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Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia

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1. International Efforts to Harmonise Legal Approaches to Folklore and Traditional Knowledge Protection

This paper will present a short survey of various approaches to traditional knowledge and folklore protection in Australia and Southeast Asia. It seems that both the terminology used in the debate about traditional knowledge and folklore and the legal solutions envisaged are very diverse. Over the last decade there has been an explosion of international declarations and organisations advocating internationally harmonised notions of rights to culture, often on behalf of indigenous minorities or other local communities. This often leads to what Cowan, Dembour and Wilson[2] have called "strategic essentialism". The term refers to the attempts by activists from or working on behalf of communities to define unanimous or seemingly unanimous demands with regard to culture and rights and to make them fit into the categories of national or international legal regimes. The authors assume that "we need to be more cognisant of the role played by law in essentialising categories and fixing identities, as a concomitant of its task of

1 The author's research into traditional knowledge protection and intellectual property in Australia and Southeast Asia is currently supported by a Queen Elizabeth II fellowship of the Australian Research Council (ARC).

2 J.K. Cowan/M.B. Dembour/R.A. Wilson, "Introduction", in: J.K. Cowan/M.B. Dembour/R.A. Wilson, *Culture and Rights: Anthropological Perspectives*, Cambridge University Press 2001, 10-11.

developing general principles to include, ideally, all possible cases."[3] In other words, litigants in cases involving indigenous rights legislation might be forced to adopt a notion of culture as static and inflexible[4] and "as a pre-existing given…rather than as something creatively reworked during struggles to actualise rights."[5] As a result, the international concepts of community rights to culture and heritage in the form of traditional knowledge or folklore protection begin to look more unified than they actually are.[6]

This presentation aims to demonstrate the diversity of the approaches. It shows how much of the debate originated in settler colonies with significant indigenous minorities such as Australia. However, if one moves to Asia, there is a different understanding as to who may be bearing rights to folklore and traditional knowledge. There is still little recognition of indigenous minorities and instead Asian governments push at international conventions and in national legislation for the rights of farmers, herbalists and other "local communities". Much of the current discussion tends to blur this distinction and one finds publications discussing the rights of Thai farmers, Korean shamans or Indian Ayurvedic healers together with Aboriginal or North American Indian minorities. The attempt to harmonise the various approaches has also shifted the terminology from "folklore" to "traditional knowledge" based on the holistic understanding of the material by some of the communities involved in the international debate. In line with the author's current ARC funded research project, Southeast Asian examples for this paper will be drawn mainly from Indonesia and the Philippines, with occasional reference to Thailand.

2. The Diversity of Approaches: Folklore and Traditional Knowledge Protection in Australia, the Philippines, Thailand and Indonesia

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3 *Ibid*., 21.

4 S.E. Merry, "Changing Rights, Changing Culture", in: J.K. Cowan, M.B. Dembour and R.A. Wilson (above note 2), 39.

5 J.K. Cowan/M.B. Dembour/R.A. Wilson, "Introduction" (above note 2), 19.

6 For a sceptical assessment of the role of intellectual property in protecting indigenous culture see also M.F. Brown, "Can culture be copyrighted?", *Current Anthropology*, Vol. 39 No. 2, 193; M.F. Brown, *Who owns native culture?*, Harvard University Press, Cambridge/Mass.-London, 2003.

The discussion about aspects of traditional knowledge has a fairly long tradition in Australia, yet it is relatively new to Southeast Asia. There are several reasons for this, which have to do with the differences in approach between Australia on the one hand and Southeast Asian nations on the other. The first reason is that the term was for a long time used more or less simultaneously with the term "indigenous knowledge". Writers from countries with significant and officially recognised indigenous minorities such as Australia or Canada dominated the international debate, in part also because they published their case materials and articles in English. However, as Kingsbury has shown,[7] the concept of "indigenous peoples" is problematic in Asian countries. It is particularly problematic in Southeast Asia where colonial legacy has created a multiethnic society with various waves of migration bringing in ethnic minorities from India, the Arab peninsula and from China. As a consequence, the term "indigenous" is understood in Indonesia or Malaysia as referring to a person who is ethnic Malay and literally translated as "son of the soil" ("*pribumi*" or "*bumiputra*") as opposed to "alien" minorities of Chinese and Indian descent. Descendants from even earlier waves of migration to Southeast Asia, who can be found, for example, in the interior of Borneo or on the Mentawai islands off the coast of West Sumatra, were until recently referred to in Indonesia as "*suku bangsa terasing*", remote or secluded living ethnic groups. To recognise these groups as bearers of particular rights is more difficult to argue in densely populated post-colonial Asia than in settler colonies such as Australia, where recognition of Aboriginal rights is often regarded as recognition of past injustices and as an important component of the reconciliation process.

