

# Human Rights, Anthropology and Securitization: Reclaiming Culture

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## I. Introduction

In Raymond Williams's renowned adage, culture is "one of the two or three most complicated words in the English language".<sup>1</sup> Within a legal setting,<sup>2</sup> the rhetoric on culture goes beyond a purely abstract significance to potentially having tangible ramifications, in particular for minority and indigenous groups.<sup>3</sup> In a human rights context this is certainly the case. While international human rights standards articulate numerous references to 'culture' in the sense of its broad anthropological usage,<sup>4</sup> thinking in that area is still at an embryonic stage and is "confusing rather than illuminating".<sup>5</sup> For human rights lawyers this is equally frustrating and regrettable, given the norm's undoubted potential.

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<sup>1</sup> R. Williams, *Keywords* (Fontana Press, London, 1998), at 76. Rodolfo Stavenhagen describes three well established definitions of culture: the "accumulated material heritage of human kind"; a "process of artistic and scientific creation"; and the classic anthropological view of culture as a "total way of life". The essay focuses on the final approach. R. Stavenhagen, "Cultural Rights: A Social Science Perspective", in A. Eide *et al.* (eds.), *Economic, Social and Cultural Rights* (Martinus Nijhoff, Dordrecht, 2001), at 88.

<sup>2</sup> On the subject of culture and human rights, see generally L.S. Bell, "Introduction: Culture and Human Rights", in L.S. Bell *et al.* (eds.), *Negotiating Culture and Human Rights* (Columbia University Press, New York, 2001); J.K. Cowan *et al.*, "Introduction" in J.K. Cowan *et al.* (eds.), *Culture and Human Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001); Y.M. Donders, *Towards a Rights to Cultural Identity?* (Intersentia, Antwerp, 2002). See R. Stavenhagen, "The Right to Cultural Identity" in Berting *et al.* (eds.), *Human Rights in a Pluralistic World* (Meckler Westport, London, 1990); J.H. Burgers, "The Rights to Cultural Identity" in Berting *et al.*, *ibid.*; J. Almqvist, *Human Rights, Culture and the Rule of Law* (Hart, Oxford, 2005); X. Li, *Ethics, Human Rights, and Culture: Beyond Relativism and Universalism* (Palgrave MacMillan, 2006); I. Schulte-Tenckhoff, "The Rights of Persons Belonging to Minorities to Enjoy their Own Culture", UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.7 (1997); E. Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff, Leiden, 2007); Stavenhagen, *supra* note 1; E. Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Brill, Leiden, 2007).

<sup>3</sup> On the matter of legal consequences see M. Beukes, "The International Dimension of Culture", 20 *South African Yearbook of International Law* (1995), 126-143.

<sup>4</sup> Article 27 of the Universal Declaration on Human Rights recognizes the right to cultural life. Article 15 of the International Covenant on Economic Social and Cultural Rights expresses the right to participate in cultural life. The Convention on the Rights of the Child addresses the rights of minority children to their own culture. Adalsteinsson and Thorhallson, based on a study of the *travaux préparatoires*, have highlighted what they refer to as a "high culture" approach in the drafting of Article 27 of the Universal Declaration of Human Rights. See R. Adalsteinsson and P. Thorhallson, "Article 27" in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights* (Kluwer, Dordrecht, 1999).

<sup>5</sup> Beukes, *supra* note 3, at 142.

Against this challenging legal landscape, culture has again returned to the political frontlines. The hostile post-9/11 atmosphere has seen the emergence of the concept as a marked feature of the securitization debate, with some Western states reconfiguring notions of national identity.<sup>6</sup> In Britain, for example, Tony Blair marked the attacks in London by reassessing the very concept of British cultural identity. These have been ‘top-down’ state-led abstractions, with minorities scarcely involved. Following the monumental ethnic victories of the 1960s, is it possible that we are witnessing the beginnings of a redrawing of the culture map? Of course for states, the place of ‘the other’ has been an eternally delicate matter, what with its perceived complications for the national vision. Thus, the question is: how do we progress from here?

The article is aimed at the chasm between the current needs of minorities in this hostile setting and the uncertain character of the normative protection of culture. The discourse from anthropology has rightly highlighted the value of its field-based theory for human rights law.<sup>7</sup> The author strongly echoes this sentiment, as its thinking is ‘grounded’ in the day-to-day life of communities, captured through the eyes of the reflexive anthropologists who typically spend substantial periods of time living among their subjects. In the context of the ongoing and intense cultural dialogue the time is ripe for cold reflection, particularly in terms of the legal protection of culture. With a view to bringing an element of clarity to the murky area of culture, the author suggests a model for human rights law based on a fusion of classic and contemporary thinking. Because the configuration is thought to capture the necessary scope of legal protection (i.e. what the law must protect), its application is likely to result in enhanced protection for the rights of minorities and indigenous groups. Thus far, there has been strikingly sparse engagement by anthropologists in the broad debate on culture and multiculturalism.<sup>8</sup> It seems timely to address this unfortunate lacuna.

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<sup>6</sup> A number of prominent examples are cited here. On the situation on Europe, see L. Fekete, “Anti-Muslim Racism and the European Security State”, 46 *Race and Class* (2004), 3-29; on the secularization measures in France, see generally E. Thomas, “Keeping Identity at a Distance: Explaining France’s new Legal Restrictions on the Islamic Headscarf”, 29 *Ethnic and Racial Studies* (2006), 237-259; on Australia, see B.R. Vaughn, “Australia’s Strategic Identity Post-September 11 in Context: Implications for the War against Terror in Southeast Asia”, 26 *Contemporary Southeast Asia* (2004), 94-115. For an anthropological critique of the current events, see M. Mandani, “Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism”, 104 *American Anthropologist* (2002), 766-775.

<sup>7</sup> J.K. Cowan, “Cultural and Rights after Culture and Rights”, 108 *American Anthropologist* (2006), 9-24.

<sup>8</sup> S.D. Scott, “Culture in Political Theory”, 31 *Political Theory* (2003), 92-115, at 94-95.

To that end, the article considers, in the first section, the contemporary, post-9/11 significance of culture. It then examines the classic 'total way of life' model and its relevance for legal process, before turning to the distinctive meaning/behaviour schools, again out of empathy with the new legal setting. In the fourth section, the paper considers the 'new approaches' that have emerged within anthropology since the 1970s, including a more dynamic understanding of culture that argues for amalgamation with the classic school. The fifth section goes on to examine the issues that arise from the role of the anthropologist, while the sixth section considers the controversial question of cultural relativism. Finally, the author addresses the crucial matter of the cross-disciplinary transference of the model to a legal context.

