Northern Ireland Assembly

Research and Library Service Research Paper

January 2011

Dr Dan Hull & Michael Potter

Heritage and Cultural Rights: International Standards

NIAR 667-10

This paper sets out a summary of the international, European and domestic instruments which deal with cultural rights. The relationship between cultural rights instruments and cultural heritage is examined.

Paper 26/11 **14 January 2010**

Key Points

- This paper sets out a summary of the various international, European and domestic instruments which deal with cultural rights.
- The relationship between cultural rights instruments and cultural heritage is also examined, particularly with regard to the issues of repatriation, and demands for the representation or promotion of particular forms of cultural heritage.
- The challenges of managing competing or differing interpretations of heritage is highlighted.
- Difficulties in using cultural rights in the context of heritage are discussed, including the following points:
  - Difficulties in deciding which heritage should be selected, preserved or presented
  - Difficulties in establishing who has legitimacy to speak on behalf of a particular cultural group, and the dangers of government presuming to act on behalf of a group
  - The challenge posed by ‘cultural relativism’, where any or all views of cultural heritage are seen as equally valid
  - The legal relationship between cultural and human rights, especially where the rights of one group or individual could be interpreted as being contravened by the promotion of a particular aspect of cultural heritage by others
  - The ways in which cultural heritage can be used as a controlling influence either (a) by governments in seeking to assimilate minorities or (b) by minority groups in seeking secession from the political mainstream.
- It is concluded that a number of ambiguities and contradictions exist in the relationship between cultural rights and universal human rights.

Executive Summary

This paper sets out a summary of the various international, European and domestic instruments which deal with cultural rights. The context for such a summary is the release of a Draft Museums Policy in July 2010 by the Department for Culture, Arts and Leisure, Section 9 of which is dedicated to the issue of 'Cultural Rights'. The relationship between cultural rights instruments and cultural heritage is then examined.

Firstly the issue of repatriation, or the removal or return of items of cultural heritage, is examined. Secondly, contrasting demands for the representation or promotion of particular forms of cultural heritage are discussed, and the challenges of managing competing or differing interpretations of such heritage highlighted.

Finally, difficulties in using cultural rights in the context of heritage are discussed, especially as regards the relationship between cultural rights and human rights. This section uses examples to present a number of challenges, including the following:

- Difficulties in deciding which heritage should be selected, preserved or presented
- Difficulties in establishing who has legitimacy to speak on behalf of a particular cultural group, and the dangers of government presuming to act on behalf of a group
- The challenge posed by 'cultural relativism', where any or all views of cultural heritage are seen as equally valid
- The legal relationship between cultural and human rights, especially where the rights of one group or individual could be interpreted as being contravened by the promotion of a particular aspect of cultural heritage by others
- The ways in which cultural heritage can be used as a controlling influence either (a) by governments in seeking to assimilate minorities or (b) by minority groups in seeking secession from the political mainstream.

It is concluded that a number of ambiguities and contradictions exist in the relationship between cultural rights and universal human rights that may take some time to emerge and resolve.

Contents

1 Context

This paper sets out a summary of the various international and European instruments which deal with cultural rights, and examines their relevance to the field of cultural heritage in particular. A summary of the relevant sections of these agreements is given in Annexe 1. The context for such a summary is the release of a Draft Museums Policy in July 2010 by the Department for Culture, Arts and Leisure. Section 9 of the draft policy is dedicated to the issue of 'Cultural Rights'. It states there that it is 'important that museum collections and exhibitions reflect local identities'. This is expressed as an explicit goal in CR2: 'To ensure museum collections and exhibitions are considerate to the cultural rights of people and communities'.

Although the precise intention behind this section of the policy is not made clear, it could be inferred that the issue of cultural rights is being raised in the policy document to encourage or allow for the introduction of additional exhibition material which might compensate for perceived under-representation of particular aspects of cultural heritage within Northern Ireland society. Various international and European treaties are cited in the policy document, and goal CR1 states an intention 'to ensure museums have access to and an understanding of legislation, treaties and declarations relating to cultural rights'. A recently published summary of the consultation responses received by DCAL states that 'many respondents pointed to a lack of clarity around the definition of 'Cultural Rights' and its obligations'[1].

What follows is an examination of the various treaties and instruments cited in the draft policy and their application to cultural rights issues. Additional instruments are also summarised, and their interpretation specifically within a museums context is examined. Finally, a number of challenges in applying cultural rights instruments in practice are highlighted.

