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# Traditional Knowledge Systems, International Law and National Challenges: Marginalization or Emancipation?

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## Abstract

*Traditional knowledge systems of indigenous and local communities have been of immense value over millennia. They have filled the breadbasket that has fed the world, provided medicines that have healed the world, and provided for the sustainable management of resources, including biodiversity. In short, these knowledge systems have fed, clothed, and healed the world. They may yet hold the key to dealing with the risks posed by climate change. Yet today they are in danger of being marginalized. This article identifies the threats, the inadequacy of the international legal architecture, and the faltering national attempts to reassert their role. It identifies the varying interests and elements and assesses their influence in the marginalization and resuscitation of traditional knowledge systems; and finally argues for the emancipation of these systems and their restoration to the plurality of knowledge systems to provide sustainable solutions to natural resource management.*

## 1 Introduction

### A Central Role of Traditional Knowledge

Traditional Knowledge (TK) represents a viable knowledge system that was the basis of traditional and developing societies.<sup>1</sup> The experience of peoples constituting these societies – indigenous and local communities – expressed through

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<sup>1</sup> 'Traditional knowledge encapsulates spiritual experience and deep relationships with the land and its resources': Wyenberg, Schroeder, and Chennels, 'Introduction', in R. Wyenberg, D. Schroeder, and R. Chennels (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the Hoodia Case* (2009), at 3, 6.

customary norms and customary ‘law’ was the route by which the ‘commons’ were managed.<sup>2</sup> The community was the cohesive driving force subsuming the individual. The indigenous person functioned in an entirely communal context, free yet dependent upon the rest, on the memory of the past, and with an abiding commitment to maintain the balance between nature and culture.<sup>3</sup> Such an ethos was pervasive, temporal, and applicable to all societies which acknowledged the role of customary knowledge in resource management. For this reason, for example, the Danish-Norwegian King Christian IV in 1604 refused to let the Norwegian General Code of law replace customary laws, and allowed it to replace only existing codified laws.<sup>4</sup> The critically central role of the TK of indigenous and local communities (ILCs) in resource management is best illustrated in the knowledge and practice relating to forestry and agriculture. In local knowledge systems the plant world is not artificially separated on the basis of commodity markets to which it supplies raw materials and resources such as timber and food commodities. Instead, the forest and the field are in an ecological continuum. Activities in the forest contribute to the food needs of the local community, while agriculture itself is modelled on the ecology of the tropical forest.<sup>5</sup> Further, the contribution of TK to health systems has been immense. Three quarters of the plants that provide active ingredients for prescription drugs came to the attention of researchers because of their use in traditional medicine.<sup>6</sup> The potential for the use of such knowledge is immense, as culturally diverse knowledge systems hold valuable information about the diversity of plant species; only 1 per cent of such species have been documented by science for their medicinal or chemical properties.<sup>7</sup> For a multitude of generations, farmers have drawn on the diverse plant genetic resources to breed the major crops that feed the world today.<sup>8</sup> Their knowledge ensured food security then, now, and for the future.<sup>9</sup> In sum the traditional knowledge systems of indigenous and local communities fed, healed, and clothed the world. And more is portended as the world looks to ancient proven systems of resilience to extreme climates to deal with the spectre of climate change.

<sup>2</sup> Rose, ‘Property and Persuasion’, in C. Rose, *Essays on the History, Theory and Rhetoric of Ownership* (1994), at 124.

<sup>3</sup> See generally on this T.O. Elias, *The Nature of African Customary Law* (1956), at 82–87.

<sup>4</sup> Obreich, and Bosselman, ‘The Linkage between Sustainable Development and Customary Law’, in P. Obreich *et al.*, *The Role of Customary Law in Sustainable Development* (2005), at 12, 16.

<sup>5</sup> G.S. Nijar, *In Defence of Local Community Knowledge and Biodiversity: A Conceptual Framework and the Essential Elements of a Rights Regime* (1996), at 1; V. Shiva, *Monocultures of the Mind* (1993).

<sup>6</sup> A. Gray, *Between the Spice of Life and the Melting Pot: Biodiversity Conservation and its Impact on Indigenous Peoples*, International Working Group for Indigenous Affairs (IWGIA) (1991), Doc. 70.

<sup>7</sup> Kloppenburg Jr, ‘No Hunting! Biodiversity, Indigenous Rights, and Scientific Poaching’, *Cultural Survival Q* (1991) 15.

<sup>8</sup> G. Moore and W. Tymowski, *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture* (2005), at 1.

<sup>9</sup> G.S. Nijar *et al.*, *Food Security and Access and Benefit-Sharing for Genetic Resources for Food and Agriculture* (2011).

## B TK as Dynamic

Two preliminary points need to be stressed. First, that TK does not embody inflexible traditions, the support for which is animated by nostalgia and a return to the past – although this may be a natural response to the chaos of modern life and government control. The Blackstonian view of customary law as static immemorial practice was never quite relevant to developing countries. In these societies, TK and customary law reflect a process of natural indigenous resources management that embodies adaptive responses. Viable customary law systems are dynamic and adjustable.<sup>10</sup> The fault in describing them as ‘inflexible’ may be attributed to deeply culturally embedded perceptions amongst scholars, including anthropologists, ‘very few of whom probed to determine how customs developed over time’.<sup>11</sup> Also, the living and changing systems of law which had governed Africans prior to the establishment of colonial states were re-conceptualized to fit into an ‘unprogressive’ ranking of legal development; as well as into the understood relationship that the colonizers already had of ‘custom’ that it was longstanding and beyond living memory. A commentator has stressed:<sup>12</sup>

the enormous influence of the European jurisprudential idea that custom had to be static and fixed in order to have legal force combined with the idea that non-European societies were static in nature, i.e. that their culture was one of stasis as opposed to the Western one of progressive movement.

