

Indigenous Peoples and the International Legal System: A Still Inaccessible Domain?

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ABSTRACT

The paper illustrates that, while Indigenous Peoples' cultures and traditional knowledge are today widely studied and discussed at the international level, Indigenous holders and stakeholders of traditional knowledge still struggle to attend in person those international forums where their issues are being discussed and cannot personally deliberate on matters that would ultimately greatly affect their lives. The consequence of this is serious: not only Indigenous Peoples are often forbidden any actual participation, but they are also denied any right to intervene in the law-making process that so deeply affects their cultures and traditional way of living. The article explains that Indigenous Peoples are the sole stakeholders of their cultures and should personally manage the process of selection of the representatives who will attend international forums in total respect of the traditional roles of the keepers of knowledge and the customary laws of the community. This would avoid any corruption of the information presented and, consequently, would prevent any manipulation of legal and economic assessments. Only then, actual Indigenous representation will be de facto attained.

Keywords: Indigenous' culture, participation, fairness, identity, customs

2019 is the year that celebrates Indigenous Peoples' languages worldwide;¹ and yet, those languages seem to be still widely unheard. While awareness for Indigenous traditions has, over the years, slowly risen, Indigenous Peoples still struggle to make an appearance and be heard in those international forums where issues and topics of great importance for their future are discussed. Though the international system speaks a language of respect and reconciliation, in actual fact, things are changing at a very slow pace and Indigenous Peoples are still widely discriminated. The article intends to shed some light on why Indigenous Peoples' voices are today still internationally widely unheard, and why the system that pretends to support them does not give them the space and attention to bring forth their issues in person. Indeed, without a voice, no matter which language one speaks, one can hardly be heard.

Indigenous Peoples' Cultural System

Indigenous Peoples today exist in many regions of the world. They are the descendants of the original inhabitants of those territories taken over by aliens through conquest or settlement. Their cultures are generally holistic; where holism² can be rightly interpreted as the spiritual and symbolic element that integrates and gives life to all the other parts of the cultures of Indigenous Peoples. It is the spiritual belief that bonds together the members of an Indigenous community and ties them to their land and their shared traditions, while, at the same time, inspires the continuous creation of idiosyncratic forms of cultures, traditional knowledge (TK) and traditional cultural expressions (TCE)³. Through their way of living, ceremonies and rituals, Indigenous Peoples keep these traditions alive and convey them to future generations. Holism, as such, is the common understanding of life as perceived by Indigenous Peoples worldwide. It is collective in nature and transmitted from one generation to another orally or through cultural/symbolic creations. Indigenous culture can generally be held collectively

or safeguarded by a restricted number of members of a community. The elders and guardians are carefully selected for the purpose, and have a duty of care to manage the most sacred and secret knowledge of the community: to preserve it and pass it on.

Today, Indigenous Peoples' organizations, NGOs, and stakeholders are actively trying to safeguard what is left of Indigenous cultures, through restitution, reparation and pressure for the adoption of sui generis legislation at national and international level.

From a realistic viewpoint, in fact, while it is true that history cannot be changed or cancelled and the changes that every society have gone through during its history are undeniable, regardless of the just or unjust reasons that determined such changes, it is also obvious that, in order to redress wrongs done in the past, Indigenous Peoples are compelled to use the existing legal systems in a 'defensive' way to seek justice and safeguard their cultures. In other words, they are 'forced' to adjust their claims, needs and expectations to the cultural and legal standards of the society they inhabit disregarding much of their traditional human and cultural rights. Today, they are still a vulnerable minority in a global context, which speaks and reasons differently.

Human rights systems advocate the importance to respect and preserve all cultures, and yet, Indigenous Peoples' traditions are still globally marginalized and exploited. At the same time, whilst it is correct to say that the international legal community is slowly including Indigenous cultures in their reasoning, it is also true that, in taking decisions of vital importance for Indigenous Peoples, international forums only in rare cases confer directly with Indigenous representatives to find ad hoc, sui generis legal solutions for the preservation of their traditions.

