Protecting Indigenous Knowledge as Intellectual Property Rights through the Entrenchment of Indigenous Customary Law and Communities Rights in National Constitutions

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Abstract

One of the burning issues of academic debate is how best to protect the Intellectual Property Rights (IPR) of indigenous groups, who under the current IPR regime have little or no protection. The essence of this paper is to find a possible solution to this academic puzzle by examining the "entrenchment of indigenous customary law and communities rights in national constitutions" to unlock the difficulty created by the western styled IPRs regimes in protecting the intellectual rights of indigenous peoples. This paper is intended to espouse how national constitutions have entrenched traditional knowledge, indigenous customary law and communities rights as part of their provisions to guard against violations and ensure that benefits from IPR are accruable to the groups or communities that owe these rights or indigenous knowledge over generations.

1. Introduction

As a primary mechanism for the allocation of rights over knowledge, Western or conventional Intellectual Property Rights (IPRs) provide the conceptual platform in this ongoing inquiry. However, very serious concerns are raised in indigenous and scholarly circles about the suitability of conventional IPRs to the nature of traditional knowledge.[1] There is almost a consensus that

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the inadequacy of conventional IPRs in relation to indigenous knowledge compels a look in the direction of a *sui generis* regime of rights for indigenous knowledge protection.[2] However, the *sui generis* proposals are drawn within the rubric of conventional IPRs.[3] Protection of indigenous knowledge is always considered in relation to the conventional intellectual property system. This is understandable because, in the global economy, conventional IPRs are the primary and formal mechanism for the protection of rights over knowledge. However, little regard is given to the fact that virtually all cultures have their own knowledge-protection protocols or conventions. Fundamentally, such culture-specific protocols are designed to protect knowledge. In that sense, they are functionally akin to Western intellectual property frameworks. Enforcing the protection of indigenous knowledge over conventional intellectual property rights may be achieved by ensuring their entrenchment as existing customary rules in a national constitution rather than international conventions like the

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1 Chidi Oguamanam, "Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge," *Indiana Journal of Global Legal Studies*, Vol. 11. No.2, 20004, pp. 135-135, 141-143.

2 *See* The Crucible II Group, Seeding Solutions: Policy Operations for Genetic Resources: Peoples, Plants and Patents Revisited (2000); 2 The Crucible II Group, Seeding Solutions: Policy Operations for National Laws Governing Control Over Genetic Resources and Biological Innovations (2001).

3 *See* Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection", 44 *McGill Law Journal* 953, 961 (1999). See also Dan Leskien & Michael Flitner, *Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System*, 6 Issues in Genetic Resources (1997) 30. See generally Peter Drahos, "Indigenous Knowledge and Duties of Intellectual Property Owners", 11 *Intellectual Property Journal* (1997) 179.

Paris Convention for the Protection of Industrial Property adopted in 1883 and the Berne Convention for the Protection of Literary and Artistic Works adopted in 1886 which are not enforceable in municipal courts. To buttress this claim, Bangladesh for instance drafted the "Biodiversity and Community Knowledge Protection Act" that prohibits the violation of "Common Property Regimes" which include various rights, relations, arrangements and cultural practices, whether or not they have legal expressions or recognition and for which communities own, use and have access to such as biological and genetic resources. The reason for this assertion is that Traditional Knowledge protection under a particular national law or constitution would become enforceable at the national level and creates territorial rights. Furthermore, in strengthening national legislations to include traditional knowledge, customary practices and traditional systems of resource management as protected rights, will prevent unauthorized use of such communally associated IP regimes.

2. Meaning of Indigenous Peoples

Indigenous communities or indigenous peoples are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns (including knowledge), social institutions and legal systems.[4]

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[4] Martínez Cobo José; UN Doc. E/CN.4/Sub.2/1983/21/Add. 8. 1983. See also Jayantha Perera, "International Law and Indigenous Peoples' Rights Land and Cultural survival: The Communal Land Rights of Indigenous Peoples in Asia", Chapter 1, available online at

According to Anaya:[5]

> Indigenous peoples broadly to the culturally distinctive communities of the living descendants of pre-invasion inhabitants of lands now dominated by others.