There is, however, little conformity in this regard in Southeast Asia. On the one hand, there is some recognition of indigenous peoples in the Malaysian Constitution[8] and the Philippines has enacted an Act to recognise, protect and promote the rights of indigenous cultural communities/indigenous people.[9] The Philippines is an interesting case study, because its

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7 B. Kingsbury, "The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia", in: J.R. Bauer/D.A. Bell, *The East Asian Challenge for Human Rights*, Cambridge University Press 1999.

8 R. Bulan, "Native Status under the Law", in: Wu Min Aun (ed.), *Public Law in Contemporary Malaysia*, Longman, Petaling Jaya 1999, 259; S. Gray, "Skeletal Principles in Malaysia's Common Law Cupboard: The Future of Indigenous Native Title in Malaysian Common Law", in: LAWASIA Journal 2002, 101.

9 Republic Act No. 8371 of 1997.

different approach to the issue has its historical roots in the US administration during the first half of the 20th century.[10] At the time, the Americans established a Bureau of Non-Christian Tribes and applied policies similar to those for American Indians,[11] hence the similarities of the Philippines in this respect with the Anglo-Saxon settler colonies. On the other hand, countries such as Thailand recognise the hill tribes of North and Northwest Thailand as ethnic groups but have made it plain to the United Nations that such groups "are not considered to be minorities or indigenous peoples but as Thais who are able to enjoy fundamental rights… as any other Thai citizen."[12] As a consequence, the amended Thai Constitution of 1997 in Art. 46 protects "traditional communities", who are given the right "…to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently…."[13] Similarly, the Indonesian Constitution of 1945, four times amended between 1999 and 2002, declares in Art. 18B(2) that the state "recognises and respects adat law communities along with their traditional rights". "*Adat*" (customary law) is widely used in communities all over Indonesia. Different from the situation in Thailand, however, such recognition of customary rights occurs only "as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law." Furthermore, Art. 28I in the new Chapter XA on 'Human Rights' maintains that "the cultural identities and rights of traditional communities shall be respected", but again adding the qualification that this has to happen "in accordance with contemporary development and civilisation."

A second reason is the newness of the term "traditional knowledge" as opposed to the still better known term "folklore". Traditional knowledge, as it is now defined by WIPO, includes "tradition based literary, artistic and scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition-based

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10 For a recent collection with comparative essays on US rule in the Philippines see J. Go/A.L. Foster (eds.), *The American Colonial State in the Philippines: Global Perspectives*, Duke University Press, Durham and London 2003.

11 Kingsbury (above note 6), 353.

12 See the statement of the Government of Thailand of 12 May 1992, cited in Kingsbury (above note 6), 357.

13 Cf. Section 46 of the Constitution of the Kingdom of Thailand of 1997.

innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic field." This is a working definition used in a WIPO report of 2001 on the intellectual property needs and expectations of traditional knowledge holders.[14] The report was the result of several fact-finding missions that took WIPO delegations to countries on four continents. Australia was included in the fact-finding mission to the South Pacific and roundtable discussions were held in 1998 in both Darwin and Sydney. It is obvious from the definition of traditional knowledge that the definition is written by people concerned with intellectual property law. At the same time, however, the definition crosses the entire range of intellectual property rights. It makes no distinction between copyrights, patents, trade marks or other forms of intellectual property. The definition does, however, distinguish intellectual property related forms of traditional knowledge from other forms of real or moveable property and from heritage protection in a broader sense.

