

THE ROLE OF CUSTOMARY LAW UNDER SUI GENERIS FRAMEWORKS OF INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL AND INDIGENOUS KNOWLEDGE

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INTRODUCTION

Bowing to pressure from developing countries, indigenous groups, and civil society, a number of international organizations have embarked in recent years on measures to enhance the protection of indigenous and traditional knowledge.¹ The United Nations Educational, Scientific and Cultural Organization (UNESCO), for example, responded in 2003 to a perceived disproportionate focus on tangible cultural heritage in its programs² by adopting a new instrument for the safeguarding of intangible cultural heritage.³ A year

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1. For the definition of the term traditional knowledge see *infra* notes 103-06 and accompanying text. Examples of traditional knowledge noted in legal instruments include: poetry, riddles, songs and instrumental music, dances and plays, productions of art in drawings, paintings, carvings, sculptures, pottery, terra cotta, mosaic, woodwork, metal-ware, jewelry, handicrafts, costumes, and indigenous textiles. Copyright Act, (1988) Cap. 68, § 28(5) (Nigeria). Community leaders describe traditional knowledge to include dispute-settlement processes and systems of governance, hairstyling techniques, traditional methods of preparing food, spices, and drinks, meat-cutting techniques, languages, and historical sites. WORLD INTELLECTUAL PROP. ORG. [WIPO], INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY NEEDS (1998-1999) 86 (2000) [hereinafter INTELLECTUAL PROPERTY NEEDS]. Other examples cited are medicinal uses of plants and environmental and biodiversity conservation-related knowledge, such as knowledge of grass species, grazing and animal tracking systems, weather patterns, and knowledge relating to the preservation and use of natural and genetic resources. Finally, traditional knowledge is said to include farming and agricultural methods, traditional birthing methods, hunting skills, divine worship, and spiritual aspects of healing. *Id.* at 146.

2. The list of matters protected under UNESCO's Convention Concerning the Protection of the World Cultural and Natural Heritage adopted in 1972 revealed a gross over-representation of items from developed nations, which UNESCO attributed to "a weakness in the organization's historic focus on the protection of tangible heritage, rather than intangible heritage, thereby marginalizing a vast range of cultural expressions that often belong to the countries of the 'South,' which are crucial for the map of cultural diversity." U.N. EDUC., SCIENTIFIC AND CULTURAL ORG. [UNESCO], FIRST PROCLAMATION OF MASTERPIECES OF THE ORAL AND INTANGIBLE HERITAGE OF HUMANITY ii (2001).

3. UNESCO, *Convention for the Safeguarding of Intangible Cultural Heritage* (2003), available at <http://portal.unesco.org/en/ev.php-URL-ID=17716&url-DO-TOPIC&URL->

earlier, the Food and Agriculture Organization (FAO) established a multilateral system to facilitate access to plant genetic resources for food and agriculture.⁴ On its part, the World Intellectual Property Organization (WIPO) continues to pursue discussions centered on intellectual property-based solutions.⁵

These efforts to improve the protection of traditional knowledge have been informed largely by a recognition of the need to counter the negative effects on indigenous communities arising from the widespread commercial exploitation of traditional knowledge, especially in the pharmaceutical,⁶ cosmetic,⁷ and agriculture industries,⁸ as well as the entertainment and retail

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4. International Treaty on Plant Genetic Resources for Food and Agriculture, *opened for signatures* Nov. 4, 2002 (*entered into force* June 29, 2004). The treaty addresses the link between traditional knowledge and food security. In exchange for access to plant genetic resources, users are required by the treaty to share, in a fair and equitable way, the benefits arising from the utilization of these resources. *Id.* art. 10.2. In particular, the treaty notes the enormous contribution that local and indigenous communities and farmers of all regions of the world have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agricultural production throughout the world. *Id.* pmb1.

5. In 2000, WIPO's General Assembly created an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to discuss issues relating to traditional knowledge. Actions taken so far by the IGC have focused on trying to understand the needs and expectations of traditional communities, ascertaining the adequacy of current methods for protecting traditional knowledge, and surveying proposals to enhance such protection. The IGC has recommended the use of model access contracts and the creation of databases on traditional knowledge to enable communities protect their traditional knowledge (defensively) under prior art considerations. WIPO, CONTRACTUAL PRACTICES AND CLAUSES RELATING TO INTELLECTUAL PROPERTY, ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING, WIPO Doc. WIPO/GRTKF/IC/5/9 (2003).

6. Within the pharmaceutical industry, traditional people's knowledge and experiences of the medicinal properties of plants have played a crucial role in the development of drugs. For example, approximately seventy-five percent of the pharmaceutical products derived from plants in one year were reportedly discovered through the study of their traditional medical uses. KERRY TEN KATE & SARAH A. LAIRD, THE COMMERCIAL USE OF BIODIVERSITY, ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING 61 (1999). Similarly, a correlation has been noted between traditional medical use and the commercial use of the base compound in most of the top 150 plant-derived prescription drugs. *Id.* The relevance of ethnobotanical information in the discovery of drugs has been confirmed by others. See, e.g., MICHAEL J. BALICK ET.AL., MEDICINAL RESOURCES OF THE TROPICAL FOREST 19 (1996).

7. Many of the new ingredients in the cosmetic industry are said to be drawn from their traditional uses as antiseptics, anti-inflammatories, anti-infectives, body decoratives and toners (mud packs), wound healers, and mouth and teeth cleaners. Commercial literature has highlighted the significance of traditional knowledge in providing leads to new product development in the cosmetic industry. For example, a publication by Aveda has observed: "Our most valuable resource is indigenous peoples, for they are living libraries of ancient wisdom and ways. Working with them as partners, we have combined their botanical knowledge with today's technology to create a wealth of flower and plant products." KATE & LAIRD, *supra* note 6, at 273.

8. The most important uses of traditional knowledge in the agriculture industry are in seed development and crop protection to improve crop plants' productivity and resistance to pests and disease. With respect to seed development, agriculture research scientists have collaborated with traditional farmers to obtain local crop varieties to improve existing varieties

market sectors.⁹

Indigenous groups have been quite vocal in their complaints about the lack of adequate compensation,¹⁰ loss of community rights,¹¹ misrepresentation of products¹² and practices as indigenous,¹³ and the unauthorized public

of seeds and develop new crop species considered vital for sustainable development and food security. For centuries, farmers in traditional areas have improved varieties by adapting germplasm to local conditions and selecting the best seed for each season, and it is this knowledge that modern researchers have sought to tap through various collaborative arrangements.

In the case of crop protection, traditional knowledge has been used to identify chemicals relevant to the production of pesticides used to that kill weeds and insects and microorganisms that destroy crops. This is similar to the ethnobotanical approach and involves the testing of samples known to have certain biological activity based on observations of the practices of traditional people. For example, from the chrysanthemum known as *tanacetum cinerariaefolium*, traditionally used for the control of household pests, scientists have been able to developed a class of compounds called "pyrethroids" which are used as the base for natural crop protection products with annual sales in excess of \$1 billion. See generally *id.* at 117-57.

9. Lucrative markets exist in Western countries for traditional arts and crafts acquired from other countries. DARRELL A. POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* 27 (1996).

10. Here the charge is often made that indigenous communities are not appropriately rewarded for the exploitation of their traditional knowledge, perhaps due to the deliberate refusal of the exploiters to pay, difficulties in identifying the proper owners to whom payment is to be made, or simple mismanagement. *Id.* at 33-41. Even where the communities are compensated, the benefits often pale in comparison to the huge profits made by the exploiters. For example, after the discovery of the tumor-fighting capabilities of Madagascar's periwinkle, the plant was patented and marketed, netting the company some \$100 million, eighty-eight percent of which was profit to the company. See A.B. Cunningham, *Indigenous Knowledge and Biodiversity: Global Commons or Regional Heritage?*, *CULTURAL SURVIVAL Q.*, Vol. 15.3, July 31, 1991, at 4, 6.

11. A significant source of friction relates to uses of traditional knowledge that result in the expropriation of the interests of traditional communities when valuable pieces of traditional knowledge are removed from the traditional communities and sent to western markets. While some of these items may have been sold or given away by traditional elders, in many cases the items were probably illegally exported or even forcibly removed. Babacar Ndoye, *Protection of Expressions of Folklore in Senegal*, 25 COPYRIGHT MONTHLY REV. WORLD INTEL. PROP. ORG. 374, 375 (1989). Expropriation also occurs when farm seeds are collected by researchers under collaboration arrangements and stored *ex-situ* beyond the reach of traditional farmers who now have to pay high fees to acquire rights to improved varieties of the seeds. Stephen B. Brush, *A Non-Market Approach to Protecting Biological Resources*, in *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK* 131, 133 (Tom Greaves ed., 1994) [hereinafter *SOURCEBOOK*]. Furthermore, community rights are diminished when some parties successfully acquire intellectual property rights in other forms of traditional knowledge, such as art and craft, music, and dance. For example, copyright may be claimed for documentation of information about indigenous people, which is used commercially without appropriate acknowledgment as to source of material. POSEY & DUTFIELD, *supra* note 9, at 36.

12. The commercial exploitation of traditional knowledge creates problems of authenticity and misrepresentation as the need to satisfy increasing demand for traditional art and craft often results in the mass-production of cheap imitations and inferior quality goods. Sandra Lee Pinel & Michael J. Evans, *Tribal Sovereignty and the Control of Knowledge*, in *SOURCEBOOK*, *supra* note 11, at 41, 47. The mass-produced items sold as traditional craft raise authentication problems to the extent that they do not have the same attributes as the traditional items. Items of traditional knowledge express important values in traditional societies which the mass-produced

disclosure¹⁴ and use of secret knowledge, images, and other sensitive information pertaining to indigenous communities.¹⁵ An improvement in the regulatory environment, arguably, would provide indigenous groups greater control over the use of traditional knowledge and ensure that access to traditional knowledge would be on terms that are mutually acceptable and respect indigenous culture.¹⁶

items cannot possibly have, since they did not originate in those societies. Indeed, one commentator has characterized the production and sale of fake indigenous items as a "cultural and psychological threat to the authentic practitioners of traditional arts and to the traditional groups whose values those arts express." Alan Jabbour, *Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protections of Folklore*, 17 COPYRIGHT BULL. 10, 11 (1983).

13. For example, some have charged that where African dances are copied and performed abroad, African culture is denigrated to the extent that the "non-African actors cannot lend the gestures that communicate warmth specific to Africa." Ndoye, *supra* note 11, at 376. Another writer contends:

[I]t is possible to encounter groups and soloists who unscrupulously modernize works of folklore by arranging them in a new manner, by giving folk songs added rhythm and volume at the expense of their melodic character. . . . Performances of folk songs often take the form of . . . banal impersonal shows devoid of the characteristics peculiar to . . . folk dances As for the garishly-colored costumes worn by the dancers, they are a travesty of the originals.

E.P. Gavrilo, *The Legal Protection of Works of Folklore*, 20 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 76, 79 (1984). Such commoditization of traditional performances as entertainment, it is feared, would eventually lead to the erosion of people's cultural identity. POSEY & DUTFIELD, *supra* note 9, at 6.

14. TERRI JANKE, *OUR CULTURE, OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS* 19 (1998). Indigenous culture is viewed to be degraded when cultural items are displayed outside of their traditional setting and for purposes different from those for which they were originally created, such as when religious artifacts are sold as mere decorative art. David Sassoon, *The Antiquities of Nepal: It Is Time to Start Listening to Communities Whose Possessions Have Become Objects of International Consumption*, CULTURAL SURVIVAL Q., Vol. 15.3, July 31, 1991, at 47, 49. Similar considerations apply to the reproduction of sacred and secret imagery in inappropriate contexts such as T-shirts. JANKE, *supra*, at 19.

15. In the United States, Native American groups have fought against the use of indigenous names in settings they perceive to be demeaning, such as in reference to mascots or sports teams. One commentator notes:

Images of Indians have advertised and identified products and services too numerous to list A search of the Trademarkscan-U.S. Federal database in Westlaw reveals that derogatory names—Injun, Braves, Red Man, Squaw, and Redskins—are used to sell everything from corn chips to football. Sports teams parade caricatured Indian mascots, such as Chief Wahoo (Cleveland Indians) or Illiniwek (Fighting Illini of Illinois). The Seminole activist Michael Haney describes many fans as "cultural cross-dressers" decked out in day glo warpaint and turkey feathers.

Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1006-07 (1995).

16. Control by indigenous farmers over crop varieties would guarantee certain rights to: (a) grow folk varieties and market folk variety seeds and food products, (b) be compensated when folk varieties, folk variety genes, folk variety food products and names are used or marketed by others, and (c) have a say in the manipulation and other uses of folk varieties by outsiders, which may violate the cultural and

As part of this international dialogue on traditional knowledge, the case has been made for the development of sui generis regimes to complement or supplement the intellectual property system.¹⁷ To the extent that the proposed schemes are premised on the protection of traditional knowledge in accordance with the customs of indigenous groups,¹⁸ customary law has become an important area of inquiry. Despite this recognition, however, not much information is available in literature regarding the effectiveness of customary law as a protective mechanism. It is the objective of this Article to remedy this gap by elaborating on the concept of customary law and describing the extent to which it is recognized and enforced in various legal systems around the world.

With reference to regional models and national laws, Section One describes the framework for protecting traditional knowledge under sui generis regimes and notes the central role played by customary law in the process. Following a discussion in Section Two on the extent of recognition of customary law under selected legal systems, Section Three assesses the effectiveness of customary law as an enforcement mechanism. Despite the noted limitations of customary law, this Article urges the formal recognition of customary law as part of national legal systems and the improvement of methods for ascertaining and enforcing it. For maximum protection, however, the use of customary law at the national level needs to be complemented with the adoption of a binding international scheme governing the access to and sharing of benefits arising from the utilization of traditional knowledge.

SECTION ONE: THE SUI GENERIS OPTION

I. ALTERNATIVES TO INTELLECTUAL PROPERTY RIGHTS

WIPO has given serious consideration to the possible protection of indigenous knowledge through various forms of intellectual property rights (IPRs), including copyright, patents, plant varieties, industrial designs, and trademarks.¹⁹ As a practical matter, however, it may be difficult to protect

religious values with which folk varieties are often deeply imbued.

Daniela Soleri et al., *Gifts from the Creator: Intellectual Property Rights and Folk Crop Varieties*, in SOURCEBOOK, *supra* note 11, at 24. Control or autonomy over aspects of tourism by indigenous people would also minimize environmental damage to sacred sites or parks caused by noise, depletion of resources such as wood, overcrowding, use of vehicles, and road construction. POSEY & DUTFIELD, *supra* note 9, at 6-9.

17. Many members of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore have called for the establishment of *sui generis* systems in their written submissions to the Committee. They include Ethiopia, Thailand, Brazil, Colombia, the African Group, the Asian Group, Venezuela, the Russian Federation, Iran, Indonesia, Morocco, Egypt, and the Andean Community. See WIPO, TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE LEGAL AND POLICY OPTIONS, para. 108, n.42, WIPO Doc. WIPO/GRTKF/IC/6/3 (2003), available at http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_3.pdf.

18. See *infra* notes 35 and 47 and accompanying text.

19. See generally INTELLECTUAL PROPERTY NEEDS, *supra* note 1.

traditional knowledge through IPRs due to problems fitting traditional knowledge into "certain accepted notions of intellectual property relating to ownership, originality, duration, fixation, inventiveness and uniqueness,"²⁰ among others.

For example, it has been argued that IPRs are unsuitable for indigenous knowledge because they focus on individual rather than group rights,²¹ they offer protection for fixed periods of time unlike the indeterminate periods applicable to indigenous knowledge,²² and the requirement of a writing for protected works virtually excludes much of the indigenous knowledge that is transmitted orally through generations in traditional societies.²³ Additionally, IPRs are expensive to obtain and the costs of enforcement high.²⁴ Long and costly administrative and judicial procedures would render the IPR option unattractive for many indigenous people.

Given this perceived incompatibility between IPRs and traditional knowledge, the case has been made for the development of a *sui generis* regime specifically adapted to the nature and characteristics of indigenous knowledge.²⁵ The argument for adopting a separate instrument for traditional knowledge is based on the recognition that traditional knowledge is created, owned, and utilized differently.²⁶ Unlike intellectual property law, traditional knowledge is designed not to confer economic benefits to individual creators but is intended for common exploitation.²⁷ "Consequently, it does not make sense to try to fit [it] within the rigidities of national intellectual property law."²⁸

The establishment of a *sui generis* regime, however, poses a number of

20. Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 793 (1999) [hereinafter Kuruk, *Protecting Folklore*].

21. *Id.* at 794-95.

22. *Id.* at 798.

23. Regarding fixation, it is explained:

Another requirement to grant copyright protection to a work is that it must have been "written down, recorded or otherwise reduced to material form." Certain rights in folklore such as song and dance are unlikely to satisfy this fixation requirement inasmuch as they are largely verbal and have not been written down or recorded.