## II. The (Re)Politicization of Culture

The new millennium has witnessed the extraordinary return of culture (if ever it vanished) to the political centre-stage.<sup>9</sup> For states, the debate surrounding the place of 'the other' has been a perennially sensitive one, and one that has been revisited in recent years. The situation has been gravely accentuated, if not entirely provoked, by the current 'war against terror' and the harsh ramifications of this for minority communities.<sup>10</sup> Under a veil of securitization, we are witnessing a fundamental reassessment of state—minority relations and national identity. In many Western states the multiculturalism debate is firmly back on the table. For minority communities touched by this unfortunate trend, this is a troubling time.<sup>11</sup> McGoldrick captures this mood as follows:

A series of events and issues have combined to put the concept of multiculturalism back at centre stage in Western states. These include the attacks on the United States on 11 September 2001 and the securitisation measures taken in response by many states around the world. It has been alleged that many of these measures have disproportionately affected particular cultural groups and have weakened the degrees of respect and tolerance accorded to them by other groups. Secondly, there is the rise of religious fundamentalism, particularly when allied to political Islam. The war on terrorism and controlling extreme religious groups are daunting challenges that attract

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<sup>9</sup> McGoldrick addresses this in terms of human rights. D. McGoldrick, "Multiculturalism and its Discontents", 5 *Human Rights Law Review* (2005), 27-56.

<sup>10</sup> On the question of human rights and the 'war on terror', see P. Hoffman, "Terrorism and Human Rights", 26 *Human Rights Quarterly* (2004), 932-955; R. Foot, "Collateral Damage: Human Rights Consequences of Counterterrorist Action in the Asia-Pacific", 81 *International Affairs* (2005), 411-425.

<sup>11</sup> On the growing right-wing and anti-diversity trend among states, see V. Stolcke, "Cultural Fundamentalism", in *World Culture Report 2000: Cultural Diversity, Conflict and Pluralism* (UNESCO Publishing, Paris, 2000).

much political and legal attention. However, the real practice of multiculturalism is found in the way hundreds of aspects of daily life are resolved. Among the practical issues are the application of personal religious laws concerning families, children and property, the application of employment and health and safety law to religious groups, the dissolution of Islamic political parties (for example, in Turkey), the regulation of Islamic clothing in the workplace or in educational facilities (for example, the hijab (headscarf)/jilbab debate in France, Germany, the UK, Turkey and many other countries)[...] and the control of burials (for example, in Switzerland). Another interesting case study is the multicultural arrangements that came out of the Good Friday/Belfast multiparty agreement in Northern Ireland, where one of the subsequent legal consequences was the amendment of the Irish constitution to “recognize diversity of identities and traditions”.<sup>12</sup>

Britain, in many ways, exemplifies these cultural challenges, as it has been such an intense focus for many of these issues.<sup>13</sup> At the very least it may be said of Britain that it currently has a ‘strained’ relationship with its minority groups and in particular with its Muslim communities. In December 2006, Tony Blair delivered a controversial speech on multiculturalism in Britain, focusing on the theme of common British values in what was in essence a reassessment of British identity:

But this is, in truth, not what I mean when I talk of integration. Integration, in this context, is not about culture or lifestyle. It is about values. It is about integrating at the point of shared, common unifying British values. It isn’t about what defines us as people, but as citizens, the rights and duties that go with being a member of our society.

Christians, Jews, Muslims, Hindus, Sikhs and other faiths have a perfect right to their own identity and religion, to practise their faith and to conform to their culture. This is what multicultural, multi-faith Britain is about. That is what is legitimately distinctive.

But when it comes to our essential values – belief in democracy, the rule of law, tolerance, equal treatment for all, respect for this country and its shared heritage – then that is where we come together, it is what we hold in common; it is what gives us the

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<sup>12</sup> McGoldrick, *supra* note 9, at 29-30.

<sup>13</sup> See generally T. Abbas, “Muslim Minority in Britain: Integration, Multiculturalism and Radicalism in the Post-7/7 Period”, 28 *Journal of Intercultural Studies* (2007), 287-300. See the report by the Commission on British Muslims and Islamophobia, “Islamophobia: Issues, Challenges and Action” (Trentham Books, Stoke on Trent, 2004).

right to call ourselves British. At that point no distinctive culture or religion supersede our duty to be part of an integrated United Kingdom.<sup>14</sup>

Put simply, Blair wants cultural diversity but common values.<sup>15</sup> This is evidently to assume that culture and values are distinct concepts. Terry Eagleton rightly sees the issue as a cultural one:

Tony Blair believes in a common culture [...] It is just that what Blair means by a common culture is that everyone should share his values so that they won't bomb tube stations. In fact, no cultural value is ever extended to large groups of newcomers without being changed in the process. This is why the Blair project is wet behind the ears as well as culturally supremacist. There is no assumption in Downing Street that such values might be challenged or transformed in the process [...]

A truly common culture is not one in which we all think alike, or in which we all believe that fairness is next to godliness, but one in which everyone is allowed to be in on the project of cooperatively shaping a common way of life.<sup>16</sup>

Culture, however, is not a state policy, but a process that emerges substantially and is propagated by the people.<sup>17</sup> At its heart, the Blairian vision is a 'top-down' state construct which fails to address the actual circumstances of minority groups.<sup>18</sup> Neither are minorities involved in this defining process. For many cultural communities, in Britain and beyond, this is a worrying time. Culture is returning to the arms of the state. The challenge for human rights is to offer guidance in this critical matter.<sup>19</sup>

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<sup>14</sup> "The Duty to Integrate: Shared British Values, 6 Dec. 2006, at <[www.number10.gov.uk/output/Page10563.asp](http://www.number10.gov.uk/output/Page10563.asp)> (accessed 14 Sept. 2009)

<sup>15</sup> See A. Føllesdal, "The Problem of Defining the 'Good' in Pluralistic Societies" in *World Culture Report 2000: Cultural Diversity, Conflict and Pluralism* (UNESCO Publishing, Paris, 2000).

<sup>16</sup> T. Eagleton, "Those in Power are Right to See Multiculturalism as a Threat", *The Guardian*, 21 February 2007.