¹ "In 2016, the United Nations General Assembly adopted a resolution proclaiming 2019 as the International Year of Indigenous Languages, based on a recommendation by the Permanent Forum on Indigenous Issues. At the time, the Forum said that 40 per cent of the estimated 6,700 languages spoken around the world were in danger of disappearing. The fact that most of these are indigenous languages puts the cultures and knowledge systems to which they belong at risk", UNESCO portal, retrieved from <https://en.iyil2019.org/>

² "Holism is a theory that the universe and especially living nature is correctly seen in terms of interacting wholes (as of living organisms) that are more than the mere sum of elementary particles", Merriam-Webster dictionary, retrieved from www.merriam-webster.com/dictionary/holism

³ For the definitions of TK and TCE see the World Intellectual Property Organisation (WIPO), retrieved from www.wipo.int/tk/en/tk/

Regrettably, the Western legal system still organizes everything according to Western methods, and in this legal monopoly 'Indigenous issues' are not granted venues where Indigenous claims are presented with Indigenous epistemological instruments.⁴ The Western-built legal institutions that host and analyze Indigenous cultural claims, most of the time, in fact, tend to deconstruct and decontextualize Indigenous cultures.⁵ Moreover, in these forums Indigenous traditional holders and custodians of knowledge are not allowed to present their own claims and fight for their own rights in their own 'languages'. At the same time, for the Western legal system, Indigenous 'customary laws' have no legal validity whatsoever.

Hence, in 2019 Indigenous Peoples and Traditional Knowledge holders are still struggling to live by their customs and safeguard what is left of their traditions. The struggle they face is legal and political, as well as moral and psychological. It is internal within the community, as much as external in the world at large. Time has changed and awareness has arisen, but Indigenous voices still go widely unheard.

Indigenous Peoples: "Where Are Your Voices?"

It is true that we entered the twenty-first century and Indigenous Peoples (like it or not) are now part of the 'global family' inhabiting this world. In this

perspective, the mixing of Indigenous cultures with the world culture could be, when not forced, rightly considered the result of evolutionary patterns we are all subjected to. It is also true that the mixing of such distinctive cultures (Western and Indigenous) is never easy, straightforward and painless.

Over the centuries, the transmission of Indigenous cultures has remained a fluid, complex phenomena of internal and external forces. The existence of such Indigenous knowledge and epistemology, being it a reflection of traditions existing prior or post colonization, is enough to justify the existence of Indigenous rights over their culture and traditions.⁶ For this reason, Indigenous Peoples, being the holders, guardians or the totality of the community, should be considered legal personalities and granted the full accessibility to their knowledge, and the right to dispose of it as they so decide.

It goes without saying that the first act of violence starts when, in order to be heard, Indigenous representatives are 'forced' to shift from their epistemological system of knowledge to the Western one; a shift that often causes objective problems (linguistic, cultural, etc) in the translation of values and knowledge that are alien to the Western auditorium and, most of the time, non-translatable. In addition to that, today, international and national fora are often inappropriate venues to address Indigenous issues, and mostly because none of them is Indigenous-oriented. At those venues, Indigenous representatives can only attend as observers with no voting rights,⁷ even when the decisions at stake have profound implications for their lives. How can

⁴ L. M. Semali and J. L. Kincheloe (eds), (1999), *What is Indigenous Knowledge? Voices from the Academy* (Falmer Press, New York and London), 31

⁵ "In this Western gaze, indigenous knowledge is tacitly decontextualized, severed of the cultural connections that grant meaning to its indigenous producers, archived and classified in Western databases, and eventually used in scientific projects that may operate against the interests of indigenous peoples", *Ibid.* 21

⁶ R. J. Coombe (1998), *The Cultural Life of Intellectual Properties* (Duke University Press, Durham and London), 218

