

AUTHORS

Elan Abrell - Natural Justice

Kabir Sanjay Bavikatte - Natural Justice

Gino Cocchiaro - IDLO

Harry Jonas - Natural Justice

Andrew Rens Ph.D,

Intellectual Property Law Research, Department of
Private Law , University of Cape Town

NATURAL JUSTICE

LAWYERS FOR COMMUNITIES AND THE ENVIRONMENT

Natural Justice is a South Africa-based NGO facilitating the legal empowerment of indigenous peoples and local communities. Natural Justice takes its name from the legal principle that people should be involved in decisions that affect them. Accordingly, we assist communities to engage with legal frameworks to secure environmental and social justice.

Mercantile Building, 63 Hout Street, Cape Town, 8001, South Africa
Tel / fax: +27 21 426 1633 | email: scott@naturaljustice.org.za

www.naturaljustice.org.za

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INTERNATIONAL DEVELOPMENT LAW ORGANIZATION

Viale Vaticano, 106, 00165 Rome, Italy
Tel: +39 06 4040 3200 | Fax: +39 06 4040 3232

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IMAGINING A TRADITIONAL KNOWLEDGE COMMONS



A community approach to sharing traditional
knowledge for non-commercial research



NATURAL JUSTICE

IMAGINING A TRADITIONAL KNOWLEDGE COMMONS

A community approach to
ensuring the local integrity of
environmental law and policy

Authors: *Elan Abrell* is an associate of Natural Justice, and a doctoral Candidate, Department of Anthropology City University of New York. *Kabir Sanjay Bavikatte:* Co-Director of Natural Justice. Kabir is also a PhD candidate in the Department of Private Law, University of Cape Town. *Gino Cocchiaro:* Legal Researcher, International Development Law Organisation (IDLO) and *Harry Jonas* is Co-Director; Natural Justice.

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Viale Vaticano, 106, 00165 Rome, Italy

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IMAGINING A TRADITIONAL KNOWLEDGE COMMONS

A community approach to ensuring the local integrity of environmental law and policy

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**International Development
Law Organization**
Viale Vaticano, 106, 00165 Rome, Italy
Tel: +39 06 4040 3200
Fax: +39 06 4040 3232
www.idlo.int

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1

INTRODUCTION

*A gift is to the giver, and
comes back most to
him - it cannot fail...*

Walt Whitman

In August 2009, around 80 traditional healers living in the Bushbuckridge area of the Mpumalanga province in South Africa developed a biocultural community protocol¹ which provided clear terms and conditions for access to their collectively held traditional knowledge (TK).

The motivation for the biocultural protocol was an attempt by these traditional healers to assert their rights over their TK under Article 8(j) of the CBD² and the concomitant South African ABS law. While the biocultural protocol itself sought to regulate access to their TK based on their biospiritual virtues³, what was more interesting was the process of deep introspection that the biocultural protocol triggered within this community about the nature of their knowledge.

The healers were clear about the idea of asserting ownership over their TK. According to them, their knowledge was passed on to them from their teachers, gained through experience, sharing, intuition, dreams and ancestral spirits and although they were the custodians of this knowledge they didn't have absolute proprietary rights over them but still have a right to profit from the use of this knowledge, whether collectively or individually owned. Of course a small fee in cash or in kind was charged from patients who could afford it, but this fee merely ensured the healer's livelihood and wasn't seen as a right to profit from their knowledge.

1. The term 'bioculture' implies ways of being and knowing of communities whose way of life is based on a deep sense of kinship with the land, the plants and animals. A biocultural community protocol is a protocol that is developed as a result of a consultative process within a community that outlines the community's core cultural and spiritual values and customary laws relating to their traditional knowledge and resources based on which the community provides clear terms and conditions under which access to their knowledge and resources shall be provided

2. Article 8j of the Convention on Biological Diversity states: (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; (Convention on Biological Diversity (1994). Convention on Biological Diversity Text. CBD Secretariat, Geneva).

3. Biospiritual virtues are virtues at the heart of the spirituality of biocultural communities and form the ethical foundation of customary laws and cultural practices of these communities.

The healers did not want to interpret Article 8(j) as providing them with a title deed over their knowledge as they already saw themselves as custodians of this knowledge, but as a right to ensure that their knowledge would be used in accordance with their biospiritual virtues.

They were healers who had a sacred calling, and had received knowledge from their teachers and ancestral spirits, which obliged them to share this knowledge and serve their communities through the healing powers that the knowledge bestowed on them.

