a country with 56 minorities and a variety of versions of the Chinese language being spoken besides the official language based on the Beijing dialect of Mandarin Chinese.⁴⁰ Of importance in this context is the protection of culturally distinct groups against internal migration schemes, calculated by the authorities in order to weaken the groups' cultural autonomy, as witnessed, for example, in Tibet with increasing numbers of internal migrants from the country's majority of Han Chinese over many years. The availability of equal education in regard to cultural differences is another important issue.⁴¹ A very different example in this context is India, which celebrates linguistic pluralism as one of the country's features.⁴² Nevertheless, it should be noted that China is one of the very few countries that has introduced a specific law on the protection of intangible heritage.⁴³ However, the law also limits the involvement of individuals and private organisations – even more foreign ones – in any investigations or surveys on intangible heritage in China and consequently ensures the complete control by the Chinese authorities over the identification and definition of intangible cultural heritage.⁴⁴ This is in line with the purpose of the law, as it only safeguards heritage that reflects the 'good' traditional cultures of the Chinese people, although no further

³⁹ Michael Loewe, 'The Heritage Left to the Empires' in Michael Loewe and Edward L Shaughnessy (eds), *The Cambridge History of Ancient China, Vol. 1: From the Origins of Civilization to 221 B.C.* (Cambridge University Press 1999), 967.

⁴⁰ For an overview on modern Chinese dialects, their differences, usage, history and classifications, see Maria Kurpaska, *Chinese Language(S): A Look through the Prism of the Great Dictionary of Modern Chinese Dialects* (De Gruyter Mouton 2010).

⁴¹ See, eg, Lin Yi, *Cultural Exclusion in China: State Education, Social Mobility and Cultural Difference* (Routledge 2008).

⁴² Vrajendra Raj Mehta, 'Linguistic Rights in India' in *Cultural Rights and Wrongs* (UNESCO and Institute of Art and Law 1998) 120.

⁴³ Law of the People's Republic of China on Intangible Cultural Heritage [2011].

⁴⁴ *Ibid.*, ss 14, 15.

explanation of that term is provided. Having the monopoly to decide which kind of heritage is good and worth preserving is an enormous privilege and a very forceful political tool.

1.3.1 Comparative examples from the Asia Pacific region

Cultural rights of minorities are often one of the main targets of human rights violations. Several comparative examples can also be drawn from Australian history, which might first appear unique, but, nevertheless, illustrate universally applicable issues. Many human rights violations related to cultural heritage are fuelled, *inter alia*, by cultural ignorance and racism. One example is the shameful era of the Stolen Generations⁴⁵ when children from Aboriginal families in Australia and Indigenous families from the Torres Strait Islands were separated from their relatives and communities against their will to be raised by white foster families and organisations⁴⁶, as the Australian authorities and large parts of the society regarded Aboriginal culture as primitive and a hindrance to the children to develop and lead meaningful lives.⁴⁷ This ill-fated policy has left numerous families and children deeply traumatised until nowadays with many of them not having been reunited.⁴⁸ It is fair to say that Australians are widely ashamed of this part of their history and the Australian government has since addressed these unfortunate mistakes and issued a formal apology to the victims of that policy.⁴⁹

A rather successful case of cultural revitalisation of a minority that has suffered significantly under cultural assimilation policies are the Ainu in Japan. While its culture was largely forbidden since the middle of the nineteenth century, the campaign by the Ainu for the

⁴⁵ Approximately 1869–1969.

⁴⁶ See further Human Rights and Equal Opportunity Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997) < http://www.hreoc.gov.au/social_justice/bth_report/report/content_page_full.html >.

⁴⁷ Boer and Gruber (n 20), 384.

⁴⁸ Human Rights and Equal Opportunity Commission (n 46).

⁴⁹ Australian Prime Minister Kevin Rudd, 'Formal Apology to the Stolen Generations' (Speech delivered to the Parliament of Australia, Parliament House, Canberra, 12 February 2008) < <http://www.abc.net.au/news/events/apology/text.htm> >.

recognition of their rights since the 1980s has resulted in a change of policy and even led to the enactment of the *Ainu Culture Protection Act* in 1997. Although the Ainu are still facing several problems, their situation has improved dramatically due to the results of activism and political engagement.⁵⁰

Another important issue is the interaction of people with their own heritage and whether the alteration or even destruction of heritage sites or items created by a cultural community, which is still actively using them, is acceptable or should be prohibited. It touches on the basic question as to what extent cultural communities still own sites and items once they are recognised as heritage. Again, comparative examples can be drawn from the history of Australia to illustrate the problem. These examples are relevant to many Asian countries with their many minorities and the question of whether the authorities could and should prevent these minorities from jeopardising heritage assets, identified as being important beyond those communities, or even open sites as tourist destinations without prior approval by the minorities. The development of ancient city centres as tourist sites, sometimes being a result of an inscription on the World Heritage List, can lead to serious cases of gentrification, the collapse and disbanding of the whole communities, as witnessed, for instance, in Lijiang in Yunnan Province, which used to be the centre of the Naxi minority or Hoi An in Vietnam.⁵¹ The original populations of both cities have been largely replaced by internal migrants and the former owners and inhabitants were forced to relocate due to rising property prices, costs of living and often pressure from investors and developers.

