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INTRODUCTION

This article addresses the extent to which national and international law regards the entitlement of communities to protect and preserve their intellectual property in the form of traditional knowledge, expressions of folklore, and genetic resources as a communal right. In particular, communal intellectual property is a right collectively held by communities over their intellectual property. Such rights arise because the creation, maintenance, enhancement, and transformation of intellectual property is done by the community as a whole. The communal nature of the right does not diminish the fact that individuals are the physical agents in the creation of communal intellectual property. Still, such contribution happens in the context of communal values, and often with the vision, supervision, and authority of the community. In general, the existence of communal creations and knowledge is universally acknowledged. Yet, it is a different matter when a claim is asserted that a community has exclusive rights over the products and the processes resulting from these creations and knowledge. This difference is where, both at the international and national level, heated debates and controversies have dominated the discussion about whether intellectual property rights could be asserted by communities as opposed to individuals.

A simple way to approach this issue is to identify existing norms in national constitutions where such a communal intellectual property right is recognized. Given that intellectual property rights are essentially territorial, the recognition by national constitutions of communal rights is usually, although not exclusively, the clearest evidence of the recognition of such rights. In this respect, this article argues that a combination of recent constitutional provisions in regions such as Latin America and Africa, as well as international treaty provisions, support the assertion of the existence of communal intellectual property rights. However, the lack of widespread state recognition of communal intellectual property rights, in the background of the ongoing controversy of the relationship between intellectual property and human rights, suggests that communal intellectual property rights are still emerging. That is, such rights have yet to be firmly established as a general legal principle in many jurisdictions. Moreover, these rights confront significant obstacles as well, some of which are specifically addressed in this article.

In this context, it is worth highlighting that part of the difficulty of asserting communal intellectual property rights is because the nature of intellectual property rights remains largely unclear. Given the controversies surrounding recognition of individual intellectual property rights in the background of the development of human rights as a liberal conception and protection of individual rights, it would appear problematic to assert that

communities have a right to their intellectual output. Still, provisions in international treaties such as Article 15 of the International Covenant for Economic Social and Cultural Rights—as well as Article 27 of the Universal Declaration of Human Rights—do offer some support for the recognition of intellectual property rights as human rights. Moreover, the recent jurisprudence[1] from national courts, the European Court of Human Rights, and the European Court of Justice has established that the right to property protects intellectual property,[2] and that intellectual property and human rights remain valuable individual rights.[3] As a result of these decisions, it no longer seems possible to disregard the importance of intellectual property as a human right.

Similarly, even though a number of national constitutions do not recognize intellectual property rights,[4] several others do. Accordingly, if intellectual property is protected as a part of the right to property in these constitutions, the fact that some constitutions recognize collective rights of communities seems to support the assertion that, in addition to individual intellectual property rights, there may also be a peoples' right to communal intellectual property.[5] Within this context, this article supports the right of

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1. *See* Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1, 1 (2008).

2. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Protocol 1, 1952, 213 UNTS 262.

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Id.; *see also* LAURENCE R. HELFER & G. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY MAPPING THE GLOBAL INTERFACE (2011). In the United States there is considerable dicta that recognizes intellectual property as property at least within the Due Process Clause. *See, e.g.*, Chavez v. Arte Publico Press, 204 F.3d 601, 605 n.6 (5th Cir. 2000) ("Since patent and copyright are of a similar nature, and patent is a form of property [within the meaning of the Due Process Clause] . . . copyright would seem to be so too."); *Lane v. First Nat'l Bank*, 871 F.2d 166, 174 (1st Cir. 1989).

3. *See, e.g.*, Christophe Geiger, *The Constitutional Dimension of Intellectual Property*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS 111 (Paul L.C. Torremans ed., 2008).

4. Note, however, that in the certification process leading up to the adoption of the FC, there was a proposal to include the right to intellectual property in the FC. *See Certification of the Constitution of Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 48 para. 75 (S. Afr.). When the Constitution came before the Constitutional Court, the Court was urged to recognize the right to hold intellectual property because it is a universally accepted human right. *Id.* at 48, ¶ 75 (stating that the Court held the right to hold intellectual property is not a universally accepted fundamental human right and that the FC is not defective thereby). *See* O.H. Dean, *The Case for the Recognition of Intellectual Property in the Bill of Rights*, 1997 (60) THRHR 105 (SA) at 105 (S. Afr.).

5. *See* Jack Donnelly, *Human Rights, Individual Rights and Collective Rights*, *in* HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 49 (Jan Berting et al. eds.,

communities over their products and processes that derives from their creativity and knowledge which is better described as a peoples' right.[6] A peoples' right is a group right that belongs to the people who hold the right.[7] Starting from this proposition, this article seeks to address the challenges that the bearers of this peoples' right face with respect to claiming communal intellectual property rights, as well as the nature and content of this right and its relationship to human rights in general. In particular, Part II addresses the legal basis of communal intellectual property rights in international treaties and national laws. Part III attempts to dissect the difficult questions concerning the recognition and acceptance of a right to communal intellectual property, including: identifying the bearers, the specific content, and the limits that define the scope of this right.

