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The Role of Customary Laws and Protocols to Protect Traditional Knowledge and Cultural Expressions in the Intellectual Property Rights System

Dr Miranda
Risang Ayu and
Yasmi Adriansyah¹

The Nature of Customary Laws and Protocols

The customary laws and protocols of traditional and local communities,² and traditional knowledge and cultural expressions³ naturally originate from a similar socio-psychological archetype.⁴ Customary laws and protocols shape the way of life of traditional and local communities and guide them in expressing and sharing their knowledge and creativities. One of the key functions of customary laws and protocols is to protect traditional and local communities' tangible and intangible assets against illicit use.

However, customary laws and protocols no longer exist as the core sources of modern laws. Traditional knowledge and cultural expressions have also become important assets for many countries⁵ with a rich cultural and biological diversity. However, traditional knowledge and cultural expressions can come up against basic problems which can prevent them from benefiting from the protection provided by the modern Intellectual Property Rights (IPR) legal system. This is due to the difference in scope of the objects, the precise meaning of originality,⁶ questions of ownership,⁷ the duration of protection,⁸ and the numerous ways in which people believe spiritual values⁹ should be respected and protected. These problems largely constitute the causes of traditional knowledge and cultural expressions being rendered vulnerable to misappropriation and misuse.¹⁰

Several efforts have been made to assess and resolve these problems.¹¹ At the international level, customary laws and protocols from all countries have been incorporated into and recognised by a number of international laws in the context of the promotion and protection of the human rights of Indigenous people. At the national level, customary laws and protocols serve to enhance the people's fulfilment of their cultural rights through various institutions mandated to protect local customs and traditions.

Customary Laws and Protocols in International Laws

The above-mentioned acknowledgement of the human rights of Indigenous people can be found in Articles 27 (1) and (2) of the *Universal Declaration of Human Rights* (UDHR), Article 27 of the *International Covenant of Civil and Political Rights* (ICCPR), Article 15 of the *International Covenant of Economic, Social and Cultural Rights* (ICESCR), Article 1 and 2 of the *Declaration on the Rights of Development* 1986 (DRD), Article 8(j) of the *Convention on Biological Diversity* (CBD),

and Article 15 (1) of the *International Labor Organization Convention Number 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169).

Concern about the protection and upholding of customary laws and protocols has also been reflected by efforts to safeguard intangible cultural heritage in the international fora. The UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, the UNESCO Universal Declaration on Cultural Diversity of 2001, and the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture all highlight the need for the safeguarding of safeguard intangible cultural heritage. The most important international legally binding instrument dealing with this matter is the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (CSICH).

More precisely, the acknowledgement of customary laws and protocols can be found in the Preamble of the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous People* (Mataatua Declaration) and the *Muscat Declaration on Intellectual Property and Traditional Knowledge* (Muscat Declaration). It is also regulated in Articles 11, 12, 13, 31 and 34 of the *Declaration on Indigenous Rights* (DIR).

There are, however, some weaknesses within these international instruments in relation to the aim of providing optimum protection for traditional knowledge and cultural expression.

First, the legally binding international instruments, namely the ICCPR, ICESCR, CBD and ILO Convention 169 deal merely with aspects of the human rights of Indigenous communities as minority people. Their cultural rights are also acknowledged specifically in Article 15 of the ICESCR, albeit in a very general manner.