



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas Wesleyan Law Review

Volume 15 | Issue 2

Article 2

3-1-2009

Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources

Danielle M. Conway

Follow this and additional works at: <https://scholarship.law.tamu.edu/txwes-lr>

Recommended Citation

Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources*, 15 Tex. Wesleyan L. Rev. 207 (2009). Available at: <https://doi.org/10.37419/TWLR.V15.I2.1>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas Wesleyan Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

ARTICLES

INDIGENIZING INTELLECTUAL PROPERTY LAW: CUSTOMARY LAW, LEGAL PLURALISM, AND THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS, IDENTITY, AND RESOURCES

*Danielle M. Conway**

I. INTRODUCTION

Cultures live and cultures die. Cultures live by the transmission of law, knowledge, land, and resources from one generation to the next.¹ Cultures die, in large measure, because of exploitation of peoples and

* Professor of Law & Director, University of Hawai'i Procurement Institute, University of Hawai'i at Mānoa, William S. Richardson School of Law. I wish to thank the traditional owners of the lands of First Peoples. A significant portion of this work was based upon my research and experiences as a 2006-2007 Fulbright Senior Scholar to Australia. My Fulbright experience was made possible by the Council for the International Exchange of Scholars, the Australian-American Fulbright Commission, Canberra, ACT, Australia, Mark Darby, Lyndell Wilson, the William S. Richardson School of Law, Ka Huli Ao Center of Excellence in Native Hawaiian Law, La Trobe University Faculty of Law and Management, Bundoora, VIC, Australia, and Artists in the Black, Sydney, NSW, Australia. I also wish to thank Terri Janke, Liz Cavanagh, Nick Parmeter, Tom Calma, Leah Lui-Chivizhe, Stewart O'Connell, Raelene Webb QC, Jackie Huggins, and Michael "Mick" Dodson for the education, community absorption, and the "Welcome to Country." I am also grateful to the Texas Wesleyan University School of Law for inviting me to present this paper at the 2008 Law Review Symposium. For their support, I wish to thank Professor Jill J. Ramsfield, Dean Aviam Soifer, Assistant Professor Melody Kapilialoha MacKenzie, Wesley Kau, Jennifer Allen, Uilisone Tua, Josephine Ah Ching, Cheong Mai, and Emmanuel Quainoo. For access to their facilities, resources, and collections, I wish to thank the staff at the University of London, Institute of Advanced Legal Studies as well as the Senate House Library. Finally I dedicate this work to the eternal spirit of my mentor, muse, friend, and confidante – the late Chris Iijima.

1. Culture can be described as the collective programming of the mind that distinguishes the members of one group or community from another. Cultural life is constructed reality. Culture includes values, symbols, beliefs, and shared meanings. Culture governs what is of value and how members should think, feel, and behave. The "stuff" of culture includes customs and traditions; historical accounts; stated and unstated understandings; habits, norms, and expectations; common meanings and shared assumptions. The more understood, accepted, and cohesive the culture of community, the better able it is to move in concert toward ideals it holds and objectives it wishes to pursue. See Thomas J. Sergiovanni, *Leadership and Excellence in Schooling*, in *RETHINKING LEADERSHIP: A COLLECTION OF ARTICLES* 5, 11 (2007); see also Ngūgĩ wa Thiong'o, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 14 (James Curry/Heinemann 1986) (describing culture as that which "embodies those moral, ethical and aesthetic values, the set of spiritual eyeglasses, through which [human beings] come to view themselves and their place in the universe").

the knowledge they possess. In reality, cultures are constantly under attack from politically-oriented societies bent on exterminating, exploiting, or commercializing any culture that is different. Commercialization or commodification of culture is akin to collecting culture for purposes of exploitation,² observation, voyeurism, and objectification. The western approach to globalization is keen to recognize culture as an object rather than as a living, evolving organ to be shielded from exploitation.³ To respond to western commodification of culture, this article proposes that legal pluralism⁴ is necessary, in the interim, to protect culture from those who would, without authority or justification, exploit it and reduce it to a short term and short-lived commodity. The proposal to indigenize intellectual property law is for sure only an interim measure to protect Indigenous resources up to and until Indigenous Peoples have fully realized self-determination. In addition, the interim nature of this proposal reflects the legacy of colonization, with its complex extra- and intra-Indigenous power-oppression relationships. Because Indigenous Peoples are rarely in a position to exercise rights from a position of power, there is always risk in proposing legal rules or models for protection that may not fully account for the complex legacy of colonization. With this in mind, this article proposes that legal pluralism is one workable interim means to indigenize western intellectual property law in order to provide essential protec-