2 Cultural rights in international and European agreements

(a) An introduction

The issue of the position of minority cultures in nation states has altered significantly over time. In pre-modern times, the development of cultural group identities could proceed relatively unmolested due to the low incidence of travel between regions, the lack of extensive communications means and the distance of mechanisms of government. Even under the control of large empires, such as that of Rome or of the Ottomans[2], while those who had direct contact with government or trade entities

[1] Department of Culture, Arts and Leisure. 2011. *Museums Policy for Northern Ireland: Summary of Consultation Responses*: p4.

[2] For a description of the Ottoman Millet system, see Abu Jaber K. 1967. 'The Millet System in the Nineteenth Century Ottoman Empire' in *The Muslim World* 57:3, pp212-223.

adopted appropriate cultural or linguistic standards, group cultural identities could usually develop independently[3].

The development of Western modernity, coupled with massed communication methods and increased mobility associated with globalisation[4], has led to centralised, streamlined notions of identity and a retreat of minority cultures, both in states themselves and through modern colonial influences abroad[5]. In the late 20th Century, political changes following the demise of socialist regimes in Europe led to a situation where[6]:

> *...the international community came to understand that unsettled majority-minority relations constituted a serious threat not only to the internal peace and security of the states concerned, but also to peace and security in Europe as a whole.*

Consequently, attempts have been made to defend minority cultures from two major challenges. Firstly, nation states have sometimes reacted to perceived threats from minority identities by the suppression of cultural or linguistic expression, such as the Turkish response to Kurdish culture[7]; secondly, minority cultures have tended to decline in the face of assimilative processes associated with dominant cultures, often coupled with implications of superiority and inferiority, such as the decline of the Welsh language and culture prior to the renaissance of the 1970s[8].

Rights-based approaches to minority cultures have moved through a number of debates, which can be summarised as follows:

- Cultures that are under threat due to active suppression or decline in the face of other dominant cultures or influences, and need to be protected in order to survive[9]
- The preservation of cultural identity can be used as a rationale for undermining the rights of individuals. However, the application of individual rights trumps group rights[10]
- The protection of cultural rights is not sufficient to halt the decline of cultures. Rather, positive actions are needed to promote minority cultures[11]

[3] See, for example, Hingley, R 2005. *Globalizing Roman Culture: Unity, Diversity and Empire*.

[4] See, for example, Featherstone, M. 2003. 'Localism, Globalism and Cultural Identity' in Linda Alcoff and Eduarda Mendieta (eds), *Identities: Race, Class, gender and Nationality* pp342-356.

[5] For a study on the 'single civilisation' model of encroachment on minority cultures, see Şentürk, R & Nizamuddin, A. 2008. 'The Sociology of Civilisations: Ibn Khuldun and a Multi-Civilisational World Order' in *Asian Journal of Social Science* 36, pp516-546.

[6] Hoffmann, R. 2006. 'The Framework Convention for the Protection of National Minorities: An Introduction' in Marc Weller (ed), *The Rights of Minorities: A Commentary on the European framework Convention for the Protection of National Minorities*, pp1-2.

[7] See, for example, Kírişí, K & Minrow, G. 1997. *The Kurdish Question and Turkey*, p.25.

[8] See, for example, Thomas, A. 2004. 'The Welsh Language', in Donald McAuley (ed), *The Celtic Languages*, p253.

[9] See, for example, Kymlicka, W. 1995. *Multicultural Citizenship: A Theory of Minority Rights*.

[10] For example, Addo, M. 2010. 'The Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights' in *Human Rights Quarterly* 32:3 601-664.

[11] The promotion of the Welsh language is an example, where the Welsh Language Act 1993 placed Welsh on an equal footing with English (http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=468378), which has recently been followed by

With this in mind, a common three-pronged approach to human rights in general can be traced through a range of international human rights standards, as follows[12]:

1 Equal rights for everyone is the basic rule
2 The prohibition of discrimination is intended to achieve the equal enjoyment and exercise of rights
3 Where this is insufficient, special measures are expected to achieve the same

This approach applies equally to cultural rights as to any other form of human right.

Current debates interrogate the nature of cultures which, when under threat or used as a key element of a contested identity, are often seen as fixed according to static or stereotypical features, rather than subject to fluid developmental processes.[13] The paradox between preserving what is perceived to be the key markers of a culture and the need for cultures to develop in their own way continues to impact upon the assertion of cultural rights.

(b) International human rights standards

Article 27(1) of the **United Nations Universal Declaration of Human Rights and Fundamental Freedoms** (UNDHR)(1948) states the following[14]:

> *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

While open to interpretation, this article implies that people should not be prevented from participation in cultural life, as opposed to a duty on a state to promote a culture, and it is also directed towards the right of an individual, rather than referring to group rights.

