

# human rights

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# dialogue

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## CULTURAL RIGHTS

What they are, why they matter, how they can be realized

# human rights *dialogue*

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## ABOUT

# Human Rights Dialogue

*Human Rights Dialogue* promotes a global discussion of human rights ideas and practices by presenting firsthand accounts of human rights issues as they arise within specific real-life contexts. In so doing, the publication helps to clarify the significant and ongoing evolution that is taking place within the human rights movement to make the human rights framework more relevant and effective in addressing the social, economic, and political challenges of the twenty-first century.

Series One (1993–1998) of *Dialogue* examined all sides of the Asian values debate—the argument that Asian cultural values imply different human rights standards and priorities from those in the West. In Series Two (2000–2005), *Dialogue* addresses the problem of the “human rights box”—the constraints that have enabled the human rights framework to gain currency among elites while limiting its advance among the most vulnerable. Specifically, the essays aim to locate the barriers to greater public legitimacy of human rights and to demonstrate how those barriers can be overcome.

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Cover photo:  
Toppenish, Washington, United States.

Two police officers in front of a mural on the Yakama Nation Reservation. In the 19th century, Toppenish was a critical site for Native Americans to hunt, fish, and gather roots.

Photo by Peter Frischmuth/Peter Arnold, Inc.

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## INTRODUCTION

Together these essays describe the role that cultural rights can play in inscribing a right to cultural difference as a fundamental factor of human identity.

This issue of *Human Rights Dialogue*—the final issue in Series Two—focuses upon the evolving concept of cultural rights. It explores its potential effectiveness in advancing the human rights claims of ethnic minorities, indigenous peoples, and other cultural communities. In doing so it aims to show that cultural rights are fundamental to the protection of all other human rights.

In recent years the complex issue of cultural rights as a dimension of human rights has come to the fore of global concern. As the United Nations Development Program's 2004 *Human Development Report* asserts, "managing cultural diversity is one of the central challenges of our time." In the *Origins of Totalitarianism* (1951), Hannah Arendt famously anticipated the reasons why:

The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world.... We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinion) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation. The trouble is that this calamity arose not from any lack of civilization, backwardness or mere tyranny, but on the contrary, that it could not be repaired, because there was no longer any "uncivilized" spot on earth, because whether we like it or not we have really started to live in One World. Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether.

Arendt identifies the homogenizing impact of globalization as posing a new risk for humanity—the loss of a "place in the world." And the concomitant loss of one's home and

political status is, she insists, "identical with expulsion from humanity altogether." As our cultural identity provides us that "place in the world," to negate it is to deny full membership in the human community.

Nevertheless, there are many who regard "culture" as a set of archaic beliefs and practices stubbornly standing in the way of universal human rights. In this view, globalization is a positive process that can dismantle all remaining strongholds—especially the Middle East, Asia, and Africa—still resistant to human rights. Yet such a neo-evolutionist view fails to recognize the extent to which the fact of cultural identity has become more, not less, important at the present moment in history.

While globalization itself is not new, its current effects are more various, disjunctive, intense, and extensive than ever before. Today globalization is characterized by the reconstruction of established nation-states and the emergence of new ones brought on by the end of the Cold War, the consolidation of the European Union, the movement from authoritarian to democratic systems of government in Latin America and Asia, and the further expansion of the free market. The resultant explosive ethnic violence and religious conflicts have trained a spotlight on the predicaments of cultural and religious minorities, new challenges of political representation amid the internal diversity of states, and the very question of what we mean by "nation-state."

The present round of nation-building is unprecedented in the pressures it places upon states—both international and domestic—to better account for the undeniable fact of their internal cultural diversity. In some cases, states have responded to these pressures with the suppression of "internal dissent"; in others, the pressures have compelled states to enter the uncharted waters of wholesale multicultural reform.

In this environment, cultural rights claims are slowly



The former president of Bolivia mobilizes the Guarani; Ami children in Taiwan; and participants of the "Defining the Way Ahead for European Cultural Policy" conference at the Council of Europe. Photos courtesy of Bret Gustafson, Tony Coolidge/ATAYAL, and the Council of Europe.

being recognized as an important means for the recuperation of identity and as an essential basis for advancing claims of social justice. Yet to understand the potential power of cultural rights we also need to understand why they have historically been neglected, despite the fact that they have been enshrined in international law since 1966 with the adoption of the U.N. International Covenant on Civil and Political Rights (Article 27) and the International Covenant on Economic, Social and Cultural Rights (Article 15).

There are many reasons for the weak political commitment to cultural rights. First, not just governments but majority populations tend to view cultural rights movements that have their basis in claims to self-determination as threatening to the state-based model of sovereignty. Second, as nation-states around the world face conflicts over language, religion, and ethnicity—if not always in the same terms—these disputes often provoke the fear of “balkanization.” This fear reinforces the resistance of nation-states to recognizing culturally-based collective grievances. Third, in the global marketplace it is in the interest of transnational corporations to ignore cultural rights, a fact that has become apparent in disputes between corporations and traditional peoples over the relation of cultural heritage to cultural property. Fourth, within the human rights movement itself, advocates recognize cultural rights to be in direct conflict with other human rights, particularly the rights of women. Finally, on a conceptual level, there is the problem of clearly defining cultural rights claims so that they might become an effective basis for legal action. One aspect of this problem is the difficulty in defining “culture.” The other is the inconsistent way in which states have applied standards of cultural rights at state and international levels. Thus, cultural rights arguments have their detractors across the political spectrum. Even when defended, cultural rights are perceived to be a challenging arena for advocacy.

When critics dismiss cultural rights as secondary to questions of physical survival, they in fact dismiss the fundamental condition of cultural identity (to return to Arendt) as part of how we make ourselves “at home” in the world. Cultural recognition is a matter of both dignity and social justice, but it also carries with it certain material obligations. These obligations include recognizing cultural minorities’ legitimate claims to redress of the long-standing political and economic inequities that stem from their cultural marginalization. They also include the hard work of crafting agendas that move a reluctant international community to recognize cultural rights as positive rights, where states must act proactively to prevent social and economic discrimination as a result of cultural identity.

The essays that follow are written by researchers, activists, and policy practitioners with firsthand knowledge of cultural rights claims and/or cultural rights abuses as well as the actions being taken to address them. We have grouped these essays into three sections. The first section explores the case for cultural rights, demonstrating that the assault on cultural

communities is an assault on the fundamental rights of both groups and individuals. Section two presents an array of cases that represent the range of cultural rights claims and claimants as well as conflicts and contradictions that emerge in pressing these claims. Finally, the essays in section three examine the innovative work being carried out at the national, regional, and international levels to establish standards for the implementation of cultural rights.

Together these essays describe the role that cultural rights can play in inscribing a right to cultural difference as a fundamental factor of our human identity. In so doing they interrogate the very meaning of universal human rights in a multicultural world. With international priority historically accorded to individual civil and political rights, cultural rights have been left vaguely defined as a right of participation in the cultural life of “the community” (ICCPR, Article 27). Given the central importance of cultural identity to human well being, we need to pay better attention to exactly who these communities are.

— *The Editors*

#### CULTURAL RIGHTS AS FORMULATED IN THE INTERNATIONAL BILL OF HUMAN RIGHTS

- Universal Declaration of Human Rights (1948), Article 22:  
Everyone... is entitled to the realization, through national effort and international co-operation..., of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
- Universal Declaration of Human Rights (1948), Article 27:
  1. Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
  2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- International Covenant on Economic, Social and Cultural Rights (1966), Article 15:
  1. The States Parties to the present Covenant recognize the right of everyone:
    - (a) To take part in cultural life;
    - (b) To enjoy the benefits of scientific progress and its applications;
    - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- International Covenant on Civil and Political Rights (1966), Article 27  
In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Source: Janusz Symonides, 1998



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## The Editors



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## THE CASE FOR CULTURAL RIGHTS

The Editors

This section serves as an introduction to the application of cultural rights and addresses the question of why the concept of cultural rights is a necessary part of a human rights approach. One goal is to illustrate how cultural rights are an integral part of the international human rights framework. Another is to provide relatively clear and straightforward examples of the application of cultural rights as well as the social costs of withholding their recognition.

Article 6 of the 1948 Universal Declaration of Human Rights enshrines a “right to recognition everywhere as a person before the law.” The Universal Declaration further asserts that full recognition includes cultural rights considered “indispensable” for the maintenance of “dignity” and development of one’s “personality” (Article 22), a minimum condition for which is a right to participate in “the cultural life of the community” (Article 27). This assertion remains the baseline for subsequent statements of cultural rights concerned with determining the extent and kind of participation in cultural life necessary to ensure the fullest definition of “personhood” as the rightful subject to which human rights should apply.

This argument for the necessity of cultural rights is more recently reflected in the American Anthropological Association’s Declaration on Human Rights of 1999, which understands the “capacity for culture” to be “tantamount to the capacity for humanity.” These statements convey the fundamental belief that to disregard the cultural context of a person’s life amounts to a denial of one’s full personhood, regardless of differences among specific cultures. The recognition of “cultural identity” is thus a necessary precondition for the exercise of human rights. As Danielle Celermajer stresses in her essay in this section, culture is not something to be tacked on to an otherwise complete range of human rights, but is in fact “the organizing network within which those rights are held.” If globally diverse in its expression, culture is a universally present matrix shaping the range and kinds of choices people make. Any failure to recognize cultural experience as intrinsic in this way amounts to a limit upon individual freedoms. Cultural rights as individual freedoms are thus also collective rights.

David Nersessian’s discussion of “cultural genocide” helps to frame the other cases in this section. Nersessian calls for the restoration of Raphael Lemkin’s concept of genocide, which originally encompassed cultural genocide and was subsequently reduced to physical or biological genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The other cases document the struggle for cultural survival and identify the conditions necessary for that survival through a defense of cultural experiences or institutions central to the social reproduction of the collective cultural group.

For the Yiaaku people of Kenya as Muthee Thuku explains, guardianship of their ancestral forest is not just fun-

damental to their livelihood, but to their very identity as a people. A relationship to the Mukogodo forest is intrinsic to the Yiaaku concept of life, spirituality, language, economy, and ancestral heritage. Already reduced to just under 1000 people, the displacement of the Yiaaku from the forest would literally mean their collective disappearance. For the Guarani of Bolivia, the historical imposition of the Spanish language was a negation of Guarani personhood and of their right to exist as culturally distinct from the Bolivian nation. As Bret Gustafson argues, for the Guarani, and many others, speaking their own language is a crucial symbolic resource for cultural membership in a particular group. The case of the “stolen generation” of Australia’s aboriginal people, described by Danielle Celermajer, drives home the point that recognition of cultural identity requires its transmission across generations. If there is no “one-size-fits-all” approach to cultural rights, defense of a right to territory, language, and generational continuity are each important means for advancing cultural rights claims.

With the exception of David Nersessian’s essay, all of the cases in this section—of the Yiaaku, Guarani, and Aboriginal Australians—represent cultural survival of so-called “first peoples.” This is not accidental. Indigenous peoples pose the issue of collective cultural rights in a uniquely compelling way. Historically they have been the most dramatic casualties of the global consolidation of the nation-state, the groups most clearly set apart by their distinctiveness, and the first groups to begin to advance cultural claims in human rights terms, a process underway in earnest by the late 1980s. These three cases demonstrate how cultural rights claims are largely negotiated between specific groups and particular nation-states. They also show how the policies of nation-states—particularly such assimilationist goals as, in the words of one of our authors, the “unification of one people occupying one territory and speaking one language”—have historically posed an immediate threat to the survival of diverse peoples.

At the same time, these cases provide a basis for comparison of how states are now confronting the fact of their own internal diversity using the legal tool of cultural rights. An emphasis on culture as a means of political representation and citizenship is seen, for example, with greater recognition given to customary law through revised national law. To use Latin America as one bell weather, starting with Colombia’s 1991 Constitution, 16 countries have now officially recognized their “multiethnic and pluricultural” character. Gustafson’s discussion of Bolivia’s bilingual intercultural education reform of 1994 is one chapter in this hemispheric development. A clear lesson derived from these cases is that cultural rights are not incompatible with the sovereignty of states so much as they prompt a redefinition of the exclusivity of the state’s proprietary and sovereign interests. ■

# Rethinking Cultural Genocide under International Law

David L. Nersessian

The concept of cultural genocide must be restored to international law, as it was in Raphael Lemkin's original formulation in 1944.

“Genocide” is an amalgam of the Greek *genos* (race or tribe) and the Latin *cide* (killing), speaking literally to the destruction of a group. The term was conceived in 1944 by Raphael Lemkin, a Polish law professor who narrowly escaped Nazi occupation of his homeland. In *Axis Rule in Occupied Europe*, a seminal text on Nazi race policy, Lemkin noted that genocide signifies:

a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

Lemkin described eight dimensions of genocide—political, social, cultural, economic, biological, physical, religious, and moral—each targeting a different aspect of a group's existence. Of these, the most commonly recognized are physical, biological, and cultural. Physical genocide is the tangible annihilation of the group by killing and maiming its members, either directly or through what the International Criminal Tribunal for Rwanda recognized as “slow death” techniques such as concentration camps.



Bosnia National Library, Sarajevo, 1996.

Biological genocide consists of imposing measures calculated to decrease the reproductive capacity of the group, such as involuntary sterilization or forced segregation of the sexes.

Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a variety of ways, and often includes the abolition of a group's language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals.

Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide prohibits physical and biological genocide but makes no mention of cultural genocide. This omission was deliberate. Early drafts of the Genocide Convention directly prohibited cultural genocide. As the treaty was finalized, however, a debate emerged over its proper scope. Many

state representatives drafting the treaty understood cultural genocide to be analytically distinct, with one arguing forcefully that it defied both logic and proportion “to include in the same convention both mass murders in gas chambers and the closing of libraries.” Others agreed with Lemkin’s broader initial conception that a group could be effectively destroyed by an attack on its cultural institutions, even without the physical/biological obliteration of its members.

