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Abstracts

DEBUNKING THE VALIDITY OF CULTURE-BASED JUSTIFICATIONS FOR THE RETENTION OF THE MARITAL RAPE EXEMPTION IN INDIA

Adrija Ghosh

Marital rape remains exempt from being categorised as rape in India. While the data collected by the government itself suggests that marital rape is a common occurrence, the government is not inclined towards removing the marital rape exemption from the statute books. In 2015, an NGO called RIT Foundation filed a public interest litigation challenging the constitutionality of the MRE before the Delhi High Court. In this case, the Government took the stand that doing away with the marital rape exemption would destabilise the institution of marriage; lead to harassment of men by their wives and that the international precedent of removing the marital rape exemption cannot be applied to India given the unique differences in relation to the needs and aspirations of the people of the country. Primarily, the government's arguments in favour of retaining the exemption in the country's penal statute are based on cultural relativism.

In this paper, I have attempted to reject the aforementioned justification and have tested the hypothesis that cultural and traditional justifications have no place in the face of the rights and entitlements that ought to be guaranteed to women, including those that are married. I have surveyed human rights instruments that address the clash between gender and culture. Having done so, I have come to the conclusion that culture-based justifications cannot be legitimately used to deny fundamental human rights that are grounded in certain basic common denominators for social justice, such as equality, autonomy and dignity. The arguments forwarded in this paper are based on a combined reading of the human rights law and the 'Capabilities Approach'. I have primarily used Martha Nussbaum's formulation of the capabilities approach, as the focus of her work has been on laying down a threshold level of basic capabilities that must be protected through constitutions and may be demanded by citizens from their governments. Hence, I have examined marital rape as a violation of human rights as well as a form of capability deprivation.

A section of the paper is also dedicated to an analysis of the jurisprudence and philosophy surrounding the removal of the marital rape exemption in other Asian and Middle Eastern countries.

Specifically, I have focused on Nepal, Philippines and Israel to analyse how the said legal systems and societies overcame cultural and traditional barriers to finally reject the marital rape exemption. Drawing from the said analysis, I have sought to establish that the removal of the exemption is not incongruent even within the Indian society.

The central thrust of the paper is that cultural and traditional justifications cannot stand in opposition to claims for gender equality. Cultures must adapt and inculcate within themselves certain basic values essential for maintain a minimum standard of social justice. By using human rights law within the overall conceptual and philosophical framework of the capabilities approach, I have demonstrated that the Indian government's insistence on the retention of the marital rape exemption is illegitimate and unjustified

a student of law in my penultimate year (fourth year) of undergraduate studies, at the West Bengal National University of Juridical Sciences, Kolkata (NUJS). I take a keen interest in the subject areas of international law, constitutional law, human rights and gender justice. Specifically, I wish to be able to use my legal training to spur effective rights-based interventions, through advocacy and research.

Apart from my academic commitments, I have been actively involved with the co-curricular activity of mooting and have represented my University and have received awards at three international moot court competitions, namely, RMLNU International Media Law Moot Court Competition (2017), Manfred Lachs Moot Court Competition (2018), International Criminal Court Moot Court Competition (2019). In these moots, I have also been required to argue problems that have dealt with issues pertaining to public international law, human rights and international criminal law. I have also explored various aspects of public law through my internships with the Hon'ble Justice Chandrachud (Supreme Court of India), Mr. K.K. Venugopal (Attorney General of India) and the Centre for Constitutional Law, Policy and Governance (National Law University, Delhi). Through these experiences in moots and internships, I have been able to further my research interests.

In addition, I have been a Junior Associate member of the NUJS Law Review and have co-authored two academic papers that have been published in the said journal. I have also held positions of responsibility at University and am currently serving as the Director of 'Society for International Law and Policy' and the NUJS Chapter of the 'Students Collective for Public Interest Litigation'. I have previously been the Co-Convenor of the NUJS Moot Court Society (2018-2019) and a member of the Legal Aid Society at NUJS. In December 2019, I was also invited to deliver a lecture to undergraduate students of the Department of Philosophy at a college under the aegis of the University of Calcutta, for a skill enhancement course titled 'Logic and the Law'.

GENDER BASED VIOLENCE IN POST-CONFLICT COUNTRIES. TUNISIA

Aleisha Ebrahimi-Tsamis

The Tunisian National Family Office 2010 inquiry on violence against women reported a national rate of 47% of women experiencing domestic violence, reflecting deep-rooted existence and acceptance of Gender Based Violence ("GBV") in Tunisian society. 2016 gender equality legislation, Law No.60/2016 ("Law No.60"), has acknowledged this and commits to eradicate gender inequality and GBV post-Arab Spring. Law No. 60 has been championed by human rights actors for openly acknowledging entrenched GBV within Tunisian public and private spheres. However, Tunisia's President Essebsi, received open criticism from more conservative and culturally traditional parts of society for denouncing GBV and 'pushing through' gender equal laws. As a direct consequence of his commitment to gender equality, widespread national discord was reported. 'Strong resistance' to the President's commitment to gender equality has been vocalised by opposing political parties

and religious bodies who declared the President's legal reforms as incompatible with Islamic law and as a by-product of his Western education. Notwithstanding President Essebsi's open political commitment to gender equality, the bolstering of women's rights in Tunisia has, historically, largely fallen to grassroots organisations. Such organisations vocalise their concerns which hinge on the crucial role Islamic jurisprudence occupies with respect to the current status of gender equality in Tunisia and more broadly, the Islamic world. Such arguments are founded in challenging historical interpretations of Sharia Islamic law and highlight in compliance with International Human Rights Law in the face of such conservative views, reflecting the need to align society with legal commitments. Civil society actors have argued that those enforcing Tunisian law, including courts of law and the police, have aligned themselves with a traditionally patriarchal approach to the role of women in society on the basis of religion, which has effected the application of the law to the detriment of women. In the face of these barriers posed to realising gender equality, grassroots organisations, NGOs and politicians have turned to Islamic feminism, as a more culturally appropriate academic framework within which to promote women's rights and gender equality in Muslim countries. This paper examines the potential of Islamic feminism to advance commitments made to promote, protect and justify the implementation and upkeep of gender equality in Tunisia as a means of safeguarding Law No.60 by relying on its local legitimacy.

This paper will consider Islamic feminism, as a branch of feminism (with sub-branches), which advocates for a theology asserted and believed to be compliant with both Sharia law and Islamic texts, which sharply juxtaposes with opposing views that GBV is Islamically permitted. Despite originating from an Islamic starting point, Islamic feminism has faced and continues to face considerable resistance in Muslim countries on the basis of being culturally and socially unacceptable. Following an account of Islamic feminism and the conceptual discourse that surrounds it, this paper then analyses how debates about Islamic feminism impact on attempts to combat GBV. Tunisia's political landscape, history and contemporary setting all feed into the analysis, with particular regard being paid to perceptions and responses, some of which amount to clear obstacles, to Islamic feminism by different factions of Tunisian society, including both civil society actors and state authorities. Notwithstanding the identified potential of Islamic feminism, which centres on its credibility within an Islamic setting, the paper recognises a number of potential challenges and seeks to address them.

