

# WHAT PLACE FOR CUSTOMARY LAW IN PROTECTING TRADITIONAL KNOWLEDGE?

Traditional knowledge (TK) is a cornerstone of the cultures, livelihoods and human rights of indigenous peoples and local communities. These communities have consistently argued that any legal regime for the protection of their knowledge should be grounded in their own customary laws and practices. But this raises a number of challenging questions; for example, can customary law exist alongside national legal systems? What happens when there is a conflict between these legal systems and which law will prevail? In this article, **Patricia Adjei**, a WIPO Indigenous IP Law Fellow, from Australia, draws from her personal experiences to discuss challenges and opportunities for securing effective respect and recognition of customary law in regulating the use and protection of traditional knowledge and traditional cultural expressions (TCEs).

There is growing recognition within international circles that “due recognition or consideration” needs to be given to customary law. This is evident in international human rights law in which states are urged to “give due recognition, consideration and respect for customary law in the development of law and policy affecting indigenous peoples’ rights to their lands, territories and resources” and which calls for protection of their rights over their TK and intellectual property (IP). It is similarly reflected in text-based negotiations within WIPO’s Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) and the Draft Protocol to the Convention on Biological Diversity (CBD). What this actually means in practice, however, is unclear.

## What is customary law?

Customary law refers to the laws, practices and customs of indigenous and local communities which are an intrinsic and central part of the way of life of these communities. Customary laws are embedded in the culture and values of a community or society; they govern acceptable standards of behavior and are actively enforced by members of the community.

As these laws are peculiar to the specific cultures in which they have evolved, the global landscape of customary laws and practices is rich and highly diverse. While there are similarities from which common principles may be drawn, customary laws are often quite distinctive and as such do not lend themselves easily to a “one-size-fits-all” approach.

## Working through the challenges

Customary law is typically holistic in nature and often sits alongside human rights law, land rights and IP law to protect TK. For many practitioners, such as anthropologists, lawyers and environmentalists working on TK and TCEs, “meshing” customary laws with national laws that protect TK is often puzzling and always challenging.

When customary law meets national legal systems a raft of questions arises. For example, how does customary law interact with prevailing legal systems and how does it apply to third parties? How are rules of evidence and proof of custom governed? What are the procedures for its interpretation? To what extent are effective remedies for breaches of rights over TK and TCEs found in customary law? What is the role and treatment of customary law in international judicial forums and in alternative dispute resolution procedures?

While developing a workable interface or fit between customary law and national legal systems presents challenges, it is now widely recognized that these two distinctive systems can co-exist in harmony. Such legal pluralism, however, when differing sets of laws operate at the same time, does require a great deal of creativity on the part of national governments responsible for adapting existing laws and drafting and implementing new legislation.

Challenges arise when customary laws are incorporated into national legal frameworks; for exam-

ple, when a court is faced with a situation in which copyright ownership conflicts with the principles of ownership defined in customary law.

Some commentators have suggested that such challenges may be addressed by documenting and codifying the norms and principles of customary law to provide the basis for drafting new *sui generis* legal mechanisms that merge customary law with the prevailing national legal systems. The extent to which such national legal systems recognize customary law, however, will largely depend on the political will of the implementing government. The merits of this approach are currently under discussion within the IGC.

low a number of strict customary laws to protect the use of their stories and music. For example, anyone from outside the community wishing to use a song or a dance must first consult with the elders of the specific island concerned to obtain permission to do so. These laws are known to most communities and passed down from generation to generation, not necessarily in written form.

While customary law and the Australian common law system operate in parallel in the Torres Strait Islands, when there is a conflict between laws, the common law system prevails over customary law. The common law system does not as yet recognize any customary laws before a court and, as

Photo: MASWAC



**Donny Woolagoodja, Senior Artist, Chairman of the Mowanjum Artists Spirit of the Wandjina Aboriginal Corporation with Andrew Leslie of Viscopy, a non-profit rights management organization for the visual arts. Art work features the Wandjina spirit of the Mowanjum community.**

A crucial step towards securing effective respect and recognition of customary laws is for policy-makers and lawmakers to develop an understanding of how to overcome the practical and legal obstacles that arise when customary law interfaces with existing legal systems, both in the countries in which custodians of TK and TCEs reside as well as in those countries in which their TK and TCEs are documented, stored and used.

## Parallel legal systems

TK and TCEs are developed, maintained and used within indigenous communities. Many communities observe their customary laws regardless of whether the protection of TK and TCEs is provided for in the national legal system.