2. See MICHAEL A. BENGWAYAN, MINORITY RIGHTS GROUP INT'L, INTELLECTUAL AND CULTURAL PROPERTY RIGHTS OF INDIGENOUS AND TRIBAL PEOPLES IN ASIA 20 (2003), available at <http://www.minorityrights.org/download.php?id=135>. Bengwayan joins a chorus of misappropriation opponents who repeatedly articulate that "[c]orporations are well aware of how cost-efficient it is to tap the knowledge of communities that live with and depend on biodiversity for their survival. Pharmaceutical transnational corporations [] have taken plant samples from tropical forests (identified and genetically manipulated by indigenous peoples) to use as raw materials in developing new drugs." "In Asia, agricultural companies took disease resistant seeds, [again] (identified and genetically manipulated by indigenous peoples). After some modification, this genetic material was patented, mainly in the [United States], and the resulting seeds or products were marketed. . . ." "Corporations have realized enormous benefits from their free access to genetic materials, especially in the case of crop plants from developing countries." Corporate monopolies, created by inequitable application and enforcement of western IPR, have created a fertile paradox in which corporate interest and profits are "built on and through the [mis]appropriation of the [very] resources conserved and knowledge generated by indigenous peoples." See *id.*

3. See Pradip Thomas and Francis B. Nyamnjoh, *Intellectual Property Challenges in Africa: Indigenous Knowledge Systems and the Fate of Connected Worlds*, in INDIGENOUS KNOWLEDGE SYSTEMS AND INTELLECTUAL PROPERTY IN THE TWENTY FIRST CENTURY: PERSPECTIVES FROM SOUTHERN AFRICA 12, 22 (Isaac Mazonde and Pradip Thomas eds., 2007).

4. See generally Paul L.A.H. Chartrand, *Legal Pluralism: Reflections On The Role Of Law In Providing Justice For Indigenous Peoples - A Canadian Context*, F.I.R.S.T. FOUNDATION, <http://www.firstfound.org/vol.%201/chart1.htm>.

tions against the ongoing obliteration of Indigenous Peoples' rights, identity, and resources.⁵

When this article promotes its theme of indigenizing intellectual property law, it means to apply legal pluralism to justify employment of Indigenous law as a primary source of law to begin the development of a *sui generis* legal system to bring to the fore essential protections for Indigenous knowledge, tangible and intangible cultural materials and artifacts, secret and sacred information and know-how, cultural expressions, and the biogenetic resources justly owned and possessed by Indigenous Peoples. By urging adoption of the indigenizing paradigm, this article implies that the current and most widely used and recognized laws governing intellectual property are, in their current form, incapable and at times inconsistent with protecting the rights and interests of Indigenous Peoples in their resources and intangible assets that have, through time, putatively derived from their origins, their interactions with their environment, their adaptations to the surrounding world, and their cosmology and creation stories.

The discourse about Indigenous rights in the information age is greatly enhanced by the opportunity to implement legal pluralism to demonstrate the capacity for Indigenous law and legal systems, whether complementary or not, to provide essential protections for Indigenous resources and intangible assets. Recognizing that Indigenous law is equivalent to western intellectual property law would evince a serious attempt by the dominant settler societies to work in partnership with Indigenous Peoples to develop a meaningful *sui generis* system of protection for Indigenous resources and intangible assets.

