

Intellectual Property, Community Rights and Human Rights

The biological and genetic
resources of developing countries

Marcelin Tonye Mahop



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Foreword

In the past four decades, phenomenal developments in biotechnology and information technology have combined to push to the fore the great potentials and benefits of PGRs. It is now widely accepted that plants contain an immense store of chemical resources that could be used for a variety of purposes. The astonishing aspect of this unfolding phenomenon is the emerging realization by researchers and scientists that much of the knowledge of the diverse uses of plant resources are possessed by various persons and stakeholders in traditional communities where most of the plant resources have been grown and used for millennia. Thus, PGRs and traditional knowledge must of necessity be construed and understood as community assets. These assets are essential for maintaining the livelihoods of rural communities, and for sustaining myriad cultural and societal functions. However, the increasing scientific and commercial interests engendered by the huge potentials of bio-cultural plant resources has opened up fissures at various levels on the fair and equitable use of plant bio-cultural resources.

The emerging debate underscores the important point that in addition to scientific and commercial interests in the exploitation of these elements of bio-cultural diversity, other institutions and stakeholders, in particular, local communities, have relevant interests in PGRs and traditional knowledge. For several generations now, community assets from developing countries have been exploited by scientifically and technologically capacitated actors, sometimes legally but also illegally and generally unethically. Such exploitation activities are a cause of concern to local and indigenous communities ranging from overutilization and depletion of the resources, 'bio-piracy', lack of respect of communities' prior rights over their assets and failure to ensure community participation in decision-making processes and to provide them with fair benefits and compensation. Sadly, in the power structure which imbues each stakeholder with voice and capacity in deciding who gets what 'rights' in the debate regarding the exploitation of resources, local communities are often given the short shrift.

While myriad national, regional, and international regulatory instruments and regimes on plant resources have focused on the intellectual property rights dimensions of plant resources, the underlying issue of fairness and justice to local communities has not gained equal prominence. Local communities lack voice because their contributions to PGRs are not respected and considered worthy of

bearing legal rights. This stems largely from an elitist conception of what constitutes knowledge and which knowledge is worthy of respect and legal protection. This condescending attitude towards local communities diminishes the millennia of scientific contributions of local communities while ignoring the palpable human-rights dimensions of the regulation of access to and use of community assets for scientific and commercial purposes and the management of and control over access to these assets by local and indigenous communities.

This book fills a significant gap in contemporary scholarship on the human-rights aspects and justice-based formulation of the rights of local communities to plant resources. In pulling together an analysis of a cross-section of case studies of exploitation of community assets and trespass upon their human rights and of national, regional and international intellectual property-related biodiversity instruments and human-rights instruments drawn from the Americas, Asia Pacific and Africa, the author has crafted an elegant, readable, and penetrating analysis of the human-rights dimensions of the lingering neglect and denial of the human-rights issues raised by the scientific and commercial exploitation of community assets. Unless and until we understand the neglect of local communities and exploitation of traditional knowledge of the uses of plants as human-rights issues, the quest for sustainable development will be a mirage. Those lessons still need to be learned and this excellent book is a good place to start.

Ikechi Mgbeoji
Professor of Law
Osgoode Hall Law School, Toronto, Canada

Preface

PGRs and traditional knowledge, defined in this book as ‘community assets’, are very important elements of bio-cultural diversity, attracting scientific and commercial interests nationally and internationally. However, these elements of bio-cultural diversity are also essential for maintaining the livelihoods of rural communities in the developing countries rich in these assets. Apart from and in addition to scientific and commercial interests in the exploitation of community assets, other entities or institutions hold genuine interests in respect of their relationships with PGRs and traditional knowledge. Indeed, access to and potential exploitation of community assets are regulated through national, regional and international biodiversity regulatory schemes which are administered by specific institutions. Such regulatory schemes are generally developed to reflect well known legally and non-legally binding international and regional environmental laws, treaties and protocols such as the 1992 Rio Convention on Biological Diversity (CBD), the 2002 Bonn Guidelines on Access to Genetic Resources, the Andean Community Common Regime on Access and Benefit Sharing, and the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA) of the Food and Agriculture Organization (FAO) of the United Nations (UN). Other international treaties impacting on PGRs and traditional knowledge more oriented towards the commercial exploitation of these elements are the intellectual property treaties such as the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO) and the conventions of the International Union for the Protection of New Plants Varieties (UPOV) especially the UPOV 1991 Convention. Additionally, there are indigenous peoples and professional bodies’ declarations developed as soft instruments which attempt to streamline access to genetic resources and traditional knowledge and to balance the interests of all stakeholders involved in access processes such as local communities, researchers, industries and politically motivated decision-makers. The institutions administering all of these treaties and the peoples working for them all have interests in one or more aspects pertaining to the regulation of access to, use of and sustainable management of community assets. Above all, there is a human-rights dimension in the regulation of access to and use for scientific and commercial purposes and the management and control over access to community assets. This human-rights dimension is indeed

