

Legal Assessment of the Human Rights Limitations on the Preservation of Cultural Heritage

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This article researches the following questions: defining the protectable subject matter as cultural heritage in the International Law, the obligation to protect the cultural heritage and evaluation of the cultural heritage as a Human Rights issue. Additionally, assessment of the Human Rights-based limitations on the preservation of the cultural heritage and legal grounds for the right to destroy and its limits have been discussed. It is defined that, the obligation to protect the cultural heritage is a duty established by the International Law on the states, rather than on the non-state actors. The general approach for the assessment of the Human Rights limitations on cultural heritage protection is expected to be based on the principles of balance of interests and the limited transformation or conditionality.

Keywords: cultural heritage, preservation of cultural heritage, destruction of cultural heritage, human rights limitations on cultural heritage preservation, right to destroy.

Žmogaus teisių apribojimo kultūros paveldui išsaugoti teisinis vertinimas

Straipsnyje nagrinėjami šie klausimai: saugotino objekto kaip kultūros paveldo apibrėžimas tarptautinėje teisėje, pareiga saugoti kultūros paveldą ir kultūros paveldo vertinimas kaip žmogaus teisių problema. Be to, aptartas žmogaus teisėmis pagrįstų kultūros paveldo išsaugojimo apribojimų ir teisės sunaikinti teisinių pagrindų bei jos ribų įvertinimas. Apibrėžiama, kad pareiga saugoti kultūros paveldą yra tarptautinės teisės nustatyta pareiga valstybėms, o ne nevalstybinėms organizacijoms. Tikimasi, kad bendras požiūris vertinant žmogaus teisių apribojimus kultūros paveldo apsaugos srityje bus grindžiamas interesų pusiausvyros ir ribotos transformacijos ar sąlygiškumo principais.

Pagrindiniai žodžiai: kultūros paveldas, kultūros paveldo išsaugojimas, kultūros paveldo naikinimas, žmogaus teisių apribojimas kultūros paveldui išsaugoti, teisė sunaikinti.

Introduction

International cultural heritage protection law providing safeguard for cultural heritage has emerged as a response to the intentional destruction of cultural heritage. There are examples when the cultural property is destroyed due to urban changes to the views of the cities (UNESCO, 2013; UNESCO, 2011) or establishment of infrastructure (UNESCO, *The Rescue of Nubian...*), or for the purposes of

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demolishing the ideas of colonialism, oppression¹, etc. Also, establishment of monuments or statues reflecting 'values' in some political regimes may be subject to debates and when there happen changes, in most cases those monuments are destructed by the new regimes, governments or by people (UNESCO, *The Mutilation of Bucharest...*, p. 27).

Although, cultural heritage protection refers directly to the protection from state actions, but sometimes destruction may be held by non-state actors against some group of people (for example, deliberate destruction of Buddhas in Bamiyan, Afghanistan) (UNESCO, *Cultural Landscape...*) as well.

By its substance, cultural heritage is the expression of the values of the community reflecting certain (national) identity, and particular groups realize their certain human rights upon their cultural property. It means that cultural heritage is one of the instruments for realization of human rights. Moreover, universal value of the cultural heritage takes it to be recognized as the common heritage of humankind.

The right to destroy is assumed to be one of the elements of ownership. In some circumstances, it can be accepted as form of freedom of expression. Or, it can be part of cultural engineering (or civil (re)construction) based upon certain legal grounds.

Protection of cultural heritage is recognized in International Law as a duty of states to preserve (preservationist approach). Human Rights limitations on the preservation of cultural heritage may be observed from two sides. The first one is about limitations to find the right balance in relation with conflicting rights (freedom of expression, access to truth, protection of the cultural heritage, etc.). The second side is about cultural engineering or civil (re)construction in the society.