I. THE RIGHT TO COMMUNAL INTELLECTUAL PROPERTY IN INTERNATIONAL INSTRUMENTS AND NATIONAL CONSTITUTIONS

In this section, I explore the normative foundations of the right to communal intellectual property in international instruments and national constitutions. It is the recognition of this right in national constitutions that justifies the assertion that a right to communal intellectual property exists in addition to the recent jurisprudence interpreting regional human rights treaties, such as the American Convention of Human Rights. To illustrate this point, examples are drawn from the recognition of collective rights in the constitutions of certain Latin American countries, coupled with the decisions emanating from the American Convention of Human Rights. In addition, recent constitutional proposals from Kenya, Egypt, and Tunisia are explored with respect to the potential recognition of intellectual property rights in these constitutions, as well as the protection of group rights as it is found in the African Charter on Human and Peoples Rights.[8]

1990); John Nordenfeldt, *Human Rights - What They Are and What They are Not*, 56 NORDIC J. INT'L L. 1, 7 (1987).

6. *See* T. van Boven, *The Relation Between Peoples' Rights and Human Rights in the African Charter*, 7 H.R.L.J. 183 (1986).

7. *See* Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 HUM. RTS. Q. 80, 82 (1999).

8. *See* African Charter of Human Rights art. 19, June 27, 1981 (noting the equality of all peoples); African Charter of Human Rights art. 20 (involving rights to existence); African Charter of Human Rights art. 21 (the right to freely dispose of their wealth and natural resources); African Charter of Human Rights art. 22 (stating the right to their economic, social, and cultural development); African Charter of Human Rights art. 23 (noting the right to national and international peace and security); and African Charter of Human Rights art. 24 (stating the right to general satisfactory environment).

A. The Right to Communal Intellectual Property in Latin America and the Right to Property in the American Convention of Human Rights

The fact that communal intellectual property is implicated in the collective rights of indigenous people is based on the jurisprudence that has developed around Article 21 of the American Convention of Human Rights (American Convention), which recognizes communal property. In this regard, Article 21[9] of the American Convention has become the fulcrum of the collective rights of indigenous and tribal peoples. In a number of decisions, including *Saramaka v. Suriname*,[10] *Awas Tigni v. Nicaragua*,[11] *Yakya-Axa v. Paraguay*,[12] *Moiwana Village v. Suriname*,[13] *Sawhoyamaxa Indigenous Community v. Paraguay*,[14] *Xákmok Kásek Indigenous Community v, Paraguay*,[15] and *Sarayaku v. Ecuador*,[16] the Inter-American Court of Human Rights has recognized the rights of tribal and indigenous peoples to communal property based principally on Article 21 of the American Convention.[17] These decisions were particularly relevant because the Court did not significantly differentiate between indigenous peoples and other tribal peoples in reaching

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9. Inter-American Commission on Human Rights art. 21, Nov. 22, 1969.

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
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> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Id.

10. Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 96 (Nov. 28, 2007), *interpreted by* Inter-Am Ct. H.R. (ser. C.) No. 185 (2008) [hereinafter *Saramaka*].

11. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶149, 153, 155 (Aug. 31, 2001).

12. Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 154–56 (June 17, 2005).

13. Moiwana Cmty v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶134–35 (June 15, 2005) [hereinafter *Moiwana*].

14. Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶144 (Mar. 29, 2006)

15. Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶85–89 (Aug. 24, 2010) [hereinafter *Xákmok Kásek*].

16. Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶145 (June 27, 2012).

17. *See generally* Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. INT'L L. 113 (2013); Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American court of Human Rights in the Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51 (2009).

its conclusions in the various cases.[18]

In *Yakya Axa*, for example, the Inter-American Court recognized the "right to cultural Identity" even though such right is not expressly stated in the American Convention. In *Xákmok Kásek*, the Court linked the right to cultural identity to Article 21 of the American Convention. The nature of the right to property recognized by Article 21 was reconfigured in *Saramaka* to include the right of tribal and indigenous communities to "freely determine and enjoy their own social cultural and economic development . . . . "[19] In this case, the Court further held that tribal and indigenous communities "may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States."[20] In addition to recognizing the right to communal property, the Court in *Sarayaku* also recognized, for the first time, that indigenous people suffered harm as a group. This approach broke from the traditional focus of individual harm and embraced a group focus in facilitating protection for the community as group.

As a result, even though these decisions concerned primarily land-related interests, there is little doubt that the reasoning of the Court in these decisions can be extended to create the basis for recognizing the right to communal intellectual property.[21] However, the decision leaves unanswered the question of whether the identified obligations, arising out of Article 21 of the American Convention, require the effective participation of tribal and indigenous people. In general, these decisions seem to indicate that the recognition of a right to communal intellectual property would nonetheless require other practical manifestations, such as the ability to exclude third parties from the property, which are closely related to the nature of the property. That said, the acknowledgment that intellectual property can be likened to both real property and potentially communal property (according to Article 21 of the American Convention) is important since these elements can greatly contribute to a general recognition of a right to communal intellectual property.