grounded on the community way of life and cultural association with their assets and is recognized in the regional and international human-rights instruments.

It is widely known that from the colonial era till date, community assets from developing countries have been exploited by scientifically and technologically capacitated actors, sometimes legally but also illegally and generally unethically. Such exploitation activities are a cause of concern to local and indigenous communities ranging from overexploitation and depletion of their assets, 'bio-piracy', lack of respect of communities' prior rights over their assets and failure to ensure community participation in decision-making processes and to provide them with fair benefits and compensation. All these concerns are human-rights related, and understanding that and addressing them as 'human rights' elements can go a long way to mitigating community concerns and establishing trust between local and indigenous communities and other actors and entities including scientific and commercial users, institutions administering key regulatory instruments and decision-makers working for these institutions in national, regional and international settings.

It is against this background that the idea to write this piece emerged and the product emerged. It is my strong and profound belief that a practical consideration and construction of human-rights principles in the regulatory instruments of access to and utilization of community assets is the way forward to making biodiversity-related regulatory approaches aligned with the interests of all actors. This belief stems from two pillars. On the one hand, despite the fundamental differences and technical and legal complexities inherent to the application of patents and plant breeder's rights systems, it is important to enable local and indigenous communities to understand how these two IP tools operate, the rationale for scientific and commercial operators' pursuit and acquisition of them and the potential benefits that may ever accrue to local communities. All these will gradually help them to accept and value the intellectual property rights such as patents and plant breeders' rights of others as legitimate rights. On the other hand, it is critical that all aspects of access processes and scientific and commercial utilization of community assets reflect the human rights of local and indigenous communities. The approach of this book is to bring about this balance through the development and suggestion of ways to implement intellectual property based and human-rights oriented biodiversity regulatory measures at the national level. The book has focused its analysis on four countries – Brazil, India, Peru and South Africa – used as case study countries. However, it is at the core of these analyses the understanding that the regulatory approaches discussed be replicable and adaptable to various national contexts according to every country's peculiar circumstances.

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which I contribute as an African professional on biodiversity and intellectual property policy issues and especially on ABS issues.

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Last but not least, I have very special thoughts to my late father, sister and godfather who made me the man and professional I am today but did not live to see these achievements.

Abbreviations

ABS	access and benefit sharing
ACB	African Centre for Biosafety
A(B)CHPR	African (Banjul) Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
BIO	biotechnology industry organization
BIS	balanced information sharing
BMA	British Medical Association
CBD	Convention on Biological Diversity
CBD-COP	Convention on Biological Diversity Conference of the Parties
CBIPRs	Community Based Intellectual Property Rights
CBO	community based organization
CBPR	community based property right
CCM	cultural consensus model
CCP	code of civil procedure
Cefic	European Chemistry Industry Council
CICPR	community intellectual and cultural property rights
CIEL	Center for International and Environmental Law
CIG	common initiative group
CIMMYT	International Maize and Wheat Improvement Center
CIP	International Potato Center
CITES	Convention on International Trade in Endangered Species
CONAGEBIO	National Commission for the Management of Biodiversity (Costa Rica)
CPG	common policy guidelines
CSIR	Council for Scientific and Industrial Research
DEAT	Department of Environmental Affairs and Tourism (South Africa)
DSM	Dispute Settlement Mechanism
DTI	South African Department for Trade and Industry
EDV	essentially derived varieties
EIA	environmental impact assessment