THE PRACTICE OF ASIAN STATES IMPLEMENTING THE PRINCIPLE FOR PROTECTION OF MONUMENTS AND WORKS OF ART BEFORE THE WORLD WAR I

Alice Lopes Fabris

A *jus gentium* principle for the protection of historic monuments and works of art in times of war has started to be codified in the Nineteenth century. As the first humanitarian instruments were regional, the 1863 Lieber Code of the United States of America, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864 drafted by European and American States, the Declaration of Brussels of 1874 signed by European countries, and the Oxford Manual of 1880 drafted and approved by European and American lawyers, it was only with the Peace Convention at the Hague in 1899 that an universal forum to discuss humanitarian principles took place. At this conference, the principle for the protection of a certain property was unanimously accepted. Those principles, and the instruments that stipulated them, are inspired and established by western countries. However, they were implemented on the Asian continent during conflicts that marked its history, in the pivotal years of the nineteenth and twentieth centuries. In this sense, a study

of the acceptance by the Asian States of those humanitarian principles, since they did not take part in the process of drafting them, could be interesting to understand the amplitude of the consensus of this principle. In the present paper, the application of the principle for the protection of historic monuments and works of art in times of war in Asian conflicts before the World War I will be discussed. The practice in two episodes, the First Sino-Japanese War of 1894-1895 and the Russo-Japanese War of 1904-1905, will be analyzed.

INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL PROPERTY IN NON-INTERNATIONAL ARMED CONFLICT: APPLICABILITY TO NON-STATE ARMED GROUPS IN SYRIA

Allison McClelland

Often fuelled by ethnic, racial or religious tensions, intentional damage, destruction and misappropriation of cultural property have become increasingly commonplace in non-international armed conflict (NIAC). Recognition of the importance of cultural property to peace and security, sustainable development, human rights and post-conflict reconstruction has elevated its protection to an issue of international concern. While the significant damage inflicted on cultural property by States is well documented, academic analysis of the intentional and unintentional destruction exacted by a growing multitude, variation and sophistication of Non-State Armed Groups (NSAGs), is lacking. Arguably, at its height, the Syrian conflict presented us with 'the most widespread destruction of cultural heritage, both intentional and unintentional, since the Balkan Wars of the 1990s and possibly since World War II' (Gerstenblith, 2014). This paper will examine the impact of the Syrian conflict on cultural property as well as rationales for its protection under international law. It will provide an overview of the legal classification of the conflict and the development of the international legal framework for the protection of cultural property in NIAC. Primarily, the paper will examine whether and to what extent treaty and customary international law rules governing the protection of cultural property in NIAC bind NSAGs, specifically with respect to the activities of two key parties to the Syrian conflict: the Free Syrian Army (FSA) and the Islamic State of Iraq and Syria (ISIS). It will analyse the strengths and weaknesses of the six principal explanations for the binding nature of the rules regulating NIAC on NSAGs. Proceeding from the premise that the FSA and ISIS are bound on the basis of one or more of the six explanations, the paper will analyse the substantive content of each group's treaty and customary international law obligations pertaining to the protection of cultural property, before seeking to assess their relative compliance with them. Finally, it aims to consider challenges to the applicability, substance and implementation of these obligations.

AMIN MAALOUF AND THE VALUE OF CULTURAL DIVERSITY FOR UNIVERSAL CULTURAL RIGHTS IN INTERNATIONAL LAW: LESSONS FROM THE LEVANT

Beatriz Barreiro Carril

This paper seek to contribute to the better understanding of current international rights and of their evolution by focusing on the Lebanon of Amin Maaouf. His novel *The Disoriented* dealing with "identity, and the clash of cultures and beliefs"¹ in the contemporary Lebanon appears as a very useful tools for the object of this paper. I will take into account the importance of a right understanding of the legal concepts of universality and cultural diversity in international law.

¹ www.worldeditions.org/product/the-disoriented/

In the first section, I will show the trend that International Human Rights Law has shown to deal with cultural rights. Law -International Law included- being *static* by nature to assure foreseeability, has used for many decades a wrong conception of culture which did not understand its *dynamic* nature, as well as the capacity of diverse cultural expressions to engage in conversation among them and to generate common and universal cultural expressions. Culture was commonly seen as a risk for universality and universal human rights. In the second section, I will explain how things started to change and International Law has definitively left the attitude of “demonizing” culture and started to put into question the wrong conceptions it has been used.²Such a change is clear in the works of two different organs of United Nations: The Economic, Social and Cultural Rights Committee and the Independent Expert of Cultural Rights, established in 2009, the same year that such a Committee issue its General Comment on the right to take part in cultural life. The third section, will put the attention on the notion of cultural diversity and its links with International Human Rights Law. Cultural diversity is essential for an adequate understanding and implementation of Cultural Rights understood as universal rights. This paper will explain such a concept of Cultural Diversity as it is developed in the 2005 UNESCO Cultural Diversity Convention). I will base my analysis of the concept of cultural diversity also on the draft of this convention made by an interdisciplinary group who included international but also experts from other disciplines, including Amin Maalouf. The fact that Amin Maalouf was at the origin of the text of the Cultural Diversity Looking into extra-legal tools for contributing to the understanding of cultural rights is therefore essential, and literature, as Martha Nussbaum shows through the concept of *narrative imagination*, is therefore key. This paper seeks to contribute to explaining the value of cultural diversity for universal cultural rights in legal terms through the novel of Lebanese-born French author Amin Maalouf *The Disoriented*. This novel offers invaluable material for the understanding of complex legal concepts- culture, identity, and community- which are at the core of an adequate use of cultural rights and cultural diversity which avoids segregation and contribute to the knowledge among diverse cultural expressions and to the fulfillment of the universal human dignity.

COUNTERING ONLINE ANTIQUITIES TRAFFICKING NETWORKS FINANCING TERRORISM IN SYRIA AND IRAQ

Barbora Brederova & Layla Hashemi

With the recent war-related looting of ancient Syrian and Iraqi sites, illicit antiquities from these countries entered the art market *en masse*. Modern use of the internet and online sales platforms further create endless opportunities for anonymous no-questions-asked transactions, and the new profitable business ventures with nearly unlimited global reach generate revenue for terrorism and other forms of armed violence in the Near East.

The main objective of the Countering the Looting of Antiquities in Syria and Iraq (CLASI) project was to investigate the elaborate supply chains and mechanisms that finance terrorism through antiquities smuggling to the west. Due to their heavy presence in the market, significant attention was given to ancient coins. The project also aimed to address what sources, methods and tools would be most effective for combating this type of transnational crime and to examine how responsible selling and consumption of cultural heritage can be promoted.

Efforts to enhance our understanding of smuggling practices through online sales monitoring illustrated the nature and dynamics of suspicious sales but, at the same time, revealed difficulties

² Merry, S. E. (2003) “Human Rights Law and the Demonization of Culture (And Anthropology Along the Way), *PoLAR* 26 (1). 55-76 p. 67.

with mapping potential smuggling networks. Such challenges often involved invented identities and provenances, as well as 'piggybacking' – a practice of mixing genuine and illegally traded items that appears to be more common than previously anticipated. The mitigation of this problem through social media investigation proved efficient as such accounts are widely used for advertising material for sale, arranging deals, and maintaining contacts with suppliers and customers.