This paper adopts the above definition because it is expansive.[6] The attempt to define indigenous peoples has been controversial.[7] Some states have challenged the need for a definition, while others have found it necessary. Indigenous people themselves have expressed concerns regarding the idea of a formal definition for fear of excluding groups that are not encompassed by the definition. In addition, there has been debate about the use of the term "peoples" due to its association with the right of self-determination. Regardless, bodies like the United Nations, the International Labour Organization, and the World Bank have attempted to formulate a definition. Although all the definitions differ from each other, certain commonalities exist such as cultural distinctiveness, self-identification, the experience of subjugation, and an occupation of the land prior to outside

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http://www.ccc-cambodia.org/downloads/adi/adireport/ADB_ ADI_ land-cultural-survival.pdf, accessed 13 July, 2013.

5 J. Anaya, *Indigenous Peoples in International Law*, (Oxford: Oxford University Press, 1996).

6 M. RaoRane, "Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions", *Pacific Rim Law & Policy Journal Association* Vol. 15, No.3, 2006., pp. 831-832.

7 Peter-Tobias Stoll & Anja von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, in Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore, 5, 8-9 (Silke von Lewinski ed., 2004); *See also* Jeremy Firestone & Jonathan Lilley, Isabel Torres de Noronha, "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Law," 20 *American University International Law Review*, (2005), 219, 223-231.

settlers that are significant to an understanding the term "indigenous peoples."

The protection under IPRs of traditional and indigenous knowledge (TK) has received growing attention since the adoption of the Convention on Biological Diversity (CBD) in 1992. Numerous contributions by academics, NGOs and governments have considered the need to provide some form of protection to TK. However, significant divergences exist as to whether IPRs should be applied and, if that were the case, what would be the rationale and modalities of protection.[8]

3. Definition of Indigenous Knowledge or Traditional Knowledge

In the course of this paper, the terms indigenous/traditional/local knowledge refers to knowledge forms in indigenous and other non-Western societies including the umbrella category referred to as "local communities." The terms *indigenous knowledge and traditional knowledge* will be used interchangeable by the author to mean one and the same thing notwithstanding the different debates on their propriety and validity.

Though different authors have ascribed different meanings to both terms, hence indigenous knowledge could be defined as that knowledge which is held and used by a people who identify themselves as indigenous of a place based on a "combination of cultural distinctiveness and prior territorial occupancy relative to a more recently-arrived population with its own distinct and subsequently dominant culture." [9]

Traditional knowledge is on the other hand, that which is held by members of a distinct culture and/or sometimes acquired

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8 C.M Correa, "Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge A Discussion Paper," (Geneva: The Quaker United Nations Office (QUNO), 2001), p. 2.

9 UNEP/CBD/3/Inf.33 Annex.2.

"by means of inquiry peculiar to that culture, and concerning the culture itself or the local environment in which it exists."[10] Indigenous knowledge fits neatly into traditional knowledge category but traditional knowledge is not necessarily indigenous. Traditional knowledge is thus the totality of all knowledge and practice, whether explicit or implicit, used in the management of socio-economic and ecological facets of life. This knowledge is established on past experiences and observations. It is usually the collective property of a society. Many members of the particular society contribute to it over time. This knowledge is transmitted from generation to generation.[11]

4. The Controversy over the Inadequacy of the IPRs Regimes in the Protection of Indigenous or Traditional Knowledge

There are several ways in which conventional IPRs are said to be a mismatch for indigenous knowledge forms.[12] None of these arguments represents the complete picture. Indeed, for each of them, there are counterarguments.[13] The debate over the fitness of conventional IP to indigenous knowledge forms is an ongoing one.

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10 *Ibid.*

11 J. Mugabe, P. Kameri-Mbote, and D. Mutta, *Traditional Knowledge, Genetic Resources and Intellectual Property Protection: Towards a New International Regime*, IELRC Working Paper, 2001-5 Geneva: International Environmental Law Research Centre, 2001, pp. 2-3.

12 J. Rosemary Coombe, "Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biological Diversity", *6 Indiana Journal of Global Legal studies* (1998) 77.

