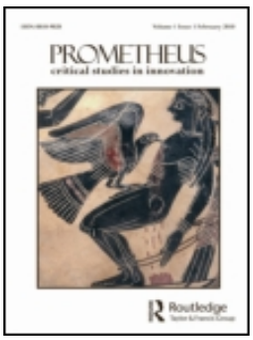

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RESEARCH PAPER

The traditional knowledge movement in the Pacific Island countries: the challenge of localism

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This paper explores the challenge of respecting the local nature of traditional knowledge in two Pacific Islands' regional initiatives. It argues that the embedded nature of traditional knowledge within the social fabric of Pacific Island communities necessitates an approach to regulation that respects existing customary laws and institutions, and contrasts this with the prevailing state-centred approaches. It also unpacks the different agendas behind the ambiguous term 'protection' and demonstrates the potential for misunderstanding among different stakeholders involved in this field. The paper finally identifies a number of negative consequences that could eventuate if a homogenised, state-based approach is adopted in this area, arguing that care must be taken to ensure that the regulatory framework chosen does not destroy more than it protects.

Introduction

Unlike state-based forms of intellectual property, traditional knowledge is essentially a local phenomenon, deeply rooted in the community in which it originates. As Taubman (2005, p.524) argues, 'traditional knowledge is not simply information: it has an inherent normative and social component'. Dealing adequately with this localism is a profound challenge for those attempting to craft international and regional frameworks to protect traditional knowledge, as such frameworks are often geared towards transparency and harmonisation. This paper analyses the extent to which two regional frameworks that have emerged in the Pacific Islands region in the last decade, the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) (Model Law) and the Draft Melanesian Spearhead Group Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture (2011) (Treaty), meet this challenge. The Model Law was developed by the South Pacific Commission in 2002, but it is only in the past year that it has started to be developed into national legislation in seven countries in the region under the Pacific Island Forum's Traditional Knowledge Implementation Action Plan (2010) (Action Plan).[1] The reasons for the delay are unclear, but appear to be related to funding and prioritisation of issues. The Treaty was endorsed in principle at a Leaders' Summit in April 2011, but has not as yet been signed by all members, and will apply only to the Melanesian countries in the region.[2]

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This paper first deals with some of the terminological issues surrounding the term 'traditional knowledge'. It then discusses, in very broad terms, the normative and social aspects of traditional knowledge in the Pacific Islands region today. The next section outlines the approach that is being taken with regard to the protection of traditional knowledge in the Model Law and the Treaty. It argues that both essentially treat traditional knowledge as giving rise to exclusive blanket rights that are created and enforced by the state. Thus, they miss an opportunity to develop a regulatory structure that draws upon existing understandings of the role of that knowledge in particular countries and the existing customary regimes that regulate access to it. The paper then goes on to highlight the confusion of objectives that bedevils this area, and which currently represent a real barrier to meaningful public discussion of traditional knowledge initiatives. Following suggestions from academics such as Drahos (with Braithwaite, 2002, p.ix) and Boyle (2008, p.56) to look at the disadvantages as well as the advantages of extending the reach of any type of intellectual property protection, the final section identifies a number of problems that may flow from the state-centric approach evident in the Model Law and Treaty. In concluding, the paper argues that model laws and treaties should be treated with caution, and that there is no substitute for developing national laws on the basis of widespread community consultation and respect for the existing customary regulatory structure, despite the time and costs involved.

What is traditional knowledge?

Defining traditional knowledge is an ongoing challenge in international, national and regional fora, and many different definitions abound (see, for example, Antons, 2009, pp.1–4). One of the difficulties is that a definition depends upon the purpose (s) for which it is being used and, as argued below, a lack of clarity of legislative objectives is a common feature in this area. Another issue, also well canvassed in international debates, such as those by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (WIPO, n.d.-a, p.1), is whether one piece of legislation should be used for all forms of traditional knowledge, as in the Treaty,[3] or whether separate laws should be used for traditional cultural expressions (such as songs, stories, oral traditions, visual and performing arts, ritual and cultural practices) and the protection of biological knowledge, innovations and practices. This latter approach is adopted by the Model Law, which is solely concerned with traditional cultural expressions. It is complemented by the Model Law on Traditional Biological Knowledge, Innovations and Practices. The separation between these two types of traditional knowledge could be argued to undermine the integrated and holistic nature of traditional knowledge systems (Tobin and Taylor, 2009, p.26), and also to be unnecessarily confusing, especially if different legal frameworks are put in place to deal with its different aspects. On the other hand, international treaties, such as the Convention on Biodiversity (1992) and the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing (2010), are increasingly imposing requirements on states to regulate genetic resources and associated knowledge in particular ways, and academics such as Chanock (2009, p.193) argue that the issues at stake in the two areas are different.[4] From a pragmatic perspective, given the realities of the limited resources in most Pacific Island countries, and also the deep connection between the natural and cultural worlds in the region, a single regulatory structure would appear to be preferable.

