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Research paper

Forbidding the Tragedy of Commons; Conserving Indigenous Knowledge through Indigenous Peoples and Local Communities Entitlement for Future Generations from the Perspectives of Intergeneration Justice

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Abstract

Conserving indigenous knowledge (IK) has long been discussed in international fore for more than five decade. The core issues is there is unanimity among scholars, governments, indigenous peoples and local communities on whether and how issue of IK could be harmonise within intellectual property rights law framework particularly copyrights. This paper aims to highlight the issues of conserving indigenous knowledge since indigenous knowledge does not belong to one generation but all generations. Discussion will embark on from the perspective of intellectual property jurisprudence through the works of Henry Reynolds, James Tully and Will Kymlicka. The outcome of this paper demonstrates promising thought into the role of intergeneration justice in protecting indigenous peoples in Malaysia. It is the contention of this paper that perhaps such conditions could apply to traditional knowledge too in addressing the plight of indigenous peoples.

Keywords: *Indigenous Peoples, Entitlement, Intergeneration Justice, Traditional Knowledge, Jurisprudence.*

1. Introduction

Conserving indigenous knowledge is not something strange and it has been in international discussions for more than five decades. The main concerns of indigenous knowledge holders and is about the conserving indigenous knowledge for past, present and future generations. Generally, intergeneration justice may provide the platform for indigenous people and local communities in accessing justice to conserve indigenous knowledge. The principle of intergeneration justice arose from the theory of John Rawls that all generations have mutual obligations, without any exceptions, including the present generations. Thus, intergeneration justice may provide layout for the protection of traditional knowledge of the indigenous peoples.

In her seminal work, Elinor Ostrom has introduced the concept of common pool resources. According to her, common pool resources developed on institutions that are more robust, meaning that the rational appropriator "designed basic operational rules, created organisation to undertake the operational management of their common pool resources and modified their rules over time in light of past experience according to their own-collective choice and constitutional choice rules" [1]. Thus, Ostrom offers a compelling argument in common pool resources, have a correlation to indigenous people's groups, and to certain extent it may be applied in conserving indigenous knowledge.

2. Issues and Problems of Indigenous and Local Communities' Entitlement and Conservation

There is a relatively small body of literature that is concerned with the entitlement of indigenous peoples, Jane Anderson's work display correlation between indigenous people's knowledge and intellectual property [2]. Anderson brought in the emergence claims pertaining protection of IK and using Australia as case study. Anderson's further the discussion on the ability of IP law adapt and adjust to IK. Since the traits of IK steadily ostensible its ongoing grappling with new subject matters. The main contentious issues, there are unanimity among scholars, governments, indigenous peoples and local communities on whether and how issues of IK could be incorporated within IP law framework. A closer look at copyright jurisprudence from the narrative of the authorship and originality shows interesting development as it could be probable IK situation will improve in the long term. In the section below will attempt to explore the jurisprudence of intellectual property from the work of Henry Reynolds then the discussion embark on James Tully's work and finally the work of Will Kymlicka.

3. The Reynoldian Approach

Henry Reynolds starts his early work in supporting aboriginal land tenure in Australia. Reynolds's work is a tremendous collection which documents the historical events resulting in the removal of

aboriginal land in Australia. This manifest injustice which Reynolds documented is overwhelming, and his critical work begins from Locke's perspective of the "mixing of one's labour with the soil, through [an] account of original acquisition because [the] lack of aboriginal inclination towards agriculture would have rendered them property less" [3]. He set an example that English law, as applied in the United Kingdom, was, in fact, flexible enough to recognise decidedly different forms of property. For example, there is tenure over uncultivated land used exclusively for hunting and fishing and in many cases local customary tenure [3]. There is, therefore, no reason to deny the justice of indigenous acquisition through occupancy and customary use of the land, even if these uses are non-agricultural. Reynolds noted that this was based on the antiquity of the indigenous peoples occupation and their land and tenure usage. Reynolds also supports Justice Brennan's opinion in the Mabo Case decision, stating that "the fallacy of equating sovereign and beneficial ownership of land gives rise to the notion that native title is extinguished by the acquisition of Sovereignty". In depth, Reynolds's unearths the usual conception which is being used to generate the doctrine "Terra Nullius", but a total rejection of this reasoning could also amount to a denial of the liberal view of civil society. Conversely, Reynolds's view of aboriginal land-claims apparently conforms to the commonly accepted Lockean-Nozickian paradigm. Although Reynolds criticises certain elements and rejects the Lockean account of original acquisition in this paradigm, Reynolds agrees that acts associated with original acquisition trump the authority of the state. In summary, his analysis leaves a grey area as to whether the full liberal concept of ownership applies to acts of customary communal acquisition.