13 *Ibid*, at 59. John Frow, "Public Domain and Collective Rights in Culture," 13 *Intellectual Property Journal* 39, 51 (1998); Ikechi Mgbeoji, "Patents and Traditional Knowledge of the Uses of Plants: Is a Communal Patent Regime Part of the Solution to the Scourge of Bio Piracy?" 9 *Indiana Journal of Global Legal Studies*, (2001) 163, 183.

Given the consensus that conventional IP does not satisfy the peculiarity of indigenous knowledge, the most important question today appears to be how to mitigate this state of affairs and what manner of a *sui generis* IP model should be employed.

The first argument is that indigenous knowledge is usually community property derived from communal effort.[14] Each member of the community is thus entitled to share in it, and none may exercise an exclusive claim, as the concept of conventional IPRs requires.[15] Generally, individualism is the model for entitlement to IPRs within the conventional system.[16] An ownership structure based on the community stands in sharp contrast to a knowledge-protection scheme that reifies the individual as the primary harbinger or agent of intellectual advancement.

The second argument is based on the concept of legal personality. Because most indigenous societies are based on a communal or collective organizational structure, they are said to lack the requisite legal or juridical personality on the basis of which they can hold IPRs. Under conventional IPR theory, juristic

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14 Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" 30 *Connecticut Law Review* 1, 30 (1997).

15 See generally Justin Hughes, "The Philosophy of Intellectual Property," 77 *Georgetown Law Journal*, 287 (1988). Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property", 68 *Chi-Kent Law Review*, 841 (1993) (providing practical justifications for the protection of intellectual property); Keith Aoki, "Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection", 6 *Indiana Journal of Global Legal Studies* (1998) 11, 26–27.

16 *See* Marci Hamilton, "The TRIPS Agreement: Imperialistic, Outdated, and Overprotective", 29 *Vanderbilt Journal of Transnational Law* (1996) 613, 617.

persons in the form of natural and corporate entities are the only appropriate holders of rights in knowledge.

The third argument issues from the nature of indigenous knowledge, rather than from the nature of indigenous social structures. Indigenous bio-cultural knowledge is said not to constitute original information.[17] Indigenous knowledge represents historical information collected from time immemorial in an incremental fashion. Such information is part of the "intellectual commons." As such, it is not considered new. Indeed, it is said to be in the public domain as common heritage of mankind[18] and ought to be freely available to all people who may require them at any point in time. Being in the public domain as a common heritage, the argument goes, indigenous knowledge forms do not qualify for IP protection.

5. Protection of Traditional Knowledge Rights under the United Nations System

5.1 Universal Declaration of Human Rights (UDHR) (1948)

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17 *See* Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" 30 *Connecticut Law Review* (1997) 18.

18 Rudiger Wolfrum, *The Principle of Common Heritage of Mankind*, 43 *Heidelberg Journal of International Law* (1983) 312; *see also* Stephen Gorove, *The Concept of Common Heritage of Mankind: A Political Moral and Legal Innovation*, 9 *San Diego L. Rev*. (1972) 390. See generally Surendra Patel, "Can IPR Systems Serve the Interest of Indigenous Knowledge?" in Valuing Local Knowledge: Indigenous Peoples and Intellectual Property Rights 3 (Stephen Brush & Doreen Stabinsky eds., (1996). See also Michael Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law," 22 *European Intellectual Property Review* (2000) 251, 252; See Naomi Roht-Ariazza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technological Knowledge of Indigenous and Local Communities," 17 *Michigan International Law Journal* (1996) 919, 964.

Article 27(1) of the UDHR, 1945 provides that everyone has the right freely to 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. Since 1948, many international human rights instruments and documents have reinforced the importance of IP as a human right.[19]

5.2 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

Article 15(1) of the ICESER, 1966 provides that 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.[20]

5.3 UN Convention on Biological Diversity (CBD), 1992.

Article 8(j) of the CBD 1992 provides that subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application

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19 U.N. Universal Declaration of Human Rights, signed 10 December, 1948, G.A Res. 217A (III), U.N Doc. A/810, (1948) See also., S. Hansen and J. VanFleet, *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, Washington, DC: American Association for the Advancement of Science (AAAS), 2003, p.vii.