The healers of Bushbuckridge pose an interesting challenge to the implementation of Article 8(j) of the CBD: Can Article 8(j), while ensuring the rights of indigenous peoples and local communities to enter into ABS agreements for the commercial use of their TK, also envisage an expanding TK Commons that includes non-traditional users who use TK strictly in accordance with the biospiritual virtues of its custodians?

The answer to this question resonates beyond the preservation of TK to the issue of the continued existence of indigenous and local communities (ILCs) themselves.

International law provides a range of human rights instruments that guarantee the civil, political, economic, social and cultural rights of ILCs.

These human rights are often conceptualized as having at least three generations or categories⁴.

The first generation of rights – political and civil rights – is outlined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)⁵.

What is commonly referred to as the second generation of rights are socio-economic and cultural rights. They are also covered in the UDHR and are enshrined in the International

Covenant on Economic, Social and Culture Rights (ICESCR)⁶. The third generation of rights includes a range of other rights not explicitly covered in the previous two categories, such as collective and group rights and rights to a healthy environment and sustainable development⁷.

4. See Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

5. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on December 10, 1948, in Paris, France. The International Covenant on Civil and Political Rights was adopted by the UN General Assembly on December 16, 1966, and entered into force on March 23, 1976.

6. The International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly on December 16, 1966, and entered into force on January 3, 1976.

7. For more on group and collective rights see the Declaration of the Rights of Indigenous Peoples (DECRIPS), adopted by the UN General Assembly on September 13, 2007. For more on environmental rights see The Declaration of the United Nations Conference on the Human Environment (or Stockholm Declaration), which was adopted June 16, 1972, by the UN at the 21st plenary meeting and The Rio Declaration on Environment and Development (or Rio Declaration), which was drafted at the 1992 UN "Conference on Environment and Development" (UNCED, or also referred to as the Earth Summit).

In addition to these three categories, there is also increasing advocacy for a fourth generation of rights that would include rights to access to information. This entire generational spectrum of human rights is essential in providing the international legal framework necessary to facilitate the recognition of ILCs' rights to self-determination and to culture, two of the most important cornerstones supporting their ability to enter into ABS agreements from a firm bargaining position.

However, none of these rights categories directly addresses the dialectical nature of ILCs' relationships with their TK and the ecosystems from which it was developed. Like the healers of Bushbuckridge, many ILCs conceptualize their relationships to their TK as involving not only rights to its use but also biospiritual virtues guiding its use and

responsibilities and obligations to the communities and ecosystems in which it is used. To divorce these rights from their reciprocal responsibilities could be detrimental to the biocultural framework of the ILCs and hence to the very integrity of the ILCs as they now exist.

It is for this reason that the question of whether an expanding TK Commons can provide a framework with which to preserve TK without severing it from its attendant biospiritual virtues is relevant both to the future of ILCs as well as the continued development of an international human rights framework that can incorporate the category of biocultural rights within its range of protections.

2

FROM COMMUNITY KNOWLEDGE TO A KNOWLEDGE COMMUNITY

*One man's gift must not be
another man's capital.*

Marcel Mauss

Unlike liberal conceptions of rights that emanate from a conceptualization of the individual as the fundamental agent of social activity, a biocultural approach to rights takes as its primary focus the community and the myriad relationships that bind it together.

Since the principal concern of a liberal approach to human rights is the preservation of the liberty of individuals in their relation to the state and each other, and since a primary locus of social relationships in liberal societies is property and the exchange of property, it is not surprising that rights related to the protection of individual property interests hold a *sine qua non* status in a liberal rights framework.

In a biocultural context, however, in which TK rather than private property is one of the primary agents mediating human relations, the biospiritual virtues that determine a TK user's responsibilities to the community and the ecosystem provide the basis for a somewhat different rights perspective that focuses on communal ties as well as the individuals that share them.

Therefore, before proceeding to a conceptualization of what TK Commons is and a further exploration of its implications for biocultural rights, it would be

useful to understand the role customary and spiritual norms governing the use, sharing, movement and growth of TK play in exercising a centripetal force that ties an expanding community of knowledge holders to a virtuous center.

The traditional healers in Rajasthan (India) refer to themselves as gunis. The word guni is derived from the Sanskrit word guna, which has a threefold meaning-knowledge, healing and virtue. A guni is therefore one who not only has the knowledge of healing but is also a person of virtue. The gunis in their biocultural protocol outlined the guni dharma, which is a code that all gunis subscribe to. The term dharma is translated as 'the virtuous path' and guni dharma is a code of virtue that gunis are sworn to uphold. The gunis recite an oft-quoted Hindi verse of the saint Tulsī Das that sums up their guni dharma: *daya dharma ka mool hai, paap ka mool abhimaan*-translated as 'compassion is the root of the virtuous path and the root of wrongdoing is self-centeredness'. The gunis believe that it is compassion that makes them serve their community selflessly, care deeply for nature and share their knowledge for the well being of humanity.