This research paper analyses the issue of the legal assessment of the Human Rights limitations on the preservation of cultural heritage in the following domains:

1. Assessment of the subject matter of cultural heritage protection (questions such as what deserves legal protection; whether it is a subject matter, having outstanding universal value; to what extent value-neutral objects may be protected as cultural property; historical value of the cultural property which its unwanted message has been expired; cultural property of special importance to a non-state group, integrity of the culture, etc.).
2. Assessment of the intent behind the destruction of cultural property (whether it is about changing the historical facts or hostile destruction of the cultural heritage belonging to others; whether it is about building infrastructure; prevention of unwanted message to the community; freedom of expression through destruction of monuments; destruction of monuments memorializing human rights violation; etc.).

This article focuses on the physical cultural heritage such as monuments or statues (not intangible cultural heritage such as traditional knowledge or traditional cultural expressions).

1. Protectable subject matter within the frame of cultural heritage protection in the International Law

Cultural heritage reflects the cultural development of society. Although, there is not sole definition of cultural heritage in the International Law, it does not mean impossibility of defining it in a unique way, but it means that different platforms are tended to different aspects of the multi-faceted components of cultural heritage in compliance with their purposes. Protection of cultural heritage has been enshrined in the different fields of the International Law, as it is an anthropological phenomenon and related

¹ Experiences in South America (Destruction of the statues of Spanish conquerors; Removal of the sculptures celebrating colonialism in Peru, etc.)

with the environment, economic and social development, trade, etc. Meanwhile, determination of the main ideas and principles of cultural heritage protection in combination with the Human Rights Law, starts with the initial questions such as what is the protectable subject matter in the cultural heritage protection and ‘determination to whom that belongs’ (Introduction in: Francesco, Vrdoljak, 2020) or to what extent it matters who is the owner (otherwise, objective and subjective criteria).

As to the first question, mostly used terms are: ‘cultural heritage’ in general meaning, terms such as ‘cultural property’, ‘natural heritage’, ‘cultural objects’, ‘tangible and intangible cultural heritage’, ‘movable and immovable cultural heritage’ and the term of ‘cultural good’. The term ‘cultural heritage’ in general meaning refers to all of them or it can be said that cultural heritage as an anthropological concept is formed around all these objects implying to the interrelationship (moral and physical) between the human and the objects constituting material subject of the cultural heritage.

Analyses of the international treaties (The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; The UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage; The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage) shows that the main component of the protected subject matters is the *culture or cultural aspects expressing certain additional value*. This value is subjective and directly related with the ‘human’ factor and subject to certain public interest in truth, certainty, memory, identity, etc. expressed in these objects (More discussed at: Lenzerini, 2011; Merryman, 1989). Moreover, it is not stable and changes depending on the social factors. Protection of ‘property’ and ‘culture’ aspects has been raised in scholarly debates (Mastalir, 1992, p.1037–1039). The main point is that, if the subject is just ‘property’ or just ‘heritage’, then that to be regulated by the national Civil Law. Difference of cultural property from any property is in its cultural value. Property implies to ownership (containing a range of individual rights including the right to alienate, exploit or exclude) (Prott, O’Keefe, 1992, p. 310) and commerce. From this point of view, the content of the cultural aspect is expressed in the international legal instruments as having “outstanding universal value”, “great importance to the cultural heritage of every people”, “artistic, historical or archaeological interests”, “value from the point of view of history, art or science”, “value from the historical, aesthetic, ethnological or anthropological point of view”. It means that, the protectable subject matters in the cultural heritage refer to the same or similar values and in the similar domains. And, the term ‘value’ implies to information, truth and attribution (More discussed at: Wangkeo, 2003, p. 189–191) which is related with the core values of human rights (General Comment No. 21... ; Donders, 2020, p. 379). But, legitimacy of these values depends on the interpretation in the light of the socio-political and economic circumstances existing at the time of revision. Information and attribution imply to possible information related with the origin, history or traditional setting of people, communities or groups having those as their identities and specific features. Although, the rights of the indigenous people, groups and communities are increasingly getting recognized, the international legal instruments are mostly state-oriented. Core values sometimes are explained to be preservation, access, and truth which implies to the purposes in respect to the protected values. Although those imply to moral aspects of cultural heritage, economic and social development aspects are important elements as well.