The ***Hague Convention*** *(1954)*[15]provides for the protection of cultural property during armed conflict. States are required to take measures to ensure that cultural property is not damaged during conflict (Article 3), that it is respected (Article 4), and if it can be moved, that it be placed in a place of safety to prevent damage (Article 8). Although the UK government 'agrees that protection of cultural property in the event of armed conflict is a priority', it has never ratified the convention[16].

---

the Proposed Welsh Language Measure for certain rights for Welsh speakers and a Welsh Language Commissioner (http://www.assemblywales.org/ms-ld7944-e.pdf).

[12] Alfredsson, G. 2006. 'Article 4' in Marc Weller (ed), *The Rights of Minorities: A Commentary on the European framework Convention for the Protection of National Minorities*), p145.

[13] See, for example, Maalouf, A. 200. *On Identity*; or Yun Kim, Y. 1996. 'Identity Development: From Cultural to Intercultural' in Hartrut Mokros (ed), *Identity and Interaction*, pp347-370.

[14] http://www.un.org/en/documents/udhr/index.shtml.

[15] http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[16] Department for Culture, Media and Sport. 'Hague convention: the Government's position': http://www.culture.gov.uk/what_we_do/cultural_property/6630.aspx Accessed 13.1.11.

The ***International Convention on the Elimination of All Forms of Racial Discrimination*** *(CERD)(1965)*[17] is primarily concerned with the enforcement of existing rights being applied to minority ethnic groups, Article 5(e)(vi) ensuring a right to equal participation in cultural activities. This is not further defined, but the principle of non-discrimination can be applied more generally where one culture is promoted by the state and another is not, if it can be proven that the difference of treatment is on racial grounds.

Articles 15 (1) and (2) of the ***International Covenant on Economic, Social and Cultural Rights*** *(CESCR)(1966)* state[18]:

> *1. The States Parties to the present Covenant recognize the right of everyone:*
>
> *(a) To take part in cultural life;*
>
> *(b) To enjoy the benefits of scientific progress and its applications;*
>
> *(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*
>
> *2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*

While Article 15(1)(a) appears to reiterate Article 27 of the UNDHR, Article 15(2) of the CESCR suggests that a context has to be maintained by the state in order for people to enjoy their cultural rights. This seems to move from the protection of culture to the promotion of culture, for which the state has a duty.

The ***United Nations Convention on the Rights of the Child*** *(CRC)(1989)*[19] is far more explicit regarding the context that has to be created for the cultural development of children. With particular regard to the education of children, Article 29(1)(c) states that the education of the child will be directed to:

> *The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.*

This gives a clear indication that the educational development of children should allow for their linguistic and cultural identity. Taken with Article 17(a), states should:

[17] http://www2.ohchr.org/english/law/cerd.htm.
[18] http://www2.ohchr.org/english/law/cescr.htm.
[19] http://www2.ohchr.org/english/law/crc.htm.

> *Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29.*

By this, the cultural education of children does not take place in isolation, but there is an onus on developing media resources to assist and inform this process.

International standards, therefore, provide a framework by which individuals are to be assured rights to their own cultural practices, provided they do not impinge on individual rights. In particular, rather than the right to practice a culture that is already associated with an individual, children have rights regarding their educational development in terms of cultural development and the acquisition of a culture. While this implies a context in which cultural development may take place, the standards are not explicit with regard to the extent and nature of the context, or what duties the state and related cultural agencies have to provide this context.

However, it is important to note that international standards, unlike European Union or domestic law, are not directly judiciable and therefore tend to be unevenly implemented. While the failure to implement international human rights treaties can lead to a degree of embarrassment for the governments in question, commentators have noted that the application of international human rights standards in domestic law is complex and uncommon[20], and that the lack of incentive to implement such standards or to police treaties has led to a significant level of non-compliance[21].

(c) United Nations Educational, Scientific and Cultural Organization (UNESCO) conventions

There are three key UNESCO conventions which are of relevance here. It is important to note that these are not legally binding[22], though they are agreements signed by the Member States which have chosen to participate (which includes the UK in all three cases). In this context, they may be cited in legal cases, but cannot themselves form the basis of legal judgements.

