

Customary law as the basis for Prior Informed Consent of Local and Indigenous Communities

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The development of national and International law and policy on ABS is inextricably linked to the development of appropriate law and policy to recognize and protect the rights of indigenous peoples and local communities over their traditional knowledge (TK). There is a growing tendency to require prior informed consent of indigenous peoples and local communities for access to genetic resources on their land as well as to TK. It is also increasingly recognized that customary law and practice of indigenous peoples and local communities has a key role to play in defining the manner in which PIC procedures should be applied. This paper seeks to highlight the importance of customary law and practice for the realization of the three objectives of the CBD and to identify a research agenda to help define modalities for ensuring the effective recognition, respect and enforcement of customary law in any international regime on ABS.

PIC of Indigenous Peoples and Local Communities

The Convention on Biological Diversity established the moral if not the legal basis for requiring prior informed consent (PIC) of local and indigenous communities for access to and use of their traditional knowledge, innovations and practices relating to biological resources. The Bonn Guidelines went further stating that PIC of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained. Experience in the development of regional and national ABS laws has tended to take the approach that ABS and TK issues must be dealt with in tandem, and to recognize an obligation to seek PIC of indigenous and local communities as a condition of access to use of genetic resources on their territories and to traditional knowledge. Such is the case with the Andean community Decision 391 and the African Model Law.

Requirements for PIC of local and indigenous communities, has been established at the national level by various different instruments, including constitutional law (Venezuela), national indigenous rights law (Philippines), as well as under laws for the protection of rights over traditional knowledge (Peru) and folklore (Panama). Rights of communities to PIC also arise under ILO Convention 169, which requires consultation prior to the granting of exploration and exploitation rights over natural resources. All of these instruments recognize, in varying degrees, a role for customary law of indigenous peoples in the regulation of access and/or the resolution of disputes relating to the use of resources and/or knowledge.

The applicability of customary law and practice for natural resource management in general, and for ABS and protection of TK in particular, is even more widespread. In many parts of Africa, Latin America, Asia and the Pacific region, constitutional and national law recognizes a role for customary law in issues covering natural resource management and land and marine tenure. In the Pacific region, for example, upwards of 80% of land and a significant portion of coastal and marine areas are subject to traditional tenure rights. Likewise in this region, rights over both biological and genetic resources are subject to customary law rights. It can be seen, therefore, that under such circumstances ABS issues must be governed with due

respect for, and compliance with, customary law. Furthermore, it is clear that customary law is closely linked to traditional resource management.

In Search of Mechanisms for Protection of TK

In the development of TK regimes there has been a tendency to focus on developing mechanisms to control the scientific and commercial use of TK, with the apparent aim of enabling indigenous and local communities to capture the anticipated benefits of the commercialization of TK. This has often conflicted with the expressed desire of indigenous and local communities to protect the integrity of traditional knowledge, as part of their cultural heritage, rather than allowing it to become another marketable good.

Despite its capacity to regulate local resource and TK use, it is immediately clear that limitations upon the enforcement of customary law and practice outside areas under the control of indigenous and local communities, reduces its effectiveness for protecting rights over traditional knowledge. Similarly, the capacity of national law to extend protection to traditional knowledge, which has found its way beyond the area of control of indigenous peoples, is limited to the frontiers of national jurisdiction. Regional initiatives, such as those of the Andean Community, Organization of African Unity and the South Pacific Forum may provide for a further extension of rights but once again these are limited. This highlights the need for a global response, establishing clear recognition and respect for links between customary laws and the various levels of national, regional, and international law.

The multiplicity of existing customary law regimes would make it impossible to identify a specific body of rules, which could apply to all cases. The Four directions Council, a North American indigenous organization, states:

Indigenous peoples possess their own locally-specific system of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language. Rather than trying to establish a one size fits all IP regime to protect traditional knowledge the Four Directions Council proposes that governments agree that traditional knowledge must be acquired and used in conformity with the customary laws of the people concerned

This demonstrates the need for the development of a flexible international regime providing the security of an enforceable system of protection for the rights of local and indigenous communities, while ensuring respect for and compliance with a variety of differing systems of customary law and practice.

To achieve the objective of protecting and strengthening traditional knowledge and innovation systems, in the most appropriate and effective fashion, it will be necessary to identify:

- The objectives of protection;
- Threats faced by traditional knowledge and innovation systems;
- Potential mechanisms for securing protection;

- Priorities of the custodians of traditional knowledge; and
- Potential mechanisms for securing wide protection in a manner that enhances, respects and conforms with customary law and practice.

Building Bridges between Indigenous Customary Law and Practice and National and International Legal Regimes

Presently, in the majority of cases, where customary law conflicts with domestic law the latter prevails. The exception being when a national law can be shown to conflict with constitutionally recognized customary rights. In such cases the aggrieved party will still need the authorities to amend the offending legislation, and to take such remedial measures as may be required to redress any wrong doing. Sometimes, there may be little hope of redress where irreversible exploitation of resources has occurred. Where no constitutional protection exists, communities will forever be dependent upon the goodwill of the national authorities, as legislative action can at any time result in the abrogation of ancestral rights.

Customary law and practice may be undermined by the adoption of culturally insensitive national laws. Similarly, traditional authority is being eroded as those unhappy with their decisions seek recourse to alternative decision-making authorities, or judicial review, both a cause and a symptom of the break down of community social structures.

