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Can Modern Law Safeguard Archaic Cultural Expressions? Observations from a Legal Sociology Perspective

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ABSTRACT

The development of legal safeguards for traditional cultural expressions (TCE) at the international level faces many contradictions. One that is particularly interesting for lawyers trying to apply copyright instruments to protect TCE is the collision between modern and archaic perceptions of TCE. Copyright-based approaches presuppose that TCE are “works of art or literature”. Anthropologists, however, point to the fact that TCE fulfil ritual or indicative functions, which are not comparable to the western concept of autonomous modern art underpinning the copyright definition of the protected “work”. This paper presents a closer look at collisions between the knowledge forms and principles of organisation of tribal societies and modern law. First, the reasons for such conflicts are explored and, second, human rights are introduced as collision norms.

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1. Introduction

The cultural expressions of indigenous peoples have been much acclaimed in recent exhibitions mounted by internationally renowned museums.

In September 2006, the “Musée de Quai Branly” opened with much fanfare in Paris. This beautiful new museum is devoted to the art of primary cultures in Africa, Asia, Oceania and the Americas. The Branly Museum is an idea of Jacques Chirac, who, like many French Presidents before him, wants to leave his personal imprint on the city of Paris. Although the new museum has been praised, there has also been criticism: one critique asked whether it is right to treat artefacts that were used in the practical life of traditional communities in a way no different from western art. The question raised refers to the problem of “decontextualisation” and whether it is right to blur the distinction between art and objects with practical or ceremonial use.¹

A similar question was raised in 2005 when the beautiful bark paintings of the well-known Aboriginal artist John Mawurndjul were exhibited in the Tinguely Art Museum in Basel, Switzerland.² Anthropologists pointed out that the paintings of artists in Arnhemland fulfil ritual or indicative functions, which are not comparable to the western concept of autonomous modern art.

Such contradictions arise from a clash between local traditions and the global art system. They are also an important issue for lawyers trying to apply modern copyright instruments to protect and promote traditional cultural expressions (TCE), although lawyers may often not bother much about the sociological and anthropological background of the contradictions. It is a fact that the globally interconnected world has increased the risk of the knowledge and creativity of indigenous peoples being continuously appropriated and commercialised by global players without any possibility for the peoples concerned to prevent it.³ For lawyers, copyright seems to be the natural instrument for protecting TCE since they are perceived as similar to “works of art and literature” – a term which is commonly used in many copyright statutes and the Berne Convention.⁴ However, copyright cannot be successfully invoked in many instances of misappropriation of indigenous heritage *inter alia* because the cultural expressions at issue are much older than the standard

¹ See Heyd, 2003, at 41.

² See Museum Tinguely, 2006.

³ Whereas from the fifteenth to the twentieth century substantial harm was done to indigenous peoples’ cultural heritage by European colonisation, in recent years, tourism and an increased consumer demand for “primitive” art represent a major threat to indigenous peoples’ ability to protect their cultural property (see Daes, 1993, at paragraphs 18 and 159 and Heyd, 2003, at 42). With the development of technology in the electronic media and telecommunications sectors, abuses have multiplied (see Ficsor, 2002, at paragraph 10.67). Today, the ubiquitous digitisation and the pervasiveness of the Internet constitute new challenges with potentially grave consequences.

⁴ Berne Convention for the Protection of Literary and Artistic Works, revised at Paris on 24 July 1971. Available at <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>, last visited 17 January 2007.

term for copyright protection and thus belong to the “public domain”,⁵ because of their lack of originality, or because it is not possible to attribute them to an individual author.⁶

“Many folklore expressions came into being a long time before copyright emerged and they went through a long series of limitations combined with step-by-step minor changes as a result of which they were transformed in an incremental manner. [...] The creator is a community and the creative contributions are from consecutive generations.”⁷

Above all, as Erica-Irene Daes noted, “indigenous peoples do not view their heritage in terms of property at all – that is, [as] something which has an owner and is used for the purpose of extracting economic benefits – but [rather] in terms of community and individual responsibility”.⁸

The conflict between a modern concept of copyright law and a traditional understanding of the rights in artwork is well exemplified by the *Yumbulul* case. In this case,⁹ the Reserve Bank of Australia reproduced a “Morning Star Pole”¹⁰ on an Australian ten-dollar banknote, without due authorisation. The artefact was created by the Australian Aboriginal artist Terry Yumbulul under the authority given to him as a member of the Galpu clan. Terry Yumbulul had licensed the right to reproduce the Morning Star Pole to the Aboriginal Artists Agency who sublicensed the Reserve Bank of Australia. The Galpu clan, however, criticised Yumbulul’s licensing as exceeding the authority which had been given to him.¹¹ The clan members argued that Yumbulul had been trained by the community in the preparation of the pole and that he was only allowed to sell the work to a place where it would be displayed to educate a wider audience about Aboriginal art.¹² As a result of this criticism Yumbulul sued the Australian Reserve Bank and the Aboriginal Artists Agency claiming that his licence was invalid since only the Galpu clan would have had the power to assign copyrights to the bank. The case against the Reserve Bank was ultimately settled out of court. The case against the Aboriginal Artists Agency, however, came to court, where it was dismissed. The district judge decided that “Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin”.¹³