As Michael Blakeney has pointed out, the shift away from the term "folklore" occurred after it was criticised for its eurocentric content and lack of capability to express the holistic conception of many non-Western communities with regards to knowledge and the transmission of knowledge. The term folklore was regarded as giving the impression of dealing with static rather than evolving traditions and it gave the communities an inferior status in comparison with the dominant culture.[15] The view of indigenous Australian representatives was prominent in this criticism. In her report "Our Culture: Our Future", written in 1998 for the Aboriginal and Torres Straits Islander Commission (ATSIC), Terri Janke preferred to use the term "indigenous cultural and intellectual property rights" introduced a few years earlier by Ms. Erica Daes, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[16]

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[14] World Intellectual Property Organization, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge*, Geneva 2001, 25.

[15] M. Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law", [2000] E.I.P.R. 251.

[16] T. Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Company, Sydney 1998.

The WIPO definition is narrower than the definition of "indigenous cultural and intellectual property" used in the report drafted by Terri Janke. This report's definition includes indigenous ancestral remains, sacred indigenous sites, so-called "cultural environment resources" such as minerals and species and even languages as far as they are relevant for "cultural identity, knowledge, skill and the teaching of culture".[17] On the other hand, the WIPO definition is much wider than the previously predominant term of "folklore", which clearly focused on copyright related artistic expressions such as handicrafts, dances and music.[18] WIPO has illustrated the new approach with a picture of overlapping circles.[19] The WIPO term is, therefore, narrower than heritage, but wider than both "expressions of folklore" and "indigenous knowledge", because the material in question may be produced by indigenous people, but that is not necessarily the case.

In view of the reluctance of developing countries of Southeast Asia to provide special protection for indigenous peoples, it comes as no surprise that the term "indigenous knowledge" has not found much acceptance in this part of the world. The Philippines is again a notable exception here. In the Indigenous Peoples Rights Act of 1997, it recognises "community intellectual rights" and "rights to indigenous knowledge systems" of indigenous cultural communities and indigenous peoples. "Indigenous societies" are also mentioned as potential beneficiaries in the Traditional and Alternative Medicine Act of 1997[20] and Executive Order No. 247 of 1995 and the implementing rules and regulations for this order of 1996[21] speak again of indigenous cultural communities and indigenous peoples.

Thailand's Plant Varieties Protection Act of 1999 allows for the registration of local plant varieties by "local communities". The Act on the Protection and Promotion of Thai Traditional Medicine of 1999 distinguishes between medicinal formulas that are in the public domain and other that may be privately owned or become the property of the state. The latter occurs when the formula is of significant benefit or has special medical value and has been declared as such by

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17 T. Janke, 11-12.

18 See WIPO (above, note 10), 22. In 1982, WIPO and UNESCO drafted the Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and other Prejudicial Actions.

19 *Ibid.*, 26.

20 Republic Act No. 8423.

21 Department Administrative Order No. 96-20.

the Ministry of Health.[22] The special mentioning of "local communities" as rights holders is a consequence of the amendment of the Thai Constitution in 1997 and the granting of rights to "traditional communities" that was mentioned earlier.

While Thailand allows for appropriation of forms of traditional knowledge only in the field of traditional medicine, Indonesia provides for the strongest centralised role of the state of the countries surveyed here. It speaks of "folklore" and of "products of the culture of the people" in the Copyright Act and stipulates that the state holds the copyright with regards to this material. In fact, while many countries have recently shifted from using the term "folklore" to "traditional knowledge", Indonesia has gone the opposite way, at least in its legislation. The term "folklore" has been newly introduced into the Copyright Act of 2002, whereas the previous Act spoke only of the "products of popular culture". According to the Plant Varieties Act, local varieties that are "property of the public" are controlled by the state.