20 UN International Covenant on Economic, Social and Cultural Rights. G.A.R. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3rd January, 1976.

with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[21]

5.4 International Labour Organization Convention No. 169, 1989

Article 15(1) 1989 provides for the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.[22]

5.5 UN Draft Declarations on Indigenous Rights 2007

Article 29 provides that indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.[23]

The period of the early 1990s to the millennium was also characterized by the rapid rise in global civil society. The high-

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21 United Nations Convention on Biological Diversity, June 5, 1992, 31 ILM 818, entered into force 29 December, 1993) Available online at www.juridicas.unam.mx/publica/librev/rev/boletin/cont/122/el/el16.pdf accessed 6 February, 2013. The Convention on Biological Diversity (Biodiversity Convention or CBD) was adopted at the Earth Summit in Rio de Janeiro, Brazil in June 1992, and entered into force in December 1993.

22 ILO: Convention No. 107 of 1957 and its Reversed Version (Convention No. 169 of 1989).

23 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

level Brundtland Report of 1987 recommended a change in development policy that allowed for direct community participation and respected local rights and aspirations.[24] Indigenous peoples and others had successfully petitioned the United Nations to establish a Working Group on Indigenous Populations that made two early surveys on treaty rights and land rights. These led to a greater public and governmental recognition of indigenous land and resource rights, and the need to address the issue of collective human rights, as distinct from the individual rights of existing human rights law.

The collective human rights of indigenous and local communities has been increasingly recognized such as in the International Labour Organization (ILO) Convention 169 (1989) and the Declaration on the Rights of Indigenous Peoples (2007). The Rio Declaration (1992),[25] endorsed by the presidents and ministers of the majority of the countries of the world, recognized indigenous and local communities as distinct groups with special concerns that should be addressed by states. Initial concern was over the territorial rights and traditional resource rights of these communities. Indigenous peoples soon showed concern for the misappropriation and misuse of their "intangible" knowledge and

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24 G. Bruntland, (ed)., Our Common Future: The World Commission on Environment and Development, (Oxford: Oxford University Press.1987*)*. The Brundtland Report, 1987 also known as *Our Common Future* Report of the World Commission on Environment and Development: Our Common Future - A/42/427 Annex Available online at: http://www.ace.mmu.ac.uk/eae/Sustainability/Older/Brundtland_Report.html accessed 12 March, 2013.

25 United Nations Convention on Biological Diversity, June 5, 1992, 31 ILM 818, entered into force 29 December, 1993) Available online at www.juridicas.unam.mx/publica/librev/rev/boletin/cont/122/el/el16.pdf accessed 6 March, 2013. The Convention on Biological Diversity (Biodiversity Convention or CBD) was adopted at the Earth Summit in Rio de Janeiro, Brazil in June 1992, and entered into force in December, 1993.

cultural heritage. Indigenous peoples and local communities have resisted, among other things; the use of traditional symbols and designs as mascots, derivative arts and crafts; the use or modification of traditional songs; the patenting of traditional uses of medicinal plants; and the copyrighting and distribution of traditional stories.

Indigenous peoples and local communities have sought to prevent the patenting of traditional knowledge and resources where they have not given express consent. They have sought for greater protection and control over traditional knowledge and resources. Certain communities have also sought to ensure that their traditional knowledge is used equitably - according to restrictions set by their traditions, or requiring benefit sharing for its use according to benefits which they define.

Though the relationship between IP and Traditional Knowledge (TK) is nuanced and complex because the central issues of IP and TK rights go well beyond whether or not copyright to a book or photograph is still in effect. One of the elements of contestation over the intellectual aspects of TK today is the uncertainty over the intellectual ownership, control and use of collections held within cultural institutions which have been identified above in the course of this article.[26] Interestingly, the United Nations have advanced the need for protection of knowledge of indigenous people through different instruments in recent decades. One of the most notable references is the 2007 United Nations Declaration on the Rights of Indigenous Peoples.

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[26] Molly Torsen and Jane Anderson, Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical options for Museums, Libraries and Achieves, World Intellectual Property Organization, 2010, p.13.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples explicitly addresses these as urgent and legitimate issues in articles 11, 12 and 31. Article 31 provides: [27]

> Indigenous people have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

The 2007 Declaration also highlights that indigenous peoples have the right to access, practice and revitalize their cultural traditions. Article 12(1) states that: [28]

> Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

The effective protection of the right to indigenous cultural traditions and belief and the right to manifest and practice them are thus the key to understanding of the declaration and this fundamental goal thus undergirds this novel provision.