The question who is the owner of the cultural heritage or to what extent it matters who is the owner needs to be assessed from the point of human rights protection. Two main theoretical models in relation with cultural property is known as ‘nationalist’ and ‘internationalist’ approaches (more at: Merryman, 1989; Merryman, 1986) which both of them are valid and have legitimate grounds. The first implies to the national identity of a group which attributes national character and that’s why nations have special

interest in its protection. The second refers to the common interest in the cultural heritage of all nations independent of its origin, location, jurisdiction or any property rights which implies to the shared interest of humanity in cultural heritage protection. This means respect to and preservation of diversity worldwide. Legal regime for the preservation of cultural heritage does not consider the ownership as an important element for the purposes to protect.² Communities to whom cultural heritage belongs (identification) and owners (holders) of the cultural property need to be differentiated. Currently, there are objects constituting cultural heritage whose original owners do not exist *now*.

Determining the cultural object that can be protected as cultural heritage and the assessment of the public (general) or private interest should be accepted as much more important element rather than the question of who the owner of the cultural heritage is. Because, if there is any kind of interest in the cultural heritage, that interest takes it to be a protectable subject matter. That interest can be public interest of the community, general interest of the world community or even private interests such as academic research, etc. Thus, that implies to shared interest in the protection of cultural heritage (Francioni, 2004, p. 1210). And, these interests are towards the core elements (values) of the cultural heritage which have been discussed above.

Thus, in fact cultural heritage forms around any cultural property ('physical artifacts' (Amineddoleh, 2015, p. 729)) or cultural object which means, the cultural heritage is a much more abstract term rather than the cultural property which implies to physical existence. Although cultural heritage in principle is not any phenomena reflecting definite legal content and meaning (for example, such as right to freedom of religion, etc.) as it is a dynamic concept, but it is recognition of the (cultural) values of groups and communities in relation with some object. For the purposes of the protection of cultural heritage, ownership approach or clarification of ownership is less effective than a shared interest.

2. Current international legal frame of the obligation to protect the cultural heritage

Current international legal frame started with addressing to the states rather than to the non-state actors in relation with the obligation to protect the cultural property in times of war.

Existing legal frame comprises various provisions coming from different fields such as protection of cultural property during the armed conflicts, prevention of the illicit trade of cultural goods, prevention of deliberate destruction of cultural heritage, conservation of the cultural heritage including traditional cultural expressions, traditional knowledge through Intellectual Property rights, protection of biodiversity through Environmental Law, etc. Multi-faceted aspects of cultural heritage make necessary to apply fragmented approach to the conservation of cultural heritage and makes it difficult to provide unity in the international cultural heritage law as there are various sources of danger including war or military conflicts, (deliberate) destruction, illegal trade and stealing of cultural objects, appropriation, etc.

The world community has observed acts constituting deliberate destruction due to various reasons including economic and social development projects for water supply, improvement of lifestyle, intentional destruction of cultural property based on the religious grounds or based on political grounds but being justified under reasons of engineering or reconstruction in the society, destruction of the monuments celebrating colonialism or slavery, etc. (Francioni, Lenzerini, 2003, p. 619; Lostal, Hausler, Bongard, 2018, p. 36–47; etc).

² For example, Council of Europe Convention on Offences relating to Cultural Property, Article 10 (the phrase "regardless of the ownership of such property")

In respect to illegal trade or stealing the cultural objects, confrontations emerged mostly in the approaches of the source nations and market nations (Convention on the Means ..., 1970), as the first may rely on grounds such as prior possession and repatriation of the stolen cultural objects, the second may rely on the conservation of cultural objects independently where it is (Mastalir, 1992, p. 1035–1037). There is not any international specialized monitoring or compliance mechanism or institution, however, states are accepted as the custodians of the cultural heritage.

