



A legal approach to induce the traditional knowledge of forest resources



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ABSTRACT

Indigenous people have a vital role in environmental management and development because of their knowledge and traditional practices. The concept of sustainable development requires taking consideration into the legal system of traditional knowledge for the benefit of indigenous people who live in or near the forest. In modern administrative countries, the statutory legal system established by the government had almost prevailed over the common law system especially relating to management of natural resources. The statute regulating forest resources should prescribe the inherent interests to traditional knowledge of indigenous people in the forest. To endow indigenous people with inherent interests about forest resources and rights to traditional knowledge, the statute legal system and the common law system have to cooperate with each other according to the governance theory of cross-regulation.

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1. Background

The concept of sustainable development requires taking consideration into the legal system of traditional knowledge for the benefit of indigenous people who live in or near the forest.¹ Many scholars and specialists who prepared articles relating to the traditional knowledge have already urged many times the establishment of legal system or institution thereof.² After 1992, several countries introduced some legal paths to the traditional knowledge about forest resources under the legal pluralism including the public trust doctrine or the customary law principles.³

Traditional knowledge of forest resources was inherently results or outcomes of so-called tradition, so it might be free from the regime of legal system established afterwards by the government in each country. So to speak, traditional knowledge should be in the first place regulated by the customary law system which had been

developed by the community. But the customary law system in the realm of forest resources has been much decayed during the period of modernization by each country or colonization by imperialism. In modern administrative countries, the statutory legal system established by the government had almost prevailed over the customary law system especially relating to management of natural resources.

But the legal systems of advanced countries almost do not know the customary law except the U.K. Though the U.S.A. and Canada have some statutes as followings protecting the indigenous people's rights and traditional knowledge, the concept of indigenous people and community as an organizational basis has been restricted to the Indian people. The traditional knowledge is not an exclusive possession and is dependent upon the native or aboriginal people. The legal contexts of traditional knowledge should be extended to not only native or aboriginal people but also to the indigenous people without the concept of tribe or ethnicity, that is, old inhabitants living for a long time at his or her native place or a countryside area including rural, seaside or mountainside area.

2. Object of study

Ordinary legal systems, especially statute legal systems, in the developed countries or the developing countries have not prepared legal paths to gain access to traditional knowledge in respect of rights. The customary law system like the U.K. has scarcely been interpreted as a tool for regulating traditional knowledge contexts. Such legal situations without regards to traditional knowledge are similar to those of Korea that has partly a customary law system in the Civil Law and the Commercial Law besides the administrative legal system. Therefore, the present customary law system should be adapted to or reinterpreted according to the concept of traditional knowledge

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¹ "Indigenous people... have a vital role in environmental management and development because of their knowledge and traditional practices. State should recognize and duly support their identity, culture and interest and enable their effective participation in the achievement of sustainable development." (1992) 31 *ILM* 876, Principle 22.

² For example, Marie-Claire Cordonier Segger, Ashfaq Khalfan, Jorge Cabrera Medaglia and Kathryn Garforth, "Sustainable Biodiversity Law in Social Regimes", *Sustainable Development Law* edited by Marie-Claire Cordonier Segger and Ashfaq Khalfan (Cordonier Segger et al., 2004), pp.341–350.

³ Benjamin J. Richardson and Donna Craig, "D. Indigenous Environmental Governance in a National Context", *Environmental Law for Sustainability*, edited by Benjamin J Richardson and Stepan (HART Publishing, 2006), pp.210–225.

used or owned by the indigenous people or old inhabitants in the countryside or forest.

Some advanced scholars proposed the method of protection by way of intellectual property rights under the patent law.⁴ A legal access like this may be somewhat useful at the dimension of international trade. But the patent law system is taking after the market-orienting legal model which is unfamiliar with the community-based legal model like the customary law. Ordinarily, indigenous people have no ability to adapt themselves to the patent system and employ the agent on behalf of themselves.⁵ For the purpose of protecting the traditional knowledge of indigenous people relating to forest resources, a new legal paradigm like governance is necessary in the legislation and execution thereof.

In this thesis, I would like to detect the existence of articles and principles within the customary law system and related statute law of Korea contributing to the inducement of traditional knowledge. I would like also to suggest an alternative paradigm, that is, cross-regulation principle composed of cooperation between government and community under the governance theory instead of market-oriented legal paradigm like patent law system in an advanced country. As the pilot legal approach in respect of cross-regulation⁶ in traditional knowledge, I would like to adduce cooperative methods from the Civil Law and the Act relating to Fostering and Management of Forest Resources [AFMFR] in Korea. While the Korean Civil Law is a customary law system abided by the community regulating commons and natural resources, the AFMFR is a statutory legal system regulating forest resources by the government. The present legal frame of AFMFR is a command and control model which is insufficient of governance principle between government and community. But the governance between statute law and customary law for traditional knowledge should be sooner or later introduced into Korean legal system.