The present understanding of genocide preserves the body of the group but allows its soul to be destroyed.

Cultural genocide ultimately was excluded from the final Convention, except for a limited prohibition on the forcible transfer of a group’s children. The drafters acknowledged that the removal of children was physically and biologically destructive but further recognized that indoctrinating children into the customs, language, and values of a foreign group was “tantamount to the destruction of the [child’s] group, whose future depended on that next generation.”

Despite the limited definition of the offense itself, broader cultural considerations do still play two important roles in prosecuting genocide under the Convention. First, acts of cultural genocide—conduct violating what the International Criminal Tribunal for the Former Yugoslavia (ICTY) referred to as the “very foundation of the group”—tend to establish the genocidist’s specific intent to destroy the protected group. The ICTY, for example, held that Serbian destruction of Muslim libraries and mosques and attacks on cultural leaders established genocidal intent against Muslims in the former Yugoslavia.

Second, cultural characteristics are used to help define the contours of the protected groups enumerated in the Convention. Since there are no universally accepted definitions of racial, ethnic, religious, or national groups, each must be assessed on a case-by-case basis in light of unique historical and contextual considerations. Cultural concerns, such

as a group’s social, historical, and linguistic characteristics, help to determine whether a given group of people is protected under the Convention.

Cultural genocide thus plays a subsidiary role in our present understanding of genocide and group destruction. But this is a product of the political realities of treaty negotiation between states rather than any limitation inherent in the concept. The Convention’s drafters acknowledged the legitimacy of cultural genocide, and indicated that it might be addressed

through other international instruments. Indeed, an individual right to cultural existence was recognized in the 1948 Universal Declaration of Human Rights and subsequently affirmed in the International Covenant on Economic, Social and Cultural Rights. And to accommodate the erosion of traditional geographic and economic boundaries, more recent treaties such as the Charter of the European Union and the Council of Europe’s Framework Convention for the Protection of National Minorities contain anti-assimilation language and create express obligations to respect cultural diversity. Culture also is protected through such specific-purpose instruments as the European Cultural Convention and the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

Without denigrating the importance of such developments, it nevertheless is important to recognize their limitations. Human rights treaties (and their concomitant compliance and adjudicatory mechanisms) depend upon the voluntary and good faith participation of states party to the instruments themselves. Adjudicated violations (including those amounting to cultural genocide) create at most an obligation to desist from the offending practice and to pay compensation. The responsible parties are states, and there is no recognition of individual civil or criminal responsibility for the conduct at issue. Those most likely to commit cultural genocide are least likely

to participate in any voluntary human rights scheme.

Human rights jurisprudence lacks sufficient flexibility to properly redress cultural genocide, which differs from other infringements upon cultural rights in both scope and substance. The existing human rights scheme redresses the intentional and systematic eradication of a group’s cultural existence (for example, destroying original historical texts or prohibiting all use of a language) with the same mechanisms as it would consider the redaction of an art textbook. But cultural genocide is far more sinister. In such cases, fundamental aspects of a group’s unique cultural existence are attacked with the aim of destroying the group, thereby rendering the group itself (apart from its members) an equal object and victim of the attack. The existing rubric of human rights law fails to recognize and account for these important differences.

Collective identity is not self-evident but derives from the numerous, interdependent aspects of a group’s existence. Lemkin’s original conception of genocide expressly recognized that a group could be destroyed by attacking any of these unique aspects. By limiting genocide to its physical and biological manifestations, a group can be kept physically and biologically intact even as its collective identity suffers in a fundamental and irremediable manner. Put another way, the present understanding of genocide preserves the body of the group but allows its very soul to be destroyed.

This is hardly a satisfactory situation, and it is time to revisit the issue put aside by the Convention’s drafters through a new treaty dealing specifically with cultural genocide. These efforts should be preceded by a comprehensive analysis of state practice and *opinio juris* to ascertain the current status of cultural genocide under customary international law. The need is patent. Cultural genocide is a unique wrong that should be recognized independently and that rises to the level of meriting individual criminal responsibility. After all, if indeed the highest values of a society are expressed through its criminal laws, what message is being conveyed by not labeling acts of cultural genocide as criminal? Perhaps a message better left unsent. ■

# "This Forest Is Ours"

Muthee Thuku

The cultural survival of the Yiaaku people in the Mukogodo forest of Kenya depends upon preserving their intimate relationship with the forest.

When Yiaaku people gather, or a father blesses his family, the prayers uttered are full of symbolism and poetic beauty.

## Entropilo\*

May the land of our fathers and  
mothers embrace you  
May you grow as huge as a  
Loimugo tree  
May you smell as sweet as the  
Songoyo tree  
Be as straight as the Itarokwa tree  
Be as studious as Ol Donyo  
Keri mountain  
And as cool as the forests of Mukogodo

When a Yiaaku person has been scorched by the hot sun beating on the plains, he faces the direction of Mukogodo forest and cries, "How I long for the forest of my father and mother!"

Since time immemorial the Yiaaku have been a part of the Mukogodo forest in the central Kenya highlands, living as cave dwellers and practicing a hunter-gatherer lifestyle. Today, however, they are settled in six villages located in a wide area around the forest where they supplement their traditional beekeeping with the raising of cattle and goats. Still, it is the Mukogodo that gives meaning to their concept of life and spirituality, and they continue to hold a deep attachment to the trees, hills, animals, and caves that comprise their natural environment and their cultural heritage.

A dwindling ethnic minority, fewer than a thousand people identify them-



An indigenous forest, like the Mukogodo, in the Aberdare mountains of Kenya.

selves as Yiaaku. They speak the Maa language, which they adopted from their populous Maasai neighbors through many years of assimilation. Maasai are of Nilotic origin while Yiaaku are Cushitic. According to UNESCO's *Red Book of Endangered Languages*, Yiaaku is officially extinct. Fewer than ten speakers remain of their original mother tongue.

Because they were initially cave dwellers and without livestock, the Maasai branded the Yiaaku as "ontorobo," meaning "poor people"—a name that stuck for centuries, deeply affecting the psyche and pride of the Yiaaku. "We were never a poor people," counters Jennifer Koinante, a Yiaaku by birth and the Director of Yiaaku Peoples Association, a recently formed organization championing Yiaaku rights. "The resources of our forest have always been abundant."

Colonialism in the nineteenth centu-

ry brought unprecedented tribulations to the Yiaaku. Game hunting was banned and the colonial government attempted to settle the Yiaaku outside their forest in order to "civilize" them. Coupled with a high rate of assimilation into Maasai culture, such external onslaughts left the Yiaaku weakened and disoriented, both culturally and socially. But perhaps the worst that befell them was when in 1937 the government designated the Mukogodo a protected forest, which in turn led to their eventual relocation into villages and their transition toward a more pastoral lifestyle similar to the Maasai. Since that time the Yiaaku community has been undergoing an identity crisis amounting to a slow death. It has only been in recent years, following education and the passing of a generation, that the Yiaaku have rediscovered a deep pride in their unique ethnic and cultural identity.

Although the Mukogodo is now

\* Entropilo, meaning "fragrant breath," is the opening word for all prayers in Maa. It is a form of blessing and a wish for ceremonial cleanness uttered by the elder saying the prayers.

The Yiaaku community has been undergoing an identity crisis amounting to a slow death.

protected by official forest guards, the small number of remaining Yiaaku continue to have direct and unrestricted access to the forest and its resources—for the moment. However, it is known that several years ago forest guards spoke to locals about government plans of eviction. Such threats have resulted in forced evictions for other forest dwellers, such as the Ogiek group of the neighboring Nakuru District, and the warning has left the Yiaaku alarmed and unsure of their future.

“We have been the silent guardians and keepers of Mukogodo forest for centuries,” explains Koinante. “When other forests across Kenya are being destroyed, ours is still intact. We protect it because it is our only heritage on this planet. How can a law passed in a far-away city decide that our forest is now public property? Does the law consider us as part of the wildlife?”

Whereas the government views the Mukogodo as a strategic national resource worthy of protection, the Yiaaku view the Mukogodo as a cultural heritage and as inseparable from Yiaaku life. Yiaaku refer to the forest as *loip* (the shade) and as *gorgola* (the armpit): The shade protects them from severe droughts, the armpit shields them from enemies and other potential harm. In the traditional Yiaaku land tenure system, different clans own the various hills of Mukogodo forest. It is within these hills that clan members hang their beehives. As Koinante explains, “When children of pastoralists inherit cattle, the sons of Yiaaku inherit trees with beehives... We know every type of tree and the flowers that yield nectar.” Yiaaku also invoke their ancestral attachments to the Mukogodo forest. “Our ancestors sleep in this forest,” asserts Koinante. “This is where all umbilical cords of our community lie. Our attachment to this forest is maternal. To ask us to leave is to sever all our links with the past generations. We will be without history.”

Indeed, Yiaaku guardianship and occupation of the forest ensures their unity and the continuity of their ancestral domains. The vital connection between the people and the forest is reflected in their language, folklore, traditions, and indigenous knowledge in such areas as beekeeping, ethno ecology, and herbal medicine. As Koinante explains:

Our language is one of the forest. It describes our flora and fauna heritage in ways only we can understand. It's a language of trees, wild animals, bees, and caves. Without the forest, our language becomes obsolete and ceases to exist. To remove us from the forest is to ask us to develop a new language. It's unimaginable.

In short, to deny the Yiaaku their ancestral right to the forest is a form of ethnocide.

What the Yiaaku want is for the status of the Mukogodo forest to be changed from a protected forest to a Trust Forest in their name. That change of status should come with the relevant legal documentation, demarcation of boundaries, and a Title Deed. A Title Deed would legally allow the Yiaaku and Forest Department joint management of Mukogodo. The Yiaaku consider these measures the only way to herald a new beginning for their threatened ethnic and cultural identity. It would also set a precedent for other forest-dwelling ethnic minorities of Kenya. At this time when Kenya is drawing up a new constitution and a comprehensive land policy, Yiaaku people hope that the demands of forest dwellers will be taken into account and given legitimacy. To them, the new concepts of nation-state and globalization should embrace, respect, and preserve cultural diversity and not suffocate it in the quest for a homogenous society.

Koinante clearly sees the claim to the forest as a struggle for human rights.

“Cultural rights are human rights,” she asserts.

That is why we are articulating our claims from a human rights perspective. The Kenyan constitution guarantees the right to culture, and so does the Universal Declaration of Human Rights. We are entitled to Mukogodo forest as our cultural abode and to a full recognition as a complete and living ethnic group. We are ready to defend our claims in Kenyan and international courts of law.

Lobbying for support of their cause is in high gear. The Yiaaku Peoples Association is an active member of local and national human rights networks, and the Yiaaku are a member of the Indigenous Peoples of Africa Coordinating Committee (IPACC). Over the past year the Association has held awareness forums for elders, women, and youth aimed at mobilizing community resources and strengthening the struggle through collective decisions. To promote community management of forest resources, the Association has set up a community honey refinery and marketing center in Dol Dol Township, on the fringes of the forest. The proceeds go to joint community development activities spearheaded by the Association. The Association also intends to build a cultural center in Mukogodo forest, which will serve as a documentation and education facility; among its activities it will teach the Yiaaku dialect to young children and compile a Yiaaku-Maasai dictionary.

“We know we are going to win in the end,” says Koinante. “To take the Yiaaku out of their forest is like asking fish to live out of water. Mukogodo forest is our culture and identity. We are not bargaining with anyone. This forest is ours.”

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For more on the conflict between government conservation policies and indigenous rights in Kenya see “When Parks and People Collide,” by Peter G. Veit and Catherine Benson in the environmental rights issue of *Human Rights Dialogue*, available online at <http://www.carnegiecouncil.org>.

# Language Rights and Guarani Renaissance in Bolivia

Bret Gustafson

The Guarani are claiming their right to speak their own language in Bolivia as a basic cultural right.



With limited resources, Guarani students paper a village school's adobe walls with writing in Guarani and Spanish.

In much of Latin America the idea that Indian languages are fit for any modern purpose is seen as absurd, even subversive. The 60,000 Bolivian Guarani, like most other indigenous peoples throughout Latin America, have been fighting this prejudice as part of a wider struggle for political equality. In Bolivia, state reforms defined by “interculturalism” hold some promise for indigenous peoples. However, the quest for robust cultural rights is ongoing, and the history of native languages is particularly illustrative of that quest in Latin America.

The Guarani language flourished for several thousand years across South America and survived five hundred years of violent colonialism. With speakers in Bolivia, Paraguay, Brazil, and Argentina, Guarani is still one of the largest indigenous language groups in South America. However, the language and its speakers find themselves increasingly displaced

today. As Guarani land bases are reduced and communities are fragmented by migration and poverty, Guarani language has given way to Spanish, mirror-

Guarani language has given way to Spanish, mirroring in some ways the fate of the people themselves.

ing in some ways the fate of the people themselves.

In Bolivia, elites long shared the Western idea that the path to modern nationhood required the unification of one people occupying one territory and speaking one language. With the expansion of public schooling after 1955, the country pursued this monolithic vision for fifty years, seeking to eradicate native languages and to impose Spanish in their stead. Reinforcing racist ideas about “Indian-ness,” the effort stigma-

tized native language use and promoted cultural assimilation. Most Guarani remember their two or three years of schooling as a time of violence, fear, and silence. Today a bilingual teacher recalls trembling at the sight of white teachers. An elder recalls that “speaking out, especially in Guarani, would bring the stick.” The imposition of Spanish was thus not just about the acquisition of a national language as a useful instrument, but about the negation of the indigenous right to exist as culturally distinct peoples.