The project concluded with suggesting that information derived from monitoring and tracking smuggling endeavors could be an effective tactic to interrupt a major part of terrorist funding. This approach could allow law enforcement to take vigorous action against criminal traders and their associates. As a result, collecting illicit antiquities would be less culturally and financially rewarding, which could potentially reduce the demand in the west

INDIGENOUS PEOPLE IN SOUTH ASIA: SAFEGUARDING CULTURAL HERITAGE IN A CHANGING WORLD

Devashree Talunkar

A number of indigenous peoples possessed of diverse and distinct history, traditions and ways of life reside in South Asia, some of whom are estimated to have lived there since ancient times. Their existence has been time and again threatened and their lives altered, by invasions and colonisation. Throughout history, their cultural heritage has been wrested from them and they have been denied recognition of their separate cultural identity.

In recent years, a phenomenon that continually affects indigenous culture is the modern notion of progress. This is particularly true in the developing economies of South Asia where the struggle for progress of the nation as a whole has sometimes led to forcible integration of indigenous people in the mainstream society. In the course of this struggle, the cultural heritage and traditions of these communities have either been lost or diminished. Even where integration has not been brought about through direct force, economic hardships triggered by loss of lands traditionally occupied by the indigenous communities and depletion of natural resources on which their livelihoods once depended has caused them to abandon their traditional way of life.

As in many other parts of the world, national laws in South Asia have attempted to protect the cultural heritage and in some cases provided special protection to indigenous communities. The international community has also in recent years recognized the need to safeguard the distinct identity and culture of indigenous people, through international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007.

This paper seeks first of all, to examine the concept of 'cultural rights' in international law, in the context of indigenous people. It will also consider the term 'indigeneity' and its meaning South Asia. It will examine British colonial policy towards indigenous people and its role in shaping the present-day South-Asian laws relating to indigenous people. It will further seek to scrutinize the laws of India and Bangladesh, to determine to what extent they are consistent with and inclusive of the safeguards provided by international law to indigenous people. Finally, it will consider the adequacy of such laws and whether they provide sufficient protection to indigenous communities and can effectively safeguard their cultural heritage.

HUMAN RIGHTS AND UNDERWATER CULTURAL HERITAGE: MIGRANT SHIPWRECKS

Dr. Elena Perez-Alvaro

In history, there have been large movements of people for many reasons, such as climate change, conquest, slavery, demographic growth, or the formation of new states. This migration has either been forced or voluntary. Most of those movements have crossed continents and some of them have crossed the sea. Some of the vessels used for these movements have sunk, and there is still news today of sunken boats that have dead migrants on board. In fact, the trade of refugees is considered to be the modern-day slave trade. Population movements before 1945 were mainly, although not only, due to colonialism, slavery, and war refugees. These three movements are still happening: colonialism in the shape of domination and the exploitation of native people or of genocide, slavery in its modern form of women and children sexual exploitation, and war refugees, which is a problem that the world is facing more than ever. For the benefit of the argument, this article will look at refugees' travels by boat as a continuation of the slavery middle passage. Although this approach may seem too ambitious, the abusive treatment of refugees in overcrowded dinghies, the human degradation on the journeys, the race and ethnicity of the victims, and the interconnection of the modern trade with the world economy are the main reasons for this inevitable comparison. There are, however, many other reasons, such as the high mortality of these population movements due to illness and shipwrecks, the sea travel of the migrants to find a new country, and the human and legal neglect of the immigrants if they do reach land. Some of these refugees are part of a network of illegal smuggling or are forced to work once they arrive on land. In fact, 'The Coolie Trade' was, and seems to still be today, a type of slave trade Chinese to the American continent disguised as immigration movements. What is more important for the development of this article is the travel by sea that both slaves and refugees have had to endure in order to reach the new land. Although most of those vessels and sunken boats do not have an especial cultural, historical or archaeological importance to be preserved as underwater cultural heritage, the process of recognising it as heritage is a memory-making activity that may serve as an example for the future, as it is today slave shipwrecks. As a consequence, this article explores not only slave and refugee shipwrecks that have been underwater for more than 100 years, but also vessels that still sink today. This will create a bridge that will let us explore the history of these human movements by sea, examining the ethics behind this human trafficking and its place within the underwater cultural heritage preservation debate, also examining the slaves and refugees' belongings on board of the vessels carrying them. To conclude, this study will analyse the responsibility that the international community has, not only with the refugees that reach land -out of our scope- but with the human remains after those boats have sunk.

SOCIAL ENTERPRISE GROUPS FOR SOUTH SUDANESE REFUGEE SURVIVORS OF SEXUAL AND GENDER-BASED VIOLENCE AND TORTURE LIVING IN SETTLEMENTS IN NORTHERN UGANDA

Dr. Helen Liebling and Professor Hazel Barrett

The paper to be presented will provide empirical data that demonstrates the success of social enterprise groups established following British Academy/Leverhulme-funded research with South Sudanese survivor refugees living in settlements in Northern Uganda.

The conflict in South Sudan is characterized by human rights violations, including sexual and gender-based violence (SGBV) and torture, with over 1.5 million South Sudanese fleeing to Northern Uganda. Our innovative British Academy/Leverhulme-funded research project investigated the impact of SGBV and torture on refugees' health, including their psychological and reproductive health. It analysed health, welfare and social justice needs of men and women refugees using a gendered approach from their own and service providers' perspectives. The research team investigated the experiences of 20 men and 31 women refugee survivors living in 3 locations in Adjumani and Bidi Bidi refugee settlements and 37 key stakeholders. The research found women refugees became heads of households and men torture survivors were frequently not registered as they often arrived in Uganda after their wives and also did not register for safety. As a result of this men refugees could not access treatment for their injuries. Their health problems left men unable to work and support their families. The sparse services struggled to respond to refugees' health and social justice needs. The services received were better for women refugees but women told us they were at risk of SGBV from locals, relatives and other refugees and lacked personal security. Specialist reproductive, gynaecological and maternity health services for women survivors and medical treatment for male survivors of sexual violence and torture were particularly lacking. This research further indicated refugees pressing needs were to improve access to livelihoods as well as emotional support for their experiences.

Subsequently, the researchers successfully obtained Enterprise funding from Coventry University to assist with this. Six men and women refugee social enterprise groups were established in Bidi Bidi and Adjumani refugee settlements in northern Uganda. The researchers provided training in developing and running a social enterprise as well as strategies for emotional support. The project worked in collaboration with the Refugee Law Project <https://www.refugeelawproject.org/>, Isis-Women's International Cross-Cultural Exchange <http://isis.or.ug/> and Kitgum Women's Peace Initiative, <https://www.peaceinsight.org/conflicts/uganda/peacebuilding-organisations/9339-2/> all international community-based organisations in Uganda. They utilise participatory methodologies aimed at empowering refugees and capacity building Ugandan organisations. The enterprise groups were evaluated using a self-report scale which, addressed factors including the ability to run a social enterprise, resilience, ability to care for themselves and their families. Focus groups discussions were also held and analysed using thematic analysis.

