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**“THE RIGHT TO HERITAGE: EXPLORING DIFFERENT APPROACHES TO
SECURE THIS RIGHT”**

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ABSTRACT

The paper gives an understanding of human rights in general. It attempts to look into the ‘right to heritage’ and seeks to find its basis in the existing International Conventions. The paper then further explores the different possible approaches to secure and enforce it. Through an analysis of the different approaches, the author establishes that the right to heritage can best be enforced using a combination of the rights based approach and the capabilities approach. The paper will prove that while there are arguments to reaffirm that the right to heritage must be given the status of a human right internationally, there are certain limitations to it being a human right. The paper is divided into seven parts. Part I gives a basic introduction and understanding of rights while part II discusses Human rights and its characteristics. Part III introduces the idea of a ‘right to heritage’ and part IV explains the different approaches available to secure this right. The possibilities and limitations involved in classifying the right to heritage as a human right is explored in part V after which the better approach to securing the right to heritage is provided in part VI. Part VII provides the concluding remarks by the author.

AN UNDERSTANDING OF RIGHTS

There are different rights all over the world. People are entitled to Human Rights by virtue of being a human and them being universal in nature¹ whereas civil rights arise only through the legal guarantee of that right. Civil rights are enjoyed by virtue of being a citizen of a particular State. They are protected by the Constitution of the country. They provide the right to free speech, equal protection, the right against self-incrimination, and so forth.² Most rights are derived from human rights. An important point to note is that International players are less likely to take action to enforce a nation's violation of its own civil rights, but more likely to respond to human rights violations.³

the right to heritage: exploring different approaches to secure this right

HUMAN RIGHTS AND ITS CHARACTERISTICS

Human rights are rights which are inherent to all human beings, regardless of race, sex, gender, nationality, ethnicity, religion, or any other division.⁴ They include the right to freedom of expression, education, healthcare, Life, liberty, etc.⁵ In essence people all around the world are entitled to these inalienable rights.

Human rights were conceived shortly after the end of World War II. It was a response to the holocaust and the 'final solution' of Jews and other victims by the Nazis. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights, cementing the foundation of Human Rights in international law and policy.⁶ It is a noteworthy accomplishment of the UN as it created a comprehensive body of law that seeks to protect human rights. This body of law serves as a universal and internationally protected code for nations to follow. These have been enshrined within the Universal Declaration of Human Rights and the Charter of the United Nations. Mechanisms were also brought about to promote

¹ 'What is the Difference Between a Human Right and a Civil Right?', HG.Org Legal Resources, Available at: <https://www.hg.org/legal-articles/what-is-the-difference-between-a-human-right-and-a-civil-right-31546>, accessed 20 October, 2019.

² *Ibid.*

³ *Ibid.*

⁴ 'Human Rights', United Nations, Available at: <https://www.un.org/en/sections/issues-depth/human-rights/>, accessed 24 October, 2019.

⁵ *Ibid.*

⁶ *Supra n.1.*

and protect these rights and carry out their responsibilities.⁷ Gradually, this led to the development of International human rights law which mandated governments to protect the rights of the people and also prevent its violation.

THE RIGHT TO HERITAGE

The *Right to Heritage* is a right that has not been directly and clearly laid out in any of the Conventions or Covenants that exist at the moment. However there are various manifestations of this right in International law. Some instruments of the UN implicitly try to impart such an understanding of the right to cultural heritage and its meaning to the world community.⁸ Some conventions attempt to directly address the concern and try to convey the idea of a shared humanity and cultural identity by the integration of communities and assimilation of different cultures and traditions of people.⁹ For instance, the right to heritage despite not being directly provided for has been included through General Comment 21, under the International Covenant of Social and Economic Rights. It has also been included in the Faro Convention¹⁰ in which the right to heritage comprises the right to access and enjoyment of heritage. It is seen as a part of the right to access the culture and the right to education.¹¹ There are various definitions of heritage found in national and international instruments.¹²

⁷ *Supra n.5.*

⁸ Farida Shaheed, 'Report of the independent expert in the field of cultural rights', A/HRC/17/38, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, General Assembly, United Nations, 21st March, 2011.