Both the Treaty and the Model Law define traditional knowledge as knowledge transmitted in an intergenerational context and 'distinctively associated with' (Treaty, Article 5) or 'regarded as pertaining to' (Model Law, Section 6) a particular traditional, indigenous or local community. The Model Law (Section 4) requires the knowledge to have 'been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes'. The Treaty (Article 5) narrows protection further by limiting it to traditional knowledge and an expression of culture that is 'integral to the cultural identity of a traditional, indigenous or local community that is recognized as holding the knowledge through a form of collective and cultural ownership or responsibility'. This relationship 'may be established by customary practices, laws or norms'. Potentially, this is a significant limit on the scope of the protection, as it seems geared towards traditional knowledge and expressions of culture that are shared and held by a group that at least amounts to a 'local community'. It would seem to exclude knowledge that is held by a particular sub-section of a community, such as a particular lineage or clan, as is often the case in Melanesia. This type of knowledge *is* encompassed by the Model Law, which requires only that the knowledge be 'collectively originated and held' (Section 4). It is unclear which criteria will be used to determine what types of traditional knowledge are integral to the community. Such differences in definitions in the two laws, amongst other differences discussed below, raise questions about the commitment to, and possibility of, the harmonisation/uniformisation agenda of the Pacific Islands Forum.[5] Indeed, the existence of two different regional legal frameworks in this area demonstrates the extent to which the issue of traditional knowledge is being politicised. A discussion of these issues is beyond the scope of this paper, but at one level they involve different visions of development in the region, and in particular the role of culture in trade and development.

The normative and social aspects of traditional knowledge in the Pacific Islands region

The rich ethnographical literature pertaining to traditional knowledge and intellectual property rights in the region (see, for example, Whimp and Busse, 2000; Sykes *et al*., 2001; Hirsch and Strathern, 2004; Mead and Ratuva, 2007; van Meijl, 2009) illustrates the degree to which traditional knowledge is embedded in the fabric of Pacific Island societies. Traditional knowledge played and plays a fundamental role in economic, social, political, religious and legal systems across the region. In most countries, it continues to remain crucial to: leadership status, agricultural practices, fishing, navigation and trade routes, ceremonial practices, rights to land and land use, spiritual beliefs, healing practices, social organisation, customary law, concepts of belonging, and exchange networks. Du Plessis and Fairbairn-Dunlop (2009, pp.100–11) argue:

> The indigenous knowledge systems of the Pacific incorporate technical insights and detailed observations of natural, social and spiritual phenomena, which in turn are used to validate what is important in life – what sustains people and what connects them to particular places and spaces, and is crucial to their identity. . . . In Pacific communities, knowledge is communally made, sanctioned, shared and used with the aim of achieving the good life for all members – however this is defined.

Traditional knowledge is often intimately bound up with social organisation in a particular community because access is restricted to certain members of that

community (see, for example, Recht, 2009, pp.240–41). For example, knowledge about a particular ancestor-creator may be limited to people of certain status in a particular community. Thus, Whimp (Whimp and Busse, 2000, p.19), in a study of Papua New Guinea, observes:

> At least in some Papua New Guinea societies, the value of knowledge, for example, is inversely related to the number of people who possess it. The more people who know something, the less significant it is assumed to be. Restricting access to knowledge can reinforce cultural identity and strengthen social hierarchies and inequalities.

The exchange of traditional knowledge in the form of, *inter alia*, songs, artistic designs and specialist knowledge is also important to the maintenance and development of social networks. Whimp and Busse (2000, pp.17, 18) argue 'the primary purpose and result of gift exchanges are to establish and maintain relations between persons making such exchanges', and that 'the power of gift exchanges to create enduring social relationships lies precisely in the fact that the objects given are not completely alienated' (see also Mauss, 1990).

The fruitful exchange of traditional knowledge, which also stimulates the production of new traditional knowledge, is facilitated, in part, by the decentralised nature of the customary laws and institutions that regulate it today. These indigenous systems of law exist throughout the region, although their strength varies tremendously from country to country and they are strongest in rural areas less affected by the nation state (Regenvanu, 2009). They operate on the basis of established and evolving community norms (both explicit and implicit) and, perhaps more importantly, an autochthonous process of conflict management that is principally restorative in nature and concerned with maintaining community peace.[6] The system as a whole is dynamic and driven by the needs of a particular dispute or event, rather than by concerns to lay down a prescriptive normative framework. In other words, customary law, including that concerning traditional knowledge, is continually evolving/reactive and is in many ways an ongoing dialogue about the way things should be done in the community, mediated by customary leaders.