While developing their biocultural protocol the gunis emphasized that compassion leads to selflessness, which opens oneself up to a deep sense of kinship with nature and one's community. This biocultural connectedness leads to dreams and intuitions about the healing properties of plants. The gunis therefore view themselves as custodians and conduits rather than owners of their knowledge and see their ability to heal as a gift or a calling.

For the gunis it is a violation of the guni dharma to profit from their knowledge and the greatest of transgressions is a refusal to heal the ailing who can ill-afford to compensate the guni.

The dharma of the gunis is not an isolated example of an ancient code of biospiritual virtues but resonates with the codes of virtue of other traditional communities such as the sangomas (traditional healers) of South Africa and the Raika pastoralists of India. These communities perceive their knowledge as an outcome of virtuous relationships with the land, the plants and animals.

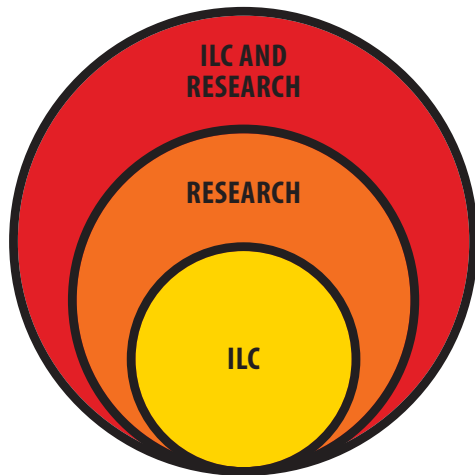
Knowledge in these communities is not seen as property that can be owned and sold as a disembodied commodity but rather the very flow of knowledge affirms biocultural relationships within communities and between communities and their ecosystems.

Knowledge is not purely material but simultaneously cultural and spiritual and its movement and application promotes a kind of virtuous cohesiveness.

Amongst biocultural communities, the movement of knowledge does not generate profits as in the sale of commodities. On the contrary the knowledge itself increases by creating a continually widening community of knowledge holders all of who are bound by the code that insists that they do not profit from what they have received freely. Whereas in a transaction of the sale of knowledge, the profit remains with the seller, within biocultural communities, the increase follows the knowledge while simultaneously affirming cultural and spiritual bonds within communities.

While biocultural communities, be they healers or pastoralists, do engage in transactions where they are compensated in money or in kind in exchange for their knowledge, the nature of TK is such that it places a clear limit on the extent to which the knowledge can be commodified.

EXPANDING COMMUNITY



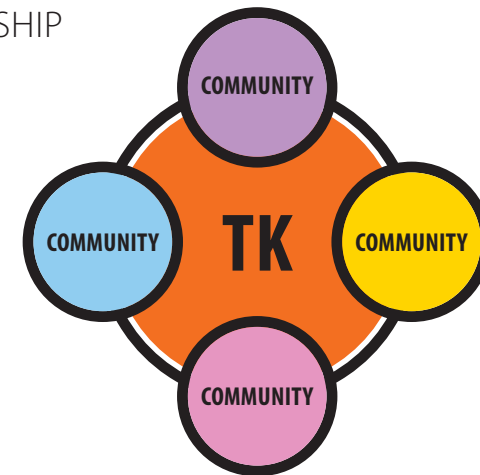
Because when knowledge that emerges from certain cultural and spiritual relationships is commodified it results in an erosion of a value system that creates such knowledge and frays the ties that hold the community together. Some of the healers believe that it even affects the efficacy of the knowledge since it separates the healer from the community by restricting their interaction to a material relationship mediated by the commodity. The movement of knowledge as a relationship on the other hand blurs the boundaries between the self and others strengthening cultural and spiritual bonds that makes for a community.

The healers see a large part of healing as involving a spiritual reaching out to the ailing, which is adversely affected if the entire relationship is based on a pure commercial transaction.