The right to communal intellectual property is also found in a number of Latin American national constitutions. Bolivia and Ecuador, for example, recognize multinational and intercultural states within their countries and accordingly recognize their collective rights, including their rights to culture

18. *See Moiwana*, Inter-Am. Ct. H.R. No. 124, ¶86(5) (2006). .

19. *Saramaka*, Inter-Am. Ct. H.R., No. 185, ¶95 (2007).

20. *Id.* at ¶121.

21. *See* Maria Dolores Mino, *Traditional Knowledge under International Human Rights Law: Applying Standards of Communitarian Property over Ancestral Lands to Traditional Knowledge-Related Claims*, SELECTED WORKS 1, 22 (2011), *available at* http://bepress.com /mariadolores_mino/1 (last visited Mar. 7, 2014).

and intellectual property.[22] In particular, Article 57 of the Ecuador Constitution of 2008 recognizes a number of collective rights of indigenous communes, people, and nations that include a right to uphold, protect, and develop their collective knowledge, science, technologies, ancestral wisdom, and genetic resources; and it prohibits all forms of appropriation of such knowledge, innovations, and practices. Similarly, the Political Constitution of the Plurinational State of Bolivia (from 2009) protects the collective rights of the indigenous people of Bolivia.

B. The Right to Communal Intellectual Property in Africa and the African Charter on Human and Peoples' Rights

Recent constitutional provisions adopted in Kenya, Egypt,[23] and Tunisia[24] suggest the possibility of the recognition of a right to communal intellectual property when interpreted within the jurisprudence relating to "group rights" as provided in the African Charter on Human and Peoples' Rights (African Charter). In particular, section 11 of the Constitution of the Republic of Kenya, 2010, recognizes culture as the foundation of the nation and requires the State to promote the intellectual property rights of the people of Kenya. The same section enjoins the Parliament from enacting legislation on two items. First, to ensure that communities receive compensation or royalties for use of their cultures and cultural heritage; and second, to recognize and protect ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics, and their use by communities in Kenya. Article 40(5) further provides that the State shall support, promote, and protect the intellectual property rights of the people of Kenya.

A cumulative interpretation of these Constitutional provisions supports the assertion that the Kenyan Constitution recognizes communal intellectual property rights. It is arguable however that what is conceived by the constitutional provisions is merely individual property rights since Article 40(5) appears as part of the right to property in the Bill of Rights of the Kenyan Constitution. Similar considerations apply to an interpretation of Article 69 of the 2014 Egyptian Constitution and Article 41 of the 2014 Tunisian Constitution. While it may be argued that these provisions relate to individual rights to intellectual property, the cast of these provisions does not

22. *See* Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1590 (2011); *see generally* Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008).

23. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, 18 Jan. 2014, art. 69 ("The State shall protect all types of intellectual property rights in all fields . . .").

24. THE CONSTITUTION OF THE TUNISIAN REPUBLIC, 26 Jan. 2014, art. 41 ("The right to property shall be guaranteed . . .").

rule out communal intellectual property.

At the regional level, the African Charter contains a number of rights that can be said to recognize communal intellectual property rights.[25] For instance, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on Behalf of Endorois Welfare Council) v. Kenya*,[26] the African Commission on Human and Peoples' Rights recognized the right to property of the Endorois people, making it plausible that the right to their communal intellectual property[27] would also be recognized in appropriate circumstances.

II. DIFFICULT QUESTIONS BORDERING THE RIGHT TO COMMUNAL INTELLECTUAL PROPERTY

In this section, two difficult questions concerning the right to communal intellectual property are addressed as a means of clarifying the bearers and scope of this right. It is crucial to determine the communities that are entitled to this right, as well as the content of their entitlement.

A. The Bearers of the Right to Communal Intellectual Property

The first conceptual challenge to address, in regards to recognizing the right to communal intellectual property, is the identification of the groups that qualify as "people" who, in turn, will be bearers of this right. Without adequately confronting this challenge, the right would be of doubtful practical assistance and incapable of enforcement.[28] The challenge in this respect is primarily due to the difficulty of defining and understanding the concepts of "culture" and "communities" as an abstraction emanating from beliefs, practices, and values that are shared among the community, as well as recognizing the "institutions" that identify the members of such community.[29]

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25. African Charter of Human Rights, June 27, 1981. The following rights are peoples' rights in the Charter: the equality of all peoples (Article 19); rights to existence (Article 20); right to freely to dispose of their wealth and natural resources (Article 21); right to their economic social and cultural development (Article 22); right to national and international peace and security (Article 23); and right to general satisfactory environment (Article 24). *Id.* Article 22(1) of the Charter provides that "[a]ll Peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." *Id.*

26. *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on Behalf of Endorois Welfare Council) v. Kenya*, (2009) App.276/03., 46th Ord. Session (Kenya). Available at www.minorityrights.org/download.php@id=748 (last accessed Apr. 17, 2015).

27. *See id.* at ¶238 ("[T]he African Commission agrees with the Complainants that the Property of the Endorois people has been severely encroached upon and continues to be so encroached upon.").