This nested nature of traditional knowledge within the communities in which it originates has two important consequences for any legislative initiatives. The first is that neither traditional knowledge nor the customary norms that regulate access to it can sensibly be separated from the social processes in which they have been developed, although this is often what Western reforms, such as the Model Law and Treaty, attempt to do. A holistic approach is therefore necessary, one that sees traditional knowledge in what Sillitoe (2010, p.15) calls 'a wider cultural context'. This requires the crafting of a regulatory structure that permits the processes and institutions of customary law, as well as customary norms, to determine questions regarding responsibility for, and access to, traditional knowledge. The second is that it is difficult to boil down the multiple links and resonances that traditional knowledge has within the community of which it is a part to a single 'right' that is 'owned' by a clearly defined group of people. Moreover, there can be all sorts of ramifications flowing from unauthorised access to traditional knowledge that can only be dealt with by community leaders. These observations suggest that it is unwise to equate customary entitlements to access to traditional knowledge with 'ownership' (see Kalinoe, 2000) and that introducing such concepts risks fundamentally altering the role of traditional knowledge in the region.[7]

A brief overview of the Model Law and Treaty

The Model Law and the Treaty adopt a relatively similar approach to regulating traditional knowledge, and indeed their approach in many ways follows the general contours established by the UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985). They both confer upon owners of traditional knowledge the right to authorise others to exploit their traditional knowledge, and to prevent others from exploiting it without their free, prior informed and full consent. The Treaty does not explicitly give the owners the right to actually exploit their own traditional knowledge, but rather in Article 12 provides that the protection given shall not be prejudicial 'to the continued availability of traditional knowledge and expressions of culture for the practice, exchange, use and transmission of the knowledge and expressions of culture by its owners and holders'. Given the fundamental changes to the way traditional knowledge will be regulated as a result of the Treaty, this is perhaps a rather unrealistic provision. Both pieces of legislation require the authorisation to be in writing and to be approved by an expressly-created national authority. The contradiction of a state/centralised body being empowered to determine the use/exploitation of what is essentially local is discussed further below.

In both cases, the decision to draft a *sui generis* protection regime was prompted by concerns that Western intellectual property law protection was inappropriate for traditional knowledge.[8] Academics have argued that intellectual property laws are 'inadequate and inappropriate for protection of traditional ecological knowledge and community resources' because, *inter alia*, they simplify ownership regimes, stimulate commercialisation, are difficult to monitor and enforce and are expensive, complicated and time-consuming (Posey, 2002, p.9). Certainly the Model Law and the Treaty overcome the limitations of the requirements of materiality, originality, individual ownership and limited time span,[9] all of which have made the applicability of state-based intellectual property legislation problematic with regard to traditional knowledge. However, they both result in the creation of proprietary rights in traditional knowledge and focus on the right of owners to exclude or authorise others to exploit the knowledge.[10] As discussed below, the determination of ownership is likely to be extremely complex in many situations and the creation of exclusionary rights may lead to inter-community conflict. In addition, the authorisation agreements must be negotiated within a limited period of time, be in writing, be approved by a state agency, and be subject to fees being paid. In both pieces of legislation, the state is thus given the role of primary regulator, and although there is some reference in each to customary law,[11] there is no engagement with the complex arrangements that would be necessary to ensure that existing customary authorities play a meaningful role in the new regulatory system.

A further problem with the way in which both the Treaty and the Model Law refer to custom is that they are based on a static view of what it constitutes, drawing distinctions between 'customary use' and 'non-customary use' and seeming to equate 'custom' with 'traditional'. In reality, custom is dynamic, able to respond creatively to new circumstances and regularly engaging with outside influences. This means the line between customary and non-customary use is profoundly blurry. Even were it possible to delineate a category of uses that are 'customary', it

is unrealistic to think that these can be quarantined from the effects of imposing a new state-based regulatory structure on other uses of traditional knowledge. A growing body of international experience in pluralistic legal structures demonstrates that introducing state or donor support into an area previously not regulated by the state will have political implications touching on issues of power, resources and rights (Albrecht and Kyed, 2010, p.2).

In many respects, the rights-based, commoditisation of knowledge and creative expression that is at the heart of Western intellectual property regimes is thus being reproduced in these traditional knowledge frameworks. Consequently, the problems of intellectual property laws in this area identified by Posey (2002) are not overcome. Moreover, the opportunity to explore creatively how Pacific Islanders' unique conceptions of knowledge and responsibility for this knowledge may shape a new intellectual property regulatory structure has largely been missed. This is attributable, in part, to the top-down processes by which both have been created. Neither was drafted on the basis of research into the adequacy of existing systems of regulation or detailed investigation into the needs of traditional knowledge holders in the region. Although the World Intellectual Property Organisation (WIPO) did conduct a fact-finding mission to the South Pacific in 1998, only four days in total were spent in the Pacific Island countries, and state leaders were consulted rather than traditional knowledge holders (WIPO, n.d.-b). The top-down approach adopted is made explicit in the Action Plan (2010, pp.3, 6), which emphasises the drafting of legislation as an initial step, and envisages community consultation as occurring only down the track.[12] Even then, community consultation is not seen as a way of developing the framework together with the community leaders, but rather as an opportunity for traditional knowledge owners to 'understand the implications of the Model Law and the effect of subsequent proposed legislation on their resources' (Action Plan, 2010, p.5). The exploration of a possible role for customary laws and practices is regarded as a 'medium-term period' activity.[13] The problem with this approach is that it is significantly more difficult to alter a law once it has been drafted than at the policy development stage: by then, the general contours of the framework are fixed and there is relatively little room to negotiate.