The paper will present the results and describe the different ways in which culturally-informed social enterprise groups are improving the lives of the 36 women and men refugees, their families and communities. It will discuss the intended application of the researcher's holistic model through combining social enterprises with emotional support in service delivery with urban refugees in Kampala.

STRATEGIC USE OF CUSTOMARY LAW AS A PROMISING TOOL FOR SOCIAL CHANGE: AN OVERVIEW OF THREE CHAMPION CASES

İlayda Eskitaşçıoğlu

Taking inspiration from the contentious UN Human Rights Council resolution adopted in 2012, which recognized *"that the better understanding and appreciation of traditional values contribute to promoting and protecting human rights and fundamental freedoms"* and Stuart Scheingold's *"myth of rights"* theory, this paper aims to find answers to the following questions: is it possible to create real social change through the use of customary law as a tool? Can Scheingold's criticism towards

human rights talk being ineffective in creating social change be refuted through successful cases of human rights realization with the use of the customary law? Can a better understanding of traditional values, as framed by the Human Rights Council, be used for the promotion of human rights and further essential social changes?

This paper discusses the questions above by analyzing three relatively successful cases in which customary law has been used as a tool for the promotion of human rights and social change: (1) the '*isbat nikah*' practice in Indonesia, (2) the '*imece*' system in rural Turkey and (3) the Aboriginal Community Courts in Australia. For all three examples, firstly, a brief explanation of the use of customary law will be made. Secondly, an analysis will be made for each, focusing on the way the customary law is integrated within the national human rights framework, which human rights they are associated with, and whether they actually create social change. Following, the paper will end with some concluding remarks on how to understand the success of such uses of customary law as a tool, and despite being promising, how they can not be a panacea.

SEEKING REFUGE IN THE ENVIRONMENT: NATURAL HERITAGE SITES, HERITAGE PARKS, AND PROTECTED AREAS AS SAFEGUARDS OF TANGIBLE AND INTANGIBLE CULTURAL HERITAGE IN THE PHILIPPINES

John Vincent T. Castro

With over seven thousand six hundred forty-one (7,641) islands, the Republic of the Philippines is a mega-diverse country, rich in ecosystems, species, genetic resources, and cultures. In the country's fragile ecosystems exist over a thousand endemic flora and fauna and one hundred ten (110) ethno-linguistic indigenous peoples group. All of which have a sensitive symbiotic relationship with nature. Land is life in indigenous cultural communities in the Philippines and is important to their psychological, moral, spiritual, social, educational, and recreational well-being. There, however, exists no law on tangible and intangible cultural heritage of indigenous peoples in the Philippines. The article shows the overlap between ancestral domains and protected areas that house important natural heritage and tangible and intangible cultural heritage. Indigenous cultural communities consider many protected areas as sacred natural sites. The article highlights the spiritual value attached to ecosystems or its components and the rich cultural diversity and heritage found in them. In spite of the distinct and spiritual importance attributed to ancestral domains and protected areas, the article argues that the inadequate Indigenous People's Rights Act of 1997, together with increasing social and economic activities in their land, result to the decay, degradation, and destruction of sacred natural sites. The article reviews the protection offered by the 1972 World Heritage Convention, the 1984 ASEAN Declaration on Heritage Parks and Reserves, and the National Integrated Protected Areas System Act of 1992, as amended by the Expanded National Integrated Protected Area Systems Act of 2018, to ancestral domains that overlap with protected areas and discusses advantages and disadvantages of the international convention, regional declaration, and national law.

DESTRUCTION AND LOOTING OF CULTURAL PROPERTY IN YEMEN'S CIVIL WAR: LEGAL IMPLICATIONS AND METHODS OF PREVENTION

Julia Emsteva

As the list of victims of the Yemeni internal conflict continues to grow, people there are vulnerable not only to annihilation by rebel attacks and Arab Coalition strikes, but also to the deprivation of their cultural identity and history. The international community focuses on the humanitarian catastrophe caused by the multiplicity of armed groups while the destruction and damage of Yemeni historic sites is mostly ignored. Both customary international law and treaty law recognize the destruction of or damage to cultural heritage as a war crime and establish accountability for those responsible for these unlawful acts. This paper confirms that the official government of Yemen, as well as the Arab Coalition, failed to justify their actions in accordance with the military necessity principle. The looters, namely the Houthis and terrorists, should also bear responsibility for ransacking Yemeni cultural sites. However, combatants and their commanders are not the only actors who contribute to the deprivation of the cultural identity of peoples. Those who buy the stolen art objects smuggled from the war zones and then display them either at their homes or art galleries and museums are aiding and abetting the war crime of plunder and thus should bear responsibility as well. The paper will first provide the facts about the destruction of the Yemeni cultural property and then apply these facts to the relevant legal instruments and studies in order to ascertain the liability of those responsible. The same will be done with the crime of looting. The final part will discuss the existing mechanisms of the protection of cultural heritage and who is obliged to safeguard cultural sites and objects both during wartime and peacetime.

PROTECTION OF CULTURAL HERITAGE IN CHINA: A LEGAL AND ETHICAL OVERVIEW FROM THE LENS OF HUMAN RIGHTS

Jia Wang

The protection of cultural heritage is becoming more and more important for both international and domestic human rights initiatives. Culture is often conceived as an intangible collection of customs and other distinguishable qualities which have great potentiality in assisting and assuring the realisation of the meaning and purpose of human existence. Culture could also be materialised into tangible objects, historical sites, and intellectual products, etc. Both individual and community possess certain cultural identities that are inherited and passed on as their cultural legacy. This paper aims to provide a brief overview of the protection and promotion of cultural heritage in China from both legal and ethical perspectives.

The first part of the paper draws on the legal framework concerning the protection of cultural heritage in China. The protection of material cultural heritage has taken the lead in the 1980s in China marked by the *Cultural Objects Law* (entered into force in 1982 and most recently amended in 2017). Violations of this law are criminalised and can be punished according to the *Criminal Code* (entered into force in 1979 and amended in 2017). In the recent decade, more attention and resources have been paid to the protection of intangible cultural heritage in China. It is noted that in almost all central and local governmental initiatives, the protection of cultural heritage relies on the government's responsibility to administer and protect.

The second part of the paper explores the ethical dimension of the protection of cultural heritage in China. It tackles three compelling issues concerning cultural heritage protection in China. They are repatriating a large amount of previously looted antiquities from China during the 1860s,

maintaining historical sites amidst the rapid expansion of urban space driven by social development, and the legalisation of private commercial transaction. Contextualisation of these compelling issues in China reveals the following paradox. On the one hand, the focus on the collective character of cultural rights and the abovementioned Chinese legal framework mirrors the core of Chinese culture which perceives the meaning and purpose of the self as being a part of the broader society and collective identity. On the other, for members of this cultural environment to thrive, individual rights and demands have to be justified by social recognition.