<sup>17</sup> The issue is closely related to the problems surrounding recognition for minorities. See J. Bengoa, "Existence and Recognition of Minorities", Working Paper for the Working Group on Minorities, E/CN.4/Sub.2/AC.5/2000/WP.2 (2000). On a recent Irish controversy on the question of ethnicity, see D. Keane, "International Law and the Ethnicity of Irish Travellers", 11 *Washington and Lee Race and Ethnic Ancestry Law Journal* (2005), 43-60.

<sup>18</sup> As Stamatopoulou describes it: the "culturalization of political life and rhetoric". Stamatopoulou, *supra* note 2, at 8.

<sup>19</sup> Sieghart reminds us that human rights is a superior standard: "... there is now a superior international standard established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign States ...". P. Sieghart, *The International Law of Human Rights* (Clarendon Press, New York, 1983), at 15.

### III. 'Total Way of Life' Approach and Human Rights Law

The greatest contribution of anthropology to academia has perhaps been the remarkable insight it has brought to our understanding of the group.<sup>20</sup> All of this emanated from the pioneering spirit of Tylor's holistic approach to culture, the seminal inquiries of which marked the outset of anthropology's interest in groups.<sup>21</sup> His definition proposed what is now commonly termed the 'total way of life' approach:<sup>22</sup>

Culture or Civilization, taken in its wide ethnographic sense is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society. The conditions of culture among the various societies of mankind, in so far as it is capable of being investigated on general principles, is a subject apt for the study of laws of human thought and action.<sup>23</sup>

Comment [KN1]: Which Tyler at *supra* note 21?

For Tylor, culture is a totality; it is both behaviour and meaning and it is socially acquired. These concepts have been the pillars on which anthropology has grounded its understanding of culture. As noted below, all retain some currency today, albeit to varying degrees. It is in this sense that we speak of 'a culture' as synonymous with a group. This is anathema to many anthropologists who reject this as an outmoded and simplistic interpretation (again, see below). Within anthropology, culture is a highly contested matter. However, for law it retains a distinct value. Fundamental to Tylor's approach was its application to field work. The 'total way of life' model was an attempt by anthropology to represent the cumulative lifestyle that confronted the ethnographer in the course of field research. Rather than an analytical

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<sup>20</sup> For general introductions, see for example A. Kuper, *Culture: The Anthropologist's Account* (Harvard University Press, Cambridge, 1999); T.H. Eriksen, *Small Places, Large Issues: An Introduction to Social and Cultural Anthropology* (Pluto Press, London, 2001); R.M. Keesing, *Cultural Anthropology: A Contemporary Perspective* (Holt, Rinehart and Winston, New York, 1981). For current anthropological understandings, see M. Harris, *Theories of Culture in Post-Modern Times* (Altamira Press, London, 1999).

<sup>21</sup> See primarily what is generally regarded as the first anthropology textbook: E.B. Tylor, *Primitive Cultures* (Harper Torch, New York, 1871). See also E.B. Tylor, *Anthropology* (University of Michigan Press, Ann Arbor, 1881).

<sup>22</sup> See Huntington's critique: "Anthropologists, perhaps most notably Clifford Geertz, have emphasized culture as 'thick description' and used it to refer to the entire way of life of a society: its values, practices, symbols, institutions and human relationships ... if culture includes everything it explains nothing. Hence we define culture in purely subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society". S.P. Huntington, "Cultures Count", in S.P. Huntington and L.E. Harrison (eds.) *Culture Matters* (Basic Books, New York, 2000), at xv.

<sup>23</sup> Tylor, *supra* note 21, at 1.

approach, early anthropologists focused simply on recording the observable life before their eyes.<sup>24</sup>

For the equality philosophy of human rights, Tylor's approach reveals a number of notable aspects. His definition marked a uniquely egalitarian approach to culture and his approach was revolutionary within the social sciences, breaking down as it did the distinction between 'high' and 'low' culture that came from early Victorian society and scholarship.<sup>25</sup> The Victorians thought of culture in an elitist 'high culture' sense.<sup>26</sup> Tylor's thinking was inspired by the pomp of Victorian Britain, and his response was the study of distinct exotic groups that he regarded as an antidote to this cultural arrogance. Accordingly, his vision stressed the equality of cultures.<sup>27</sup> Over a century later, international law would articulate a similar attitude.<sup>28</sup> Thus, just as British and African cultures are taken as equal, so too are cultural groups within states. Importantly, this applies to the relationship between minority and majority communities. This egalitarian quality has persisted throughout the evolution of the discipline, and cultural communities are not judged comparatively. Secondly, equality applies as between cultural elements, i.e. the individual facets that compose a total culture. Tylor was engaged with the everyday lives of his subjects. The act of playing football is as relevant to the anthropologist as the creation of a piece of art. As Raymond Williams would later comment, "culture is ordinary".<sup>29</sup>

**Comment [KN2]:** Which Tyler at *supra* note 21?

Anthropology's cumulative ethos is tellingly illustrated by Clifford Geertz's "thick description", as he would later describe it.<sup>30</sup> Attempting to demystify the roots of anthropological research, Geertz cites an informative (unedited) passage from his field notebooks, "quoted raw" as he himself puts it:

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<sup>24</sup> As noted by Evan-Pritchard, one of anthropology's pioneering fieldworkers: "... culture was for them something concrete. They thought of exogamy, tokenism, matriliney, ancestor worship, slavery and so forth as customs – things – and it was an enquiry into these customs or things that they regarded themselves as pursuing". E. Evan-Pritchard, *Social Anthropology* (Cohen and West, London, 1951), at 40.

<sup>25</sup> On Victorian anthropology, see generally G.W. Stocking, *Victorian Anthropology* (Free Press, New York, 1987).

<sup>26</sup> Most notably, this included Matthew Arnold who viewed culture as the "best that has been said and thought in the world". M. Arnold, *Culture and Anarchy: an Essay in Social and Political Criticism* (Smith Elder, London, 1869), at viii.

<sup>27</sup> Tylor, *supra* note 21, at 6-7.

<sup>28</sup> UNESCO Declaration on the Principles of International Cooperation, adopted 4 November 1966, Art. 1(1).

<sup>29</sup> R. Williams, "Culture is Ordinary", in N. McKenzie (ed.), *Conviction* (MacGibbon and Kee, London, 1958).

<sup>30</sup> C. Geertz, *The Interpretation of Cultures* (Basic Books, New York, 1973), Ch. 1.