Fortunately, it appears that as the drafting of legislation under the Action Plan proceeds, there is some national consultation taking place in the countries concerned, and in both Samoa and Kiribati a Traditional Knowledge policy is being established prior to the drafting of legislation. In Fiji and PNG the consultation process has also been described as intensive by some involved. The processes for developing the Treaty however, lacked community engagement and this is demonstrated most clearly in the fact that approximately 70% of it is directly cut and pasted from the African Regional Intellectual Property Organization's Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010) and 20% from the Model Law. It is possible that the Treaty may be amended in the national consultations scheduled to occur prior to the signing by member countries, but the limited timeframe proposed seems to mitigate against this. One of the biggest problems with both these pieces of legislation is confusion in objectives and scope of application. The next section argues that it is essential that these are clarified for any meaningful dialogue at a national and community level to take place.

Objectives of legislation

The amorphous term 'protection' is often used in international, regional and national fora in relation to traditional knowledge initiatives. However, upon close scrutiny, it is possible to discern at least three different, and arguably competing, aims for traditional legislation that are covered by this term, all of which are present in both the Model Law and the Treaty, and also in the policy statements surrounding them. The first is the conservation of traditional knowledge in the face of pressures resulting from rapid social change. For example, one of the objectives of the Treaty (Section 1.2) is the preservation and safeguarding of traditional knowledge. The Action Plan (2010, p.2) refers to 'the need for protection of cultural values'. A related sub-category of this approach is the interpretation of protection as capturing or recording traditional knowledge in Western forms of data storage, such as databases. The second interpretation of protection is the prevention of inappropriate exploitation of traditional knowledge contrary to the wishes of the holders of traditional knowledge. The background to the Model Law [Section 2.1(b)] states that it is in response to 'increasing exploitation and inappropriate commercialization' of traditional knowledge. One of the purposes of the Treaty is to protect traditional knowledge holders against 'misappropriation, misuse and unlawful exploitation'. No concrete examples are given of where this has occurred to date, nor is there any assessment of the extent of the problem. There is a handful of documented instances where Pacific Islanders' traditional knowledge has led to the granting of patents, including some involving kava (Lindstrom, 2009) and the mamala tree (Cox, 2001).[14] However, at least in relation to the former, it is not evident that any misappropriation has occurred as an access and benefit-sharing agreement was signed with the community and the Samoan government. One clearer case of exploitation is the use of a Solomon Islands lullaby by the international rock band, Deep Forrest (Feld, 2000). The third meaning of 'protection' is the facilitation of the commercialisation of traditional knowledge by the traditional knowledge holders themselves. This aim is being increasingly prioritised by the Pacific Islands Forum in its implementation of the Model Law through the Action Plan. For example, the Plan (2010, pp.2, 7) states that it is underpinned by '[i]mproved policy transparency, the creation of a supportive environment for private sector expansion and economic growth, and assuring accountability and good governance', and that '[l]egal certainty of ownership and management of resources will be established, providing security and predictability for economic developments in business, technology and investment, local creativity and innovation'.

To date, there has been little acknowledgment of the fact that conservation of cultural heritage and traditions may well be incompatible with the establishment of a structure that facilitates their commercialisation (for an exception to this, see Serrano and Stefanova, 2011). The multiplicity of objectives is also present in a number of the documents produced by the IGC; for example, the Revised Provisions for the Protection of Traditional Knowledge, but these are stated to be 'not mutually exclusive but rather complementary to each other' (Intergovernmental Committee, 2011, p.8). A similar conflation of aims was identified in Papua New Guinea by Kalinoe (2000, p.8), who argues that people have been misled 'into thinking that these matters can be comfortably housed together'. In developing national legislation, it will be essential for each country to consider in detail which aims to pursue, and to target the legislation as narrowly as possible. It will also be essential in

public consultations about traditional knowledge to clarify what is being envisaged by 'protection' as the term offers real scope for misinterpretation and talking at cross-purposes with such a multi-faceted term. This is related to Busse's (2009, p.359) observations of 'a gap in conceptual definitions of culture' between politicians and bureaucrats (who view culture primarily as a commodity to sell to tourists) *vis-à-vis* ordinary villagers, who understand culture 'as a way of life linked to specific people and their places'. The potential for radically different viewpoints about how traditional knowledge should be treated is demonstrated by the radio story given below.

Vanuatu chiefs limit Pentecost land dives

Radio New Zealand
Posted at 03:24 on 16 February 2011, UTC

The council of chiefs of South Pentecost in Vanuatu, the Malbangbang, has decided there'll be just four *nangol*, or land-diving, ceremonies for tourists this year. In a letter to travel and tourist agents, the chairman of the council, Chief Livusbangbang Telkon Watas, says the cuts are an effort to preserve the traditional value of *nangol*. This year, the South Pentecost Tourism Council had planned 26 land diving ceremonies for the visitors. Chief Watas has also told the travel agents that the Malbangbang is the sole custom owner of *nangol*, and they have to respect its decision. He also advises that tourists wanting to attend the ceremonies need to obtain tickets in Port Vila. Chief Watas says any visitor who arrives on the island without the approval of his council will not be allowed to see the *nangol*. Tourism industry operators say the decision doesn't make economic sense.