## C TK as Scientific

Secondly, TK should not be contrasted as a diametric opposite of the scientific traditions of western science. Valid, ancient usage reflects a ‘scientific knowledge-based recognition of the importance of estuaries and wildlife, of diversity and biological productivity, and of the possibilities of sustainable development’.<sup>13</sup> Science is constantly revealing new truths about the web of life through validated ecological findings. These practices often confirm the ancient practices embodied in customary law.<sup>14</sup>

Indeed, positing a divide between western science and TK serves misleadingly to represent indigenous cultures as static and bounded, and opens them to exploitation, or biopiracy, as knowledge stocks within a globalized system.<sup>15</sup> TK systems may even supplement scientific knowledge where current scientific information is inadequate. Recourse to the practical knowledge of communities with long traditions of resource use in such situations is not unknown.<sup>16</sup>

<sup>10</sup> Obreich *et al.*, *supra* note 4, at 16.

<sup>11</sup> L. Sheleff, *The Future of Tradition, Customary Law, Common Law and Legal Pluralism* (2000).

<sup>12</sup> Chanock, ‘Customary Law, Sustainable Development, and the Failing State’, in Obreich *et al.*, *supra* note 4, at 338.

<sup>13</sup> Sax, ‘The Limits of Private Rights in Public Waters’, 19 *Environmental L* (1989) 473.

<sup>14</sup> Obreich *et al.*, *supra* note 4, at 9.

<sup>15</sup> Agrawal, ‘Dismantling the Divide Between Indigenous and Scientific Knowledge’, 26 *Development and Change* (1995) 413, cited in Leach and Fairhead, ‘Manners of Contestation: “Citizen Science” and “Indigenous Knowledge” in West Africa and the Caribbean’, IV(3) *Int’l Social Science J* (2002) 299, at 301.

<sup>16</sup> C.H. Freese, *Wild Species as Commodities: Managing Markets and Ecosystems for Sustainability* (1998), at 133.

## D Threats

Over the years, there have been serious threats to the very survival of this alternative knowledge system. Foremost among these has been the lack of the recognition of rights within which TK flourishes, primarily land and habitat. Examples abound. Take the state of Sarawak, which hosts a 150-million-year-old rainforest, the oldest in the world. The colonial Rajah Brooke<sup>17</sup> regime in Sarawak accorded to natives rights to land, described as ‘native customary rights’. But the indigenous law, in common with that of other colonial states, lived on the fringes of legal respectability, tolerated under certain strict conditions.<sup>18</sup> The laws of the early Rajahs defined and regulated native customs and rights over land and specified the areas or zones where such rights could be created, acquired, or exercised.<sup>19</sup> These severely limited the way in which land was acquired and used by the natives under their customary law and practices.

The emphasis on economic development in post-colonial societies led to the takeover or diminution of the vast swathes of land in the interiors within the native preserves.<sup>20</sup> The underlying imperative bringing about this change is hardly distinguishable from the fate suffered by the commons in 13th-century England, in particular the Charter of the Forest, enacted alongside the Magna Carta:<sup>21</sup>

The Charter of the Forest demanded protection of the commons from external power. The commons were the source of sustenance for the general population: their fuel, their food, their construction materials, whatever was essential for life. The forest was no primitive wilderness. It had been carefully developed over generations, maintained in common, its riches available to all, and preserved for future generations – practices found today primarily in traditional societies that are under threat throughout the world.

The Charter of the Forest imposed limits to privatization. By the 17th century, however, this Charter had fallen victim to the rise of the commodity economy and capitalist practice and morality.

With the commons no longer protected for co-operative nurturing and use, the rights of the common people were restricted to what could not be privatized, a category that continues to shrink to virtual invisibility.

The quest for a development ethos grounded in ‘modernization’ combined with the perpetuation of the static view of traditional societies and customary law radically altered the way commons were treated, and also how they were conceived. This also explains local state actions in effect extinguishing native customary land rights and handing

<sup>17</sup> The first Rajah, Sir James Brooke, was ‘handed’ the Government of Sarawak in 1841.

<sup>18</sup> Chanock, *supra* note 12, at 338.

<sup>19</sup> J.C. Fong, *Law on Native Customary Land in Sarawak* (2011), at xiii.

<sup>20</sup> To accomplish ‘the rapid transformation of the state from a very rural, agricultural economy ... to a high income, modern economy’, ‘more and more native customary land would inevitably be required for development, or the natives themselves would have to put their land ... to better or higher economic utilization in order to realize their optimum potentials and returns’: Chief Minister, Sarawak, in *ibid.*, Foreword.

<sup>21</sup> Chomsky, ‘How the Magna Carta became a Minor Carta’, available at: [www.guardian.co.uk/commentis-free/2012/jul/24/magna-carta-minor-carta-noam-chomsky/print](http://www.guardian.co.uk/commentis-free/2012/jul/24/magna-carta-minor-carta-noam-chomsky/print) (last accessed 7 Nov. 2013).

the lands to corporations to exploit the rich timber resources.<sup>22</sup> Native customs in relation to land have been steadily narrowed by statutory definitions of what constitutes 'native customary law'.<sup>23</sup> This has led to the erosion of native customary rights to land. The fundamental justification for depriving ILCs of their lands finds its counterpart in other ex-colonial jurisdictions (like Australia) which relied upon the concept of *terra nullius*,<sup>24</sup> to expel indigenous communities; or their massacre of natives who were 'just wanderers in an untamed wilderness' (as in America). The onerous task of turning these empty and wasted lands to profitable commercial use fell upon 'the hard-working colonists' or, in modern times, to a 'body corporate approved by the Minister'.<sup>25</sup>

The enclosure of lands invariably led to the destruction of indigenous peoples' culture and linguistic diversity through the loss of social relations that had sustained their culture and identity.<sup>26</sup> The links between linguistic and cultural diversity and biodiversity are manifestations of the diversity of life on earth.<sup>27</sup> Language and the environment are linked through the mediation of traditional ecological knowledge, as language is the main repository of and transmission vehicle for knowledge.<sup>28</sup>