In this paper, I would like to present a closer look at such collisions between the knowledge forms and principles of organisation of tribal societies and modern law. First, I shed light on the reasons for such collisions and, second, a human-rights based approach is introduced to provide a collision norm to balance conflicts between individual and collective interests in TCE. Since there are considerable sociological and anthropological differences between the

⁵ See Golvan, 1992, at 231, discussing the example of the Wandjina image of north-west Australia, which has been reproduced many times without the consent of the local Aboriginal community. See also Morphy, 1998, at 58–59.

⁶ Golvan, 1992, at 227; Daes, 1993; Haight Farley, 1997, at 29–35; Coombe, 2003, at 1179–1180; WIPO Secretariat 2001, at 160. For anthropologist’s critiques of copyright based approaches to protect cultural property of indigenous communities see Brown, 1998; Brown, 2005, at 54–60 and Barsh, 1999.

⁷ Ficsor, 2002, at paragraph 10.68.

⁸ Daes, 1993, at paragraph 26.

⁹ *Yumbulul v Reserve Bank of Australia*, Intellectual Property Reports 21 (1991) 481.

¹⁰ Morning Star Poles are artefacts that have a crucial function in sacred Aboriginal rituals commemorating the deaths of important members of the tribe. Blakeney, 1995.

¹¹ For a discussion of this case, see Golvan, 1992, at 229; Blakeney, 1995; Haight Farley, 1997, at 31–32; Janke, 2003, at 61; and Wüger, 2004, at 187.

¹² Janke, 2003, at 61.

¹³ *Yumbulul v Reserve Bank of Australia*, Intellectual Property Reports 21 (1991) 481; see also Wüger, 2004, at 187.

many indigenous peoples around the world, I limit my reflections to a consideration of Australian aboriginal art (hereinafter referred to as “Aboriginal art”) without necessarily excluding the possibility that some of the analysis might also be valid for aboriginal artefacts outside Australia.

2. Collisions of Modern and Archaic Patterns of Social Organisation

2.1 Aboriginal Art and Totemic Culture

In his renowned book “The Elementary Forms of Religious Life”, first published in 1912,¹⁴ Emile Durkheim described Aboriginal culture as a *totemic culture*. Although the term is not of Australian origin,¹⁵ Durkheim and his followers have used it as a universally accepted concept to describe Aboriginal patterns of life. A totem is generally defined as a natural or supernatural being that spiritually represents a group of related people such as a clan. Commonly the totem is an animal or plant but sometimes a phenomenon of nature such as wind, thunder, rain, clouds or the sun may serve as totem.¹⁶ According to Durkheim, Aboriginal tribes are organised as clans.¹⁷ Within the clan there is a relationship of kinship. In contrast to a western understanding, this kinship is not grounded on blood ties but arises from the fact that the members of the clan have the same totem from which they derive their name: “Every clan has a totem that belongs to it alone; two different clans of the same tribe cannot have the same one.”¹⁸ When an animal or a plant is adopted by a clan as its totem it is “ordinarily not an individual but a species or a variety”.¹⁹ For Durkheim, the totem is something like the name of a clan.²⁰ A newborn child may receive its totem, according to the customary law of the clan, either from his or her mother or father, or from a mythical ancestor.²¹

According to Howard Morphy, an anthropologist at Australian National University, Aboriginal art cannot be understood without the concepts of “Dreaming” or “Dreamtime”.²² Dreaming or Dreamtime are English translations of Aboriginal words denoting a very complex religious concept.²³ The Dreaming exists independently from our linear concepts of time. The Dreaming was there in the beginning, it is there today and it will be there in future. In the view of Aboriginal peoples there was a time before landscape took form and before human beings lived.²⁴ This was the time when the Dreamtime ancestors emerged from within the earth and started to shape the earth, which, at that time, was a flat plain.²⁵ Subsequently, the form of the landscape was created by interventions of the mythical ancestral beings.²⁶

¹⁴ The book was originally published 1912 as *Les formes élémentaires de la vie religieuse: Le système totémique en Australie*, Paris: F. Alcan.

¹⁵ On the origins of the word see Lévi-Strauss, 1962, at 18.

¹⁶ See Durkheim, 1995, at 102.

¹⁷ Durkheim, 1995, at 100.

¹⁸ Durkheim, 1995, at 100.