In the discussion part, the author argues that the current legal protection of cultural heritage in China primarily rests on the recognition of cultural rights as collective rights are largely due to China's historical experience. The protection of cultural heritage, similar to other fields of domestic legislation in China, has not yet fully embraced a human rights-based approach. Conventional values such as fairness and justice still dominate China's domestic legislation and foreign policies. Finally, the paper concludes with the remark that the protection of cultural heritage cannot be viewed as a standalone human right issue and its improvement could be substantially influenced by a critical cultural acceptance in China, which positions individuals at an equal level with society, if not prioritises. That critical cultural acceptance has been seen with positive expressions in public but subjects to further development.

MOVING PAST POST-COLONIAL: RETHINKING INDIGENEITY AND SELF-DETERMINATION IN SOUTHEAST ASIA

Jin Ming Tan ad Alec Thompson

Two Contested concepts are key to understanding postcolonial Southeast Asia's apparent resistance to the advancement of Indigenous People's rights: indigeneity and the right to self-determination. Asia is home to two-thirds of the world's indigenous population, but there is a notable dearth of legal discourse on indigenous rights. Adopting a critical Third World perspective, the proposed paper will argue that advocacy by the global indigenous movement, heretofore dominated by European settler states, should be adapted to engage more effectively with the realities of postcolonial Southeast Asia.

First, the paper will highlight the complex debates that surround the concept of indigeneity. Indigeneity must be seen as a political declaration to ground claims for rights. Political upheavals in the region through the period of colonisation and decolonisation, the heterogeneity of marginalised ethnic minorities and international advocacy organisation have shaped the self-perception of people groups claiming indigeneity, as well as state responses to them. Southeast Asian states contest that the international definition of "indigenous peoples" should only apply to populations that have suffered from saltwater settler colonialism. Such a recognition endangers the idea of a 'nation-state', which governments of Asian states view as a threat to their territorial sovereignty. As such, this paper will investigate the enduring impact of colonial policies on notions of indigeneity and the emergence of postcolonial constitutions in the region.

Second, the paper will analyse the internal/external dichotomy of the right to self-determination. The former was developed primarily by Western states through key cases like *re Secession of Quebec* and state submissions to the ICJ in proceedings for its advisory opinion on Kosovo, while the latter was prominently claimed by the Third World during the period of decolonisation to gain independence. As a result, democratic governance became a dominant indicia, if not synonymous, with internal self-determination. This paper will argue the inheritance of these Western political values, and the development of the right to self-determination in the context of decolonisation, has

produced a structure poorly suited for the unique challenges and circumstances of Southeast Asian indigenous groups. The internalisation of this structural legacy has led to difficulties in asserting the right to self-determination in Southeast Asian states.

AINU, AN INDIGENOUS PEOPLE IN JAPAN. PROTECTION OF CULTURE AND REPATRIATION OF HUMAN REMAINS

Makoto Shimada

Ainu is an indigenous people of Japan who have lived for centuries on the northern island of Hokkaido. Like some other indigenous and minority peoples in the world, Ainu have long suffered the effects of a policy of forced assimilation. Ainu has also been a target of research interests. Throughout the 20th century, a dozen of universities in Japan collected and stored Ainu human remains and burial accessories for research purpose. In particular, Hokkaido University had nearly 1,500 collections, which were mostly excavated by researchers from “abandoned graveyards”. In 2012 and 2014, legal cases were brought by individuals and/or a group of Ainu people against Hokkaido University for return of certain remains which were alleged to be looted from their graveyards. In these cases the claimants faced difficulty in verifying their right to request restitution of each of the remains claimed. That is mainly because the concept of legal ownership of human remains under Japanese law is not consistent with Ainu customs and philosophies. While such issue was unresolved, in 2016 and 2017, the claimants and the university reached settlement agreement, pursuant to which the latter returned the remains to be buried in the original graveyards. Meanwhile, the Japanese government has decided its policy towards Ainu people recently. In 2008, the National Diet of Japan approved a resolution, calling upon the government to recognize the Ainu as indigenous to Japan. Following the resolution, the government started preparing a draft Act (which was enacted in April 2019), confirming Ainu as an indigenous people for the first time and aiming at supporting their culture and communities. In parallel with the deliberation of this Act, the government suggested the universities which retain Ainu remains to return them to Ainu. In 2014 and 2018, the government published guidelines for restitution procedure of Ainu human remains, etc. However, the policy of the government concerning return of Ainu remains is still criticized by Ainu people as being insufficient. In particular, they insist that it is not appropriate to apply the existing Japanese law, based on the philosophy and customs of the ethnic Japanese, to Ainu who has different customs. This paper first introduces the issues raised in the above legal actions for repatriation of Ainu human remains. The paper then analyses the Japanese legislation related to treatment of human remains, its relationship with the current Ainu policy of the government, and possibility to return the Ainu remains under the existing law.

THE CULTURAL LEGITIMACY LOST THROUGH THE DENIAL OF CULTURAL RIGHTS WITHIN A MULTICULTURAL CONTEXT (THE CASE OF THE ISLAMIC REPUBLIC OF IRAN)

Niloufar Omid

This paper examines the cultural legitimacy of a state in the context of denying citizens, with different affiliations, their cultural rights. It draws on the case of Iran, a country with considerable cultural diversity and geopolitical significance in the Middle East.

The paper first describes the depth of cultural diversity throughout Iran before discussing the key elements shaping multiculturalism in this vast country. The second section of the paper analyses the Constitution of the Islamic Republic of Iran and its approach to cultural rights. Here, the discussion

focuses on the extent to which cultural diversity has constitutional recognition and which cultural rights are recognised and implemented by this legal source. To this purpose, it analyses the preamble (Section: The Public Media), Articles 19 and 20 of the Constitution, alongside the last report of the UN Special Rapporteur on the situation of human rights in this country (A/74/188 July 2019). It then explores the *extent* to which the government is obliged to *respect the cultural rights based on the Constitution*, on the one hand, and the current situation of cultural rights in Iran, on the other hand.

The last section of the paper examines how the denial of cultural rights by an effective authority can make the authority illegitimate in the context of cultural diversity. It discusses the influence of the recognition of cultural rights on the legitimacy of a state, illustrating the interaction patterns between these two elements. It demonstrates how the explicit denial and lack of awareness and understanding of the cultural rights of people from different ethnicities, traditions, religions and sects evident in Iran's Constitution has impeded the legitimacy of the state and led to a rise in increased insecurity and civil disobedience.

The paper concludes that every state requires, *inter alia*, cultural legitimacy to govern effectively, and this kind of legitimacy is based on a context which facilitates the recognition, implementation and enforcement of cultural rights of different minorities from various ethnic, religious, and linguistic backgrounds who reside in a country. Thus, the realisation of cultural rights should not be regarded as a gift to be granted to a nation. Rather, it should be considered a constitutional imperative for the government. Otherwise, states should expect consequences such as increased civil disobedience in response to the denial of cultural recognition and loss of cultural legitimacy, a core element of a state's general legitimacy. They might hold the position of authority, but they will not be recognised as legitimate authorities by the left behind citizens.

PARTITION, MEMORIALISATION AND GENDER IN PAKISTAN

Dr. Qudsia Mirza

The first museum to commemorate the 1947 Partition of India and Pakistan opened recently in Amritsar, India in 2017. Thus, it has taken seventy years for India to memorialise the trauma of that event. Pakistan (and Bangladesh) have still not acknowledged the existence of Partition in any official capacity.