4. The Tullyian Approach

James Tully offers another approach to indigenous peoples land claims, as he defended indigenous land claims in North America in a way which appears to avoid consistency with conservative Lockean-Nozickian traditions. Tully agitates for the idea of the formation of state and institutions of civil society to lawfully disband resources acquired in the state of nature, though empowering the state to replace the common practice of ownership and projected towards public goods. Theoretically, Tully's inclination towards Locke's interpretation appears to refute the natural rights that could be connected to land (i.e. in the state nature or in civil society):

"A property in something is the completion of man's natural rights to the means necessary to preserve and comfort himself and others. It is a paramount and remarkable feature of this initial claim right that it is not to the earth itself but to the man-made products useful to man's life".
[4]

Tully clearly deconstructs Locke's asserted view and, moreover, Tully's prior project on Locke's works entails the refusal of land entitlements previously constrained by the state's authority. However, Tully idea contradicts Reynolds' pertaining to sovereign and beneficial title to land. Tully indicates that indigenous peoples societies themselves were nations, asserted with an independent system of property, traditions of thought and international customary laws established over centuries of use. Hence, indigenous peoples property rights seem to be preserved in indigenous ancient state laws and approved by the sovereign nations. Tully illustrates that the American-Indian (Indian) ancient state was formerly recognised by European powers through conciliation and treaty as evidence. According to Tully, "negotiations cannot extinguish the status of Aboriginal societies as a nation with independent systems of property and traditions of thought, any more than negotiations can extinguish the equal of the U.S. and Canada" [5]. In a way, Tully is noting that this ancient state does not mislay their sovereign right but exists as a state and under the holding or fiduciary of the United States or Canada [6].

Tully's observations on indigenous peoples land rights have an unswerving relation with his prior work, which contrasts with Reynolds, on the importance of the establishment of indigenous peoples into nation states. Indigenous peoples land tenure is unable to restrain the state due to indigenous peoples holdings being rightfully acquired independently and, more importantly, being established before the creation of the state, as indigenous peoples represent unchallengeable claims against the United States and Canada because indigenous peoples nation states do exist within the United States and Canadian borders. Moreover, Tully concludes that these countries must counties their fiduciary responsibility and recognise the authority of the Indian states, albeit that the United States and Canada have breached the original agreements. Hence, Tully moved to address the connection between ensuing breaches of agreement and the creation of a modern constitution [7]. It is undeniable that modern constitutions are the brilliant work of Hobbes, Bodin and Locke, in which constitutions spawn the conception of faultless legal and uniform essential authority, and relatively blanket acceptance of the equivalence of authority based on ethnic dissimilarity, which generates an assorted jury system, social system and enhancement of local autonomy. Tully later asserted that modern constitutions have become so powerful they eliminate or assimilate cultural variety to justify uniformity [7].

Hence, Tully responds:

"An ancient is multiform, an 'assemblage' as Bolingbroke puts it, whereas a modern constitution is uniform. Because it is the incorporation of varied local customs, an ancient constitution is motley of overlapping legal and political jurisdiction, a kind of jus gentium 'common' too many customary jurisdictions, as in the Roman Republic or the common law of England" [7].

Tully mentioned that the development of new establishments was based on previous constitutions (i.e. ancient) prior to the Peace Treaty of Westphalia in 1648. Tully highlighted that the formation of new establishments made room for customs (i.e. customary forms of ownership). Hence, the new establishments and laws are at variance from the locale, and somehow jurisdiction is preserved by the conditions of ancient constitutions; moreover, modern constitutions decline to acknowledge the diversity of local customs and apply a procrustean solution for all communities in the particular nations; the diversity of communities are included in homogeneous laws that submit to a singular standardised legal and political authority in one system [7].