28. *See* Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and People's Rights*, 31 HOW. L.J. 643, 656-57 (1988).

29. *See* Janusz Symonides, *Cultural rights: a neglected category of human rights*, 158 INT'L

Ultimately, delineating the bearers of this communal right remains a question to be resolved based on the social construct or blood descent of a community, the language, the geographical contiguity, and the religion around which such community is organized. That definition should entitle the community to its right of a communal culture. Not surprisingly, communities that are organized around blood descent are usually ethnic communities, which often share language and other cultural traits. Indigenous people are most frequently part of these communities and are the potential bearers of this communal right. As noted by Siegfred Wiessner,[30] community-related groups can additionally be distinguished between "organic groups" and "non-organic groups." While the former refers to communities "who have made and maintain a conscious decision . . . which manifests in their will to live together as a community,"[31] non-organic groups "do not have the same interest in sharing all aspects of life."[32] In this respect, organic groups may deserve protection by reason of their peculiarities of sharing all aspects of their life together, while other non-organic groups may not deserve the same or any protection at all.

While a genuine case can be made for the recognition of the communal rights of indigenous people, the same can be said of other communities especially if communal intellectual property is an expression of the identity of the communities as a whole. It would appear that the recognition of ethnic communities as bearers of collective rights is settled for a number of reasons. First, a number of national constitutions appear to recognize rights of ethnic communities. Examples include the constitutions of a number of Latin American countries such as Bolivia and Ecuador. In addition, the Kenyan Constitution recognizes marginalized communities as including indigenous people, traditional communities, pastoral persons, and communities living at the fringe of the Kenyan society. It thus appears that ethnic communities are at the heart of the meaning of communities, and thus of communal rights.[33] Second, the analysis of the jurisprudence under Article 21 of the American Convention on Human Rights indicate that tribal communities, in addition to indigenous communities, have been recognized as bearers of the right to property. Third, decisions of the African Commission recognize "peoples" as part of groups but without any special significance reserved for indigenous

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SOC. SCI. J. 559, 561 (1998).

30. *See* Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 E.J.I.L. 121, 125 (2011).

31. *Id.*

32. *Id.*

33. *See* CONSTITUTION, art. 260 (2010) (Kenya).

peoples.[34] This position could perhaps be explained given the peculiar historical development of Africa where it can be asserted that there are no indigenous people in a strict sense. That is, usually the claim to "indigenity" is functionally designed to draw attention to marginalized communities.[35] In summary, it could be concluded that indigenous communities, including ethnic communities, can generally be considered to be entitled to a right to communal intellectual property.

Given this background, whether other socially based communities are so entitled will continue to be a debated subject. For example, arguments have been advanced that the definition and meaning of culture recognizes that communities are social constructs that can be organized around other social facts, which may not be intrinsically less important than blood or descent. For example, communities can be organized around religious beliefs. Since there is no implicit association of culture with ethnicity, other socially based communities deserve recognition and the protection of their intellectual property. International cultural property law has long recognized religious books, monuments, artifacts, and sites as cultural property,[36] and it would be difficult to assert that communities organized around other social facts are less entitled to protection of their expressions. Accordingly, religious communities, as an example, may be entitled to claim a right to communal intellectual property over their intellectual creations.

B. The Scope of the Right to Communal Intellectual Property

The scope of the right to communal intellectual property, and the extent to which the recognition of this right prevents non-members of the community to access the content that is protected, is another difficult issue that confronts the legitimacy of the right to communal intellectual property and remains central to its enforcement. One way to articulate the scope of protection of this right is to examine the emerging perspectives in this respect at the international, regional, and national levels. As I elaborate below, two narratives can be identified at the international level that could assist in defining the scope of the right to communal intellectual property. The first narrative revolves around Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[37] while the second narrative is supplied by the

34. *See* African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Advisory Opinion, at ¶¶9–13 (2007), *available at* www.achpr.org/files/special-mechanisms/indigenous-popultions/un_advisory_opinion_idp_eng.pdf.

35. *Id.* at ¶¶1, 15, 19.

36. *See, e.g.*, Convention Concerning the Protection of World Cultural and Natural Heritage, United Nations Educational, Scientific and Cultural Organisation, art. 1, Nov. 16, 1972.

37. International Covenant on Economic, Social and Cultural Rights, art. 15(1), Dec. 16,

United Nations Declaration on the Rights of Indigenous Peoples (DRIP).[38] In addition, other narratives and examples can be found at the regional and national level, including in the Americas, Europe, and Africa.