The **UNESCO Universal Declaration on Cultural Diversity** (2001)[23] asserts that cultural diversity is 'the common heritage of all humanity', and recognises that 'cultural diversity is as necessary for humankind as biodiversity is for nature'. Most pertinent to the issue of cultural rights is Article 5, which states that cultural rights should be regarded 'as an enabling environment for cultural diversity'. The article states that,

> *Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent.The flourishing of creative diversity requires*

[20] McGoldrick, D. 2010. 'The Boundaries of Justiciability' in *International Comparative Law Quarterly.* 59: pp981-1019.
[21] Hathaway, O. 2002. 'Do Human Rights Treaties Make a Difference?' in *Yale Law Journal*. 111, pp1935-2042.
[22] Graber, CB. 2006. 'The new UNESCO Convention on Cultural Diversity: A counterbalance to the WTO?'. *Journal of International Economic Law* 9(3): 563.
[23] UNESCO Universal Declaration on Cultural Diversity: http://unesdoc.unesco.org/images/0012/001271/127160m.pdf

> *the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.*

The **UNESCO Convention Concerning the Protection of World Cultural and National Heritage** (1972)[24] was responsible for the setting up of the World Heritage List, and emphasises the 'conservation and protection of the world's heritage'. It recognises 'cultural heritage' and 'natural heritage' as distinct categories (to which 'landscapes' was later added). Though the tone is largely one of safeguarding and preservation, rather than active promotion, Article 4 does refer to 'the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage'. The convention also prescribes the setting up of a fund, and encourages states to create 'educational and information programmes'.

Further to the 1972 convention on heritage, the **UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage** (2003)[25] is concerned with non-physical heritage, including oral traditions and expressions, performing arts, social practices, ritual and festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship. It seeks to complement the 1972 convention and covers similar ground. Although most of the text is concerned with safeguarding in a passive sense, there is a hint that the active representation or promotion of intangible heritage is desirable. Article 1 states a purpose,

> *…to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;*

(d) European human rights standards

The ***European Convention on Human Rights*** *(ECHR)(1950)*[26] has set out the main European rights standards for the past sixty years and the articles of the Convention were translated into UK law through the Human Rights Act 1998[27]. The Convention is not specific to cultural rights, although rights to 'freedom of thought, conscience and

[24] UNESCO Convention Concerning the Protection of World Cultural and National Heritage: http://nia1.me/3q
[25] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage: http://nia1.me/3r
[26] http://conventions.coe.int/treaty/en/treaties/html/005.htm.
[27] http://www.legislation.gov.uk/ukpga/1998/42/contents.

religion' (Article 9) and 'freedom of expression' (Article 10) could have some cultural application. However, the right to non-discrimination (Article 14) includes the following:

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

This can be used in conjunction with, for example, Article 2 of Protocol 1 of the Convention[28], the right to education (which is included in the Human Rights Act):

> *No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

If access to education is impeded by, for example, language or minority status, the issue of cultural rights can be raised through the Convention.

The ***European Charter for Regional or Minority Languages*** *(ECRML) (1992)*[29] outlines obligations relevant to language rights. Article 7(1) sets out a number of principles, including the following:

> *(c) the need for resolute action to promote regional or minority languages in order to safeguard them;*
>
> *(d) the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life;*
>
> *(e) the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages;*

This suggests a formal promotion of a minority language used in the territory of the signatory state. Article 8 goes further, to require the state to make available pre-school, primary, secondary, technical and vocational, university and adult and continuing learning education in the minority language. In terms of cultural repositories controlled by the state, Article 12 indicates the role to be played in the encouragement of the use, learning and dissemination of minority languages by:

> *libraries, video libraries, cultural centres, museums, archives, academies, theatres and cinemas, as well as literary work and film production, vernacular forms of cultural expression, festivals and the culture industries, including* ***inter alia*** *the use of new technologies...*

[28] http://conventions.coe.int/treaty/en/treaties/html/009.htm.
[29] http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=148&CL=ENG.

For purposes of the Charter, 'regional or minority languages' refer to those used traditionally in the territory of the state by a group that is numerically smaller than users of the official language, but not including dialects or migrant languages (Article 1).

The more specific standards relating to cultural rights emerging from the Council of Europe are in the context of the ***Framework Convention for the Protection of National Minorities*** *(FCPN)(1995)*[30]. In particular, Article 4(2) states:

> *The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.*

This would imply that states have a duty to take steps to ensure equality between minority and majority cultures. In this respect, Article 5(1) is more explicit:

> *The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.*

That states are obliged to create a context for minority cultural development implies that there is a duty to ensure minority cultural elements are adequately represented in appropriate settings under state control and influence. It is not sufficient to leave minority cultures to their own devices[31]:

> *It is not enough for the state to leave the minority to sink or swim. There is an obligation to provide an environment in which the minority can flourish if the members so wish. Moreover, the minority must be allowed to flourish as far as possible; there can be no glass ceilings put in the way of the minority culture.*

While the majority of articles in the Framework Convention are protective, ie designed to prevent hindrance to minority cultural development, there remain duties to be more proactive, such as Article 12:

> *The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.*

Fostering such knowledge of a minority culture, history and language would imply inclusion of such elements within the relevant cultural institutions of the state.

[30] http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm.