Indigenous peoples in Canada and the United States have a valid reason to demand such claims, and this stems from prior obligation as assured by the Royal Proclamation of 1763 and the United States Supreme Court decision by Justice John Marshall, in referring to the case of *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, *Worcester v. Georgia*, which acknowledged and remedied the restoration of a constitutional accord which mirrors original commitments between Indian and European powers. In it, there is the assurance of the cohabitation of both cultures within the fiduciary relationship. Hence, acknowledgements of this pact are supposed to be invincible, but nevertheless situations do change, and it continues to exist and be relevant; to restore such claims, it would require the rejection of modern constitutionalism along with authoritative and exclusionary features, as it would also diminish territorial jurisdiction of indigenous peoples. Thus, discourse for ancient instead of modern constitutional ideas seem convincing as it has weight and there is a basis for asserting historical entitlements of indigenous peoples on the grounds of other contingent facts relating to original, or earlier occupation. Tully turns to the earlier discussion in which he proclaims the prior virtue of ancient homogeny, in maintaining equal citizens by dealing with them identically and not necessarily equally. It may sound awkward, but justice could only be comprehended where difference is recog-

nised, protected and respected. Subsequently, to materialise this aspiration, one must preserve rather than destroy the jurisdiction of ethnic groups with respect to social organisation, language, kinship, leadership, property and territorial control.

Moreover, the diverse forms of social establishment, language and property relations can theoretically be accommodated within a sufficient territory by recognising different social modalities where a long established ethnicity coexists. For example, Switzerland is an example of a unified state consisting of different districts with different languages and traditions. Harmonisation between copyright and IK is a solution to some extent which touches on the problems of indigenous peoples land tenure, where the issue is establishing claims, given the passage of time in which these claims have gone unacknowledged.

The problem is not entirely whether customary forms of ownership and devolution should apply over indigenous peoples territories (though this is an extremely vital component of disagreement) but rather the identification and bounding of the relevant territory. Indigenous peoples land claims often intertwine two issues: 1) the physical extent of the territory or territorial boundaries claimed by specific groups; 2) the jural system of property relations which will apply within that territory (i.e. whether customary indigenous law applies or the real property laws of Western society). It may not immediately answer the questions in alphabetical order, but the second question gives rise to more questions, for example, if the state grants customary laws to indigenous peoples within tribe 'A's' jurisdiction, it does not necessarily share the same virtues with tribe 'B,' and later on the problem may arise as to whether the law should be extended nationwide, as it cannot be certain that other indigenous peoples are interested in the same issues. Nevertheless, Tully's ideas on indigenous autonomy may somehow be able to accord with indigenous people's customary systems and with the operation through the Western framework of law on the one hand. On the other hand, it still does not solve the issue of the legitimate boundaries of that jurisdiction. Then, we are back to square one again, since this idea does not solve the core ownership issue; alternatively, reasserting indigenous peoples customary acquisition of ownership and subsuming both systems would be horrendous for states to operate. For example, the indigenous peoples system entails a piece of land, which in the Western system's view is an ownerless piece of land but in the indigenous people's system is probably recognised as having indigenous peoples ownership (i.e. ownership rights gained through customary modes). Overall, Tully's work seems to return to the Lockean, Honorean and Nozickan approach, as these approaches accept that ownership of resources can be acknowledged on contingent events. Tully's analysis still depends on the priority of entitlement based on earlier territorial occupation entitlement, instead of legitimisation and unanimity based on the conception of justice.

Hence, the weaknesses in this approach derive from values of cultural diversity and customary modes of acquisition, which are not harmonious with other customary arrangements. In the beginning, Tully's work seems to be a promising solution, but this approach backfires since the approach has strong correlations with territorial occupation as an entitlement claim rather than a consensus-based model of justice. Moreover, another obstacle to this approach is acceptance of the customary arrangement of value in different indigenous peoples. It would be tantamount in property issues and also challenging to achieve consensus, as customary claims would also affect non-indigenous peoples. Based on this reason, the distribution of justice is in accordance with the authority of the state, as traditionally argued by liberals. Moreover, by accepting this view, it would be insufficient to make such claims from the customary perspective since the historical occurrence of occupation by one group changes the delimitation of ownership and maintains that justice will be eroded.

5. The Kymlickian Approach

This approach seems to be possible for use in support of the customs and claims by Indigenous peoples; this approach is dependent on and incorporates the theory of transcultural liberal principles. Based on previous work by, for example, V. Van Dyke, Joseph Raz, and Tully, Kymlicka expended his approach by arguing for the development of the authority of state to the indigenous peoples; in this way, indigenous peoples could preserve their cultural way of life (i.e. beliefs, norms, language and customs) [8]. He also challenged the liberal propensity to enunciate the justice principle in its distinction between an individual, state and others. Furthermore, he mentioned that indigenous peoples ought to be accorded specific protection of the law, in the way that indigenous people's culture is not undermined or weakened, and which would later cause damage to the individuals in the indigenous peoples.