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27 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1/2007. Article 31.

28 *Ibid.* Article 12(1).

6. The Value Assessment and Ridiculous Notion of Indigenous or Traditional Knowledge by the Western World

Indigenous or traditional knowledge (TK) has been used for centuries by indigenous and local communities under local laws, customs and traditions. It has been transmitted and evolved from generation to generation. TK has played, and still plays, an important role in vital areas such as food security, the development of agriculture and medical treatment.

However, it has been argued that western societies have not, in general, recognised any significant value in TK nor any obligations associated to its use, and have passively consented to or accelerated its loss through the destruction of the communities' living environment and cultural values. Recently, western science has become more interested in TK and realised that TK may help to find useful solutions to current problems, sometimes in combination with "modern" scientific and technological knowledge. Despite the growing recognition of TK as a valuable source of knowledge, it has generally been regarded under Western intellectual property laws as information in the "public domain", freely available for use by anybody. Moreover, in some cases, diverse forms of TK have been appropriated under intellectual property rights by researchers and commercial enterprises, without any compensation to the creators or possessors of the knowledge.[29]

The protection of traditional knowledge is debated in a wide range of international fora, including the UN, WTO, WIPO, The Convention on Biological Diversity (CBD), Food and Agricultural Organisation (FAO) and the International Labour Organisation (ILO). But conventional protection of traditional knowledge had

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[29] See Martin Gisberger, "Intellectual Property Rights and Traditional Knowledge: Background Terminology and Issues Arising," Paper presented to the Workshop on Biological Diversity and Biotechnology, Berne, Switzerland, 9-11 March, 2000, p. 3.

been advocated in line with the western conception of protection of intellectual property rights which hinges on copyright,

Copyright, which is called 'author's rights' in most European languages other than English, is a branch of the law dealing with the rights of intellectual creators. The subject-matter of copyright protection covers original works in the literary, scientific, and artistic domain, whatever the mode or form of expression. Copyright grants authors and other artistic creators of works of the mind (literature, music, art) rights to authorize or prohibit, for a specific limited time, often 70 years after the author's death, for the use made of the works. In so doing, copyright awards limited monopolies to creators related to their creations so as to control the right to make copies of a given work. Generally copyright protects the expression of the author's ideas in tangible form rather than the ideas themselves. Copyright protection is justified as an important means of encouraging authors and artists to create, thereby promoting, enriching and disseminating a nation's cultural heritage.[30]

The next sub-section of this article will examine the possibility of using indigenous customary law and communities' rights in national constitutions as avenue to protect the traditional knowledge of indigenous groups considering the wanton controversy that trailed the fitness of western model of protecting intellectual property rights as a model for protecting traditional knowledge of indigenous groups.

7. Case Studies of Communities Rights in National Constitutions

30 R. A Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c),* Copyright Bulletin, Paris Cedex: Division of Arts and Cultural Enterprise, UNESCO Vol. xxxv No. 3 2001, pp. 8-9.

Over the past several decades, there has been a publicized absence of trust between indigenous and traditional communities and the cultural institutions that hold pieces of their cultural heritage.[31] Indigenous peoples and traditional communities have not been recognized as rights holders or acknowledged as having legitimate relationships with the material within the collections of such cultural institutions. It would be of immense benefit to both indigenous and traditional communities and cultural institutions to step beyond this awkwardness in order to understand how best to protect, promote and provide stewardship for the rich cultural heritage that indigenous and traditional communities have shaped over millennia.[32] This can be done through the entrenchment of these indigenous cultural rights in national constitutions as it has been done in the Philippines, Thailand, Ecuador, Brazil, Venezuela and Costa Rica.

The Constitution of the Philippines of 1987 provides that: "The State shall recognize, respect and protect the rights of the indigenous cultural communities to preserve and develop their cultures, traditions and institutions".[33]

Thailand's Constitution of 1997 states: "Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the

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31 See, Hector Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art (Basic Books, 1998); Martin Bailey, "Don't Return Artefacts to Nigeria", *The Art Newspaper*, 10 January, 2000; Martin Bailey, "The Met and Louvre are Behaving Unethically", *The Art Newspaper*, 9 January, 2001; Kate Fitz Gibbon, *Who Owns the Past?: Cultural Policy, Cultural Property, and the Law*, Rutgers: Rutgers University Press, 2005.