A crucial question to address in determining the objectives of the legislation is who the law is intended to regulate. It appears that one of the major drivers of the legislation is a concern that there is 'continued exposure of Pacific TK [traditional knowledge] to improper exploitation without due compensation' (Action Plan, 2010, p.3). Given that only Fiji, Samoa and Papua New Guinea have manufacturing sectors, and that these are in very limited areas (Scollay, 2010, p.8), any mass-production necessary for commercial exploitation in any quantity is likely to occur outside the jurisdictional limits of the countries involved. Any legislation that is introduced must therefore be considered in terms of its regulatory effects on the Pacific Islanders themselves, and their exceedingly small populations of non-indigenous citizens (except in Fiji). There is value in Recht's (2009, p.238) argument that, in the light of the continuing lack of international commitment for an international treaty, developing legislation at a regional or national level is at least a start, and may have strong moral and political force, even if it cannot be enforced extra-territorially. However, as will be discussed in the next section, there are disadvantages as well as advantages of extending the reach of any type of intellectual property protection. In addition, traditional knowledge holders already have the potential to wield considerable moral clout as today many international companies are very wary of using traditional knowledge in opposition to the local community, as demonstrated by Autogen withdrawing from a genetic profiling project in Tonga as a result of community opposition (Smith, 2001, p.70; Kanongata'a, 2007), and this year an abandonment of a patent based on blood samples collected without prior consent in the Solomon Islands (*Solomon Times*, 2011). Further, a lot of control can be exercised through ethics policies, protocols and codes of conduct in

the absence of state legislation. It is notable that a recent study (Torsen and Anderson, 2010) into intellectual property and the safeguarding of traditional cultures in relation to museums, archives and libraries found that 30% of the world's best practice initiatives were from Pacific Island countries.

Areas of caution

This final section outlines some potential problems that may arise with the introduction of state legislation to regulate access to traditional knowledge without adequately grounding this knowledge in existing customary regulation structures and local approaches to knowledge.

New state-based laws risk undermining customary institutions and thus traditional knowledge itself

The inter-relationship between customary institutions, traditional knowledge and the social and economic bases of communities has been discussed above. The intrusion of the state into this field threatens these important relationships as it introduces a competing source of authority. One of the chief concerns with the Model Law is that it puts the evolution of traditional knowledge into the state's hands in the sense that the state decides the threshold questions about what is customary use (and not regulated by the state) and what is not (and regulated by the state). It thus usurps a very important role for customary institutions: that of finding a path through the challenges of modernity while maintaining those traditional values that continue to be of importance to the local community. Both the Model Law and the Treaty also potentially undermine customary institutions by requiring the involvement of the state (through the Cultural Authority, a state created body) in every non-customary use of traditional knowledge, even by the community itself in the case of the Model Law (Forsyth, 2010), thus again cutting across the authority of local institutions. Existing customary institutions are fragile in the region, and challenges to their authority by the state may destroy them altogether.[15] The worst possible outcome would be if the new state structures were to aid the disappearance of existing regulatory structures but, because of the weakness of state institutions that characterises much of the region (see, for example, Firth, 2006), were unable to put in place an effective replacement system.

Fostering of community division

There is a risk that the Treaty, Model Law and initiatives in the Action Plan, such as the creation of databases, may become a catalyst for internal conflicts, something to which the region (especially Melanesia) is prone. Claims over ownership of particular traditional practices, particularly where there is a hope of economic benefit, have the potential to cause considerable community tension. Strathern (2000, pp.51–52) observes:

> Intellectual property rights seem a poor social register and may even set people against one another. If the identification of individual authors or inventors becomes problematic in light of traditional authorship and collective inventions, then the identification of individual property holders becomes problematic in the light of multiple claims. Even if a group can be identified, who belongs to the group? Who is the representa-

tive to speak on its behalf? What about power inequalities between different interests within the group?

It can be assumed that ownership is likely to be controversial in many cases, especially if there is the prospect of a windfall gain involved, real or imaginary (see Chanock, 2009, p.180; Kleba, 2009, p.119). One has only to look at the bitter land disputes that have accompanied the return of land to customary 'owners' at independence and the distribution of royalties from resource developments across Melanesia (Nari, 2000; Bennett, 2002; Hassall, 2005; Filer, 2006; Haley and May, 2007) to visualise the potential difficulties involved in determining rights to certain aspects of cultural heritage. As with land, the problems of determining the limits of entitlement to traditional knowledge claims are compounded by the movement of communities since colonisation as a result of missionisation, cyclones, volcanic eruptions, plantation labour, epidemics and – more recently – urban drift [Chapman (1991, p.263); see also Chanock (2009, p.188) for a discussion of similar problems globally].