Id. at 796.

24. The costs of preparing and prosecuting a patent application in the United States has been estimated at more than \$20,000. John H. Barton, *Intellectual Property Rights and Innovation*, in CAPITAL FOR OUR TIME: THE ECONOMIC, LEGAL AND MANAGEMENT CHALLENGES OF INTELLECTUAL CAPITAL 123, 127 (Nicholas Imperato ed., 1999).

25. See generally JOHN MUGABE, *INTELLECTUAL PROPERTY PROTECTION AND TRADITIONAL KNOWLEDGE: AN EXPLORATION IN INTERNATIONAL POLICY DISCOURSE* (1998).

26. Theodor H. Gaster, *Definitions of Folklore*, in FUNK & WAGNALLS STANDARD DICTIONARY OF FOLKLORE, MYTHOLOGY AND LEGEND 255-64, 399 (Maria Leach ed., 1959) [hereinafter DICTIONARY OF FOLKLORE].

27. Mamie Harmon, *Definitions of Folklore*, in DICTIONARY OF FOLKLORE, *supra* note 26, at 399-400.

28. Kuruk, *Protecting Folklore*, *supra* note 20, at 837-38.

complex conceptual and practical issues, including the definition of subject matter of protection, goals for protection,²⁹ requirements of protection, extent of rights to be conferred, the title holders (individuals or communities), modes of acquisition, and duration and enforcement measures.³⁰ Presently, no internationally binding sui generis regime exists, although a number of related regional and national instruments have been developed within the past decade in part to assist national governments in complying with their obligations under the Convention for Biological Diversity (CBD).³¹

Specifically, Article 8, Section j, of the CBD calls on Contracting States to “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.”³² In addition to “promot[ing] their wider application . . . of such knowledge, innovations, and practices” with “the approval and involvement of the holders [thereof,]” the CBD also encourages the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.³³

Essentially, these provisions of the CBD reflect a compromise between the need by parties from the North for access to biological resources of the South versus the demands of the South to restrict such access. The balance struck was to facilitate access to biological resources while ensuring the transfer of some benefits to providers of such resources. The hope, in part, was that such returns would in turn provide the incentive for the preservation of environmentally sound practices.³⁴ To the extent that mutual arrangements were envisaged as the principal mechanisms for effecting these exchanges, however, the CBD and the sui generis regional and national instruments, which implement its provisions, reflect contract-based solutions.

A. Regional Frameworks

One of the earliest comprehensive regional sui generis instruments on traditional knowledge is the African Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources (African Model Law) adopted by Council of Ministers of

29. WIPO, REVISED VERSION OF TRADITIONAL KNOWLEDGE: POLICY AND LEGAL OPTIONS, at 27, WIPO Doc. WIPO/GRTKF/IC/6/4 Rev. (2004).

30. CARLOS M. CORREA, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY 27 (2001).

31. Convention on Biological Diversity, opened for signature June 5, 1992, 31 I.L.M. 818 [hereinafter Convention on Biological Diversity].

32. *Id.* art. 8.

33. *Id.*

34. As noted in the preamble, the CBD provisions were shaped partly by the recognition of “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations, and practices relevant to the conservation of biological diversity and the sustainable use of its components. *Id.* pmbl.

the Organization of African Unity (OAU) in June 1998.³⁵ The African Model Law reaffirms the sovereignty of the State and people over their biological resources and provides for the establishment of a National Competent Authority³⁶ to administer the instrument's provisions.³⁷ Article 16 of the African Model Law recognizes the rights of communities over their innovations, practices, knowledge, and technologies acquired through generations.³⁸ It also recognizes their right to collectively benefit from the utilization of such resources. These community rights are to be protected in accordance with "norms, practices and customary law found in, and recognized by, the concerned local and indigenous communities, whether such law is written or not."³⁹

To be granted access to biological resources and knowledge or technologies of local communities in any part of the country, one must apply for the prior informed consent and written permit of the National Competent Authority. The applicant must also include such details as the identity of the applicant, type and reasons for resources requested, risks in the use of the resources, benefits to the local communities, and proposed benefit-sharing arrangements.⁴⁰ To ensure transparency, the African Model Law requires

35. Council of Ministers of the Organization of African Unity, *African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, available at http://www.opbw.org/nat_imp/model_laws/oau-model-law.pdf [hereinafter *African Model Law*].

36. *Id.* art. 57.

37. The Competent National Authority has many duties:

- i) create and operate a regulatory mechanism that will ensure effective protection of Community Intellectual Rights and Farmers' Rights, and the regulation of access to biological resources;
- ii) carry out the process of consultation and participation of local communities, including farming communities, in the identification of their rights as provided for under the customary practices and laws of the communities;
- iii) identify types of Community Intellectual Rights and Farmers' Rights;
- iv) identify and define the requirements and procedures necessary for the recognition of Community Intellectual Rights and Farmers' Rights;
- v) develop criteria and mechanisms to standardise procedures;
- vi) develop a system of registration of items protected by Community Intellectual Rights and Farmers' Rights according to their customary practices and law;
- vii) issue licenses for the exploitation and commercialisation of biological resources, including protected species, varieties or lineages, and community innovations, practices, knowledge and technologies;
- viii) identify relevant technical institutions that will assist local communities, including farming communities, in the categorisation and characterisation of their biological resources, innovations, practices, knowledge and technologies.

Id. art. 58.

38. *Id.* art. 17.

39. *Id.*

40. The Law provides:

publication of the application in a public registry or newspaper. The consent of the concerned local community must also be obtained and access carried out; without local and State consent, the access is invalid.⁴¹ The National Competent Authority is required to verify with local communities that their consent was in fact sought and granted.⁴² Under the African Model Law, the local communities may “withdraw consent or place restrictions on activities relating to access where such activities are likely to be detrimental to their socio-economic life, or their natural or cultural heritage.”⁴³

Significantly, Article 23 of the African Model Law recognizes Community Intellectual Rights, which are defined to include those rights held by traditional professional groups, especially traditional intellectual property practitioners. Non-registration of any community innovations, practices, knowledge, or technologies will not disqualify protection as community intellectual rights.⁴⁴ Neither will publication of information about biological

In making an application for access as provided in article three above, the following information shall be provided by the applicant:

- i) the identity of the applicant and the documents that testify to her/his legal capacity to contract, including, where appropriate, the identity of all partners with the contracting party;
- ii) the resources to which access is sought, including the sites from , its present and potential uses, its sustainability and the risks which may arise from access to it;
- iii) whether any collection of the resource endangers any component of biological diversity and the risks which may arise from the access;
- iv) the purpose for which access to the resource is requested including the type and extent of research, teaching or commercial use expected to be derived from it;
- v) description of the manner and extent of local and national collaboration in the research and development of the biological resource concerned;
- vi) the identification of the national institution or institutions which will participate in the research and be in charge of the monitoring process;
- vii) the identity of the location where the research and development will be carried out;
- viii) the primary destination of the resource and its probable subsequent destination(s);
- ix) the economic, social, technical, biotechnological, scientific, environmental or any other benefits that are intended, or may be likely to, accrue to the country and local communities providing the biological resource as well as the collector and the country or countries where he/she operates;
- x) the proposed mechanisms and arrangements for benefit sharing;
- xi) description of the innovation, practice, knowledge or technology associated with the biological resource; and
- xii) an environmental and socio-economic impact assessment covering at least the coming three generations, in cases where the collection is in large quantities.

Id. art. 4, § 1.

41. *Id.* art. 5, § 2.

42. *Id.* art. 5, § 3.

43. *Id.* art. 20.

44. *Id.* art. 23, § 3.

resources or local use or presence of the resources in a genebank "preclude the local community from exercising its community intellectual rights in relation to those resources."⁴⁵ The communities are guaranteed a right to at least fifty percent of the access permit fees to be shared equitably with "the full participation and approval of the concerned local communities."⁴⁶

Like the African Region, the Pacific Region has developed a *sui generis* framework entitled Model Law for the Protection of Traditional Knowledge and Expressions of Culture (Pacific Model Law).⁴⁷ The Pacific Model Law recognizes as traditional owners and as holders of traditional cultural rights individuals, clans, or groups in whom the custody or protection of the traditional knowledge or expressions of culture is entrusted in accordance with customary law and practices.⁴⁸ Such traditional cultural rights are inalienable,⁴⁹ perpetual in duration,⁵⁰ and valid whether or not the underlying traditional knowledge or expressions of culture are in material form.⁵¹ The rights are considered to be supplementary to, and therefore, not to affect any rights that may subsist under intellectual property law.⁵² In addition to traditional cultural rights, the owners also enjoy moral rights in traditional knowledge.⁵³

Under the Pacific Model Law, certain uses of traditional knowledge and expressions of culture are subject to the prior and informed consent of the traditional owners.⁵⁴ To obtain such consent, an application must first be addressed to the Cultural Authority required to be created under the Pacific Model Law.⁵⁵ Upon receipt of the application, the Cultural Authority is authorized to publish it in the national newspapers and to endeavor to identify and notify the relevant owners of the traditional knowledge that is the subject-matter of the application.⁵⁶

Rights-holders, if interested in the proposal, could at this stage enter into negotiations with the applicants over the terms of access to, or use of, traditional knowledge. Although any agreement reached between the applicant and the traditional group is subject to review by the Cultural Authority, the traditional owners may accept, reject, or modify any comments made by the

45. *Id.* art. 23, § 4.

46. *Id.* art. 22, § 2.

47. Model Law for the Protection of Traditional Knowledge and Expressions of Culture, reprinted in SECRETARIAT OF THE PACIFIC COMMUNITY, PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE 3-15 (2002) [hereinafter SECRETARIAT OF THE PACIFIC COMMUNITY].

48. *Id.* arts. 4, 6.

49. *Id.* art. 10.

50. *Id.* art. 9.

51. *Id.* art. 8.

52. *Id.* art. 11.

53. The moral rights include the right of attribution of ownership, authorship, and non-derogation. *Id.* art. 13.

54. *Id.* art. 18.

55. *Id.* art. 15.

56. *Id.* art. 16.

Cultural Authority after its review.⁵⁷ If traditional knowledge is to be used for a commercial purpose, the agreement must contain a benefit-sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners.⁵⁸

The Pacific Model Law makes it a criminal offense, punishable by a fine or jail term, to use traditional knowledge in a non-customary manner (whether or not of a commercial nature) and in relation to which the required prior and informed consent has not been obtained.⁵⁹ In addition, civil suits can be brought by the traditional owners in relation to such non-customary use of traditional knowledge⁶⁰ for remedies including injunctive relief, damages, seizures, and accounting for profits.⁶¹ The term “customary use” is employed in this context to mean “the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of traditional owners.”⁶² Significantly, while the Pacific Model Law envisages a resort to the national court systems to resolve disputes concerning traditional knowledge, it states quite categorically that it does not preclude the use of customary law and practice as a dispute resolution mechanism.⁶³

In September 2000, the Andean Community adopted Decision 486 on a Common Intellectual Property Regime,⁶⁴ which sought to create a sui generis system for traditional knowledge. Under Decision 486, the Andean Community member states undertook to safeguard and respect “their biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities.”⁶⁵ The Decision also recognizes “the right and the authority of indigenous, African American, and local communities in respect of their collective knowledge.”⁶⁶

The Decision requires any application for a process or product patent obtained from or developed on the basis of the traditional knowledge of indigenous, African American, or local communities in the member states to include written proof from a member country of authorization to use such knowledge.⁶⁷ It also provides for the invalidation of patents based on such knowledge but in respect of which proper evidence of authorization was not provided at the time of the application.⁶⁸ Furthermore, unless an “application is

57. *Id.* art. 21.

58. *Id.* art. 12.

59. *Id.* art. 26.

60. *Id.* art. 30.

61. *Id.* art. 31.

62. *Id.* art. 4.

63. *Id.* art. 33.

64. Andean Community Commission, *Decision 486: Common Intellectual Property Regime* (Dec. 1, 2000), available at <http://www.sice.oas.org/trade/junac/decisiones/DEC486e.asp>.

65. *Id.* art. 3.

66. *Id.*

67. *Id.* art. 26, § i.

68. *Id.* art. 75, § h.

filed by the community itself or with its express consent," the Decision bars from registration as trademarks, signs that "consist of the name of indigenous, African American, or local communities, or of such denominations, words, letters, characters, or signs as are used to distinguish their products, services, or methods of processing, or that constitute an expression of their culture or practice."

B. National Frameworks

In addition to the regional frameworks discussed above, some national measures are equally noteworthy. For example, Panamanian legislation on the intellectual property rights of indigenous communities subjects "the rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, [to] . . . the regulation of each indigenous community approved and registered in the DIGERPI or in the National Copyright Office of the Ministry of Education."⁶⁹ For purposes of the law, indigenous collective rights means "[i]ndigenous intellectual and cultural property rights law relating to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people."⁷⁰

On its part, Ecuador's Law on Intellectual Property of 1998 provides that protection given to industrial property should ensure the protection of the country's biological and genetic heritage.⁷¹ The 1998 Law also conditions the grant of product or process patents that relate to such heritage on the legal acquisition of elements of the heritage from the relevant traditional owners.⁷²

In 1997, the Philippine Congress passed the Indigenous Peoples Rights Act⁷³ to "recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs),"⁷⁴ including "the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions."⁷⁵ The Act recognizes rights of indigenous peoples to ancestral domains,⁷⁶ self-

69. On the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Communities, for the Protection of their Cultural Identities and Traditional Knowledge, Law 20, art. 15 (June 26, 2000) (Pan.).

70. *Id.* art. 2, § v.

71. Law on Intellectual Property, Registro Oficial No. 320, § 120 (May 19, 1998) (Ecuador).

72. *Id.* § 120.

73. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8371 (1997) (Phil.).

74. *Id.* § 2(a).

75. *Id.* § 2(c).

76. *Id.* ch. III.

governance and empowerment,⁷⁷ social justice and human rights,⁷⁸ and cultural property.⁷⁹ With respect to cultural property, the Act affirms the right of ICCs/IPs to the full ownership and control and protection of their cultural and intellectual rights.⁸⁰

Under the Philippine Act, access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization, and enhancement of these resources is permitted within ancestral lands and domains of the ICCs/IPs “only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community.”⁸¹ As used in the Act, the term “free and prior informed consent” means “the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.”⁸²

The Philippine Act guarantees ICCs/IPs the right to practice and revitalize their own cultural traditions and customs⁸³ and obligates the State to “develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.”⁸⁴ The Act also recognizes the right of ICCs/IPs “to practice and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites; the right to use and control of ceremonial objects; and, the right to the repatriation of human remains.”⁸⁵

77. *Id.* ch. IV.

78. *Id.* ch. V.

79. *Id.* ch. VI.

80. The Act provides indigenous groups:

the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and hearth practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

Id. § 34.

81. *Id.*

82. *Id.* § 3(g).

83. *Id.* § 32.

84. *Id.*

85. *Id.* § 33.

II. THE RELEVANCE OF CUSTOMARY LAW

A. *Nature of Customary Law*

Common to the *sui generis* instruments just surveyed is the requirement to ascertain and enforce traditional knowledge in accordance with the practices of indigenous groups. Customary law, as the system of rules and customs that governs conduct and rights in such groups,⁸⁶ would therefore be relevant to any analysis of rights and obligations under traditional knowledge provided for under the *sui generis* models.

The scope of customary law rules can be traced to the structure of indigenous societies. In Australia, for example, Aboriginal customary rules have evolved based on social relations with the family as the basic social unit.⁸⁷

Kinship relations in Aboriginal societies involve rights and obligations with respect to such matters as "marriage and private arrangements, food gathering, distribution and sharing of the other goods, certain trading relationship and educational roles."⁸⁸ Aboriginal customary law also recognizes procedures for the conduct and resolution of disputes,⁸⁹ and "responsibilities . . . for land and for objects and ideas associated with land."⁹⁰

On their part, the Maori of New Zealand observe customary law rules⁹¹

86. AKINTUNDE O. OBILODE, *THE NIGERIAN LEGAL SYSTEM* 83 (1979).

87. Groups of families make up a band which in turn combines with other bands to form a tribe. An important aspect of the social organization is the spiritual and physical relationship Aborigines maintained with the land. They considered certain portions of the land to be of special and sacred importance and therefore kept secret from all uninitiated persons certain knowledge or practices relating to land. Bruce DeBelle, *Aboriginal Customary Law and the Common Law*, in *INDIGENOUS AUSTRALIANS AND THE LAW* 81-83 (Elliot Johnston QC et al. eds., 1997).

88. *Id.* at 83.

89. One commentator describes early Aboriginal customary law:

[a] body of rules backed by sanctions and . . . a set of dispute resolution mechanisms. At a more informal level, it was also a series of accepted behaviors which allowed daily social life to proceed. The formal rules are backed by sanctions and are clearly articulated in terms of what one should do and why. These shade into more informal areas of behavioral controls which may never be clearly stated, but which are the stuff of interpersonal relationships, the self-regulating patterns of interaction.