32 Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, Geneva: World Intellectual Property Organization, 2010, pp.12-13.

33 Constitution of the Philippines of 1987. Section 17, Article XIV.

management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law." [34]

The Constitution of Ecuador 1998 recognises "collective intellectual property rights" on communities' ancestral knowledge.[35] The Intellectual Property Law[36] establishes a *sui generis* system of collective intellectual rights of indigenous and local communities.[37]

According to the Constitution of the Federative Republic of Brazil of 1998: "The Indians shall be accorded recognition of their social organization, customs, languages and traditions and the original rights in the lands that they occupy by tradition, it being the responsibility of the Union to demarcate them, protect them and ensure respect for all their property"[38].

The Constitution of the Republic of Venezuela of 1999 provides that, "the collective intellectual property of indigenous knowledge, technology and innovations is guaranteed and protected. Any work on genetic resources and the knowledge associated therewith shall be for the collective good. The registration of patents in those resources and ancestral knowledge is prohibited."[39] The Costa Rican Biodiversity Law states that: "The State expressly recognises and protects, under the common denomination of *sui generis* community intellectual rights, the knowledge, practices and innovations of indigenous peoples and local communities related to the use of components of biodiversity and associated knowledge. This right exists and is legally recognised by the mere existence of the cultural practice or knowledge related to genetic resources and biochemicals; it does

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34 Thailand's Constitution of 1997, Section 46.

35 Constitution of Ecuador 1998. Article 84.

36 No. 83 of 1989.

37 The Intellectual Property Law, No. 83, 1989, Article 377.

38 Constitution of the Federative Republic of Brazil of 1998. Article 231.

39 Constitution of the Republic of Venezuela of 1999. Article 124.

not require prior declaration, explicit recognition nor official registration; therefore it can include practices which in the future acquire such status. This recognition implies that no form of intellectual or industrial property rights protection regulated in this chapter, in special laws and in international law shall affect such historic practices"[40]

In Brazil, the Provisional Measure[41] provides that: "the State recognises the indigenous and local communities' rights to decide on the use of traditional knowledge associated to genetic resources. This knowledge is protected against "illicit exploitation" and other unauthorised uses.[42] This Measure has been subsequently renewed (and partially amended) by acts of the Brazilian Executive Power.[43] Decision 391 of the Andean Group (1996) recognises the rights of indigenous, Afro-American and local communities to decide on their knowledge, innovations and traditional practices associated to genetic resources and derived products.[44]

As many institutions have discovered, working with indigenous peoples and traditional communities can provide invaluable information about their collections. Indeed, tradition-bearers can provide contextual information and personal narratives regarding their accumulation, explain the alternative meanings embedded within them, and outline the access conditions that respect the indigenous or traditional community from which those materials derive, as well as those other users who are keen to learn

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40 Costa Rican Biodiversity Law, Article 82.

41 Brazil, the Provisional Measure 2.052-6 of 21 December, 2000.

42 *Ibid*. Article 8 (1) and (2).

43 Brazilian Executive Power Provisional Measure No. 2.126-11 of 26 April 2001.

44 *Ibid*. Article 7.

and understand different cultures and cultural practices from them.[45]

In responding to such difficult legal, cultural and political challenges, institutions in many countries are seeking to develop new frameworks for understanding the legal implications inherent in caring for ethnographic and cultural materials, including indigenous knowledge. These initiatives recognize that there are different world-views of, aspirations and rationalizations for preservation and access. As part of an innovative strategy, it is clear that new agreements, regularly reviewed to ensure their relevance in light of changing law, could help to ensure appropriate policies.

Cultural institutions would benefit from gaining a basic understanding of the communities whose materials are in their collections and determining who may access the materials, under what circumstances, and whether the source community has specific preferences regarding the reproduction of their materials.