⁹ Ondřej Vícha, 'The Concept of the Right to Cultural Heritage within the Faro Convention', *International and Comparative Law Review (International and Comparative Law Review)*, issue: 2 / 2014, pages: 2338, Central and Eastern Library.

¹⁰ The Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) (2005).

¹¹ *Ibid.*

¹² See in particular UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (1972), art. 1; Convention for the Safeguarding of the Intangible Cultural Heritage (2003), art. 2; Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) (2005), art. 2 (a); ASEAN Declaration on Cultural Heritage (2000), art. 1.

**A LOOK AT THE DIFFERENT APPROACHES TO SECURE THE
'RIGHT TO HERITAGE'**

CHARITY APPROACH

The charity approach emphasizes on doing charity towards individuals who are seen as 'victims'. The idea is to make the richer sections of the society feel morally responsible for the welfare of the lower strata. They try to address the manifestations of problems while providing assistance to individuals.¹³

NEEDS BASED APPROACH

The needs based approach is self-explanatory in the fact that it emphasises on needs. It focuses on inputs rather than outcome. While recognizing needs as a valid claim, it looks at individuals as objects of intervention and as someone requiring assistance. The main goal of this approach is to focus and solve immediate causes of problems faced by people.¹⁴

OUTSTANDING VALUE BASED APPROACH¹⁵

The Outstanding Value Based approach assesses heritage on the basis of the "*Outstanding universal value*" as identified by UNESCO. According to this approach, a monument has to be authentic, integral and a signifier of an outstanding example of a particular phase or culture of the society or the civilization. The understanding of 'Outstanding' is a combined interpretation of the scientist and the archaeologist in objective terms. This approach is dependent on the knowledge of categories of objects, types of site and architecture, and on expert evaluation of particular examples in relation to others.¹⁶ It uses the disciplines of Science and cultural value to attach significance to the particular heritage.¹⁷ It evaluates heritage in terms of quality, rarity and diversity of things¹⁸. The universal categorizations made are purely based on Western

¹³ 'Integrating the Human Right to Water and Sanitation in Development Practice', WaterLex, Available at: <http://www.waterlex.org/waterlex-toolkit/what-is-a-human-rights-based-approach-and-how-is-it-different-from-other-development-practices/>, accessed 30 October, 2019.

¹⁴ *Ibid.*

¹⁵ Ian Hodder, 'Cultural Heritage Rights: From Ownership and Descent to Justice and Well-being', *Anthropological Quarterly*, Vol. 83, No. 4 (Fall 2010), pp. 861-882, The George Washington University Institute for Ethnographic Research, Available at: <https://www.jstor.org/stable/40890842>, accessed 29 October, 2019.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

values and are abstract.¹⁹ They are not based on social values and are bound to be contested over time.²⁰

HUMAN RIGHTS AND RIGHT TO HERITAGE

Heritage, specifically cultural Heritage, is linked to the human rights understanding of the dignity and identity of individuals and communities. It creates and strengthens communal ties while also creating a cultural identity. It can thus be said that Cultural heritage is linked to human dignity and identity.²¹ The approach here is to give cultural heritage a human dimension. It is inclusive of aspects of the environmental degradation resulting from the interaction between people and places.²²

The right to access and enjoy cultural heritage is an important feature of being a member of a community. It is in line with the idea of a shared or world identity. Its treatment as a human right is important and necessary, in addition to the preservation/safeguard of cultural heritage. Cultural heritage with reference to human rights would require taking into consideration the multiple heritages through which individuals and communities express their humanity, give meaning to their lives, build their global views and represent their encounter with the external forces affecting their lives.²³

In order to treat the right to access and enjoyment of cultural heritage as a human right, it must be proved that this comes within the existing framework of International Human rights. The right to cultural heritage has been read into the existing framework of rights by the Committee on Economic, Social and Cultural Rights in the General comment 21.²⁴ The aim was to treat the right to cultural heritage as a cooperative process whereby specificities and purposes are preserved and a culture of humanity is created.²⁵

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ First report of the independent expert, A/HRC/14/36, para. 9 mentioned in Farida Shaheed, 'Report of the independent expert in the field of cultural rights', A/HRC/17/38, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, General Assembly, United Nations, 21st March, 2011.