[31] Gilbert, G. 2006. 'Article 5' in Marc Weller (ed), *The Rights of Minorities: A Commentary on the European framework Convention for the Protection of National Minorities*, p157.

The European Union has lacked a specific human rights framework until the ***Charter of Fundamental Rights of the European Union*** *(CFREU)(2000)*[32]. While setting human rights standards for the EU, the Charter has not been binding until the ratification of the Lisbon Treaty[33]. The articles of the Charter, however, are primarily confined to protections and freedoms, rather than duties on Member States to promote minority cultures. Article 22 states that 'The Union shall respect cultural, religious and ethnic diversity'. As with other human rights standards, there is a commitment to non-discrimination (Article 21):

> *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

Therefore, the exclusion of a linguistic or national minority from a cultural setting where others are promoted could be construed as discrimination under this article.

(e) Northern Ireland agreements

The ***Belfast Agreement*** *(1998)*[34] set out certain commitments regarding how the different cultural traditions should be treated, as follows:

> *3. All participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.*
>
> *4. In the context of active consideration currently being given to the UK signing the Council of Europe Charter for Regional or Minority Languages, the British Government will in particular in relation to the Irish language, where appropriate and where people so desire it:*
>
> - *take resolute action to promote the language;*
> - *facilitate and encourage the use of the language in speech and writing in public and private life where there is appropriate demand;*
> - *seek to remove, where possible, restrictions which would discourage or work against the maintenance or development of the language;*
> - *make provision for liaising with the Irish language community, representing their views to public authorities and investigating complaints;*

[32] http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
[33] http://europa.eu/lisbon_treaty/full_text/index_en.htm.
[34] Belfast Agreement. 1998. 'Economic, social and cultural issues: http://www.nio.gov.uk/agreement.pdf Accessed 17.1.11.

- *place a statutory duty on the Department of Education to encourage and facilitate Irish medium education in line with current provision for integrated education;*
- *explore urgently with the relevant British authorities, and in co-operation with the Irish broadcasting authorities, the scope for achieving more widespread availability of Teilifis na Gaeilige in Northern Ireland;*
- *seek more effective ways to encourage and provide financial support for Irish language film and television production in Northern Ireland; and*
- *encourage the parties to secure agreement that this commitment will be sustained by a new Assembly in a way which takes account of the desires and sensitivities of the community.*

While there is 'respect' for Ulster Scots, there are clear commitments in relation to the Irish language.

As a consequence of the Belfast Agreement, Section 75 of the ***Northern Ireland Act*** *(1998)* contains certain commitments to equality between a number of groups[35]:

> *A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—*
>
> *(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;*
>
> *(b) between men and women generally;*
>
> *(c) between persons with a disability and persons without; and*
>
> *(d) between persons with dependants and persons without.*

This list does not include cultural or linguistic groups, but where, for example, culture is perceived to include religious belief or political opinion, cultural equality between groups might be raised under this legislation.

3 Cultural heritage and museums

Within the broader context of cultural rights agreements and instruments, some specific references exist to cultural heritage, and some of these have provided the context for interpretation within a museums context. References to, and uses of, cultural heritage agreements can be grouped into two broad categories: the repatriation of items of cultural heritage, and the right of representation. In general terms, it has been more common for national and international agreements to be used in practice to ensure the

[35] http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2045126.

removal of cultural objects from display, rather than *adding them to* displays in order to correct any perceived omissions. However, a number of agreements allow for, or encourage, groups to assert the right to increased representation in cultural institutions, including museums.

(a) Repatriation issues

The theme of the return – or 'repatriation' – of cultural artefacts or human remains displayed in museums has been a strong one in debates about human rights and cultural heritage. It has also been an area which has seen substantial discussion and policy development in recent years.

Museums professionals and archaeologists in the UK have been working for some time now to deal with the practical ramifications of the association of cultural objects in their care with assertions of identity and ownership by minority groups. In 2003, a Department for Culture, Media and Sport (DCMS) Working Group on Human Remains produced a report which made a series of key recommendations. The report was produced in response to a series of requests made by indigenous groups in Australia, New Zealand and the USA for the return of human remains within UK museum collections. As a consequence, the report established a Code of Practice which specifies a number of procedural responsibilities for museums, including rigour, honesty and integrity, sensitivity and cultural understanding, respect for persons and communities, responsible communication, openness and transparency, and fairness in giving due weight to all parties[36].