The challenge for ongoing processes is to come up with systems for defining ownership and “responsibility” under law in a culturally sensitive and appropriate fashion, without leading to an erosion of confidence and security for communities. Where indigenous peoples rights are defined in a constitutional framework which is completely alien to them, analysis of their rights, rather than proving protective and enabling, becomes a form of cultural and legal domination (Glenn 2000). Likewise, indigenous peoples are not empowered when placed in the dilemma of being forced to defend their collective rights in a legal, textual and interpretative context so foreign to their own social or political context, that simply making a claim requires accepting the dominant cultural and conceptual framework (Turpel 1990). The challenge for legislators at both the national and international level is therefore to encounter means to respect and protect indigenous rights in a culturally appropriate and legally effective manner.

Terri Jenki, in a comprehensive work on protection of Australian indigenous peoples cultural heritage, argues that it is not merely a matter of recognising the uniqueness of indigenous culture but of respecting it and understanding that indigenous knowledge and western knowledge are two parallel and equal systems of innovation. Furthermore, she contends it must be recognised that indigenous customary law and the existing Australian legal system are two parallel systems of law, both of which need to be given proper weight and recognition (Jenki 1998).

While recognition and respect for customary law and practice is considered fundamental for securing the conservation and sustainable use of land and marine ecosystems, where such laws conflict with basic human rights, there is a need to develop meaningful processes to promote the progressive phasing out of infringing practices. In the process of advocating the rights of local and indigenous communities to govern their own affairs (utilizing customary law and practice), an opportunity exists to promote respect for human rights - although care must

III. Specific Issues for consideration in the elaboration of the IR:
Indigenous Peoples-Community-level PIC for accessing TK and genetic resources

be taken to ensure that in the name of human rights protection the fundamental rights of communities are not arbitrarily overridden.

Proposals for the codification of customary law and practice have arisen in a number of forums, including the WIPO IGC. This is something which requires careful consideration as to do so would affect the flexibility of customary legal regimes and could have negative impacts for the long term protection of indigenous rights. Consideration of the experience of native title issues in Australia provides a salutary lesson with regard to this proposal. Commenting upon proposals for the codification of customary law based upon the Australian experience, long time aboriginal activist, Mick Dodson, has warned that the codification of rights may signify the first step towards their exhaustion. This occurred with the Native Title Act, where the development of the principle of exhaustion of rights resulted in many aboriginal peoples losing their land rights. Opposition also exists amongst communities in South Pacific Island States where traditional tenure is linked to the ability to narrate genealogies. Disclosure is seen as akin to giving away ownership, and communities frequently display reluctance to the codification and sharing of this information for fear this will compromise rights.

While awareness of the intrinsic, economic, social, environmental and cultural value of traditional knowledge has grown there has been little research of the links between ABS, TK, customary law and practice, and traditional territorial rights as defined in traditional land tenure. To this end, a study of the experiences of indigenous and local communities with regards the recognition and protection of their rights over their TK, lands and resources, may provide some guidance for legislators at all levels, and a means for respecting customary law and practice. Drawing from practical experiences, both successful and otherwise, it may be possible to identify those measures, which enhance the efficacy of the interface between customary law and national, regional and international law.

A comparative study of the underlying principles of customary law and practice may assist in identification of general concepts, which may in turn help define a body of equitable principles to assist in the resolution of disputes relating to access to genetic resources and TK. Further research questions are considered in the attached annex.

Conclusions

The links between national governance and customary law, traditional knowledge and customary land tenure, will require in-depth comparative analysis if best practices for the development of interfaces between differing legal regimes are to be identified.

Any such study should not limit itself to merely considering the modalities for the protection of traditional knowledge, and the development of mechanisms to control the commercial and scientific use of TK. Rather, what is required is the adoption of a wider and more expansive view of the nature, role and values of traditional knowledge and its relationship to traditional resource management systems, with a view to determining the internal and external factors which are placing strains upon traditional knowledge and innovation systems, as well as those which are conducive to their protection and continuing development.

Consequently, it is proposed that there is need for a wide ranging comparative study of the mechanisms for securing the protection and strengthening of traditional knowledge and innovations systems, through the development of effective interfaces between national and international legal regimes and customary law and practice. Furthermore there is a need to

gear such study towards the investigation of modalities for enhancing the adoption of national policy to promote respect, understanding and promotion of TK, as well as the strengthening of traditional resource management systems and customary land tenure.

ANNEX

Developing a research agenda

In order to advance the debate on issues relating to the role of customary law and practice in ABS regulation, there is a need for a more concerted effort to promote the necessary research - and most importantly research by indigenous and local community experts - into issues such as:

- What framework of national legislative, administrative and policy measures is most conducive to ensuring the full and effective recognition and respect for the implementation, jurisdiction and effective implementation of customary law and practice?
- What is the correlation between recognition and respect for traditional authority and conservation and sustainable use of resources?
- What is the link between traditional knowledge, customary law and practice and traditional land and marine tenure?
- What is the role of customary law and practice in securing conservation and sustainable use of resources?
- Are there cases where allowing the free exercise of traditional authority and/or customary law and practice may have negative social, cultural, environmental and economic impacts?
- Are there any instances when national law may legitimately intervene in traditional decision-making processes in order to ensure social, economic, cultural or environmental rights?
- Where must a line be drawn between protection of human rights and the right to freely apply traditional authority and customary law and practice?
- What conditions are necessary for the functioning of a stand-alone system of customary law and practice?
- What conditions lead to the deterioration of traditional decision making authority?
- To what extent are non-codified customary law regimes susceptible to manipulation by incumbent authorities?