The problem of disputes has already arisen in a database initiative in Fiji run by the Ministry of Indigenous Affairs. Reflecting on this programme, the Director of the Institute of Fijian Language and Culture notes that disputes by communities over ownership present an ongoing problem (Qereqeretabua, 2010). Such considerations make essential clear avenues for dealing with these disputes. Unfortunately, this is an area where both the Model Law and the Treaty are extremely unclear. The Treaty provides no provisions for dealing with ownership disputes, except to give responsibility to 'settl[e] cases of concurrent claims from communities of different countries' (Article 18.3), thus turning a legal issue into a political one. Indeed, the problem of what has come to be called 'disseminated traditional knowledge' is proving to be very thorny worldwide (see Kleba, 2009). The Model Law in Section 18(1) provides that if there is a dispute the Cultural Authority 'must refer the matter to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties'. This is the closest the legislation comes to deep pluralism, and is clearly a step in the right direction. However, at the national implementation stage, very clear thinking and development with the relevant customary institutions and leaders will be required. It is not sufficient to create a new and controversial concept and then to delegate responsibility for resolving claims to customary authorities without prior consultation concerning their ability and willingness to deal with such claims. It is especially unfair to require them to deal with such claims within the limited timeframe set down in the legislation. Customary institutions must be properly supported for such responsibility; for example, by developing new ways to ensure their decisions are respected as a result of the state's restrictions on their use of physical force. It will also be essential to designate which institution is responsible for each type of dispute, rather than leaving this to the parties to determine. Experiences with land disputes in Vanuatu and elsewhere in Melanesia have demonstrated that where litigants have the ability to forum shop, disputes are very hard to resolve (Regenvanu, 2008). A hybrid court, such as the Samoan Land and Titles Court, may be a good solution (Samoa Law Reform Commission, 2010, p.45).

The links between intellectual property and opportunistic behaviour recently outlined by Drahos (2010) also have application here. Thus, the monopolistic approach

set up in the legislation, where one group wins absolute access over traditional knowledge (not even balanced by a limited time period as in Western-style intellectual property legislation, or by compromise as is often the case in customary dispute settlements) is likely to promote rent-seeking behaviour by the particular 'owners'. This may, in turn, cause further divisions within society and restrict the traditional structures for the diffusion of traditional knowledge.

Unreasonably raised expectations

A problem related to the one above is that the push towards protecting traditional knowledge may create unreal expectations of benefit amongst the local population. To an extent, this has already started. For example, the popular magazine, *Island Business*, recently wrote: 'If one were to evaluate commercial potential beginning from the metaphysics to blood cells and going out to cultural expressions, flora and fauna, Pacific Islanders are sitting on a gold mine. They just don't fully comprehend it yet' (Tabureguci, n.d.). Strathern (2000, p.47) similarly comments that: 'Intellectual property has suddenly become a topic of widespread international interest. Moreover, once articulated it rapidly catches the public imagination, and this is something to be taken into account in policy development'.

There is a need to make sure that there are realistic expectations about the modest profit that traditional knowledge commercialisation is likely to bring. Commentators such as Dutfield (2004, p.144) have cautioned that 'it is important not to over-estimate the economic potential of TK'. It is likely that envisaged gains will be in no way comparable to the cultural richness that could be lost by interfering with the current dynamic tradition of community-based exchange and use of traditional knowledge.

Problem of traditional knowledge already in the public domain

A question that has not been clearly addressed by the Model Law or the Treaty is how to deal with the problem of traditional knowledge that has already spread from its ancestral location (if this can be located) and is being used elsewhere, perhaps even outside the Pacific Island countries.[16]

In Palau, this issue is dealt with in the Traditional Knowledge Bill (2005) by requiring all pre-existing non-customary uses to be registered with the ministry within 180 days of the legislation taking effect. Then, commencing one year after the legislation has been in force, users of such traditional knowledge are required to attach a label to objects that embody the traditional knowledge stating 'This product includes elements of Palauan traditional knowledge or expressions of culture which have been used without the express guidance or approval of the traditional owner', or make a speech at the start of a performance to the same effect [Section 26(a)]. It can be imagined how unpalatable this is to the local tourist industry and could be the reason the Bill has not yet been promulgated.

Stifling of internal research, use and development by traditional knowledge owners themselves

One of the greatest dangers is that the legislation and associated initiatives could impede the current exchange and development of traditional knowledge. There is a

risk that such an initiative will encourage a commercialisation mentality in which people seek to guard 'their' traditional knowledge in order to profit from it in the cash economy.[17] Dutfield (2004, p.145) observes that 'modern IPR reflect, but also help to underpin (through the rewards they provide) a highly competitive winner-take-all business ethos' and similar concerns arise in the Model Law and Treaty, which involve determinations of ownership by finite groups of people. Once again, the parallels with the social problems following the leasing of customary land and resources development in Melanesia are only too apparent (Hickey, 2008; Haccius, 2011). As mentioned above, if the free movement of traditional knowledge between communities is impeded, the cultural richness of the society as a whole will be diminished and the evolution of traditional knowledge impeded. There may also be negative impacts on many people who depend on the use of traditional knowledge, such as workers in primary health care and resource management.[18]