The most recent, high-profile instance of a repatriation dispute affecting a UK museum arose as a result of a request made by the Council of British Druid Orders that a Neolithic skeleton in the Alexander Keiller Museum, Avebury, be removed from display and reburied on the grounds that it was 'immoral and disrespectful' to exhibit it. Following a consultation, English Heritage and the National Trust decided to keep the skeleton on display in the museum for the benefit of public access and understanding[37]. The decision was arrived at as a result of four considerations: the benefit to future understanding likely to result from not reburying the remains outweighing the harm likely to result from not reburying them; the request did not meet the criteria set out by DCMS for considering such requests (including the fact that there is little evidence of a genetic or genealogical link between the complainants and the remains in question); not reburying the remains is the more reversible option; and the public generally support the retention of prehistoric human remains in museums, and their inclusion in museum displays.

Outside the UK, Australia, New Zealand, Canada and the United States of America have all had agreements or legislation in place for some time now dealing with the issue of collections within their care which are contested or claimed by minority

[36] Department for Culture, Media and Sport. 2003. *Guidance for the Care of Human Remains in Museums*: p14.
[37] English Heritage. 'Avebury reburial request: results of consultation': http://nia1.me/2v Accessed 7.1.11.

groups[38]. In Australia, codes of ethics have been put in place that recognise indigenous custodial rights, set out the arrangements by which research may be carried out, and what objects and human remains may be placed on display[39]. In the USA also, a suite of State and Federal laws governing repatriation are in place[40].

(b) Representational issues

Beyond the issue of the repatriation of artefacts, cultural heritage has also featured in debates about cultural identity, particularly where it is called upon to support or bolster the identity of minority groups. As a number of commentators have indicated, claims to cultural heritage are often bound up with wider claims for land, resources and ownership. Laurajane Smith, in commenting on the claims exercised by Australian Aboriginal groups, states that,

> *Heritage objects or places, and human remains, are often held to be representatives of community identity, and as such, become important symbolic resources in underpinning claims to cultural identity, which in turn have a consequence in wider negotiations for political legitimacy.*[41]

Resolution No. 1 of the International Council of Museums (ICOM), adopted in 1998, declares a commitment to:

> *c. the development of museums as sites for the promotion of heritage values of significance to all peoples through cross-cultural dialogue,*
>
> *e. promoting access of cultural communities to information and collections relevant to their cultural heritage.*

This second point appears to refer specifically to the issue of ensuring that all groups are adequately represented in public collections. A similar point is made in the UNESCO Universal Declaration on Cultural Diversity (2001), which states in article 6 that 'care should be exercised that all cultures can express themselves and make themselves known'. The article goes on to state,

> *…the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.*

Dealing more specifically with cultural heritage, article 7 states that,

> *Creation draws on the roots of cultural tradition, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be*

[38] Smith, L. 2004. 'The repatriation of human remains: problem or opportunity?' *Antiquity* 78 (300): pp405.

[39] Specifically, Australian Archaeological Association. 1991 (updated 2004). *Code of Ethics*: http://nia1.me/3t; Museums Australia. 2005. *Continuous Cultures, Ongoing Responsibilities: Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage*: http://nia1.me/3u

[40] For instance, the Native American Graves Protection and Repatriation Act (NAGPRA) 1990: http://www.nps.gov/nagpra

[41] Smith, L. 2007. 'Empty gestures? Heritage and the politics of recognition', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: pp160-1.

> *preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.*

The terms 'enhanced' and 'handed on' imply an imperative to actively promote, rather than simply preserve, aspects of cultural heritage.

There would seem to be few examples of particular cultures or minority groups actively *demanding* representation in a national museum collection, where they would not otherwise feature. However, an example of a museum proactively seeking alternative interpretations of a museum display is Manchester Museum which, in 2009, presented an exhibition on Darwinism. A declaration was made through an institutional 'Position Statement' about the importance of the concept of evolution, and this was presented to the Manchester Faith Leaders' Forum and to the museum's Community Advisory Panel. The statement declared that,

> *While the Manchester Museum has taken a definite position on the science of evolution, we support the right of freedom of belief for all and acknowledge that there is a range of perspectives on this subject*[42]*.*

However, in addition to this statement, the museum followed the Museums Association *Code of Ethics*[43] in acknowledging the sensitivity of the subject matter, dealing with its presentation carefully, and involving communities and users. Creationists were invited to debate the concept[44], and the museum offered leadership and advice to other organisations running Darwin- and evolution-themed programmes across north-west England[45].

A similar exhibition was created at Manchester Museum on the prehistoric bog body 'Lindow Man'. The exhibition was informed by extensive public consultation beforehand. The museum sought to present a number of quite different perspectives of the body and its interpretation, including science, archaeology, spirituality and nostalgia, with none privileged above the other[46]. A series of seven recorded voices in the gallery expressed opinions about the origins and circumstances of the body on display. Staff worked to create a dialogue with, for example, those within the pagan community, but without stating that this community had special privileges over any other views.