The French [the informant said] had only just arrived. They set up twenty or so small forts between here, the town, and the Marmusha area up in the middle of the mountains, placing them on promontories so they could survey the countryside ...

One night when Cohen (who speaks fluent Berber), was up there, at Marmusha, two other Jews who were traders to a neighbouring tribe came by to purchase some goods for him. Some Berbers, from yet another neighbouring tribe, tried to break into Cohen's place, but he fired his rifle in the air ...

So the sheikh, the Jew and a small company of Marmushans went off ten or fifteen kilometres up into the rebellious area where there were of course no French ...<sup>31</sup>

There is a sense from Geertz's piece that, as an ethnographer, in his work he is not contemplating what is or what is not culture, rather he is freely engaging with all aspects of his subject community. This is the essence of the 'total way of life' approach. Geertz points to this base data to illustrate that anthropological research is "thick", i.e. it is detailed and substantial.<sup>32</sup> In so doing he reveals the empirical heart of anthropology. This is what the anthropologist does: living amongst his subjects, he observes, interviews on and records their everyday lives. Living as a group member over prolonged periods of time, he is exposed to group life in a remarkably intimate manner. This is the source from which anthropological thinking emanates. Its cultural theory is empirically tested. As Kuper rightly notes, "... their experiments offer the most intriguing and satisfactory test of the value – and perhaps the validity – of cultural theories".<sup>33</sup> By contrast, many of our solutions to cultural issue are normative in their nature, visions of culture as it should be.<sup>34</sup> Anthropology captures culture as it is. Tylor's formulation came at a time when anthropology was focused on 'primitive groups', typically remote tribal groups to which the colonies provided ready assess.<sup>35</sup> For legal process, the model is a timeless one; anthropology and human rights are after all united in seeking to address living groups. For the lawyer (as for the anthropologist) the 'total way of life' approach is perhaps best understood, functionally, as addressing the respective group under their gaze.

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<sup>31</sup> *Ibid.*, at 7-8.

<sup>32</sup> *Ibid.*, at 9.

<sup>33</sup> Kuper, *supra* note 20, at x.

<sup>34</sup> Notably, see for example W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995); W. Kymlicka, *Liberalism, Community and Culture* (Clarendon Press, Oxford, 1989).

<sup>35</sup> See for example G.D. Berreman, "Is Anthropology Alive? Social Responsibility in Social Anthropology", 9 *Current Anthropology* (1968), 397-402; E. Said, "Representing the Colonized: Anthropology's Interlocutors", 15 *Critical Inquiry* (1989), 205-225.



#### IV. Culture as Behaviour/Meaning

Anthropology is marked by a rudimentary disagreement in its reading of culture.<sup>36</sup> Since the 1950s and 1960s, it has evolved from a focus on behaviour to a more abstract notion of culture as an attribute of ideas or a configuration of both.<sup>37</sup> Within the broad discourse of human rights, this split has recently proved controversial, provoking a stern warning from Cowan:

The tendency of political philosophers in this debate to use the word culture to refer to a minority group is infuriating to anthropologists, most of whom insist on the importance of distinguishing the ‘culture’ concept as an ideational realm – or, at least, a realm in which ideas and practices are coherently linked – instead of seeing ‘culture’ as synonymous with ‘society’ or ‘social groups’ (including minority groups). It certainly creates conceptual confusion in cross-disciplinary readings.<sup>38</sup>

Although Cowan does not expressly mention human rights thinking, his caveat is clearly concerning. Clarity on the matter, particularly among legal practitioners, is clearly of benefit.

The idealist philosophy is concerned with viewing culture as an attribute of ideas. The approach is based on the notion that culture consists of the ideas and meaning behind behaviour and not behaviour itself. As Keesing observes in exemplary fashion:

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<sup>36</sup> This was illustrated by a renowned 1952 review of anthropology’s approaches to culture: “Culture consists of patterns, explicit and implicit of and for behaviour acquired and, transmitted by symbols, constituting the distinctive achievements of human groups, including their embodiment in artefacts; the essential core of culture consists of traditional (i.e., historically derived and selected) ideas and especially their attached values; culture systems may, on the other hand, be considered as products of action, on the other as conditioning elements of further action”. A.L. Kroeber and C. Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Vintage, New York, 1952), at 181.

<sup>37</sup> See generally S.B. Ortner, “Theory in Anthropology since the Sixties”, 26 *Comparative Studies in Society and History* (1984): 126-166, at 127-132; P. Rabinow and W.M. Sullivan, “The Interpretive Turn: Emergence of an Approach” in P. Rabinow and W.M. Sullivan (eds.) *Interpretive Social Science: A Reader* (Berkeley, University of California Press, 1979). For prominent contributions to the school see, for example, V. Turner, “Symbolic Studies”, 4 *Annual Review of Anthropology* (1975), 145-161; V. Turner, *The Forest of Symbols* (Cornell University Press, Ithaca, 1967); V. Turner, *The Ritual Process* (Chicago, Aldine, 1969); M. Douglas, *Purity and Danger* (Routledge and Kegan Paul, London, 1966).

<sup>38</sup> Cowan, *supra* note 7, footnote 8.

... we will use 'culture' to refer to systems of shared ideas, to the conceptual designs, the shared system of meaning, that underlie the way in which a people live. Culture, so defined, refers to what humans learn, not what they do and make.<sup>39</sup>

The result for anthropology has been a tension in the discipline between an ideational and a realist/materialist approach to culture. David Bidney describes the debate as follows:

Realists as a group tend to conceive culture as an attribute of human social behaviour and usually define culture in terms of acquired habits, customs and institutions ... idealists tend to conceive culture as an aggregate of ideas in the mind of individuals.<sup>40</sup>

Nor is the division an obvious one among many anthropologists who view culture as consisting of both ideas and the activities arising from those ideas.<sup>41</sup>

It may be noted that the division is still ambiguous. First, behaviour remains a concern for the ideational anthropologist. Notwithstanding the theoretical distinction between ideas and behaviour, research is still focused on the behaviour of subjects, albeit in an attempt to come to some understanding of the mental aspects of the process. Second, in a sense, behaviour is the outward expression of a process that engages both meaning and behaviour. As Geertz, himself a staunch ideationalist, concedes, "culture this acted document, thus is public, like a burlesque wink or mock sheep raid. Though ideational, it does not exist in someone's head; though unphysical it is not an occult entity".<sup>42</sup> In the context of the legal process, protecting the mental aspects of culture is evidently beyond its innate scope. While law does on occasion take account of certain mental aspects – for example in the criminal law concept of *mens rea* – these are auxiliary questions of legal process and do not aim to substantially protect. A parallel may be drawn with the realm of intellectual property rights. In a sense the term is oxymoronic: although it claims to protect 'intellectual' property, in reality it protects the physical manifestations of the process. The legal process must (and can) function within the tangible behavioural element of culture, and in this sense reveals a fundamental compatibility with anthropology.