EPC	European Patent Convention
EPO	European Patent Office
FAO	Food and Agriculture Organization (of the United Nations)
FAO-IU	International Undertaking of the Food and Agriculture Organization
FDA	Food and Drug Administration (United States)
GBS	global bio-collecting society
GREEN Foundation	Genetic Resource, Energy, Ecology and Nutrition Foundation (India)
HRC	Human Rights Committee of the ICCPR
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDCID	Institute of International Trade Law and Development (University of São Paulo, Brazil)
IGC	Intergovernmental Committee
IIFB	International Indigenous Forum on Biodiversity
IKS	indigenous knowledge systems (South Africa)
ILO	International Labour Organization
INDECOPI	Office of Inventions and New Technologies (Peru)
IP	intellectual property
IPR	intellectual property right
IR	international regime
IRABS	International Regime on Access and Benefit Sharing
ITPGR	International Treaty on Plant Genetic Resources
IT-PGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
IU	International Undertaking
IUCN	International Union for Conservation of Nature (or the World Conservation Union)
JPO	Japan Patent Office
MAS	marker assisted selection
MEC	Member of Executive Council (for environmental affairs at the provincial level in South Africa)
MoU	Memorandum of Understanding
NBA	National Biodiversity Authority
NCE	new chemical entities
NTFP	non-timber forests product
OAS	Organization of American States
OAU	Organization of African Unity
PBR	plant breeders' right
PGRs	plant genetic resources
PGRFA	Plant Genetic Resources for Food and Agriculture

PIC	prior informed consent
PVP	plant variety protection
QPM	Quality Protein Maize
RIG	resources interests group
SANBI	South African National Botanical Institute
SANBI	South African National Biodiversity Institute
ST	scheduled tribes (India)
STRC	Scientific, Technical and Research Commission
STRC-OAU	Scientific, Technical and Research Commission of the Organization of African Unity
TK	traditional knowledge
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
TRRs	traditional resources rights
UDHR	Universal Declaration on Human Rights
UN-DRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues
UPOV	International Union for the Protection of New Varieties of Plants
USPTO	United States Patent and Trademark Office
WIPO IGC	World Intellectual Property Organization Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore
WIPO PCT	World Intellectual Property Organization Patent Cooperation Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO-DSM	World Trade Organization Dispute Settlement Mechanism

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1 Setting the scene

Focus, main themes and broader objectives

As indigenous peoples, the protection (legal or otherwise, such as through voluntary instruments and professional bodies' declarations) of 'community rights'¹ at the national level in countries rich in biological and cultural diversity, needs to follow the path of a human-rights approach.² This suggestion is based on the recognition that community rights are crafted in many human rights instruments, international and regional, legally and non-legally binding (such as declarations), which should be taken into account in national policy-making. Unfortunately, in respect of national policy-making processes aimed at protecting community rights and addressing their concerns about access to and use of biological and genetic resources, and traditional knowledge (TK) in scientific and commercially motivated activities, there is often a lack of integration of human-rights considerations in the process. Furthermore, law and policy-making aimed at addressing the concerns of local communities are usually pursued in a very fragmented and piecemeal fashion at the national level, with no practical cooperation among the various actors and government institutions involved in the various aspects of management and regulation of community assets. As a consequence of this unpractical approach, there is no comprehensive and workable regulatory framework in force anywhere in the countries endowed with significant richness in bio-cultural diversity which can be viewed as providing protection to community rights from a human-rights perspective and addressing the various concerns of traditional and local communities – one of which being the issue of bio-piracy – over access to and use of their assets³ by technologically advanced and capacitated users.

Ironically, to address their interests, technologically capacitated users of the assets of traditional communities use other weapons in their possession, such as the application of modern intellectual property rights (IPRs) such as patents or PBR systems over the outputs of their research endeavours based on the raw assets taken from local communities or their traditional lands. Analyses contained in the following sections and chapters are based on the realization and acknowledgement that IPRs and community rights are, in a way, all linked to each other within the framework of existing human-rights instruments. Indeed, even though human rights and IPRs are fundamentally dissimilar regimes because they pursue different