¹⁹ Durkheim, 1995, at 103.

²⁰ Durkheim, 1995, at 111.

²¹ Durkheim, 1995, at 104–105.

²² See Morphy, 1998, at 67–100.

²³ According to Morphy, 1998, at 68, Spencer and Gillen were the first anthropologists to use the two terms in 1896.

²⁴ Morphy, 1998, at 103.

²⁵ Morphy, 1998, at 103.

²⁶ Morphy, 1998, at 5.

“Every action of the ancestral beings had a consequence on the form of the landscape. The places where they emerged from the earth became waterholes or the entrances to caves; where they walked, watercourses flowed; and trees grew where they stuck their digging sticks in the ground.”²⁷

For Aborigines landscape is sacred not only because it was shaped by the ancestral beings but also because it is partly the result of the transformation of the bodies of ancestral beings. As an example, sources of ochre in Arnhemland are held to be transformations of the blood of ancestral beings.²⁸

Within the totemic cosmos of Aboriginal culture, works of art including songs, dances, paintings and sculptures are extremely important. They commemorate a relationship between the Dreamtime ancestors, the landscape and custom and enable people to maintain contact with the spiritual dimension of existence. Taking account of this complex relationship, I suggest defining Aboriginal art as a construction of a “totemic polygon” encompassing the Dreamtime ancestors, the landscape, totemic custom and the artist.

For Durkheim, Aboriginal totemic artefacts such as carved wood, engraved ornaments and paintings on human bodies have a double function as emblems and as religious symbols.²⁹ In their emblematic function, he perceived totemic artefacts as a kind of label for a clan, which can be compared with the heraldic coat of arms used in western societies.³⁰ As such, it is a proof of the identity of the clan and each person belonging to the clan is allowed to wear the totem. In its religious function, the totemic artefact is used in ceremonies and is part of the liturgy. Things are considered to belong to the sacred or to the profane by reference to the totem.³¹

In a similar way, Morphy also distinguishes social and mythological aspects of Aboriginal visual art. In his view, Aboriginal representations of place and space are a kind of “maps of land”.³² They are maps in the sense that the land itself is a sign system, which is the result of the mythological actions and transformations of the Dreamtime ancestors. In this sense Aboriginal songs, stories, paintings and dances commemorate the sacred actions of the ancestral beings related to the landscape and enable people to maintain contact with the spiritual dimension of existence.³³ Moreover, such artistic expressions often also reflect the social identity of the artist and the clan he or she belongs to.³⁴ The rights of the artist to make or perform the artworks are inherited authority and often imply “rights in the land itself”.³⁵ They vary according the relationship between the artist and the ancestral beings, and depend on his relationship to the land and “his knowledge of its spiritual and mythological significance”.³⁶

²⁷ Morphy, 1998, at 69.

²⁸ Morphy, 1998, at 69.

²⁹ Durkheim, 1995, at 111–117.

³⁰ See Burns Coleman, 2004; Burns Coleman, 2005, at 73.

³¹ Durkheim, 1995, at 118.

³² Morphy, 1998, at 103; for a generalisation of this metaphor see Barsh, 1999, at 19.

³³ Morphy, 1998, at 5; on the crucial role of songs see Chatwin, 2005, at 57–61.

³⁴ Morphy, 1998, at 107.

³⁵ Morphy, 1998, at 107.

³⁶ Morphy, 1998, at 108.

2.2 Modern versus Archaic Concepts of Artefacts

The above-described function of Aboriginal art corresponds closely with what sociological systems theory considers a typical feature of a particular knowledge form of a segmented (or tribal) society. As we have seen in the *Yumbulul* case, the organisational principles of the clan may collide with the organisational principles of modern society. This is essentially a collision between local traditions and global communication systems. Modern society is characterised by the fact that it decouples bindings with pre-existing traditions and defines itself through the continuous *production* of meaning.³⁷ Modern society is a world society: that is a society, which communicates in all its sub-systems with global horizons of relevance. Even in situations where local traditions are celebrated, one cannot prevent these traditions from being observed globally. Modern society is functionally differentiated into various autonomous sub-systems such as the law, science, politics, economy and art.

With regard to art, the thesis of functional differentiation was first defended by Max Weber. In his articles on the sociology of religion, published in 1920, he wrote: "Art constitutes itself as a cosmos of more and more consciously grasped eigenvalues."³⁸ From the observation of different techniques of art production Weber concluded that artistically styled forms of expression became increasingly independent from a religion-based cultural exchange.³⁹ Historically, an important precondition of the differentiation of a functionally autonomous art system was the development from a patronage-based court-sponsored production of art towards modern models of art production financed by the middle-class in a capitalistic environment.⁴⁰ This development implied a multiplication of the sources available for financing art production and this financial plurality consequently reduced the heteronomy that was part of pre-modern models of art sponsorship. The multiplication of the artist's possibilities for financing his or her work was thus an essential precondition for the differentiation of an autonomous art system, that is, a system operating its proper aesthetic code free from heteronomous religious determination.