1. The International Convention on Social and Cultural Rights

The narrative supplied by Article 15(1)(a) and (c) of the ICESCR regards the right to communal intellectual property as consisting of two parts. The first part can be said to refer to the communal enjoyment by the community and its members of their intellectual property and the concomitant right to determine how third parties can have access to their property. Their collective enjoyment of the right is better understood in a negative sense as entitling communities to restrict access to their intellectual property in accordance with their rules processes and norms also described as their customary law.[39] The second part of the right to communal intellectual property requires, it is submitted, the access of members of the community and third parties to communal intellectual property in properly defined circumstances.[40] This narrative is enhanced by the authoritative interpretation of Articles 15(1)(a) and 15(1)(c) of the ICESCR by the United Nations Committee on Economic Social and Cultural Rights (UNCESCR).[41] While General Comment No. 21 (GC 21)[42] provides the content to Article 15(1)(a) of the ICESCR, General Comment No. 17 (GC 17)[43] provides content to article 15(1)(c) of the

1966, 993 U.N.T.S. 3.

38. *See generally* U.N. GAOR, 107th plen. mtg., U.N. Doc. 61/295 (Sept. 13, 2007). (recording of 143 in favor and 4 against—Canada, United States, New Zealand—and 11 abstentions including three African States-Burundi, Kenya, Nigeria). In 2010 New Zealand Canada and the United States formally endorsed the declaration meaning that no country opposes the DRIP. *See United States Finally Endorses Historic United Nations Declaration on the Rights of Indigenous Peoples* 36 *NARF LEGAL REV.* 1 (2011), *available at* http://www.narf.org/about-us/legal-review/.

39. *See, e.g.*, Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Protection of the heritage of indigenous people*, ¶ 3–9, U.N. Doc. E/CN.4/Sub.2/1995/26/annex (June 21, 1995). Also, Daes affirmed "the applicability of *customary law as the ultimate determinant of rights and responsibilities in relation to indigenous cultural and intellectual heritage*." Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, AM. SOC'Y INT'L L., 95th Annual Mtg., at 147 (Apr. 4–7, 2001).

40. *See, e.g.*, G. Davies *Copyright and the Public Interest* (Thomson, Sweet and Maxwell 2002) 7 (emphasizing that protection and access as the dual purpose of copyright. It is submitted that this is a general feature of all intellectual property rights and therefore feasible for a communal intellectual property right.)

41. Of note, comments of the CESCR are important as they provide guidance to State parties to the ICESCR as to the nature and meaning of the ICESCR.

42. *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, Gen. Cmt. No. 21, 43d Sess., U.N. Doc. No. E/c.12/GC/21, (2009) [hereinafter *GC 21*].

43. *The Right of Everyone to Benefit from the Protection of the Moral and Material Interests resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author*

ICESCR. The first component of the right to communal intellectual property is found in Article 15(1)(c) of the International Convenant of Economic, Social and Cultural Rights, which provides for the right for everyone to benefit from the protection of the moral and material interests resulting from any scientific activity. The scope of GC 17 made by the UNCESCR can be found in paragraph 1 of the document and includes a recognition that "[h]uman rights are fundamental, inalienable, and universal entitlements *belonging to individuals and, under certain circumstances, groups of individuals and communities*."[44] Paragraph 8 of GC 17 defines "everyone" in Article 15(1)(c) to include communities or groups of individuals. The meaning of scientific literary or artistic production is explained to include knowledge, innovations, and practices of indigenous and local communities.[45]

The UNCESCR outlined the general legal obligations of State Parties in paragraph 28.[46] Specific legal obligations can be found in paragraph 32. The Committee recommends that states adopt measures to ensure the effective protection of the interests of indigenous peoples taking into account the preferences of these people. A protection framework is recommended by the UNCESCR, and its features might include: (i) measures to recognize, register, and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes; (ii) measures that prevent the unauthorized use by third parties of scientific literary and artistic productions of indigenous people; (iii) the principle of free prior and informed consent of the indigenous authors concerned; (iv) respect for the oral or other customary forms of transmission of their indigenous peoples' intellectual productions; (v) the collective administration by indigenous peoples of the benefits derived from their productions.[47] These features create a positive protection regime for the expressions of folklore under Article 15(1)(c). One failing on the part of GC 17 is the diminished autonomy for communities

(Art.15, Para. 1(c) of the Covenant) Gen Comt No. 17, U.N. Doc. No. E/C.12/GC/17 (2006) [hereinafter *GC 17*].

44. *Id*. at ¶1.

45. *Id*. at ¶9.

46. *Id.* at ¶41. The right of everyone to benefit from the protection of the moral and material benefits resulting from any scientific, literary, or artistic production of which he or she is the author, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect, and fulfill. *Id.* at ¶48. The obligation to respect requires State parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. *Id.* The obligation to protect requires State parties to take measures that prevent third parties from interfering with the moral and material interests of authors. *Id.* Finally, the obligation to fulfill requires State parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of article 15, paragraph 1(c). *Id.*

47. *Id*. at ¶32.

because it makes no reference to the customary laws and protocols that is the normative framework within which communities protect their intellectual capital. That said, one profound achievement of GC 17 is the recognition that the cultural rights of communities are not absolute. Paragraph 22 of GC 17 makes the Article 15(1)(c) rights subject to limitations and requires it to be balanced with the other rights recognized in the ICESCR. Such limitations must be determined by law in a manner compatible with the nature of these rights and must be strictly necessary for the promotion of the general welfare in a democratic society in accordance with Article 4 of the ICESCR. Paragraph 23 of GC 17 provides that limitations must be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed. Limitations must be compatible with the very nature of the rights protected in Article 15(1)(c), which lies in the protection of the personal link between the communities and their creation, and of the means which are necessary to enable communities to enjoy an adequate standard of living. GC 17 further requires, in paragraph 24, that the imposition of limitations may, under certain circumstances, require compensatory measures, such as payment of adequate compensation for the use of scientific, literary, or artistic productions in the public interest. It is submitted that Article 15(1)(a) of the ICESCR is an example of the limitation envisaged by paragraph 22 of GC 17, and it is considered in the next section.