A third reason for the differences in approach has to do with culture and with customary law. Cultural taboos and customary law prohibitions dealing with traditional knowledge material are strong in relatively isolated indigenous communities. In such communities, traditional knowledge material is often regarded as secret and sacred, because it plays a vital role in the survival of the community. It is linked to animist practices and religion and as long as local belief systems remain sufficiently strong, it is possible for local elders, headmen and practitioners of traditional forms of medicines to enforce the taboos. However, in the setting of the larger society of a nation state, where the majority of the people adheres to mainstream religions such as Islam, Buddhism or Christianity, taboos based on customary law lose their power and can no longer be enforced. The question of recognition of such customary enforcement depends then on how much scope the nation state and the majority or majorities are prepared to grant to indigenous customary law. Here, we can perceive again a distinction between the policies of the various countries in this survey. In Australia, customary law is still strong in Aboriginal communities in the northern part of the country. It is only in recent years

[22] J. Kuanpoth/G. Dutfield/O. Luanratana, *Devising New Kinds of International and National Systems for the Protection of Traditional Medicine* (draft report for the WHO, on file with the author), 83-86.

that it has gained recognition as part of the national legal system, but Aboriginal communities are in a fairly strong bargaining position here due to the international attention paid to the issue and the necessity for a settler society to find ways for reconciliation.

In the Philippines, the recognition of indigenous customary rights has improved with the acceptance of the international concept of "indigenous peoples" by the government.[23] In Thailand, there is practical assistance for the "hill-tribe" people of North and Northwest Thailand, but apparently so far little recognition of their customary law.[24] The Thai Ministry of Foreign Affairs has pointed out that it is committed to capacity building programs for "local community and grassroots people in rural areas".[25] In addition, the amended Thai Constitution now gives "traditional communities" the right "to conserve or restore their customs" but the precise meaning of this right is yet to be established. In Indonesia, customary law or *adat* is officially recognised as part of the legal system. It is important, however, to distinguish between what has been termed as "remote living communities" and the much larger communities of Javanese, Sundanese, Balinese, etc., that together form Indonesia. Mystical practices certainly play a great role in Java, for example, but the Javanese are little acquainted with the idea that knowledge should be sacred and secret. In an interesting study carried out in 1997 and 1998 for her PhD thesis, Cita Citrawinda Priapantja surveyed the attitudes of sellers of traditional *jamu* (herbal medicine) and of traditional Chinese medicine in the area of Metropolitan Jakarta and in Semarang and Yogyakarta in Central Java.[26] She found that especially the sellers of *jamu gendong* (literally: carried *jamu*, sold by street peddlers and carried in a bottle on their backs) in Jakarta were poor migrant women from central Java for whom the traditional Javanese values of village cooperation (*gotong royong*) and harmony *(rukun*) were more important than business

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23 Kingsbury (above note 6), 353-354.

24 Kingsbury (above note 6), 356. See also the website of the Statement of the South-East Asia Indigenous and Tribal Peoples Consultation Workshop of the Asia Partnership for Human Development at http://www.pphd.or.th/southeast_RP.html.

25 See the website of the Ministry of Foreign Affairs, Kingdom of Thailand at http://www.mfa.go.th/web/24.php.

26 C.C. Priapantja, *Budaya Hukum Indonesia menghadapi Globalisasi: Perlindungan Rahasia Dagang di Bidang Farmasi* (Indonesian legal culture facing globalisation: the protection of trade secrets in the field of pharmaceuticals**)**, Chandra Pertama, Jakarta 1999.

competition or the secrecy of their formulas.[27] As far as artistic expressions are concerned, the anthropologist Koentjaraningrat has pointed out that in Javanese religious symbolism, ceremonies play a very important role to give magical power to artistic items. The Javanese dagger (*kris*) for example becomes magical only through ritual and only in relation to a particular person.[28] There is, therefore, no particular reason why such an item without spiritual energy may not be produced as folklore for the tourist market.