**Comment [e3]:** This does not make sense – either it has been misquoted or more of the quotation will need to be included.

<sup>39</sup> Keesing, *supra* note 20, at 139.

<sup>40</sup> D. Bidney, *Theoretical Anthropology* (Transaction, New Brunswick, 1996).

<sup>41</sup> See, for example, D. Bidney, "The Concept of Cultural Crisis", 48 *American Anthropologist* (1946), 534-552, at 535.

<sup>42</sup> Geertz, *supra* note 30, at 10.

## V. Contemporary Anthropology

Largely since the 1970s, anthropology's 'post-modern turn' has witnessed revolutionary changes via a paradigmatic shift in its theoretical understandings.<sup>43</sup> The critique largely followed the more fluid social dynamics of globalization, and prompted anthropologists to rethink their dated and static understandings of culture in favour of a more dynamic approach.<sup>44</sup> Within this crusade was a robust criticism of anthropology's classic 'total way of life' approach to culture,<sup>45</sup> with commentators even suggesting a radical and complete abandonment of the concept.<sup>46</sup> Why then is the concept still a viable one in the context of human rights law?

Anthropologists were reacting to its dated paradigm. Susan Wright reflects five characteristics defining the 'old' anthropology:

- i. Cultures are 'bounded small scale' entities.
- ii. A culture is a collection of 'defined characteristics'.
- iii. These characteristics are 'unchanging in balanced equilibrium of self-reproducing'.
- iv. A culture involves an 'underlying system of shared meaning'.
- v. Members of cultures are homogenous.<sup>47</sup>

However, once anthropology evolved from its obsession with 'pure' homogenous culture (if this even exists), in the guise of remote tribal groups, to addressing the contours of contemporary multicultural life, its theories also began to evolve. This transformation is captured by Preis:

... rapid changes in the modern world have forced anthropologists to rethink their disciplines fundamentally 'relativistic' position, and most importantly, its underlying

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<sup>43</sup> A number of anthropologists have proposed the 'new understandings' of human rights. Prominently, see the volume by Cowan *et al.*, *supra* note 2.

<sup>44</sup> See generally A.P. Vayda, "Actions, and Variations and Change: The Emerging Anti-Essentialist View in Anthropology" in R. Borofsky (ed.) *Assessing Cultural Anthropology* (McGraw-Hill, New York, 1994; Wright provides a useful summary of both schools. S. Wright, "The Politicization of 'Culture'", 14 *Anthropology Today* (1998), 7-15.

<sup>45</sup> For a comprehensive overview of this debate, see generally C. Brumann, "Writing for Culture", 40 *Current Anthropology* (Supplement) (1999), 1-27. For an analysis of the perceived flaws, see R. Brightman, "Forget Culture: Replacement, Transcendence, Relexification", 10 *Cultural Anthropology* (1995), 509-546. L. Abu-Lugho, "Writing against Culture" in R.G. Fox (ed.) *Recapturing Anthropology: Working in the Present* (School of American Research Press, Santa Fe, 1991).

<sup>46</sup> See, for example, Abu-Lugho, *supra* note 45; F. Barths, "A personal View of Present Tasks and Priorities in Cultural and Social and Anthropology", in Borofsky, *supra* note 44.

<sup>47</sup> Wright, *supra* note 44, at 8.

assumption of ‘culture’ as a homogenous, integral and coherent unity... In order to capture this more fluid character of present-day relationships between centre and peripheries and the realisation that cultural flows are no longer territorially bounded, notions like ‘creolization’, ‘hybridity’ and ‘cultural complexity’ have emerged in anthropological vocabulary.<sup>48</sup>

The critique was, in essence, a concerted attempt by anthropologists to emerge from their outmoded paradigm to embrace the realities of the modern world. A similar outlook from human rights would be a significant step towards establishing itself as a viable forum for minority and indigenous groups.<sup>49</sup> This tentatively suggests that classic and contemporary thinking are in opposition. As Preis observes, “[a] major implication of these perspectives is that ethnography is no longer defined as the interpretation of distinct, ‘whole’ ways of life, but rather as a series of specific dialogues, impositions, and inventions”.<sup>50</sup> So how can human rights address this paradox? The discourse recently witnessed a significant contribution on the matter. Li proposed a cultural framework for human rights emphasizing the ‘classic’ anthropological school.<sup>51</sup> For the legal requirements of human rights, an amalgamation was regarded as a more viable approach: a model grounded in the tangible, socially acquired behaviour and group concept that simultaneously embraces the openness of the modern world. Anthropology’s new message, and a welcome one for human rights, is to accept culture as we find in all its complexity.

## VI. Culture is a Representation

One of the criticisms to which **this essay** stands open concerns the role of the anthropologist. Within anthropology itself, robust opposition has formed against its claim to objectivity,<sup>52</sup>

**Comment [KN4]:** Whose essay? Li’s? Or this article?

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<sup>48</sup> A.B.S Preis, “Human Rights as Cultural Practice: An Anthropological Critique”, 18 *Human Rights Quarterly* (1996), 286-315, at 288-9.

<sup>49</sup> It should be noted that inconsistencies with the new understandings within the human rights forum have been highlighted. For a useful introduction to this issue, see generally Wright, *supra* note 44. See S.E. Merry, “Human Rights and the Demonization of Culture”, 26 *Political and Legal Anthropological Review* (2003), 55-76.

<sup>50</sup> *Ibid.*, at 298.

<sup>51</sup> X. Li, *Ethics, Human Rights and Culture: Beyond Relativism and Universalism* (Palgrave Macmillan, New York, 2006), at 9-14.