Specific protection for the cultural heritage during the armed conflicts has been prescribed in the Hague Convention adopted in 1954. Articles 2, 3 and 4 of the Convention accordingly determine the term *protection* as “the safeguarding of and respect for” cultural property and defines the content of this obligation.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Convention on the Means ..., 1970) also puts obligation on the state to recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property. The Convention recognizes the right of the member states to nominate certain cultural property as “an inalienable cultural property” and to provide legislation for prohibition of export of those cultural objects (Convention on the Means ..., 1970).

Article 3 of the UNESCO Convention of 1972 (The UNESCO Convention Concerning..., 1972) puts obligation on the state to identify and delineate the properties situated on its territory which can be protectable subject matter as cultural or natural heritage. Article 4 stresses the duty of states to ensure the identification, protection, conservation, presentation of the cultural and natural heritage and transmission of it to future generations. If evaluate the obligation prescribed in the Convention to protect the cultural heritage, *it is applied to the objects that state intends and wants to protect*. Under the Convention states are entitled to list, standardize, monitor and through this way conserve its past.

The UNESCO Convention of 2003 (The UNESCO Convention for the Safeguarding..., 2003) also puts on the state, duties of safeguarding and taking relevant measures of safeguarding the intangible cultural heritage.

It can be observed that the dimension of the measures taken by the states and interests or priorities of the states to protect the cultural heritage is based on the reasons such as attribution, aesthetical view, economy, etc. Weak and vague language of the international treaties (Vigni, 2020), avoidance of the states from stronger obligations and non-consideration of the cultural heritage protection regimes seriously by the states (Posner, 2007, p. 219–220) have been raised in scholarly debates. Those mentioned problems may be observed in the example of the reports to the international institutions and reports of the international organizations operating in this field or in relation with memberships to the relevant international instruments.

Thus, international instruments providing legal frame for the protection of cultural heritage is tended to states more than the non-state actors, however, there are some provisions for recognition of the rights of non-state actors, especially indigenous and traditional groups and societies (UN Declaration on the Rights..., 2007; Convention on Biological Diversity, 1992). But, within this frame of obligation to protect, there is necessity of specifically addressing to the private actors, such as museums, collectors, etc. as they are indirectly very active participants in the field of cultural heritage (especially regarding to the tangible cultural objects) and have the opportunity to influence the states.

The current frame of the obligation to protect is limited with the protection from belligerents in times of war and protection from illicit trade and stealing. ‘Military necessity’ is considered to justify the destruction of irreplaceable cultural properties including monuments in times of war. As well as,

unified approach in relation with the prevention of illicit trade and stealing of the cultural objects has not been accepted yet between the source nations and the market nations. Non-determination of the status of the private actors (museums, including academic institutions, libraries, etc.) and their obligations remains problematic issue in respect to the frame of the obligation to protect the cultural heritage. Despite the various economic, social, cultural, environmental, etc. dimensions of the cultural heritage making it to be the issue of the various branches of the International Law and necessitating the application of fragmentation, the obligation to protect the cultural heritage is the issue of the International Law towards the actors of it rather than the non-state actors.