⁷ See Rule 39 – "Observers shall not have the right to vote", World Intellectual Property Organization, General Rules of Procedure CRNR/DC/9 Rev WIPO, retrieved from www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_9.doc

Indigenous issues be de facto resolved if they are presented by non-Indigenous representatives, and any follow-on resolution is voted by non-Indigenous people? ⁸

“We ... the Original Stakeholders of Our Cultures”

Indigenous Peoples are the stakeholders of their knowledge, and as such they should be entitled to more decision-making rights over issues that concern the livelihood of their communities and have profound implications for their future. Generally, Indigenous stakeholders attending international fora include specific Indigenous communities, local, national and international organizations and NGOs that play a representative role of Indigenous Peoples' interests; while member states' stakeholders include countries that are either members of organizations—e.g., World Trade Organization (WTO), United Nation (UN)—or signatories of international instruments that deal with Indigenous Peoples' issues—UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the Convention on Biological Diversity (CBD), the International Labour Organization Convention 169 ⁹. The latter are generally considered as regional blocks with the power to “exercise their right to vote with a number of votes equal to the number of their member States which are Parties. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa”.¹⁰ In the case of industrial stakeholders, these organizations must have “direct

or indirect commercial interests in traditional knowledge and are involved in the debate at the international level”. ¹¹

The recent growing concern over Indigenous Peoples' cultural survival has resulted in the growth of Indigenous representatives-stakeholders who are convinced that currently no existing forum is appropriate to host and address their claims. Additionally, in many cases, the stakeholders representing Indigenous Peoples' interests are profoundly bureaucratized individuals with well-defined political and social agendas that often operate at a considerable geographic, cultural and linguistic distance from the communities they intend to represent. This distance can result in a tendency to oversimplify and romanticize the Indigenous issues at stake.

At the same time, while it is true that the organizations sometimes provide the economic and legal resources to support Indigenous issues, they often build around Indigenous claims unrealistic and exaggerated expectations about the economic potential of

¹⁰ Principle 39.2 - Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity (CBD), retrieved from www.cbd.int/convention/rules.shtml

¹¹ Ibid.

¹² “Researchers of all sorts, religious organizations, international funding agencies, corporations, and state bureaucracies all influence and complicate the politics of indigenous representation in accordance with their own agendas. ... dissent and internal discussion within indigenous groups over the issue of representation often gives potential credence to both sides of the argument, just as it reveals the problems inherent in negotiating collectively owned cultures with only a selection of indigenous brokers. Because of the collective nature of claims to culture as property, there is a common assumption on all sides of the debate that indigenous collectives must possess a centralized structure of representative authority comparable to that of consolidated nation-states with which external actors can negotiate. Establishing who are the legitimate representatives of indigenous collectives is, however, often a matter of internal and external debate”, S. Greene, (2004), “Indigenous Peoples Incorporated? Culture as politics, culture as property in pharmaceutical bioprospecting”, *Current Anthropology* 45 (2).

⁸ C. K. Maina (2011), “Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums”, in the *International Journal of Cultural Property*, 18, 145-178, 158.

⁹ “Member states stakeholders are either individual states or regional blocks such as the African Union or the European Community (EC)”, Maina (2011), 154

Indigenous Peoples' intellectual property claims.¹² In other cases, NGOs stakeholders tend to legitimize those Indigenous groups which conform to the political, institutional and social objectives of the organization, without confronting the complex realities of Indigenous lives and customs in their environment.