<sup>52</sup> Prominently see J. Clifford and G.E. Marcus, *Writing Culture: The Poetics and Politics of Ethnology* (University of California Press, Berkeley, 1986); R. Rosaldo, *Culture and Truth: The Remaking of Social Analysis* (Beacon Press, Boston, 1989); R. Wagner, *The Invention of Culture* (University of Chicago Press, Chicago, 1981).

including its holistic reading of culture.<sup>53</sup> While it is evident that the anthropological methodology it is not a native account of culture, in recent years the objectivity of the discipline has come into question. Much of this post-modern critique was provoked by certain presumptions that existed in terms of scientific (or at least social scientific) objectivity.

In 1981 a profound and influential polemic from Roy Wager questioned anthropology's claims to, and indeed very capacity for, absolute objectivity:

... it is necessary for a research worker to be as unbiased as possible in so far as he is aware of his emotions, but we often take our own cultures more basic assumptions for granted that we are not even aware of them. Relative objectivity can be achieved through discovering what these tendencies are ... . 'Absolute' relativity would require that the anthropologist have no biases, and hence no culture at all.<sup>54</sup>

**Comment [KN5]:** This sentence seems strange - quote should be checked.

What Wagner rightly acknowledged was the inherent cultural disconnect between anthropologist and subject. This is a valid position: it is unreasonable to expect the anthropologist to cast aside his human make-up and operate in a cold 'objective' scientific manner dismissive of his own cultural background. This led Wagner to the reasonable thesis that, "[w]e might say that the anthropologist actually 'invents' the culture he believes himself to be studying, that the relation is more real for being his particular acts than the things to which it 'relates'".<sup>55</sup>

Wagner's arguments did not go unheeded, provoking a degree of reflection within anthropology over its previous presumptions of objectivity. Capturing this mood, in 1989, Rosaldo writes:

... a sea change in cultural studies has eroded once-dominant conceptions of truth and objectivity. The truth of objectivism – absolute, universal and time-less – has lost its monopoly status. It now competes, on almost equal terms, with the truths of case studies that are embedded in local contexts, shaped by local interests and colored by local perceptions ... Such terms as objectivity, neutrality, and impartiality refer to subject positions once endowed with great institutional authority, but they are arguably

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<sup>53</sup> R.J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press, Durham, 1998), at 34-35.

<sup>54</sup> Wagner, *supra* note 52, at 2.

<sup>55</sup> *Ibid.*, at 4.

neither more nor less valid than those of more engaged, yet equally perceptive, knowledgeable social actors.<sup>56</sup>

What Rosaldo highlights is the growing acknowledgement of the influence of the ethnographer on field work.

What are the implications for human rights? It should firstly be highlighted that anthropology's 'human' dimension is also its forte. As Eriksen writes:

... anthropology has its distinctive character as an intellectual discipline, based on ethnographic field work, which tries simultaneously to account for actual cultural variation in the world and to develop a theoretical perspective on culture and society.<sup>57</sup>

What Eriksen alludes to is the inherent connection between field-work and theoretical anthropology: theories are based on the experience of a reflexive researcher living in the cultural environment of his subjects (frequently for years at a time). Anthropology theory thus paradoxically contains elements of two apparent opposites: the local and the universal. What the current criticism correctly highlights is that anthropological theory is not without its flaws; however, perfect objectivity is perhaps an unrealistic aspiration in such a person-orientated methodology, and it is nonetheless a highly valuable model.

## VII. Philosophical Gulf between Anthropology and Human Rights

Traditionally, the greatest philosophical gulf to a union of human rights and anthropology has been the thorny issue of cultural relativism.<sup>58</sup> In a rights-based approach to culture this manifests itself in terms of the questions of limitations. How do we limit a right to culture? In the debate on cultural relativism opponents of the philosophy typically cite acts such as

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<sup>56</sup> Rosaldo, *supra* note 52, at 21.

<sup>57</sup> Eriksen, *supra* note 20, at 5.

<sup>58</sup> On human rights and cultural relativism, see Iovane's comprehensive review of the issue. See generally, M Iovane, "The Universality of Human Rights and the International Protection of Cultural Diversity", 14 *International Journal on Minority and Group Rights* (2007), 231-262. See J. Donnelly, "Cultural Relativism and Universal Human Rights", 6 *Human Rights Quarterly* (1984), 400-419; A. B. Fields and W.-D. Narr, "Human Rights as a Holistic Concept", 14 *Human Rights Quarterly* (1992), 1-20; W.E. Washburn, "Cultural Relativism, Human Rights and the AAA", 89 *American Anthropologist* (1987), 939-943; M.J Perry, "Are Human Rights Universal? The Relativist Challenge and Related Matters", 19 *Human Rights Quarterly* (1997), 461-509.

female genital mutilation and honour killings<sup>59</sup> as occurrences that may be justified on cultural grounds.<sup>60</sup>

### *The Foundations of Cultural Relativism*

The question of limits is hugely complicated by the philosophical gulf that exists historically between the disciplines. In 1948 the Universal Declaration of Human Rights proclaimed the goal of universality.<sup>61</sup> As Zechenter rightly observes, “[u]niversalism, thus, is at the root of modern human rights law”.<sup>62</sup> Despite this explicit ethos, the discourse of human rights scholars had focused largely on the extent to which human rights should take local cultural circumstance into consideration in the implementation of norms.<sup>63</sup> Any lingering debate was resolved at the World Conference on Human Rights in Vienna in 1993, which asserted the primacy of human rights standards:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>64</sup>

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<sup>59</sup> The United Nations estimates that approximately 5,000 women are killed annually through honour killings. UNFPA, “State of World Population 2000: Lives Together, Worlds Apart: Men and Women in a Time of Change” (2000), Available at: <http://www.unfpa.org/swp/2000/english/>, Accessed 19.11.2009. This is a significant theme of the prominent volume edited by Okin. S.M. Okin (ed.), *Is Multiculturalism Bad for Women?* (Princeton University Press, Princeton, 1999).

<sup>60</sup> However scholars have nonetheless defended the dogma of relativism; see, for example, E. Hatch, “The Good Side of Relativism”, 53 *Journal of Anthropological Research* (1997), 371-381; K. Boulware-Miller, “Female Circumcision: Challenges to the Practices as a Human Rights Violation”, 8 *Harvard Women’s Law Journal* (1985), 155-177; R.B. Edgerton, “Traditional Beliefs and Practices: Are Some Better than Others?”, in L.E. Harrison and S.P. Huntington (eds.), *Culture Matters* (Basic Books, New York, 2000); M. Parker, “Rethinking Female Circumcision”, 65 *Africa* (1995), 506-523; H. Montgomery, “A Case Study of Child Prostitution in Thailand”, in Cowan *et al.*, *supra* note 2; T. Asad, “On Torture, or Cruel, Inhuman and Degrading Treatment”, in W. Richard (ed.) *Human Rights, Culture and Context* (Pluto Press, London, 1997).