Beginning in the late 1980s, Guarani speakers began to question this national policy and to consider the option of bilingualism. Such an option would use both indigenous languages and Spanish in the public schools, and would incorporate indigenous cultures and histories in curricular models—resulting in both a better education and native language survival. Bolivia and the

Guarani are not alone in this matter. From Mexico to southern Chile, indigenous demands for political participation and territorial control are accompanied by demands for bilingual education as a distinctly cultural right.

Bilingual education is based on an empirically demonstrable fact: Children learn better if taught in their first language, and these learning skills can be transferred to master second or third languages more effectively. For educators (and for multi-lingual people around the

world) the notion is common-sensical, not to mention that rights to language are guaranteed in a number of international covenants.

engage in a pluralistic society as equals. This entails recognizing that languages are social practices through which people give meanings to their social mem-

—those whose words demonstrate mastery of Guaraní knowledge (*arakuaa*). As another leader argued at the language congress, “those who have no power to speak can only create bitterness.”

During Spanish colonialism and Bolivian nation-building, missionaries charged with schooling the so-called “savages” seized on the power of language. New meanings were imposed for words like *yemboe* that sought to cause a break with the past. *Yemboe* was appropriated first to refer to catechism, and later extended to refer to Spanish school learning of all kinds. For missionaries, and eventually for Guaraní themselves, *yemboe* came to refer to a process through which Guaraní personhood was to be erased, catechized, made literate, and “made to speak” Spanish—the only language seen fit for fully human beings. This rupture is reflected today, as Guaraní distinguish two words that were once closely linked: *arakuaa* (Guaraní knowledge) and *yemboe* (school-learning, like the whites). The more one experiences the latter, the less one retains the former.

This manipulation of *yemboe* illustrates two dimensions of language: as a practice of becoming an effective member of a social group, and/or as a practice through which one gives meaning to one’s relation to other groups. To recognize a group’s right to language requires not simply to recognize their right to *have* their language, but to have tolerance for people who act and speak differently within a culturally plural society. This means transforming powerful metaphors of “nation” and “modernity” that view languages such as Guaraní (and their speakers) as somehow inferior.

A robust notion of language as a cultural right guarantees a social environment in which all people can act, speak, and create as equal members of a society. But for such equality to exist, these rights must be guaranteed where the negotiation of social norms takes place, such as in public schools. In the Latin American context, indigenous peoples seek these opportunities for intercultural dialogue and exchange both with *and* within the nation-state—in its markets, schools, political institu-

(con’t on page 36)



Guaraní school children line up to sing the Bolivian national anthem at a rural village school.

One would be hard-pressed to identify any subversive motives in the quest for bilingual schooling. The vast majority of indigenous people agree that learning Spanish, Bolivia’s national language, is important and that the state has the obligation to educate its citizens, among whom they count themselves. Yet Guaraní calls for language rights do entail a recognition that their survival as a people depends upon their control over both material (territorial) and symbolic (language, history, etc.) resources. As one Guaraní leader expressed it, having accommodated themselves to foreign invaders over the past 500 years, they do not now want “to be treated as foreigners in their own lands.”

According to a Guaraní elder speaking at a Guaraní language congress in Bolivia in 1997,

No longer will we be ashamed to speak our language in the streets of the white man’s town. No longer will we be beaten for speaking our language in the schools. We will speak out loudly, [saying] that we are Guaraní.

Guaraní thus claim the right to native language schooling not just to reproduce their distinct identity, but to

bership in a particular group, and through which they create meaningful relations between distinct groups.

In Guaraní, words such as *yemboe* encapsulate this view of language as a capacity to act as a social being. *Yemboe* means “to make oneself be made to speak.” *Yemboe* comes from the root [-e], “to speak,” combined with the prefix [-mbo-] (to make someone do something) and [ye-] (to have that action come back onto the subject). It refers to everyday practices such as adults coaxing small children to speak to others, giving them lines to say, often to comic effect. Children are taught to speak as social beings, not merely to possess language as an abstract thing. In the spiritual realm, Guaraní traditionally “make themselves speak” through singing and dancing aimed at transcending earthly mortality. On the hunt, Guaraní “make themselves speak” in formal dialogues in the forest, exchanging words of respect and a bit of tobacco with tutelary spirits who release game to hunters. Curers use songs that they are “made to speak” by spirits, who are the source of knowledge. These words heal the sick, shape the weather, prepare one for love or conflict, and so on. Guaraní value those who are skilled at using these powers of language

# The Stolen Generation: Aboriginal Children in Australia

Danielle Celermajer

The Australian government's policy to eradicate Aboriginal culture constitutes a clear-cut violation of the group's cultural rights.

"Y'know, I can remember we used to just talk lingo. [In the Home] they used to tell us not to talk that language, that it's devil's language. And they'd wash our mouths with soap. We sorta had to sit down with Bible language all the time. So it sorta wiped out all our language that we knew."

—*Testimony of an Aboriginal woman forcibly removed from her parents and placed at Umewarra Mission, from the Australian Human Rights Commission's "National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families."*

Those sitting in the halls of the academy or human rights institutions may find it difficult to define "the right to culture" in pithy terms, but indigenous Australians know what it is all too well. Having been brutally violated by the post-colonial Australian state, the right to culture is no great mystery to the thousands of Aboriginal adults currently living in Australia who have not walked over their ancestral lands, cannot tell their people's stories or sing their songs, cannot speak their native tongue, and do not know the face of their own mother. As one Aboriginal woman of the "stolen generation" (as they have come to be known) told the National Inquiry: "I got told my Aboriginality when I got whipped and they'd say, 'You Abo, you nigger.' That was the only time I got told my Aboriginality."

We can begin to capture the meaning of a right to culture by tracing the spaces where cultural identity has been

hollowed out. Aboriginal Australians, who today are deftly using the resources of international and domestic law, the media, and the economic marketplace to

Culture is the organizing network within which human rights are held.

regain their cultural rights, conduct their fight against an historical background of systematic state-sponsored abuse. For the first seventy-plus years of the twentieth century, eradicating Aboriginal culture, more benignly known as "assimilation," was Australian government policy. Paul Hasluck, the most infamous Minister for Native Affairs, summarized the policy when he wrote in the early 1950s: "Assimilation means, in practical terms, that, in the course of time, it is expected that all persons of aboriginal [sic] blood or mixed blood in Australia will live like other white Australians do."

Like culture itself, this policy of cultural eradication did not exist as some abstract set of ideas but was played out on the bodies of Aboriginal people, and most powerfully the bodies of Aboriginal children. Australian policy makers, like their U.S. and Canadian counterparts, recognized that the life of a culture depends on its transmission across generations. As such, breaking the connection between parents (and communities) and children was the shortest route to killing their culture. While records are imprecise, the Commission's report indicates that from 1910 to 1970 between one in three and one in ten Aboriginal children were

forcibly taken from their families, transported across the vast continent, and placed in state or church run institutions, or with white foster or adoptive

parents. Contact with their original families was forbidden, and they were often punished for speaking with their siblings in their mother tongue. Most were not even told that they were Aboriginal.

Aboriginality, either as they lived it in their own bodies or as they saw it in the relatives seeking them out (but with whom contact was refused), was the object of derision. As one woman recalled:



A missing person's notice posted in Canberra, Australia. Text reads:

"Missing Person. Stolen from Iron Knob in South Australia over 40 years ago by the Welfare, a young girl known as Jennifer Wingfield, daughter of Eileen Wingfield. Your mother is still alive and wants to meet you. Your sister Dorothy is trying to find you."

## Australian policymakers recognized that the life of a culture depends on its transmission across generations.

We were playing in the schoolyard and this old black man came to the fence. I could hear him singing out to me and my sister. I said: 'Don't go. There's a black man'. And we took off. It was two years ago I found out that was my grandfather. He came looking for us. I don't know when I ever stopped being frightened of Aboriginal people. I don't know when I realized I was Aboriginal. It's been a long hard fight for me.

That long hard fight, which until recently almost all members of the stolen generation have waged alone, marks the attempt of the Aboriginal people to recapture their connection with their cultural identity. Aware now of the world into which they were born, that their own life had been a node in an intricate kinship among people, land, animals, plants, celestial bodies, and ancestral beings, this loss cannot be repaired. And because culture only exists through the lived experience of actual people, Aboriginal culture has itself been the victim of this process of removal.

Of course, this was the whole point of the policy. The Australian state, established as an independent federation in 1901, was constituted on the ground of other preexisting indigenous nations, which mapped the land with their own systems of governance, laws, and other forms of social organization. In order to claim political and legal legitimacy, the post-colonial Australian state had to adopt the pretence that none of this existed—that the continent was, to use the legal term, *terra nullius*, empty land. When Aboriginal people spoke their languages, passed their land rights down the generations according to indigenous law, or dealt out legal remedies for breaches of customary law, they were giving testament to the fiction of the modern state's claim to absolute sovereignty.

In this sense, the common view that

the damage to Aboriginal cultures (languages, kinships, social relations, land rights, etc.) was the unavoidable collateral damage caused by the populations of colonial and post-colonial states simply exercising their cultural preferences, represents a failure to recognize the cultural implications of assertions of sovereignty. Like the denial of land rights, the removal of children and all that went with it was one means of securing the untrammelled political, legal, and economic claims of the post-colonial Australian state.

Here one can clearly see the intrinsic connection between cultural rights and the full range of other human rights—civil, political, social, and economic—as affirmed at the 1993 World Conference on Human Rights in Vienna. Culture is

Aboriginal peoples are creating for themselves a cultural renaissance with reinvigorated claims for rights.... It is as if history is being played in reverse.

not a set of optional practices tacked onto a set of individuals who would otherwise enjoy the full range of human rights. It is the organizing network within which those rights are held. For those of us whose cultures have not been systematically undermined, this intimate link is invisible, or taken for granted. It comes into relief only when the culture, the sovereign claims, the economic resources, and the legal rights of a group are simultaneously and inter-dependently violated.

This cultural integrity is of course something that Aboriginal peoples know from the inside—and not only through violation, but also in the fabric of their



A member of the stolen generation addresses protestors at the Call to Consultation Aboriginal Protest March in Canberra, December 2001.

lives. This is the other side of this story: the cultural renaissance that Aboriginal peoples are creating for themselves, and their reinvigorated claims for political and economic rights. Just as the removal of children and the decimation of communities atomized Aboriginal peoples and undermined their capacity to make more comprehensive claims, so too their reconnection to community and to the web of culture provides the ground for pressing forward with such claims. In both domestic and international forums, indigenous peoples are making a new type of human rights claim—one that goes beyond the dominant view that culture is a less important right than other rights. Instead, their cultural rights claim is closely tied into the more substantive rights to land and material resources, and of course the right that provokes the greatest hostility from nation states: self determination. It is as though history is being played in reverse: Asserting the right to indigenous cultures is now paving the road to the reintegration of viable political and economic communities, and training the eyes of the international community on the Aboriginal worlds that lie beneath the map that colonial powers pasted over the globe. ■

While the first section presented relatively clear-cut cases of cultural rights violations, in this section we focus on the political contexts within which cultural rights claims are asserted. In particular, the essays explore how these contexts affect the articulation of cultural rights with regard to other human rights, including women's rights, individual civil and political rights, freedoms of religious expression, and marriage rights. This process is complicated by competing human rights claims and the *realpolitik* of particular states and international alliances, against which the recognition of cultural rights often falls victim.

The legal scholar Martha Minow has noted that when "universal human rights" and "cultural difference" are seen to be at odds, we assume women's rights to be caught in the cross-fire. The discussion of the plight of Irish Traveller women by Niamh Reilly explicitly shows how perceived contradictions between cultural and women's rights can be a false dichotomy. Here the fight for cultural rights is largely a women's struggle, since it is women who shoulder the primary family responsibilities for shelter, education, and food. In other words, Irish Traveller women seek their cultural rights as women's rights.

In her discussion of marriage rites, Alison Dundes Renteln demonstrates that the question of *which* universe of rights—for example, a U.S. court of law or Islamic jurisprudence—directly bears on *how* a marriage is recognized, if at all. If the legal definition of marriage in the United States is understood to be a heterosexual union between two individuals above a minimum age, this makes it difficult for courts to recognize marital bonds constituted in different cultural terms, such as those involving more than two people or not primarily defined as between "individuals." Renteln's essay is a reminder of how cultural values can become unhinged from cultural rights, as they inform particular standards of legal decision-making, a circumstance that too often leads to other rights violations. Underscoring the point that not all cultural *rites* can be construed as cultural *rights*, Renteln complements Reilly's case by showing how non-recognition of divergent marriage customs can be both detrimental and necessary to the protection of women.

In her essay on the politics of cultural rights in China, Xiaorong Li addresses another scenario of contradiction: between cultural rights and individual civil and political rights. In China, the scenario is fueled by the government's usurpation of cultural rights as the provenance of the nation

itself, and as part of the Asian values debate. Yet the government's selective representation of "Confucian" ideals as Chinese "national culture," and against the "individualism" of civil and political rights, justifies repression of ethnic and religious minorities, like the Falun Gong. This treatment of cultural rights has led pro-democracy advocates in China to dismiss their importance. Li argues that for China the protection of civil and political rights is inseparable from that of cultural rights, which need to be understood not as the subject of national identity, but in terms of the country's own intra-cultural diversity. If state sovereignty is not a human right, her essay clearly shows how the nation-state can also position itself as a cultural rights claimant, to the detriment of its own cultural minorities.

Turning to Europe, Kristen Ghodsee and Christian Filipov explore what happens when Bulgaria finds itself caught between allegiances and priorities, seeking membership both in the European Union and NATO. On the one hand, for entrance into the European Union the country must demonstrate a respect for minority Muslims as a new multicultural democracy that respects "religious freedoms." On the other, membership in NATO requires unflinching support of the war on terror, which in practice includes limiting the cultural rights of Muslims. This is an almost impossible balance to maintain, with far-reaching consequences for the cultural identity of Bulgaria's minority Pomaks. The contrary pressures upon the Bulgarian state have further exacerbated the issue of Pomak identity, provoking this historically Slavic and Muslim population to embrace fundamentalist Wahhabism as a means of clearly distinguishing themselves. Like Li's essay on China, this case demonstrates the pushes and pulls on the identities of cultural minorities in response to the international politics of the state. In short, conflicts over cultural identity lie behind the struggles for cultural rights.