The emancipation from the old bonds of a stratified society was paralleled by the social embedding of art as an autonomous function system. That is to say that the social relevance of art must not be understood as a counter position against society.⁴¹ Art fulfils its specific function not against society but within society.

To describe the formalisation of modern society Max Weber coined the term "disenchantment (*Entzauberung*) of the world".⁴² Disenchantment is the price modernity has to pay for enabling the breakthrough of rationality-based empirical science. To art Weber attributed the function of a counterbalance: "Art accepts the function of a world immanent salvation – of whatever nature – not only from everyday life but also and above all from the increasing stress of theoretical and practical rationalism."⁴³

³⁷ Stichweh, 2004, at 191.

³⁸ Weber, 1988, at 555 (translated by the author).

³⁹ Habermas, 1984, at 157–161.

⁴⁰ For more details on this process, see Graber, 1994, at 29–68.

⁴¹ For the converse view see Adorno, 1997, at 225–226.

⁴² Weber, 1988, at 564; see Adorno, 1997 at 54.

⁴³ Weber, 1988, at 564 (translated by the author).

Similarly sociological systems theory also conceives of art as a counter power to the formalisation of society. Functional differentiation of society presupposes a generalisation of behavioural expectations within the structure of autonomous systems. Such generalisations ensure that partners in communicative interactions do not produce more uncertainty than would make sense in the respective social system. The consequence is the formalisation of social communication in the “languages” of the systems law, politics, economy, science and other areas, since ambiguity would create unnecessary friction and reduce the efficiency of communicative processes. Whereas all other function systems (perhaps with the exception of religion)⁴⁴ accelerate formalisation, art has the effect of sand rather than oil in the engine of society.⁴⁵

In the view of systems theory, it is the art system to produce the perceptions of society.⁴⁶ Through its works art makes society and the world of that society visible, audible and experienceable and at the same time it refers to the contingency of such perceptions.⁴⁷ Although art itself is a function system in this world, its function consists in pointing out the contingency of existing world versions since the function systems construct a world which could also look different. Consequently, systems theory conceives the function of art as being to undermine the formalising tendencies of modern societies and to uncover contingency in the world making of formalised social systems and thus to increase communicative chances in society.

From the perspective of systems theory, the function of art is complementary to the function of science. The latter’s function consists in reducing complex natural or social phenomena to theories which can be claimed to be true.⁴⁸ Art, however, challenges such truths in order to create space for communicative change. An expression (e.g. in a poem) which does not meet scientific standards of truth may nevertheless make sense in the eyes or ears of art.

How does one distinguish between “art” and “culture”? In contrast to art, culture is not a function system but the “memory of society”. According to Niklas Luhmann, it is “a filter of forgetting/remembering and it is the usage of the past in order to determine the range of variations of the future.”⁴⁹ The concept of culture not only allows a distinction to be drawn in terms of time but also in terms of space, that is, to compare social practices at various places in the world. Art is of essential importance to culture since it provides society with observations from which one may learn.⁵⁰

Within this architecture of systems theory, the production of culture takes place in various sub-systems of society. Where local traditions persist, differences between the local and the global perceptions may be observed as a stimulus for the production of cultural variety.

⁴⁴ On the function of religion see Luhmann, 2002, at 115–147, and Luhmann, 1982.

⁴⁵ Graber, 1994, at 84.

⁴⁶ Baecker, 2001, at 26.

⁴⁷ Baecker, 2001, at 27; Graber, 2003, at 13.

⁴⁸ Luhmann, 1990, at 271–274, and 383–391.

⁴⁹ Luhmann, 1997, at 588 (translated by the author); in a similar way Jürgen Habermas defines culture as “the stock of knowledge from which participants in communication supply themselves with interpretations as they come to an understanding about something in the world”. (Habermas, 1989, at 138).

⁵⁰ Baecker, 2001, at 28; for more information regarding the distinction between art and culture in a legal context see Graber, 2003, at 11–14.

In conclusion, a sociological analysis reveals that the functions of artefacts in archaic and modern societies differ considerably. In archaic societies, artefacts fulfil instrumental (indicative and religious) functions which are predominant even in situations where such artefacts are highly decorative. Modern societies, in contrast, conceive of art as an autonomous system operating its own aesthetic code independently of heteronomous determination by other functionally differentiated social systems.