<sup>61</sup> “... a common standard of achievement for all peoples and all nations ... to secure their universal and effective recognition and observance ...”. UN Doc., GA Res 217. A (III) (1948), Preamble.

<sup>62</sup> E.M. Zechenter, “In the Name of Culture: Cultural Relativism and the Abuse of the Individual”, 53 *Journal of Anthropological Research* (1997): 319-347, at 320.

<sup>63</sup> Prominently, see A.A. An-Na’im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992); however, see J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 2003).

<sup>64</sup> Vienna Declaration and Programme of Action, U.N Doc. A/CONF.157/24 (1993), Para. 5.

From a human rights vantage the discussion seems closed with states accepting the general principle of the universality of human rights.

By contrast, from its inception, anthropology has supported a cultural relativist ethos.<sup>65</sup> In effect, this meant that cultures were seen to establish their own moral standards,<sup>66</sup> premised on the dogma that “any society or culture, when all is said and done, can only be understood on its own terms”.<sup>67</sup> The extraordinary clash with human rights is obvious. Thus, anthropology has been, and continues to be, extremely cautious in judging other cultures and in particular what it perceives as a European-derived model of standards.<sup>68</sup> The outset of the human rights regime thus provoked an outcry from anthropologists.<sup>69</sup> However, recent years have borne witness to a softening of rhetoric: a number of anthropologists, struggling to reconcile the discipline’s relativist stance with mechanisms for dealing with human rights violations, have proposed compromised solutions.<sup>70</sup> In 1999, the American Anthropological Association issued a position document that reflected a thawing in its relativist position:<sup>71</sup>

As a professional organization of anthropologists, the AAA has long been, and should continue to be, concerned whenever human difference is made the basis for a denial of basic human rights, where ‘human’ is understood in its full range of cultural, social, linguistic, psychological, and biological senses.<sup>72</sup>

For human rights law, the issue is more clear-cut: human rights standards are the ‘bottom line’ for cultural behaviour and divide the permissible from the non-permissible. Nonetheless,

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<sup>65</sup> See V.E. Spiro, “Cultural Relativism and the Future of Anthropology”, 1 *Cultural Anthropology* (1986), 259-286.

<sup>66</sup> Much of this thinking can be traced to the pioneering work of Franz Boas who stressed the importance of understanding cultures in their own contexts. See, for example, F. Boas, *The Mind of Primitive Man* (MacMillan, New York, 1911).

<sup>67</sup> Eriksen, *supra* note 20, at 257.

<sup>68</sup> See A. Pollis and P. Schwab, “Human Rights: A Western Concept with Limited Applicability in Human Rights: Cultural and Ideological Perspectives”, in A. Pollis and P. Schwab (eds.), (Praeger, New York, 1979); A. Pollis, “Cultural Relativism Revisited”, 18 *Human Rights Quarterly* (1996), 316-344; R. Pannikar, “Is the Notion of Human Rights a Western Concept?”, 30 *Diogenes* (1982), 75-102.

<sup>69</sup> See the statement by the American Anthropological Association. The Executive Board, American Anthropological Association, Statement on Human Rights, 49 *American Anthropologist* (1947), 539-543. See J. Steward, “Comments on the Statement on Human Rights”, 50 *American Anthropologist* (1948), 351-352.

<sup>70</sup> A.D. Renteln, “Relativism and the Search for Human Rights”, 90 *American Anthropologist* (1988), 56-71; A.D. Renteln, *International Human Rights: Universal versus Relativism* (Sage, Newbury Park, 1990); W.P. Handwerker, “Universal Human Rights and the Problems of Unbounded Cultural Meaning”, 99 *American Anthropologist* (1997), 799-809.

<sup>71</sup> This is challenged by Engle who questions the extent of this change. See K. Engle, “From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999”, 23 *Human Rights Quarterly* (2001), 536-560, at 537.

<sup>72</sup> American Anthropological Association, Declaration on Anthropology and Human Rights (1999).



cultural relativism has arguably been the most significant factor in the limited involvement of anthropology in human rights. In the view of the author, both disciplines appear, at a certain level, to be compatible: human rights law provides standards by which anthropology's holistic approach can be limited. However, this is somewhat ironic given the continued hostility.

### VIII. Legal Application of the Approach

Clearly the proposed approach was not developed with legal protection in mind. Rather it was developed for, and by, the nuances of ethnographic field research. How, therefore, does the concept transfer to a legal setting?

A notable critique of the 'total way of life' approach was recently put forward by Terry Eagleton. Criticizing its breadth, he observes on the model that it involves too much: "covers everything from hairstyles and drinking habits to how to address your husband's second cousin".<sup>73</sup> Although Eagleton's remarks do not extend to the legal protection of culture they are clearly pertinent. Banal as they may be, these are all likely aspects of group life. This illustrates a fundamental difficulty with the cross-disciplinary theoretical exchange proposed by the author. Anthropology tells us that, according to its all-embracing approach, this is culture. Extending Eagleton's sentiment, is it reasonable that a minority member be entitled to go to court and claim protection for his hairstyle because this is an aspect of his culture? However, the 'total way of life' approach is conceived here as having an entirely different function. It should first be recalled that the goal of this article was to advance a viable representative model for human rights law. It is suggested that one of the benefits of such a model is that it allows us to view the issue in the context of objects of legal protection: i.e. this is what law must protect.<sup>74</sup> A telling illustration is China's longstanding dispute with Tibet.<sup>75</sup> The state has offered what seems to be a very limited cultural policy with the goal of protecting the broad Tibetan culture.<sup>76</sup> A reasonable methodology is that actions that have a

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<sup>73</sup> T. Eagleton, *The Idea of Culture* (Blackwell Manifestos, Oxford, 2000), at 32.

<sup>74</sup> See Renteln's approach to culture and law, A.D. Renteln, *The Cultural Defence* (Oxford University Press, Oxford, 2004).

<sup>75</sup> This is disputed by Sautman. B Sautman, "Cultural Genocide and Tibet", 38 *Texas International Law Journal* (2003), 173-246.