Further impairment of TK comes through definitional constructs implicit in international intellectual property rights (IPRs) instruments, in particular, the TRIPs Agreement of the World Trade Organization (WTO). Its patent criteria deny recognition to indigenous innovations: the inter-communal and inter-generational context as well as the small-scale production of goods for social exchange and for the common good is not countenanced by the west-inspired IPR regime envisaged by TRIPs. The reach of patents over naturally-occurring life forms, which forms the essential source for biotechnological products, has further widened the gap between users and providers of genetic resources and associated TK. 'Products of nature' that are discovered and isolated from the source are given the status of inventions to protect the investments of the biotechnology industries of the North.<sup>29</sup>

## 2 The International Context

The international 'legal' arena has been a fertile area for the re-assertion of TK systems especially as associated to biodiversity and resource management. There were sustained debates, initially in the context of the debates in the UN Food and Agriculture

<sup>22</sup> A 1997 amendment to the Sarawak Land Code empowers the state authority to lease land, over which natives have established ownership rights through customary law to a body corporate (usually a company) approved by the Minister: s. 18A(1), Land Code (Amendment) Ordinance 1997. The Sarawak Land Code Chapter 81, Percetakan Negara Malaysia Berhad, Kuching Sarawak, 1999, is available at: <http://pengayau.files.wordpress.com/2012/04/sarawak-land-code-chapter-81-tmp.pdf> (last accessed 7 Nov. 2013).

<sup>23</sup> S. 2 of *ibid.*

<sup>24</sup> *Mabo & Others v. Queensland (No. 2)*, (1992) 175 CLR 1.

<sup>25</sup> S. 18A(1), Land Code (Amendment) Ordinance 1997 (Sarawak).

<sup>26</sup> Vermeylen, 'The Struggle for Indigenous Peoples' Land Rights: The Case of Namibia', in Wyenberg, Schroeder, and Chennels, *supra* note 1, at 143.

<sup>27</sup> Maffi, 'Endangered Languages, Endangered Knowledge', *LIV(3) Int'l Social Science J* (2002) 385, at 386.

<sup>28</sup> L. Maffi, *On Biocultural Diversity: Linking Language, Knowledge and the Environment* (2001).

<sup>29</sup> G.S. Nijar, *Patenting Life Forms: Law and Practice* (2012), at 38.

Organization, that genetic resources placed for the common good in international collection centres – mainly by farmers from the third world – were usurped by commercial corporations for profit. This inequity led to a claim by developing countries over the biodiversity and associated TK (ATK) within their geographical boundaries. This was finally realized with the adoption in 1992 of the Convention on Biological Diversity (CBD) which repudiated the ‘common heritage of mankind’ concept, that is, that biological resources in the global commons were freely available to all. The CBD supported the South’s rights over their genetic resources. It met with opposition from some industrialized countries, notably the US, as it pre-empted the demands of their biotechnology industry for these resources. Significantly, the CBD recognized the central role of TK of ILCs in protecting and enhancing biodiversity and required government parties to ‘respect, preserve and maintain knowledge, innovations and practices’ of ILCs. It required the approval and involvement of the holders of such knowledge and the need to share benefits equitably with them (Article 8(j)). But the provisions were largely vacuous. They were couched in exhortatory language (‘promote’, ‘encourage’). Worse, the implementation was made subject to national legislation. The mandatory requirement to secure prior consent for access to genetic resources was made applicable only to governments.<sup>30</sup> The CBD provides for the prior consent of governments: which was to be provided upon fair and equitable terms for the sharing of benefits arising from their commercial or other utilization.

Although there were forensic interpretations to overcome these limitations,<sup>31</sup> the CBD had no unambiguous provision that required the prior informed consent of ILCs when their resources or associated TK were accessed. This set the stage for perpetuating the long-standing tensions between the state and ILCs. It has been said with some justification that the laudable objectives of the CBD, emanating from the 1992 Rio Earth Summit, were undermined by global capital, and the CBD was seen as being ‘much more about deciding who was to have the right to exploit living nature than protecting the earth’s diversity’.<sup>32</sup>

This contestation continued with ILCs demanding their rightful place as nurturers of biodiversity, through their TK, innovations, and practices, all alluded to in Article 8(j) of the CBD. The sustained insistence by ILCs on their prior informed consent (PIC) when their knowledge was accessed yielded some grudging results: first in state laws,<sup>33</sup> then in the Bonn Guidelines,<sup>34</sup> and finally in decisions of the CBD itself.<sup>35</sup>

<sup>30</sup> Art. 15.2, CBD.

<sup>31</sup> T. Greiber *et al.*, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (2012), at 109.

<sup>32</sup> J.B. Foster, *The Ecological Revolution* (2009), at 131.

<sup>33</sup> States enacting national biodiversity laws have required the PIC of ILCs at various stages prior to: the grant of access, the commencement of the activity, or the entering of the benefit-sharing agreement, or before the application for access is made: see G.S. Nijar *et al.*, *Food Security and Access and Benefit-sharing for Genetic Resources for Food and Agriculture* (2011), at 86.

<sup>34</sup> Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their Utilization, available at: [www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf](http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf) (last accessed 7 Nov. 2013). These Guidelines were enacted in 2002 under the CBD to assist countries to implement their national biodiversity laws focusing on access and benefit sharing.

<sup>35</sup> An example is Decision V/16: Art. 8(j) and related provisions, Annex I. 4, in Secretariat of the Convention on Biological Diversity, *Handbook of the Convention on Biological Diversity* (2nd edn, 2003), at 597, 601.

The opportunity for the resuscitation of the alternative traditional knowledge system presented itself when parties embarked on the negotiation of an international regime on access and benefit sharing (ABS), mandated by the CBD's seventh Conference of the Parties (COP7) in 2004, prompted by the complaint of provider developing countries that the benefit-sharing provisions of the CBD were being violated with impunity by 'biopirate' users from developed countries. The outcome was the binding Nagoya ABS Protocol ('the Protocol')<sup>36</sup> adopted in October 2010. Despite the faulty process leading to its adoption, which bypassed genuine conclusive negotiations on key issues,<sup>37</sup> the Protocol is said to build upon, and advance, the cause of ILCs and TK.