Just as communities are asserting themselves as legitimate rights holders who should be actively in control of how they are represented, several cultural institutions worldwide see themselves increasingly not as *owners* but as *custodians* of their collections. Through this shift, cultural institutions seek more direct relationships with indigenous and traditional communities, actively engaging with indigenous and traditional people with expertise, to foster new cross-cultural partnerships that could enrich cultural conservation work and benefit indigenous and traditional communities.

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45 Although museums', libraries' and archives' collections necessarily refer to past events, cultures are in a constant process of making and changing, unless the populations are extinguished. Hence new values and uses can be attributed to cultural testimonies of one's own or another group's culture.

8. Indigenous Customary Laws as an Effective Mechanism for the Protection of Indigenous Knowledge

The preceding discussion shows that existing IPRs provide ineffective resolutions to the problem of protecting indigenous knowledge; therefore, another solution which is the application of indigenous customary law of indigenous peoples should be implemented. The application of indigenous customary law[46]appears to be one of the most effective resolution, given the inadequacies of solutions based on the incompatible western ideals of intellectual property protection.

The assumption that existing IPRs alone can protect intellectual property is erroneous and ultimately constrains the solutions proposed for protecting indigenous knowledge. Indigenous customary law is law that has been used satisfactorily by indigenous peoples. It is a flexible solution, in that the indigenous customary law of each diverse indigenous group around the world can be applied to that group to protect its own indigenous knowledge. Mainstream solutions (existing IPRs and *sui generis* solutions) are based on a western intellectual property paradigm which fundamentally differs from the notions underlying the need to protect indigenous knowledge. This causes mainstream solutions to either overreach or under-reach in the protections they afford, leading to a denial of protection for indigenous knowledge. Thus, they are sub-optimal as solutions, and the application of indigenous customary law is a more effective resolution.[47]

The effective implementation of indigenous customary law for the protection of Traditional Cultural Expressions (TCEs) will face challenges. However, the challenges are at most different, if not identical to, those posed by other proposed solutions, and not necessarily more difficult to overcome. First, in order to comply

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46 See, *Mabo v Queensland* II (1992) 175 C.L.R. 1.

47 M. RaoRane, above note 6 at pp.842-843.

with indigenous customary laws, outsiders will need to ascertain the laws, which may pose a challenge. However, certain sui generis solutions incorporate aspects of indigenous customary laws and there too, an understanding of the group's laws is required. A similar problem is presented with existing IPRs where, even outside the spectrum of TCEs, an understanding of the laws is necessary and yet, is not always achieved. Altering the scheme of protection to be based on indigenous customary law simply reverses which group of people will need to strive to understand the laws. Given that the intent of the law is to protect the TCEs of indigenous peoples, it is not unfair to ask outsiders to carry some of the burden of protection. Hence, the first challenge melts out when compared to the other proposed solutions. [48]

Indigenous customary laws, when compared with existing IPRs and *sui generis* solutions, more effectively protect the TCEs of indigenous peoples and should be implemented. Indigenous peoples have the right to "practice and revitalize their cultural traditions," which includes the right to "maintain, protect and develop the past, present and future manifestations of their cultures."[49] Indigenous customary law is law, and it has effectively protected the TCEs of indigenous communities. It is fallacious and limiting to presume that existing IPRs, and the sui generis solutions based on them, encompass all possible solutions when other viable options such as indigenous customary law exist.[50]

9. Conclusion

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48 *Ibid*, p. 853.

49 *Ibid*, See United Nations High Commissioner For Human Rights (UNHCR), Draft United Nations Declaration On The Rights of Indigenous Peoples, Article 12, Doc. E/CN.4/SUB.2/RES/1994/45, 6 September, 1994, *available online at* http://ap.ohchr.org/documents/sdpage_e.aspx?m=120&t=11, accessed 15 June, 2013.

50 M. RaoRane, above note 6 at p. 855.

The author of this paper has been able to observe that considering the difficulties arising from advancing the intellectual property rights of indigenous peoples through the western ideology encapsulated in IP regimes of copyright, trademark, trade secret, patent rights, *sui generis* rights, geographical indications, protection of undisclosed information, industrial designs etc; the indigenous knowledge can be protected through the use of indigenous customary law and entrenchment of communities' rights in national constitutions. This will help to obviate the obstacle created by the unfitness of the western styled intellectual property regimes, which take into consideration individual claims as against communal ownership of intellectual property.