3. The National Approaches in Detail

a) Australia

In Australia, the issue of folklore protection has attracted the attention of policy makers for many years. A working party to examine the issue was formed as early as 1974 and in 1981, the Department of Home Affairs and Environment published a "Report of the Working Party on the Protection of Aboriginal Folklore", which recommended the adoption of an Aboriginal Folklore Act and the establishment of a Folklore Commission. However, the model law did not provide for indigenous ownership of the material.[29] It was soon superseded by judicial developments when the High Court overturned the doctrine of *terra nullius* that had declared Australia as uninhabited at the time of settlement in *Mabo and Others v. Queensland* [No. 2]. However, *Mabo* concerned the recognition of native title to land, but left open the question of a more general recognition of Aboriginal customary law. Shortly after the *Mabo* decision, the High Court refused to recognise customary criminal law in *Walker v. New South Wales* ((1994-95) 182 CLR 45, at 49-50).[30] Academic commentators attempted to extend native title to land to intellectual property based on the holistic understanding of Aboriginal people of the connection between songs or stories about land and the knowledge transmitted in those stories. However, so far these attempts have not been successful. In *John Bulun Bulun & Anor v. R & T Textiles Pty.*

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27 C.C. Priapantja (above note 22), 299-307.

28 Koentjaraningrat, *Javanese Culture*, Oxford University Press, Singapore 1985, 343-345, 414-415.

29 T. Janke (above note 12), 299-300.

30 Extract reprinted in H. McRae/G. Nettheim/L. Beacroft, *Indigenous Legal Issues: Commentary and Materials*, 2nd ed., LBC Information Services 1997, 126.

Ltd. (1082 FCA (1998)), Justice von Doussa pointed out that the assumption of communal ownership to a copyrighted work would involve the creation of rights not otherwise recognised by the Australian legal system.

Instead of communal ownership, Justice von Doussa in an important *obiter* remark was prepared to recognise a fiduciary obligation of an Aboriginal artist as the individual holder of the copyright to preserve the religious and ritual significance of a work that made use of traditional symbols. By using the equitable concept of the fiduciary obligation, the judge placed the Aboriginal artist in a similar position vis-à-vis his/her community as a trustee towards a beneficiary.[31] It seems that the possibilities of the law of equity in common law countries with regards to folklore and traditional knowledge protection are yet to be fully explored. Unconscionable conduct and undue influence are further doctrines that the courts might turn to in cases involving traditional knowledge of indigenous communities. Finally, there is the doctrine of confidential information that could help to counter the common attempt to use indigenous or local knowledge as a springboard for the development of new products without compensating the holders of that knowledge. Traditional knowledge, however, is often used by a fairly large number of people, making it difficult to impose an obligation of confidentiality on all of them to prevent the secret from leaking out. There is also the possibility that the confidential information approach backfires, for example, if the knowledge is discovered from outside the community through independent research or anthropological observation. In this case, communities might have an interest in arguing that the material has been published and is in the public domain.

Apart from these approaches using doctrines of the law of equity, there is, of course, the much discussed contractual approach to conclude benefit sharing agreements with indigenous communities. These agreements usually restrict the assertion of intellectual property rights and they require and facilitate the sharing of the benefits resulting from the use of traditional knowledge. A draft set of regulations dealing with these issues is currently in preparation for inclusion in the Environment Protection and Biodiversity Conservation Act.

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[31] See also the more general assumption of a fiduciary relationship in Canada between the state and its indigenous population in *R v. Sparrow* (70 DLR (4th) 385 (1990)), as cited in P. Parkinson (ed.), *The Principles of Equity*, LBC Information Services, Sydney 1996, 360.

b) The Philippines

In the Philippines, the rights of "indigenous cultural communities" to the preservation and development of their cultures, traditions and institutions has found expression in the Constitution and in four further pieces of legislation:

- The Indigenous Peoples Rights Act of 1997
- The Traditional and Alternative Medicine Act of 1997
- Executive Order No. 247 of 1995 prescribing guidelines and establishing a regulatory framework for the prospecting of biological and genetic resources, their by-products and derivatives, for scientific and commercial purposes and for other purposes
- Department Administrative Order No. 96-20 on implementing rules and regulations on the prospecting of biological and genetic resources