THE LAW REFORM COMMISSION, *THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS* para. 37 (1986) (citing Dianne Bell, *Aboriginal Women and the Recognition of Customary Laws in Australia*, in *COMMISSION ON FOLKLORE AND LEGAL PLURALISM* (1983)) [hereinafter *ABORIGINAL CUSTOMARY LAWS*].

90. *Id.* at para. 37.

91. The social organization of the Maori is comprised of three constituent groups: the *whanau* (extended family) as the basic social unit, *hapu* (sub-tribe), and the *iwi* (tribe). Moana Jackson, *Justice and Political Power: Reasserting Maori Legal Processes*, in *LEGAL PLURALISM AND THE COLONIAL LEGACY* 243, 245 (Kayleen M. Hazlehurst ed., 1995). Under this social arrangement, an individual, from the moment of birth, became a part of a kinship collective, enjoying rights within the collective, but also owing obligations to other members of the

consisting of the “values, standards, principles or norms to which the Maori community generally subscribed for the determination of appropriate conduct.”⁹² Maori customary law is synonymous with the concept of *tikanga*, a Maori term for “a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual.”⁹³

In general, customary laws are not uniform across ethnic groups in indigenous societies.⁹⁴ Differences in the customary laws of indigenous groups can be traced to such factors as language, proximity, origin, history, social structure, and economy. For example, the customary law system of an ethnic group in one region of an African country may be different from the customary law system of the ethnic group in a neighboring region even though the two ethnic groups speak the same language.⁹⁵ Generally, the customary law rules among ethnic groups speaking a common language tend to be similar, but the rather significant differences that can sometimes exist make it misleading to talk of a uniform customary law rule applicable to all members of the language group.

An important characteristic of customary law is its dynamism.⁹⁶ Customary law is not static, and its rules change from time to time to reflect evolving social and economic conditions. As noted in one judicial decision, “one of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.”⁹⁷ Like any system of unwritten law, customary law has a capacity to adapt itself to new and altered facts and circumstances as well as to changes in the economic, political, and social environment.⁹⁸ As Maori jurist Eddie Durie has noted in relation to the Maori, customary law rules are “established by

collective. RICHARD BOAST ET AL., *MAORI LAND LAW* 31 (1999). See also Jackson, *supra*, at 246.

92. Eddie Durie, *Will the Settlers Settle? Cultural Conciliation and Law*, 8 OTAGO L. REV. 449, 452 (1996).

93. LAW COMMISSION, *MAORI CUSTOM AND VALUES IN NEW ZEALAND LAW* para. 72 (2001), (citing Hirini Moko Mead, *The Nature of Tikanga* (paper presented at Mai i te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, August 11-13, 2000) 3-4) [hereinafter *MAORI CUSTOM AND VALUES*].

94. A.N. Allott & Eugene Cotran, *Restatement of Laws in Africa: The Need, Value and Methods of Restatement*, in *INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA* 17, 32 (Law Faculty, Univ. of Ife ed., 1971).

95. For example, among the Kusasi language group in Ghana, to which the author belongs, it is possible to identify component ethnic groups such as the Toende and Agolle, each with its separate customary law system.

96. E. Cotran & N.N. Rubin, *Introduction*, in *READINGS IN AFRICAN LAW* xix (E. Cotran & N.N. Rubin eds., 1970) [hereinafter *READINGS IN AFRICAN LAW*].

97. *Lewis v. Bankole*, [1908] 1 N.L.R. 81, 100-01 (Nig.).

98. *READINGS IN AFRICAN LAW*, *supra* note 96, at xx. Thus, in Africa customary law has adjusted to such influences as the introduction of European and other foreign legal systems, urbanization, and the growth of a money economy. This dynamism of customary law can be illustrated by customary law rules now permitting individual land ownership where previously land belonged strictly to the family as a group, and an individual could neither own any piece of land absolutely, nor sell it. *Id.*

precedents through time, are held to be ritually correct, are validated by usually more than one generation, and are always subject to what a group or an individual is able to do to.”⁹⁹

Similar elements are found in the definitions of folklore, traditional knowledge, and indigenous knowledge, suggesting a link with customary law. In relation to folklore, it has been noted that “[d]escriptions of the amorphous term *folklore* tend to emphasize its diverse nature, as consisting of, for example, the traditional customs, tales, sayings, or art forms preserved among a people,” applicable “not only to ideas, or words, but also to physical objects.”¹⁰⁰ Other characteristics of folklore include “its oral nature, group features, and mode of transmission through generations of people.”¹⁰¹

Similarly, WIPO defines traditional knowledge as “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”¹⁰² In this context, tradition-based refers to “knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and are constantly evolving in response to a changing environment.”¹⁰³ With respect to the use of the term indigenous knowledge as alternative terminology, one can distinguish between a broad and narrow meaning,¹⁰⁴ with the former for all

99. Like other customary law systems, Maori customary law is dynamic, with a capacity to adapt to new circumstances. To deal with new influences, it has evolved and adapted a number societal structures including the Maori parliaments, the Kingitanga of the Waikato, and the pan-Maori movements such as the Kotahitanga. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 72.

100. Kuruk, *Protecting Folklore*, *supra* note 20, at 776.

101. *Id.* at 776-77.

102. See INTELLECTUAL PROPERTY NEEDS, *supra* note 1, at 25.

103. There are many categories of traditional knowledge recognized under the WIPO definition:

agricultural knowledge; scientific knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity related knowledge; “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of traditional knowledge are items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of “heritage” in the broad sense.

Id.

104. The term “indigenous” has been used to refer to communities that, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of society 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 ethnic

practical purposes being equated with traditional knowledge.¹⁰⁵

Therefore, like customary law, all these definitions focus on communal rights of particular ethnic groups and practices that are constantly evolving and not static. In this sense customary law on the one hand, and traditional knowledge and indigenous knowledge on the other, are interrelated. Accordingly, one cannot seek to understand traditional knowledge without reference to customary law which is the system within the scope of rights in such knowledge is determined.

B. Customary Law Principles

The link just noted between traditional knowledge and customary law confirms the relevance of customary law as the primary regulatory mechanism over uses of traditional knowledge. This link also suggests that solutions to traditional knowledge issues drawn from customary law are likely to be more successful than the western oriented top-down approaches reflected in current international instruments on traditional knowledge.¹⁰⁶ From the preceding

identities as the basis of their continued existence as peoples, in accordance with their cultural pattern, social institutions, and legal systems. See TONY SIMPSON, *INDIGENOUS HERITAGE AND SELF-DETERMINATION: THE CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES* 22-23 (1997). Critical elements in this description include self-determination of the relevant community, experience of subjugation, marginalization, exclusion, discrimination, and priority in time with respect to the occupation and use of a specific territory. For example, indigenous peoples are defined in the International Labour Organisation Convention Concerning Indigenous and Tribal Peoples:

[P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 1, June 27, 1989, 28 I.L.M. 1384.

105. While useful in describing minority groups in the Americas and Australasia who were marginalized by the majority European settlers, the indigenous label, as defined, may not be apt for other regions not having similar history. As one commentator has observed, the term "indigenous people" appropriately describes "regions with a colonial history that has left a predominant national culture and autochthonous cultures that coexist and compete for limited resources, especially land." Stephen B. Brush, *Whose Knowledge, Whose Genes, Whose Rights?*, in *VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS* 5 (Stephen B. Brush & Doreen Stabinsky eds., 1996) [hereinafter *VALUING LOCAL KNOWLEDGE*]. Therefore, it may not be appropriate for parts of Africa and Asia, where a single hybrid or creole culture is not dominant. Some writers distinguish between broad and narrow definitions of the term indigenous, where it could also apply to traditional groups that do not necessarily come under the restrictive U.N. definition. Patel notes, for example, "the word indigenous is also used in its broader connotation, . . . including all those people who were native to the lands where indigenous knowledge, as contrasted to modern or technological knowledge, originated. In this sense, the reference would no longer be simply to the narrow groups of aboriginal tribes." Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, in *VALUING LOCAL KNOWLEDGE*, *supra*, at 308.

106. Professor Riley notes:

survey of the model laws, a number of principles emerge as central to the protection of traditional knowledge under customary law.

First is the recognition that indigenous groups own or have rights of custodianship over indigenous resources. Accordingly, the African Model Law provides for the rights of communities over their innovations, practices, knowledge, and technology acquired over generations.¹⁰⁷ The Pacific Model Law emphasizes the rights of individuals, clans, and groups as owners and holders of cultural rights.¹⁰⁸ Such formal recognition is significant because it confirms the primacy of rights of indigenous groups to traditional knowledge and relegates to a secondary right any claim the State may purport to assert in relation to traditional knowledge. It also clarifies the rather tenuous basis of claims in some international instruments that purport to provide for State "sovereign" rights in traditional knowledge.¹⁰⁹

As a corollary to this fundamental right of ownership, custodianship, or other relevant right in traditional knowledge by indigenous groups, there is also an acceptance in the model laws of the principle that the scope of such rights would be determined with reference to customary practices and not qualified by rules laid down by States. The African Model Law incorporates this principle by noting that community rights are to be "*protected under the norms, practices and customary law found in, and recognized by, the concerned local and indigenous communities.*"¹¹⁰

Given the objective under the sui generis models to mitigate the problems posed by the application of intellectual property criteria to traditional knowledge,¹¹¹ the model laws permit deviations from established IP criteria where necessary to effectively protect traditional knowledge. For example, the African Model Law tackles the bias evident for "individuals" under intellectual property law by emphasizing instead the "collective" nature of indigenous rights in traditional knowledge.¹¹² To remedy the problem caused by the IP requirement that protected matter be recorded or reduced to some form of

Tribal law is drawn from a tribe's traditional customary law, tribal belief systems, and other contemporary forms of tribal governance, including ordinances and tribal constitutions. It therefore reflects not only substantive legal principles, but also the cultural context from which they evolved. Through tribal law, indigenous governance of cultural property and traditional knowledge will correlate specifically to the works tribes seek to protect, allow for forms of punishment consistent with the community's values, and properly incentivize behavior that is good for the community at large.

Angela Riley, "*Straight Stealing*": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 90 (2005) (footnote omitted).

107. *African Model Law*, *supra* note 35, art. 16.

108. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, arts. 4, 6.

109. *See, e.g.*, Convention on Biological Diversity, *supra* note 31, art. 3.

110. *African Model Law*, *supra* note 35, art. 17 (emphasis added).

111. *See* J.A. EKPÈRE, OAU'S MODEL LAW: THE PROTECTION OF THE RIGHTS OF LOCAL COMMUNITIES, FARMERS AND BREEDERS, AND FOR THE REGULATION OF ACCESS TO BIOLOGICAL RESOURCES 11 (Organization of African Unity ed., 2000), available at http://www.blauen-institut.ch/Tx/tpT/t_oaumodellaw.pdf.

112. *See African Model Law*, *supra* note 36, art. 16.

writing, the sui generis models dispense with such a requirement altogether. Thus, traditional knowledge would be protected under the African¹¹³ and Pacific Model Laws¹¹⁴ whether or not it is in writing or material form.

Another difference between IP and customary law taken up in model laws is the duration of rights.¹¹⁵ Unlike the limited period of protection for IP rights, customary law rights in traditional knowledge are held for an indefinite period.

Accordingly, the Pacific Model Law provides that such rights "continue in force in perpetuity."¹¹⁶

While there is a general disposition under customary law to allow free use of traditional knowledge under notions of reciprocity,¹¹⁷ the right to such use is not automatic. Access to traditional knowledge could be denied on account of the sacred secret nature of an item or simply out of a desire of the indigenous group not to commercialize it.¹¹⁸ The right to refuse access as an important means of protecting traditional knowledge is also incorporated into the sui generis models. The African Model Law not only recognizes this right, but like the Pacific Model Law, provides elaborate rules on prior informed consent to ensure that indigenous groups have sufficient information on proposed uses of traditional knowledge to make a decision on whether or not to grant access.¹¹⁹ Even where approval has been granted, such consent can be withdrawn for reasons including the failure to comply with the conditions of the grant or unauthorized uses of traditional knowledge.¹²⁰

Significantly, the sharing ethic, which is part of the concept of reciprocity, imposes an obligation on the individual who benefits from the exploitation of communal property or rights to pass on some of the benefits from the exploitation, either in the same form or in kind to other members who may require such assistance.¹²¹ Because this sharing ethic has been threatened by exploiters who have taken undue advantage of indigenous groups by not rewarding them appropriately for uses of traditional knowledge,¹²² it is

113. *Id.* art. 17.

114. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art. 8.

115. Kuruk, *Protecting Folklore*, *supra* note 20, at 798.

116. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art. 9.

117. In many traditional communities, property is expected "to be automatically shared with one's kin and others in need and refusal to respond to a reasonable request was considered to be stingy, a particularly despised behavior." Candace S. Greene & Thomas D. Drescher, *The Tipi with Battle Pictures: The Kiowa Tradition of Intangible Property Rights*, 84 TRADEMARK REP. 418, 428 (1994).

118. JANKE, *supra* note 14, at 21.

119. See *African Model Law*, *supra* note 35, art. 5.

120. *Id.* art. 20.

121. Each member of the traditional society has a direct interest in the welfare of other kinsmen and therefore recognizes a duty to help them when they are in need. Paul Kuruk, *Refugeeism, Dilemma in International Human Rights: Problems in the Legal Protection of Refugees in West Africa*, 1 TEMP. INT'L & COMP. L.J. 179, 194 (1987).

122. See generally, CORREA, *supra* note 30, at 5-6 (noting that arguments for protection of traditional knowledge are frequently based on equity considerations of compensation by breeders and seed companies for free samples of plant varieties obtained from indigenous

imperative that a protective scheme based on customary law incorporate some form of benefit-sharing arrangement.

The scheme should require that a portion of the benefit obtained from access to traditional knowledge be assigned to indigenous groups to be applied in accordance with traditional practices. Also, such benefits need not be in monetary terms only; they could include in-kind arrangements such as the construction of schools, hospitals, or roads to benefit traditional communities. Accordingly, the Pacific Model Law provides for equitable monetary or non-monetary compensation,¹²³ while the African Model Law guarantees indigenous groups at least fifty percent of the benefits gained from the utilization of indigenous resources.¹²⁴

Regarding the enforcement of these rights and obligations, the expectation under the African Model Law is for the enforcement of rights and obligations in accordance with traditional practices.¹²⁵ The Pacific Model Law contemplates use of national courts but does not preclude a resort to customary dispute resolution mechanisms.¹²⁶ Unfortunately, both model laws do not elaborate on the enforcement mechanisms under customary law. For an understanding of the effectiveness of customary law in protecting traditional knowledge, relevant issues surrounding such mechanisms must be clarified.

Of prime importance is whether customary law is recognized as a viable component of the national legal system; no legal basis will otherwise exist for the enforcement of customary law rules. An equally important consideration is how the relevant institutions ascertain and apply customary law rules. These issues are examined in the remaining part of the Article, beginning with a comparative analysis of the practice of recognition in selected regions of the world.

SECTION TWO: RECOGNITION AND APPLICATION OF CUSTOMARY LAW

I. FORMAL SYSTEMS OF RECOGNITION

A. Africa

During the colonial era in Africa, European colonialists introduced their own metropolitan law and system of courts into their colonies, but retained so much of customary law and the African judicial process which they did not deem contrary to basic justice or morality.¹²⁷ The result of the imposition of

farmers).

123. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art 12.

124. *African Model Law*, *supra* note 35, art 22, § 1.

125. *Id.* art 17.

126. SECRETARIAT OF THE PACIFIC COMMUNITY, *supra* note 47, art. 33.

127. ANTONY ALLOTT, *ESSAYS IN AFRICAN LAW* 72-74 (1960) [hereinafter ALLOTT,

colonial rule, therefore, was to produce a dual or parallel system of courts and laws in African countries.¹²⁸ Dualism was reflected in the establishment of Western-type courts. Expatriate magistrates and judges, whose jurisdiction extended over all persons in criminal and civil matters,¹²⁹ presided over these courts and applied European law and local statutes based on European statutes.¹³⁰

A second group of courts was also established by statute. They were composed of either traditional chiefs or local elders with jurisdiction only over Africans and which, for the most part, applied the customary law prevailing in the area of the jurisdiction of the court.¹³¹ Creation of such statutory customary courts,¹³² however, did not mean the abolition of the traditional non-statutory adjudication systems that pre-dated colonialism.¹³³

At first, statutory customary law courts and the general courts developed separately. But toward the end of the colonial period, an integration of the dual court system was initiated by conferring supervisory jurisdiction on the general courts over statutory customary court proceedings.¹³⁴ Gradually, a change of personnel in the statutory customary courts occurred, from the traditional chiefs

ESSAYS].