2.3 Modern Law versus Indigenous Customary Laws

Modern copyright law is based on the fiction that the author is an autonomous individual who creates his or her original works out of his or her imagination. Originality (of the work) is an essential precondition for the law to attribute exclusive (intellectual) property rights to the author of the work.⁵¹ Although the creation of a new work may be inspired by pre-existing works, quotation from the works of others is only allowed within the limits set by the copyright statute (civil law tradition) or the fair use doctrine (common law tradition).⁵²

Conversely, the concept of a “right” is alien to most indigenous people’s cultural practices. Within Aboriginal tribes creative skills are often passed between individuals belonging to different generations of a clan bound in a totemic relationship with the Dreaming ancestors, the landscape and customs. This relationship is based on “traditions of respect, not the values of exchange”.⁵³ Hence, an Aboriginal painter, for example, may not become the “author” of the paintings he creates, since the sacred stories depicted belong not to him but to the tribe or local community of which he is a member. He is merely entrusted to use the sacred stories and symbols for certain precisely defined applications. According to indigenous customary law, Aboriginal painters have to undergo a procedure of initiation before being allowed to use pre-existing totemic designs of the clan in their own works.⁵⁴ Aboriginal law strictly prescribes the content of as well as techniques for such paintings, and the community may perceive errors as violating their religious feelings.⁵⁵ This also applies, *mutatis mutandis*, to other forms of traditional cultural expressions such as songs, stories and dances. Contemporary indigenous “authors” using pre-existing works are thus doing so in a specific role as “initiated custodians” of the clan’s cultural heritage. As custodians they must be careful not to distort the integrity of this cultural heritage when they use such material in their reproductions.⁵⁶

As we have seen in the *Yumbulul* case, conflicts may arise when rules of indigenous customary law collide with those of modern law. How should modern law recognise the totemic relationship between the indigenous creator, the landscape, the ancestral beings and the clan? How could one resolve conflicts between the clan and an Aboriginal artist regarding property rights in totemic songs, stories, dances or designs? The example of John Mawurndjui demonstrates the particular difficulties caused by situations of drift from tribal to modern patterns of artistic identity, due to greater exposure to the global art system. How

⁵¹ Haight Farley, 1997, at 18–27.

⁵² The limitation of the term of protection to 70 years post mortem auctoris defers to the public interest to make free use of the cultural heritage after a certain period of time.

⁵³ Coombe, 1998, at 245.

⁵⁴ See *Milpurruru v. Indofurn*, Australian Law Reports 130 (1994) 659; available online at <http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep7290.html> (last visited 30 January 2007). For a discussion of this case, see Blakeney, 1995; Blakeney, 2006; Wüger, 2004. See also Coombe, 1998, at 245.

⁵⁵ Blakeney, 1995, and Wüger, 2004, at 185.

⁵⁶ See Janke, 1998, at 14.

can a clan defend its customary right to continuous usage of totemic cultural expressions if exclusive property rights are attributed to a “modernised” Aboriginal artist?

3. Private Property Rights and Public Interests in TCE

Since, in a globally interconnected world, the issues related to the safeguard of TCE cannot be resolved at the sub-national or national levels alone, they have naturally entered the international debate.⁵⁷ At the international level, the tension between the rights of individual authors and the interests of indigenous groups and their cultural heritage is mirrored in the division of tasks between the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). WIPO has been discussing TCE since 2000 in a special committee concerned with the protection of traditional knowledge and folklore within a framework of intellectual property law, and, in particular, copyright law.⁵⁸ UNESCO has negotiated several legal instruments protecting cultural heritage and cultural diversity.⁵⁹ Whereas discussions within WIPO seek to protect TCE in a framework of *private property rights*, UNESCO's initiatives on cultural diversity and intangible cultural heritage are concerned with safeguarding *public interests* rather than private ones. From the viewpoint of indigenous peoples a major shortcoming of these approaches is that they tend towards a “separation of land, culture and science” and thus do not sufficiently take account of the important relationship between indigenous cultures and their lands.⁶⁰

In addition to the fragmented activities of UNESCO, WIPO and numerous other institutions, human rights have recently become more prominent in the discussion on TCE protection at the international level.⁶¹ The most relevant provisions are Article 15 of the International Covenant on Economic, Social and Cultural Rights (CESCR)⁶² and Article 27 of the International Covenant on Civil and Political Rights (CCPR).⁶³

Of particular interest for the TCE issue is Article 15(1)(c) CESCR recognising the right of everyone “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. According to a recent interpretation, Article 15(1)(c) CESCR provides for a linkage between copyright and indigenous cultural expressions. This follows from General Comment No. 17 on Article

⁵⁷ A clear sign for the acceptance of the political importance of these issues has been the proclamation of the International Decade of the World's Indigenous People (1995–2004), and its prolongation for the years 2005–2015. See generally <www.unhcr.ch/indigenous/decade.htm> and <www.ohchr.org/english/issues/indigenous/decade.htm>, last visited 30 January 2007.