The legislation could also have a curtailing effect on research that is currently being conducted, by both indigenous researchers and by foreign scholars. For example, the Vanuatu Fieldworkers, a network of indigenous researchers established by the Vanuatu Cultural Centre, conduct research on a different aspect of traditional knowledge within their own communities each year. If they are required to comply with the formalities associated with either the Model Law or the Treaty (and there is no reason why they should not comply as conducting research is not customary use), this may stifle this important initiative. As the most important aim of any traditional knowledge initiative is to keep traditional knowledge alive, any procedures that make using traditional knowledge more difficult for local people should be avoided. How can communities share traditional knowledge and learn and innovate if they always have to seek permission from a state authority? Although it may be argued that the law will be only selectively enforced and so groups such as the Vanuatu Fieldworkers would not be in danger, there is always the threat of criminal sanctions (Model Law, Sections 26–29).

Both sets of legislation aim to cover every conceivable type of traditional knowledge and expression of culture, and to provide rights in perpetuity. Whilst such an approach makes sense for certain types of traditional knowledge, such as secret/sacred material, it appears unduly restrictive overall. A different approach is suggested by Dutfield (2004, p.142), who states:

> Ideally the protectable subject matter should be defined in close consultation with the purported beneficiaries. Also, the broader the definition of TK, the more the rights provided should be limited in some way or another . . . to treat all conceivable categories of TK as deserving strong and/or permanent protection is unreasonable and would almost certainly go beyond what customary law indicates anyway.

Conclusion

The movement to protect traditional knowledge in the Pacific Islands region carries with it significant challenges, but it also creates great opportunities. There is arguably no more fruitful area for developing a truly plural regulatory structure, one that blends the experiences and wisdom of both state and customary systems in regulating access to knowledge. Existing customary systems are finding it increasingly difficult to regulate traditional knowledge in the face of the changes wrought by rapid social development in the region. However, customary systems should not simply be replaced with a state system, or sidelined to deal only with 'traditional'

uses of traditional knowledge. Such an approach fails to take into account the profound extent to which traditional knowledge is embedded in its social and normative framework, and risks undermining the fabric of the society that has led to its creation. Unfortunately, a state-based approach that fails to engage with the local nature of traditional knowledge is an almost inevitable result of regional frameworks that prioritise uniformity, transparency and efficiency of regulation. This raises serious questions about the utility of the current trend in the Pacific Islands region and elsewhere for the creation of traditional knowledge model laws. The dilemma is that most states acting to protect their traditional knowledge are limited in the resources they can devote to law reform.

Small island states should identify which of the three aims identified above they have for traditional knowledge, and which of these can be achieved by national legislation. This exercise will hopefully lead to a focus upon promoting use of traditional knowledge by Pacific Island communities themselves, not just to generate income to participate in the cash economy, but to develop the traditional economy, which continues to be a crucial although undervalued resource in the region (Regenvanu, 2009). In many respects, the greatest crisis facing traditional knowledge in the region is not its misappropriation by third parties, but rather its neglect by the younger generation (Nason and Peter, 2009, p.276). For example, Hickey (2008, p.16) states that 'students generally leave the formal education system convinced that their [traditional knowledge] is of limited value' and that '[i]nformal systems of transmitting [traditional knowledge] remain extant in many Oceanian societies, but receive little formal recognition or support'. Initiatives to re-ignite interest in traditional knowledge will clearly need to be much broader than the introduction of new laws, but a regulatory system that is based on respect for existing customary laws and institutions is an important first step. Encouragingly, the importance of customary laws to this area has been recognised by the Samoa Law Reform Commission (2010) in its public discussion paper on this issue. Customary law is also recognised as deserving respect and consideration in a number of international treaties, such as Agenda 21 (1992, Article 26.4.b), the Convention on Biodiversity [Article 8(j)] and the United Nations Declaration on the Rights of Indigenous Peoples (Article 34). Customary law also figures throughout the 2011 version of the revised objectives and principles for the protection of traditional knowledge prepared by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2011).

In terms of countering threats of misappropriation by third parties, more empirical research needs to be undertaken to understand the nature and extent of the threat and also where it is coming from. A targeted response can then be adopted that employs both legal and non-legal strategies, such as awareness campaigns and public protests. In the long term, of course, there is much work to be done in creating an international system to restrain third parties outside the country from unauthorised or offensive use of traditional knowledge. The approach that looks the most promising is a *suorum genorum* framework. Taubman (2005, p.526) defines such a framework as being 'an heterogeneous network of mutual recognition that does not confine [traditional knowledge] to one distinct *genus*, but recognizes that divergent knowledge traditions, integrated with customary law, warrant recognition as distinct *genera*, under the aegis of a general set of core principles'. Although the amorphous nature of customary law appears to present significant obstacles to the adoption of such a framework, insights from the developments occurring in the field of

non-state justice systems generally (International Council on Human Rights Policy, 2009; Albrecht and Kyed, 2010; Sage *et al*., 2011), and from successful traditional knowledge initiatives based on customary law worldwide (Recht, 2009, p.242; International Institute for the Environment and Development, 2009; Nijar, 2010, p.473) are sure to offer many solutions.