From another perspective, Kymlicka notes that the autonomy of liberal values can be undermined by individual damage [9]. This view stresses the importance of 'autonomy' in the liberal value debate and also enables Kymlicka to include a range of options in allowing the community to be autonomous when cultural indigenous peoples are under the threat. In other words, this approach views the relationship between cultural indigenous peoples and their dependence on the individual in the sense of the 'cultural context of choice' being fragile. Therefore, Kymlicka's belief in asserting the cultural autonomy of indigenous peoples may increase their choice to extend cultural sanctions and social strengths, in which the threat to the autonomy of a single ethnic group may be justified by empowering cultural groupings to ensure the cultural continuity of indigenous peoples (i.e. their traditional way of life). In detail, Kymlicka suggested indigenous peoples are qualified by some arrangement in land rights based on native title. He also proposed that indigenous peoples be awarded a reasonable amount of land reserves to the boundary of cultural protection does not possess value to indigenous peoples, in the way that the indigenous peoples begin to benefit from affirmative action or from an imbalance in opportunity [10]. As an analogy, fairness would involve individual indigenous peoples being subject to redistributive tax revenue.

Hence, the Kymlickian approach proffers that the universal principle of justice lies in humanity, as this approach illustrates the needs of the general right to property instead of a specific right based on selective events. This approach also shares a common view with liberal ideology compared to conservative traditions. This principle is fundamental to any liberals who maintain the state's right to control and govern, as an exclusive right to be the collector of wealth and property while concurrently maintaining the right of individuals to capitalist development. In reference to indigenous peoples, they are unable to maintain both positions from the historical entitlement perspective. Moreover, contemporary liberal ideology also holds that any opportunity reasons or circumstances are unacceptable reasons to award such absolute rights to manage and discard property. This argument is also being applied as the reason to legalise the disintegration of trust, single economic supremacy, red tape for trade regulations and, to a certain extent, it is being used as part of social responsibility (i.e. restructuring income based on distributive justice). However, this may weaken the legal argument if it is accepted (even though not including more elaboration or other pertinent evidence) that indigenous peoples are associated on the grounds of previous related incidents of taking property possession and chronological precedence of indigenous peoples customs. But, there is ample reason for indigenous peoples to secure rights to the property. On the other hand, if the same reason were to be applied in the capitalist's rights domain it would be challenging to recognise such rights.

Overall, this approach emphasises the trans-cultural liberal principle of autonomy as an essential part in establishing claims to indigenous peoples land rights; this approach also suggests that such a claim must be limited to historical entitlement and be in accord-

ance with distributive justice, as the claim is sufficient to sustain the viability of indigenous existence and the 'context of choice' of the individual. Furthermore, adding 'income generating rights,' which incorporate some elements of non-customary into customary ownership, ensures sustainability and can be a bargaining chip for indigenous peoples.

In the wider view, there is the question of whether land ownership for indigenous peoples can protect IK. In order to answer this question, IK requires certain a tangible shape, since IK is not a settled term as it can exist in many forms depending on the interpretation of the indigenous peoples. Although it does not have a tangible shape or exact form, the form of IK is essential; in other words, a process of IK is developed in which it is associated with ancestors from whom IK originates and, therefore, its interpretation remains open to all possible manifestations of IK. Moreover, without the land (i.e. the source or medium of transition), IK is unable to develop as it does not stand alone without a medium, such as land, plants, animals and indigenous peoples. Furthermore, since IK originates from the indigenous peoples ancestors, it takes us into the realm of time and the field of knowledge.

Since IK is associated with ancestors, it is challenging to refute that IK is something that emerged from the past or is stagnant knowledge from previous indigenous people's generations. Fascinatingly, based on the EU Council's (i.e. Regulation on Agricultural and Food Stuffs - Specific reference to clause of Traditional Specialities Guarantee) set term of 'traditional' as something being used or available to market for a period which illustrates the transition from one generation to another generation of peoples over at least 25 years, in referring to Article 7, 1(d), Application for Registration, (d) the documents proving the product's specific and traditional character'. Moreover, the EU Directive (2004/24/EC) [11] of the European Parliament and of the council of 21 March 2004, and Directive 2001/83/EC [12] on the Community code with reference to 'traditional herbal medicine products' to be registered in the EU, there is emphasis on the usage of the product for a period of 30 years, and by the community for 15 years. (*Directive 2004/24/EC*, Article 16c(1)(c),) Hence, there is an element of time which plays a key role in defining the term 'traditional' (i.e. indigenous knowledge); in other words, IK is developed by the indigenous people's ancestors and then is passed down from generation to generation. (*Directive 2001/83/EC*)