Section 32 of the Indigenous Peoples Rights Acts guarantees "community intellectual rights", whereas Sec. 34 recognises "Rights to Indigenous Knowledge Systems and Practices". It encourages the state to take "special measures to control, develop and protect their sciences, technologies and cultural manifestations". Access to biological and genetic resources needs the prior informed consent obtained in accordance with the customary laws of the communities (Sec. 35). Rights to "sustainable agro-technical development" are recognised in Sec. 36 and there is a definition of "sustainable traditional resource rights" in Sec. 3 o. According to Kingsbury,[32] somewhat more than 10 percent of the Filipino population may be referred to as belonging to "indigenous cultural communities" and, as a consequence, the concept is well established in political life in the Philippines. Nevertheless, even in the Philippines there are ambiguities as to who precisely is "indigenous". Section 3 h. defines "indigenous cultural communities/indigenous peoples" as "a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organised community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilised such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social

[32] Above note 6, 353-354

and cultural inroads of colonisation, non-indigenous religions and culture, become historically differentiated from the rest of the Filipinos." While this sounds like a classical definition of "indigenous peoples", the same section continues then as follows: "Indigenous cultural communities/indigenous peoples shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country at the time of conquest or colonisation, or at the time of inroads of non-indigenous religions and cultures, or the establishment of the present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains." This second part of the definition can in fact be stretched to include any Filipinos of Malay descent claiming to retain "some" of the pre-colonial social, economic, cultural or political institutions. Presumably such a claim would be very hard to disprove.[33]

The Indigenous Peoples Rights Acts creates a powerful National Commission on Indigenous Peoples (NCIP) appointed by the President and acting under the Office of the President to formulate and implement policies, plans and programs under the legislation (Sec. 3 k.). The NCIP has a legal affairs office, which at the same time decides legal disputes by applying customary law where local dispute resolution mechanisms have failed. Further appeals, however, go to the state courts. Indigenous customary law is recognised, but only "as may be compatible with the national legal system and with internationally recognised human rights."

The earlier Executive Order No. 247 with the official content of "prescribing guidelines and establishing a regulatory framework for the prospecting of biological and genetic resources, their by-products and derivatives, for scientific and commercial purposes, and for other purposes" and the Department Administrative Order No. 96-20 of 1996 of the Department of Environment and Natural Resources on the subject of "Implementing rules and regulations on the prospecting of biological and genetic resources" establish the framework for bioprospecting and for benefit

[33] Interestingly, the earlier Implementing Rules and Regulations on the Prospecting of Biological and Genetic Resources in Department Administrative order No. 96-20 of 1996 of the Department of Environment and Natural Resources did not yet contain the second, broader part of the definition. However, the Indigenous Peoples Rights Act of 1997 must be seen as overriding the earlier implementing order.

sharing agreements. The Preamble of Executive Order No. 247 mentions the aim of the state "to identify and recognise the rights of indigenous cultural communities and other Philippine communities to their traditional knowledge and practices." Section 1 of the Department Administrative Order refers to relevant sections in the Philippines Constitution and to the Preamble of the UN Convention on Biological Diversity. The orders distinguish between academic and commercial research agreements, create mechanisms for prior informed consent and prescribe minimum terms and conditions for research agreements. As for "traditional use", as defined in Department Administrative Order No. 96-20, this is "the customary utilisation of biological and genetic resources by the local community and indigenous people in accordance with written or unwritten rules, usages, customs and practices traditionally observed, accepted and recognised by them." Again, the definition used in various parts of the legislation widens the scope of the beneficiaries of the legislation from indigenous people to "local communities" such as farming communities and other bearers of traditional knowledge. The legislation creates an Inter-Agency Committee on Biological and Genetic Resources with members from various government departments, the science community, the National Museum, an NGO and a "People's Organisation" with membership drawn from indigenous cultural communities/indigenous peoples.

Finally, there is the Traditional and Alternative Medicine Act (TAMA) of 1997. It protects and promotes "traditional medicine" defined as "the sum of total knowledge, skills and practice on health care, not necessarily explicable in the context of modern, scientific philosophical framework, but recognised by the people to help maintain and improve their health towards the wholeness of their being the community and society, and their interrelations based on culture, history, heritage and consciousness." While the Act speaks of the protection of "indigenous and natural health resources", it is less clear than in the case of bioprospecting that this refers to "indigenous cultural communities/indigenous peoples" as they are defined in the Indigenous Peoples Rights Acts. The guiding principles of the legislation in Sec. 2 require the state to "seek a legally workable basis by which indigenous societies would own their knowledge of traditional medicine" and refers to benefit sharing agreements if such knowledge is used by "outsiders". However, the holders of this traditional medicinal knowledge according to the legislation are "traditional healers" defined as "the relatively old, highly respected people with a profound