In this context, the Protocol is founded on the premise that ILCs have exclusive right to their TK<sup>38</sup> and their PIC must be obtained for any access. This consent must be secured in accordance with communities' customary laws, community protocols, and procedures where they exist.<sup>39</sup> Where they do not, parties are required to support efforts to develop them.<sup>40</sup> There is no restriction on this obligation to seek access by ILCs to their TK. In particular there is no exclusion from complying with PIC and Mutually Agreed Terms (MAT) in respect of TK that is in the 'public domain'<sup>41</sup> or, as developing countries described it, TK that was publicly available. The absence of such an exclusionary provision implies that users seeking access must obtain PIC and MAT of ILCs. For any and every such access, there must be benefit sharing.<sup>42</sup> Developed countries had asserted during the negotiations that access to publicly available TK should not be subject to the ABS strictures of prior informed consent of the holders and benefit-sharing arrangements. This was criticized by developing countries as twisting to their advantage a concept peculiar to IPR law – no prior art and hence no patent for an invention already known to exist in the public domain. Nowhere does the CBD – and now the Protocol – say that TK that is publicly available or publicly known is not subject to PIC and MAT. Further there is also no time limit to the TK and the

<sup>36</sup> The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation to the Convention on Biological Diversity, available at: <http://treaties.un.org/doc/source/signature/2010/CN782E.pdf> (last accessed 7 Nov. 2013).

<sup>37</sup> Nijar, 'The Nagoya ABS Protocol – Identifying Implementation Challenges: an Asian Developing Country View', in E. Morgera, M. Buck, and E. Tsioumani (eds). *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (2013), at 247–248.

<sup>38</sup> Art. 7.

<sup>39</sup> Art. 12(1).

<sup>40</sup> Art. 12(3).

<sup>41</sup> 'Public domain' is a concept that relates to one element for the grant of a patent, namely novelty or prior art. This expression appears in the ITPGREFA which deals with access and benefit sharing of specified plant genetic resources for food and agriculture. The Treaty excludes from the multilateral system of exchange crops that are not in the 'public domain' by an explicit provision: Art. 11(2). It is commonly agreed that this expression 'public domain' refers to materials which are not protected by IPRs: G. Moore and W. Tymowski, *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture* (2005), at 84.

<sup>42</sup> Art. 5(5).

traditional innovation it encompasses. This means that PIC and MAT would be needed for TK regardless of time.<sup>43</sup>

The Protocol signals an important advancement as it recognizes the right of ILCs to regulate their knowledge system where previously ‘science-based’ western knowledge systems reigned supreme, with traditional non-western voices neglected or silenced.<sup>44</sup> In the end it remains for parties to the Protocol when enacting their ABS laws to restore the central role of the knowledge system in addressing key issues of biodiversity. And this is where the problem may now lie.

### 3 National Implementation

The problems in operationalizing these provisions in national legislative or policy measures arise mainly from the widely differing approaches of developing countries to TK and the rights of ILCs. To some extent these reflect the tensions between ILCs and the state, adverted to earlier. Some states consider that their entire populace consists of ILCs.<sup>45</sup> Hence the PIC from the ILCs as a distinct and identifiable entity does not apply. Others view ILCs as a distinct but integral part of the populace. Hence they should be subject to the normal law of the land, and abide by that.<sup>46</sup> That law may (or may not) provide for ameliorative measures designed to deal with distinct minorities in a population. Hence the rights are to be founded in, and accorded by, domestic law.<sup>47</sup> Yet others view ILCs as holding special and distinct rights which must be respected and reinforced, where necessary, by domestic laws. For this scenario, there are two views: one takes a paternalistic view that the guiding hand of the state is needed to ensure that ILCs are not prevailed upon against their interest. Hence the ILCs are ‘involved’ in decision-making but the final say lies with the state. The Biological Diversity Act of India requires the national and the state biodiversity authorities to consult the biodiversity management committees established by the local body (practically, representing the ILCs). The second view is that the PIC of ILCs must be sought in all access applications to their resources or associated TK. Only in this last case will their rights be full blown on the basis that they are autonomous entities located within the

<sup>43</sup> See Art. 5(5) (if TK is utilized then benefit sharing must ensue); and Art. 7 (parties’ measures relate to requiring the PIC and MAT of TK held by ILCs).

<sup>44</sup> For the several other ambiguities and uncertainties regarding the rights of ILCs and TK see Nijar, *supra* note 33.

<sup>45</sup> This was the approach of the countries constituting the African Group during the negotiations for the Nagoya Protocol.

<sup>46</sup> India’s Biodiversity Act 2002 assumes that the interests of the state equate to the interests of the people: Ramdas, ‘Whose Access and Whose Benefits? Securing Customary Rights in India’, in H. Ashley, N. Kenton, and A. Milligan (eds), *Biodiversity and Culture: Exploring Community Protocols, Rights and Consent* (2012), at 55, 56.

<sup>47</sup> India requires the competent authority to consult with the local body concerned when considering and making a decision on an application for genetic resources and associated TK: Biodiversity Rules, 2004, Rule 14.3, available at: <http://nbaindia.org/uploaded/Biodiversityindia/Legal/33.%20Biological%20Diversity%20Rules,%202004.pdf> (last accessed 7 Nov. 2013).



geographical boundaries of a party. The domestic law's role then would be to guarantee this autonomous status.<sup>48</sup> For as long as this debate is unresolved at the national level, the different interpretations of the provisions will have serious adverse consequences for the recognition of the knowledge system of ILCs in domestic, and consequently international, jurisprudence.<sup>49</sup>