These essays remind us that cultural rights are an important means of political representation that have material consequences. Given the stiff resistance of states to recognize the legitimacy of the cultural identities of their minority populations, and so to resist cultural rights claims, advancing these rights requires significant social capital. As the advocacy for, and conflicts over, claims make clear, traversing the space between cultural rights claims and their potential recognition by states, intergovernmental bodies, or international agreements is fundamentally to navigate the fog of politics. ■

# Women's Rights as Cultural Rights: The Case of the Irish Travellers

Niamh Reilly

Traveller women in Ireland are at the forefront of efforts to promote the cultural rights of their people.



Access to a Traveller community is blocked as a result of the "Anti-Trespass" legislation passed by the Irish government in 2002.

In a nation of approximately four million, Irish Travellers are an ethnic minority of some 24,000 people. Their ethnic distinction is socio-cultural, based upon a shared history, an oral tradition, a unique language (variously referred to as Cant, Gammon, or Shelta), and most notably a nomadic way of life. Historically, Irish Travellers were commercial nomads who engaged in tin-smithing, seasonal farm work, and providing entertainment such as singing and fortune-telling. The modernization of the Irish economy significantly eroded the economic niche once filled by Travellers, but nomadism continues to be a deeply valued expression of

Traveller culture even today. In his account of Irish Traveller culture, Traveller activist Michael McDonagh cites one Traveller who put it this way, "Travellers remain Travellers even when they are not travelling."

Travellers are marginalized in Irish society and subjected to discrimination within the majority population. Demographic statistics attest to the second-class status of the group. Despite living in one of the wealthiest European nations, most Travellers live in extreme poverty, suffer poor health, and experience many obstacles in accessing appropriate accommodation, education, training, and employment. They have high

birth and infant mortality rates and low life expectancy: Over 40 percent of Travellers are under 15, while only 5 percent are aged 50 or more. More than a fifth of Traveller families live on temporary roadside sites, where dangerous and unsanitary conditions mean that survival is a constant struggle.

In the early 1980s an Irish Travellers' movement emerged that explicitly framed Travellers' rights as human rights. Founded by the Travellers' rights group Pavee Point, a fundamental claim of the movement is that "Travellers...have a right to assert and celebrate their distinct ethnic identity." Importantly, Pavee Point ties these cultural rights to the group's human right to "resources which enable them to meet basic human needs, to reach a socially acceptable standard of living, and to live with dignity in society." In other words, the struggle for basic needs is built upon the claim that Travellers are a minority group with culturally specific needs, which must be met if Travellers are to survive as a culturally distinct group. Culturally appropriate accommodation for Travellers means providing adequate, safe, and properly serviced halting sites around the country as well as giving Travellers the choice of living in permanent houses. Culturally appropriate education would acknowledge that Traveller children may have particular difficulties attending settled schools, where most students live in one place and where parental literacy is assumed.

The rights of Traveller women in particular are at stake. In a May 2004 interview, Ronnie Fay, director of Pavee Point, explained that there are "no Travellers' rights without Traveller

Photo courtesy of the Traveller Visibility Group

women's rights." Fay pointed out that Traveller women face "triple discrimination—as Travellers, as women, and as Traveller women." While Traveller women "experience patriarchy in the ways that all women do...they also experience particular forms of abuse as Traveller women, when they are brutalised by descriptions in the media."

In July 2004 a newspaper columnist for *The Sunday Independent* used the words "cunning" and "devious" to describe a Traveller woman who regularly visited her mother's home seeking assistance. The journalist asserted that, "Travellers have no self-control and no civic responsibility because their disrespect for civil society has been indulged...as an element of their 'special' identity." Back in 1996 a column appearing in the same paper described Travellers as following "a life of appetite ungoverned by intellect...worse than the life of beasts...." Around that time a member of the Irish parliament had publicly advocated that the number of Travellers should be limited through the use of birth control.

In the face of such hostility, the National Traveller Women's Forum was founded in 1995 with the aim of advancing "Traveller women's rights [as] human rights, equality, cultural recognition, solidarity, liberation, collective action, anti-sexism, anti-racism [and] self-determination." In 1997 Catherine Joyce, then a community worker with Pavee Point and an active member of the National Traveller Women's Forum, addressed in writing what it means for Traveller women to negotiate life for their families who have no choice but to live on temporary, unserviced road-side sites:

We have the responsibility of the home...and children.... [I]f there is no water and no toilets it [affects women and men differently].... We are the ones...making sure [children] attend school and do their homework and that they are clean.... If Travellers are evicted children may miss school or hospital appointments and the settled people blame the mothers....

Joyce also drew attention to the particular pressures on Traveller women as they

must interface between the settled population and their own community:

The women are also the ones most in contact with settled people.... [We] are often the ones who face racism directly and who must broker on behalf of our families.... [But if we] say anything that seems to go against the community...[we] can be blamed by other Travellers....

Joyce's account underscores the imperative of recognizing the cultural rights of Travellers as an ethnic group in building the case for culturally appropriate service provision and easing the hardships Traveller women face. Recognition of Traveller cultural identity is also vital to reducing the widespread hostility toward Traveller women in their daily lives.

Over the past decade the Irish Traveller's movement has achieved some success in contesting anti-Traveller discrimination and in gaining cultural recognition as an ethnic minority. Yet the Travellers' struggle is ongoing. In fact, the Irish Government struck a blow to years of Traveller activism by contesting their official minority status in its first report under the Convention on the Elimination of Racial Discrimination

(2003). The report asserted that "Irish Travellers do not constitute a distinct group...in terms of race, color, descent, or national or ethnic origin," thereby undermining Travellers' claims to cultural distinctness and related measures to protect Travellers' human rights.

The 1990s global campaign for women's human rights is most closely associated with achieving international recognition of violence against women as a human rights issue. The campaign has generally side-stepped the issue of cultural rights, except to sound a note of caution that cultural rights are often invoked at the expense of women's human rights. The efforts of Irish Traveller women to define and secure their human rights offers an important counter-example that underscores the complex ways in which cultural rights claims and women's human rights claims often intersect. Their plight "as Travellers, as women, and as Traveller women" calls attention to the multifaceted nature of their struggle and the need for a multifaceted response. ■

For more on women's rights as human rights see the "Violence against Women" issue and the "Women's Rights" issue of *Human Rights Dialogue*, available online at <http://www.carnegiecouncil.org>.



A Traveller woman is evicted from her home.

# A Chinese Lesson on Cultural Rights

Xiaorong Li

While the Chinese government may claim to protect the cultural rights of its people, its record of violations of individual civil and political rights suggests otherwise.

Unlike many other nations, China has formally recognized cultural rights, having ratified the International Covenant on Economic, Social, and Cultural Rights. The government also claims to protect dozens of ethnic minorities and, since the end of the Cultural Revolution in the late 1970s, has gradually allowed Taoists, Confucians, Buddhists, Muslims, and Christians to resume worship within limits. As a December 2004 article in the government-run *Beijing Review* explains, such limits prohibit “endangering state or public security” and “obstructing the administration of public order or encroaching upon public or private property.” This, however, is the same pretense under which the government has long crushed pro-democracy movements and imprisoned dissidents. While China’s Marxist-Leninist legacy promises a gentler treatment of ethnic minorities than of religious believers, both groups have been considered a threat to the state, particularly in the cases of Tibetan Buddhists and Hui Muslims in Xinjiang and other Autonomous Regions.

In practice, then, China’s acknowledgment of cultural rights is at best selective. The government actively suppresses distinct cultural activities it deems to be “evil cultish” or “separatist,” and it censures the practices of Tibetan Buddhists loyal to the Dalai Lama and of members of the Falun Gong, a quasi-Buddhist sect, because they are viewed as a threat to the government’s hold on power. It pointedly avoids describing these groups as “cul-

tural communities” and does not recognize their practitioners as possessing cultural rights.

Besides limiting the scope within which ethnic and religious culture can be enjoyed, the government also tries to control the definition of the majority “Chinese culture”—a definition that it has changed over time. Initially the Communist regime rejected all “feudal residues,” including Confucianism. The

The systematic infringement of civil and political rights undercuts any protection of cultural rights.

anti-Confucian campaign reached a climax during the Cultural Revolution when Mao denounced those threatening his power as “Confucian dogs.” The tide turned during the 1980s and 1990s, however. In defiance of international criticism about the region’s anti-democratic practices and poor human rights record, South-East Asian governments laid claim to distinctively “Asian values” as legitimizing a different approach to human rights. In the face of international scrutiny for its rights violations, particularly during the 1989 Tiananmen Square massacre and its aftermath, the Chinese government eagerly joined the bandwagon. The Confucian tradition was officially “rehabilitated,” and declared China’s

authentic cultural tradition.

The government’s particular reading of Confucianism, supported by some scholars, emphasizes the family and society’s collective interests over the interests of the individual, which are associated with social instability, disorder, and the undermining of collective national pursuits. This construction of “Chinese culture” rejects “individualistic” civil and political liberties. (Conspicuously, the Chinese Government has yet to ratify the International Covenant on Civil and Political Rights.) In this way, by determining what counts as “Chinese culture,” the government promotes a narrowly circumscribed and politically self-serving application of collective “cultural rights.” Despite its professed concern for cultural rights, the government’s actions make clear that it is not interested in promoting the country’s internal cultural diversity, which it casts as socially and politically dangerous.

In fact, however, the official rehabilitation of Confucianism has inadvertently revitalized other religious traditions—a process facilitated by China’s increased engagement with economic globalization. Chinese authoritarian leaders have responded by jailing Tibetan Buddhists, driving unofficial Christian churches underground, and actively persecuting practitioners of the Falun Gong. They violate the rights of individual members of these groups through torture, secret trials, and arbitrary detention. They heavily police the Internet, forbid public gatherings to express dissent or to practice a banned religion, and punish sympathetic intellectuals, writers, and journal-



Morning Falun Dafa practice on the site of Jie Tai, an ancient temple in Beijing, China. November 2, 1996. Since the government's crackdown on Falun Gong, such large gatherings are no longer permitted.

ists. Together these actions amount to a systematic infringement of civil and political rights. This infringement, in turn, undercuts any protection of their cultural rights.

But the government's oppressive actions have a silver lining. Government persecution and suppression have turned many Tibetan Buddhists, Christian churchgoers, and members of the Falun Gong into sympathizers and supporters of China's human rights and pro-democ-

granting "exclusive" immunities or privileges, if necessary, to members of distinct cultural communities. Exclusive immunities might mean allowing time off from work to pray, facilitating teaching of local languages, permitting the practice of alternative medicine, or tolerating public expression of beliefs such as the Falun Gong practice of mind-body exercises. Institutional safeguards—including protections for freedom of religion, expression, assembly,

reformers and liberal intellectuals are suspicious of cultural claims, which has left them working with only a partial picture of the extent of the problem. They find evocations of "cultural traditions" suffocating, and blame the country's lack of democratic progress on the long dominance of old traditions. (And many of their counterparts in the West agree.) Others worry that tolerating diverse religious expressions is tantamount to endorsing particular faiths or visions of "salvation." In this way, like the government, these reformers have failed to appreciate the indivisible relationship between demands for cultural rights by members of traditional cultural communities and demands for protection of civil liberties and political freedom.

If safeguards are not put in place, the survival of China's distinct religious and cultural communities will be threatened.

rac movement. In fact, Falun Gong members have organized the most effective and sustained campaigns against torture and arbitrary detention seen in PRC history.

These groups seem to understand that the protection of civil and political rights is a precondition for the meaningful exercise of cultural rights. Promoting the "right to culture" and protecting a society's intra-cultural diversity involves

and association—are necessary to protect exclusive privileges to engage in distinct cultural practices, to express alternative (non-official or unpopular) cultural identities, to creatively develop culture, and to benefit from the unique products of one's culture. If these safeguards are not put in place, the survival of China's distinct religious and cultural communities will remain threatened.

Some Chinese pro-democracy

Political suppression, as China's own recent bloody history vividly demonstrates, can no more rid people of cultural identities and faiths than it can aid healthy debates in the marketplace of ideas and beliefs. In part because the language of cultural rights has been usurped by the state, a unified struggle for greater tolerance and better protection of civil-political liberties, which includes religious-ethnic groups and liberal reformers, has yet to materialize in China. ■

# Cultural Rights in the Age of the War on Terror

Kristen Ghodsee  
and Christian Filipov

In Bulgaria the tensions introduced into national politics by the requirements of participation in the European Union and of cooperation with the war on terror have affected recognition of minority rights.

In the wake of the September 11, 2001, terrorist attacks on the United States and the subsequent increased global preoccupation with terrorism and Islamic fundamentalism, a small Slavic Muslim group in Bulgaria, known as Pomaks, has become the subject of a national controversy. At issue is the identity of a people who have historically remained separate from the country's majority Slavic Orthodox Christian population as well as from the vast majority of its 12 percent Muslim minority, who are of Turkish origin.

The Pomak population lives in the Western part of the Rhodope Mountains near the border with Greece. Although scholars contest the history of the Pomaks, popular opinion claims they were Slavs forced to convert to Islam during Bulgaria's occupation by the

Ottoman Empire. Over the last century Bulgaria's democratic and totalitarian governments have made attempts to forcibly assimilate the Pomaks into the "true" Bulgarian culture, either Orthodox Christianity or secular Marxism. These attempts were met with sustained resistance by the Pomaks, reinforced by their geographic isolation. During communism the Bulgarian state

Pomaks have been eager to create  
a separate and distinct identity.

redrew its border with Greece many kilometers inward from the actual geographic border, leaving most Pomak villages either within this artificial border zone or in remote mountain locations.