²² Farida Shaheed, 'Report of the independent expert in the field of cultural rights', A/HRC/17/38, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, General Assembly, United Nations, 21st March, 2011.

²³ *Ibid.*

²⁴ General comment No. 21 (2009), Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, in particular paras. 49(d) and 50.

²⁵ General comment No. 21 (2009), para. 12.

CAPABILITIES APPROACH

The *capability approach* was highlighted by the famous economist Amartya Sen (1999) and Martha Nussbaum (1997)²⁶. It is a theoretical framework that entails two core normative claims.²⁷ These normative claims include the freedom to achieve well-being. This is of primary moral importance. The second normative claim is that the freedom to achieve well-being is to be understood in terms of people's capabilities. This means that real opportunities, to do and to become what they have reason to value, must be given.²⁸ In essence people are able to bring about their well-being depending on the kind of life they are effectively able to lead. This approach is mainly used in policy making and developmental studies, if one were to focus on moral and political philosophy. It is in line with the ideas of development, justice and well-being of the people.

The approach has been more prominent in theories of social justice or accounts of developmental ethics.²⁹ It has also led to a new and highly interdisciplinary literature in the social sciences resulting in new statistics and social indicators, and to a new policy paradigm known as the 'human development approach'.³⁰ The capability approach being a normative theory, not only helps to conceptualize notions of poverty, inequality, or well-being, but also helps to explain them.³¹

RIGHTS BASED APPROACH

The *Rights Based Approach (RBA)* begins with a different question than a more traditional needs-based approach. While the needs based approach is based on needs of the community, the rights based approach focuses on enforcing rights and preventing its violation.³² Rights are seen as claims enjoyed by both individuals and groups. It emphasizes on the realization of rights and presents claims toward legal and moral duty holders. The approach tries to address

²⁶ Lynn Meskell, 'Human Rights and Heritage Ethics', Stanford University, Anthropological Quarterly, Volume 83, Number 4, Fall 2010, pg 839-859, Published by George Washington University Institute for Ethnographic Research.

²⁷ Ingrid Robeyns, 'The Capability Approach', Stanford Encyclopaedia of Philosophy, Available at: <https://plato.stanford.edu/entries/capability-approach/>, accessed 1 November, 2019.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² Peter Harney, 'The Rights-Based Approach', Edmund Rice International, Edmund Rice Centre, Available at: https://www.erc.org.au/rights_based_approach, accessed 30 October, 2019.

the structural causes and their manifestations.³³ It helps to claim rights that are enshrined in the Universal Declaration of Human Rights. It entails working with not only state actors but also non-state actors. Non-state actors include local communities, leaders, rights holders and vulnerable groups. The rights based approach involves the stakeholders as participants in preserving the heritage. It ensures that by participation, the people are given a voice on how they would like to exercise their right to heritage and other such opportunities to empower themselves. It works as a broader, normative approach to rights and ensures that the stakeholders are involved in the decision making process. This increases their capacity to respond and be accountable in protecting, respecting and fulfilling human rights.³⁴