Aside from the arena of museums, the exclusion of particular heritage sites in the landscape has also been seen to infringe the human rights, or perceived human rights, of particular groups. The case of Ayodhya in Uttar Pradesh, India is significant in that it

[42] The Manchester Museum. 2009. *Position Statement on Evolution as a Scientific Theory*: http://nia1.me/4i Accessed 10.1.11.
[43] Museums Association. 2008. *Code of Ethics for Museums*: http://www.museumsassociation.org/publications/code-of-ethics Accessed 10.1.11.
[44] Correspondence with Dr Nick Merriman, Director of Manchester Museum, 4.1.11.
[45] McGhie, H, Brown, P & Horsley, J. 2010. 'Dealing with Darwin at The Manchester Museum', in A Filippoupoliti (ed) *Science Exhibitions: Communication and Evaluation*. Museums Etc.
[46] Merriman, N, Bienkowski, P & Chapman, M. 2008. 'No automatic rights'. Letter to *British Archaeology* magazine (101). Council for British Archaeology: http://www.britarch.ac.uk/ba/ba101/letters.shtml Accessed 14.1.11.

illustrates the powerful connection between cultural heritage and community identity[47]. Ayodhya is the site of the historically significant Babri Mosque, but is also claimed as the site of the birthplace of Lord Rama by Hindus. The issue of access to the site and its future care became so contested that it became the scene of social unrest and was eventually burned down in 1992. The site continued to be a potent political symbol throughout the early 1990s.

Tensions have also existed in the United States over the interpretation and presentation of Native American heritage. In spite of agreements in place there, archaeological data and interpretation often collide with Native American cosmology and oral tradition and the task of reconciling, or even presenting the two side-by-side, can be extremely challenging[48]. This task is made all the more difficult because of the historical animosity between the archaeological or 'scientific' community, and Native American communities over the issue of the ownership of human remains and artefacts. As cited above, prior to the creation of NAGPRA there were considerable tensions between institutions such as the Smithsonian and Native American communities over the return of objects in their collections.

In spite of these difficulties of reconciling competing traditions or presenting them side-by-side, some commentators have pointed to the importance of attempting such public representations of cultural heritage nonetheless:

> *Cultural heritage requires memory. It is not enough for things and monuments to exist on a landscape: in order to be cultural heritage they must be remembered and claimed as patrimony, even if their original meaning is lost or poorly understood.*[49]

(c) Difficulties in using cultural rights in the context of heritage

There are a number of difficulties and challenges both in using human rights instruments alongside cultural rights in general, but also in applying cultural rights specifically within the context of cultural heritage.

The task of selecting which pasts to preserve can be a matter of long negotiation, with some forms of cultural heritage decided on by a society as not worthy of representation at all. The Communist past of some eastern European states, such as Romania[50] and Bulgaria[51], has been 'deselected' because of the intensely negative view held by many within society. However, social attitudes towards different periods and interpretations of

[47] Lal, BB. 2001. 'A note on the excavations at Ayodhya with reference to the Mandir-Masjid issue', in R Layton, PG Stone & J Thomas (eds) *Destruction and Conservation of Cultural Property*: pp 177-126. London: Routledge.

[48] Mason, RJ. 2000. 'Archaeology and Native North American oral traditions', *American Antiquity* 65 (2) 239-266.

[49] Silverman, H & Ruggles DF. 2007. 'Cultural heritage and human rights', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: p12.

[50] Light, D. 2000. 'An unwanted past: contemporary tourism and the heritage of communism in Romania', *International Journal of Heritage Studies* 6(2): 145-160.

[51] Petkova-Campbell, G. 2006. ' The past, the present and the future of Bulgaria's heritage sites', in D Hull, S Grabow & E Waterton (eds) *Which Past, Whose Future? Treatments of the Past at the Start of the 21st Century, An International Perspective*. British Archaeological Reports International Series 1633.

the past can change, and more recently in the former East Germany there has been some enthusiasm for 'ostalgie', a nostalgia for the pre-unification past[52].

A further difficulty discussed when a claim is made that cultural heritage is being mis- or under-represented is in establishing who has legitimacy in claiming to represent the culture in question. The listing of the 'Rice Terraces of the Philippines Cordillera' as a UNESCO World Heritage Site in 1995 has proved awkward as the views of the local community which is responsible for forming the terraces has emerged as negative towards the listing on the grounds that it restricts changes to their way of life. The recommendation to list the site had come from professional policy-makers in Manila, and not from the local community themselves.