### A An Example: Malaysia

An analysis of the draft of an ABS law for Malaysia<sup>50</sup> provides a useful insight into the nature of other potential problems posed for the recognition of TK, which could extend to other developing countries similarly situated. First, there is the jurisdictional turf fight between the state and the federal government in a federal-type constitutional arrangement which distributes power between the state (in some countries, referred to as provinces) and the central government. The states are given exclusive jurisdiction over land matters under the Constitution,<sup>51</sup> and biological resources and associated TK are understood as related to land. The federal government, however, is empowered to override such jurisdiction when implementing an international treaty.<sup>52</sup> Political sensitivities and the need to maintain the delicate working relationship between the centre and the periphery militates against the use of this overriding provision. Yet not having a coordinated approach – particularly when the state may act in conflict with the government's international obligations – creates its own set of complex problems.<sup>53</sup> A solution being pursued is for a national law that must be adhered to by the states but which bestows exclusive jurisdiction to administer all ABS regulatory matters on an authority nominated by the state. This authority will process access applications and ensure that the other provisions of the Act on benefit sharing, PIC of ILCs, and such like are observed. The national body plays a coordinating and supportive role, especially in matters relating to monitoring, tracking, and enforcement when the resource accessed has left the state territory. This paves the way for a coordinated national approach without upsetting the constitutional distribution of power. Another softer solution may be for the states and the federal government to

<sup>48</sup> The Sabah Biodiversity Enactment 7 of 2000 establishes a Biodiversity Centre with the purpose of, *inter alia*, 'establishing or caused to be established a system for the protection of biological resources so that the indigenous and local communities shall, at all times and in perpetuity, be the legitimate creators, users and custodians of such knowledge, and shall collectively benefit from the use of such knowledge': s. 9(1) (j).

<sup>49</sup> Nijar, *supra* note 33.

<sup>50</sup> Draft Access to Biological Resources and Benefit Sharing Act 2012 (restricted circulation).

<sup>51</sup> Art. 74(2), Malaysian Federal Constitution.

<sup>52</sup> Art. 76(1)(a), Malaysian Federal Constitution.

<sup>53</sup> See, e.g., *Commonwealth v. Tasmania* ('The Tasmanian Dam Case') 158 CLR (1985) 1. The HC of Australia cited an example: if the rapid depletion of the world's forests were to threaten life on earth and the UN were to request nations to preserve their remaining forests, then the federal parliament should be able to comply using its external affairs power. See also Nijar, 'The Bakun Dam Case: A Critique', [1997] *MLJ* cccxxix, at cccxliii.

negotiate a ‘nationally consistent approach’,<sup>54</sup> which identifies a set of policy principles which each state agrees to incorporate in its biodiversity law.<sup>55</sup>

Secondly, several state governments are loath to acknowledge customary land rights of ILCs despite rulings by the highest courts in cases brought against them by indigenous communities.<sup>56</sup> It is noted that the jurisprudence on the subject and the rights of ILCs have been advanced by judicial authorities over the active contestation by state authorities.<sup>57</sup> And, as earlier noted, the Malaysian state of Sarawak has gone a step further by amending its Land Code to allow for the extinguishment of time-honoured native customary rights by state edicts. Thirdly, some state governments have interfered with the traditional community governance structures; they have replaced the traditional community leaders with their paid functionaries who no longer act in accordance with traditional protocols or practices.<sup>58</sup> All this aids and feeds upon the usurpation of native lands in favour of logging and other commercial entities; and irreversibly disrupts the ILCs’ habitat, their practices, traditional lifestyles, and the innovations that arise from the TK system. Thus is an entire traditional knowledge system marginalized and silenced.

## B The Role of PIC

### 1 Defining

As noted, the Protocol requires the prior informed consent of ILCs when their genetic resources or associated TK are accessed. What does the term envisage? The emerging prolific literature on PIC suggests attempts to systematize the various elements that make up the notion of ‘informed consent’. These provide a good starting point from which to draw a conceptual understanding of the term.

In an article that deals with empirical knowledge about informed consent and its implications, Bradford Gray outlines its three elements: ‘the communication of

<sup>54</sup> This is the approach of Australia, which also has a federal constitution: Nationally Consistent Approach for Access to and the Utilisation of Australia’s Native Genetic and Biochemical Resources (NCA), available at: [www.environment.gov.au/biodiversity/science/access/nca/index.html](http://www.environment.gov.au/biodiversity/science/access/nca/index.html) (last accessed 7 Nov. 2013).

<sup>55</sup> Queensland: Biodiscovery Act 2004 (Act 19), available at: <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/B/BiodiscovA04.pdf> (last accessed 7 Nov. 2013). Northern Territory of Australia: Biological Resources Act 2006 available at: [www.wipo.int/wipolex/en/details.jsp?id=6048](http://www.wipo.int/wipolex/en/details.jsp?id=6048) (last accessed 7 Nov. 2013).

<sup>56</sup> *Kerajaan Negeri Johor v. Adong bin Kuwou & Ors* [1988] 2 MLJ 158 (Malaysian CA); *Kerajaan Negeri Selangor & Ors v. Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Malaysian CA).

<sup>57</sup> Australia: *Mabo*, *supra* note 24. Canada: *Calder v. British Columbia (Attorney General)* [1973] SCR 313, [1973] 4 WWR 1 (Sup Ct). It was the first time that Canadian law acknowledged that aboriginal title to land existed prior to the colonization of the continent and was not merely derived from statutory law. With this decision the government of Canada overhauled much of the land claim negotiation process with aboriginal peoples. The basis for aboriginal title was later expanded on in *Guerin v. The Queen* [1984] 2 SCR 335, and most recently in *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 (DC).

<sup>58</sup> This was not atypical of colonized societies. In Namibia (Africa), e.g., local chiefs were in fact the administrative creations of their colonial state. After independence these customary chiefs were promoted as legitimate local leaders: Vermeylen, *supra* note 26, at 151.

appropriate information, the absence of coercion or undue influence, and a degree of maturity and competence on the part of the subject or patient'.<sup>59</sup>

In an impressive study that heralded the emergence of the term 'traditional resource rights' to define the many 'bundles of rights' and make them accessible to local communities, Darrell Posey and Graham Dutfield outlined the imperatives informing the concept of prior informed consent. They proposed a definition incorporating the following elements: full disclosure (including reasons for the activity, specific procedures the activity would entail, the potential risks involved, and the full implications foreseeable), and the right to stop the activity from proceeding and to be halted if already underway.<sup>60</sup>

However, while the terms attached to the consent – 'free', 'prior', and 'informed' – may be understood in common parlance, their precise meaning could vary depending on how the terms are understood. In the context of international law, the CBD refers to PIC in terms of 'approval and involvement of the holders of such knowledge', whilst the Nagoya Protocol refers to the 'prior informed consent or approval and involvement' of ILCs. Significantly, the substantive content of the requirements is not spelt out. Predictably, the divergent expressions have spawned a debate as to whether there is intended to be a difference in the nature of the consent that must be sought from ILCs when accessing their genetic resources and/or TK. Commentators have suggested that PIC, unlike 'approval', is a term of art with a particular status in international law, whereby certain elements are automatically attached to the concept, such as what is implied in 'prior' and 'informed'.<sup>61</sup> Domestic ABS laws too do not condescend to greater precision about the meaning of the terms.