128. Muna Ndulo, *Ascertainment of Customary Law: Problems and Perspectives with Special Reference to Zambia*, in FOLKLAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA 339, 340 (Alison Dundes Renteln & Alan Dundes eds., 1994) [hereinafter FOLKLAW].

129. *Id.* at 341-42.

130. These courts are hereinafter referred to as the "general courts."

131. For example, the Native Tribunals Ordinance of Kenya provided as follows: "Subject to the provisions of this Ordinance, a native tribunal shall administer . . . the native law and custom prevailing in the area of the jurisdiction of the tribunal . . ." Native Tribunals Ordinance, (1930) § 30 (Kenya), reprinted in WILLIAM BURNETT HARVEY, AN INTRODUCTION TO THE LEGAL SYSTEM IN EAST AFRICA 423 (1975).

132. "African courts," "native courts," "native authority courts," "primary courts," "local courts," or "peoples courts." Carlson Anyangwe, *The Whittling Away of African Indigenous Legal and Judicial System*, 30 ZAMBIA L.J. 46, 46 n.2 (1998). In this Article, this second group of courts will be referred to as "statutory customary courts" to denote their creation by statute.

133. The statutory customary courts only formalized selected aspects of the traditional systems that suited the practical purposes of the colonial administration. While not recognized at an official level, the traditional adjudication systems left intact by the colonial administration continued to be used by the parties as they wished. See generally T.O. ELIAS, NATURE OF AFRICAN CUSTOMARY LAW (1956).

Although the statutory customary courts were created mainly to apply customary law, their jurisdiction in this area, even at a formal level, was not exclusive. Provision was also made for the general courts to determine and apply customary law when it was raised in legal proceedings. For example, the Judicature Act of Kenya, Act 16 of 1967 provides:

The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or affected by it, so far as applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

PHILIPS, REPORT ON NATIVE TRIBUNALS IN THE COLONY AND PROTECTORATE OF KENYA (1945), reprinted in HARVEY, *supra* note 131, at 431.

134. Anyangwe, *supra* note 132, at 49.

and elders to young lay magistrates who were given some basic training in law. Some of the procedures at the general courts were also slowly introduced into the statutory customary courts.¹³⁵ These broad features in the development of the dual legal system are evident in the evolution of the legal systems in Ghana,¹³⁶ Malawi,¹³⁷ and Zambia.¹³⁸

135. READINGS IN AFRICAN LAW, *supra* note 96, at xxi.

136. Pre-colonial law in Ghana was essentially customary in character, having its source in the practices and customs of the people. During the colonial era, the colonial administration continued to recognize customary law but also passed local laws in addition to the existing English law it incorporated into the colony. Reflecting this dichotomy in the types of law, the colonial administration in Ghana divided formal judicial power between two systems of courts, one administering the customary law of the bulk of the African population and the other applying received English law and the recently developed national law adopted by the local legislature. English law was administered by the subordinate courts, the High Court and the Court of Appeal, all of which are referred to in this paper as the general courts. The practice and procedure followed by these courts was in substantial conformity with the law and practice observed in English courts.

Customary law was administered in Ghana mainly through the native courts that the colonial governor was empowered to create. Appointment to membership of a native court was not based on one's position or status in the community, although the governor, for the most part, selected chiefs and elders. Special training of the appointees was not required, but it was generally assumed that they were conversant with the customary law practices of their respective areas. Personal jurisdiction of the native courts was based on ethnicity. Subject matter jurisdiction was limited to civil claims under native customary law and certain customary offenses.

The system of native courts was retained after Ghana's independence in 1957. However, under the Local Courts Act of 1958, the native courts were renamed local courts, a nationally uniform system of local courts was established without the hierarchy of grades formerly used, and an effort was made to eliminate the racial criterion for jurisdiction over persons which had applied in native courts. The new Act also reflected an effort to maintain a higher quality of operation in the local courts through standards of efficiency for appointment as a court officer and the periodic inspection of court records. *See*, ALLOTT, ESSAYS, *supra* note 127, at 99-116.

137. Throughout Malawi's colonial history, jurisdiction over Africans in cases involving issues of customary law and in simple criminal cases was left to be determined by the traditional courts. Unlike Ghana, Malawi maintains a clear hierarchy of traditional courts consisting of Grades B and A traditional courts at the lowest level, then the district traditional courts, district traditional appeal courts, regional traditional courts and the National Traditional Appeal Court. All these traditional courts exercise both civil and criminal jurisdiction except the regional traditional courts, which have original criminal jurisdiction only. Generally, the jurisdiction of traditional courts is exercised in cases where the parties are Africans, but the Minister in charge of traditional courts may extend the jurisdiction of any traditional court to include non-Africans.

The hearing of a civil case is conducted in accordance with the customary law prevailing in the area of the court's jurisdiction. *See* Boyce B. Wanda, *The Role of Traditional Courts in Malawi*, in THE INDIVIDUAL UNDER AFRICAN LAW 76 (Peter Takirambudde ed., 1982).

138. Zambia's Native Courts Ordinance of 1939 initially governed its native court system. The governor during the colonial period had the exclusive authority to establish native courts upon which were conferred jurisdiction in civil matters involving Africans. The courts also exercised criminal jurisdiction where the accused was an African, except in cases where a non-African could be called as a witness and/or where the governor had directed that any party not be subject to the jurisdiction of native courts. The practice and procedure of the courts were determined by customary law and their records subject to review by the Commissioner of Native

In no African country is customary law totally disregarded or proscribed.¹³⁹ Customary law continues to be recognized and enforced, albeit to a different degree depending on the jurisdiction.¹⁴⁰ National constitutions and statutes authorize it as a major source of law to be determined and applied in legal proceedings when it is raised by the parties. For instance, the Constitution of the Fourth Republic of Ghana describes the laws of Ghana to include the “common law,” which in turn comprises the rules of customary law.¹⁴¹ Under the same constitution, customary law refers to “rules of law which by custom are applicable to particular communities in Ghana.”¹⁴²

Similarly, the constitution of South Africa provides that “[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”¹⁴³ A ruling from the Constitutional Court of South Africa even suggests that customary law as a component of the legal system may not necessarily be dependent on formal recognition by the government. In *Alexkor Ltd. v. Richtersveld Community*,¹⁴⁴ the Constitutional Court held that the Richtersveld indigenous people of South Africa had, and still have, a right of ownership of their land under their own indigenous, unwritten law, despite the fact this was not recognized or protected by the government.¹⁴⁵

Courts. In 1966, Zambia’s native courts were reorganized and renamed the Local courts. They received limited civil and criminal jurisdiction. The Judicial Service Commission now appoints members of the local courts, whose decisions can be appealed to the subordinate courts, then to the High Court, and finally to the Supreme Court. Supervision of the work of the court is ensured through advisors and officers appointed for this purpose. See Muna Ndulo, *Customary Law and the Zambian Legal System*, in *THE INDIVIDUAL UNDER AFRICAN LAW*, *supra* note 137, at 121.

139. In places such as the Sudan, while there may not have been much interest in enforcing customary law, that system of law has not been proscribed. Cliff Thompson, *The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan*, in *AFRICA AND LAW* 133 (Thomas W. Hutchison ed., 1968).

140. Three basic approaches can be identified regarding the place of customary law in the legal systems of post-independent Africa. The anglophone countries have retained much of the dual legal structures created during colonial rule while attempting to reform and adapt customary law to notions of English law. On their part, the francophone and Portuguese-speaking countries have pursued an integrationist course by trying to absorb customary law into the general law. Only in Ethiopia and Tunisia have some radical measures been adopted to legislatively abolish carefully-selected aspects of customary law. Anyangwe, *supra* note 132, at 47.

141. REPUBLIC OF GHANA CONST. art. 11, § 2.

142. *Id.* § 3.

143. S. AFR. CONST. art. 211, § 3 (1996).

144. *Alexkor Ltd. v. Richtersveld Cmty*, 2003 SACLX 79 (CC) (2003) (S.Afr.).

145. The Constitutional Court held “a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law without importing English conceptions of property law.” *Id.* at para. 50. The Court ruled that laws that fail to recognize indigenous law ownership are racially discriminatory explaining that protection is given to registered land title but not to indigenous law ownership amounts to racial discrimination. *Id.* at para. 99. Regarding the independent status of customary law, the Court noted:

While in the past indigenous law was seen through the common law lens, it must

B. *United States*

Unlike the African region, the United States has not formally recognized customary law as part of the general national legal system, although provision is made for its application where necessary by Indian tribal courts. Initially, the federal government's Bureau of Indian Affairs (BIA) created the tribal courts¹⁴⁶ as part of a strategy to assimilate Indians under a detribalization process,¹⁴⁷ facilitated by the system of education¹⁴⁸ and the government's land tenure policy.¹⁴⁹ The federal government has moved away from its policy of assimilation, however, and under the Indian Reorganization Act of 1934 (IRA), has allowed tribal groups to set up their own systems of governance,¹⁵⁰ including tribal courts and laws.¹⁵¹

now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with Customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. . . . Our Constitution does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights] It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values.

Id. at para. 51 (footnotes omitted).

146. Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 998 (1991).

147. For example, the Courts of Indian Offenses were created in 1883 "to civilize the Indians" by compelling them "to desist from the savage and barbarous practices that are calculated to continue them in savagery, no matter what exterior influences are brought to bear on them." Newton, *supra* note 15, at 1033-34. Prohibited acts included: participating in dances or feasts; entering into plural or polygamous marriages; acting as medicine men; destroying property of other Indians; and engaging in immorality, intoxication, and misdemeanors and vagrancy. *Id.*

148. According to Newton:

Education of children was also seen as a sure way to create a generation of assimilated Indians. Congress entrusted various Christian denominations with control over education on specific reservations; conversion of Indian children to Christianity was seen as a first step to assimilation. Toward the end of the nineteenth century, Indian boarding schools were preferred. Youngsters would be taken by force, if necessary, and sent away to schools, such as the Carlisle Indian School in Pennsylvania, founded in 1879, whose headmaster, Richard Pratt, promised to "Kill the Indian in him, and save the man."

Id. at 1032-33.

149. Separate land allotments in favor of individuals were authorized as an encroachment upon traditional ideas of communal land ownership. *Id.* at 1032.

150. See generally Indian Reorganization Act, 25 U.S.C. §§ 461-479 (Lexis through 2006).

151. Under a Code of Indian Offenses published in 1935, Indian tribes were allowed to create their own courts and enact their own laws. At first, the government controlled the courts that were set up under the IRA process. However, not every tribe chose to go with the IRA

Affirming the significance of tribal courts,¹⁵² the U.S. Supreme Court has referred to tribal courts as “appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”¹⁵³ The Supreme Court has also acknowledged the wide jurisdiction of the tribal courts, emphasizing, for instance, that “[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.”¹⁵⁴

Generally, Indian tribal courts are required to apply tribal law first¹⁵⁵ and to resort to federal and state law only to fill in gaps.¹⁵⁶ However, perhaps due to lack of resources¹⁵⁷ or in deference to hints from federal courts, a disturbing pattern has been reported where some courts seem to apply state law regardless of its relevance to tribal culture.¹⁵⁸ Reflecting the nature of their historical development, the tribal courts tend to be preoccupied with criminal matters, although there is a noticeable trend in their use for civil litigation.¹⁵⁹ Although subject to review by federal courts, tribal court decisions are given deference,¹⁶⁰ especially as to the tribal courts’ findings on what constitutes tribal law.¹⁶¹

scheme; some preferred to rely on traditional systems. Even for those utilizing the IRA procedures, a conscious effort was made to encourage the use of traditional systems as well. Tribes that did not have traditional adjudication systems and did not want to operate under the IRA framework went on to develop new systems. Newton, *supra* note 15, at 1035.

152. Tribal courts have become popular among, and are resorted to in an unprecedented manner, by Native Americans. The wide appeal of tribal courts has been attributed to “[t]he pan-Indian movement, the struggles of other racial minorities in changing the boundaries of the acceptable, the increasing number of Native-American attorneys . . . the critical legal jurisprudence that has questioned the foundations of Federal Indian law, and the concomitant flowering of tribal court systems.” Newton, *supra* note 15, at 1036 (footnotes omitted).

153. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted).

154. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

155. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1611 (2004).

156. Newton, *supra* note 15, at 1038.

157. The courts are said to be constrained financially, operate with inadequate staff and can barely afford more than the tribal code and some state reporters. *Id.* at 1038-39.

158. The Supreme Court’s tough approach to jurisdictional matters involving tribal courts may have forced some of the tribal courts to resort to notions of state law as way of preserving a respectable degree of jurisdiction. See Robert A. Williams Jr., *The Algebra of the Federal Indian: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, WIS. L. REV. 219, 274, 288 (1986). See also Brandfon, *supra* note 146, at 1006-09; Porter, *supra* note 155, at 1610-12.

159. Newton, *supra* note 15, at 1037.

160. Such deference is based on the notion of full faith and credit generally extended by a court to a judgment made by another court from a different state. See generally, Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of Eberhard v. Eberhard*, 28 N.M. L. REV. 19 (1998) (arguing that a tribal court need not give full faith and credit to a state court order).

161. See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 509, 558-61 (1998). See also Lona N. Laymon, Note, *Valid Where Consummated: The Intersection of Customary Law Marriages and Formal Adjudication*, 10 S. CAL. INTERDISC. L.J. 353, 365 (2001).

C. New Zealand

Under the Treaty of Waitangi, the main indigenous Maori group in New Zealand effectively ceded New Zealand territory to the British.¹⁶² During the period of colonial rule that followed, Maori customs, values, and practices were initially recognized but soon came under great stress.¹⁶³ In this context, the Resident Magistrates system ensured "some official recognition of Maori custom, norms and institutions" until it was abolished in 1893 and replaced by the Stipendiary Magistrate, who was assigned strictly judicial functions.¹⁶⁴ Although section 71 of the New Zealand Constitution Act of 1852 authorized the Queen to set aside certain districts in which Maori customs were to be observed,¹⁶⁵ the districts envisaged under the Act were never created despite the valiant efforts of some Maori groups, including the Kingitanga, Kauhanganui, and Kotahitanga movements. In several pronouncements the Chief Justice even denied the existence of Maori customary law,¹⁶⁶ while the government sought through legislation to prohibit ritualistic practices believed by the Maoris to provide medical and psychological benefits.¹⁶⁷ Government policies as typified

162. For analysis of the significance of the Treaty of Waitangi, see David Williams, *The Constitutional Status of the Treaty of Waitangi, An Historical Perspective*, 14 N.Z. UNIV. L. REV. 9 (1991).

163. Alex Frame, *Colonising Attitudes Towards Maori Custom*, [1981] N.Z.L.J. 105 (1981). Early on, the colonial administration suggested the incorporation of some Maori customs into the legal system and tentatively recognized Maori customary law in a number of statutes passed between 1844 and 1893. The Native Exemption Ordinance of 1844, for instance, incorporated Maori perspectives, norms, and values into the British justice system by limiting jurisdiction of the colonial courts in crimes involving Maori only to cases where the Maori requested such intervention and also prohibiting the imprisonment of Maori for certain civil offenses such as debt or breach of contract. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 85. The law was repealed in 1846 following a backlash from white settlers over perceived inequalities in the law.

Another statute, the Resident Magistrates Court's Ordinance of 1846, conferred summary jurisdiction on Resident Magistrates in disputes between Maori and non-Maori. *Id.* at para. 87. Where the cases involved only Maori, the Ordinance provided for the appointment of two Maori chiefs as Native Assessors with power to decide the cases. The magistrate could only intervene in cases where the assessors disagreed and no judgment was to be enforced unless all three members of the court unanimously agreed. Furthermore, in deference to Maori custom of *muru*, another statute, the Resident Magistrate's Act of 1867, provided that in lieu of a sentence, a Maori convicted of theft or receiving could be required to pay up to four times the value of the goods. *Id.*

164. *Id.* at para. 90.

165. New Zealand Const. Act, § 71 (1852) (N.Z.).

166. In *Wi Parata v. Bishop of Wellington* [1877] 3 Jur (NS) 72, Chief Justice Prendergast implicitly denied the existence of Maori customary law by observing that "[h]ad any body of law or custom capable of being understood and administered by the Courts of a civilized country been known to exist, the British Government surely would have provided for its recognition." *Id.* A year later, he ruled in another case that a marriage according to Maori customary law was not valid under New Zealand law. See *Rira Peti v. Ngaraihi Te Paku*, 7 N.Z.L.R. 235, 240-41 (S.C. 1888).

167. The Tohunga Suppression Act of 1907 criminalized *tohunga* practices under the

by a fisheries quota system effectively put land and resources beyond the reach of the Maoris and "undermined their relationships with their valued resources in accordance with their cultural preferences."¹⁶⁸ Despite these pressures, Maori custom law has survived.