IK is also associated with the field of knowledge, as certain countries have applied a definition of IK in their domestic law. For example, in Portuguese law Article 3 of Decree No. 118/2002 stated that IK is:

"…all the intangible elements associated to the commercial or industrial use of local varieties and other endogenous material developed by local communities, collective and individually, in a non-systematic manner and that are inserted in the cultural and spiritual of those communities, including but not limited to, knowledge relating to methods, process, products and denominations that are applicable in agriculture, food and industrial activities in general, including handcraft, trade and services, informally associated to use and preservation of local and other endogenous and spontaneous material that is covered with present law".
(*The Portugal Decree Law No.118/2002*) [13]

Moreover, Article 7(II) of a Brazilian statute (Provisional Measure No. 2. 186-16, 23 August 2001) [14] defines IK as "associated traditional knowledge: information or individual or collective practices of indigenous or local communities having real or potential value and associated with genetic heritage." (*The Brazilian Statue,(Provisional Measure(PM) No. 2. 186-16, 23 August 2001*) Furthermore, under the law of Peru, IK is translated as "collective knowledge"; Peruvian Law No.278, Article 2(b) mentioned "the accumulated, trans-generational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity" [15]. Thus, there is a clear relation between IK, which is associated with indigenous people's ancestors and with the knowledge as discussed in previous sections; thus, IK can be appear in many forms. In other words, IK could incorporate knowledge of flora and fauna and their associated properties, minerals and soils associated with property, mixtures of organic and non-organic residues, processes and technologies, and the means to better individuals and communities in terms of health, welfare and artistic expression [16].

6. Suggestion and Conclusion

As pointed out in the previous discussion, Reynolds's work correspond with Locke's and Nozick's conception of indigenous people's land claim but Reynolds's approach silent on whether full liberal concept of ownership could be applies to acts of customary communal acquisition. The impuissance of Reynolds's work due to value of cultural diversity and customary modes of acquisition of indigenous peoples which are not uniformity as compare to other indigenous people's tribes in creating standardise land claims. On the other hands Tully's work quite interesting and possible likely to solve indigenous peoples claims; however there is contention with territorial occupation as an entitlement claim rather than a consensus-based model of justice. Moreover, another challenge to this approach is acceptance of the customary arrangement of value in different tribes' indigenous peoples plus to get consensus from all tribes of indigenous peoples would be unimaginable situation since customary claims would also affect non-indigenous peoples. Kymlicka work's presented a universal principle of justice lies in humanity, as this approach proposed the needs of the general right to property instead of a specific right based on selective events in which align with liberal ideology compared to conservative traditions. On contrary, this may weaken the legal argument if it is accepted (even though not including more elaboration or other pertinent evidence) that indigenous peoples are associated on the grounds of previous related incidents of taking property possession and chronological precedence of indigenous peoples customs.

Based on the conceptual work of those authors on the above, native customary laws were established by the British in Malaysia since early 1800. In the early days of protecting indigenous peoples in Malaysia, history has illustrated that Colonial Officer establishing the law to safeguard indigenous peoples and honouring customs and indigenous peoples land rights through intergeneration justice in certain extent. Practically the law used as means for the government to manage indigenous peoples and indirectly it ultimately severely limited the rights of native peoples to regularise their traditional lands according to their customs [17]. Therefore, the prime beneficiaries of the dual legal system (1) government able manage insurgency, and (2) as government primary source of revenue.

The final significant event that could have a substantial impact on native land rights is a planned national inquiry by the Malaysia Human Rights Commission into the land rights of indigenous peoples in Malaysia. The inquiry begins in June 2011, and a report is anticipated by late 2012. The results of this report are bound to carry a great deal of weight. Looking at all these events together, albeit from a distance, it appears that Malaysia may be at a tipping point in its treatment of native land rights through metamorphosis something new and interesting in intergeneration justice. At this moment there is a convergence of factors: increasingly strong NGOs facilitating native communities in their land struggles, sympathetic judges at the level of the High Court, ruling in favour of native rights, renewed efforts at strengthening the Native Court system, and a Human Rights Commission that appears ready to confront the issue of native land rights [18].

Therefore, it is an ideal time to put a great deal of thought into the role of intergeneration justice in protecting native peoples in Malaysia. As this paper argue, intergeneration justice in Malaysia has not, to date, successfully supported native peoples in their quest for autonomy and security, then this might be a window of oppor-

tunity for native peoples and their advocates to thoughtfully re-structure intergeneration justice in a manner that truly creates a scenario where a respectful co-existence of different legal norms and customs is possible.

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