The situation has become so intolerable for Indigenous Peoples that, in 2012, Indigenous representatives have 'unanimously' walked out of the UN World Intellectual Property Organization's Intergovernmental Committee (IGC) in Genève.¹³ They justified the act by stating:¹⁴

We, the Indigenous Peoples and Nations present at the International Indigenous Forum during WIPO IGC 20, have evaluated our participation in all of the proceedings of this Committee, and we note with concern the continued reduction of the amount and level of our participation in this process. We Indigenous Peoples have participated as experts in the IGC sessions, we have worked in good faith, and we have made efforts over the years to submit to the IGC sessions our collectively developed and sound proposals, which have been ignored or left in brackets in negotiation texts. The IGC, in its overall procedures, has systematically ignored our rights, as Indigenous Peoples and as Nations with internationally recognized collective rights, to self-deter-

mination and full and equitable participation at all levels. The draft study of the Secretariat on the participation of observers before the IGC does not contain modifications proposed by the Indigenous Peoples to WIPO's rules of procedure. The States have obligations under their constitutions that have not been observed in the IGC, nor have they submitted proposals that could resolve the existing deficiencies in order to improve our participation. Distinguished delegates: we, the Indigenous Peoples, are the titleholders, proprietors and ancestral owners of traditional knowledge that is inalienable, nonforfeitable and inherent to the genetic resources that we have conserved and utilized in a sustainable manner within our territories. For this reason, we appeal to the States to acknowledge that the discussion on intellectual property rights and genetic resources should include Indigenous Peoples on equal terms with the States since the work will directly impact our lives, our lands, our territories and resources, and will reach to the very heart of our cultures, which are the inheritance of future generations. Therefore, the Indigenous Peoples present at IGC 20 have reflected seriously on our role in this process and have decided, unanimously, to withdraw our active participation in the work developed by this Committee until the States change the rules of procedure to permit our full and equitable participation at all levels of the IGC and until the instruments recognize and are consistent with the existing international frameworks for the rights and interests of Indigenous Peoples within the scope of the IGC. Thank you, Mr. Chairman. February 21,

¹³ Retrieved from www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resources/

¹⁴ WIPO International: Final Statement of The International Indigenous Forum at WIPO – IGC 20 – Indigenous Peoples Issues and Resources, retrieved from www.materialworldblog.com/2012/02/statement-from-the-indigenous-forum-at-wipo/

2012.

In their statements, Indigenous representatives explained that their act was dictated by the unjustifiable lack of equal participation of the attending members.¹⁵

For Indigenous representatives, the fact that they are not given effective decision-making power has profound repercussions. First of all, they are not recognized as having any authority to influence the decisions of international and national organizations or to intervene in the standards of their agendas. Second, the lack of Indigenous decision-making allows powerful stakeholders to dictate and direct the agendas limiting the participation of Indigenous Peoples and minimizing the importance of their claims.

In the World Intellectual Property Organization's General Rules of Procedure, for example, the Observers "may take part in debates at the invitation of the Chairman, but they may not submit proposals, amendments or motions".¹⁶ The same happens within the Working Group on Article 8 (j) of the Convention on Biologic Diversity (CBD),¹⁷ where Indigenous Peoples can participate only as Observers. Similarly, in the CBD's Rules of Procedure it is stated again that "Observers may, upon invitation of the President, participate without the right to vote

in the proceedings of any meeting unless at least one third of the Parties present at the meeting object" and "may, upon invitation of the President, participate without the right to vote in the proceedings of any meeting in matters of direct concern to the body or agency they represent unless at least one third of the Parties present at the meeting object".¹⁸ In the case of WTO and the meetings of the TRIPS Council (managing The Agreement on Trade-Related Aspects of Intellectual Property Rights), Indigenous Peoples cannot participate at all.

For the last twenty years, Indigenous Peoples have tried to convince the international fora that, as holders of Indigenous knowledge, they are the only ones who know what traditional knowledge is and, as custodians, they should be legally entitled to suggest and work on solutions that involve the management of their own culture. In the Kimberley Declaration,¹⁹ Indigenous Peoples expressed their position on the intrinsic value that their TK has for the livelihood of their communities, and how important is the preservation of Indigenous identities for future generations. The Declaration reads:

Our traditional knowledge systems must be respected, promoted and protected; our collective intellectual property rights must be guaranteed and ensured. Our traditional knowledge is not in the public domain; it is collective, cultural and intellectual property protected under our customary law. Unauthorized use and misappropriation of traditional knowledge is theft.