But for more important reasons, invoking legal pluralism to indigenize or act upon western intellectual property law is essential for protecting Indigenous resources and intangible assets. First, in a continually globalizing world, knowledge produces information that in turn produces an intangible asset. Asset production has the ability to create wealth and opportunities in Indigenous and neighboring communities. Wealth creation and increased opportunity in turn have the capacity to build infrastructures, enabling these communities to participate in the global economy.⁶

5. U.N. Econ. & Soc. Council [ECOSOC], *UNPFII Study on Customary Laws Pertaining to Indigenous Traditional Knowledge and on to What Extend [sic] Such Customary Laws Should Be Reflected in International and National Standards Addressing Traditional Knowledge*, ¶ 1, U.N. Doc. E/C.19/2007/10 (May 14-25, 2007) [hereinafter *Study on Customary Laws*] (explaining that for many years, indigenous peoples have expressed concern about the inadequate protection of their traditional knowledge).

6. David V. Williams, *Unique Treaty-Based Relationships Remain Elusive*, in *WAITANGI REVISITED: PERSPECTIVES ON THE TREATY OF WAITANGI* 370 (Michael Belgrave, Merata Kawharu, and David Williams eds., 2nd ed. 2005) (Williams be-

Second, invoking legal pluralism to indigenize western intellectual property legal theory is required to protect the fundamental human rights that are part and parcel of the respect for Indigenous resources and intangible assets. In many Indigenous communities, the knowledge that has originated and evolved with Indigenous Peoples through experiences with their environments forms the basis of identity and community values. Absent access to the knowledge, or acquiescing in the misuse and misappropriation of that knowledge, Indigenous identities become hostage to external perceptions and influences that often relegate Indigenous Peoples to subordinate or nonexistent status at the fringes of the global community.

Third, invoking legal pluralism to indigenize western intellectual property law promotes the principle of equivalence with respect to legal systems. Thus, Indigenous communities are able to have recognized their respective Indigenous laws, which will then influence how parties are positioned in relation to Indigenous resources and intangible assets.⁷ This concept allows for democratic ideals to emerge thereby allowing Indigenous law to be justly placed on par with western intellectual property law.

Legal pluralism is a reality, ignored by colonization, yet it previously was and presently is an essential function of society. There are myriad examples in modern western legal systems when micro law systems operate within larger, macro law systems, where the former is parallel to and accommodated by the latter. One example is the principle of federalism where state law sometimes operates alongside, in addition to, or instead of federal law. Another example is the concept of private ordering or self-regulation characterized by the law of the firm or corporation or in the context of Internet activities. A third example is the rise of the supranational legal regime, such as the European Union. Thus, the concept of legal pluralism can be invoked as the foundation for developing a *sui generis* system of legal protection based upon Indigenous law in functional operation alongside state,

lieves that "by honouring Te Tiriti o Waitangi and by moving towards an authentic biculturalism, we will enable vibrant, healthy communities to emerge within this land of Aotearoa New Zealand.").

7. See *id.* at 370 (Williams attributes the dominant settler society's resistance to bicultural legal pluralism to the desire to retain control over land and resources by imposing one sovereign under one legal system—the laws of the Pākehā. He states "Pākehā power-holders are unwilling to debate, let alone accommodate, tangata whenua aspirations if they perceive that this will lead to a divided national sovereignty, separatism, or parallel justice systems. They almost always commit firmly to a single national sovereignty with parliament as sovereign in which we are all New Zealand citizens under one law for all. If one moves away from the macro-scale national debates to the many micro-scale examples of iwi and hapū exercising local autonomy and adhering to tikanga values, however, the present reality and future prospects for bicultural legal pluralism seem less bleak.").

national, and international laws to protect Indigenous resources and intangible assets.⁸

II. ACKNOWLEDGING HISTORICAL CONTEXT

Profound is the reality that the benefits of globalization and world trade are promoted without deference to the pervasive poverty that persists in indigenous and minority communities around the world. Why is it that development and progress are measured only in a snapshot of time? When raising issues of the rule of law, democracy, and wealth distribution for Indigenous communities in contemporary society, particularly in the area of integrating and applying Indigenous law, distracting arguments center on certain long-held misperceptions constructed by dominant settler societies about Indigenous Peoples that reflect back to the “uncivilized savage.” Historical images and misperceptions of the uncivilized savage are rebranded in the public’s consciousness through settler-promoted, counter-mobilizing narratives that promote cultural commodification and the ongoing and successful repression of Indigenous Peoples.