Perhaps the most elaborate approach to free, prior, informed consent (FPIC) is contained in the Australian national ABS law. It stipulates that the Minister of the Ministry administering the law must be satisfied that informed consent was provided by the indigenous resource provider (referred to as the 'access provider') by reference to such considerations as: whether the access provider had adequate knowledge of the ABS regulations and was able to engage in reasonable negotiations with the applicant; whether there was adequate time to consider the application, including time to consult with the relevant people, traditional owners, or a representative body; and whether the access provider has received independent legal advice about the application and the requirement of the ABS regulations.

Significantly, the Australian law – unlike most national laws and academic writings – goes beyond the question of the nature of the disclosure required to obtain the PIC of ILCs. As Doris Schroeder notes, full disclosure does not mean that the relevant community has come to an informed decision.<sup>62</sup> The Australian law fills this gap as

<sup>59</sup> Gray, 'Complexities of Informed Consent', *The Annals of the Am Academy of Political and Social Sciences* (1978), 437, available at: <http://ann.sagepub.com/content/437/1/37> (last accessed 7 Nov. 2013), at 37, 41.

<sup>60</sup> D.A. Posey and G. Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Traditional Communities*, ... (1996), ch. 4, available at: <http://web.idrc.ca/openebooks/799-x/> (last accessed 7 Nov. 2013).

<sup>61</sup> Greiber *et al.*, *supra* note 31, at 111.

<sup>62</sup> Schroeder, 'Informed Consent: from Medical Research to Traditional Knowledge', in R. Wynberg *et al.*, *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the Hoodia case* (2009), at 27, 39.

it ensures that the information is understood by the ILCs. The Akwe: Kon Voluntary Guidelines, adopted by the CBD in 2004, prescribe that there must be adequate time allotted for communication with ILCs, and that information exchange must be in an appropriate language and processes. This implies that the PIC must be sought well before the start of any access activity, namely bioprospecting.

Finally the consent must be freely given. This implies an absence of coercion, undue pressure, or inducement and most other elements in private law which render contracts void for want of genuine consent. This perhaps explains the absence of this adjectival prefix ('free') to PIC in all of the international instruments, including the recent Nagoya ABS Protocol. Significantly, except for a solitary reference, parties and stakeholders in the negotiations for the Protocol did not refer to this term, despite the fact that the expression appears in UNDRIP.

## 2 Purpose

'Consent' enshrines several values: recognition of the autonomy of individuals or groups to make decisions based on freedom of choice. This advances fundamental human rights and the democratic decision-making ethos. It promotes ethical and moral conduct which paves the way for achieving an equitable and fair outcome. Schroder provides a twofold ethical basis for consent to TK: first, the communities' right of self-determination; secondly, the communities' right to fairness when their resources are accessed and used.<sup>63</sup> Where the relationship is unequal, consent aims to restore the balance of power between the seeker and the giver, a 'power-equalising' function in the words of Pimbert.<sup>64</sup> In this sense consent is premised on the principle that it is freely (voluntarily) given on the basis of full prior disclosure of all information that may influence the final decision. Such consent is best described as FPIC. This is the way in which consent is treated in this article.

Consent in this context is viewed not as a goal in itself but as the means to pursue more fundamental goals such as: improving the quality of decisions (for instance, rationality); or a quality of relationships (for example, egalitarianism); or an outcome (for example, satisfaction of the other party).<sup>65</sup> In the context of the biodiversity convention relating to access to the TK of ILCs, it is importantly a prelude to the negotiation of a benefit-sharing agreement based on mutually agreed terms. An appropriate return is contemplated by the receiver, and negotiated by the parties, as a condition for

<sup>63</sup> *Ibid.*

<sup>64</sup> Michel Pimbert goes a step further based on ongoing participatory action-research with ILCs in various regions throughout the world where "research is done *with, for, and by* people – rather than on people – to explore how locally controlled biodiversity-rich food systems can be sustained" (emphasis in original). He refers to this as 'power-equalizing' research which involves both researchers and non-researchers in close cooperative engagement, jointly producing new knowledge, with mutual learning from the process: Pimbert, 'FPIC and Beyond: Safeguards for Power-equalising Research that Protects Biodiversity, Rights and Culture', in Ashley, Kenton, and Milligan, *supra* note 46, at 43, 44.

<sup>65</sup> Gray, *supra* note 59.

the consent. This advances the 'distributive justice' balance,<sup>66</sup> provided of course that the terms negotiated are fair and equitable. A participatory process within communities is usually envisaged in shaping the FPIC requirement. Pimbert describes such participation as 'emancipatory and democratic'.<sup>67</sup>

The extents to which these values and goals may be realized depend on a consideration of a number of factors. One is the extent to which the state is prepared to rely on customary law as a policy resource upon which to construct working systems of sustainable development. This would invariably lead to the revitalization of TK systems. It also depends upon the resolve of ILCs to use customary law to defend against state and private predation in mobilization for development;<sup>68</sup> and to salvage what they can of local control and restore traditional self-management governance.