⁵⁸ For an overview see Graber/Girsberger, 2006; Wendland, 2002.

⁵⁹ UNESCO, 1972; UNESCO, 1989; UNESCO, 2001; UNESCO, 2003; UNESCO, 2005. On UNESCO's activities in the field of cultural heritage and cultural diversity protection see Barsh, 1999, at 23–29, Blake, 2000; Nas, 2002; Graber, 2006.

⁶⁰ Barsh, 1999, at. 15.

⁶¹ From a theoretical viewpoint, a human rights perspective may offer a stance of reflexivity regarding the observed fragmentation of international law in the TCE field. It would be naïve, however, to assume that human rights would restore the normative unity of global law at a meta level. For a theoretical analysis of legal fragmentation see Fischer-Lescano/Teubner, 2004.

⁶² International Covenant on Economic, Social and Cultural Rights. Concluded 16 December 1966, entered into force 3 January 1976. 993 U.N.T.S. 3.

⁶³ International Covenant on Civil and Political Rights. Concluded 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171.

15(1)(c) CESCR, which the Committee on Economic, Social and Cultural Rights (CESCR Committee) adopted in November 2005.⁶⁴

Paragraph 32 of that Comment reads as follows:

“With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned, the oral or other customary forms of transmission of scientific, literary or artistic production and, where appropriate, they should provide for the collective administration by indigenous peoples’ of the benefits derived from their productions.”

This paragraph of the comment emphasises the obligation of the States parties to the CESCR to ensure the effective protection of scientific, literary and artistic productions of indigenous peoples. It should be noted that the rights provided by Article 15 CESCR are all individual rights rather than group rights.⁶⁵ Thus, at their centre must be individuals in their capacity as members of indigenous peoples.

Cultural issues have also been addressed by the Human Rights Committee (HRC) in relation to Article 27 CCPR, safeguarding the rights of persons belonging to ethnic, religious or linguistic minorities.⁶⁶ The HRC has used Article 27 CCPR as the basis for protecting the “cultural identity” of individuals in their capacity as members of an indigenous people.⁶⁷ The HRC applies a broad definition of culture which also includes land use patterns such as fishing or hunting.⁶⁸ This is important to note against the background of our findings above on the close link existing between indigenous peoples’ cultural identity and the land they live on.⁶⁹ However, the HRC held that only individuals may invoke Article 27,⁷⁰ and has denied ethnic groups and other collectives the right to file a complaint.⁷¹ Accordingly, the minority rights provided by Article 27 CCPR are rights of individuals in their capacity as members of a minority. Hence, the HRC refrained from recognising minority rights as group rights.

⁶⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005) on Article 15(1)(c) CESCR. General Comments of the CESCR Committee (and the HRC) are an important means to provide the States parties to the Covenant with guidance as to the Covenant’s meaning and the nature of the obligations resulting from it. Another important instrument to ensure that States parties discharge their obligations is the periodic State reports on the implementation of the obligations held. These reports and the subsequent discussions in the Committee bring possible breaches of the Covenants to the attention of all parties and exert political pressure on the nonconforming States parties to comply with their Covenant obligations. See generally Human Rights Committee General Comment 31 (80), at paragraph 2.

⁶⁵ That is true for the rights provided by the International Bill of Rights in general.

⁶⁶ Article 27 CCPR reads as follows: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own *culture*, to profess and practise their own *religion*, or to use their own *language*” (emphasis added).

⁶⁷ For an overview of the HRC’s case law, see Anaya, 2004, at 134–137.

⁶⁸ See Human Rights Committee, General Comment 23 on Article 27 CCPR, at paragraph 7.

⁶⁹ See Daes, 1993; Barsh, 1999; Eide, 2001, at 20.

⁷⁰ Human Rights Committee, General Comment 23.

⁷¹ Kälin/Künzli, 2005, at 117–118.

Such an individualistic conception of cultural rights has been criticised by indigenous peoples,⁷² seconded by several scholars of social sciences.⁷³ Will Kymlicka, from the perspective of liberal political theory, deems any attempt to legally protect cultural minorities to be insufficient, as long as it is not based on a concept of group rights.⁷⁴ In a similar vein, Rodolfo Stavenhagen, a social scientist, argues that a concept of collective or communitarian rights would be a necessary complement to the individualistic understanding of the rights of cultural minorities.⁷⁵

From a legal perspective, however, a concept of collective human rights, in the sense of rights that can be exercised only by the group rather than by its individual members, must be rejected primarily because of the unclear relationship between the rights of the group and those of its individual members.⁷⁶ Group rights would pose the danger of taking away the individual human rights of the powerless group members and exposing them to pressures from the powerful ones.⁷⁷