<sup>76</sup> "The Chinese government has always respected and valued the traditional culture of ethnic minority groups. It has allocated large sums of money for the protection and maintenance of historical relics and sites of ethnic minority-groups. Between 1989 and 1994 the government invested 53mn yuan to completely renovate the

substantive effect on culture are separated from less vital activities. This echoes Stamatopoulou's approach in her recent study on cultural rights.<sup>77</sup> This is a case-specific approach to culture that does not *prima facie* dismiss an element of culture from protection without first considering its specific circumstances. In a sense, this configuration is already evident within the human rights forum. The Human Rights Committee, quantitatively speaking the body with the most voluminous jurisprudence on the subject, has been protecting cultural groups from outside threats to their cultural existence and has applied this filtering system.<sup>78</sup> Heretofore, its cultural thinking has been largely related to indigenous groups and reveals a highly traditional focus, which calls into question its relevance in the modern world. The discourse on the intersection of law and culture has witnessed an inquiry into the intrinsic capacity of the legal process to protect culture, to which the obvious retort is that this is occurring in human rights law.<sup>79</sup>

**Comment [KN6]:** What is occurring? The protection of culture by law? Should be made a bit clearer.

Second, the lesson from contemporary anthropology is that legal practitioners must acknowledge the cultural realities of contemporary life, including indigenous groups. The absence of such reasoning was poignantly illustrated in the recent *Yorta Yorta*, which, in the author's view, was rejected on the basis of a highly static and restrictive reading of culture.<sup>80</sup> That decision was to have profound ramifications for the long struggle of indigenous Australians in securing land rights, signally a 'reeling in' of the landmark *Mabo* case.<sup>81</sup> Canadian jurisprudence has recently seen a related controversy: in *R v. Van der Peet*, the Canadian Supreme Court upheld the appellant's conviction for commercially selling salmon, based on a highly restrictive 'integral to a distinctive culture' test, which was regarded as the basis for establishing an aboriginal right.<sup>82</sup> The test required claimants to prove that the

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world-famous Potala Palace in Tibet and finished 111 projects. This is the biggest renovation of the Potala Palace since it was constructed early in the Qing dynasty in the mid-17th century. In 1991 the government invested more than 30m yuan and provided manpower and material for the renovation of the Kumbum Monastery, a Tibetan Buddhist establishment in Qinghai". Chinese State Council, White Paper on Human Rights (1995).

<sup>77</sup> Stamatopoulou, *supra* note 2, at 112-5.

<sup>78</sup> See for example *Lovelace v. Canada*, UN Doc. CCPR/C/OP/1 (1995); *Kitok v. Sweden*, UN Doc. CCPR/C/33/D/197/1985 (1988); *Lubicon Lake Band v. Canada*, UN Doc. CCPR/C/38/D/167/1984 (1990);

<sup>79</sup> See for example *Äärelä and Näkkäläjärvi v. Finland*, CCPR/C/73/D/779/1997 (2001); *Länsman v. Finland*, UN Doc. CCPR/C/83/D/1023/2001 (2005).

<sup>80</sup> *Members of the Yorta Yorta Aboriginal Community v. Victoria* [2002] HCA 58. See G. McIntyre, "Native Title Rights after Yorta Yorta", 9 *James Cook University Law Review* (2003), 268-330.

<sup>81</sup> *Mabo and Others v. Queensland*, 23 HCA [1992]. See G. Nettheim, "The Mabo Response in Australia: Reconciliation or Continuing Conquest?", 10 *Anthropology Today* 8 (1994), 8-11.

<sup>82</sup> *R v. Van der Peet*, 2 SCR [1996]. See generally R.L. Barsh and J.Y. Henderson, "Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand", 42 *McGill Law Journal* 993 (1997), 3-19; M. Murphy, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?", 34 *Canadian Journal of Political Science* 109 (2001), 109-129.

relevant practice was integral to group life prior to European contact. Regrettably, the case rolled back the far more dynamic and contemporary approach taken by the Court in *R v. Sparrow*.<sup>83</sup> Again, the case was a substantial hurdle in the already difficult struggle of indigenous communities to secure rights.

## IX. Conclusion

The culture question is one of the most profound and challenging issues facing humanity today. In the hostile post-9/11 atmosphere, some minorities are under enormous pressure in terms of their very place in society. Under the call of securitization, the period has witnessed a reassessment of fundamental notions of national identity in some states. Of course, this has been a government-led initiative with minorities largely voiceless. This article has focused broadly on the human right system as a potential solution to this profound dilemma, and in particular on nuances within the legal process. Minority cultural identity is an established concern of human rights law, but it is gravely disadvantaged because it is at such a formative stage. Nonetheless, the overwhelming majority of states have recognized the rights of minorities to their own cultural identity, and have acceded in parallel to legal obligations.

Through the model it has advanced, this article has sought to clarify the regrettable lacuna in offering guidance to legal practitioners in this crucial and complex area. Much of the theoretical knowledge was gleaned from anthropology, academia's specialist in questions of culture. Anthropology is a wonderful source for cultural models as its theoretical life is informed by the experiences of reflexive field workers who commit to substantial periods of study while living among their subjects. Its theory is at once universal and local, and it is grounded in real-life communities. Through its application, this article has sought to capture a viable representative model for human rights law; put simply, this is what law must protect.

The holistic 'total way of life' approach is one that is synonymous with anthropology's traditional focus on the group: culture is everything. For human rights law, mandated to address (minority) groups, the model is equally applicable. This article sought to capture the

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<sup>83</sup> "The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner". *R v. Sparrow* 1 SCR [1990], at 1075. See generally M. Asch and P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v. Sparrow*", 29 *Atlanta Law Review* (1991), 498-517.

tangible, behavioural elements of the cultural process that might be addressed by legal practitioners. Equally vital are the new approaches of contemporary anthropology. These have centred on a dynamic understanding of culture, invoked by anthropology as a means of embracing the modern world. In parallel with this post-modern turn, human rights must also acknowledge the realities of the modern globalized world in all its cultural complexity. The proposed model is a fusion of the 'classic' and 'contemporary' schools, one that is grounded in the tangible notion of the group while acquiescing to contemporary life. The human rights discourse has heard recent calls for a cultural model focusing on the classic approach, but some question its relevance to the contemporary world. However, anthropology's greatest lesson to human rights is perhaps that it must acknowledge and seek to protect that which it encounters in the living communities before its eyes.