3. Cultural heritage as a Human Right issue

Both concepts ‘heritage’ and ‘culture’ are phenomena related with humans. Personal identities and identity of the groups or communities get formed through cultural development. Although there exists a certain category of rights called cultural rights, but cultural heritage is not solely the phenomena related just with cultural right. The elements existing and deserving to be protected in the cultural heritage are the issues of human rights concerns. Thus, cultural heritage may be related with the right to property which implies to solely an individual right implying to commercial interest, at the same time cultural heritage can constitute ground for realization of fundamental human rights such as the right to self-determination, right to life, freedom of thought, conscience, and religion, freedom of expression, etc. Safeguarding cultural heritage is considered to be necessary due to the public interest in it, as it is a concept related with people or communities and their identities. It has both objective and subjective criteria, but the reason of preservation is directly linked with the subjective criterion. Cultural heritage has a dynamic character and is formed based on and around the (cultural) property which is static. Human rights approach to cultural heritage in human rights law is different from the preservation of cultural heritage in the International Law, however, they are complementary to each other. In the first case, it is an instrument in realization of human rights, it may be changed, eradicated, judged for the sake of protection of the other rights. In the latter case, it implies to the obligation to protect. Several rights prescribed in the international human rights instruments imply to the rights related with the cultural heritage. Moreover, human rights may have certain limitations on cultural heritage if there are reasonable grounds meeting certain conditions. Rights related with cultural heritage may be both individual right or group or collective right. In respect to cultural heritage as an individual right, certain rights are directly related with cultural heritage like the right to freedom of expression, freedom of information, the right to an identity, etc. Cultural heritage as collective rights in the broad sense implies permanent sovereignty over natural resources, the right to development and the right to self-determination.

Intangible elements which are the ‘constitutive factors’ (Lenzerini, 2011, p. 101) of the cultural heritage play a significant role in the human dimension of the cultural heritage. Participation, contribution and access to cultural heritage rights have been developed in the Human Rights instruments (International Covenant on Economic..., 1966, Article 15; Universal Declaration of Human Rights, 1948, Article 27). However, assessment of the cultural heritage in the frame of Human Rights may also necessitate fragmentation within the Human Rights Law. The Human Rights approach does not always make the protection of cultural heritage central to its frame. There may exist room for the right to destroy in the frame of the Human Rights.

Differentiation of the legal regime of the cultural heritage in the Human Rights Law (or related with Human Rights) and the legal regime of the duty to protect the cultural heritage in the International

Law is necessary for the purpose to determine the legal status for the right to destroy. Provisions of substantive rights (such as freedom of thought, conscience and religion, freedom of expression, etc.) may invoke cultural rights including rights related with cultural heritage. For example, in the practice of the European Court of Human Rights, interference (limited restriction) to the freedom of expression has been considered to meet the test of a legitimate aim for the purposes of the general interest to protect the country's cultural heritage (*Ehrmann and SCI VHI v. France*, ECHR). As such, (right to) protection of cultural and natural heritage has not been referred in the human rights instruments, however, for example in the jurisprudence of the ECHR, it is accepted that the protection of cultural heritage and works of art may constitute legitimate aim of the state for interference with individual rights. In the jurisprudence of the Court, public right to have access to the universal culture or the cultural heritage of all nations (*Beyeler v Italy*, ECHR.; *Debelianovi v. Bulgaria*, ECHR) have been recognized. Right to access to historical truth has been accepted in its jurisprudence (*Chauvy and Others v. France*; *Monnat v. Switzerland*) as well.

In the jurisprudence of the Inter-American Court of Human Rights (The Lhaka Honhat case of the Inter-American Court of Human Rights) (bridge construction) obligation of the state to consult and in specific cases obtain the free and informed consent of the indigenous people have been stressed in relation with investment projects or exploitation of natural resources specifically in the ancestral lands. Distinction between consultation and consent has been denoted as a matter of the scale of the project, although it has not strictly observed and not sufficiently clear.

In the experience of the African Court on Human and People's Rights, 'culture' has been interpreted as "the total way of life of a particular group" (*African Commission on Human and Peoples' Rights v Kenya*, 2017).

Thus, assessment of the status of the cultural heritage within the frame of the Human Rights Law does not concur with the obligation to protect cultural heritage in International Law. Although, the status of cultural heritage necessitates fragmentation in the International Law generally, in the frame of the Human Rights Law, fragmentation may be necessary in respect to the issues of cultural heritage as well.