With regard to the specific problems arising from collisions between totemic and modern patterns of social organisation as demonstrated by the *Yumbulul* case,⁷⁸ it seems inappropriate to consider the interests involved exclusively in terms of individual versus collective rights. The situation is much more complex since the rights of an Aboriginal artist to use totemic stories, images or songs in his creative works would have to be assessed within the framework of the totemic polygon postulated above. Within this polygon the interests of the clan, the totemic landscape, the cultural heritage and the rights of the artist must be balanced on a case-by-case basis. The complexity of this balancing exercise increases considerably in situations of drift from traditional towards modern patterns of cultural practice, as demonstrated by the case of John Mawurndjul. Thus, it would not be sufficient to conceive of the rights of the Aboriginal artist in a similar way to that in which we conceive of the rights of a western artist. Neither would it be adequate to simply attribute the rights in the work to the clan. All in all it seems that modern law is not sufficiently equipped to cope with the totemic polygon, which constructs Aboriginal art.

4. Human Rights as Collision Norms?

An approach that has been adopted in recent human rights theory and practice is the recognition that most individual human rights may have a collective dimension without thus becoming collective rights.⁷⁹ This has been exemplified above with regard to Article 27 CCPR, protecting the cultural rights of individuals in their capacity as members of an indigenous people.

⁷² See Tsosie, 2002.

⁷³ See Stavenhagen, 2001, at 102.

⁷⁴ Kymlicka, 1996, at 4–5; for a variation of Kymlicka’s argument see Bowen, 2000, at 14–15 (stressing the need for a distinction between “collective rights” and “rights of indigenous peoples” deriving from a “priority of residence”).

⁷⁵ Stavenhagen, 2001, at 100–109, for a defence of indigenous groups’ “right to culture” see also Tsosie, 2002, at 332–346.

⁷⁶ See Brown, 2005, at 51.

⁷⁷ An example of such a conflict is discrimination against women, including imposed marriages or female circumcision.

⁷⁸ See above, section 1.

⁷⁹ See Kälin/Künzli, 2005, at 117–118.

In legal sociology, this collective dimension is conceived as an element of the “institutional aspect” of human rights.⁸⁰ What is the “institutional aspect” of a human right? Freedom of art may serve as an example taken from the “cultural rights” context to explain the interplay between the individual and the institutional aspect of human rights.⁸¹

“Of course, freedom of art has its individual dimension. It protects the free expression of the artist’s personality and – in a broader interpretation – the social and economic conditions of the artist’s activities. But at the same time, freedom of art is a fundamental right which is concerned with the discourse of art itself. Art in this sense is a self-reproductive communicative process that includes all kinds of communicative observations of artistic distinctions, from the creation of artistic artefacts to their enjoyment by the public and their critique. At the centre of this process is not the artist, neither as a god-like genius, nor in his right to personal expression, nor in his private property of the piece of art, rather it is the *discourse* between artist and public which is attracted by the artistic artefact.”⁸²

This goes beyond acknowledging a collective dimension of the freedom of art. The discourse of art is an institution of society encompassing a complex relationship between the artist, the work of art, art critique and the general public. Similarly, adopting an institutional approach to interpreting Article 15(1)(c) CESCR (or Article 27 CCPR) would permit the integration of some of the missing pieces of the totemic polygon such as the close relationship of indigenous peoples with landscape or interests related to the protection of cultural heritage into a balancing of interests.

The CESCR Committee, in paragraph 32 of Comment No. 17, implicitly addressed the problematic relationship of individual *versus* collective cultural rights in two ways.⁸³ First, States parties are invited to recognise not only individual but also collective authorship. Collective authorship is a concept which is common to most municipal copyright acts. It applies to situations where – e.g. in the areas of film, theatre or opera – several persons have jointly produced a copyright-protected work. Since it usually provides that such works may be used only under the condition that all authors give their prior consent, this may be a concept that could contribute to a more effective protection of indigenous cultural property in some cases. However, it should be recalled that TCE are usually the product of the contributions of many consecutive generations rather than “co-productions”.⁸⁴ Secondly, the CESCR Committee requires States parties to provide, where appropriate, “for the collective administration by indigenous peoples of the benefits derived from their productions”.⁸⁵ This second reference may have important implications as a human rights basis for proposals suggesting that use be made of concepts of collective rights management or *domaine public payant* for safeguarding traditional cultural heritage.⁸⁶

⁸⁰ For an influential theoretical foundation of an institutional concept of human rights see Luhmann, 1986, and Willke, 1975, in particular at 111–156. For a discussion of the institutional aspect of freedom of expression and information see Graber, 2005, at 82–83 and Graber/Girsberger, 2006, at 271–272.

⁸¹ Freedom of art is protected both by Article 19(2) CCPR and Article 15(3) CESCR.