knowledge of traditional remedies". This seems to refer to Filipino traditional healers in general and, thus, is not confined to "indigenous people". A further indication in that direction is that, different from the bioprospecting legislation, the Board of Trustees of the newly formed Philippine Institute of Traditional and Alternative Heath Care includes again representatives from various government departments, environmental sector organisations in addition to medical practitioners and a food industry representative. The holders of traditional medicinal knowledge, however, are only represented by a single traditional and alternative health care practitioner. It seems, therefore, that traditional medicine is not limited to "indigenous medicine", but wider and more in accordance with "alternative medicine" as in many Western countries.

c) Indonesia

Indonesia protects forms of traditional knowledge in the Copyright Act of 2002 and in the Plant Variety Protection Act of 2000. The Term "traditional knowledge" (*pengetahuan tradisional*), however, while part of the Indonesian intellectual property vocabulary by now and used on various websites, appears nowhere in the legislation. Instead, the Copyright Act of 2002 returns in fact in Sec. 10 to the older term of "folklore" which has now been added to the previously used "products of the culture of the people" (*hasil kebudayaan rakyat*). Section 10(2) explains that such folklore is common property held by the state and gives as examples "stories, tales, fairy tales, legends, chronicles, songs, handicrafts, choreographies, dances, calligraphies and other works of art". Arguably, the common understanding of folklore does not normally extend to works of choreography and calligraphy, which would have individual character, so what is meant here are apparently "choreographies" for traditional forms of dance, etc.

The folklore provision of Sec. 10 is part of the Indonesian copyright legislation since the enactment of the first Copyright Act in 1982. It raised concerns at the time that the state wanted to appropriate forms of local culture and that this would lead to restrictions for communities to freely exercise their local culture. According to Ajip Rosidi,[34] this finally led to a compromise that found expression in Sec. 10(3) that the state would hold the copyright to such works only

[34] A. Rosidi, *Undang-Undang Hak Cipta – Pandangan Seorang Awam* (The Copyright Act – A layman's perspective), Jakarta 1984, 79-80.

"with regards to foreign countries", so that Indonesians themselves would be free to use this material. This has now also entered the new Copyright Act of 2002 and Sec. 10(3) in its current wording provides that non-Indonesians will need to obtain a license from a relevant institution to publish or multiply any of the "works" as defined in Sec. 10(2). According to the explanatory memorandum to the new Act, the provision aims to prevent the monopolisation and commercialisation as well as potentially damaging acts for Indonesian cultural values by foreign parties without the approval of the Indonesian state as the copyright holder.

Academic commentators have pointed out that the legislation leaves many crucial issues unresolved, such as who will distinguish between modern and traditional forms of, for example, handicrafts, songs or dances, who will collect and distribute the royalties and what will be the manner of distribution.[35] It has also been pointed out that the restriction for foreigners to use the material can easily be circumvented by incorporating a (foreign-owned) Indonesian company that would not fall under the restrictions of Sec. 10.[36] Finally, the legislation tries to create a national approach to material that must be regarded as an expression of local identity. Not surprisingly, the explanatory memorandum stresses the national aspect of preventing appropriation by foreigners, but it fails to mention the local character of the material. For example, would a Balinese artist who has acquired Australian citizenship have to apply for a license of the Indonesian government to use cultural expressions from his home village?[37] The centralisation that is attempted by Sec. 10 Copyright Act is quite clearly not in accordance with the current Indonesian decentralisation policy that attempts to give greater autonomy and decision making powers to the provinces and that has found expression in the provisions of Chapter VI of the amended Constitution.

It is perhaps for all these reasons that the Government Regulation to implement the provision required in Sec. 10(4) has not been issued in the 22 years since the first Copyright Act came into

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35 C. Antons, *Intellectual Property Law in Indonesia*, Kluwer Law International, London 2000, 88.