¹⁵ Ibid

¹⁶ Rule 24, WIPO's General Rules of Procedure

¹⁷ The Convention on Biological Diversity (CBD) entered into force on 29 December 1993. It has 3 main objectives: The conservation of biological diversity; the sustainable use of the components of biological diversity; the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

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¹⁸ See CBD Rules of Procedure, Rule 6.2 and 7.2.

¹⁹ International Indigenous Peoples Summit on Sustainable Development, Khoi-San Territory, Kimberley, South Africa, (20-23 August 2002), retrieved from www.ipcb.org/resolutions/htmls/kim_dec.html

The usage of strong words, such as ‘theft’, proves that Indigenous Peoples are fully aware of the manipulative neo-colonialist forces that today dictate national and international economic agendas. Such feelings are clearly stated a few lines later:

Economic globalization constitutes one of the main obstacles for the recognition of the rights of Indigenous Peoples. Transnational corporations and industrialized countries impose their global agenda on the negotiations and agreements of the United Nations system, the World Bank, the International Monetary Fund, the World Trade Organization and other bodies which reduce the rights enshrined in national constitutions and in international conventions and agreements.²⁰

Consequently, the representatives gathered at Kimberley, urged the United Nations:²¹

... to promote respect for the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded between Indigenous Peoples and States, or their successors, according to their original spirit and intent, and to have States honor and respect such treaties, agreements and other constructive arrangements.

The general sentiment of Indigenous elders, guardians and representatives at international summits is unequivocal, and yet, where does the

opposition lie to enforce mechanisms guaranteeing the participation and representation of Indigenous Peoples?

At the G8 Summit held in Hokkaido, Japan (2008), Indigenous representatives prepared a Declaration in which they expressed their profound concerns for the “continuing egregious violations of our civil, political, economic, cultural and social rights”. They also stated how real is “the continuing racism and discrimination against us and against our use of our own languages and practice of our cultures”, the “non-recognition of our collective identities as Indigenous Peoples” and the “theft of our intellectual property rights over our cultural heritage, traditional cultural expressions and traditional knowledge, including biopiracy of genetic resources and related knowledge”.²²

At the G8 Summit (2008), among other important things, Indigenous Peoples requested that the international community “effectively implement the United Nations Declaration on the Rights of Indigenous Peoples and use this as the main framework to guide the development of all official development assistance (ODA), investments and policies and programs affecting Indigenous Peoples”.²³ In the same vein, Indigenous representatives demand-

²² Indigenous Peoples’ Declaration on G8 Summit (Hokkaido, Japan, 2008), retrieved from www.dominionpaper.ca/weblogs/lia_tarachansky/1925

²³ “Ensure that we, Indigenous Peoples all over the world, take up the responsibility to implement the UN Declaration on the Rights of Indigenous Peoples, themselves, and enter into constructive dialogue with States, the UN System and the other intergovernmental bodies to discuss how they can effectively implement the Declaration at the local, national, regional and international levels. 3. Use the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on Indigenous Peoples’ Rights, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, as mechanisms to monitor and ensure the implementation of the UNDRIP by the aforementioned actors”, Indigenous Peoples’ Declaration on G8 Summit

²⁰ Retrieved from www.ipcb.org/resolutions/htmls/kim_dec.html

²¹ Ibid.

ed that states “support the fundamental rights of Indigenous Peoples to practice and to enjoy their cultural history and the right to protect and to teach their cultural heritage through the establishment of Indigenous-owned and controlled cultural centers within states and local jurisdictions”.²⁴