The concept of native title¹⁶⁹ is the primary basis for the current recognition of customary law in New Zealand. The concept can be traced to judicial decision in *In Re The Landon & Whitaker Claims Act 1871*, where the Crown was held to be "bound, both by the common law of England and its own solemn engagements, to a full recognition of the Native proprietary right . . . [w]hatever the extent of that right by established Native custom appear[ed] to be."¹⁷⁰ Subject to the important qualification that lands held under native title are inalienable to third parties except the Crown, the scope of other aspects of native title, including the "kinds of rights protected, the descent groups who can lay claim to such rights, the rules of succession and transfer by marriage" is determined exclusively by the "indigenous customary law."¹⁷¹

The second way in which customary law has been incorporated into the New Zealand common law is through statutory directives requiring courts, tribunals, and officials to take customary law into account in rendering decisions. The Native Lands Act of 1865,¹⁷² Resource Management Act of 1991,¹⁷³ Conservation Act of 1987,¹⁷⁴ and Treaty of Waitangi Act of 1975¹⁷⁵

mistaken view that their practitioners were "charlatans or pseudo priests." Malcolm Voyce, *Maori Healers in New Zealand: The Tohunga Suppression Act 1907*, 60 OCEANIA 99, 101(1989).

168. The privatization of fisheries under the fisheries quota management system enabled non-Maoris to acquire control over the fisheries resource base. With that came a corresponding diminution in the application of Maori law in the fisheries industry. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 115.

169. For comprehensive discussion of the concept of native title, see generally KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989).

170. *In re the Landon & Whitaker Claims Act, 1871*, 2 N.Z.C.A. 41, 49 (C.A. 1875).

171. BOAST ET AL., *supra* note 91, at 13.

172. Section 23 of the Native Lands Act directs the Native Land Court to base land titles on native custom. Native Lands Act 1862 (N.Z.). The Maori Land Court, which has been in existence since 1865, is required under its enabling legislation to award land titles on the basis of Maori custom. *Id.* § 23. The Court's records to date indicate extensive documentation of Maori customary law to support land titles claims, typically by evidence showing that particular tracts of land had been managed in accordance with Maori custom. BOAST ET AL., *supra* note 91, at 23. Beside this general jurisdiction, the Court also has special jurisdiction to apply customary law on the basis of another statute permitting the Minister of Maori Affairs, or the Chief Judge, to refer any matter for inquiry to the Court. Te Ture Whenua Maori Act 1993, § 29 (N.Z.), available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes.

173. Resource Management Act 1991, § 39(2)(b) (N.Z.) available at <http://www.mfe.govt.nz/publications/rma/everyday/overview-jun06/index.html>. This act authorizes local authorities to "recognize tikanga Maori where appropriate." *Id.*

174. Conservation Act 1987, § 26ZH(1) (N.Z.), available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes. Like the now repealed Section 88(2) of the Fisheries Act of 1981, the Conservation Act provides that nothing in the Act was to affect "any Maori fishing right." *Id.*

175. The Waitangi Tribunal, set up under the Treaty of Waitangi Act 1975 to investigate claims arising under the Treaty of Waitangi, is authorized to refer to the Maori Appellate Court

exemplify this. Outside these two specific bases relating to native title and statutory incorporation, Maori customary law is enforceable more generally through the discretionary powers of the courts, although relevant case law on this third method of recognition is said to be rather "scanty."¹⁷⁶

D. Australia

As was the case in New Zealand, after the arrival of British settlers in Australia in 1788,¹⁷⁷ some limited form of recognition was extended initially to Aboriginal customary laws.¹⁷⁸ As time went on, however, this limited recognition¹⁷⁹ was whittled down. By 1850, Aboriginal customary law was

questions of fact that arise under the tribunal proceeding regarding (1) Maori custom or usage, (2) rights of ownership of land or fisheries according to Maori customary law, and (3) the determination of Maori tribal boundaries, whether of land or fisheries. Treaty of Waitangi Act 1975, § 6A(1)(a)-(c) (N.Z.), available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes.

Since its inception, a wide diversity of claims have been referred to the Waitangi Tribunal, including those related to land, hunting, and fishing rights; claims regarding rivers, lakes, foreshores, and harbors; claims for the maintenance of Maori customs, tradition, and identity; and rights to self-determination through tribal bodies. In determining whether these matters fall within its jurisdiction, the tribunal has chosen to focus on the spirit of the Treaty of Waitangi rather than on the strict terms of the treaty. MAORI CUSTOM AND VALUES, *supra* note 93, at para. 329. To this end, the tribunal has developed a number of principles to guide it in this process. *Id.* at para. 339. Significantly, the Custom Principle is interpreted to encompass not only the promise under the treaty to protect Maori custom and cultural values but also two subsidiary principles. The first relates to control of property in accordance with custom and having regard for cultural preferences, while the second involves the recognition of the full authority, status, and prestige of Maori possessions and interests. *Id.* at paras. 334-51. Similarly, the Property Principle has been read to require the protection and preservation of Maori property and *taonga*, which is Maori terminology denoting "tangible (such as fisheries) or intangible (such as Maori language)." *Id.* at para. 338. As interpreted by the tribunal, the promise under the treaty not only includes a duty to preserve Maori customary title but also to oblige the Crown to ensure that the Maori have full, exclusive, and undisturbed possession of their culture. *Id.* para. 325.

176. BOAST ET AL., *supra* note 91, at 15.

177. By the time the First Fleet arrived in Sydney in January 1788, the Aborigines had already been living there for over 40,000 years. Debelle, *supra* note 87, at 81. See also ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 37.

178. Viewing Australia to be a "settled" rather than a conquered colony, the early British settlers treated the Aborigines in Australia as British subjects and applied English law to them to the exclusion of Aboriginal customary laws, except in the rare case where legislation provided otherwise. For example, in a directive to the Governor of New South Wales, the Colonial Office emphasized:

It is necessary from the moment the Aborigines of this country are declared British subjects they should, as far as possible, be taught that the British laws are to supersede their own, so that any native, who is suffering under their own customs, may have the power of an appeal to those of Great Britain, or, to put this in its true light, that all authorized persons should in all instances be required to protect a native from the violence of his fellows, even though they be in the execution of their laws.

ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 1.

179. The limited recognition of customary law was part of the government's policy of

neither formally recognized in cases arising between Aborigines and settlers nor in cases between the Aborigines themselves.¹⁸⁰

Responding to pressures that had built up since the early 1920s for a review of the policy of non-recognition,¹⁸¹ the Federal, State, and Territory legislatures in Australia adopted through various initiatives, including the conferral of land rights on the basis of traditional claims,¹⁸² the protection of sacred sites,¹⁸³ the recognition of traditional food gathering rights,¹⁸⁴ Aboriginal child care practice,¹⁸⁵ and intestate property distribution in accordance with Aboriginal traditions.¹⁸⁶

Significantly, in Queensland¹⁸⁷ and Western Australia,¹⁸⁸ the respective legislatures created local courts or other systems staffed by Aborigines to improve the administration of justice to the Aborigines. Provision was also

peaceable coexistence and dictated largely by the desire of the administration not to interfere in Aboriginal disputes that did not affect British settlements. *Id.* at para. 41.

180. The refusal to accord recognition extended to Aboriginal customary laws as they related to land, criminal law, and the recognition of Aboriginal marriages and child care arrangements. *Id.* paras. 47-48.

181. Factors for such a reappraisal included perceived injustice in the denial of recognition to "distinctive and long-established Aboriginal ways of belief and action" and the need for a supplementary mechanism to address the legal system's apparent failure to "deal appropriately with many Aboriginal disputes." *Id.* at para. 2. The disproportionately high levels of Aboriginal contact with the criminal justice system epitomized this failure and pointed to discrimination within the legal system. At a more general level, the demands for recognition of Aboriginal customary law were also influenced by changes at the federal, state, and territory levels from policies of assimilation and integration to those based on self-management and self-determination. *Id.*

182. The Aboriginal Land Rights Act of 1976, for example, provides:

Subject to this section, an Aboriginal or a group of Aborigines is entitled to enter upon Aboriginal land and use or occupy that land to the extent that the entry, occupation or use is in accordance with Aboriginal tradition governing the rights of the Aboriginal or group of Aborigines with respect to that land. . . .

Aboriginal Land Rights (Northern Territory) Act, 1976, § 71(1) (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/alra1976444/index.html.

183. Beginning with the South Australian Government in 1965, all State governments have now passed legislation protecting Aboriginal sites. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para 78.

184. Section 47 of the Aboriginal Lands Act of 1983 authorizes, in limited cases, access by Aborigines to land for hunting and fishing purposes. Aboriginal Land Rights Act, 1983, § 47 (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/alra1983201/.

185. The Community Welfare Act, 1983, § 69 (Austl.), http://www.austlii.edu.au/au/legis/nt/consol_act/cwa208/s69.html.

186. The Administration and Probate Act of 1979 provides for a traditional distribution of property to be ordered in certain cases where an Aborigine dies intestate. Administration and Probate Act, 1979, div. 4A (Austl.), available at http://www.austlii.edu.au/au/legis/nt/consol_act/aapa259.

187. Aboriginal courts operate on fourteen former Aboriginal reserves in Queensland, though not on a regular basis. The courts are staffed by Aborigines and have jurisdiction over a range of minor offenses committed within the reserves. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para 83.

188. A system of Aboriginal courts was set up in Western Australia in 1979 on an experimental basis for a number of Aboriginal communities in the northwestern part of the State. *Id.*

made by statute in South Australia to give effect to the customs and traditions of the Pitjantjatjara people in the hearing of certain disputes.¹⁸⁹ Complementing these legislative measures, the Australian courts recognized Aboriginal customary laws and traditions by taking them into account in the development of interrogation rules,¹⁹⁰ the exercise of prosecutorial discretion,¹⁹¹ the application of defenses based on provocation,¹⁹² and the award of damages.¹⁹³ Customary law issues were also addressed in other cases involving land rights,¹⁹⁴ breach of confidence,¹⁹⁵ and copyright claims.¹⁹⁶

II. REFERENCES TO CUSTOMARY LAW IN TRADITIONAL KNOWLEDGE RELATED JUDICIAL DECISIONS

Customary law arguments have been made to support claims to intellectual property rights in traditional knowledge. A few cases from Australia illustrate this trend. For example, in *Milpurrruru v. Indofurn Party Ltd.*, the court found copyright infringement in relation to indigenous artworks

189. The Pitjantjatjara Lands Act of 1981 authorizes the appointment of a tribal assessor to whom an appeal from a decision of the body corporate may be lodged. Anangu Pitjuntjatjara Yankunytjatjara Land Rights Act, 1981 §§ 35, 36(1) (Austl.). The tribal assessor is not bound by the rules of evidence but is required to observe and, where appropriate, give effect to the relevant customs and traditions. Similar provisions are found in the Maralinga Tjarutja Land Rights Act of 1984. Maralinga Tjarutja Land Rights Act, 1984, §§ 35-37 (Austl.).

190. According to the Australian Law Reform Commission, "[a]boriginal people, and particularly more traditionally oriented Aborigines, are, because of language difficulties, differing concepts of time and distance, cultural differences and other problems, at a considerable disadvantage when interrogated by police." ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 75. To mitigate against this adverse impact of standard criminal law interrogation rules on Aborigines, guidelines were developed for application during interrogation. The guidelines would require an interpreter to be present during the interrogation of an Aborigine, that the right to silence be respected, and that legal assistance be provided. *R. v. Anunga* (1976) 11 A.L.R. 412 (Austl.).

191. Under the new rules, prosecutorial discretion is expected to be informed by customary law, particularly in relation to decisions whether or not to prosecute Aborigines for certain offenses, to reduce murder charges to manslaughter, or to the State's entry of a plea of nolle prosequi. This is especially warranted where a criminal offense is committed under circumstances indicating a customary law basis for the crime or where the matter has been resolved satisfactorily under customary law or the relevant Aboriginal community indicates a desire not to have the case proceed. *Debelle*, *supra* note 87, at 92.

192. In some cases, the courts took account of the fact that an Aboriginal defendant had been provoked by the uttering of prohibited words or the disclosure of tribal secrets in the development of standards for the defense of provocation. *See, e.g., R. v. Williams*, (1974) 14 S.A. St. R. 1 (Austl.).

193. Loss of traditional status as a result of brain damage or other incapacity following a motor accident is a factor considered by some courts in making damage awards. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 73.

194. *Mabo v. Queensland*, (1992) 175 C.L.R. 1 (Austl.); *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 (Austl.).

195. *Foster v. Mountford* (1976) 14 A.L.R. 71 (Austl.).

196. *Yumbulul v. Reserve Bank of Austl.* (1991) 21 I.P.R. 481.

and awarded exemplary damages to three Aboriginal artists for the personal and cultural harm they suffered as a result of the unauthorized reproduction of their work, since the artists remained ultimately responsible and liable to punishment under Aboriginal customary law for the reproduction.¹⁹⁷ However, in *Yumbulul v. Reserve Bank of Australia*, an Australian court agreed with the claim that an indigenous painting reproduced on bank currency was an original artistic work in which copyright subsisted; the court recognized the plaintiff as the owner of the copyright.¹⁹⁸ Similarly, in *Bulun Bulun v. R & T Textiles Party Ltd.*, which involved an action for copyright infringement in connection with the importation and sale of fabric on which an indigenous painting had been reproduced, the court rejected the argument that Australia's Copyright Act of 1968 recognized the communal ownership interests of an indigenous group with rights to the painting under customary indigenous law.¹⁹⁹

Other cases have involved aspects of trademark law. For example, some Native Americans initiated action in a tribal court seeking to enjoin the use of the name Crazy Horse on a malt liquor product.²⁰⁰ Crazy Horse was the name

197. *Milpurruru and Others v. Indofurn Party and Others*, (1995) 30 I.P.R. 209 (Austl.). The court made other concessions to Aboriginal custom in the case, including its observance of an Aboriginal custom not to use the names of deceased Aboriginal artists in the proceedings and its award of damages as a lump sum to enable Aboriginal clans to take account of collective ownership of the designs in the allocation of damages amongst the members of the clan. *Id.* at 239.

198. *Yumbulul*, 21 I.P.R. at 490. In this case, the plaintiff asserted claims against the Federal Reserve Bank of Australia and the agency that represented the plaintiff in connection with a license agreement to reproduce on a commemorative ten dollar note an indigenous design that he made. The court found that the plaintiff inherited from his mother, a member of the Galpu clan, the right to make the traditional design that was the subject matter of the law suit. *Id.* at 123. Unchallenged evidence was presented to the court that the "attainment of the right to make such a [design] is a matter of great honour, and accordingly abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity." *Id.*

199. *Bulun Bulun v. R & T Textiles Party Ltd.* (1998), 41 I.P.R. 513, 525 (Austl.). The suit was based in part on a claim of equitable ownership of the design by one of the plaintiffs, an artist, on behalf of his indigenous group. The plaintiffs contended that under indigenous customary law the indigenous people were the traditional owners both of the body of ritual knowledge from which the painting was derived and of the subject matter of the painting. While acknowledging the possible application of indigenous intellectual property law from 1788 (when Australia was first occupied by the Europeans) to 1912 (when the Copyright Act was passed), the Court held that the notion of "communal title" advocated by the plaintiffs could no longer be supported under Australia's legal system where copyright matters were now governed entirely by statute. *Id.* The court decision is supported by the language in section 8 of the current Copyright Act that "copyright does not subsist otherwise than by virtue of this Act." Section 8, Copyright Act 1968 (Cth). The Court observed that under the Copyright Act, copyright is owned by the "author of a work," a concept held to exclude any notion of group ownership in a work unless it is a "work of joint authorship" within the meaning of the Act. *Bulun Bulun*, 41 I.P.R., at 525. In support of its ruling, the Court referred to judicial authority, holding a person who suggests an idea is not, on that ground alone, a joint author in any work embodying that suggestion. *See, e.g., Kenrick & Co. v. Lawrence & Co.* (1890) 25 Q.B.D. 99 (Austl.).

200. *Greene & Drescher*, *supra* note 117, at 418-19.

of a very popular Sioux leader who advocated against alcoholism. The petitioners argued that the use of the name resulted in defamation, caused emotional distress, and violated the trademark law. The tribal court found in their favor.²⁰¹ On appeal, the tribal court decision was reversed on technical grounds; the tribal court lacked jurisdiction because the acts complained against had not occurred on reservation land.²⁰² It is significant, however, that the court of appeals did not criticize the tribal court's ruling on the merits. Subsequently, the defendants settled the action by issuing a public apology and paying damages in accordance with customary law.²⁰³ The case clearly underscored the critical role customary law could play in the protection of indigenous intellectual property rights.