Consequently, there was little economic investment in these regions in terms of industry, cooperative agriculture, or even basic infrastructure. Today the Pomak region is among the poorest in the country with some of the highest rates of unemployment.

In the immediate post-socialist period, religious and cultural freedoms in Bulgaria were celebrated, and the Pomak

population was largely left in peace. In 1992, Bulgaria ratified the European Convention on Human Rights (ECHR), which provided protection for ethnic and religious minorities. In preparation for Bulgaria's expected accession to the European Union, the Council of Europe urged Bulgaria to transpose its commitments under the ECHR into national law. Bulgaria did so in the form of the 2002 law called the "Confessions Act," which explicitly outlined eleven religious rights, including the right to establish and maintain connections with religious persons and communities in other countries and the right to receive religious education in any language. During this time religious and foreign language education was also permitted under the Law on Education, adopted in 1991. So long as religious secondary schools teach the approved national curriculum they are permitted to operate; and public schools impose no restrictions on wearing headscarves or other religious dress and symbols. Bulgaria's Muslim minority also



Pomak women, dressed in traditional costume, at a festival in Bulgaria.

Photo by Julian Angelov / [www.travel-photo-gallery.org](http://www.travel-photo-gallery.org)

had political representation through its own political party, the Movements for Rights and Freedom (MRF), an important coalition partner to almost every government since 1989.

Traditionally, Pomaks have professed a moderate, almost secular, version of Islam. However, as the region's economic situation deteriorated following the collapse of communism in 1989, proponents of a more fundamentalist Islam secured international aid to build new mosques, provide job training, and create schools. Dozens of shimmering new mosques were erected with money from abroad, and today their bright silver domes and spires shine across the otherwise dilapidated landscape of the Western Rhodopes. Foreign trained fundamentalist Islamic clerics have been streaming into Bulgaria and are allegedly targeting young unemployed Pomak men and women.

In 2003 the former Chief Mufti of all Bulgarian Muslims, Nedim Gendzhev, accused his successor of accepting bribes from foreign clerics to allow them to operate illegal Islamic fundamentalist schools in Bulgaria. Gendzhev singled out the Western Rhodopes as the most vulnerable region, claiming that Wahhabi fundamentalists were trying to recruit future "terrorists." The story was picked up in the national and international media, and has stoked domestic fears that Western countries might accuse Bulgaria of harboring terrorists. In particular, the Bulgarian press reacted strongly to the discovery in late 2004 that at least six insurgents fighting in Iraq had Bulgarian passports. In early 2005, Gendzhev was reinstated as Chief Mufti, and continued to claim that his rivals were dangerous Muslim radicals. Gendzhev's rivals, on the other hand,

the poor Pomak villages, many Pomaks still regard the ability to practice their Muslim faith—in whatever form that practice takes—as an important cultural and religious right. The government, however, considers radical Islam and Arabic as alien to Bulgarian Pomak culture, and therefore not defensible as a "cultural right." Article 7 of the Confessions Act allows the government to suspend religious rights if they are "directed against the national security."



A Pomak woman farms in the Rhodope region of Bulgaria.

This provision has been much criticized in that it gives the government sole discretion over the definition of "national security," and the government can therefore suspend religious rights at will. It is this provision that the Bulgarian state can use against the more radical Pomak Muslims.

The issue of Pomak cultural identity is at the heart of this controversy. While most Pomaks believe that they are for-

merly Christian Slavs who converted (or were forced to convert) to Islam during the Ottoman occupation of Bulgaria, other Pomaks insist that they are ethnically Turkic, Aryan, or Arab. The possibility of an ethnic Arab Pomak identity forms the basis for the rising influence of

Wahhabism, and the growing number of calls for a return to the "true" Muslim faith among Pomaks. Since the MRF is popularly associated with Bulgaria's Turkish minority, some Pomaks believe that their interests are not adequately represented in parliament.

In the post-socialist period, Pomaks have been eager to create a separate and distinct identity for themselves. Many Pomaks fear that they are once again being forced to assimilate—but this time it is the Muslim Turks rather than the Christian Slavs who are interested in Pomak political support, and who want the Pomaks to accept Turkish leadership in Bulgaria. Wahhabism (or Salafism, as it is also known) offers the Pomaks who embrace its teachings a clear way to distinguish themselves from Bulgarian Turks. By rejecting the very moderate version of Islam practiced by the Turkish Muslims—who eat pork, drink alcohol, rarely fast for Ramadan, and read the Koran in Turkish or Bulgarian—Pomaks are carving out a unique cultural niche.

The contested cultural identity of the Pomaks has placed the Bulgarian Government in an increasingly awkward position. On the one hand, as a rather young post-socialist democracy in the EU, Bulgaria must uphold and respect the religious and cultural rights of its minority populations. On the other hand, as a new member of NATO and a participant in the "coalition of the willing" in the war in Iraq, Bulgaria also wants to be seen as a reliable ally in the international war on terror. In the aftermath of 9/11, security concerns are slowly overtaking public opinion. For example, the Bulgarian Government decision in 2003 to close down Islamic centers in the south of the country has met with little opposition. This is in stark contrast to a situation in 2000 when outraged domestic and international human rights organizations loudly protested the deportation of a Jordanian-born radical Islamic cleric by Bulgaria's pro-Western, "democratic" government.

Bulgaria's majority Christian population still views the Pomaks as a painful reminder of Bulgaria's 500 years of oppression by the Ottoman Empire. (con't on page 36)

## The issue of Pomak identity lies at the heart of the controversy.

accuse him of having been a member of Bulgaria's state security services under communism, and of possibly being involved in the assimilation campaigns against Bulgarian minorities in the 1980s.

While this new influx of foreign financial resources has been welcome in

merly Christian Slavs who converted (or were forced to convert) to Islam during the Ottoman occupation of Bulgaria, other Pomaks insist that they are ethnically Turkic, Aryan, or Arab. The possibility of an ethnic Arab Pomak identity forms the basis for the rising influence of

# When Rites are Rights: Cultural Challenges to Marriage Laws

Alison Dundes Renteln

The legal definition of marriage can make it difficult to recognize marital bonds for minority cultures.

Marriage is a social institution designed to regulate sexual relations, preserve family ties, and protect the offspring of legal unions, depending on the cultural context. While many think of marriage as an individual choice motivated by romantic love, in many cultures marriage is conceptualized differently, such as a way to forge alliances between groups. Whatever the reasons for entering into marriages, in most societies the legal protection afforded marital relationships is important to individuals because it guarantees that they can enjoy intimacy free from governmental interference. For most individuals nothing is more central to a way of life than the ability to interact with those whom they consider significant in their lives.

The controversy over same-sex marriage in the United States, which gained prominence during the 2004 presidential

campaign, did much to identify the American concept of marriage—how it is popularly conceived and what role the state plays in its definition. Although a majority of Americans are willing to classify same-sex relationships as domestic partnerships or civil unions, thereby conferring upon them many of the same benefits that married couples receive, a significant number of these same people balk at the idea of calling such unions “marriages” and support their prohibition by the state. Yet beyond the high-profile issue of same-sex marriages there are other, quieter debates that take place in this country and elsewhere around the world—debates that raise questions about the arbitrariness of legal definitions of marriage insofar as they rely on a set of moral assumptions that may not be shared by members of certain minority groups. Consequently, when state law has denied the possibility of marriage according to a different standard, and thus has prohibited individuals from engaging in cultural practices, there have been legal challenges that are both implicitly and explicitly based upon claims of cultural rights.

In *Man and Wife in America: A History* (2002), Henrik Hartog has examined the meaning that Americans have historically assigned to marriage.

For most individuals nothing is more central to a way of life than the ability to interact with those who are central to their lives.

As Hartog notes, marriage has long meant “the legal union of man and woman, as husband and wife, for life.” In addition, a person may marry only one person at a time; multiple marriages are permissible only if they are sequential. U.S. law also prohibits marriages considered incestuous: A husband and a wife cannot be near relatives, although cousins, and occasionally even uncles and nieces, can marry in some jurisdictions. In the twentieth century the

United States along with the United Kingdom added a new requirement: Individuals have to have reached a minimum age (that varies by state)—presumably to be able to consent to marriage, although those under that age could marry with parental consent. Finally, in addition to issues of law there is a social expectation in the United States that marriage should last for a reasonable period of time, because too brief a marriage trivializes the matrimonial enterprise.

Given the remarkable variety of marriage practices documented in Edward Westermarck’s extraordinary three-volume work, *The History of Human Marriage* published in 1922, it is unsurprising that some of them clash with these public policies. Polygamy, for example, has proven to be among the most controversial forms of marriage in the United States and elsewhere. When Muslim families migrate to the United States, immigration officers inform Muslim husbands that they may bring only one wife into the country, requiring that any other wives and children be left behind. Thus, the intention of government officials to protect the rights of women by refusing to recognize polygamy may actually work to the detriment of women in some situations.

Sometimes the issue is not simply that a man has more than one wife but that a wife accompanying him across borders is “under age,”—under the minimum age for marriage established by the state in question. In the *Ezeonu* case (1992), a doctor from Nigeria was prosecuted in a New York court for rape

after he took his second “junior” wife to a clinic to obtain a birth control device. Although there was no question that this was a valid marriage according to Nigerian law, the judge rejected the well-established doctrine of “valid where consummated,” which requires the recognition of marriages properly contracted in other countries, on the ground that polygamy was deemed to be against public policy. Ezeonu’s attempt to raise a defense of marriage to a charge of rape proved unsuccessful, and he was convicted of rape.

Unfortunately, for litigants whose customary law authorizes different forms of marriage, the “against public policy” standard is a vague, ill-defined one. Nor are immigrants the only ones whose polygamous relationships are prohibited based on similar reasoning. Members of the Church of the Latter Day Saints (CLDS, also known as Mormons) have also argued that they should have the right to marry in accordance with their religious tenets. At the end of the nineteenth century, the U.S. Supreme Court rejected the notion that Mormons should be allowed to have polygamous marriages by drawing a sharp distinction between beliefs that are absolutely protected under the free exercise clause of the First Amendment and conduct that is not. Religiously motivated conduct, for example, marrying multiple wives, donning religious symbols, and sacrificing animals, is not afforded protection by invoking the principle of religious liberty. To allow each person to decide with which laws he will comply would lead to anarchy, the Court concluded. As it happened, the CLDS subsequently disavowed the requirement of polygamy. However, fundamentalist sects operating outside the auspices of the official Church are still known to have polygamous relationships. In Utah the American Civil Liberties Union has argued that this practice should be afforded protection under the principle of religious liberty.

Claims of religious freedom clearly represent one form of cultural rights claims. Although the United States is legally obligated to protect cultural rights, under which religious freedom is subsumed, litigants have opted to frame

the cultural rights claim as a free exercise claim because jurists are largely unfamiliar with the jurisprudence of cultural rights. By contrast, the American legal community accepts the free exercise doctrine as an established legal principle.

In addition to legal debates about *who* is entitled to marry, there is also the question of whether the right to culture protects *the ways* in which couples marry. Protecting traditional marriage rites may be in tension with women’s rights, as in the many documented cases of forced marriage involving the kidnap-

cases, limits on cultural rights claims are clearly necessary. Yet not all arranged marriages are forced marriages as parents often consult their daughters in the process of negotiating such marriages. Furthermore, judges can release women from such marriages if there is sufficient evidence of duress. Therefore each case must be scrutinized on its own merits before determining whether limits on cultural practices are warranted.

The refusal of U.S. courts to acknowledge different types of marriages can also be harmful to women. There are

Legal limits on marriage rely on moral assumptions that may not be shared by certain minority groups.

ping and abuse of girls. More extreme examples are cases of “honor killings,” which occur when a girl has failed to observe socially prescribed limits of behavior and thereby has jeopardized her eligibility for marriage. In such

cases in both the United States and Canada in which the judge has been asked to recognize temporary marriages known as *mut’a* under Sharia law; such a marriage can be contracted from minutes to years. While the *mut’a* has been con-



The lifetime union of a man and a woman of a certain age is what marriage means to most Americans—but not all.

Photo by Sue Cunningham



Polygamists who left Utah in the early twentieth century were later prosecuted by the Arizona government. Short Creek, Arizona, 1953.

controversial, in Islamic jurisprudence there is no question that a woman in a *mut'a* relationship has legal rights that she lacks without it and that the children produced in the relationship are considered legitimate in the eyes of the law. The judiciary had to grapple with the inter-

claim, as here when the husband conveniently denies it, effectively undermines women's rights.

While all nations are under an obligation to protect cultural rights, not all *rites* should be protected as cultural *rights*. Sometimes customs are better

There is also a question of the proper limitations that must be placed on the exercise of cultural rights when they conflict with other human rights. Even if a rite can be defended as a cultural right, other more fundamental rights, like those of women, children, and other vul-

Traditional marriage rites may be in tension with women's rights ... but court refusal to acknowledge different types of marriages can also be harmful to women.

pretation of *mut'a* under California law in *In Re. Marriage of Vryonis*. According to Fereshteh Vryonis, an Iranian citizen and a visiting professor at the University of California, Los Angeles, she and Speros Vryonis, Jr., the Director of the Near Eastern Studies Center, entered into a temporary marriage. When the relationship disintegrated, she filed for dissolution, attorney's fees, spousal support, and a determination of property rights. Speros denied that a marriage existed. Although Fereshteh prevailed in the trial court, the appellate court reversed the decision, declining to recognize the *mut'a* marriage in the context of divorce. Failure to recognize the cultural rights

protected by means of other legal principles. Although one could interpret cultural rights to cover same-sex marriage, for example, it is unclear whether gays and lesbians have a truly distinct culture and even if they do, whether marriage is an integral part of that culture. While there may be many good reasons to permit same-sex marriage, equal protection or privacy rights may provide a stronger basis for this form of marriage than the cultural rights of sexual minorities. To determine whether to allow or disallow particular cultural traditions, the right to culture is only one of several normative bases of the argument, and not necessarily the most compelling.

nerable groups, may outweigh the right to culture. In general, the right to culture should be protected so long as the customs are innocuous. In the absence of any demonstrable harm, individuals and groups should be entitled to follow traditions that are important to their way of life, free of any governmental intervention.