In Australia, many indigenous communities follow their own customary laws alongside state and federal laws, such as in the Torres Strait Islands, in the far north of Queensland. Indigenous islanders fol-

such, it cannot be used by the indigenous islanders to defend their interests against third parties. This situation arises in relation to national laws in many countries.

If customary laws were to be recognized in the common law system, this might open the way to more effective protection of TK and TCEs. While desirable from the viewpoint of indigenous communities, this is a challenging prospect as it would mean states would have to recognize the customary laws within communities and potentially apply them to third parties outside these communities.

## Growing recognition

While the need to give due consideration to customary laws in the protection of TK and TCEs is increasingly recognized, it is not yet clear what this means in practice. Ultimately, it will fall to national governments to decide on the extent to



which their respective legal systems evolve to incorporate customary laws.

At present, indigenous communities have little or no legal recourse to redress situations that are contrary to their customary practices. In some instances, communities have endeavored to protect their interests by using protocols and contracts. These voluntary arrangements foster greater respect for indigenous communities by encouraging third parties to engage with and consult communities about their customary laws in relation to the use of TK and TCEs.

## Australian indigenous arts boost recognition

The Australian indigenous arts industry is using this approach to promote respect and acceptance of customary laws in dealing with indigenous communities and their TK and TCEs. For example, if someone wants to sample a particular song from an indigenous community, the music protocol<sup>1</sup> encourages that third party to obtain permission and acknowledge that community. It may even go so far as to provide for the sharing of copyright royalties with that community.

Certain Australian arts organizations, such as the Arts Law Centre of Australia and television networks including National Indigenous TV and Special Broadcasting Service (SBS), also use contracts and protocols to protect TK and promote respect for customary laws.

## Mowanjum language groups face tough challenges

While contracts and protocols support recognition of the customary laws of indigenous communities, they do not prevent misuse of TK or TCEs by third parties. Take, for example, the misuse of the Wandjina spirit by a non-indigenous artist near Sydney, Australia. This incident clearly illustrates the challenges confronting indigenous communities in this regard.

The Wandjina spirit is the creation spirit that belongs to the Mowanjum language groups who live in Derby, Western Australia. According to their laws, these three language groups are the only Aboriginal peoples in Australia permitted to paint and use the Wandjina spirit.

This, however, did not stop a non-indigenous artist in Eastern Australia from using the image of

the spirit to create a huge sculpture. While this act has caused the Mowanjum community great distress, in the eyes of the common law system the artist has not committed an infringing act.

Under Australian copyright law, non-indigenous people can reproduce indigenous symbols or figures without it being deemed illegal. Under the common law system, the non-indigenous artist's act would only be considered an infringement if it were considered to substantially copy a pre-existing artistic work that qualified for copyright protection. As there is no recognition of the customary law of the Mowanjum community – which prohibits the use of their creation spirit by outsiders – within the common law system, the community is powerless to defend its interests.

TK and TCEs can only be protected under current IP laws if they meet the requirements of those laws. Incidents such as those experienced by the Mowanjum community point to a pressing need for an international legal framework that secures respect and recognition of customary law to prevent such misuse.

## Focusing on the future

The capacity to gain insights into another culture and to understand and appreciate its customs and the rationale of its laws can be very challenging. It is particularly testing for practitioners trained and versed in formal legal systems to remain neutral when attempting to understand and incorporate customary laws into these legal systems. But such an objective approach is a necessary first step in examining how customary laws can be used to protect and nurture TK and TCEs within communities. This is particularly important in light of the fact that TK and TCEs are increasingly recognized as having significant potential in designing and implementing sustainable development policies.

While all communities are governed by different laws, there are similarities between them that can be extrapolated to establish common principles around which legal practice might be developed. There are clearly many challenges ahead, and the debate continues to roar, but there is at least widespread recognition of the need to work towards effective solutions that protect the interests of indigenous communities and safeguard them against the misuse and misappropriation of their TK and TCEs.

<sup>1</sup> Australia Council for the Arts protocol, "Music: Protocols for producing Indigenous Australian music" [www.australiacouncil.gov.au/research/music/reports\\_and\\_publications/music\\_protocols\\_for\\_producing\\_indigenous\\_australian\\_music](http://www.australiacouncil.gov.au/research/music/reports_and_publications/music_protocols_for_producing_indigenous_australian_music)