The second component of the right to communal property as advanced by this narrative is found in Article 15(1)(a) of the ICESCR, which provides for the right to take part in cultural life. As stated above, GC 21 affirms that the right of everyone to take part in cultural life is closely related to other cultural rights in Article 15(1) of the ICESCR.[48] In paragraph 6, the right to take part in cultural life is recognized as a freedom that requires "both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods)."[49] GC 21 began an analysis of Article 15(1)(a) by considering the meaning of "everyone" and stating that the "term 'everyone' in the first line of Article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such."[50] The meaning of the term "to participate" was examined in

48. Note that in paragraph 3 of GC 21, the fact that paragraph 1 of the Universal Decalartion of Human Rights recognizes the right of everyone to take part in cultural life. GC 21, *supra* note 41, at ¶3.

49. GC 21, *supra* note 42, at ¶ 6.

50. *Id.* at ¶9.

GC 21, which stated in paragraph 15 that it has three interrelated components that are "(a) participation in,[51] (a) access[52] to, and (c) contribution to cultural life."[53] The elements of the right to take part in cultural life are first availability, accessibility, acceptability, adaptability and appropriateness (which refers to the "realization of the right in a way that is respectful of the culture and cultural rights of individuals and communities"[54]). Paragraphs 17 to 20 of GC 21 deal with limitations to the right to take part in cultural life.[55] Of particular importance in the context of this article is paragraph 19, which provides that:

> Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of

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51. *Id.* at ¶15(a).

Participation covers in particular the right of everyone—alone, or in association with others or as a community—to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity;

Id.

52. *Id.* at ¶15(b)

Access covers in particular the right of everyone—alone, in association with others or as a community—to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities[.]

53. *Id.* at ¶15 (noting that the citations inside the quote were added)

Contribution to cultural life refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.

54. *Id.* at ¶16(e).

55. *Id.* at ¶¶17–19.

limitations may be imposed.[56]

Paragraph 19 also lists the human rights that are "intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association."[57] Of the five core obligations of Article 15(1)(a) listed by paragraph 55, the fourth obligation on state parties to the ICESCR that is especially relevant is "[t]o eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind."[58] The academic commentary on the significance of GC 21 dwells on how Article 15(1)(a) could impact intellectual property rights. Lee Shaver argues that states should work nationally and internationally to immediately implement legal reforms to eliminate unjustified barriers to access knowledge, expand exceptions and limitations, and ensure that penalties for copyright infringement are proportionate.[59] Tzen Wong, among other academics, argues that GC 21 enables us "to rethink what public access to cultural works ought to entail."[60] Even though the access of the public to communal intellectual property has not been at issue, there is little doubt that GC 21 supports the access to communal intellectual property in appropriate circumstances. It is significant that GC 21 tracks and identifies those human rights—such as the right to freedom of opinion and expression; right to freedom of association and right to freedom of thought, belief and religion— that are closely related to Article 15(1)(a) because in many cases it will be these rights which are put forward as the basis of a request of individual access to communal intellectual property.[61] These human rights define, in more specific terms, the entitlements that seek ventilation. Article 15(1)(a) may therefore be regarded as an omnibus limitation clause affirming the importance of limitations. Thus, while Article 15(1)(a) serves as an internal limitation to Article 15(1)(c), other human rights closely related to Article 15(1)(a) serve as external limitations. It is important to understand that Article 15(1)(a) stakes a claim as an equal partner in the

56. *Id.* at ¶19.

57. *Id.*

58. *Id.* at ¶55(d).

59. *See* Lee Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT'L L.J. 637 (2009).

60. *See* Tzen Wong et al., *Cultural Diversity and the Arts: Contemporary Challenges for Copyright Law*, *in* INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT 2 (Tzen Wong et al., eds., 2011), *available at* www.piipa.org.

61. *See* GC 21, *supra* note 42, at ¶55.

right to communal intellectual property. Without such a claim of equality, the right of communities to moral and material interests of their creation would be dominant, allowing only a few measured limitations. Without a limitations provision in the form of Article 15(1)(a) of the ICESCR, the control of communities over their intellectual capital will go overboard and important public interests will not be achieved.[62] Swathes of knowledge in communal intellectual property important for advancement of society may be locked as a result of the exclusive rights of communities. Article 15(1)(a) introduces a balance in the right to communal intellectual property.[63]

2. The United Nations Declaration on the Rights of Indigenous Peoples

Another narrative, as stated above, is the one that is woven around the DRIP, whose importance includes the fact that the DRIP contains a catalogue of rights of indigenous people that provide a clue as to the content of the right to communal intellectual property.[64] In this respect, the right to communal intellectual property is articulated in a number of ways.