4. Finding the borders or balance of interests as a limitation on the right to destroy

Main line and principle in the Cultural Heritage Law is the conservation of the cultural heritage. Intentional destruction of cultural property has been addressed as a crime in the International Law. Legal grounds for justification in relation with the right to destroy by the communities of the cultural property belonging to them have not been addressed in the International Law yet. But several human rights create baseline for the right to destroy although it does not sound positive.

Destruction of the cultural property implies the systematic and deliberate cleansing of cultural property belonging to some nation, group or community. It is also expressed as a cultural genocide (Thake, 2018). According to Article 8 of the Rome Statute of the International Criminal Court, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly constitutes war crimes (The Rome Statute of the..., 1998). "Not justified by military necessity" issue in this provision is subject to certain discussions as it means that, if there is military necessity, there may emerge legal grounds for destruction. Deliberate destruction of cultural heritage as war crimes was also prescribed in the 1954 Hague Convention. Before this Convention, the principle of immunity of cultural property had been established by the Hague Convention of 1899 (Convention (II) with Respect to the Laws..., 1899, Art. 23) and later in 1977 Protocol to Geneva Conventions again

repeated the obligation to protect the cultural property (Protocol Additional to the Geneva Conventions..., 1977). The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage takes the language of bearing commitment to fight against intentional destruction of cultural heritage in any form so that, such cultural heritage to be transmitted to the succeeding generations and provides definition of intentional destruction of cultural heritage as an “act intended to destroy in whole or in part cultural heritage thus compromising its integrity” in a way either as “violation of International Law or an unjustifiable offence to the principles of humanity and dictates of public conscience” (The UNESCO Declaration concerning..., 2003).

Assessing the international legal instruments, target of the deliberate intentional destruction of cultural heritage is not the property as a physical object, but the human community and their interrelationship with the cultural property that reflects their heritage and carries special significance for them. That is why, intentional destruction of cultural heritage as part of planned strategy to destroy the targeted community is considered to constitute war crime, crime against humanity, or intent for genocide (Vrdoljak, 2016). Here, the main subjective criterion is the intent behind that destructive act. For example, Malian jihadist Ahmad Al Faqi Al Mahdi was found guilty of war crimes for the destruction of religious sites in Timbuktu (*The Prosecutor v. Ahmad Al Faqi Al Mahdi...*) and the ICC noted in its judgement that “mausoleums and mosques constitute a common heritage for the community and those were visited by the residents for pray and pilgrimage” (*Public judgment and sentence in the case of the Prosecutor v. AHMAD AL FAQI AL MAHDI*). In the beginning of the conflict, residents asked to stop these practices. But, later, destructive attacks against the targeted cultural property still happened. The other examples, destruction of Mesopotamian culture in Iraq (*The Intentional Destruction of Cultural Heritage...*), or, destruction of Buddha Bamiyan in Afghanistan (Afghanistan, Destruction of the Bamiyan Buddhas...) imply to the intent of the attackers to break the communication between the community and the cultural property that carries specific significance for them. The UN institutions also evaluated the attack to cultural heritage as an attack to the people and their fundamental human rights (Bennoune, 2016).

Destruction can also be viewed from the other point which is an intentional destroy of cultural property for the purposes of human rights concerns, cultural engineering or urban changes. This point has not been addressed in the International Law yet, specifically as a right to destroy. However, in some national legislations, certain regulation is getting applied in this respect (for example, specific regulation in construction related to maintaining the previous or existing heritage; destruction of monuments celebrating acts that currently constitutes human rights violation, etc.) (The United States National Historic..., 1966; Granada Convention for the Protection..., 1985; Valetta Convention on the Protection..., 1992; etc.). At some point, although not all, but some groups or communities may also be interested in their right to destroy including its recognition in the International Law for the above-mentioned purposes. There is room for debates on this matter especially in respect to finding balance. For example, under the title ‘cultural engineering’ or ‘holistic social engineering’ (Khmer Rouge policies in Cambodia...) certain acts had been committed which in fact constituted war crimes, genocide or crimes against humanity as destruction of cultural heritage.