## 4 The Way Forward

Several factors point to the resuscitation of the traditional knowledge system as an accepted part of the plurality of existing knowledge systems that offer conceptual and sustainable approaches to resource management and the multifarious ways of living sustainably. Of crucial importance is the adoption of the UN Declaration of the Rights of Indigenous Peoples (UNDRIP)<sup>69</sup> by the General Assembly of the UN in September 2007. It marked the zenith of the recognition by the world community<sup>70</sup> of the widest range of rights of indigenous peoples. Although UNDRIP is non-binding 'soft law' and countries continue to enact laws post-UNDRIP which violate the fundamental precepts on which the rights are anchored, namely, for indigenous peoples to be informed and their consent sought in matters affecting their rights,<sup>71</sup> yet it is inevitable that countries must consider the inclusion in domestic law of the rights they have endorsed at the international level for a number of reasons. First, Article

<sup>66</sup> Schroeder, *supra* note 62, at 19. The author defines distributive justice as '[t]he division of existing resources among a group of qualifying recipients'.

<sup>67</sup> Pimbert, *supra* note 64, at 43–44.

<sup>68</sup> Chanock, *supra* note 12, at 353.

<sup>69</sup> The Declaration incorporates the approaches in other previous international instruments primarily relating to human rights, such as the Draft General Recommendations under the 1967 UN Committee on the Elimination of Racial Discrimination, the 1992 Rio Declaration on Environment and Development (Principle 22), and the 1995 Copenhagen World Summit for Social Development.

<sup>70</sup> The UNDRIP was adopted on 13 Sept. 2007 by 144 countries, with 11 abstentions and four countries voting against it. These four countries were Canada, the USA, New Zealand, and Australia. Since 2009 Australia and New Zealand have reversed their positions and now support the Declaration, while the US and Canada have announced that they will revise their positions: see <http://indigenousfoundations.arts.ubc.ca/?id=1097> (accessed 9 Sept. 2012).

<sup>71</sup> See, e.g., the enactment in Malaysia of the Wildlife Conservation Act 2010: '[t]he Orang Asli were not consulted when the amendments were being drafted and the majority of them are still unaware of this new law. Such has become the fate of the Orang Asli. They are the last to know of any development or policies that affect them. And the first to be victims of programmes and policies foisted on them': C. Nicholas, J. Engi, and Y.P. The, *The Orang Asli and the UNDRIP: from Rhetoric to Recognition* (2010), at v.

26 of UNDRIP obliges states to give ‘legal recognition and protection’ to the lands, territories, and resources of indigenous peoples and traditional communities ‘which they have traditionally owned, occupied or otherwise used or acquired’. Article 31 recognizes the right to maintain, control, and protect their traditional knowledge system, including all its manifestations. Secondly, increasingly international treaties are limiting the sovereignty principle of countries to ignore these rights. An example is the recently enacted Nagoya Protocol which deals with access to genetic resources and associated traditional knowledge.<sup>72</sup> As discussed earlier, the Protocol obliges parties to take measures to ensure that the PIC or approval and involvement of ILCs is obtained for access to genetic resources,<sup>73</sup> as well as traditional knowledge associated with genetic resources.<sup>74</sup> Despite the qualifiers: ‘in accordance with domestic law’, ‘established rights’ (for genetic resources), ‘as appropriate’, it is widely acknowledged<sup>75</sup> that this is a clear advance from the rather vacuous provisions of the parent treaty, the CBD, which eschewed reference to PIC and made the preservation and respect for the traditional knowledge of ILCs ‘subject to national legislation’.<sup>76</sup> Further, there is much force in the argument that although the CBD requires PIC from parties, the reference in Article 8(j) to ‘knowledge, innovations and practices’ of ILCs assumes that TK associated with genetic resources often vests with ILCs.<sup>77</sup> Hence it is their PIC that must be obtained. This abridgment of State sovereignty has been reinforced by the Articles of the Nagoya Protocol discussed earlier.

Thirdly, parties to the CBD have consistently recognized that access to TK must be subject to the PIC of ILCs, as reflected in several decisions.<sup>78</sup> A similar intent appears in the Bonn Guidelines referred to earlier.<sup>79</sup> This is central to the restoration of the governance systems of ILCs on the basis of their laws, traditions, and customs through community protocols developed with the full participation of communities. The pace of development of these has accelerated recently.<sup>80</sup> Article 33 of UNDRIP accords indigenous peoples the unqualified right to determine the structure, and to select

<sup>72</sup> *Supra*, note 15.

<sup>73</sup> Nagoya Protocol, *supra* note 36, Art. 6.

<sup>74</sup> *Ibid.*, Art. 7.

<sup>75</sup> Buck and Hamilton, ‘The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation to the Convention on Biological Diversity’, 20 *Rev EC and Int'l Environmental L* (2011)47, at 54–55; Nijar, *supra* note 37, at 28–29; Greiber *et al.*, *supra* note 31, at 111–112.

<sup>76</sup> CBD, Art. 8(j).

<sup>77</sup> Greiber *et al.*, *supra* note 31, at 109.

<sup>78</sup> E.g., COP 5 in 2003 adopted General Principles which state: ‘[a]ccess to TK, innovations and practices of ILCs should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices’: Decision V/16, Annex, I.5. Secretariat of the Convention on Biological Diversity, *supra* note 35, at 597, 601.

<sup>79</sup> Bonn Guidelines, *supra* note 34, Art. 31. The Art. tracks the phraseology of Art. 8(j) ‘subject to domestic laws’.

<sup>80</sup> Swiderska *et al.*, ‘Community Protocols and Free, Prior Informed Consent – Overview and Lessons Learnt’, in Ashley, Kenton, and Milligan, *supra* note 46, at 25, 27.

the membership, of their institutions in accordance with their customary laws and practices.

Fourthly, national courts through litigation initiated by indigenous peoples against the state in a wide range of jurisdictions have recognized their rights to land,<sup>81</sup> and with it impliedly matters associated therewith. This would include genetic resources and associated TK. Significantly, the basis of these decisions has been the impact of the international fundamental rights jurisprudence protecting the rights of indigenous peoples to their traditional lands. The Australian High Court acknowledged the salutary influence of this in the historic *Mabo (No. 2)* decision which recognized native title:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of settled colony, denies them the right to occupy their traditional lands.<sup>82</sup>

This approach signals the incorporation into national law of international laws and standards through domestic adjudication processes.<sup>83</sup> It bears reiteration that the unjust discrimination referred to relates to ongoing laws and practices impinging on native customary rights and not a mere formal recognition of the rights.<sup>84</sup>

Finally, other international fora build on the position that TK belongs to its creators, the ILCs. And this makes it imperative that their PIC is secured. This is evident in the work of the World Intellectual Property Organization (WIPO) pertaining to TK. Similarly legal literature in relation to a future Reducing Emissions from Deforestation and Forest Degradation international framework (REDD-plus) under the UN Framework on Climate Change (UNFCCC), anticipates benefit sharing with ILCs as an integral component.<sup>85</sup> Benefit sharing implies negotiation of the terms on which access will be granted on the basis of PIC.