First, in Article 11(1), the DRIP provides that indigenous people have the right to practice and revitalize their cultural traditions and customs.[65] "This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."[66] Paragraph 2 of Article 11 directs States to "provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[67]

Second, Article 31(1) provides that:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral

62. *See, e.g.*, Michael F. Brown, *Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 199 (1998).

63. *See* GC 21, *supra* note 42, at ¶15(a).

64. *See* Chidi Oguamanam, *Indigenuos Peoples' Rights at the Intersection of Human Rights and Intellectual Property Rights*, 18 MARQ. INTELL. PROP. L. REV. 261, 277 (2014).

65. U.N. GAOR, *supra* note 38, at art. 11(1).

66. *Id.*

67. *Id.* at art. 11(2).

> traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[68]

Again, Article 31(2) directs States—in conjunction with indigenous people—to take effective measures to recognize and protect the exercise of these rights.[69] The rights of indigenous people, however, are not absolute. Notably, Article 46 provides that indigenous people must exercise their rights within the context of the Charter of the United Nations and within the territorial integrity or political unity of sovereign and independent States.[70] These limitations are to be determined by law and in accordance with international human rights obligations.[71] "Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[72] It appears that the envisaged limitations will have to pass a high muster, making the entitlements of indigenous people higher than permissible limitations.

Thus, the balance of the right to communal property in the DRIP tilts in favor of the entitlements of indigenous peoples. There are a number of conclusions to be drawn from a comparison of the frameworks of Articles 15(1)(a) and (b) of the ICESCR as well as the DRIP. First, the right to communal intellectual property consists of a two part structure of control over the intellectual capital of communities and access to their intellectual capital of equal parts. Second, the manner in which control over the intellectual capital of communities is cast is flexible. It is not clear that the control of the intellectual property of communities should be achieved by the grant of exclusive rights even though this appears likely, especially in the provisions of DRIP. Third, the recognition of the normative framework of communities in the form of their customary law as a basis of their control over their communal intellectual property is crucial and may be part of the recognition by States of the right to communal property of communities. Fourth, the facilitation of access to the communal intellectual property of indigenous people will largely result from the claims made by individuals based on a number of human rights including: the freedom of expression; the right to privacy; the right to property; and the right to dignity. This Article now turns

68. *Id.* at art. 31(1).
69. *Id.* at art. 31(2).
70. *Id.* at art. 46(1).
71. *Id.* at art. 46(2).
72. *Id.*

to a consideration of regional initiatives that suggest a content of the right to communal intellectual property.

3. Regional and National Approaches

At a regional level, it would appear that the content of a right to communal property is to be found in the right to property. The possibility of protecting communal intellectual property under the right to property in the American Convention for Human Rights was noted earlier in this Article. That possibility also exists with respect to the African Charter. This is not strange since there is abundant evidence that intellectual property is conceivable and protectable as property in national constitutions and regional treaties. A number of examples will suffice.

First, the European Court of Human Rights, in a number of decisions interpreting Article 1 of the First Protocol of the European Convention on Human Rights (*Melynchuk v. Ukraine*[73]*; Anheuser Busch, Inc. v. Portugal*[74]; *Balan v. Moldova*[75]; and *Ashby Donald v. France*[76]), has asserted that there can be no doubt that Article 1 of Protocol Number 1 is applicable to intellectual property. In interpreting Article 17(2) of the Charter of Fundamental Rights of the European Union, the European Court of Justice has stated that the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union[77] (the Charter). "There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected."[78] It is therefore appropriate to imagine that the right to communal intellectual property could be conceived as a property right, albeit in a collective sense. One of the consequences of the recognition of intellectual property as part of the right to property by European Courts[79] is the requirement of a balancing exercise to align the right to property with other fundamental rights.[80] At a

73. Melynchuk v. Ukraine, App. No. 28753/03, Eur. Ct. H.R. (2005).

74. Anheuser Busch, Inc. v. Portugal, App. No. 73049/01, Eur. Ct. H.R. (2007) (confirming the Grand Chamber of the European Court of Human Rights).

75. Balan v. Moldova, App. No. 19247/03, Eur. Ct. H.R. (2008).

76. Ashby Donald v. France, App. No. 36769/08, Eur. Ct. H.R. (2013).

77. 2000 O.J. (C 364) 12. (" Intellectual Property shall be Protected.").

78. *See* Case C-70/10, Scarlett Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 2011 E.C.R. I-12025, ¶43.

79. *See generally* Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1 (2008).