Supporters of the limited right to destroy try to find their argument mostly in respect to the human rights concerns taking into account whether that property has established in celebration of a violation of the international Human Rights Law (Perot Bissell, 2019, p. 1133) (or, for example, freedom of expression) or in celebration of the values of political regimes. Reference to the right to destroy somehow is the recognition of the protected subject matter to be expired or left its value. Also, nowadays, practices of requiring reports on the effects of new constructions or engineering on historic properties (National Historic Preservation Act..., 1966; the Law for the Protection..., 1950; etc.) results in certain

solutions to the problem. National registration and official list of all cultural properties is also one of the mechanisms accepted in some countries³. But the issue is that, even the purpose behind these national practices seems sometimes vague, and they are based on just a few arguments including mostly historical significance or just a certain age is considered sufficient to be ‘protected’ under the above-mentioned regulations.

Thus, destruction of cultural heritage constitutes crime in the International Law, and almost all legal instruments go further in this direction not opening room for the right to destroy, but focusing on the obligation to safeguard and protect and in few cases referring to the Human Rights from common perspective. A crucial point while talking about the ‘right to destroy’ is that, the subject matter of the protection must be clearly and precisely established and the responsible actor who is either the state or non-state actor should have definite knowledge about the concrete protectable subject matter. So, at this stage opening place for the right to destroy does not make any sense for the purposes of the obligation to protect. But what is protected or what should be protected needs to be assessed and settled based on the human rights approach taking into account the preservationist and precautionary interests. Moreover, finding out whether it should be protectable must be assessed in the light of the impact of the result of its destruction as well.

Not everything needs to be preserved (Prott, O’Keefe, 1992, p. 309). But the significance of the object for the society from different perspectives, or for the academy in learning the truth about history are the factors to be assessed duly for the purposes of protection. And, if the non-renewable cultural heritage gets destroyed, it may not be possible to restore it (more at: Wangkeo, 2003, p. 266). Thus, while discussing any legal ground of the right to destroy in relation with the cultural heritage, at least the expected end result necessitates to take the ‘precautionary approach’.

It should be noted that within the frame of the Human Rights Law certain exceptions and limitations have been considered on the cultural rights for the situations of negative practices, or infringement of other human rights, etc. (General Comment No.21 by CESCR). Culture is the social phenomena changing over times and it reflects stages and layers of the history and its values. Thus, over time approaches to cultural rights or cultural heritage objects is subject to unavoidable changes, however those need to be acceptable changes.

Conclusion

1. In general, the concept of cultural heritage is an abstract idea, however, cultural heritage forms around some object (material or immaterial) having certain value from the Human Rights perspective, which makes it protectable subject matter.
2. The intent behind the destruction of the cultural heritage is not the heritage, but is the targeted human group or people and their interrelationship with that object.
3. Cultural Heritage Law does not precisely describe why preservation is needed nor does it precisely answer to the question what deserves legal protection as a cultural property or cultural heritage as in most cases there is subjective criterion. However, the end result is that it is protected for the interests and enjoyment of the present and future generations.
4. Protection of the cultural heritage is expected to respond to the historical and social evolution of the creators and bearers of it. That necessitates the collaboration and balance of interests between the bearers and creators for achieving effective results in relation with the preservation.

³ This practice is applied in France; As well as the experience of “Catalogo generale dei Beni Culturaly” in Italy.

5. The obligation prescribed in the International Law to protect the cultural heritage expresses absolute duty. That's why it is not reasonable to open room for the right to destroy at the point of obligation to protect, even the restricted exceptions and limitations would have been resulted in abuse from this right. But the place of the right to destroy may be discussed within the frame of Human Rights Law due to the reason that, subject matter of protection in the cultural heritage is a changeable social phenomenon and subject to various (public) interests.