36 A. Sardjono, "Perlindungan Folklore: Apakah Rezim Hak Cipta Memadai?" **(**The Protection of Folklore: Is the copyright regime sufficient?**)**, in: *Jurnal Hukum Internasional*, Vol. 1 No. 1, 2003, 124-137.

37 C. Antons, "Law and Development Thinking after the Asian Crisis of 1997", in: *Forum of International Development*, Vol. 20 No. 12, 2001, 219-220.

force. Rather surprisingly, the approach has nevertheless found its way again into the new copyright legislation of 2002. Academic commentators in Indonesia doubt whether the provision will ever become operative and prefer a *sui generis* legislation for the issue.

As a further interesting aspect of the debate in Indonesia, there is at least one stream of thought among academic commentators that, apparently inspired by anthropological explanations, regard the term "folklore" as wider than the term "traditional knowledge".[38] This is clearly different from the current WIPO working definition and shows an understanding that puts a lot of emphasis on the oral and artistic transmission of the knowledge.

The second piece of legislation of some relevance for traditional knowledge protection is the Plant Varieties Act of 2000. It protects in Sec. 7(1) "local varieties owned by the public that are controlled by the State."

4. Conclusion

The case studies from Australia and Southeast Asia show that there are significant differences in the way the debate about forms of traditional knowledge and intellectual property rights is conducted in various countries. It is most intensive in the settler colonies of Australia, Canada, the US, New Zealand and Latin America, where it appears as a debate between a non-indigenous majority and an indigenous minority about the right to self-determination, facilitated by the fact that traditional knowledge is often regarded as more or less exclusively held by the indigenous minority. In the developing countries of Southeast Asia, on the other hand, much of traditional knowledge is not confined to indigenous minorities but held by traditional healers or farming communities that can be termed "local" but are not necessarily "indigenous". Because of the size and the spread of the communities and because of the importance of the issue for the national development efforts, we find the state (the national government) slipping into the role of the negotiator for those communities vis-à-vis foreign parties. As a result, the distinction between "indigenous", "local" and "national" interests is blurred.

[38] A. Sardjono, above note 32.

At a conceptual level, indigenous communities with strong concepts of taboos related to secret and sacred expressions and a lack of distinction between artistic expressions and knowledge of scientific relevance prefer the wider term "traditional knowledge" to "folklore". But again, this term is not universally understood as representing a wider concept. Many local communities in Asia do not share the same kind of taboos regarding secrecy and do not use artistic expressions to communicate knowledge of scientific value, so that a clearer distinction between "traditional knowledge" related to medicine, food production or the environment and "folklore" related to artistic expressions is in fact possible.

The comparison shows how different national governments and communities in the South Pacific region try to adapt local culture to national or international legal concepts. While benefit sharing agreements, in particular with regards to bioprospecting, are widely promoted, few countries have attempted to grant intellectual property rights to forms of traditional knowledge. Where such attempts have been made as in the Indonesian Copyright Act, the Thai Traditional Medicine Act or the Thai Plant Varieties Act, the rights are usually exercised by the state on behalf of local communities or simply not yet implemented. This demonstrates the continuing incompatibilities of traditional knowledge and intellectual property. It is further interesting to note that WIPO in its more recent documents seems to be moving away from the holistic notion of traditional knowledge adopted in its 2001 report. The Secretariat in a document prepared for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore acknowledges that "some national and regional instruments aim to protect both expressions of folklore/traditional cultural expressions and traditional knowledge together". It continues, however that "in line with the practice of this committee, this document deals specifically with the protection of traditional knowledge in the strict sense." Earlier in the same document, traditional knowledge in the strict sense was defined as "technical traditional knowledge".[39] It must be concluded, therefore, that it remains difficult for intellectual property law at an international stage to discard the distinction between folklore on the one hand and other

[39] See WIPO/GRTKF/IC/6/4 of 12 December 2003, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Sixth Session, Geneva, 15-19 March 2004 – Traditional Knowledge: Policy and Legal Options, 5.

forms of traditional knowledge on the other, and instead to adopt the holistic concepts advocated by the representatives of indigenous groups.