“When ‘knowledge’ passes from hand to hand in this spirit, it becomes a binder of many wills. What gathers in it is not only the sentiment of generosity but the affirmation of individual goodwill, making those separate parts a *spiritus mundi*, a unanimous heart, a band whose wills are focused through the lens of the ‘shared knowledge’. Thus the knowledge becomes an agent of social cohesion, and this again leads to the feeling that its passage increases its worth, for in social life; at least, the whole really is greater than the sum of its parts. If it brings the group together, the ‘knowledge’ increases in worth immediately upon its first circulation, and then like a faithful lover, continues to grow through constancy”⁸

8. Hyde, Lewis, *The Gift: Imagination and the Erotic Life of Property*, Random House: New York, 1983, pg 35.

KNOWLEDGE AS A RELATIONSHIP



3

TOWARDS A TK COMMONS

To feel the intimacy of brothers is a marvelous thing in life. To feel the love of people whom we love is a fire that feeds our life. But to feel the affection that comes from those whom we do not know, from those unknown to us... that is something still greater and more beautiful because it widens the boundaries of our being, and unites all living things

Pablo Neruda

TK Commons offers the user an access and benefit sharing arrangement that differs from the conventional model of an ABS agreement. TK Commons would provide ILC's a half way house between providing unregulated access to their knowledge leaving it open to abuse and having to negotiate an ABS agreement for every non-commercial use of their TK which would greatly restrict the sharing of that knowledge.

In a TK Commons system the customary laws and values of ILC's are held intact whilst simultaneously applying certain restrictions on the use of their knowledge.

In a similar vein to the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples⁹, a TK Commons seeks to allow indigenous and local communities to share and exchange knowledge, provided that the knowledge is used in accordance with the conditions that they are able to define and control.

The crucial difference between traditional knowledge and knowledge as a commodity in the context of Article 8(j) lies in the manner in which the knowledge is produced and how it is shared. While TK is a result of biocultural relationships

between communities and their ecosystems and is shared according to biospiritual virtues, knowledge as a commodity is a result of commercial exchanges and its movement is governed by the principles of the market. The moment TK becomes a commodity it loses its biospiritual moorings and snaps the biocultural relationships within which it is embedded. While this may be inevitable when TK enters the marketplace through ABS agreements, it begs the question whether the transformation of TK into a commodity undermines the in situ conservation aspect of Article 8(j) that requires the

“respect, preservation and the maintenance of knowledge, innovations and practices (TK) of indigenous and local communities and promotion of their wider application”.

Indigenous peoples and local communities seek to limit the wholesale commodification of their TK by basing ABS agreements relating to the commercial use of their TK on their biocultural protocols or customary laws. While the right of communities to enter into commercial ABS agreements for the use of their knowledge needs to be respected, it raises the question of how communities should respond to non-commercial uses of their knowledge, especially if the user in question is willing to comply with the biospiritual virtues of the community. While Article 8(j) requires the sharing of benefits arising from any non-traditional utilization of TK, it also assumes that the customary sharing of TK within and between communities falls outside the realm of ABS since any increase of knowledge is not appropriated by individuals but collectively shared.

9. Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)- <http://www.ngatiawa.iwi.nz/documents/mataatua.shtml>

The question that confronts us now is whether the notion of community can be expanded to include non-traditional users who would be willing to use TK in accordance with the biospiritual virtues of the community and be willing to freely share any increase of knowledge that arises from its use with the community.

The expanded notion of community that includes non-traditional users who are willing to allow their use of TK to be regulated by the biospiritual virtues of the community providing such knowledge is the TK Commons.

The TK Commons is a widening circle that goes beyond the direct reciprocity of an ABS agreement.

Whereas reciprocity involves a relationship of two, a circle requires the continued movement and growth of knowledge that benefits not just the original community that provided the knowledge but other communities too. While the benefits are indirect, the members of a TK Commons benefit not just from the increase in their knowledge but also from the knowledge of others who are a part of the Commons.

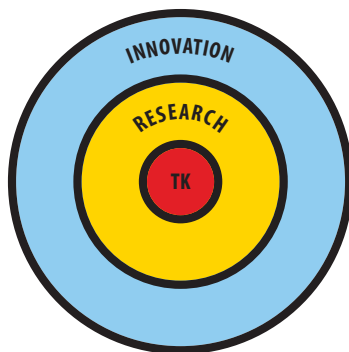
What is a commons? *“Commons” refers to a particular institutional form of structuring the rights to access, use, and control resources¹⁰.* A Commons is a resource, which is controlled by a community using systematic rules, which govern use of the resource. Limitations on use are 'symmetrical'. The rules, which govern the Commons, permit some uses while prohibiting others. TK systems that both permit use of knowledge and require reciprocity are knowledge Commons.

The issue is not therefore how TK may be placed into a Commons but how to give effect to the rules governing existing TK Commons using national and international law. From a legal perspective the rules governing a Commons grant rights while also imposing obligations. Although often not acknowledged in law, with its overt focus on concepts of property owned by individuals and corporations, most developed economies rely on commons.