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Legal Assessment of the Human Rights Limitations on the Preservation of Cultural Heritage

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S u m m a r y

The International Cultural Heritage Protection Law has emerged as a response to the intentional destruction of cultural heritage. However, currently, there are various examples of the destruction of the cultural heritage intentionally due to military conflicts, as well as in relation with urbanist changes to the views of the cities, or for the purposes of demolishing the ideas of oppression and colonialism.

The Article analyses the issue of the legal assessment of the Human Rights limitations on the preservation of cultural heritage from the perspectives of the assessment of the subject matter of cultural heritage protection, and the assessment of the intent behind the destruction of cultural heritage. On the grounds of researching the existing international legal frame of the obligation to protect the cultural protection and protectable subject matter within the frame of cultural heritage protection, it has been stressed that, as there are various economic, social, cultural, environmental, etc. dimensions of the cultural heritage, it is the issue of the International Law. Also, the obligation to protect the cultural heritage is the issue of the International Law towards the actors of it rather than the non-state actors.

In relation to the assessment of the cultural heritage protection from the Human Rights perspective, it is defined that such factors as contribution, attribution, information, etc. are the main factors (values) for cultural heritage to be protected as a human dimension. As a human dimension is a subjective phenomenon which is subject to changes, the Human Rights approach does not always make the protection of cultural heritage central to its frame. There may exist room for the right to destroy in the frame of the Human Rights. Differentiation of the legal regime of the cultural heritage in the Human Rights Law and the legal regime of the duty to protect the cultural heritage in the International Law is necessary for the purpose to determine the legal status for the right to destroy. The significance of the object for the society from different perspectives, or for the academy interest in learning the truth about history, are the factors to be assessed duly for the purposes of protection.

Žmogaus teisių apribojimo kultūros paveldui išsaugoti teisinis vertinimas

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S a n t r a u k a

Tarptautinė kultūros paveldo apsaugos teisė atsirado kaip atsakas į tyčinį kultūros paveldo naikinimą. Tačiau yra įvairių pavyzdžių, kai kultūros paveldas naikinamas tyčia dėl karinių konfliktų, taip pat dėl urbanistinio požiūrio į miestus keitimo ar siekiant griauti priespaudos ir kolonializmo idėjas.

Straipsnyje nagrinėjamas žmogaus teisių apribojimo kultūros paveldui išsaugoti teisinis vertinimas, kultūros paveldo objekto apsaugos perspektyvos ir siekis sunaikinti kultūros paveldą. Vertinant esamą tarptautinės teisės pareigą saugoti kultūros paveldą ir saugotinus šio paveldo objektus, pabrėžta, kadangi yra įvairių ekonominių, socialinių, kultūrinių, aplinkosauginių ir kt. saugotinių objektų paveldas – tai tarptautinės teisės dalykas. Pareiga saugoti kultūros paveldą tarptautinės teisės nustatyta valstybėms, o ne nevalstybinėms organizacijoms.

Kalbant apie kultūros paveldo apsaugos vertinimą žmogaus teisių požiūriu, pabrėžiama, kad tokie veiksniai kaip indėlis, priskyrimas, informacija ir kt. yra pagrindiniai veiksniai, padedantys saugoti kultūros paveldą kaip žmogiškąją dimensiją. Kadangi žmogiškoji dimensija yra subjektyvus reiškinys ir gali keistis, žmogaus teisių požiūriu kultūros paveldo apsauga ne visada yra svarbiausia. Egzistuoja teisė panaikinti kultūros paveldo apsaugą žmogaus teisių apsaugos labui. Siekiant nustatyti būtinumą panaikinti saugomo kultūros paveldo teisinį statusą, reikia diferencijuoti saugotino kultūros paveldo teisinį režimą pagal žmogaus teises saugančius įstatymus ir pagal tarptautinę teisę. Objekto svarba visuomenei įvairiais aspektais arba akademinis interesas pažinti istoriją yra veiksniai, į kuriuos reikia atsižvelgti sprendžiant kultūros objekto apsaugos klausimą.

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