For a discussion of honor killings, see Leylâ Pervizat's article, "In the Name of Honor," as well as Zehra F. Arat's response, "A Struggle on Two Fronts," in the "Violence against Women" issue of *Human Rights Dialogue*, available online at <http://www.carnegiecouncil.org>.

In this section we look at some of the latest efforts to recognize and institutionalize cultural rights, with essays that illustrate the problems encountered in setting clearly defined and judicable standards for cultural rights claims. Perhaps most difficult is the requirement of legal fixity, where “culture” must be defined as a discrete, static, and distinctive set of traditional beliefs and practices—a view of culture that is ill-suited to recognize the ways that cultural identity is a socially negotiated process. The challenge of finding both flexible and accountable legal standards for cultural rights becomes simultaneously one of determining cultural boundaries and to whom a given judgment should apply.

Avigail Eisenberg’s discussion of Canadian jurisprudence offers an account of cultural rights from the state’s eye view. It also serves a comparative purpose, adding its weight to the cases of Bolivia, Australia, China, Ireland, and Bulgaria, all of which nuance our understanding of the different approaches to cultural rights of nation-states. In Canada, a country that has given extensive consideration to its own multicultural identity, the courts have begun using a “distinctive cultural test” in decisions concerning potential restrictions upon cultural practices. The test requires courts to determine how integral a disputed practice is to an indigenous group’s cultural identity by whether the practice in question existed “prior to contact” with Europeans. But proofs of the continuity of cultural identity from “pre-contact” to “post-contact” run counter to another requirement to balance native claims against Canada’s existing legal system. In effect, the test mixes standards—of non-historical continuity and of a post-contact status quo—and rolls them into one. Eisenberg’s essay shows that setting standards can involve controversial assumptions, but she nonetheless lauds the effort to do so as an important first step.

Will Kymlicka’s account of Europe’s new High Commissioner on National Minorities (of the Organization for Security and Co-operation in Europe) explores the challenges of reaching consensus on cultural rights legislation as a part of the ongoing evolution of new forms of regional-level cooperation. Like Latin America’s Organization of American States and its consideration of indigenous peoples’ rights through the Inter-American Human Rights Court, the European Union has turned its attention to the problem of national ethnic minorities as a human rights concern. Kymlicka points to the difficulty of “internationalizing” the question of ethnic minorities by developing “European standards” for minority rights, since countries differ significantly in how they both define and accord rights to different minori-

ties. In other words, in a time of rapid regional transformation, lurking behind the problem of what minority cultural rights in Europe should be is the problem of what a “European union” is in the first place.

The remaining essays in this section explore how cultural rights have become a part of international efforts to institutionalize standards of global cooperation for markets and states. Dinah Shelton explains why the UN Human Rights Committee has ended up rejecting almost every cultural rights claim it has heard. On the one hand, the Committee lacks any enforceable standards for whether particular state governments act “in good faith.” On the other hand, it sets very high standards for apparent violations of available cultural rights instruments, such as Article 27 of the ICCPR. The upshot amounts to a de facto validation of the state as representative of a majority “democratic” decision at the expense of claims of cultural minorities. The record of the Committee suggests that intergovernmental approaches to cultural rights can fall prey to these same governments, since recognition of alternative forms of cultural autonomy, beyond the “sovereignty and territorial integrity of states,” is rarely forthcoming.

Such a discussion of alternatives is taking place in another corner of the UN system as part of the World Intellectual Property Organization’s effort to reach out to “new beneficiaries.” As Rosemary Coombe tells us, the goal of cultural protection—including collective ownership by indigenous groups—is often met by calls for “fair use,” individual “freedom of speech,” and a wide open “public domain.” The rising heat of intellectual property debates is reflected in UNESCO’s current effort to draft a binding cultural diversity convention. This effort aims to bring better balance to the rapidly globalizing system of rights of invention, access, use, and appropriation regulated by the World Trade Organization and using the language of patent, copyright, and trademark. If this system is to avoid setting one-sided standards (as in Shelton’s account) favoring the “free trade” of economic globalization, it must first reconcile with existing cultural rights standards. To do so requires recognizing forms of protection for traditional sources of cultural creativity that support collective cultural distinctiveness.

This section offers a picture of emerging standard-setting at the multiple levels of the state, the region, intergovernmental institutions, and the global system of trade regulation through which cultural rights claims will be considered for the near future. Taken together, the cases show how legislative efforts themselves help to create the form of “culture” in cultural rights. ■

# The Distinctive Culture Test

Avigail Eisenberg

In Canada, the application of a “distinctive culture test,” beginning with the ruling of *R. v. Van der Peet* fails to meet standards in assessing cultural distinctiveness.

In diverse societies, especially those shaped by colonialism and discrimination, many people find they must defend themselves against public laws and regulations that threaten practices they view as crucial to their cultural or religious identity. Oftentimes political and legal institutions are called upon to broker these conflicts, and in some cases they have developed methods to guide that process. Very little attention has been devoted to these methods, but they are a growing part of how public institutions respond to claims of protecting cultural identity.

and consuming salmon) did not count as a protected Aboriginal right.

According to the Court, in order for a practice to receive constitutional protection it must pass a two-stage “distinctive culture test.” In the first stage, the plaintiff must show that the disputed practice is integral to the pre-contact indigenous culture of the community in question. In other words, to be protected practices must be central, not incidental, to the culture, and only those practices that existed before Aboriginal-European contact are eligible for constitutional protection. In the second stage, the prac-

tice must be balanced with the legal system with which it conflicts—in this case Canadian common law. The Court’s job is to render Aboriginal perspectives “cognizable to the non-Aboriginal legal system” through a reconciliation process that places equal weight on each perspective. In *Van der Peet* the Court was convinced that, even though salmon was central to Sto:lo culture, trade in salmon did not pre-date contact with Europeans. Trade in salmon was “incidental and occasional” at best and no established market system existed until well into the nineteenth century. Since the practice did not pass the first stage of the test, the need to determine whether it would pass the second stage did not arise.

Only Aboriginal practices that developed pre-European contact are eligible to be exempt from Canadian laws.

In this context, *R. v. Van der Peet* (1996) of the Canadian Supreme Court is instructive because it shows what happens when public institutions try to design a set of criteria for determining when a cultural practice should be exempt from state law. Dorothy Van der Peet, as a member of the Sto:lo First Nation, claimed exemption from regulations restricting individual fishers from selling salmon without a license. Van der Peet argued that her right to trade in salmon derived from her membership in a native Aboriginal nation whose cultural identity is intimately tied to salmon fishing, and thereby protected by section 35 of Canada’s Constitution. The majority of the Court justices found against Van der Peet and argued that trade in salmon (as opposed to fishing

and consuming salmon) did not count as a protected Aboriginal right.

What makes this case so important is less its success or failure at accurately

understanding Sto:lo culture than the difficulty the Court encountered in designing and applying fair criteria to assess what is distinctive about Sto:lo culture. To some extent any verdict was doomed from the start given that many Aboriginal peoples in Canada view the courts as institutions of the colonizing state, and therefore particularly lacking the political legitimacy to define the nature and meaning of Aboriginal cultures. Moreover, whereas Aboriginal people seek ways of enhancing their autonomy, the distinctive culture test applied by the Court offers at best the

state’s accommodation and protection of their distinctive practices and activities. Beyond these obstacles, the test itself is ethnocentric. Although the decision putatively aims at “reconciliation”—a word used several times in the judgment—the court focuses only on what reconciliation requires of Aboriginal peoples, not of both peoples. The distinctive culture test states that only Aboriginal practices that developed pre-contact are eligible to be exempt from Canadian laws. It does not stipulate, nor does the Court seem aware of the ironic implication, that if equitably applied the test would similarly insist that only European cultural practices that developed pre-contact are eligible for exemption. The irony here is that a conflict between contemporary European-based

cultural practices and Canadian law would never arise because the law in question was established by European settlers and has evolved to accommodate their changing cultural practices. In this way, the distinctive culture test actually judges Aboriginal rights on the basis of the degree to which Aboriginal societies are politically and sociologically *similar* to Western culture, allowing that they have distinctive practices that ought to be protected.

Yet it would be a mistake to conclude that the distinctive culture test, or something like it, ought to be abandoned *tout court*. To determine in the context of cultural disputes whether a particular practice is central to a community's

regard courts as the legitimate arbiters of rights. But we are likely to be less comfortable with the idea that a state's supreme court should decide what counts as distinctive about the culture of a community that the state has colonized. Similarly, we can accept that rights must be understood according to standards embedded in the development of law. But when a legal test is used to identify the standards that explicitly distinguish a culture, the biased nature of these standards becomes less obscure and abstract (as in the case of the pre-contact rule) and therefore more likely to be questioned.

The point is not that the distinctive culture test is less ethnocentric than

“magic moment of European contact” rather than the “traditions and standards of the aboriginal people in question” as the standard within the test. Aboriginal peoples in Canada, despite serious reservations about the test, have made arguments in at least two additional constitutional cases using the distinctive culture test. And, internationally, something similar to this test is being developed through the evolving work of the United Nations Human Rights Committee. Notably, no international case uses the European contact requirement found in *Van der Peet*.

In the end, there is no magical fix to working out fair relations in a pluralistic society. Yet these relations can be

A distinctive culture test is a helpful way to bring implicit biases out into the open so they can be challenged and changed.

identity, as the distinctive culture test does, and to reconcile what is central to one culture with what is central to another are unavoidable concerns in a pluralistic society. Moreover, the process of establishing transparent criteria that ask what is distinctive and integral about a culture has the potential to compel public institutions to confront difficult questions about political legitimacy and ethnocentricity that they might not confront otherwise.

Many of these difficult questions recede into the background when cultural conflicts are framed in terms of abstract and contending rights because discussions that focus on rights bring with them their own implicit set of standards and procedures for reasoning through claims. For example, we tend to

other ways of framing and discussing cultural conflicts. Ethnocentricity is likely to be a part of any public discussion about cultural claims. The important question is what sort of institutional approach is likely to expose these biases and render them more open to critical assessment and revision. Something like a distinctive culture test is a helpful way to bring implicit biases out into the open so that they can be challenged and changed, and so that a fair and systematic guide to the assessment of cultural claims can be developed.

Legal activists in Canada and elsewhere are working to use and refine the distinctive culture test. The Supreme Court of Canada was not unanimous in its judgment in *Van der Peet*, and dissenting justices argued against using the

improved by finding ways in which institutions can engage in, rather than avoid, discussions about culture and cultural identity in public forums and institutions, and in a manner that exposes ethnocentricity and problems of legitimacy. A distinctive culture test is one such way, and is likely to be increasingly used and developed by national and international institutions. ■

Read about the struggles facing members of Cambodia's fishing communities as they fight for the rights to access and manage natural resources crucial for their survival in “Environmental Rights as a Matter of Survival” by Blake D. Ratner in the environmental rights issue of *Human Rights Dialogue*, available at <http://www.carnegiecouncil.org>.

Photos courtesy of Gitksan Chiefs' Office; Copyright Greenpeace; Courtesy of the Secwepemc Fisheries Commission.



The Gitksan Nation at the Supreme Court of Canada; members of the Nuxalk First Nation; and Chief Nathan Matthew of the Secwepemc First Nation.

# A European Experiment in Protecting Cultural Rights

Will Kymlicka

As Europe continues to institutionalize its union, the cultural rights approach it has adopted to address minority rights falls short.

Over the past fifteen years a fascinating if flawed experiment has taken place in Europe regarding the codification of cultural and minority rights. As communism collapsed in Eastern Europe in 1989 several ethnic conflicts broke out, and people feared that ethnic violence would spiral out of control. In response, Western democracies decided to “internationalize” the treatment of national minorities in post-communist Europe, creating a pan-European regime to monitor their treatment in accordance with

standards of minority rights, there has been far less agreement about what precisely these standards should be. Western countries differ significantly in terms of which rights they accord to which minorities, or even which groups they recognize as “minorities.” Trying to find a common framework for articulating pan-European standards has not been easy.

As a starting point, European organizations looked to Article 27 of the International Covenant on Civil and

teeing of political representation for minorities; or the prohibition on settlement policies designed to swamp minorities in their historic homelands with settlers from the dominant group. Article 27 has nothing to say about such claims. If European standards were to be useful in resolving such conflicts, they would have to address claims for positive minority rights.

Article 27 has a second limitation in that it applies to all types of ethnocultural minorities, no matter how large or small, recent or historic, territorially concentrated or dispersed. Indeed, the UN Human Rights Committee has declared that Article 27 applies even to visitors within a country! Article 27, in other words, articulates a truly *universal* cultural right—a right that can be claimed by all individuals and carried with them as they move around the world.

This commitment to identifying universal cultural rights limits the sorts of minority rights that can be recognized in international law. In particular, it precludes claims that flow from facts of historic settlement or territorial concentration. Since Article 27 articulates a universal and portable cultural right that applies to all individuals, even migrants and visitors, it does not articulate rights that are tied to the fact that a group is living on what it views as its historic homeland. Yet it is precisely claims relating to residence on a historic homeland that have been at stake in all of the violent ethnic conflicts in post-communist Europe, (e.g., in Bosnia, Kosovo, Macedonia, Georgia, Chechnya, Nagorno-Karabakh). Indeed, homeland claims are at the heart of most violent

The “right to enjoy one’s culture” is too weak to address issues underlying ethnonational conflicts.