How a state moves forward to accord to the TK system a status within its national law and policy framework will hinge on several factors and its view of the value of the system to its natural resource management imperatives. At one end of the spectrum is the view that contemporary resource management arrangements are ineffective and there is a need to resurrect the wisdom of tried and tested indigenous knowledge as alternative development approaches and to incorporate TK into sustainable

<sup>81</sup> Australia: *Mabo*, *supra* note 24; Canada: *Calder v. British Columbia (Attorney General)*, *supra* note 57. Malaysia: in *Kerajaan Negeri Johor v. Adong bin Kuwou & Ors* and *Kerajaan Negeri Selangor & Ors v. Sagong bin Tasi & Ors*, both *supra* note 56.

<sup>82</sup> *Mabo*, *supra* note 24, at 1. (per Brennan J), applied in the Malaysian cases cited in the preceding footnote.

<sup>83</sup> Nijar, 'The Application of International Norms in National Adjudication of Fundamental Rights', in Malaysian Bar Council, *Proceedings of the 12th Malaysian Law Conference* (2005), at 52.

<sup>84</sup> As to this formal approach to justify the inapplicability of the decisions see Fong, *supra* note 19, at 174.

<sup>85</sup> Morgera and Tsioumani, 'The Evolution of Benefit Sharing: Linking Biodiversity and Community Livelihoods', 19 *Rev EC and Int'l L* (2010) 150, at 171.

development, contemporary development strategies, and resource management arrangements.<sup>86</sup> A mediate position is the reliance on the existing architecture of laws, court decisions, and policy statements to construct a basis for the recognition of TK as a fundamental basis for the recognition of indigenous peoples, their rights, governance, and, implicitly, their TK systems.<sup>87</sup> Yet another position is recognition of the right of ILCs to grant PIC for TK or resources on their lands without the state recognizing their rights to the land or the customary law by which such consent may be given. This in effect renders the right illusory.<sup>88</sup> For example, requiring the PIC of communities may be undermined by taking away their rights to the land from which the resources or associated TK is sought; or by vesting the decision-making process for the PIC in government functionaries as opposed to the traditional leaders of the community – a sort of ‘engineering of consent’,<sup>89</sup> praised by journalist Walter Lippman as a ‘new art’ in the practice of democracy. At the other end of the spectrum is a lack of willingness to incorporate even the meagre beneficent provisions in international law validating customary law and the TK of ILCs in either state law or policy.<sup>90</sup>

Seeking to push the process forward are the multifarious initiatives by indigenous and local community groups and non-governmental organizations to advance the rights of ILCs with regard to their lands and resources by strengthening the decision-making process through the development of biocultural community protocols. Written by the communities themselves, these protocols seek ‘to communicate the importance of their lands and resources for a community’s livelihoods and way of life, their role as stewards of land and resources, and their customary rights and how these are recognized in international and national law’.<sup>91</sup> Such biocultural protocols also capture and reflect the myriad local differences in customary law.<sup>92</sup> However, unless there is recognition by the state of the customary law establishing these rights, community protocols may be rendered irrelevant or undermined.<sup>93</sup>

## 6 Conclusion

In a sense, seeking to assert rights of ILCs to the preservation of their traditional knowledge systems in the context of the national implementation of relevant international law instruments such as the CBD and its progeny, the Nagoya Protocol, may be

<sup>86</sup> Veitayaki, ‘Taking Advantage of Indigenous Knowledge: The Fiji Case’, *LIV(3) Int’l Social Science J* (2002) 395, at 401.

<sup>87</sup> Nicholas *et al.*, *supra* note 71, at 76–77.

<sup>88</sup> Similarly protocols developed by communities for the grant of PIC for access to their land, resources, or TK may be irrelevant or undermined where there is no recognition of customary law establishing these rights: M.R. Muller, *The Protection of Traditional Knowledge: Policy and Legal Advances in Latin America* (2006), at 158.

<sup>89</sup> The term ‘engineering of consent’ was popularized by one of the founders of the modern public relations industry, Edward Bernays of the Wilson-Roosevelt-Kennedy ilk: see Chomsky, *supra* note 21.

<sup>90</sup> Obreich and Chanock, in Obreich *et al.*, *supra* note 4, at 384, 406.

<sup>91</sup> Swiderska *et al.*, *supra* note 80.

<sup>92</sup> M. Torten and J. Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures* (2010), at 76.

<sup>93</sup> Muller, *supra* note 88, at 158.



seeking to reconcile seemingly irreconcilable interests. The CBD vests powers in relation to all matters on access to resources in states; with carve-out in a highly qualified manner of the rights of ILCs when their knowledge is accessed. The CBD is also categorized by some as doing little more than commodifying nature as it makes resources and associated TK tradeable through bilateral contracts.<sup>94</sup> These characteristics of the international instruments appear antithetical to the normative ethos of ILCs in their relationship to nature. The structural logic of the normativity game does not at first sight leave much room for a truly workable reconciliation. Hence the emancipation sought for the re-emergence of traditional knowledge systems may run into choppy waters, if not a storm. But, as pointed out, there seems to be a relatively favourable climate for these tensions to be resolved. Identifying the varying interests and elements and assessing their influence in the marginalization and resuscitation of traditional knowledge systems has been the main thrust of this article.

<sup>94</sup> This was the thrust of the view of the ELBA group of countries (comprising Ecuador, Venezuela, Cuba, and Bolivia), at the plenary session which adopted the Nagoya Protocol in Oct. 2010.