This paper explores the public discourse in Pakistan over questions of collective recollection of the event, of state memory, particularly in relation to the disproportionate trauma suffered by women as victims of abduction, rape and sexual assault. Although the ideological deployment of a constructed 'Pakistani/Muslim woman' was integral to the nationalist cause, women's experiences have not been included adequately in the country's state historiography or other official versions of history.

This paper contends that one of the reasons for the overwhelming silence on the memorialisation of Partition is that official recognition would entail the country's need to address the widespread violence that women were subjected to during, and in the aftermath of the event. In addition, policies of Islamisation in decades subsequent to Partition also presented particular constructions of womanhood which have had an enduring and damaging effect.

In attending to the issue of Partition, it would be necessary to address and challenge such constructions of femininity and sexuality and the violence that women were subjected to. In addition, there would be a need to address issues of masculinity and how the violence women suffered compromises the construction of the 'Pakistani/Muslim man'. This infliction of violence on women

has been perceived as a 'stain' on notions of masculinity and of male honour. This paper offers an analysis of the complex interplay of policies of Islamisation and ideals of femininity and masculinity and how these have contributed to Pakistan's failure to memorialise Partition.

PROTECTING CULTURAL HERITAGE BY RECOURSE TO INTERNATIONAL ENVIRONMENTAL LAW: CHINESE STANCES ON STATE LIABILITY

Riccardo Vecellio Segate

Several international policy documents define the environment as made of "natural heritage" and "cultural heritage" together, along the lines of concepts such as "biosphere" or "ecosystem" which have been introduced relatively recently to define the complexity of humanenvironment interactions. Nevertheless, distinguishing natural heritage from the cultural one helps analyse situations where damage inflicted to the former negatively impacts the latter. In fact, cultural heritage sits under siege worldwide due to polluting activities and environmental degradation, which are causing irreparable damage to—or even the disappearance of—valuable expressions of civilisations' legacy. Most damages are transboundary, thereby calling into question bilateral forms of States' liability; others involve a globalised dimension of climate change, addressed through "trusteeships" whereby the international community establishes centralised compliance schemes which are built on incentives and sanctions while do not necessarily provide for clear-cut liabilities. Yet, this uncertainty on the liability schemes to be applied to different sources of environmental damage to cultural heritage remains underexplored in legal scholarship, which rather tends to focus on the protection of cultural heritage in armed conflicts, on environmental damages exclusively considering environment's natural elements, on state liability within domestic jurisdictions only, or on liability as a corollary of state responsibility. Two categories of events are to be assessed: those where a home damage to the environment results in damage to cultural heritage abroad, and those where the damage to both occurs directly extraterritorially; these both may occur due to state initiatives, or through malpractices of corporations which are neither owned nor controlled by the State. Strict, absolute, or "soft" liabilities are invoked by privates when their property is violated, or by States when their heritage as collective good is damaged, but might also involve the international community as a whole when such cultural expressions are deemed of public interest and conceptualised as "global commons". When it comes to damages of this sort, it is unlikely that States purposively caused them or even deliberately refrained from preventing them; what is more, these damages often occur as a result of concurrent actions by multiple countries over extensive periods of time. Consequently, the legal analysis on liabilities warrants to be framed under a broader cosmopolitan solidarity and burden-sharing perspective, whereby States voluntarily uphold the convenience of selected forms of international liability, in order to protect cultural heritage and contain one of the most perilous side-effects of deregulated anthropisation. To this end, China's metamorphosis from law-recipient to law-maker status on the international plane is worth focusing on. By scrutinising Beijing's approach to (international) environmental law during the "Western humiliation" period, the WW2 aftermath, the "Cultural Revolution" and the transition to world power status under the label of "socialist market economy with Chinese characteristics", it is possible to draw inferences on what liability schemes for cultural heritage protection are deemed desirable in Chinese politics and discourses. An investigation of the values underpinning China's policies over the last decades facilitates the tracing of the normative spillovers from environmental law to cultural heritage law (and vice versa), as well as the debunking of implementation asymmetries between domestic and international preferences.

CULTURAL HERITAGE DESTRUCTION DURING THE ISLAMIC STATE'S GENOCIDE AGAINST THE YAZIDIS

Sean Fobbes, Ahmed Khudida Burjus, Kristen Hopper

On 2 August 2019, the eve of the 5th anniversary of the attacks on Sinjar by the Islamic State (IS), RASHID International, Yazda and the Endangered Archaeology in the Middle East and North Africa Project (EAMENA) released the results of their investigation into cultural heritage destruction during the genocide against the Yazidis in a 117-page report entitled '**Destroying the Soul of the Yazidis: Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis**'. The report is available online and is open access. We presented the results of our investigation to the international community in order for these deeds to not go unacknowledged and unpunished.

The proposed presentation will summarize key findings from the report and place them in the larger legal and political context of cultural heritage destruction in the modern era. It will be split into three parts of 10 minutes each, to be held by senior representatives from RASHID International, Yazda, and EAMENA, respectively.

Part 1 of the presentation will explain the rationale behind the investigation and contextualize it within the international legal framework. Discussions of the genocide committed against the Yazidi people by IS from 2014 onwards have generally focused on murder, slavery and sexual exploitation. In our report we analyzed the destruction of Yazidi tangible and intangible cultural heritage as a significant facet of the Islamic State's policy of ethnic cleansing and genocide. The destruction of cultural heritage is most often placed under the heading of war crime, but we argue based on extensive case law that it can also viably be prosecuted as the crime of persecution and serves as evidence of the special intent to commit genocide.

Part 2 will introduce the Yazidi (Êzidî being the preferred term) people and the strong connection to their cultural heritage. The speaker will further provide an overview of the conventional acts of genocide committed against the Yazidis. The Islamic State made no secret of its intention to eradicate the Yazidi community and commenced a coldly calculated policy of ethnic cleansing and genocide on 3 August 2014, causing untold harm from which the community has not recovered to this day.

Part 3 will discuss original research, evidence and context regarding the destruction of Yazidi tangible cultural heritage in the Bahzani/Bashiqa and Sinjar areas of northern Iraq. We present satellite imagery analysis conducted by the EAMENA Project, drawing on data provided by Yazidi representatives. According to the Department of Yazidi Affairs in the Ministry of Awqaf and Religious Affairs in the Kurdistan Regional Government 68 Yazidi sites were destroyed by the Islamic State. We consider 16 sites in the Bahzani/Bashiqa area and 8 in the Sinjar area to which access was possible and which could be documented. In our report we included descriptions and religious importance of each site, satellite analyses and photographic evidence. The presentation will highlight key examples to give the audience an appreciation of the value of the full report.

TRUST(S) "WITH CHINESE CHARACTERISTICS" AND CULTURAL HERITAGE PROTECTION IN THE PEOPLE'S REPUBLIC OF CHINA.

Simona Novaretti

This paper will analyze two of the most original typologies of trust currently employed in the People's Republic of China (hereinafter: PRC): "cultural property trust" (文物托管 *wenwu tuoguan*) and "museum trust" (博物馆托管 *bowuguan tuoguan*).