In 2007, before the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), it was reported that “a set of initiatives to promote the participation of Indigenous and local communities has culminated in the creation of an Indigenous-chaired panel as opening segment of each session of the IGC, and the successful launch of a Voluntary Fund directly to support the participation of these communities”.²⁵

Although the initiative of WIPO is admirable, it does not take into account important aspects of the issue. It is unrealistic to believe that all Indigenous Peoples are informed about the traditional practices (and related cultures) happening within the community, otherwise there would be no need for the role of the elders, guardians and TK holders. On the other hand, the custodians are, most of the time, holders of sacred/secret practices that cannot be disclosed to the general public inside and outside the community. Additionally, Indigenous guardians are not the custodians of the resources (natural and non), but of the knowledge that comes with the use of the resources. While resources can be static, the knowledge and cultural practices connected to them are dynamically evolving and, consequently, mostly unfixable. It is the knowledge that brings value to the resource. Without it, the resource would be valu-

able only in its potential unexplored intrinsic value. To add a problem to a problem, not all Indigenous representatives or stakeholders might have at heart the best interests of their communities. Moved by easy profit, some Indigenous representatives who grew up outside the educational values of the community might be capable of exploiting the cultural expressions of that same community they represent. This scenario is today far from being unrealistic. In this case, the selection-process of Indigenous representatives within international fora becomes of strategic importance.

This raises the question whether Indigenous experts are actually chosen by Indigenous communities. In this regard, WIPO remains vague. It says that over the years the “WIPO Secretariat has continued its practice of consulting with interested representatives of Indigenous and local communities on draft documents and other material being developed for the IGC”,²⁶ but it does not explain who these representatives are, why they have been chosen and what credentials they bring to the forum. Additionally, when it comes to Indigenous representatives, WIPO explains that their role is limited to ‘consultation’, without any active participation in the voting system.

It is obvious that such selection processes are of key importance for the correct and effective representation of Indigenous communities within national and international fora. It is also clear that the participation in the decision process of traditional knowledge holders should be more effective and incisive.

In the Mataatua Declaration on Cultural and

²⁴ Ibid.

²⁵ WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9, 4

²⁶ WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9, 13

Intellectual Property Rights of Indigenous Peoples (1993), Indigenous representatives insisted that “existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights”.²⁷ They stressed that the beneficiaries of the knowledge “(cultural and intellectual property rights) must be the direct Indigenous descendants of such knowledge”.²⁸ They added that they are “the guardians of their customary knowledge”²⁹ and consequently have the right “to protect and control” its dissemination³⁰ and to be “the first beneficiaries of Indigenous knowledge”.³¹

Over time, Indigenous statements and declarations have repeated the same view that “... Indigenous Peoples and Nations ... are capable of managing our intellectual property ourselves, but are willing to share it with all humanity provided that our fundamental rights to define and control this property are recognized by the international community”.³²

Who should be then called to represent Indigenous peoples’ interests?

In the management of intellectual property, for example, Indigenous Peoples often refer to the role of the guardians as keepers of the knowledge

who are the only ones entitled by customary laws to manage the diffusion and transmission of the knowledge.³³ They are the representatives that should be informed of the decisions taken at national and international fora, and should be the only representatives to attend such meetings. How could it be otherwise?

How can representatives who know little of Indigenous cultures fight for their protection?

It is true that one can present and discuss the material manifestation of such knowledge which has already entered the public domain through art, medical remedies, songs, etc. And yet, there is a difference between the intrinsic spiritual values of the cultural expression that is embodied in the expression, and the abstract knowledge (sacred or not) that was channeled in that specific form. By saving the expression of the knowledge, do we save the knowledge? Or is the intrinsic knowledge manifested in material form that should be safeguarded?

In the second case, it is the role of the guardian/elder that becomes essential for any assessment, as well as the customary laws that control such role. This means that the values of the guardianship associated with the custody of the knowledge are the ones that need to be defined and protected, as living manifestations of the sacred knowledge itself.