European standards. Some of these standards were formulated by the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE)—a position established in 1993. Others were formulated by the Council of Europe in its 1995 Framework Convention for the Protection of National Minorities. Compliance with these OSCE and Council of Europe standards became a requirement for a country to “join the West,” and in particular to join the European Union.

This was a novel idea—the first time that the Western democracies collectively asserted that respect for minority rights was a prerequisite for membership in the family of liberal democracies. It has also been a controversial idea. While there has been broad support for the general principle that post-communist countries should meet minimum stan-

Political Rights (ICCPR), adopted in 1966, which for many years was the only example in international law of a minority rights norm. While this article provided a starting point, it was widely viewed as insufficient for two reasons. First, the right to “enjoy one’s culture” as originally formulated included only negative rights of non-interference, in effect simply reaffirming that members of minorities must be free to exercise their standard rights of freedom of speech, association, assembly, and conscience. These minimal guarantees, while vital, were inadequate to address the issues underlying violent ethnic conflicts in post-communist Europe. These conflicts centered on various positive claims, such as the right to use a minority language in courts or local administration; the funding of minority schools, universities, and media; the extent of local or regional autonomy; the guaran-

ethnic conflicts in the West as well (e.g., the Basque provinces, Cyprus, Corsica, Northern Ireland). In all of these cases, minorities claim the right to govern themselves in what they view as their historic homeland, including the right to use their language in public institutions within their traditional territory, and to have their language, history, and culture celebrated in the public sphere (e.g., in the naming of streets, the choice of holidays and state symbols). None of these claims can plausibly be seen as universal or portable; they only apply to particular sorts of minorities with a particular sort of history and territory. In short, these are all cases of *ethnonational* (or ethnonationalist) conflict, revolving around competing claims to nationhood and national territory.

To be useful in resolving conflicts in post-communist Europe, European standards would need to go beyond universal minority rights and articulate *targeted* minority rights, focusing on the specific ethnonational groups involved in these conflicts. Whereas Article 27 lumps together “national, ethnic, religious and

linguistic” minorities, the Council of Europe’s Framework Convention and the OSCE High Commissioner focus solely on “national minorities.” While there is no universally agreed-upon definition of “national minorities,” the term usually refers to historically-settled minorities, living on or near what they view as their national homeland. Most countries have explicitly stated that immigrant groups are therefore not national minorities.

Unfortunately, having set themselves the courageous and novel task of defining the rights of national minorities, European organizations then lost their nerve. The new norms do not in fact address the challenges raised by national minorities. There is no discussion of how to resolve (often competing) claims relating to territory and self-government or how to assign official language status, and there are no guarantees that minorities can pursue higher-level education or professional accomplishment in their own language. States can fully respect these standards and yet centralize power in such a way that all decisions are made in forums controlled by the dominant

national group. They can also organize higher education, professional accreditation, and political offices so that members of minorities must linguistically assimilate in order to achieve professional success and political power. In short, these norms do not address the clash between minority self-government claims and centralizing state policies that generated the destabilizing ethnic conflicts in the first place.

In fact, the Council of Europe and OSCE norms are essentially a revised version of the Article 27 right to enjoy one’s culture, strengthened to include certain modest positive rights, such as public funding of minority elementary schools, the right to spell one’s surname in accordance with one’s own language, and the right to submit documents to public authorities in the minority language. These changes are significant, but they do not address the distinctive characteristics and aspirations of national minorities—their sense of nationhood and claims to a national homeland.

This failure to address the more fundamental issues of cultural identity has,



Photo by J. Dago/ UNEP/ Peter Arnold, Inc.

Bread is thrown to Kosovan refugees prevented from entering the former Yugoslav Republic of Macedonia.



Kosovo Albanians fleeing ethnic conflict.

I believe, resulted in an unstable situation. At the moment only national minorities are currently protected by these European norms, however inadequately. But since the actual rights being codified are not based on claims of historic settlement and territorial concentration, there is no reason why they should not be extended to apply to immigrant groups as well. And indeed there is currently a movement within both the Council of Europe and the OSCE to do exactly that—in effect, to move back to the original Article 27 model that attempts to articulate universal cultural rights applicable to all minorities, new or old, large or small, dispersed or concentrated.

Many people involved in issues of minority rights assume that redefining the category of national minorities to include immigrants is a progressive step: The more groups that are protected, the better. Moreover, immigrants in Europe today are clearly a vulnerable group in need of international protection. The ideal solution would be to adopt a decla-

ration focused on distinctive needs of immigrants, but that seems unlikely. After all, none of the EU states has ratified the 1990 U.N. Convention on the Protection of the Rights of All Migrant Workers, and the prospects of adopting European-level norms are almost nonexistent. Consequently, the only realistic way to achieve this protection is by fitting immigrants under some pre-existing scheme of minority protection, which in the European context means sliding them under the umbrella of national minorities.

While this extension is progressive in giving protection to groups that would not otherwise be protected, we must also recognize that it is potentially regressive in other respects. It amounts to the slow abandonment of the bold experiment of articulating international norms targeted at the distinctive historic/territorial claims of national minorities—norms capable of resolving potentially violent ethnonationalist conflict.

Is there any alternative? One option would be to enshrine a norm of “internal

self-determination,” granting national minorities the right to territorial autonomy. Such a norm has been included in recent declarations on indigenous rights (for example, in the U.N.’s Draft Declaration on the Rights of Indigenous Peoples). Moreover, most Western democracies have accepted the need for territorial autonomy to accommodate their national minorities—for example, Catalonia, the Basque provinces, Scotland, Wales, Flanders, South Tyrol, Aland Islands, Quebec, Puerto Rico—and this seems to be working well.

However, many European countries were unwilling to accept a principle of national minority self-government. For many states, particularly in Eastern Europe, acknowledging the “national” dimension of a minority’s identity raises the spectre of secession or irredentism, and jeopardizes the right of the state to speak for, and to govern, all of its citizens and territory. As a result, the few tentative proposals for incorporating a norm of internal self-determination—including a proposal by the Parliamentary Assembly of the Council of Europe in 1993—were quickly quashed.

In short, the “right to enjoy one’s own culture” is too weak to address the issues underlying ethnonational conflicts, and the right to “internal self-determination” is too strong to be accepted by most states. Is there any way out of this deadlock? Some commentators have suggested that the right to “effective participation” might provide the key. This idea, which is also part of OSCE and Council of Europe norms, may provide a basis for addressing the *political* dimensions of ethnonational conflicts without embracing the controversial idea of internal self-determination. The hope is that states and minorities would be more likely to resolve their competing claims relating to territory and autonomy if they framed them in the language of effective participation, rather than nationhood and national self-government. In my view, this only defers, rather than genuinely addresses, the underlying conflicts, but it is at the moment the only hope for developing more effective norms. Time will tell whether it will fare any better. ■

# The U.N. Human Rights Committee's Decisions

Dinah Shelton

For the past twenty-five years, every time a cultural minority has petitioned the Human Rights Committee under Article 27 of the ICCPR, it has failed.

Over the past twenty-five years, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) has been invoked in more than a dozen individual complaints brought to the United Nations Human Rights Committee against states that have ratified the covenant and its Optional Protocol establishing the complaints procedure. These complaints have come from a wide variety of sources and have concerned interference with land and resources and restrictions on use of minority languages. Nordic indigenous Sámi have filed cases against Finland, Norway, and Sweden; Maori brought a complaint against New Zealand; Bretons against France; Sudetenland Germans against the Czech Republic; Afrikaaner and Khoi against Namibia; and indigenous groups have complained against Colombia and Canada. In nearly every case, the Committee has declared the complaint inadmissible or rejected it on the merits.

For minority groups, the Committee's expansive interpretation of Article 27 through General Comment No. 23, issued in 1994, raised hopes that the U.N. system would provide them with legal recourse. According to the Comment,

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection

and measures to ensure the effective participation of members of minority communities in decisions which affect them.... The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.

There are several reasons why, despite this broad reading of the Article, members of minority groups have been unsuccessful in pressing their claims. First, many cases have been declared inadmissible for failure to exhaust local remedies. The ICCPR requires that all effective and available local remedies be

exhausted, even if they are difficult and expensive to undertake. Thus, the Committee has required recourse to the prevailing legal system in a state even in the face of complaints that it deals unfairly with communal land tenure or nomadic lifestyles.

Second, the Committee has accepted without question the right of a state to file a reservation to Article 27, effectively excluding the minority rights contained therein. France filed a "declaration" at the time it ratified the ICCPR in which it asserted that Article 27 was inapplicable in the country because of its national laws on equality and nondiscrimination. The Committee held the declaration to be a reservation, noted that no states had objected to it, and



In Quebec, commercial signs such as the ones on Old Quebec Street seen here are only in French.

The Committee has set a high threshold for finding a violation. It is not enough that there is an impairment of a minority way of life; it should be a serious deprivation of cultural life.

concluded that it therefore lacked jurisdiction over all the Breton language cases brought to it. In effect, such reservations amount to a denial that minority groups exist because all individuals are treated with equal rights and freedoms. No allowance is made for cultural diversity and the right to be different.

Third, the Committee has set a high threshold for finding a violation. It is not enough that there is an impairment of a minority way of life; it should be a serious deprivation of cultural life. Thus, in *Lánsman et al v. Finland (I)*, the Committee decided that Article 27 was

not violated by the extent of stone-quarrying permitted by Finland in traditional lands of the Sámi. Moreover, the Committee determined that measures were taken to minimize the impact on reindeer herding activity and on the environment. In effect, the Committee interpreted the treaty to mean that measures whose impact amounts to a denial of the right to culture are not acceptable, but those that simply have a “certain limited impact on the way of life of persons belonging to a minority” do not violate the treaty.

In *Diergaardt v. Namibia*, the

Committee judged for itself the link between an economic activity and the claim of cultural rights, determining that cattle herding by descendants of an Afrikaner and Khoi community did not present the type of links protected as cultural rights. The Committee stated that “although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture.” While the community did have self-government over a period of time, this was not seen as being “based on their way of raising



Members of the Sámi tribe herding reindeer in Inari, Finnish Lapland.

Photo by Matt Snellman/ Copyright Greenpeace

cattle.” Therefore, there was no violation of Article 27.

The Sámi cases suggest a fourth reason why applicants have failed to prove a violation. The Committee considered it significant that the state made efforts to consult the minority community and take their views into account in making its decision. The consultations had been extensive and resulted in some changes in the government’s plans, based on dialogue with leaders of the affected Sámi community. It thus appeared to the Committee that the dispute was as much between factions within the minority group as between the group and the majority represented by the government.

The Committee did not articulate any standards for determining whether the government had acted in good faith, but returned to the issue in the Maori complaint against the government of New Zealand. In *Apirana Mahuika et al v. New Zealand* the petitioners claimed violations of the rights of self-determination, right to a remedy, freedom of association, freedom of conscience, nondiscrimination, and minority rights as a result of New Zealand’s efforts to regulate commercial and noncommercial fishing after a dramatic growth of the fishing industry. The government and the Maori, whose rights are guaranteed by the Treaty of Waitangi, executed a Deed of Settlement in 1992 to regulate all fisheries issues between the parties. The authors of the communication represented tribes and sub-tribes that objected to the Settlement, contending that they had not been adequately informed and that the negotiators did not represent them.

The government acknowledged its duty to ensure recognition of the right to culture, including the right to engage in fishing activities, but argued that the Settlement met the obligation by balancing the needs of the majority and minority after good faith negotiations. According to the government, the system of fishing quotas reflected the need for effective measures to conserve the depleted inshore fishery. Thus, in imposing the quotas the government carried out its “duty to all New Zealanders to conserve and manage the resource for future generations...based on the reasonable and objective needs of overall

sustainable management.” The Human Rights Committee decided in favor of the government, emphasizing

that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process concerning these measures and whether they will continue to benefit from their traditional economy.

The consultations undertaken by the government complied with this requirement because the government paid special attention to the cultural and religious significance of fishing for the Maori. Thus, the Committee evaluated both the process and the substantive balance between majority and minority interests.

State actions have been found reasonable and the harm to the community insufficient to amount to a breach of cultural rights as guaranteed by Article 27.

Finally, the Committee has taken a strict view of what constitutes a minority within a state. For example, it has refused to view English-speakers in Quebec as a minority because they are part of the national majority in Canada even though they are a minority in Quebec. The Committee did find, however, that a measure requiring all commercial signs to be in French was a denial of freedom of expression to the English-speaking businessman. It is not clear how far the Committee will go in re-characterizing minority complaints as individual complaints involving violations of other rights under the Covenant. In the case of the signage, the practical results for the applicant were the same whether the case was won based on Article 27 (minority rights) or on Article 19 (free speech). By characterizing the case the way it did, however, the Committee avoided the prospect of looking within states at smaller geographic areas where the ethnic balance may be different from the country as a whole. The Committee

might have felt that this was too intrusive in domestic matters, or that it would exacerbate tensions to call the majority a minority because of population distribution in particular areas.

In sum, the Committee has balanced the cultural and economic needs of the minority with respect for the majority’s laws and has unquestionably regarded the state as the representative of the majority’s decisions made through the democratic process. When it decides the merits of complaints, the Committee has assessed the impact on the minority group of the actions taken, the degree to which the state has consulted the group and attempted to mitigate damage, and the benefits to all those in the state, including the minority, from the actions taken. In general, it has found the state actions reasonable and the harm to the community insufficient to amount to a

breach of cultural rights as guaranteed by Article 27. The Human Rights Committee also has restricted potential claims by minority groups through General Comment No. 23, where it provides its interpretation of Article 1 on the right of peoples to self-determination. In the Comment, the Committee concluded that the right of petition cannot extend to matters of self-determination because it is a right belonging to peoples, while only individuals can file complaints. This allows the Committee to avoid deciding matters of self-determination. Thus, despite the Committee’s broad definition of cultural rights in General Comment 23, it has chosen to limit claims of autonomy by minority groups, thus upholding the sovereignty and territorial integrity of states. ■

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A full list of communications of the United Nations Human Rights Commission’s decisions on cultural rights can be found at <http://www.carnegiecouncil.org/dialogue/Shelton>

# Cultural Rights and Intellectual Property Debates

Rosemary J. Coombe

A case involving Taiwan's Ami people can be seen as a model for how best to protect the rights of cultural minorities when it comes to questions of ownership and appropriation of cultural property.