In some cases, the concept of heritage being a good for all humankind can collide with the right of people to interact with and conserve their heritage in accordance with their own beliefs and traditions, which may result in dispute. One example concerns Australia's Aboriginal communities and the rock paintings left by their ancestors. In order to preserve them as part of their culture and to meet their duties to their ancestors, many rock paintings

⁵⁰ Yuuki Hasegawa, 'The Rights Movement and Cultural Revitalization: The Case of the Ainu in Japan' in Michele Langfield, William Logan and Máiréad Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice* (Routledge 2010) 208.

⁵¹ See further Stefan Gruber, 'Poverty and the Loss of Cultural Heritage Sites' in Yves Le Bouthillier, Miriam Alfie Cohen, José Juan González Marquez, Albert Mumma and Susan Smith (eds), *Poverty Alleviation and Environmental Law* (Edward Elgar: Cheltenham 2012) 284.

are periodically repainted under the supervision of the Aboriginal elders.⁵² Although this practice has been going on for centuries and only the youngest layer of paint is usually identifiable, the repainting regularly triggers protest from outside the Aboriginal community, as some regard it as the spoiling of an archaeological site.⁵³ This provokes the question of who really owns cultural heritage and whether the public can take possession of cultural heritage items that belong to culturally autonomous communities or whether those communities should have the exclusive right to manage their heritage.⁵⁴ Is it legitimate to open sites for tourists and other visitors without the consent of all the stakeholders involved? These questions become even more complicated when physical manifestations have also become a significant aspect of the heritage of people who do not form part of the cultural community that created them. This also applies to the management of cultural landscapes in Asia, for example in Vietnam and Thailand, where local interests often collide with international obligations or other conflicting interests.⁵⁵ Although an in-depth discussion of those matters is beyond the scope of this paper, it is important to consider their importance when dealing with cultural heritage that forms part of the daily life of people.⁵⁶

⁵² See Josephine Flood, *Rock Art of the Dreamtime* (Angus & Robertson 1997) 298–300.

⁵³ See Sandra Bowdler, 'Repainting Australian Rock Art' (1988) 62(236) *Antiquity* 517.

⁵⁴ Boer and Gruber (n 20), 390.

⁵⁵ See, eg, Ken Taylor, 'The Challenges of the Cultural Landscape Construct and Associated Intangible Values in an Asian Context' in Kapila D Silva and Neel Kamal Chapagain (eds), *Asian Heritage Management: Contexts, Concerns, and Prospects* (Routledge: London 2013) 189.

⁵⁶ For related discussions and examples, see, eg, Laurajane Smith, 'Empty Gestures? Heritage and the Politics of Recognition' in Helaine Silverman and D Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer 2007) 159. In relation to Australian Indigenous people, see Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (Oxford University Press 2006) ch 9. See further examples and background information on disputes mainly involving Native North American tribes in Rebecca Tsosie, 'Who Controls Native Cultural Heritage?: Art, Artifacts, and the Right to Cultural Survival' in James A R Nafziger and Ann M Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce* (Leiden 2009) 3.

2 Conservation of heritage and intergenerational justice

Another important aspect of the connection of cultural heritage conservation and human rights is that of intergenerational justice. The international law framework uses this concept “to recognise the rights of future peoples to the values and collective memories expressed in objects, ruins, rituals, and musical performances, and is another way of expressing the principle of intergenerational equity, as part of a package of concepts which coalesce under the broad principle of sustainable development”.⁵⁷ The World Commission on Environment and Development defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁵⁸ In relation to heritage protection it means that the present generation must not exploit cultural and natural heritage resources to such an extent that it prevents future generations from enjoying, experiencing and generally benefitting from heritage resources.⁵⁹ The present generation has the duty to recognise the implications of any decisions regarding heritage, because they directly affect what will be passed on to future generations, as any heritage items that are destroyed are usually lost forever.⁶⁰

The current rapid economic development in many parts of Asia is fuelling the restructuring of many city centres and the consequential disappearance of numerous historic residential areas, monuments and other heritage structures. This has led in many cases to forced evictions and relocation of the inhabitants of whole suburbs, such as in the Hutongs in Beijing, which not only resulted in the destruction of invaluable heritage sites but also in the disbanding of traditional communities and the vanishing of significant intangible heritage.⁶¹ While the present generation of developers, officials and business operators undoubtedly benefit from

⁵⁷ Boer and Gruber (n 20), 396.