In this thesis, for the first time, the meaning and extent of the traditional knowledge [TK] and forest resources should be defined; secondly the contents of rights and legal sources relating to traditional knowledge; as well as the identity of such rights holder should be set up; and thirdly the coverage of traditional knowledge and the relation of such TK and intellectual property rights should be explained. And then finally I will establish the governance mechanism for inducing and fostering traditional knowledge in forest.

3. Meaning and extent: Traditional knowledge in forest

What are the meaning, sort and coverage of the traditional knowledge? Traditional knowledge informs indigenous environmental activities in many ways, including for medicine, foodstuffs and construction materials.⁷ Native cultural and intellectual property is also being recognized for its commercial value, such as for biotechnology and popular art. The term 'traditional knowledge' expresses the ways and means by which individuals or communities identify and improve genetic resources over time, including processes related to their extraction from nature and their preparation for human usage.

At the dimension of biotechnology, the term 'traditional knowledge' expresses the ways and means by which individuals or communities identify and improve genetic resources over time, including processes related to their extraction from nature and their preparation for human usage. Also implicated by the term are methods and

techniques for preserving the communities' accumulated information about biologic or genetic resources for future generations.⁸

Forest resources have some traditional knowledge relating to how to acquire and use them. According to Korea legal system, 'forest resources' among natural resources are "useful things beneficial to national economy and citizens' life including bio-resources like woods, grasses, mosses and fungi, inorganic resources like stone, sand and water, and recreation in forest and scenery resources" (section 2(2) of AFMFR 2005, Korea). Recently a new community-integrates intellectual property rights [IPRs] model, building on the work of the UNESCO's proposed Model Provisions for the Protection of Folklore is being developed.⁹

One might object that the term 'customary' IPRs is more accurate than 'traditional', because it assimilates the 'contemporary indigenous practices and beliefs which form inherent part of any TK definition'. Some scholars use the term of 'traditional' only to signify the 'conventional' nature of the process of gathering information, as distinct term of 'bio-prospecting' and other modern forms of collecting knowledge.¹⁰ I think that the concept of TK might be extended to the legal rules comprising of customary law relating to the management of natural resources, because such customary law and its principles and procedures are not only the results of tradition but also the heritage of culture.

While there is no need to require novelty as a prerequisite of protection, a certain level of intellectual activity should accordingly be required for Intellectual Property [IP] protection. TK not eligible for IP protection thus encompasses 'items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of "heritage" in the broad sense'. Traditional intellectual property [TIP] rights covering plant genetic resources in particular should protect TK relating to nutrition, health prevention, healing and other human activities. In order to identify TK protected by IP rights, and to render it eligible for legal protection, the specific subject matter needs to be recognized or documented in some codified knowledge system.¹¹

4. Rights: Can the interests be protected as rights?

Right is usually defined as interest which can be protected by the law. According to such preposition, whether the interests which indigenous people own relating to the traditional knowledge are rights or not that might be protected is contestable. Traditional knowledge should be prescribed as a valuable interest in law including statute or customary law. Interest relating traditional knowledge might be prescribed as a protective right in Constitutional Law, statute law, or customary law.

Nationally, some governments have adopted measures to protect indigenous intellectual property, including constitutional protection¹² and the model law on community rights and access to biological resources drawn up by the Organization of Africa Union. African Model Legislation for the Protection of Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources of 1998 was published by the Organization of African Unity, Scientific, Technical and Research Commission.¹³

⁸ Thomas Cottier and Marion Panizzon, 'Legal Perspectives On Traditional Knowledge: The Case For Intellectual Property Protection', *Journal of International Economic Law* 2004.7(371)(Oxford University Press, 2004), p.1.

⁹ *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1982), published by the Unesco Committee of Governmental Experts on the Intellectual property Aspects of the Protection of Expressions of Folklore; D Craig, 'Global Sustainable Development: Human Rights, Environmental Rights and Indigenous Peoples', *Working Paper 2003/03* (Australian Human Rights Centre, Craig, 2003)

¹⁰ Thomas Cottier and Marion Panizzon, *op.cit.*, p.9.

¹¹ *Ibid.*, p.10.

¹² For example, Republic of Venezuela Constitución de 1999, Art 124 and Constitution of the federative Republic of Brazil 1988, Art 231.

¹³ Benjamin J. Richardson and Donna Craig, *op.cit.*, p. 209.

⁴ Patrick Masiyakurima, "Biodiversity and Law : Intellectual Property, Biotechnology and Traditional Knowledge", *Enviro L R* 11 2(146) (Vathek Publishing, 2009)

⁵ Fiona Darroch, "Railing against Exploitation", *Special Report: IP Bar* (Pg.29) [Focus – 9 of 49 Documents] Centaur Communications Ltd. The Lawyer, January 17,(2000)

⁶ About the concept and scheme of cross-regulation, see Jaekyong Chun, *Paradigm Shift of Regulation* (Korea Legislation Research Institute, November 2009), pp.189–221.

⁷ See M Gadgil, F Berkes and C Folke, 'Indigenous Knowledge for Biodiversity Conservation' (1993) 22(2/3) *Ambio* 115.

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