Even in non-IPR related actions, such as land claims, customary law arguments have gained prominence. For example, in *Mabo v. State of Queensland (No. 2)*, the Court held that under Australian common law indigenous rights in land survived European occupation unless a valid and express appropriation of those rights had been made by the Crown.²⁰⁴ A similar result was reached in *Wik Peoples v. State of Queensland*, where the central issue concerned whether certain pastoral and mining leases granted under statute from the Crown extinguished native title.²⁰⁵ Citing to the *Mabo (No. 2)* decision, the Court held the leases did not confer exclusive possession on the grantees because the rights of the grantees under the leases coexisted with the rights and interests of the indigenous inhabitants whose occupation derived from their traditional title.²⁰⁶

201. Terence Dougherty, *Group Right to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 389-90 (1998).

202. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998).

203. The measure of damages was "seven race horses and thirty-two Pendleton blankets, braids of tobacco and sweet grass." Sarah La Voi, Comment, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875, 886 (2003).

204. *Mabo v. Queensland (No. 2)*, (1992) 66 A.L.R. 408 (Austl.). Analogizing the position of indigenous people to that of a conquered society, the court ruled that local law would subsist to the extent it did not conflict with received British law, or until it was abolished by the colonial administration. *Id.* at 448. By this decision, the Court not only rejected the long-held view that Australia was an uninhabited territory country at the time of the European invasion but also the view that no concept of law existed. The Court determined there was some semblance of a system of rights and obligations observed by the traditional community. *Id.* In this sense, the case validated as indigenous customary law practices which until recently were the subject of anthropological study.

205. *Wik v. Queensland*, (1996) 141 A.L.R. 129 (Austl.).

206. In construing the effect of the leases, the Court focused not only on the language of the statute authorizing the leases but also on the customs and practices of the particular Indigenous community claiming rights derived from native title. It was clear from the Court's ruling that both the statutorily-based rights and indigenous rights could coexist as long as there was no conflict. While noting that native title rights would yield in the case of a conflict, the Court did not rule on whether native title rights were merely suspended or were extinguished during the period of the inconsistency. *Id.* at 159-60, 185. However, that matter has now been settled in a subsequent case. In *Fejo v. N. Territory of Austl.*, [1998] H.C.A. 58 (unreported), it

More recently, in *Alexkor Ltd. v. Richtersveld Community*, the Constitutional Court of South Africa upheld the right of the Richtersveld indigenous people of South Africa to occupy land as determined according to indigenous law without importing English conceptions of property law.²⁰⁷ In its decision, the Constitutional Court emphasized the “originality and distinctiveness of indigenous law as an independent source of norms within the legal system.”²⁰⁸

The determination of non-IPR-related rights in traditional knowledge through customary law has not been limited to land cases. In the United States, the superior courts have validated customary law claims in indigenous art and craft. For example, in *Chilkat Indian Village v. Johnson*, a tribal court authorized the return of artifacts and carvings on grounds that they constituted the property of an Alaskan village.²⁰⁹ The tribal court’s claim was based in part on an ordinance adopted by the Indian tribe pursuant to the tribe’s IRA-authorized constitution prohibiting the removal of artifacts from the village.²¹⁰ In an action by the tribe seeking return of the artifacts and monetary damages, the Ninth Circuit Court of Appeals upheld the power of tribal courts to act pursuant to local authority conferred on them, especially on matters affecting members of the tribe.²¹¹

Customary law has also been invoked to prevent the disclosure of sacred and secret traditional knowledge. In *Foster v. Mountford*,²¹² an indigenous group prevailed in its breach of confidence claim against an anthropologist planning to publish a book containing information he received from tribal leaders about tribal sites, objects, communal legends, secrets, paintings,

was held that native title rights were extinguished to the extent of any conflict. AUSTL. COPYRIGHT COUNCIL, PROTECTING INDIGENOUS INTELLECTUAL PROPERTY: A DISCUSSION PAPER 28 (1998).

207. *Alexkor Ltd. v. Richtersveld Cmty*, 2003 SACLRL 79 (CC) (2003) (S. Afr.).

208. *Id.* at para. 51.

209. *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989).

210. As quoted in the court’s decision, the Chilkat Indian Village Ordinance of 1976 provided:

No person shall enter on to the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange the removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.

No traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council.

Id. at 1471 (quoting Chilkat Indian Village Ordinance of 1976).

211. As the court noted, “[i]n the overwhelming majority of instances, a tribe’s enforcement of its ordinances against its members will raise no federal questions at all. Such cases primarily raise issues of tribal law, and they are the staple of the tribal courts.” *Id.* at 1475-76 (citation omitted).

212. *Foster v. Mountford*, (1976) 29 F.L.R. 233 (Austl.).

engravings, drawings, and totemic geography.²¹³ In granting the group's request for injunctive relief, the Australian court noted the serious harm to the traditional community that would result from publication of material the court found to have religious and cultural significance.²¹⁴ The findings of this case were echoed in another case brought by the indigenous group in relation to lantern slides taken by the same anthropologist of secret sacred material.²¹⁵

While these cases illustrate the relevance of customary law in matters involving traditional knowledge, the impression must not be left that customary law plays a perfect role in this context. Indeed, there are several issues with the application of customary law that could negatively impact its use as an enforcement scheme:²¹⁶ such as the inadequate recognition of customary law under national legal systems, weaknesses in the bases for the application of customary law sanctions, jurisdictional limitations, the indeterminate character of customary law, and the subjection of customary law to English concepts.²¹⁷ Some of these problems are inherent in the concept of customary law itself while others can be traced to specific rules developed for the ascertainment of customary law. These limitations of customary law are presented in the next section.

SECTION THREE: EFFECTIVENESS OF CUSTOMARY LAW AS AN ENFORCEMENT MECHANISM

I. STATUS OF CUSTOMARY LAW

Of the selected regions surveyed in the preceding section, the strongest recognition of customary law appears to be in Africa, where it is provided for in national constitutions. In general, the application of customary law in other areas is rather piecemeal. Although Australian case law demonstrates the sensitivity of the courts to issues pertaining to indigenous communities, the

213. AUSTL. COPYRIGHT COUNCIL, *supra* note 206, at 24.

214. In the opinion of the Supreme Court of the Northern Territory, the tribal community's cultural and social life would be disrupted by the "revelation of the secrets to their women, children and uninitiated men [which] may undermine the social and religious stability of their hard-pressed community." *Id.*

215. In *Pitjantjatjara Council, Inc. v. Lowe*, (1982) 30 ABORIGINAL LAW BULL. 11 (Austl.), the Court held that disclosure of the slides to the public would breach the trust reposed on Dr. Mountford when the slides were originally taken and would disrupt the social and religious structure of the Pitjantjatjara people. An order was issued turning over the slides to the council for examination as to whether they contained references to the philosophical or religious traditions of the Pitjantjatjara people. JANKE, *supra* note 14, at 73 (referring to an unreported decision of the Supreme Court of Victoria). Significantly, the Court held the property in and ownership of these selected slides, photographs and negatives vested in the Pitjantjatjara Council for and on behalf of the Pitjantjatjara Yankunjatjara and Ngaayjatjara peoples. *Id.*

216. See *supra* note 107 and accompanying text.

217. See footnotes 219 to 312 and accompanying text.

judicial responses cannot be said to accurately reflect a formal acceptance of customary law as part of the legal system. A criticism of the Australian judicial responses is that the recognition of customary law has tended to be particular rather than general, confined to particular jurisdictions, and often depended on the exercise of discretion by the courts rather than existing as of right. This is unsatisfactory, and in the words of the Australian Law Commission, has rendered "the recognition of Aboriginal customary law [to be] erratic, uncoordinated and incomplete."²¹⁸

Similarly, in New Zealand, the recognition of customary law has been characterized as "very limited and constricting, treating Maori customary law as analogous to foreign law or local custom in England."²¹⁹ The danger with this approach is that "in many contexts, Maori customary law will simply be supplanted by statute."²²⁰ As one writer concluded rather pessimistically, "[i]t is difficult to see how this situation could be changed by the courts, given the strong tradition of parliamentary sovereignty characteristic of New Zealand law.

A more substantial recognition of Maori customary law could only be brought by Parliament."²²¹ The creation of tribal courts in the United States is also welcome, but a great deal still needs to be done in terms of financial and other logistical support to improve the efficiency of the tribal courts.²²²

Even in Africa, where customary law is formally recognized as part of national legal systems, evidence of a weakening in the status of customary law²²³ is a cause for great concern. As customary law becomes less important as a source of law, it also loses its effectiveness as a method of protecting traditional knowledge. Factors responsible for this weakening of customary law in Africa include the lack of official recognition of traditional non-statutory adjudication systems in some areas, the general assumption that Western law is superior, and the abandonment of teaching of customary law in educational institutions.²²⁴

In some African countries, no serious effort has been made to study and implement customary law, relegating it to the unenviable status of the "nearly forgotten source of . . . law."²²⁵ Similar reasons account for the subordinate position of Maori customary law in New Zealand.²²⁶ Customary law would remain an effective method of protecting traditional knowledge only in so far as

218. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 85.

219. BOAST ET AL., *supra* note 91, at 18.

220. *Id.*

221. *Id.*

222. *See supra* note 159 and accompanying text.

223. Anyangwe, *supra* note 132, at 48.

224. *Id.* at 59.

225. Thompson, *supra* note 139, at 148-49.

226. Factors contributing to the undermining of Maori law include: "(a) the belief that English . . . law was superior; (b) the desire to create an ideal society in New Zealand; (c) the introduction of English laws and internalising colonial values; and (d) the settlers' desire for land resulting in land alienation from the Maori." MAORI CUSTOM AND VALUES, *supra* note 93, at para. 97.

it is recognized and applied in national legal systems by the courts. Consequently, unless concrete remedial steps are taken to enhance the status of customary law where it is already recognized and secure its recognition where it is not, the benefits of its application to traditional knowledge would be lost.

II. PRINCIPLES OF LIABILITY

Customary law sanctions may include censure, fines, or even ostracism and expulsion in more serious cases.²²⁷ Generally, the bases for the application of customary law sanctions can be traced to a variety of factors, including religious and magical beliefs, notions of collective responsibility, and fears of ridicule and ostracism.²²⁸

The religious sanction is premised on the view of the social unit²²⁹ as a continuous entity consisting of both the living and the dead who are equally concerned about the due observance of the law.²³⁰ The fear that the spirits of ancestors would unfailingly punish offenders ensures compliance with society's rules.²³¹ Where the offense has already been committed, legal compensation is urged to avoid the spiritual retribution that could befall the offender.²³²

Magical sanctions are similar to religious sanctions in that they are also believed to apply automatically after breaches of taboo.²³³ Thus, invoking a public magic ritual or even making a threat of witchcraft can create such a

227. Greene & Drescher, *supra* note 117, at 427-28.

228. See J.H. Driberg, *The African Conception of Law*, 16 J. COMP. LEGIS. & INT'L L., 230, 238-41 (1934).

229. As noted earlier:

The social organization of traditional societies is based on a strong pattern of kinship groups with the lineage as the basic constituent. The lineage forms the foundation of a wide social group called the clan. A system of interclan lineages in turn results in a tribe made up of people belonging to different lineages but speaking the same language with the same traditions.

Kuruk, *Protecting Folklore*, *supra* note 20, at 781 (footnotes omitted).

230. Driberg, *supra* note 228, at 238.

231. As Driberg notes:

The ancestors are just as much concerned as the living in the due observance of law. The law has moral support, not only of the living tribe, but of all the tribesmen who have ever lived and died. This terrific antiquity, remote but ever present, is in itself a very potent force in securing due regard for the law. But it does more: it introduces a religious sanction, which is perhaps the most potent factor of all. . . . Every offence has to be legally compensated and ceremonially purged, and until both are done the offender and his community are in danger of spiritual retribution.

Id.

232. Proposed amounts of compensation are generally flexible and take into account factors including the capacity of the guilty party to pay as well as the victim's willingness to accept a lower or substituted assessment, such as an acceptance of 6 goats instead of a cow. ELIAS, *supra* note 15, at 261.

233. Driberg, *supra* note 228, at 239.

strong fear of retribution to secure reparation from a recalcitrant offender.²³⁴

Under the concept of collective responsibility, all kinsmen are responsible for the actions of other kinsmen and are required to protect them. The concept is important to the system of punishment in several ways. First, collective responsibility serves to deter unnecessary wrongdoing because of the inherent belief that any offense committed by kinsmen would be avenged against any member of the social unit.²³⁵ Second, it increases the deterrent effect of expulsion as a form of punishment since an offender who has been expelled can no longer count on the support and protection of his ethnic group.²³⁶ Finally, the sanctions of ridicule and ostracism are premised on the importance indigenous societies attach to status.²³⁷ Though less effective than the preceding sanctions, the effect of public ridicule and ostracism is to put the victim out of status and no longer in a position to participate in communal activities until his offense has been purged and his status restored.²³⁸

All these sanctions would be useful in securing compliance with the customary law rules on traditional knowledge. For instance, since sacred objects tend to be associated with ancestral worship, the desecration or unauthorized uses of such items could be checked through fears of the inevitable infliction of religious retribution by the ancestors upon the offender. Similar considerations apply to the practice of traditional medicine, which is believed to be reserved only to individuals chosen by ancestors.²³⁹ Because punishment will not be limited to the individual but could apply to his children, spouse, relatives, and even clansmen under the notion of collective responsibility, a party would not deliberately set out to ignore rules regarding use of a sacred object considered part of traditional knowledge.

However, the bases for the application of customary law sanctions by indigenous groups may be inadequate to ensure compliance with rules governing access to traditional knowledge. Customary law in indigenous

234. Kuruk, *Protecting Folklore*, *supra* note 20, at 781.

235. Driberg, *supra* note 228, at 238.

236. Writing on the consequences of ostracism, one commentator notes, [D]isobedience could lead to the offender being ostracized by the larger family, or by the entire community. This was often the worst kind of punishment. The community would not buy from him or sell to him or members of his immediate family. If he was still obdurate (depending on the offence), he could either be banished from the community or he would leave of his own accord because he would not be able to bear the shame. Such exit usually must be for a distant community. Neighboring communities would probably know that the newcomer was an offender from another community. He would then be seen either as bringing ill luck, or as a danger to the new community since he might be disobedient and cause an upset in the new community.

BANKOLE SODIPO, *PIRACY AND COUNTERFEITING: GATT, TRIPS, AND DEVELOPING COUNTRIES* 43-44 (1997).

237. Driberg, *supra* note 228, at 241.

238. *Id.* at 240.

239. See, e.g., JOHN ROSCOE, *THE BAGANDA: AN ACCOUNT OF THEIR NATIVE CUSTOMS AND BELIEFS* 277-78 (1965) (discussing the role of medicine men among the Baganda).

societies generally relies on norms and sanctions that seem to make sense only to members of the groups. As noted, with reference to the Kiowa in the United States, sanctions are effective only "within a community of small size in which individuals generally knew other and many of whom were also linked by ties of kinship and personal obligation."²⁴⁰ Within the groups there is pressure to recognize and respect the rights and privileges associated with traditional knowledge in the common interests of members of the community.²⁴¹ Inherent in this system, however, is a defect that may limit the usefulness of customary law in tackling the problems of unauthorized uses of traditional knowledge. Since many of the individuals engaged in the unauthorized use of traditional knowledge are non-indigenous,²⁴² they may not have the incentive to respect the norms in the interest of the general community. Where those individuals using traditional knowledge are outside of the relevant community, fear of sanctions as a factor in securing compliance is simply non-existent due to lack of communal and ritual interests.²⁴³

240. Greene & Drescher, *supra* note 117, at 427-28.

241. The Author has previously described the nature of African customary law rights in traditional knowledge:

[R]ights are vested in particular segments of the community and are exercised under carefully circumscribed conditions. For instance, with regard to song, the recitation of oriki, a praise-singing poetry among the Yoruba in Nigeria, was preserved exclusively for certain families. Among the Lozi in Zimbabwe, each traditional leader has his own praise songs containing both historical lore and proverbial wisdom that are recited on important occasions by a select group of bandmen.

Precise rules also govern who can make or play certain musical instruments, and at what time and for what reasons they are played. Thus, the great national drums of the Lozi which are beaten only for war, or in national emergencies, are under the watchful eye of a special council of elders. Each Baganda king in Uganda has a select group of drummers who play special drums to ensure the permanency of his office. Among the Bahima of Uganda, only women keep harps which they use at home. Among the Baganda, fifes are owned and played mainly by herd boys. In Nigeria, certain musical instruments are dedicated to particular cults.

. . . Among the Tonga of Zimbabwe, crafts are subject to the sexual division of labor, in which wood and metals is assigned to men, the making of pots, baskets and mats to women...The making of Banyoro pottery, which is known for its excellent quality, is reserved to a distinct class separate from the ordinary peasants. In Nigeria, the Dakakari people have given exclusive rights to women to make grave sculpture. With respect to cloth-making, the chief of the Ashantis in Ghana is the trustee of interests in all designs in fabrics which he would either reserve for himself or allow prominent royals or dignitaries to copy for their use.

Kuruk, *Protecting Folklore*, *supra* note 20, at 783-85 (footnotes omitted).

242. This term is used broadly to refer not only to non-citizens of the country but also to citizens who are not members of the particular ethnic group to which the folkloric rights are relevant.