“Commons are another core institutional component of freedom of action in free societies, but they are structured to enable action that is not based on exclusive control over the resources necessary for action¹¹. ”

10 & 11. Yochai Benkler, *The Wealth of Networks*, Yale University Press, 2006, pg24

TRADITIONAL KNOWLEDGE COMMONS



Commons based peer production is the basis of technologically enabled successes such as Free and Open Source Software (FLOSS), and Wikipedia. FLOSS in particular the Linux operating system have enabled members of the FLOSS community to benefit from their co-operative creation of the software while preventing its appropriation by software vendors with proprietary models.

A Knowledge Commons should not be confused with the public domain. Free software for example is not in the public domain, but rather secured from appropriation by a license, usually the GNU General Public License that requires those all users to use the

software according to the values of the free software community. While someone may rework something in the public domain, and then claim “ownership” in the reworking, a Commons governs the re-use of resources, usually requiring reciprocity, attribution of others, and re-licensing on the same terms.

A Commons is also distinguishable from a publicly available resource like a free to air broadcast which may be freely viewed but not freely re-transmitted, because the publicly available resources vest in companies or individuals not communities, and while they may permit some uses but not others, they do not form the basis of a community.



4

HOW THE TK COMMONS WORKS

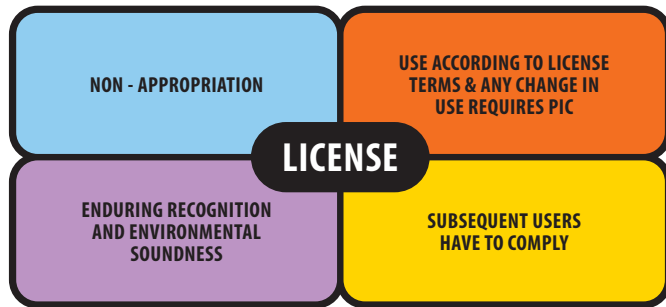
The creation of a TK Commons would require a community of TK holders to develop in accordance with their biospiritual virtues the terms and conditions for non-commercial¹² access to their TK. These terms and conditions would be in the form a license that would need to be complied with by non-commercial users of TK such as students, non-profits, academic researchers and archivists. The general characteristics of the licenses could include:

- a) The use of the knowledge takes place only on the terms of the license. Any person using the knowledge is therefore taken to have agreed to be bound by the license. The license sets out not general permission to use the knowledge but how knowledge can be used, what obligations a user incurs to respect the spiritual and cultural values of the knowledge bearing community. The licensee will not appropriate or profit from any new development based on the TK by restricting further access to such new development or requiring payment for it, but will instead place these new developments back into the TK Commons, usually by placing it under the same license.
- b) TK in a manner that is inconsistent with the stated terms and conditions in the license.
- c) Any subsequent non-commercial users of the TK or developments based on it who access it from the licensee will also have to comply with the terms of the license.
- d) All licensees must provide enduring recognition of the source of the TK.
- e) Any change in licensed use of the TK would require explicit permission from the holders of the TK.
- f) The licensee will not use the TK in any manner that would cause harm to the environment
- g) The license requires that subsequent users of the knowledge comply with the license

Researchers who engage directly with TK communities would need to take on greater responsibilities to the community in terms of non-monetary benefit sharing than others who make use of the knowledge, as it is mediated through the primary researchers. Primary researchers would therefore need research licenses which impose a broader range of requirements on them, one of which is that the various research outputs must be licensed under traditional knowledge commons licenses. A research license would be issued to an individual researcher on personal application by that researcher, while a traditional knowledge commons license would operate in the same manner as a free software license, by accompanying the encoded knowledge resources and applies to everyone who uses the resource. Both types of licenses would conform to the general characteristics listed above.

12. Non-commercial research refers to research with the goal of adding knowledge to the public domain, without restrictions or proprietary ownership. Non-commercial research generates new knowledge and collections of reference specimens that generate benefits through the public domain, without generating proprietary benefits. Countries that provide access to their biodiversity for non-commercial research derive a range of non-monetary benefits, including training, a better understanding of their genetic resources, and an improved basis for managing, conserving, and developing their biodiversity. Policy Forum: Global Biological Resources - Preserving International Access to Genetic Resources for Non-commercial Biodiversity Research. David E. Schindel, Christoph L. Häuser, Scott E. Miller and the International ABS Workshop.