These are types of trust so far almost neglected by Chinese national legislators and rarely investigated by Chinese legal academics. In the last decade, however, they have aroused the interest not only of the scholars most concerned about the protection of Chinese material cultural heritage, but also that of collectors, owners of movable and immovable cultural relics, museums and (more in general) public and private institutions, and have originated some relevant, even if not very frequent, experiments at local level.

In this article, I will explore the above-mentioned developments, still little known by non-experts, both inside and outside the People's Republic, which I believe, in the future, could prove instrumental in the creation of a truly effective system of management and promotion of the cultural heritage.

In particular, I will start analyzing the general definitions of "cultural relic" and "trust" contained in PRC's laws and legal theory. Then, I will explore how Chinese legal actors have been able to take advantage of the vagueness of these definitions to "create" two new types of cultural heritage trusts, different but (at least apparently) equally useful in enhancing the protection of Chinese material heritage. Finally, I will devote some attention to the proposals, *de jure condendo*, recently advanced by Chinese scholars in order to introduce the concepts of "cultural property trust" and "museum trust" in Chinese legislation, and to the results of the experiments in these fields already carried out within the territory of the PRC.

THE ROLE OF EDUCATION IN PROTECTING THE RIGHT TO CULTURE OF INDIGENOUS PEOPLES AND ETHNIC MINORITIES AND IN PEACE BUILDING: THE ROHINGYA

Siobhan Smith

Since 2016, military-led operations in Rohingya Muslim minority communities in Myanmar have caused the displacement of hundreds of thousands of people, destroyed schools in hundreds of devastated villages, caused hundreds of schools to be closed, and killed untold numbers of students and teachers.³ This paper examines the situation within Myanmar in order to highlight the role that education can play in protecting the right to culture of indigenous and minority groups, and the peace building effect of this. The paper analyses the right of Rohingya minorities to education and culture, in accordance with Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights respectively, which Myanmar has ratified. Article 27 of the International Covenant on Civil and Political Rights also protects the right to culture, though this instrument has not been subject to ratification by Myanmar. The paper continues to discuss the role of education as a powerful tool for the realisation of the right to culture of indigenous peoples and minorities, particularly where such individuals are displaced on a mass scale. More importantly, where education is provided in a manner consistent with the protection of the right to culture, it has a significant role in preventing

³ Global Coalition to Protect Education from Attack, *Education under Attack: 2018* (Global Coalition to protect Education from Attack 2018), 173

armed conflict and restoring peace. Education can prevent conflict where the equal right of all groups to education is respected, and where the education promotes, by incorporating the culture of indigenous or minority groups into the curriculum, values such as mutual respect, understanding, and conflict resolution. Education itself can conversely play a contributory role in the outbreak of armed conflict, for example, tension and violence between groups may increase where curricula, language policies or teaching methods are insensitive towards the cultures of indigenous or minority groups.⁴ While education can prevent or cause a conflict, it can also be instrumental in the restoration of peace. The role of education in peace building is in fact mentioned in many peace agreements.⁵ This paper finally considers the ways forward in respect of the situation of the Rohingya in Myanmar, including the issue of reparations. The finding of this paper is that more needs to be done in Myanmar to not only ensure the right to education for the Rohingya, but also to ensure that this education is provided in a manner that facilitates the realisation of their right to culture, as doing so is vital for peace in Myanmar.

IMPLEMENTING THE OBLIGATION TO RETURN ILLICITLY EXPORTED PROPERTY TO THE AUTHORITIES OF AN OCCUPIED OR FORMALLY OCCUPIED TERRITORY: WHO BEARS THE OBLIGATION UNDER IHL?

Sofia Pouloupoulou

During the armed conflict in Iraq in 2003, a Jordanian specialised unit was established on the Iraqi border to control the illicit transport of Iraqi heritage, as part of the measures taken by Jordan to seize and safeguard Iraqi cultural property. In 2008, the Jordanian government returned to the Iraqi authorities stolen artefacts that were looted from archaeological sites around Iraq. A similar example concerns the case of the mosaic of Apostle Marcos, which was illicitly removed from the occupied areas of Cyprus and repatriated to the country from the Netherlands in 2018. In light of the examples above, this paper aims to identify the scope and duty-bearers of the obligation to return cultural property to the authorities of occupied territories or territories previously occupied and enquire into the monitoring system that oversees the implementation of the provisions related to the return of cultural property to the aforementioned territories. The Convention on the illicit trade in cultural property establishes the obligation of states parties to suppress illicit practices by “removing their causes, putting a stop to current practices, and by helping to make the necessary reparation.” Paragraph 3 of the First Protocol for the protection of cultural property in the event of armed conflict also imposes obligations on all states parties by requiring that “each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph.” Contrary to the above, Rule 41 of the Customary International Humanitarian Law Database by the International Committee of the Red Cross only considers the obligation by the occupying power to return illicitly exported cultural property to be of customary nature. The scope of the obligation is therefore more narrowly construed in Rule 41. Considering that Jordan and the Netherlands are parties to the First Protocol for the protection of cultural property and that Cyprus and Iraq are occupied and formerly occupied territories respectively, the case-studies of repatriation of artefacts to Iraq and Cyprus provide an excellent opportunity to analyse the applicable legal framework and shed light on the interpretation and practical application of the obligation to repatriate illicitly exported property. In addition, the analysis

⁴ Global Education Cluster, *Booklet 6: Education for Building Peace, Protecting Education in Countries Affected by Conflict Series* (Global Education Cluster 2012), 3-5

⁵ Kendra E Dupuy, ‘Education in Peace Agreements, 1989–2005’ (2008) 26 *Conflict Resolution Quarterly* 149, 149

of the applicable legal framework allows for an enquiry into the monitoring system in charge of the implementation of the respective obligations by states. Considering that the practice of the existing monitoring mechanisms within the Geneva Conventions of 1949 is limited, enquiring into the monitoring system of the First Protocol for the protection of cultural property will provide a useful insight into the system and practice of other treaties falling within the IHL framework.

MIDDLE EASTERN ANTIQUITIES FOR SALE IN ASIA: A NEW MARKET AND A NEW TRAFFICKING ROUTE?

Steven Gallagher and Stefan Gruber

The international community has responded to concerns about the looting and trafficking of antiquities from the Middle East by implementing legal and regulatory measures. In particular, this response has been spearheaded by the USA and the European Union, promoting cooperation between themselves and the source states of the Middle East to prevent Europe being a thoroughfare for this trafficking, and Europe and the USA being markets and final destinations for this looted heritage. The main drive for the involvement of the USA and the European Union has been the possible use of the sale of looted antiquities for terrorist funding. Although the Middle East continues to have a serious looting issue, the efforts of the international community have been celebrated for making it more difficult for traffickers to feed the illicit markets. However, if one route is made more difficult, then traffickers search for easier routes through more amenable, less concerned and less vigilant states. The states of Asia, and in particular Southeast Asia, have their own heritage looting concerns. Their government and local officials may be less aware of the issues involving antiquities from the Middle East or even that these items are from the Middle East. Customs and other authorities in Asia also have a reputation for flexibility and blind eye cooperation. Therefore, it should be no surprise to find antiquities from the Middle East and even classical Greece and Rome openly for sale in the major art markets of Asia. This paper documents some of these offerings and proposes that an open offering of antiquities from these vulnerable cultures only represents a tiny fraction of the Middle Eastern and classical antiquities sold in and trafficked through Asia.