As the mounting controversies around pharmaceuticals, genetically modified organisms, technology transfer, and school readings make clear, the expansion of corporately-held intellectual property rights can conflict with other recognized human rights such as rights to health, food security, economic development, and education. One prominent response has been the movement to “free culture,” based upon the widespread conviction that the expansion and enforcement of intellectual property have a chilling effect on cultural creativity and the sharing of public goods. We cannot deny a need to protect the public domain from overzealous and sometimes inhumane intellectual property enforcement, particularly when driven by corporate interests. Unfortunately, however, in the words of legal theorists Anupam Chandler and Madhavi Sundar, this newfound “romance of the public domain” sees *all* forms of cultural protection as equivalent forms of nefarious censorship, according little respect for the distinctive rights of indigenous peoples and other minorities to their intangible cultural heritage.

The rights of peoples with respect to their cultural heritage pose new and necessary challenges for balancing the exercise of intellectual properties with individual freedoms of creativity. These include a need for the international human rights system to pay greater attention to potential violations of the cultural rights of minorities and indigenous peoples. Obligations to protect traditional environmental knowledge and to respect indigenous cultural heritage are already internationally recognized.

States are seeking to meet their legal obligations under the Convention on Biological Diversity and to respect international principles established by the Draft Declaration on the Rights of Indigenous Peoples. The World Intellectual Property Organization (WIPO) has, likewise, recognized a need to reach out to “new beneficiaries” if the intellectual property system is to achieve global legitimacy. This includes an extensive effort to articulate the principles through which traditional knowledge and traditional cultural expressions are best recognized, maintained, and protected. All of these initiatives involve the elaboration of cultural rights, although they are rarely framed as such.

Cultural rights have largely been ignored in contemporary debates about the extension of intellectual property rights and the endangerment of the public domain. Perhaps this is because Americans operating within the United States legal tradition are the most publicized intellectual property activists. For these activists, the remedy for corporate over-reaching is a robust jurisprudence of “fair use” together with the constitutional protection of free speech. These are understood to balance the use of copyrights and trademarks, permitting transformative, critical, or noncommercial usages of cultural works. Such a perceived conflict between intellectual property rights and the expressive rights of individuals has a strong legal foundation in the United States.

The United States has not, however, ratified the International Covenant on Social, Economic, and Cultural Rights. This international framework—in which

rights of intellectual property are both specified and limited—is governed by the overarching obligation to identify and to take specific measures to improve the position of the most vulnerable and disadvantaged groups in society. This Covenant has, unfortunately, remained largely outside of the purview of most intellectual property activists. Moreover, the U.S. Government has historically distanced itself from UNESCO—the UN

A more inclusive public domain must acknowledge a wider range of social relationships than is recognized by fair use and freedom of speech.

body responsible for preparing and interpreting international normative principles and instruments with regard to cultural rights. This lack of a U.S. commitment to the Covenant and to UNESCO has limited recognition within contemporary debates that intellectual property rights are also cultural rights within international law and thus must be balanced with other cultural rights claims and obligations.

The rights of communities to participate in decisions that involve the use of their cultural heritage are affirmed in too many international and national

legal instruments to be ignored. Particularly in Europe, we can point to the promotion of the ethnic, cultural, linguistic, and religious identities of national minorities. Such developments acknowledge the need to preserve and promote cultural diversity as a public good within and between societies. Renewed attention to the rights of minorities to enjoy and to develop their own cultures together with a growing recognition of cultural diversity as grounds for sustainable development suggest that we are moving toward a greater appreciation for the understanding of culture as a resource. This understanding can be applied to current discussions about intellectual property.

The influential assumption that there should be a singular or unitary public domain of cultural materials—including the concept of a digital “creative commons”—cannot embrace the range of concerns expressed by ethnic minorities and indigenous peoples. These might include an understanding of cultural heritage as the basis for group identity and as an integral resource for the continued survival of a people. A more inclusive public domain must acknowledge and respect a wider range of social relationships to cultural forms than is recognized by fair use and freedom of speech. The cultural survival of peoples demands that we formulate new principles governing the use of cultural heritage to ensure the conditions necessary to foster diverse forms of cultural creativity.

In a global environment where opportunities for cultural representation are so unequally distributed, vague fears about “copyrighting culture” cannot ethically be met with mere assertions of individual liberty or the importance of the undifferentiated public circulation of culture. We should be working toward cultural policies that enable more peoples with distinct traditions to participate in the cultural life of their own communities, in new and emergent forms of cross-cultural dialogue, and in a more inclusive public domain. A case involving the music of the Ami of Taiwan illustrates this potential.

In 1978 visiting researchers in Taiwan recorded for archival purposes



An Ami troupe shares its cultural traditions through music.

what was then considered an oral performance of the folk music of a minority ethnic group, the Ami. Unknown to the performers of this music, the recording made its way into a compilation of Chinese folk music on a record album released in France. Twenty years later a European band used a sample of this recording to create a musical composition, which received widespread acclaim. The music performed by the Ami singers was neither individually authored nor fixed in material form. Therefore, it was squarely in the public domain, and not eligible for copyright protections. Its use by the band was not in violation of any laws in force. The European composition, *Return to Innocence*, was a global hit and the Olympic Committee chose it as an anthem for the 1996 Olympic Games in Atlanta. In the absence of global information and transportation technologies, it is unlikely the original performers would even have learned of the appropriation. But news of their voices in the recording reached the elderly performers. Ultimately, with the help of a local record company and sympathetic lawyers, a little known international legal provision that prohibited the unauthorized appropriation in material form of performances was used to effect

a settlement that recognized the contributions of these talented vocalists.

Compensation for the two singers was arguably the least of what was accomplished here. More importantly, the case conveyed to a global audience an acknowledgement of Ami oral culture, which enabled the establishment of a foundation for the preservation and revitalization of Ami tribal music. It also drew world attention to the cultural traditions of Taiwan’s indigenous peoples, affirming their existence as distinctive first peoples after years of state denial. Many groups, whose languages and traditions were considered extinct by scholars and who had been repressed by the state, found new means of pursuing cultural self-determination through the incentives and opportunities for musical contribution and collaboration afforded in the case’s aftermath. In short, the case provided a means for the revitalization of endangered traditions.

This experience suggests that rights of acknowledgement or attribution—ideally coupled with legal requirements for prior consent and mutually agreed upon forms of compensation for culturally distinctive forms of creation—can enable cross-cultural dialogues that foster the growth of cultural diversity. Such

## Coombe *(con't from page 35)*

cultural exchange and creativity are not nourished by the protection of market-circulated commodities as intellectual properties in what is otherwise a global public domain. Neither are they nourished by an exclusive commitment to a cultural or creative commons and the vigorous defense of free speech and individual creativity. Our challenge, therefore, is to pursue a more inclusive and culturally pluralist public domain when considering the privileges to be accorded to intellectual property. Doing so recognizes that the objectives of sustainable development, the promotion of social cohesion, and the support for democracy all require respect for the *full* range of cultural rights provided by international law. ■

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For a related perspective on the conflict between the international intellectual property system and the rights of local and indigenous communities see Justin VanFleet's "Protecting Knowledge," from the Globalization issue of *Human Rights Dialogue* available online at <http://www.carnegiecouncil.org>.

## Ghodsee & Filipov

*(con't from page 21)*

After repeated failed attempts at forced assimilation, they have now only grudgingly come to accept the Pomak identity. In this setting, Bulgaria's support for the war on terror inadvertently aids both majority Slavic Christians and minority Turkish Muslims who seek to forcefully shape the Pomak culture into something more acceptable to mainstream Bulgarian society. ■

## Gustafson *(con't from page 12)*

tions, etc.—not as distinct ethnic enclaves.

With constitutional changes and the launch of a sweeping national education reform in 1994, Bolivia's government recognized native languages as valid instruments of schooling. "Bilingual intercultural" education, at least in official law, promises significant change, even redefining Bolivia itself as a "pluri-ethnic" and multilingual nation. However, detractors of bilingual education continue to voice the racism of those who oppose cultural rights more broadly. There are also technical challenges to such profound educational change in the form of preparing new textbooks in indigenous languages, restructuring school administration, retraining teachers, transitioning to a more intercultural curriculum—all requiring money, administrative capabilities, and skilled personnel. In other words, full implementation of these reforms is by no means guaranteed.

Nevertheless, bolstered by multicultural reforms, indigenous movements are already transforming the state from with-

in. The Guarani are taking back the meaning of their language while working to change public understandings as well. In events staged for both Guarani and Spanish-speaking Bolivians, the Guarani make claims for legitimacy as citizens with distinct histories and ways of speaking, yet citizens nonetheless. At a 1998 event commemorating the Guarani struggle, the leader Valerio Mena signaled this renaissance of a new kind of *yemboe* (school learning), reconnecting the word to the Guarani word *arakuaa* (knowledge), in effect beginning to repair the ruptures produced by schooling in the past:

Our ancestors did not read and write, but they had *arakuaa*, they defended this land so that we could live... We will not forget these histories. Now that we have our own teachers and our own *yemboe* we will pass this new knowledge on to the young. This is *arakuaa* that we have been given; let us place these words into our very being. ■

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The ideas expressed are the author's and do not purport to represent official Guarani positions.

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For an edited transcript of portions of this workshop and further information see [www.carnegiecouncil.org](http://www.carnegiecouncil.org).

### WHAT DO YOU THINK?

Do you have a response to this issue? Share it with thousands of other *Human Rights Dialogue* readers on the web. Send your comments to Human Rights Initiative, Carnegie Council on Ethics and International Affairs, 170 East 64th Street, New York, New York 10021-7496, USA, fax: (212) 752-2432, e-mail: [dialogue@ccea.org](mailto:dialogue@ccea.org). We regret that we will not be able to post every response. Please limit your response to 300 words, and be sure to include your name and contact information. We reserve the right to edit text as necessary.



**Concerns about Conservation**

In “When Parks and People Collide,” Peter Veit and Catherine Benson seem to identify two major guilty parties: first, undemocratic regimes in Africa “that have used their monopoly over nature to consolidate power and wealth among a small circle of elite;” and second, a “powerful international lobby of conservation-first organizations” that “encourage” these governments “to establish networks of protected areas.” What ensues, the authors claim, is mass displacement of indigenous people from their homelands that “may exceed 14

million people in Africa alone.”

This is an astonishing and tragic number!

I am perplexed, however, by what these African governments and their “circle of elite” gain by these lands being set aside. Ecotourism dollars? I know that the global conservationists operate out of the ideological belief that the preservation of wildlife and biodiversity should be prioritized above all else. But what motivates African governments to sacrifice the welfare of so many of its citizens in favor of national parks?

The larger question for the environmental community is how nature can co-

exist with people’s material needs, whether they are met through hunting, fishing, logging, energy extraction, etc. It would be nice if environmentalists departed from their “conservation-first” mentality and demonstrated as much concern for the preservation of native cultures as they do for the preservation of the land these people depend on for survival.

**Keith Kloor**  
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**Climate Change’s Effects**

I appreciated Sheila Watt-Cloutier’s article on climate change and human rights. Although Micronesia’s environment has little in common with that of the Arctic, climate changes may prove equally devastating for its people.

Spread over an area nearly the size of the United States, Micronesia’s some 2,000 islands and surrounding reefs host a diversity of ecosystems that rival any on the planet. For countless generations the people of the region have thrived on an intimate relationship with nature. Despite centuries of colonization, the devastation caused by world conflicts, and Cold War atomic tests, many of the ecosystems in Micronesia are still intact. Yet as the effects of globalization reach Micronesia’s shores and the region becomes integrated into the world economy, the area’s natural abundance is threatened by a series of man-made and natural forces on a global scale. Climate change, in particular, has unleashed the threats of coral bleaching, droughts, and rising sea level. Shore erosion, tide encroachment in low-lying areas, and salt-water intrusion into fresh groundwater are also becoming more dramatic as a result of global climate change.

It is an unalienable right of the Micronesia peoples to continue to live on their islands, preserve their cultural

heritages and continue a way of life in synchrony with the environment. But it is also the right of every person on the planet to benefit from Micronesia’s unique diversity of plant and animal life.

**Susi Menazza Olmsted**  
MIC Program Coordinator  
*The Nature Conservancy*  
Micronesia

**Individuals as Violators**

Many of the articles in the environmental rights issue show how governments and multinational corporations encroach on the environmental rights of individuals and communities. I would like to highlight an additional area of environmental rights concern: situations in which individuals and groups encroach on the environmental rights of others as they explore and exploit the environment for their sustenance and survival.

For example, certain tribes in Southern Nigeria—such as the Edos, Urhobos, Ijaws and Itshekiris—are predominantly hunters, fishers, and farmers. Some of them hunt wild animals and fish with chemicals, a hazard to the life and health of others. Many set forest fires as a means of killing wild animals, which threatens or even destroys the flora and

fauna. When farmers set fire to their farmlands in order to clear them for crop planting, bush fires can spread to other farms, damaging properties and in some cases harming people.

People who engage in such practices might not see their actions as violations of others’ environmental rights, but rather as their legitimate way of life. Should ways of life that infringe on the environmental rights of others be modified or changed? What is the way forward?

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Education reforms in Bosnia and Herzegovina are giving Romani children, seen here and on the back cover, greater access to schools. Photos courtesy of the Organization for Security and Co-operation in Europe (OSCE)