In conclusion, this paper suggests that Pacific Island countries and other small developing nations should not rush to implement model laws on protecting traditional knowledge. The creation of a homogenous, state-based regional regulatory system is unlikely to extend the jurisdictional reach of the participating countries to any unauthorised users of traditional knowledge operating on a commercial scale. It is, however, likely to saddle these countries with a framework that prioritises the state and undermines customary governance in this important area. Traditional knowledge protection presents a real opportunity to craft a new approach to intellectual property in the region, grounded in local understandings of knowledge and its role in the social fabric. This inevitably requires time and resources, but it would be a great pity not to take advantage of the opportunity presented.

Notes

1. In a press release (27 September 2010), the Pacific Islands Forum Secretariat stated that the Action Plan was being implemented in the Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea, Solomon Islands and Vanuatu. However, as of the date of writing, it was only in a publicly accessible Bill stage in Palau. Vanuatu has incorporated protection of expressions of indigenous culture into its recently-gazetted (February 2011) Copyright and Related Rights Act 2000. This takes quite a different approach to both the Model Law and the Treaty, but a detailed analysis is beyond the scope of this paper.
2. The Melanesian Spearhead Group comprises the Fiji Islands, Papua New Guinea, the Solomon Islands, and the Republic of Vanuatu. The *Front de Liberation Nationale Kanak et Socialiste* of New Caledonia has observer status.
3. The Treaty applies to any knowledge (including know-how, skills, innovations, practices and learning) that originates from a local, indigenous and traditional community, as well as encompassing expressions of culture.
4. There are others who argue for an even more compartmentalised approach. Andemariam, 2010, for instance, argues that there should be a specific regime for traditional medicine in Eritrea.
5. The Pacific Islands Forum Secretariat refers in a press release of 27 September 2010 to 'uniform national legal systems of protection' and envisages a 'regional arrangement of mutual recognition and enforcement regime to protect and promote TK use'.
6. For example, the village *fono* system in Samoa, the *kastom* system in Vanuatu, and the *maneaba* in Kiribati. In the context of Vanuatu, see Forsyth, 2009; in the context of Micronesia, see Nason and Peter (2009).
7. The international debate sparked by Michael Brown, 2003; Brown, 2010 and more recently re-ignited by Carpenter *et al*. (2010) on the role of property law in traditional knowledge is very pertinent to this issue.
8. For a detailed discussion of the misfit between state-based intellectual property requirements and traditional knowledge, see Githaiga, 1998. For a discussion of these issues in the context of Samoa, see Samoa Law Reform Commission (2010).
9. Although this seems to be increasingly honoured more in the theory than the actuality, with multiple extensions of the period of protection. See, for example, the US Copyright Term Extension Act of 1998.
10. In a different context, an important study (Merry, 2006) has found a rights-based discourse in the Pacific Islands region to be counter-productive.
11. The role of customary law in the Model Law has been extensively analysed in Forsyth (2010).

12. Ironically, the Action Plan refers to the importance of adopting a bottom-up and holistic approach while outlining completely the opposite.
13. Action Plan, p.4. This state-centred approach is also supported by various official statements. For example, the Director of the Institute of Fijian Language and Culture, Misiwaini Qereqeretabua (2010) states that in Fiji 'We have a legal consultant who is finally working with this national law which will come into effect in 2010. So we hope that the law will also be taken down to the grassroots people, the owners and custodians of ICH in consultations, so their views will be heard and that the law will be amended accordingly'.
14. For some other examples of 'details of research and commercialised products arising from biological samples that were sourced from the Pacific region', see the Bioprospecting Information Resource compiled by the United Nations University, available from http://www.bioprospector.org/bioprospector/pacific/home.action?id=102.
15. As demonstrated in another study (Forsyth, 2009) in the context of criminal law, where there are two competing sources of authority (state and customary), there is a great temptation to avoid the authority of each by using one to criticise the legitimacy of the other.
16. It could be argued that attempting to regulate this is like trying to shut the paddock gate after the horse has bolted, although the example of the recent success some European countries have had in re-gaining protection for commodities such as cheese and wine through the movement for GIOs and AOs may contradict this. However, to achieve such successes, significant economic bargaining power is required.
17. The author does not mean to suggest that such a mentality is not already in existence in the region, but merely that it would be dramatically encouraged by such initiatives.
18. Dutfield (2004, pp.142–43) notes that the World Health Organisation has stated that 80% of the world's population depends on traditional medicine for its primary healthcare and that traditional knowledge is indispensible for its survival. In the context of Melanesia, Hickey (2008, pp.9–11) argues that 'traditional knowledge and resource management systems that are used for promoting household food and social security' are largely intangible and so are difficult to valorise. However, the traditional economy 'contributes significant capacity to provide food and social security, employment, livelihood diversity, good governance, life-satisfaction and sustainable human development'.

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