THE RIGHT TO CULTURAL HERITAGE AS A HUMAN RIGHT- POSSIBILITIES AND LIMITATIONS

We see a number of approaches, possible to secure the right to heritage. However, given today's scenario and the importance given to human rights in the regime, it is argued that the right to enjoyment and access of cultural heritage must be treated as a human right above anything else. The human rights approach is significant in demanding equality as minorities and indigenous people find an argument to garner support for their claims to be equally treated on an international platform. Further, the right to heritage as a human right is necessary and complementary to the preservation/safeguard of cultural heritage as it would oblige one to take into account the rights of individuals and communities in relation to an object or manifestation and connect cultural heritage with its source of production.³⁵ Having this as a human right, ensures the safeguarding and protection of cultural heritage property as well. The idea behind having the right to heritage as a human right is not only a reminder of the cultural heritage that evokes a sense of pride in the people, but is also recalling the errors made in the past and actions

³³ Integrating the Human Right to Water and Sanitation in Development Practice', WaterLex, Available at: <http://www.waterlex.org/waterlex-toolkit/what-is-a-human-rights-based-approach-and-how-is-it-different-from-other-development-practices/>, accessed 30 October, 2019.

³⁴ Celestine Nyamu-Musembi and Andrea Cornwall, 'What is the "rights-based approach" all about? Perspectives from international development agencies', IDS Working Paper 234, 2004, INSTITUTE OF DEVELOPMENT STUDIES Brighton, Sussex BN1 9RE ENGLAND.

³⁵ Farida Shaheed, 'Report of the independent expert in the field of cultural rights', A/HRC/17/38, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, General Assembly, United Nations, 21st March, 2011.

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reflecting the darker side of humanity. This is a part of the cultural memory which is equally important to transfer to posterity.³⁶

However the human rights approach to the right to Heritage comes with its own set of limitations as well. It is not clear if the comprehensive code of law on human rights has been successful in limiting violence and inhumane actions.³⁷ The human rights framework, it is seen, serves as a very legalistic and formalistic solution.³⁸ It acts as an approach involving multiple layers yet lacking an intrinsic and organic influence on the modus operandi of how rights can be enforced. Moreover these are non-binding instruments signed by States and may not even be enforceable unless ratified by the signatories. It is observed that these are Western perspectives being imposed on non-Western States.³⁹ Human rights rely too much on formal institutions which may not easily be accessible to marginalised groups. Moreover, there is no guarantee of fairness in the process.⁴⁰ The language of Human rights doesn't focus on moral and social justice. It appears to be very disconnected from underlying issues of inequality and injustice as was predicted by famous personalities like Karl Marx and Michel Foucault, who foresaw and discussed this. While Marx claimed that we would achieve political freedom without resolving issues of alienation and inequality, Foucault believed that rights would become a form of disciplinary power through his idea of governance.⁴¹ The language is purely a weapon used by States to criticize each other and interfere in other's affairs without reforming their own Human Right enforcement mechanism.⁴² The legal framework of Human rights also fails to have any direct mention of heritage⁴³. It creates unambiguous distinctions between

³⁶ *Ibid.*

³⁷ Ian Hodder, 'Cultural Heritage Rights: From Ownership and Descent to Justice and Well-being', *Anthropological Quarterly*, Vol. 83, No. 4 (Fall 2010), pp. 861-882, The George Washington University Institute for Ethnographic Research, Available at: <https://www.jstor.org/stable/40890842> , accessed 29 October, 2019.

³⁸ *Supra n.37.*

³⁹ Stacy, Helen M. 2009. *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture*. Stanford: Stanford University Press.

⁴⁰ Helaine Silverman & D. Fairchild Ruggles, 'Cultural Heritage and Human Rights', Springer, 2007.

⁴¹ *Supra n.38.*

⁴² *Ibid.*

⁴³ Lynn Meskell, 'Human Rights and Heritage Ethics', *Stanford University, Anthropological Quarterly*, Volume 83, Number 4, Fall 2010, pg 839-859, Published by George Washington University Institute for Ethnographic Research.

different types of rights.⁴⁴ It in fact creates confusion which leads to pitting people against each other in an adversarial setting instead of social negotiation and collaboration.⁴⁵

The Human rights approach doesn't place duties on people apart from imposing obligations on the State.⁴⁶ It is important to carry out duties in relation to each community to achieve a state of well-being, with the same being backed by law.⁴⁷

While the approach is broader in claiming for equality and serves as an ongoing process of work on a global platform, it alone would not suffice in securing the right to heritage.