80. *Id.*; *see also* C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV, 2012 E.C.R. 1, 9, *available at* http://curia.europa.eu/juris/document.

national level, there is abundant evidence that intellectual property is protected as a right to property.[81]

As a matter of design it has become fashionable for constitutions to expressly mandate the statutory elaboration of fundamental human and peoples' rights. We have seen this with respect to the Kenyan Constitution, which requires legislation to express constitutional affirmations of the rights of Kenyan people to their intellectual property. Any such legislation would certainly be in furtherance of the right to communal intellectual property. It is interesting that the statutory elaboration occurs even when the constitutional basis of statute is unclear. A good example of this manner of statutory elaboration is found in the December 2013 South African legislation, which is the Intellectual Property Amendment Act 2013 (IPAA 2013) that seeks to "provide for the recognition and protection of certain manifestations of indigenous knowledge as a species of intellectual property."[82] To this end, IPAA 2013 amends a number of intellectual property legislation[83] by: recognizing copyright in traditional works; recognizing traditional terms and expressions; making provisions for geographical indications; recognizing traditional designs; and protecting performances of traditional works. Both the National Environmental Management: Bio-Diversity Act[84] and the IPAA 2013 constitute an elaborate statutory framework for the protection of communal intellectual property in South Africa. The extent to which the absence of a right to communal intellectual property in the South African Bill of Rights will affect the interpretation of IPAA 2013 remains to be seen. It is very likely that a number of rights (such as the right to property,[85] the right to freedom of expression, and the limited right to culture in sections 30 and 31 of the South African Constitutions) will weigh heavily in the elaboration of this statutory scheme.[86] It is, however, the right to property that would have the greatest impact given the widespread recognition that communal property is contemplated as part of the right to property.[87] It is important to recognize that

81. *See* Enyinna S. Nwauche, *The Judicial Construction of the Public Interest in South African Copyright Law*, 39 INT'L R. INTELL. PROP. & COMPETITION L. 917, 921 (2008); *see, e.g.*, Laugh it Off Promotions CC v. South African Breweries, (42/04) SA 1 (CC) at ¶17 (S. Afr.).

82. Intellectual Property Amendment Act 28 of 2013 Preamble (S. Afr.).

83. *See, e.g.*, Performers Protection Act No. 11 of 1967 §§ 2, 3 (S. Afr.); Copyright Act No. 98 of 1978 § 1 (S. Afr.); Trade Marks Act No. 194 of 1993 § 43(2) (S. Afr.); Designs Act No. 195 of 1993, §§ 1(1), 1(20) (S. Afr.).

84. National Environmental Management: Biodiversity Act No. 10 of 2004 § 81(1)(a) (S. Afr.).

85. S. AFR. CONST., 1996 § 25.

86. *Id.* at §§30, 31.

87. *See, e.g.*, Mikhalien Du Bois, *Recognition and Protection of Traditional Knowledge Interests as Property in South African Law*, 2 EUR. PROP. L.J. 144 (2013); Mikhalien Du Bois,

the South African framework is not the only statutory framework for the protection of communal intellectual property. The Pacific Island countries are currently elaborating the protection of traditional knowledge by intellectual property rights within the context of the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture.[88]

To sum up this part, it is clear that the elaboration of the content of the right to communal intellectual property will remain a central concern in general. In particular, the challenge would be "the balance between heritage as a resource for all of humanity and as something that properly belongs to, and remains controlled by, its communities of origin."[89] This challenge will be in issue more at the national level than anywhere else.

CONCLUSION

The idea that property rights, including intellectual property, can be protected as communal property is one that remains controversial and will certainly continue to stir heated debates among academics and beyond. Still, the recognition of a right to communal property is a fundamental element in establishing the entitlement that communities may have in protecting their culture and advancing their economic and social identity. In this respect, this article has highlighted that the existence, or adoption, of state practices in the form of constitutional recognition and statutory protection of a communal right to property—and in turn, intellectual property—are crucial to guarantee the possibility of creating and guaranteeing such entitlement, and thus such a right. As this Article has noted, it is highly significant that some countries have chosen the path of protecting communal property in their national statutes and in several instances in their constitutions. Where a national constitution or statute does not protect the right to communal property directly, the fact that the legal system may provide a right to property can also play a crucial role in recognizing and protecting the rights of communal property.

Still, this article has also noted that even where the right to communal property is recognized and a community is entitled to claim this right, the enforcement of such a right must strike an adequate and equal balance between the protection of the communal right and the interests of the public.

Intellectual Property as a Constitutional Property Right: The South African Approach, 24 S. AFR, MERCANTILE L.J. 177 (2012).

88. *See* Miranda Forsyth, *Do You Want it Gift Wrapped?: Protecting Traditional Knowledge in the Pacific Island Countries*, *in* INDIGENOUS PEOPLES' INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 189, 189 (Peter Drahos & Susy Frankel eds., 2012).

89. *See* Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT'L J. CULTURAL PROP. 40, 49 (2005).

With respect to the right to communal intellectual property, this balance includes crafting a balanced system that permits, with limitations and exceptions, the access to the knowledge, materials, processes, and products that are comprised within the communal intellectual property rights, and also to members of the public, that is, people from outside the community. Without this balance, an overprotective framework may act against the widespread acceptance of the right to communal property on the one side, and it may negatively affect innovation, creativity, and development on the other.