These misperceptions are accompanied by certain irrational beliefs about the inequities that will befall the dominant settler society in the event that Indigenous Peoples reclaim their rights to land, territory, and resources, i.e., the point at which the power-oppression paradigm shifts toward normative balance. Some of the concerns about inequitable treatment are framed according to rights as material, tangible, and rivalrous. The tug-of-war conception invoked by the dominant settler society pits the primacy of the value of loss of property and proprietary interests of whites against the value of loss suffered by Indigenous Peoples; adheres a welfare-based framework and narrative to Indigenous Peoples who are forced to rely upon the dominant settler society for protection of Indigenous property and proprietary interests; and derides any attempt to invoke a rights-based framework for recognizing the legitimacy of Indigenous interests by proclaiming that Indigenous Peoples’ rights cannot co-exist with the dominant settler society’s rights, interests, laws, and policies. As a result, attempts to place into service Indigenous law to indigenize western laws, in this context intellectual property laws, are all but condemned as ancient, inflexible and, at times, uncivilized.⁹

8. See *Study on Customary Laws*, *supra* note 5, at ¶ 3 (reporting that there exists a relationship between indigenous traditional knowledge and customary laws, such that the recommendation from the International Technical Workshop on Indigenous Traditional Knowledge to the Permanent Forum was the “commission [of] a study on ‘customary laws pertaining to indigenous traditional knowledge in order to investigate to what extent such customary laws should be reflected in international and national standards addressing indigenous traditional knowledge’”).

9. See Larissa Behrendt, *ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA’S FUTURE* 32 (Federation Press 2003).

Why is condemnation of Indigenous law so pervasive? Is this really a rejection of legal pluralism as a theoretical concept or is the rejection of Indigenous law and its application to Indigenous land, territories, and resources something more inimical? There are several things working against application of Indigenous law to protect Indigenous resources. Some concerns about recognizing and adopting Indigenous law are theoretical and relatively innocuous, while others are persistently irrational and pretextual.

One concern that sits firmly in the former category is the degree of complexity in identifying what is Indigenous law and determining how that law reflects the values of the modern Indigenous community. This concern is primarily resolved by entrusting Indigenous Peoples with the development of Indigenous legal systems to respond to modern Indigenous life as a distinct segment of a larger society. What the dominant settler society must do to facilitate this is to respect Indigenous legal systems and work toward synthesizing, as opposed to assimilating, these systems. On the other side are irrational concerns of diminishing rights for the dominant settler society. Without considering historical context, it is easy to understand why the dominant settler society views Indigenous rights-based advocacy as harmful to its interests. The dominant settler society has characteristically been able to use Indigenous land, territory, and resources to achieve a very high standard of living and quality of life for non-Indigenous societies. These gains have exponentially increased with each benefiting generation of settler descendents. What Indigenous Peoples are attempting to achieve is survival of their societies in the midst of the incalculable wealth of non-Indigenous Peoples.

Survival of Indigenous Peoples does depend, in large measure, on land restoration. To be clear, land functions as a base to rebuild Indigenous communities, to establish an economic footing in modern society, and to restore and disseminate culture from the Indigenous perspective. Even accepting the finite nature of land resources, the dominant settler society must shed the view that rights, as a whole, are too inflexible to represent anything more than material interests. With particular attention to intellectual property rights, many of these rights are best characterized as non-rivalrous and capable of being used appropriately to retain the spirit of indigeneity without depleting the resource for others to use in a manner culturally, economically, and politically essential to the laws and customs developed under Indigenous legal systems.

Recognizing historical context and linking it to the foundational principle that rights-based advocacy is essential to the survival of Indigenous Peoples is the primary democratic means of reconciling the injustices historically and continuously exacted on Indigenous Peoples. As Martin Luther King Jr. so aptly taught: Injustice anywhere is a threat to justice everywhere. Larissa Behrendt seized upon this

principle and gave it practical meaning for Indigenous Peoples when she stated:

By failing to recognize Indigenous ownership and presence, Indigenous property rights are relegated to the status of a hand-out. Native Title is not seen as a property right descended from prior occupation but a welfare measure: Indigenous people[s], when a legitimate property right is recognized, are seen as getting something for nothing.