243. Soleri et al., *supra* note 17, at 22 (noting that U.S. guidelines for collecting folk varieties only call for respect of the local farmer and do not mention requesting permission or any form of recognition compensation).

Even with respect to indigenous collaborators residing in the community, who should be bound by the norms, socioeconomic factors seem to have eroded the significance of norms otherwise applicable to them.²⁴⁴ Initially, the simple nature and small size of traditional societies made it possible to accommodate a system of specialists providing for other members without any commercial motives. This was due largely out of necessity²⁴⁵ and as a gesture of generosity emanating from abundant resources.²⁴⁶

The advent of the modern state, however, has dispensed with the need for mutual cooperation to protect the community.²⁴⁷ In some areas, notions of collective ownership have been contaminated by concepts of private ownership and of production for profit as resources became scarce and the competition for them keen.²⁴⁸ As a result, considerations of communal interests seem to have given way to individualistic notions with their attendant commercialism.²⁴⁹ This modern individualism²⁵⁰ explains why customary law norms may not be quite as significant in traditional societies as they used to be and why some indigenous people are now willing partners in the unauthorized transfer of the community's traditional knowledge.

III. NATIONAL SYSTEMS OF ENFORCEMENT

In addition to the traditional adjudication systems comprising elders and chiefs in indigenous societies,²⁵¹ national court systems have been established in some areas by statute with a mandate to ascertain and apply customary law only. In the United States, Native American tribal courts are required to apply

244. According to T.O. Elias, "[t]he introduction of the money economy and of western legal and political ideas and values has meant the partial, and in some cases total, dissolution of the traditional ways of life of the peoples." T.O. Elias, *The Problem of Reducing Customary Laws to Writing*, in FOLKLAW, *supra* note 128, at 321 [hereinafter Elias, *Problem of Reducing*].

245. See GAIM KIBREAB, AFRICAN REFUGEES: REFLECTIONS ON THE AFRICAN REFUGEE PROBLEM 68 (1985) (explaining that people in traditional societies found it necessary to unite to protect life and property and to overcome problems caused by natural forces over which they had little control because of their poorly developed productive forces).

246. See *id.* (discussing the fact that the absence of private ownership of the basic means of production and the concomitant absence of any profit motives in the primarily low subsistence level economies that existed made it possible for visitors to be accommodated materially).

247. See *id.* The modern African state, with its developed system of defense in the form of large standing armies and efficient police units, provides adequate security for the community, making mutual cooperation for defense unnecessary. *Id.*

248. See Samuel K.B. Asante, *Interests in Land in the Customary Law of Ghana: A New Appraisal*, 74 YALE L.J. 848, 857 (1965) (discussing evolving concepts of land ownership in response to social and economic changes).

249. See *id.*

250. A principal effect of the introduction of capitalism to traditional societies is that "the extended family ties weakened in a number of places." Irina Sinitsina, *African Legal Tradition: J.M. Sarbah, J.B. Danquah, N.A. Ollennu*, in FOLKLAW, *supra* note 128, at 272.

251. John C. Messenger Jr., *The Role of Proverbs in a Nigerian Judicial System*, in FOLKLAW, *supra* note 128, at 422-25.

customary law as the primary law.²⁵² In Queensland and Western Australia, special courts staffed by Aborigines have also been created to apply Aboriginal law.²⁵³ In Africa, the customary law courts created by statute were given various designations depending on the country, such as "African courts," "native courts," "native authority courts," "primary courts," "local courts," or "people's courts."²⁵⁴

Complementing these statutory customary law courts are the general courts of the national legal system with jurisdiction to apply other types of law, including customary law. In areas where statutory customary courts coexist with general courts, the latter tend to have supervisory jurisdiction over the statutory customary courts.²⁵⁵ In other areas, however, like New Zealand, where statutory customary courts have not been set up, the general courts would apply customary law more or less on a discretionary basis.²⁵⁶

An advantage of judicial enforcement through the national courts is their complementary nature to the authority of elders and chiefs, particularly in cases where such authority is flouted. Thus, parties could be compelled to appear before the national courts and judgments against them enforced through sanctions specified by law.²⁵⁷ The effectiveness of such courts²⁵⁸ could be circumscribed by jurisdictional problems, however, since powers of these courts tend to be defined in terms of ethnicity, territoriality, and nationality. For example, the statutory customary courts in Africa have no jurisdiction over non-natives²⁵⁹ or even natives who have moved out of the courts' local spheres of influence within the country. In addition, the statutory customary courts, along with the general courts, will be denied personal jurisdiction where

252. Newton, *supra* note 15, at 1038; Porter, *supra* note 155, at 1611.

253. ABORIGINAL CUSTOMARY LAWS, *supra* note 89, at para. 83.

254. Anyangwe, *supra* note 132, at 46 n.2.

255. The Nigerian Constitution authorizes the creation by each state of a customary Court of Appeal to exercise appellate and supervisory jurisdiction in civil proceedings that involve customary law. However, no person is to be appointed as a judge in the state Customary Court of Appeal unless shown to have "considerable knowledge of and experience in the practice of Customary law." Constitution of the Federal Republic of Nigeria, Section 281(3)(b) (1999) available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>. Appeals from a state Customary Court of Appeal lie as a matter of right to a Federal Customary Court of Appeal created under the Constitution. At least three of the fifteen-member Federal Customary Court of Appeal are to be learned in customary law. See CONSTITUTION, arts. 280-81 (1999) (Nig.).

256. BOAST, *supra* note 91, at 15.

257. See, e.g., OBILADE, *supra* note 86, at 188-216 (describing the jurisdiction and powers of the national courts in Nigeria).

258. These include the general and statutory customary courts in Africa, tribal courts in the United States, and the courts administering justice to Aborigines in parts of Queensland and Western Australia.

259. According to Allott, "the most characteristic feature of native or African courts everywhere in Africa is that their jurisdiction is mainly or solely limited to persons of African race." ALLOTT, ESSAYS, *supra* note 127, at 114.

potential defendants leave the country.²⁶⁰

IV. PROCEDURES FOR THE ASCERTAINMENT AND APPLICATION OF CUSTOMARY LAW

Special rules have been developed in Africa for the ascertainment of customary law. Members of the statutory customary courts are presumed to know the customary law and are authorized to apply it on the basis of their knowledge. Judges in the general courts are not presumed to be familiar with the customary law, however, and are prevented from relying on such personal knowledge as their prior experience might provide.²⁶¹

As a rule, the party relying on customary law in the general courts is required to establish an adequate basis by allegation and proof before the court can apply it.²⁶² After proper pleading, customary law can be “proved in the first instance by calling witnesses acquainted with the native customs.”²⁶³ Such proof may come from chiefs, linguists, assessors, or others who qualify as experts on customary law. One could also prove customary law by referring to books or manuscripts recognized as legal authority, statutes, case law, or reports from statutory customary courts on questions referred to them.²⁶⁴

Recognizing that the determination of customary law as fact by the introduction of evidence is inconvenient, time-consuming, and sometimes fraught with uncertainty, the landmark case *Angu v. Attah* has also suggested the possibility of dispensing with evidence when “the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them.”²⁶⁵ Therefore, it opened the door for the ascertainment of customary law as a question of law through the taking of judicial notice by the general courts of well-established rules of customary law.

Once ascertained, customary law is to be applied by the courts, subject to the following conditions.²⁶⁶ First, the customary law rule cannot be repugnant to natural justice, equity, and good conscience. Second, it is not incompatible either directly or by implication with any law for the time being in force.²⁶⁷

260. However, they will have jurisdiction over “native foreigners,” i.e. non-nationals from other African countries found within the jurisdiction and who accept such jurisdiction. *Id.*

²⁶¹ A.N. Allott, *The Judicial Ascertainment of Customary Law in British Africa*, in FOLKLAW, *supra* note 128, at 296 [hereinafter Allott, *Judicial Ascertainment*].

262. It was held by the West African Court of Appeal in *Bonsi v. Adjena* that customary law, if relied upon by a party in to a civil case, must usually be specifically pleaded. *Bonsi v. Adjena*, (1940) W.A.C.A. 241.

263. *Id.*

264. Allott, *Judicial Ascertainment*, *supra* note 261, at 302-13.

265. *Angu*, PRIVY COUNCIL DECISIONS 1874-1928 43 (1916).

266. C. OGWURIKE, CONCEPT OF LAW IN ENGLISH-SPEAKING AFRICA 68 (1979).

267. *Id.* Although some statutes have identified public policy as another possible ground for invalidating a rule of customary law, it was apparently not a significant factor affecting the validity of customary law. Only a few reported cases make references to public policy in relation to customary law, and even then rather tangentially. For example, in discussing the

While the repugnancy clause is intended to invalidate "barbarous" or uncivilized customs,²⁶⁸ in applying the repugnancy test, it is not within the province of the courts to modify an uncivilized custom and apply the modified version of the custom.²⁶⁹ The second test, regarding that of incompatibility, has generally been limited to laws specifically enacted by the local legislature.²⁷⁰ A rule of customary law on a subject matter is perceived to be incompatible with a local statute if the statute is manifestly intended to govern that subject matter to the exclusion of customary law.²⁷¹ It is equally clear that where the coexistence of a rule of customary law and the statute is not inconsistent with the manifest object of the statute, no issue of incompatibility is raised. In every case, it is a question of construction whether a statute on a particular matter abolishes or modifies the customary law on the matter or is intended to coexist with the customary law.²⁷²

To some degree, the rules for ascertaining customary law in other regions of the world resemble African practice. For example, New Zealand courts, relying on African precedent, have laid down tests for enforcing customary law. These tests are based first on whether the alleged custom exists and second on whether it is contrary to statute and third on whether it is reasonable.²⁷³

In the United States, the indigenous law required to be applied in some tribal courts may derive from two main sources: the applicable laws of the tribe and the customs and usages of the tribe.²⁷⁴ The former are the written regulations adopted by the tribal governments in contrast to the latter, which may be ascertained from the advice of persons generally recognized in the community as being familiar with such customs and usages. For example, the Navajo Tribal Code permits the receipt of evidence from witnesses or elders or through independent investigation while the court is in recess.²⁷⁵ Where a legal

possible existence of a Yoruba custom of legitimation by acknowledgment of paternity, one court held only that if such a custom encouraged promiscuity it would be contrary to public policy. *Re Adadevoh*, (1951) 13 W.A.C.A. 304. The court did not refer to any statute authorizing the application of the test of public policy, but appeared to have considered the test on the basis of the common law. *Id.* at 310.

268. OBILADE, *supra* note 86, at 100. N.L.R. 65.

269. "The Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience." *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*, [1931] A.C. 662, 673 (Nig.).

270. The term "any law in force" has been held to refer to rules of the common law which include other classes of the received English law such as equity and statutes. OBILADE, *supra* note 86, at 106.

271. *See Salau v. Aderibigbe*, [1963] W.N.L.R. 80, 81 (Nig.).

272. OBILADE, *supra* note 86, at 109.

273. *Public Trustee v. Loasby*, [1908] 27 N.Z.L.R. 801, 806 (S.C.). Furthermore, in *Huakina Development Trust v. Waikato Valley Authority*, it was held that "customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence." [1987] 2 N.Z.L.R. 188 (H.C.).

274. Newton, *supra* note 15 at 1038-39.

275. Andrew M. Kanter, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411, 431 (1995).

rule is not found in the particular tribe's laws, some tribal codes authorize tribal courts to examine "the law of any tribe or state which is consistent with the policies underlying tribal law, custom and usages."²⁷⁶

It has been argued that the particular methods relied upon by the general courts and the statutory customary courts in ascertaining customary law may be prone to error.²⁷⁷ Contrary to expectations, members of statutory customary courts may not have deep knowledge of the relevant customary law rules in their areas of jurisdiction, especially where diverse practices are found among sections of an apparently homogenous tribe. Therefore, the danger exists that the rule applied by a member of a statutory customary court on the basis of his personal knowledge may not accurately reflect the rule of the particular locality. In some cases, the courts have declared customary law without reference to evidence or authority, relying purely on their own preconceptions of what the law should be.²⁷⁸ In other circumstances, the courts have used logic "to extend or discover rules of customary law."²⁷⁹

Where witnesses are used, whether by general or statutory customary

276. Title 7, Section 204, of the Navajo Nation Code provides:

A. In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.

B. Where any doubts arise as to the customs and usages of the Navajo Nation, the court may request the advice of counselors familiar with these customs and usages

C. Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.

NAVAJO NATION CODE tit. vii, § 204 (1985).

277. As noted by Cliff Thompson:

What little is known about customary law from the judgments of the state courts is potentially suspect because the judges who are expert in dealing with custom are outnumbered by those who, through no fault of their own, have neither experience nor training in either the nature or substance of customary law. The potentiality of error is increased by the surprising fact that there are no official guidelines for determining customary rules. Where relevant anthropological research is available, a court may use it, but otherwise the methods of determination vary considerably, particularly in the lower courts. Within a single province there may be one district judge who relies on the evidence of tribal elders, another who depends on the advice of his clerk because he happens to be a member of the tribal group concerned, and yet another who strictly applies his predecessor's memorandum on the local customs. Because some of these judicial techniques are of doubtful merit, there is an urgent need for a study leading to the drafting of minimum standards for the methods by which courts determine the substance of customary law.

Thompson, *supra* note 139, at 151 (footnotes omitted).

278. Gordon R. Woodman, *Some Realism About Customary Law—The West African Experience*, in FOLKLAW, *supra* note 128, at 88.

279. In this context, the courts reason that "this must be the customary law, because in the circumstances it is the only logical possibility." *Id.*

courts, there would be the usual problems of misrepresentation through witness bias, ignorance, corruption, tendency to idealize the law, and failure to appreciate that traditional law may have been modified by subsequent practice.²⁸⁰ Where chiefs are relied upon to declare customary law, problems of accuracy may exist; chiefs concurrently exercise executive and judicial powers and it may be difficult to know whether the declared law is a customary practice or a directive of the chief.²⁸¹ Additionally, chiefs often tend to be behind their communities in terms of the current legal thought and practice, leading to further problems of divergences.²⁸²

Given the different objectives anthropologists and lawyers appear to have when they examine social practices,²⁸³ some concerns may also be raised about the use of anthropological works by general courts and the statutory customary courts. While the lawyer may be concerned about the binding nature of customary law, and thus, with rules that can be enforced by the courts, this concern is not central to the work of the anthropologist.²⁸⁴ Therefore, not every practice referred to in an anthropological work rises to the level of customary law, and indiscriminating use of anthropological works as customary law could

280. Allott, *Judicial Ascertainment*, *supra* note 261, at 299.

281. Elias, *Problem of Reducing*, *supra* note 244, at 324.

282. According to Elias, "[W]ith but few important exceptions [the chiefs] are the least competent to make an effectual synthesis of the old and the new rules of conduct in a fast changing social and economic side." *Id.* at 324-25.

283. As Allott explains:

The aim of anthropology is wide, to record custom as one of the various phenomena of social life in the tribe or people under investigation. The anthropologist seeks to show the social purpose of customary rules, and how they fit into the structure of behavior. The aim of legal research is narrow, to record those rules of custom or usage which are either enforced in the courts, or are a kind which the courts would enforce. Appreciation of the part which these rules play in the social structure is therefore irrelevant, or at most only needed as background-knowledge, or for the better elucidation of the meaning of these rules.

A.N. Allott, *Methods of Legal Research into Customary Law*, in FOLKLAW, *supra* note 128, at 286 [hereinafter Allott, *Methods of Legal Research*].

284. One commentator noted:

[T]he tension between customary and formal law is deeply rooted in the very nature of each system of law, and it parallels inherent tension between the goals of anthropology and the goals of the legal system. For the anthropologist, the accommodation of customary law means more than the mere enforcement of marriage [social practice] in the formal system: it means preservation of customary law in a way that preserves cultural meaning and significance. Anthropologists would view the accommodation of customary law as treatment of "custom on custom's terms" with emphasis on oral narration, cultural growth and change, the subjective significance of the custom, and its varied, community based nature. The aims of the legal system are often in stark opposition to these anthropological principles: written or "hard" evidence, consistency, objective fact-based tests, and emphasis upon national or state society rather than smaller, community units.