⁵⁸ World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) ch. 2.

⁵⁹ See Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd ed 2009) 256; Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Transnational Publishers, 3rd ed 2004) 16.

⁶⁰ Boer and Gruber (n 20), 396.

⁶¹ See further Stefan Gruber, ‘Protecting China’s Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law’ (2007) 10(3&4) *Asia Pacific Journal of Environmental Law* 253.

those projects, and the economic rise lays the foundation for the prosperity of future generations, each of those projects comes at a cost. Whether that cost is worth it will be answered differently depending on what benefits an individual expects to gain or what loss to suffer as a result. However, one group among the stakeholders, which cannot participate in the planning of such projects and articulate its concerns, is that of the future generations.

It is crucial to respect the rights of future generations and take their potential preferences into consideration as far as possible, as they might differ significantly from what the present generation regards as being important.⁶² One could make the point that there is no rationale for heritage conservation if it is limited only to the concerns of the present generation. Thus, by the nature of the endeavour, it must be directed to the assumed interests of future generations. As discussed, heritage assets are non-renewable and lose their integrity even if reconstructed or redeveloped once destroyed and in such cases can only be preserved through recording, memory and documentation.⁶³ While of course not every cultural heritage asset can be preserved, it is important to reflect on the preferences of the future generations very carefully. Some items might not seem that valuable to the majority, but they might be of great significance to local communities or specific culturally unique groups.⁶⁴ It is, therefore, crucial to recognise such values and traditions shared only by local people within their native context.⁶⁵

3 Conclusion

This paper has explored the links between heritage protection and human rights and also the existence of a human right to the protection of people's cultural identity and heritage in both its tangible and intangible manifestations. Such rights also include the right of communities

⁶² Boer and Gruber (n 20), 396.

⁶³ Boer and Gruber (n 3), 101.

⁶⁴ Boer and Gruber (n 20), 396-398.

⁶⁵ Yukiya Kawaguchi, 'Covering Heritages, Erasing Locals: Passing on History to the Next Generation' in Kenji Yoshida and John Mack (eds), *Preserving the Cultural Heritage of Africa: Crisis or Renaissance?* (James Curry / Unisa Press 2008) 137-138.

to define, access and control their heritage.⁶⁶ Of particular importance in this context is the right to recognise people's cultural identity as part of their human dignity, which deserves the highest level of protection and respect. Consequently, any heritage conservation instrument - at both the international and the national levels - should be understood and interpreted as part of the protection of human dignity and related human rights.⁶⁷

If practiced consistently, this approach will also assist in promoting an increased recognition of human rights in Asia. By underlining the human rights component of heritage conservation, human rights will take a more prominent position in related public discourses and will receive more public exposure as a consequence. Those rights must, therefore, always be a part of any decision-making, either economic, political or legal, that might have an impact on cultural heritage or when protecting heritage assets against deliberate damage, destruction or criminal activities.⁶⁸

Another important aspect discussed is the principle of intergenerational justice in the context of cultural sustainability. While it is impossible – and often undesirable - to protect and conserve all cultural heritage to make room for development, it is crucial to consider the needs and wishes of the future generations when deciding what heritage to pass on. The ideas of the present generation might differ from those of the future ones, which might draw very different conclusions in regard to the heritage left by their predecessors. Albert sums up the connection between the heritage and the present as follows:

Consequently, it is not the past that determines which elements of culture will be granted the status of cultural heritage worthy of protection. It is always contemporary society which defines what is important in its history. It is the aims, values and judgements of the present which motivate and guide reflections on the past. Accordingly, cultural heritage is 'present' in the present in a twofold way. The intangible aspects of cultural heritage guide people in their lifestyles and in interpreting their everyday lives. In its tangible aspects, cultural heritage is a product of a social interpretation of both the present

⁶⁶ See further William S Logan, 'Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection' in Helaine Silverman and D Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (Springer 2007) 33.

⁶⁷ Boer and Gruber (n 3), 115.

⁶⁸ Ibid.

and the past. More precisely: cultural heritage is the product of a reconstruction of the past determined by the needs of the present.⁶⁹

The present generation has the privilege and arguably a duty to choose what to conserve and hand down to the coming generations. However, with such power comes an enormous responsibility, involving fundamental questions of human rights and intergenerational justice, as this paper has attempted to show. Such responsibility must be exercised especially consciously in times of rapid change - currently taking place in many parts of Asia - when heritage is acutely threatened by the undesired effects of large-scale social and economic development.

⁶⁹ Albert (n 25), 51.