THE ELEMENTS OF A TK COMMONS LICENSE



The Varieties of TK Commons:

The above-mentioned features of a TK Commons license are not any different from the customary norms that community members who use the TK are bound by. The biospiritual virtues of the sangomas or gunis such as sharing, non-appropriation or profiting, enduring recognition, conservation and respectful use are merely elaborated as the terms of a license. If the terms of a license are based on biospiritual virtues identified in the customary laws or biocultural protocols of indigenous peoples and local communities, it is a possibility that the licenses of the different groups could vary.

For example, while the terms of a license developed by different groups of traditional healers may have common elements it could differ from the terms of a license developed by pastoralists.

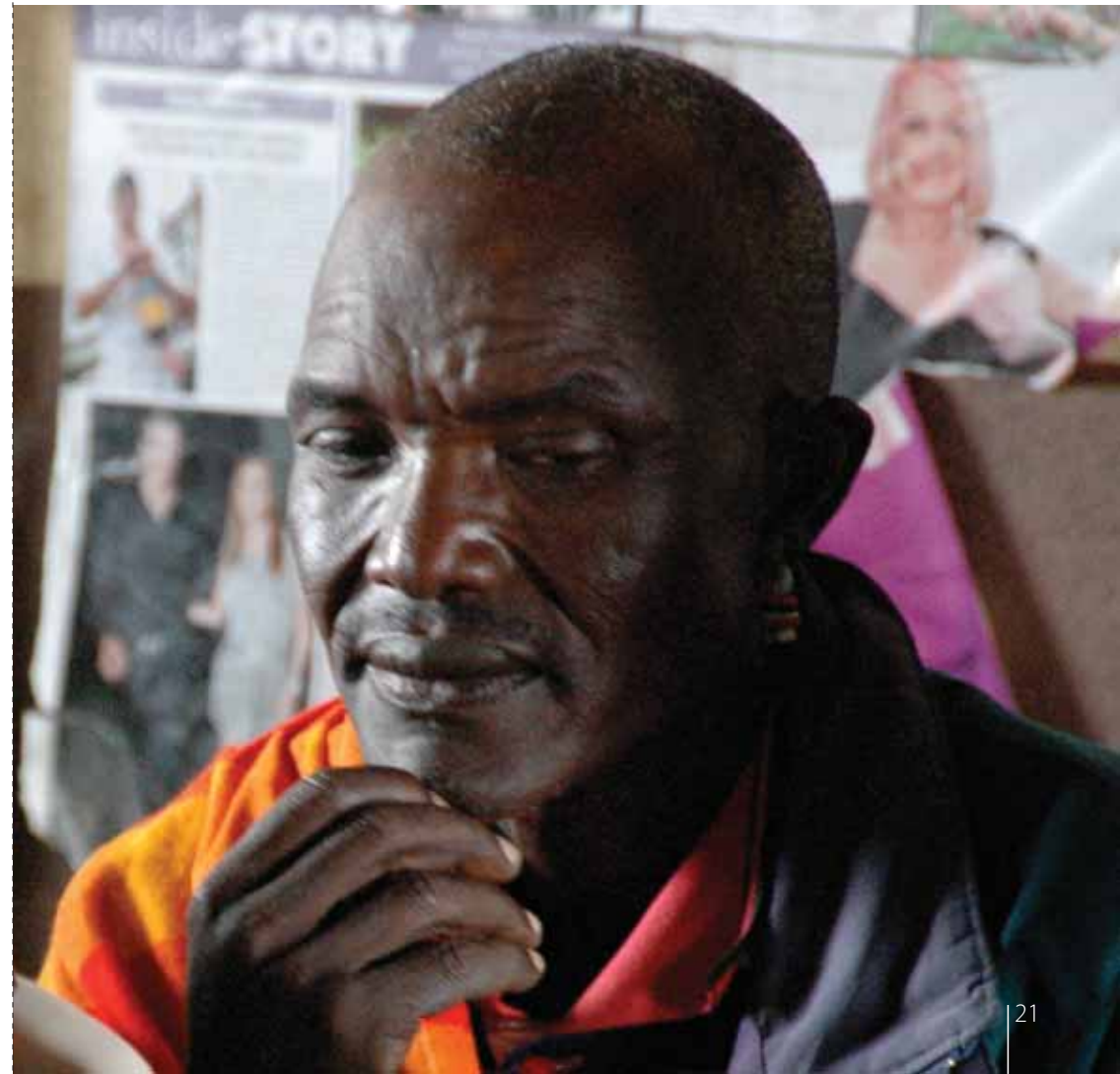
This raises the possibility of not one 'TK Commons' but a few different ones.

Its important to note that without the permission given by the license a person cannot make use of the knowledge without violating the community protocols and ultimately supporting legislation. The permission given by the license is only to use the knowledge in the ways prescribed in the license. Use which does not comply with the license is then use for which no permission has been given.