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aims, it is nevertheless the case that IPRs and community rights are all encapsulated in a number of international and regional human-rights treaties and recognized by international bodies such as the UN (more on this in Chapter 4). Despite this obvious linkage between human rights and IPRs, current regulatory avenues such as the ABS legislations (or biodiversity regulations) being established at the international and national levels and the voluntary mechanisms in the form of, for example, some declarations of professional bodies aiming to address the concerns and expectations of rural communities, fail to incorporate human-rights considerations from their development through to their implementation. Perhaps this situation is due to the lack of involvement of human-rights experts in these law- and policy-making processes. One of the consequences of this failure is that the weight and consideration given to IPRs in the end products from these law-making processes generally outweigh community rights and interests, perhaps due to the significant influence of corporate actors in these processes, who after all are not ready to lose, see themselves weakened, or have undermined all the benefits that they currently enjoy from strong consideration of IPRs. There seems to be profound and arguably obvious resentment on the part of traditional communities and actors sympathetic to their concerns that, indeed, in respect of policy development targeting issues of access to community assets and use of them in scientific and technology-intensive processes, IPRs of corporate and technologically capacitated actors have more influence than the community rights of local and indigenous peoples who are also traditional holders and custodians of biological resources and associated TK. For example, while corporate and research operators enjoy all the benefits arising from protecting their plants and TK-based research and development outputs by patents or PBRs including the associated financial benefits and the bargaining leverage, indigenous and local communities are being prevented from enjoying their own social and cultural benefits arising from their traditional rights over the very assets that formed the bedrock of technologically based research and development endeavours. Some of these rights that communities are arguably prevented from enjoying by PBRs are the rights to save and reuse planting materials for the next farming season and the rights to participate in decision-making processes pertaining to access to and the use of their assets at all stages of modern research and development processes.

How then should human rights come into play in an attempt to balance the interests of technology holders and modern users of the assets of traditional communities, the concerns of local and traditional communities over access and use of their assets, modern intellectual property (IP) over the application of the relevant outputs? This question is at the centre of the discussions and arguments running through the following sections and chapters of this book. Our point of departure is that in every instance involving access to community assets and use of them in profit-making technology-intensive processes with the application of patents and PBRs, we argue that stakeholders need to address the expectations of local communities from a human-rights perspective. This approach does not necessarily mean that the financial and other beneficial expectations of technology-holders would be affected negatively if they adopted a human perspective in

the course of their actions. Rather, such an approach will more likely have no effect on such beneficial expectations of technology holders, but will instil and strengthen communities' trusts in the activities of technology holders, setting the stage for sustainable and more mutually beneficial relationships between local communities and the users of their assets. The human-rights considerations will be crafted in workable policy measures that will comprehensively integrate community rights and interests as well as the goals and objectives of the IPRs.

Using four carefully selected jurisdictions, namely Brazil, India, Peru and South Africa, this book focuses on suggesting some workable, comprehensive and enforceable policy measures embedded in regulations aimed at protecting the rights and addressing the concerns and expectations of traditional communities without undermining the goals and objectives of IPRs (patents and PBRs) in the context of access to community assets, use of them in scientific and commercially oriented activities. The book does so by decrypting how modern exploitation of community assets in research and development processes and the application of patents and PBRs, in line with the concept of bio-piracy, typically bring disrespect to community rights, which are recognized in regional and international human-rights law and processes. There is no intention here to blindly blame corporate and research institutions practices for bio-piracy. The subsequent bio-piracy-related accounts are objectively analytical in nature. They refute the bio-piracy concept when a specific case is not grounded on convincing evidence and, therefore, aim to oppose any non-evidenced or blatantly anecdotal negative impact of patents and PBRs on the rights, interests and expectations of indigenous and local communities. It must however be stressed that analyses carried out in this book are not strictly limited to the four selected countries. Where deemed necessary, the book will refer to cases and examples from other countries and areas rich in bio-cultural diversity, to the extent that such examples are relevant to the main themes discussed herein.

As it transpires from the above, the main themes discussed in the book are:

- Community rights. The rights of local and indigenous communities will be defined and discussed within the frames of the various laws and policies covered in this book.
- Human-rights instruments to the extent that they address community rights and concerns.
- Biodiversity-related regulations with special emphasis on the extent to which they address community rights, interests and expectations.
- IPRs, in particular, patents and plant variety protection (PVP) systems.
- Scientific and commercially oriented exploitation of community assets with the application of patents and PBRs in the protection of the relevant outputs – with an eye on the concept of bio-piracy.

The objectives of the book are among others:

- To examine cases of access to PGRs in Brazil, India, Peru and South Africa and their utilizations in scientific and commercially oriented activities pursued