RIGHT TO LAND AS PART OF THE RIGHT TO CULTURE: AN INTERNATIONAL LAW CRITIQUE OF THE RECENT SUPREME COURT ORDER ON THE INDIA'S FOREST RIGHTS ACT 2006

S Pandiaraj

On 13th February 2019 the Supreme Court of India delivered a decision of vital significance to the forest governance in India. The apex court's decision came in a case challenging the constitutional validity of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA). In addition to challenging the FRA, the petitioners (wildlife activists, conservation NGOs and retired forest officials) also prayed for eviction of the tribals whose claims had been rejected under the Act. Accepting the arguments of the petitioners that FRA has (among others) led to large-scale devastation of forests, the Supreme Court privileged conservation over people's rights, and ordered that all households whose rights claims under FRA have been rejected should be evicted from forests by 27 July 2019. The order has been under the stay until today.

Against this background, this paper will look at the Feb.13, 2019 order through the prism of international human rights law, particularly in the light of India's international legal obligations

arising out of human rights instruments that it has voluntarily agreed to. While arguing that this order is anti-tribal, anti-forest dwellers, and is against international legal norms, the paper will try to demonstrate the same by reference to India's international human rights obligations and the relevant jurisprudence. Locating this order within the matrix of the linkages between land rights and the protection of cultural ethos of the indigenous community, it will specifically demonstrate that right to enjoy one's own culture incorporates a plethora of aspects that have been disregarded by the Court in this case. These include: collective aspects of the enjoyment of culture and protection of lands, territories and resources of tribals within this cultural matrix; a right against forced eviction and the right to free, prior and informed consent of the tribals before interfering with their way of life and cultural practices. While calling for an explicit recognition in international human rights law of land as a human right in view of the central significance of land as a sustainer of culture, the paper will also argue for a separate law on evictions in India based on global standards.

THE MINORITY REPORT 2.0: CHARACTER & CIVIC EDUCATION & THE CULTURAL RIGHTS OF BAHÁ'IS IN IRAN?

Tahirih Danesh

The Twentieth Century gave birth to a vision of modern human rights believing humanity will 'never again' face atrocities similar to those experienced during World War II. However, recurrence of atrocities in Rwanda, BiH, South Africa, The Congo, Afghanistan, Iran, Iraq, Sri Lanka, Syria, Yemen or other instances highlight the need to strengthen human rights, including cultural rights.

In parts of Asia and the Middle East, often the tensions between modernity and tradition, mean that cultural rights are often among the first casualties of human rights violations against minorities. A clear example is that of the Baha'i minority in majority Muslim MENA. Although the case of the Baha'i minority involves a range of Asian and Middle Eastern countries, perhaps the most obvious case is the 18-decade-long anti-Baha'i pogrom in Iran. More recently, since the establishment of the Islamic Republic, Iran has systematically persecuted this minority as part of its state secret blueprint, by ignoring its own laws, violating its international commitments, spreading propaganda, and using vague and random references to bar Baha'is' access to rights, as individuals or as a community.^[1]

The sustained efforts to 'block of the progress' of the Baha'i minority in Iran, has impacted their access to cultural rights. This largest non-Muslim religious minority has suffered the loss of several of its globally treasured sacred heritage sites, is branded as 'unclean' whose members cannot take part in many public spaces, including educational or care facilities, are banned from maintaining any form of administration, and are systematically eliminated from institutions in charge of higher education, arts, entertainment or cultural efforts nationwide.

Given the primacy of education among Iranians, one way to tackle this issue is through education. Although Iran boasts high levels of technical and academic education, the rise in the level and types of violence throughout Iran, including the case of the Baha'is, points to significant cavities in the cultural corpus of the Iranian nation rooted in the 1981 Islamic Cultural Revolution. The state-sponsored policies and practices of this process reshaped and 'cleansed' education and culture in Iran through Islamification of academic subjects, and erosion of individual and collective characteristics that foster a culture of human rights.^[2]

RECONCILING CONSTITUTIONAL LAW, GENDER EQUALITY AND RELIGIOUS DIFFERENCE: LESSONS FROM *SHAYARA BANO*, INDIA'S TRIPLE *TALAQ* DECISION⁶

Professor Vrinda Narain

Muslim women in India are subject to discriminatory religious personal law that regulates their status within the family and the community and are unequal relative to both Muslim men and other Indian women. The personal laws regulate family relations and are the only laws which apply to individuals on the basis of their religious identity. Whereas all religious personal laws disadvantage women, the postcolonial Indian state has reformed some of the most egregious gender discrimination in the personal laws of other religious groups while Muslim law remained unreformed as it was seen to be a minority rights issue.

The public regulation of Muslim women's inequality is a consequence of the contradiction between constitutional guarantees of equality and state sanctioned discrimination against them under Muslim personal law. Simultaneously included and excluded from equal citizenship, Muslim women are located at the intersection of public sphere equality and private sphere discrimination, facing discrimination within the family in the 'private sphere' and denied the constitutional guarantee of equality. The public/private binary underpins the preservation of Muslim personal law as the private sphere of autonomy for Muslim religious leaders, exempt from the constitutional requirements of equality, as a demonstration of the state's commitment to upholding minority rights.

The contradictions inherent in the simultaneous existence of discriminatory Muslim personal law and constitutional equality guarantees pose serious challenges for Muslim women's equality. The status of Muslim women is politically controversial in India and also resonates globally as pluralist democracies grapple with questions of minority rights, social diversity, women's equality and democratic inclusion. This paper considers *Shayara Bano*, the 2017 decision of the Supreme Court of India declaring instant divorce, or Triple *Talaq (talaq-e-biddat)* unconstitutional. The Indian case offers a constructive lens through which we can consider these questions and it holds important lessons for other societies with multiple legal systems. Balancing women's equality with religious freedom, responding to the call for change from within the Muslim community, this decision is an important milestone in the evolution of Indian religious freedom jurisprudence. The objective of this paper is to examine the extent to which constitutional guarantees, and their judicial affirmation, can ensure justice for Muslim women. Considering how best to balance women's equality, minority rights and religious difference is an exciting area of study that resonates across global democracies as they grapple with the issue of fostering constitutional cultures that can strengthen citizenship, equality and the protection of women's human rights.

^[1] See: A Revolution Without Rights available online at: <https://fpc.org.uk/publications/a-revolution-without-rights-women-kurds-and-bahais-searching-for-equality-in-iran/>

^[2] See: A discriminatory educational discourse by Saeed Paivandi in Iran Human Rights Review: Youth available online at: <https://fpc.org.uk/wp-content/uploads/2012/08/1482.pdf>

⁶ *Shayara Bano and others v Union of India and others*, (2017) AIR SC 4609