Logan has highlighted the dangers of 'relativism', where any and all views of which cultural heritage to conserve and present are held to be equally valid, making decisions about what to represent in museum collections very difficult to reach[53]. The implication of the UNESCO Universal Declaration on Cultural Diversity (2001), for example, is that all forms of cultural heritage are equally valid, and are equally deserving of conservation. This presents problems where the heritage may derive from particular cultural practices which others regard as offensive. For example, conserving the cultural heritage of the Ku Klux Klan would be viewed by many as problematic[54].

It may be the case that some forms of cultural expression actively contravene either the group rights, or the individual human rights, of others. Human rights are regarded as universal and indivisible, that is, there is no hierarchy of rights as such. However, some commentators have pointed out that in the context of international human rights, the rights of the individual will tend to predominate over the rights of the group, in part due to the difficulties of establishing the legitimacy of a group and its membership[55]. Indeed, some have pointed out that the recognition of cultural diversity itself is a challenge to the very idea of universal human rights[56]. A further issue is the fact that the *process of engaging in* cultural heritage can itself contravene an individual's human rights. The production of traditional rugs and carpets in countries such as India, for example, may be viewed as a distinctive form of cultural heritage, even though arguments have been made about the use of child labour in the production process[57]. In this regard, Logan poses the question,

[52] Berdahl, D. 2005. 'Expressions of experience and experiences of expression: museum re-representations of GDR history', *Anthropology and Humanism* 30(2): 156-170, cited in Silverman, H & Ruggles DF. 2007. 'Cultural heritage and human rights', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: p3-22.

[53] Logan, W. 2007. 'Closing pandora's box: human rights conundrums in cultural heritage protection', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: pp39-40.

[54] Logan, W. 2007. 'Closing pandora's box: human rights conundrums in cultural heritage protection', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: pp37.

[55] Barkan, E. 2007. 'Genes and burkas: predicaments of human rights and cultural property', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: p185, 188-9.

[56] Charlesworth, H. 2010. 'Human Rights and the UNESCO Memory of the World Programme', in M Langfield, W Logan & M Nic Craith, M. *Cultural Diversity, Heritage and Human Rights: intersections in theory and practice*. Routledge: p23.

[57] Sharma, AN, Sharma, R & Raj, N. 2000. *The Impact of Social Labelling on Child Labour in India's Carpet Industry*. New Delhi: Institute for Human Development. ILO/IPEC Working Paper.

> *To what extent should the state remain tolerant in respect of cultural practices that appear to restrict the enjoyment of some human rights by members of a community?*[58]

Article 2 of the UNESCO Convention for the Safeguarding of Intangible Heritage (2003) states that,

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

In a paper given for the Commonwealth Parliamentary Association conference in Bangladesh, this distinction was summarised as follows,

> *Every human has the right to culture, including the right to enjoy and develop cultural life and identity. Cultural rights, however, are not unlimited. The right to culture is limited at the point at which it infringes on another human right. No right can be used at the expense or destruction of another, in accordance with international law.*[59]

Finally, the UNESCO Universal Declaration on Cultural Diversity (2001) states that,

> *No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.*

A further problem exists where the assertion of the cultural rights of a group is interpreted by the state government as representing an attempt to secede from political control. This has been speculated by some as the reason why Australia has not ratified the UNESCO Convention for the Safeguarding of Intangible Heritage, for example[60]. Tensions between UNESCO, the Australian government and the aboriginal Mirrar people over the treatment of Kakadu National Park, a UNESCO World Heritage Site, highlighted the close relationship which can exist between community identity and cultural heritage, and the ways in which this relationship can sometimes work against state government control.

Equally, and in contrast to cultural rights being used to assert secession, nation states may use the cultural rights of a majority culture to attempt the assimilation of minorities. Coffee has described the risk of museums acting as 'agents of ideology', and cites a

[58] Logan, W. 2007. 'Closing pandora's box: human rights conundrums in cultural heritage protection', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: pp44.

[59] Ayton-Shenker, D. 2003. *The Challenge of Human Rights and Cultural Diversity*. United Nations Background Note, 49th Commonwealth Parliamentary Association Conference, 4-12 October 2003.

[60] Logan, W. 2007. 'Closing pandora's box: human rights conundrums in cultural heritage protection', in H Silverman and DF Ruggles (eds), *Cultural Heritage and Human Rights*. Springer: pp41.

number of exhibitions in the USA where 'ideology is…evident in exhibitions celebrating the triumphs of the ruling class'[61].

It seems clear from these examples that a number of ambiguities and contradictions exist in the relationship between cultural rights and universal human rights that may take some time to emerge and resolve.

[61] Coffee, K. 2008. 'Cultural inclusion, exclusion and the formative roles of museums', *Museum Management and Curatorship*, 23(3): pp261- 279.