Indigenous Peoples have repeatedly said that knowledge has always existed. The guardians and TK holders have been selected and granted the access and the task to ensure protection of that knowledge because they were judged suitable to guarantee its perpetual protection. All the rights over the knowledge reside in the community customary laws. Knowledge creates the laws and the laws guarantee the continuation of the knowledge. To intervene in this circular mechanism means to interrupt or dis-

²⁷ The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples Commission on Human Rights Sub-Commission of Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations (Whakatane, Aotearoa, New Zealand, 1993), Article 2, retrieved from www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf

²⁸ Art 2.5.

²⁹ Art 2.1.

³⁰ Art 2.1.

³¹ Art 2.1.

³² The Julayinbul Statement on Indigenous Intellectual Property Rights (1993)

³³ The Manukan Declaration of the Indigenous Women’s Biodiversity Network (IWBN) Maunkan, Conference of the Parties to the Convention on Biological Diversity (COP 7) (Sabah, Malaysia, 4-5 February, 2004)

tort (alter) the flow of the knowledge itself.

In this light, is it correct to use the Western legal framework as the referential point from where all laws depart if those laws where de facto never inclusive of Indigenous rights?

At present WIPO seems divided between the interests of TK holders and the political pressure of industrial and states stakeholders: the first stressing the holistic nature of TK and TCE that cannot become subject of “private IPRs in the hands of outside parties”;³⁴ the second insisting on the importance to work with a broader notion of protection in which Indigenous custodians, as a minority in the great scheme of things, must try to accommodate their claims in order to be heard. After years of debates, it seems, however, that both requests cannot be accommodated at the same time. While a one-size-fits-all approach will not be workable for Indigenous Peoples, dividing IPRs into Indigenous Peoples and the rest of the world seems, politically and economically, not only unpractical but unrealistic. In fact, how can the world safeguard Indigenous knowledge from commercialization while commercializing it?

In Western societies, human knowledge and the reproduction of that knowledge entails an idea of reward, personal control, dissemination and commercial agreement between the right-holder and the society that is manifested in the commercialization of the property and its protection from the commercialization’s mechanisms. Intellectual property rights regulate the protection of the knowledge and

its representations.³⁵ On the other hand, the safeguarding of Indigenous knowledge can be guaranteed not in the control of the dissemination, but in the restriction of the access. In this case, Indigenous Peoples already possess a code of laws which guarantee the restriction of the access to the knowledge through “locally-specific system of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language”³⁶ that are not recognized by national and international laws, and yet remain the best system of regulations that Indigenous Peoples possess. In this light, in today’s multicultural world, a workable compromise between Western-based legal systems and Indigenous customary laws becomes of crucial importance.

Conclusion

2019 is the year of Indigenous Languages. The world is, again, celebrating ‘difference’. And yet, are those languages let free to speak and tell their truths? Can those voices actually speak loud and be heard in those forums where Indigenous legal, human and cultural issues are discussed?

There are many different legitimate Cultures in this world and they cannot be understood and safeguarded by Western standards alone. Globalization and the explosion of media information have brought together cultures so fundamentally different that the whole system based on Western ‘universalism’ has been shaken to its foundations. Today,

³⁴ Ibid., 20, para 24

³⁵ J. Gibson (2005), *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate Publishing, Aldershot), “Introduction”.

³⁶ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Genève, 2007) Doc WIPO/GRTKF/IC/11/9, 20, para 25

multiculturalism insists that international human and cultural rights are not, or should not, be oriented toward one culture at the exclusion of another. No culture is, in this regard, better than another one. Thus, Indigenous cultures cannot still be judged in universalistic, neo-colonialist terms for the simple reason that they are intrinsically idiosyncratically different from the Western idea of culture. As such, they should be epitomized, nationally and internationally, by representatives and stakeholders who actually know what they are talking about. Until that day, Indigenous Peoples' languages will remain voiceless.

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