THE BETTER POSSIBLE RECOURSE TO THE RIGHT TO HERITAGE: A MIXTURE OF THE RIGHTS BASED APPROACH AND THE CAPABILITIES APPROACH

The rights based approach along with the capabilities approach seems like the better, possible recourse to securing the right to heritage, as together they facilitate an arena for engagement and intervention that is broader than those conventionally related to heritage rights.⁴⁸ The combination of the two approaches transforms the people from being mere passive beneficiaries to right holders by emphasizing more on justice and well-being⁴⁹.

The rights based approach addresses issues of accountability of all actors and enables people to empower themselves to overcome obstacles in the realization of their rights. It refers less to frameworks and focuses more on good intentions.⁵⁰ It aims to achieve a transformation of power relations among the various development actors.⁵¹ It is a more inclusive, participatory way of involving the community in the right to heritage. It involves stakeholders; both state

⁴⁴ Ian Hodder, 'Cultural Heritage Rights: From Ownership and Descent to Justice and Well-being', *Anthropological Quarterly*, Vol. 83, No. 4 (Fall 2010), pp. 861-882, The George Washington University Institute for Ethnographic Research, Available at: <https://www.jstor.org/stable/40890842> , accessed 29 October, 2019.

⁴⁵ *Ibid.*

⁴⁶ An example of this is seen in the United Nations Declaration on Rights of Indigenous Peoples, 2007.

⁴⁷ Ian Hodder, 'Cultural Heritage Rights: From Ownership and Descent to Justice and Well-being', *Anthropological Quarterly*, Vol. 83, No. 4 (Fall 2010), pp. 861-882, The George Washington University Institute for Ethnographic Research, Available at: <https://www.jstor.org/stable/40890842> , accessed 29 October, 2019.

⁴⁸ Celestine Nyamu-Musembi and Andrea Cornwall, 'What is the "rights-based approach" all about? Perspectives from international development agencies', IDS Working Paper 234, 2004, INSTITUTE OF DEVELOPMENT STUDIES Brighton, Sussex BN1 9RE ENGLAND.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

and non-state actors and understands the ‘what, who and why of right’ to heritage’⁵² The capabilities approach as given by Amartya Sen focuses on the concern for a good life by enhancing human capabilities.⁵³ It focuses on well-being, social change and evaluation of social arrangements. It, like the rights based approach, is in line with the ideas of development, justice and well-being of the people.

CONCLUSION

It is observed over time that the human rights framework has proved to be inadequate to cover and resolve all issues pertaining to the community. It would be ideal to have human rights and heritage rights porous and mutually reliant. However, this would require a re-conceptualisation of universal human rights. Looking at the different approaches to the right to heritage, the complexities involved and the intricacies to be considered, it becomes clear that the better approach to secure this right would be a combination of a rights based and capabilities approach. This would ensure participation, engagement and involvement of the stakeholders in the process of securing the right to heritage in a more amicable manner. This approach demands duties to be fulfilled by people towards each other, which makes everyone responsible to pave the way towards a common heritage. It would be in line with well-being and social justice that would promote the idea of a shared humanity.

⁵² ‘World Heritage And Rights-Based Approaches- Learning from practice: Building capacity to support rights-based approaches in the World Heritage Convention’, Report From Workshop in Oslo 1-3 April 2014 Building Capacity To Support Rights-Based Approaches In The World Heritage Convention: Learning From Practice, NORGE ICOMOS, IUCN and ICCROM.

⁵³ Lynn Meskell, ‘Human Rights and Heritage Ethics’, Stanford University, Anthropological Quarterly, Volume 83, Number 4, Fall 2010, pg 839-859, Published by George Washington University Institute for Ethnographic Research.