The conventional understanding of holders of TK is one where they are perceived as a homogenous ethnic community. A more nuanced understanding would be one where they could be a group of shared knowledge holders. Examples might include: traditional healers living in a certain region with knowledge about the use of plants in that region or communities living within a biosphere engaged in a variety of practices that have conserved the biosphere, or communities living across national boundaries that share TK by virtue of living within the same ecological corridor or pastoralists on specific migratory routes with shared ethno-veterinary knowledge and breed diversity. Each of these groups has certain commonalities that make them a community that live by certain biospiritual virtues.

The variety of communities that share TK throw open the possibility of a variety of TK Commons- such as the 'Biosphere Commons', a 'Traditional Healers Commons' or a 'Pastoralist Commons' forming clusters around which communities with shared interests can share knowledge and resources with others. A 'Biosphere Commons' for example could be regulated by a biocultural protocol jointly developed by the different

stakeholders within the biosphere all of whom are in different ways responsible for the conservation of the biosphere. The 'Traditional Healers Commons' or a 'Pastoralist Commons' can be similarly regulated by a biocultural protocol and be a pool of knowledge held in trust by the traditional healers or pastoralists whose use is clearly regulated in accordance with their biospiritual virtues.



5

A TK COMMONS ONLINE LICENSING SYSTEM

An example of how a TK commons could work would be through an online licensing system. The key elements of an online licensing system would be:

- ▶ The potential user prior to use of the TK of the community will have to agree to the online license on the TK Commons website that acts as a database of the TK the community is willing to share or TK that is already publicly available from *ex situ* sources.
- ▶ The TK Commons website will then store a copy of the license and the user will be provided with a copy of the license and a link to the license on the website that s/he must display in any work that they produce based on the TK.
- ▶ The licensee will be bound by the 'share alike' terms of the license which means that they can not appropriate or privatize any of work they produce based on the TK but must share it further in accordance with the conditions they accessed the TK.
- ▶ All future users of the licensed work based on the TK must further display this license on their work so as to ensure enduring recognition of the rights of the providers of TK and the licensing conditions.
- ▶ If the use changes (still within the noncommercial framework) for e.g. a student accesses the TK from an archivist who has a different kind of a license, then s/he would have to get a new license from the TK Commons website.
- ▶ The license terms will state that a copy of any work/research based on the TK would have to be placed back into the TK Commons website where it will be collated under different database headings.
- ▶ All the new research or knowledge based on the TK of any community that is a part of the TK Commons will be accessible to all other communities thus creating a system of knowledge sharing between communities across the world.
- ▶ Any use of this new knowledge from the TK Commons will be licensed in a similar fashion.
- ▶ Communities that share certain kinds of knowledge or face similar challenges can through their representative organizations set up a group of 'knowledge trustees' who will be individuals / organizations that have the requisite expertise in the different database areas to periodically review the new research/knowledge that is banked with the TK Commons to identify new knowledge that is relevant for the community and disseminate it in the vernacular. The TK Commons would also allow communities to place requests on the website to seek assistance in solving certain issues that the community may be facing. Researchers are able access the 'requests' page on the Commons website and, should they wish, focus their research on these areas.
- ▶ The 'knowledge trustees' would periodically review the research results added to the TK Commons and identify any new developments that may be of interest to the communities that are members of the TK Commons. These new developments will be communicated in a user friendly format to ILC's or their representative NGO's through the TK Commons website and through regular meetings between trustee members and ILC representatives.
- ▶ Based on the research updates by the 'knowledge trustees', ILCs are free to use or apply this knowledge in accordance with the terms of their license.
- ▶ The TK Commons website will be managed by a governing board which would comprise of representatives of ILCs, research centers and universities. The TK Commons website and the knowledge trustees will be supported through periodic stipulated financial contributions by research centers and universities who are members of the governing board.

Protecting the TK Commons:

The purpose of the TK Commons will be to provide communities with a trusted system through which they can be as certain as is reasonably possible that the terms and conditions under which their TK will be made available to the Commons are being complied with.