⁸² Graber/Teubner, 1998, at 67 (emphasis added).

⁸³ Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005) on Article 15(1)(c) CESCR, at paragraph 32.

⁸⁴ Ficsor, 2002, at paragraph 10.68.

⁸⁵ Comment No. 17, at paragraph 32.

⁸⁶ See Blakeney, 2006, at 123, Lucas-Schloetter, 2004, at 341–342 and 366, and Ficsor, 2002, at paragraph 10.69.

These quotations from Comment No. 17 suggest that CESCR Committee acknowledges a collective dimension of Article 15(1)(c) CESCR. In our view, however, one should go one step further and recognise that the rights provided by Article 15(1)(c) CESCR encompass, as do most other human rights including freedom of (artistic) expression, an institutional dimension. In this respect, it is vital to recall that TCE involve indicative and liturgical functions and are closely related to a cosmological relationship involving landscape, ancestors, the tribe and the artist. This is well documented for the totemic polygon of Aboriginal art but will also hold true for artefacts of other indigenous peoples.⁸⁷ The production of contemporary TCE presupposes the transfer of traditional cultural heritage from one generation of a certain local community to the next and that the acquisition of traditional knowledge is often based on a special relationship of trust and close collaboration.⁸⁸

This special discourse-based social and ritual matrix can be taken into account by the institutional aspect of the rights protected by Article 15(1)(c) CESCR. Since the contemporary indigenous creator is essentially the “product” of this discourse, the institutional aspect of Article 15(1)(c) would also impose certain limitations in considering the specific social relationship within an indigenous community.⁸⁹ Hence, the rights of an Aboriginal artist would have to be defined within the totemic polygon, taking account of the special relationship between indigenous knowledge and landscape.⁹⁰ This approach would provide sufficient flexibility to consider situations of drift from archaic to modern forms of social organisation.

In paragraph 35 of Comment No. 17, the CESCR Committee clarified that the right provided by Article 15(1)(c) CESCR “cannot be isolated from the other rights recognized in the Covenant”. The Committee stressed therewith that States parties must strike a balance between the various rights at issue. “In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration.”⁹¹ In the specific context of TCE, this balancing exercise should translate, in my view, into a requirement to define the rights of contemporary indigenous “authors” in terms of their specific role as “initiated custodians” of the tribe’s or traditional group’s cultural heritage and with a view to protecting the interests of future generations.⁹²

An institutional dimension of TCE safeguards may also be found in the obligations of Article 15(1)(a) CESCR, which are related to the right to participate in cultural life. The relationship to this obligation has not been spelled out in General Comment No. 17. However, the CESCR Committee stressed that these obligations together with the obligations contained in paragraphs 1(b) and 3 of Article 15 CESCR will be fully explored in separate general comments.⁹³ In my view, the obligation to fulfil, as provided by Article 15(1)(a) CESCR,

⁸⁷ For references to relevant anthropological scholarship, see Barsh, 1999; Brown, 2005 and Coombe, 2005.

⁸⁸ Coombe, 2005, at 601.

⁸⁹ Graber/Girsberger, 2006, at 269, quoting Blakeney, 1995, and Wüger, 2004, at 185.

⁹⁰ On the relationship between the artist’s customary rights to make or perform artworks and his or her knowledge of the landscape’s spiritual and mythological significance see above (2.1).

⁹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005) on Article 15(1)(c) CESCR, at paragraph 35.

⁹² Coombe, 2003, at 1185 and Heyd, 2003, at 42.

⁹³ *Ibid.* at paragraph 4.

encompasses a duty of the State party to promote indigenous cultural heritage as a basis for contemporary indigenous creators to participate in the cultural life of the arts and sciences and to perpetuate the transfer of specific cultural knowledge to the following generations.

5. Conclusions

1) In archaic societies, artefacts fulfil instrumental (indicative and religious) functions which are predominant even in situations where such artefacts are highly decorative. Modern societies, in contrast, conceive of art as an autonomous system operating its own aesthetic code independently from heteronomous determination by other functionally differentiated social systems.

2) In a global society, local traditions may collide with the global art system. Particularly difficult to grasp are situations of drift from tribal to modern patterns of social organisation. From a perspective of modern law, such differences translate into collisions between individual claims of authors relating to their private property and claims of indigenous groups or the general public relating to traditional cultural heritage.

3) At the international level, the tension between the rights of individual authors and the interests of indigenous groups and their cultural heritage is mirrored in the division of tasks between WIPO and UNESCO.

4) Human rights may serve as collision norms if one accepts an institutional dimension complementing the individual dimension of cultural rights. Both, Articles 15 CESCR and 27 CCPR contain an institutional dimension, which, methodologically, may serve as an entry point for balancing the private interests of individual authors and the collective interests of indigenous groups and the wider public.

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