Laymon, *supra* note 161, at 380-81 (footnote omitted).

sometimes lead to error. The problem with the statement of normative rules by anthropologists is not that the rules are erroneous per se. Indeed, the rules are accurate as representing what the anthropologists were told by the people they studied. The error, however, is in failing to recognize that the asserted rules are often subject to important qualifications not noted by those consulted.²⁸⁵ Even where anthropological works identify proper legal rules, they may be viewed as too authoritative and treated as a type of legislation exhibiting the same ossification problem noted in connection with codified customary law.²⁸⁶

Similarly, rules compiled through interviews of members of traditional communities are sometimes unreliable as customary law; the interviews are often directed toward obtaining abstract rules that fail to show the function of the rules in the social system.²⁸⁷ Besides, the interviews may yield distorted views of customary practices owing to individual opinions and pre-conceptions of the interviewer or the interviewee.²⁸⁸ Rules obtained through observation of actual cases of the non-statutory adjudication systems are more reliable than interviews; the cases tend to be more accurate and comprehensive, show what kinds of problems actually arise for resolution, and provide an insight into procedural aspects of customary law.²⁸⁹ Reliance on observed cases alone may not be practical, however, as it may be necessary to follow the activities of the non-statutory adjudication systems for years before a picture of the law

285. Moore explains this problems as follows:

There is no doubt that rule statements which sound exact are often made by the peoples anthropologists study. When Gutmann reports rules . . . he was surely not misrepresenting what his Chagga informants told him. Old ethnographies are full of legal rules stated as practices. For example Gutmann tells us that among the Chagga the wergild for the homicide of a man was seven steer and seven goats. But despite that apparently exact statement, anthropological knowledge of the way such matters work in practice suggests that matters were much more indefinite. What is meant by a steer? Were castrated male animals the only acceptable payment? Or was whatever Chagga term was used simply generic for cattle? Were cows ever used in payment? Could substitutions be made? And the age and sex of the goats? And what about the timing of payment—all at once, some immediately after the death, some later? Some perhaps never? What might lead to adjustment in the amount or kind of payment? And what happened if payment were delayed? Might a creditor choose to accept a few goats now rather than a calf later on? Negotiations were always necessary to answer these questions despite seemingly “exact” rules. The same kind of variability is often inherent in systems of bridewealth payment. The rules are “exact” but actual instances do not necessarily conform. Institutionalized forms of negotiation are standard adjuncts of these types of rules, demonstrating their inexactitude in practice.

SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: “CUSTOMARY” LAW IN KILIMANJARO, 1880-1980*, at 39-40 (1986) (citation omitted).

286. Elias, *Problem of Reducing*, *supra* note 244, at 319.

287. Simon Roberts, *The Recording of Customary Law: Some Problems of Method*, in FOLKLAW, *supra* note 128, at 332.

288. *Id.* at 333.

289. *Id.* at 333-34.

emerges. Even then, there may be gaps in knowledge where customary law matters of interest have not come up for resolution.²⁹⁰

With respect to proof through case law, no clear doctrine has emerged regarding the effect of previous judicial decisions on customary law. Where customary laws are treated as authority, problems may arise over the relative status of case law and customary practice, particularly in the general courts.²⁹¹ Reliance on codified legislation on customary law²⁹² is also problematic since codification freezes customary law in time; its rules become less customary, fossilized, and "far removed from the experience and comprehension of the people . . . [especially] as the processes of legislative amendment or adjustment to the changing needs of society are notoriously slow."²⁹³

Similar problems arise with proof of customary law through judicial notice. Although useful as a convenient and clear method of ascertaining customary law, judicial notice could impede the development of customary law and divorce it from the on-going life of the community, or even be applied improperly to actions involving parties from different tribes.²⁹⁴ Therefore, strict reliance by the national courts on case law, codified customary law, and judicial notice would only lead to gaps between customary law as practiced by the people and what is administered by the courts. At a more theoretical level, a related problem is that the basis of the application of customary law would change. Customary law is based on the fact that it is habitually obeyed by those subject to it. But, once customary law is codified or settled by judicial decision, its binding force then depends on the statute or the doctrine of precedent; it ceases to be customary law.²⁹⁵

There is a greater preference for legal textbooks as sources of customary law. They lack official authority and are, therefore, more flexible than statutes, and are more precise in the formulation of legal rules than anthropological works.²⁹⁶ As renowned jurist Elias stated quite eloquently, legal textbooks separate the "wheat of legal principles from chaff of cultural and economic irrelevancies."²⁹⁷ With rather few authoritative textbooks on the subject available,²⁹⁸ however, use of this method of ascertaining traditional knowledge

290. *Id.* at 335.

291. Allott notes that it is in magistrate courts that questions of precedent are likely to arise. Allott, *Methods of Legal Research*, *supra* note 283, at 285.

292. A well-known example of a comprehensive attempt at codification was in the Natal Province of South Africa with the compilation of the Natal Code of Native Law in 1875-1878 and 1891 respectively, and its revision in 1932. Allott, *Judicial Ascertainment*, *supra* note 261, at 312.

293. Elias, *Problem of Reducing*, *supra* note 244, at 326.

294. According to Gordon Woodman, "once a rule has been judicially recognized, it is liable to be applied to ethnic groups other than those whose customs were in issue in the decisive cases." Woodman, *supra* note 278, at 91.

295. Allott, *Judicial Ascertainment*, *supra* note 261, at 309.

296. Elias, *Problem of Reducing*, *supra* note 244, at 320.

297. *Id.* at 328.

298. The best known examples in Africa are Mensah Sarbah's *Fanti Customary Laws* and

may be quite limited.

V. IMPRECISION AND FLEXIBILITY OF CUSTOMARY LAW

The largely unwritten character of customary law²⁹⁹ would contribute significantly to problems with ascertaining and enforcing it in the national courts.³⁰⁰ Because it is transmitted orally from generation to generation, customary law contains a margin of error that makes it impossible to achieve the same level of clarity and precision frequently sought in Western legal concepts.³⁰¹ Compounding the problem of imprecision and uncertainty in customary law rules are the different goals of non-statutory traditional adjudication systems, where the emphasis is on “negotiation leading to compromise and reconciliation of the parties, rather than the rigid application of rules to facts.”³⁰²

Thus, customary law is applied flexibly in traditional non-statutory adjudication systems³⁰³ with only arbitrary distinctions drawn between legal rules and other types of social conduct. Chiefs and elders in traditional societies would as easily invoke social norms to supply the criterion of right and reasonable behavior as they would rebuke or condemn the offender on the basis of such non-legal rules. This is justified to “maintain peace in the community and heal breaches in the social fabric, rather than to right wrongs.”³⁰⁴

Due to this mixture of legal and non-legal rules, it would be necessary for the general and statutory customary courts to exercise caution when called upon

Whitfield's *South African Native Law*. See JOHN MENSAB SARBAH, FANTI CUSTOMARY LAWS (1968); GEORGE MAXWELL BRUCE WHITFIELD, *SOUTH AFRICAN NATIVE LAW* (1948).

299. Elias, *Problem of Reducing*, *supra* note 244, at 320.

300. Laymon, *supra* note 161, at 362.

301. T.W. Bennett & T. Vermeulen, *Codification of Customary Law*, 24 J. AFR. L. 206, 212 (1980).

302. Allott, *Judicial Ascertainment*, *supra* note 261, at 296.

303. As explained by Moore:

There is a widespread assumption outside of anthropology that preindustrial peoples are somehow more rigid about their oral rules than postindustrial ones are about their written laws. That is simply not so. Among peoples such as the Chagga, the flexibility of many supposedly rule-governed arrangements was and is a basic fact of life even as it is among ourselves. In all legal systems there is a tension between standardization through rules of general application and the negotiability and discretionary arrangement of specific affairs. Further, many rules that are stated as if they were universally “applied” are in practice selectively used. Choices about these matters exist in some form in all societies. This plasticity is no less present in a system of oral customary law than in written law. Certainly some rules are much more frequently followed than others, but in the absence of statistical data comparing rules with practices, there is no reason to be literal about rule statements. They must not be read as invariable practices in any society, nor as representing the way the system “works.”

MOORE, *supra* note 285, at 38.

304. Greene & Drescher, *supra* note 117, at 427. See also Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT'L L. 62, 70 (2003).

to apply as customary law all rules claimed to have been derived from non-statutory adjudication systems. Failure by the general and statutory customary courts to discriminate "between custom having the force of law and that which lacks that force though having a moral or religious sanction"³⁰⁵ would inevitably result in errors as to what constitutes customary law.³⁰⁶

Indeed, research into the activities of the statutory customary courts has called into serious question whether those courts even actually apply "customary law" as such. The following comments reveal the basis for such skepticism:

Bohmer's study of the lower courts of Upper Volta, which was based on an acceptance of definitions of African law of Allott and Elias which stress that there was "indeed law", separable and distinct in African societies, was unable to observe the use of it by the customary courts, which did not appear to apply it. Judges and assessors, she found, were ignorant of it and thought such knowledge to be irrelevant, disputes were solved by what "seemed 'fair' in the circumstances." This was not necessarily based on idyllic reconciliation: community values projected from the audience could be oppressive, so could judicial homilies, and scorned women litigants were led sobbing from the courtroom. Van Binsbergen, observing the post-colonial "law" of the Nkoya in Zambia, concludes that courts and rules were peripheral to the judicial process and the settlement of conflict in those areas in which customary law is supposed by lawyers to apply. Regarding inheritance, he wrote, there was not a set of rules but a set of expectations and no formal redressive action could be taken if they were not met. "The relatives are left with their resentment and are likely to turn to sorcery for revenge." Action outside of a court arena might be taken by the headman to prevent this but he would be concerned not with rules and justice, or rights and obligations, but with the dulling of animosities. Conflict was regarded "not as a matter of right or wrong against abstract, unalterable criteria of formulated rules of behaviour, but as a direct threat to group unity . . . the awareness of continually being on the edge of disruption."³⁰⁷

These findings are consistent with the conclusions of another study that "actual court cases were not concerned with the identity of rules and that courts did not

305. Allott, *Judicial Ascertainment*, *supra* note 261, at 297.

306. Bennett & Vermeulen, *supra* note 301, at 214.

307. MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER* 65-66 (1985).

develop a rule-orientation of their own initiative.”³⁰⁸

VI. DEFINITIONAL ISSUES

Finally, courts seeking to ascertain customary law rules would be confronted with a basic definitional question regarding the size of the group whose practices ought to be taken into account. Because social groups rarely have clear-cut boundaries and may involve “a gradient of more or less inclusive groups that live in a certain region, have similar histories, and share many cultural traits,”³⁰⁹ significant variances in customary law could exist based on the size of the group that is the subject of focus such as the lineage, clan, tribe, or language group. For instance, a problem with the view of customary law as a question of law is the tendency to assume that customary law rules are uniform in an apparently homogenous group³¹⁰ and to ignore significant differences in customary practices among sections of a tribe where a customary rule is defined broadly in terms of the tribe. Thus, the absence of an acceptable definition for the social group relevant to the formation of folklore rights would continue to frustrate efforts to identify and enforce those rights.

CONCLUSIONS

Other than the reference to broad principles governing access to and sharing of benefits in traditional knowledge in accordance with rules of customary law, the sui generis regional model laws do not elaborate on the specific content of such rules. The omission is understandable. Given the extreme diversity in customary law amongst indigenous groups, it would not have been feasible to provide such details in model instruments. The drafters very prudently left that matter to be addressed under additional legislation or other guidelines to be developed on the basis of the model laws.

As envisaged under the model laws, anyone interested in exploiting an item of traditional knowledge would first need to approach the relevant national agency for information regarding the identity of rights-holders when unknown. When contacted, the rights-holders would apprise the resource-seekers of the specific customary law rules that govern the particular item of traditional knowledge. Beyond the national agency and the rights-holders themselves, other sources of information regarding the content of customary law rules may consist of the secondary sources discussed in the Article, including anthropological works, treatises, case-law, statutes, and interviews.³¹¹

Despite the limitations of customary law noted in the preceding section,

308. *Id.* at 66.

309. Fernando Santos Granero, Commentary, *Can Culture be Copyrighted?* 39 CURRENT ANTHROPOLOGY 214 (1998).

310. Elias, *Problem of Reducing*, *supra* note 244, at 319.

311. *See supra* notes 283-299 and accompanying text.

disuse of customary law in protecting traditional knowledge is not recommended. Indeed, such a move would be highly impractical or even illogical; it is the customary practices that define what constitutes traditional knowledge in the first place.³¹² Rather than discourage the use of customary law, the approach preferred here is to recognize formally the legal status of customary law in the legal system and then to improve on the current methods of ascertaining and applying rules relating to traditional knowledge.³¹³ While significant, the problems surrounding the utility of customary law as an enforcement mechanism are clearly not insurmountable.

Complementing the formal recognition of customary law under legal systems should come with the creation of suitable mechanisms for its enforcement. In the specific context of traditional knowledge, a national agency could be set up to oversee arrangements governing access, use, and benefit-sharing in relation to traditional knowledge as found in the regional model laws from Africa and the Pacific. Where the national agency is able to provide information regarding the location and owners of indigenous resources, it would reduce significantly the problem of biopiracy caused by the exploiters' ignorance of the identity of the owners of indigenous knowledge.³¹⁴ The agency could also assist in the effective participation of the indigenous groups in the negotiations for access and could ensure that the indigenous groups are provided full prior and informed consent. For the agencies to be able to discharge their obligations in the interests of indigenous groups without interference from the government, however, the composition of the national bodies must reflect a significant presence of indigenous persons and experts.

In addition to the creation of national agencies, procedures must be created to allow cases involving misappropriation of traditional knowledge to be enforced through an effective court system. This will remedy a defect in the African Model Law, where the revocation of permits appears to be the contemplated remedy for breaches of transfer resource contracts.³¹⁵ The possibility of an indigenous group filing suit before a national court would afford a means of enforcing the customary law decisions of indigenous groups regarding uses of traditional knowledge and thereby complement traditional non-statutory judicial systems, especially in cases where the traditional

312. *Supra* notes 87-106 and accompanying text.

313. It has been suggested that in evaluating customs:

[T]he courts are urged to consider among others, the place of the custom in the community, its value and influence, and whether its application is in accordance with the rule of law and the spirit of the constitution. In this way, the courts will not be saddled with the problem of determining different standards of natural justice, equity, and good conscience to be applied to the various communities, and whether the custom violates their notion of public policy.

Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. COMP. L. 571, 592 (1989).

314. Janet McGowan & Iroka Udeinya, *Collecting Traditional Medicines in Nigeria: A Proposal for IPR Compensation*, in SOURCEBOOK, *supra* note 11, at 59.

315. *African Model Law*, *supra* note 35, art. 14.

enforcement methods are weakened because the defendants are non-indigenous.

To improve on methods of ascertaining and applying customary law, the national agencies should undertake to identify rules governing the use of items of traditional knowledge and compile them in a database that would be available to the public, including the courts. The rules may deal with relevant issues such as the identity of rights-holders, types of traditional knowledge subject to commercialization, permitted uses, and forms of payment. As much as possible, the rules should be gleaned from contemporary interviews with indigenous persons to limit excessive reliance on anthropological works. To avoid the problem of freezing customary law, departures by courts from the compiled rules should be permitted where the evidence suggests that the compiled rule has changed. Furthermore, in deciding whether to enforce a customary law rule, a court should not test its validity with reference to intellectual property statutes unless such statutes expressly abolish or modify the related traditional knowledge claim.

Premised as they are on access and benefit-sharing principles, the regional model laws, like the Convention on Biological Diversity from which they were inspired, contemplate contracts between indigenous communities and users of traditional knowledge as the central mechanism for achieving the objectives of the instruments. However, dependence by indigenous peoples on contractual agreements as a method of protecting their rights raises significant concerns. The first major problem is that indigenous peoples lack not only the expertise to negotiate and ensure a fair deal but also the technological and scientific capacity to capitalize on commercial collaborations and opportunities that could be created under contractual arrangements. Second, because very few discoveries resulting from bio-prospecting arrangements actually translate into profits, the benefit-sharing provisions are rarely implemented with a concomitant economic loss to traditional communities. Third, the contributions of indigenous communities could be ignored by manipulating the rules of the game where, for instance, recipient-parties to the contracts claim that no compensation is payable because they made use of ex-situ collections rather than the resources of the provider-country. Fourth, contractual arrangements could be used to weaken the bargaining power of developing countries, especially where a particular resource is found in several countries. These agreements would enable biotechnology companies to shop around and play communities against each other in the companies' bids to attract the lowest possible prices to the detriment of traditional communities.

Despite these misgivings, contractual arrangements as an essential part of sui generis model laws cannot simply be ignored. The concerns noted could be mitigated by subjecting all negotiated contracts to review by the proposed national agency. Such review would ensure that the contracts are fair and equitable for the traditional communities concerned.

It is also recommended that work be continued for the adoption of a binding international instrument on access- and benefit-sharing to overcome jurisdictional and other enforcement issues certain to arise in cases that have

international dimensions. Customary law sanctions, even if supplemented or reinforced by effective government systems, provide only domestic remedies, which are useless in the event the party in breach of an access- and benefit-sharing contract leaves the country where the parties entered into the contract. Without the cooperation of the country to which the party has moved, the authorities in the first country can neither acquire jurisdiction over him nor enforce any judgment they may have obtained against him. A binding international access scheme, however, which, imposes responsibilities on both the traditional knowledge provider and user countries in terms of cooperation in connection with these jurisdictional and enforcement matters would significantly improve the framework of protection under the current *sui generis* regional models.