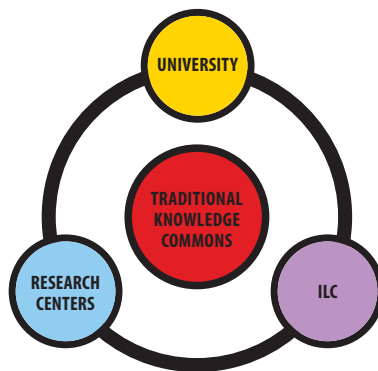
Of course there will be the possibility that the knowledge from the commons will be used in ways that violate the license. However such a possibility exists with or without a TK Commons considering that large amounts of TK are available ex situ in books and journals. The issue of tracking, monitoring and ensuring compliance with the customary laws or biocultural protocols of indigenous peoples and local communities in relation to the use of their TK is something that would have to be resolved through the potential International Regime on ABS and the concomitant national legislations. In any case a TK Commons would fall under a sui generis system of TK protection developed by ILCs and would act as an ABS arrangement of sorts with the TK Commons license providing both prior informed consent and the mutually agreed terms for the use of the traditional knowledge and the Commons as a whole being a pool of growing

knowledge benefits. This would entitle the TK Commons to the same kind of protection that the potential International Regime on ABS would provide for any ILC entering into a standard format ABS agreement for the use of their knowledge.

The outcome of a TK commons would be interoperability of licenses through which user country laws would require their institutions and citizens who use TK to have valid licenses and would determine what would constitute misappropriation or misuse based on these licenses. The ideal scenario would be one in which the aggrieved community, the ombudsman or the legal aid authority under the International Regime on ABS would contact the Competent Authority of the user country in situations where it is reported that TK is being used for purposes that are not allowed by the licenses. There would have to be similar processes at patent offices where applications for patents based on TK must disclose the relevant ABS agreement or license.

The TK Commons database can have a legal section that would conduct random and periodic checks for license violations and where such a violation is found take the necessary legal action through the channels made available through the potential International Regime on ABS.

ONLINE LICENSING SYSTEM



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CONCLUSION

Article 8 of the CBD falls under the head of 'in situ conservation' and Article 8(j) in its essence is less about the sale of TK for the benefit of indigenous and local communities and more about protecting the rights of these communities to a biocultural way of life that has for centuries conserved and sustainably used biological diversity. Article 8(j) requires Parties to the CBD to protect, preserve and maintain the values that underlie the biocultural way of life of indigenous and local communities. It assumes that some of these values are embodied in the TK and therefore seeks to promote such TK with the approval of the community holders of such TK.

Indigenous and local communities, unlike States, rarely need to be incentivized to conserve and sustainably use biological diversity through the sale of their TK or resources. The ecosystem for them is the greatest and most reliable of service providers and that is incentive enough for conservation and sustainable use. On the contrary their biggest concern is the erosion of the rights to land, culture and a way of life that underpins such TK leading to culturally and materially impoverished communities who unsustainably maximize what they can take from a land that they will soon have no access to.

The idea of a TK Commons enters the heart of the debate around TK in the context of Article 8(j). The TK Commons does not preclude the rights of communities to enter into commercial ABS agreements for the use of their TK, as in the case of the San in Southern Africa; to bring in much needed income to a desperately poor community. However TK Commons offers a further possibility for indigenous and local communities to move beyond the dominant "sale of TK leads to conservation" interpretations of Article 8(j).

A TK Commons allows communities to share their traditional knowledge whilst being able to equally define and control its use. It provides communities with an

opportunity to globalize their biospiritual virtues that are at the heart of their way of life and have ensured conservation of biological diversity. It offers a possibility for communities to ensure their knowledge isn't disembodied by widening the understanding of 'community' to include all non-commercial users who agree to abide by the biospiritual virtues that underlie the use of TK.

TK Commons ultimately seeks to view the knowledge of indigenous and local communities as a total social phenomenon that moves beyond understanding TK as a purely tradable commodity to promoting the cultural and spiritual dimensions of TK that underlie a biocultural way of life. In the process, the TK Commons would provide a medium through which an indigenous view of rights as inextricably joined to biospiritual virtues and reciprocal responsibilities can be incorporated into the larger international human rights framework. Rather than merely relying on the generations of rights that have already been formulated, ILCs could actively participate through the TK Commons in the ongoing process of shaping the evolving framework of international human rights. The TK Commons would thus enable ILCs to build on previous generations of rights with new articulations of biocultural rights that recognize the complex, interdependent relationship of ecosystems, human communities and the cohesive flows of knowledge that bind and shape them. It provides the possibility of a participatory system of rights guided and supported as much by appreciation of community bonds and biospiritual virtues as it is by legal mandate and market processes, an expanded community through, which we can all participate and, in Neruda's words, widen "the boundaries of our being" through our experience of "the affection that comes from those whom we do not know."

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ACRONYMS

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic,
Social and Cultural Rights

ILCs Indigenous and local communities

TK Traditional Knowledge

UDHR Universal Declaration of Human Rights