Due to these perceptions, Indigenous rights are vulnerable, treated differently, and given less protection than their non-Indigenous equivalents.¹⁰

Exposing historical injustices informs and conceptualizes purely theoretical debate. Accordingly, the balance of this section is devoted to describing, in brief, the colonization realities of three distinct Indigenous Peoples in the Pacific region.

A. *Aboriginal Australia, Torres Strait Islands, and Terra Nullius*

After Captain James Cook's explorations fixed the British government's attention on the "Aboriginal" land now known as Australia in 1770, the First Fleet, carrying convicts and military, arrived in Sydney Cove on 7 February 1788.¹¹ Captain Arthur Phillip raised the British flag in possession and claimed for the Crown the sovereignty and ownership of "Aboriginal" lands under the legal fiction, *terra nullius*.¹² *Terra nullius* was the doctrinal vehicle by which Europeans and Australian-Europeans dispossessed and depopulated the Aborigines for the sole purpose of European frontier expansion. *Terra nullius* ushered in European dominion and control over the natural resources of the country. *Terra nullius* made it unnecessary for the Europeans to entertain treaty negotiations with the Aborigines because the Europeans did not recognize the existence of Aborigines much less Aboriginal rights.¹³ As explained by Ronald and Catherine Berndt:

The Aborigines were landholders, landowners in the broadest sense. To the newer Australians who have supplanted them, land is a source of wealth and of livelihood, a token of security and stability. It was this to the Aborigines too; but because they approached it from a different perspective, because they were semi-nomadic, and because they did not divide up that land into parcels, individually

10. See *id.* at 171.

11. See generally Ronald M. and Catherine H. Berndt, *THE WORLD OF THE FIRST AUSTRALIANS: ABORIGINAL TRADITIONAL LIFE: PAST AND PRESENT*, 490–499 (Aboriginal Studies Press 1999); see also *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 32–33; see also *Terra Nullius*, <http://www.visitvictoria.com/displayobject.cfm/objectid.0003A614-D962-1A88-8B4680C476A9047C/> (last visited Mar. 27, 2009).

12. See Jonathan Wantrup, *The Voyage of the First Fleet*, 41 *LA TROBE LIBRARY J.* 30 (1988); see also Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 *COLO. J. INT'L ENVTL. L. & POL'Y* 295, 298 (2005).

13. See Berndt, *supra* note 11, at 497.

owned, their title to it was not acknowledged. In other words, most of them lost the only tangible asset which had any real value in the new situation of contact; and those who have not, those who still live in Aboriginal reserves, do so virtually on sufferance. More than that, because of the close tie between locality and religion, alienation of territory meant more than a straightforward economic loss.¹⁴

Terra nullius, the fiction used by European colonial nations to assert sovereignty and ownership over “backward peoples’” lands, justified British occupation of “Aboriginal” lands as well as justifying the act of making Aboriginal culture and tradition invisible. The erasure of Aboriginality, through land dispossession and cultural erosion, took only 200 years from first contact.¹⁵

Despite the great successes achieved by the Europeans in dispossessing and depopulating Aboriginal peoples, the homeland rights movement in the 1960s and 1970s witnessed a resurgence of the fight for Aboriginal land claims.¹⁶ “Native Title” is the name given by the High Court to Indigenous property rights recognized by the *Mabo* judgment.¹⁷ The judgment overthrew the legal fiction of *terra nullius*.¹⁸ The judgment found that a native title to land existed in 1788, and may continue to exist provided it has not been extinguished by subsequent acts of government and provided Indigenous groups continue to observe their traditional laws and customs.¹⁹

B. *Aotearoa/New Zealand and the Treaty of Waitangi*

Maori (iwi (tribes), hapū (sub-tribes), and whanau) groups have clashed with European colonizers and violently with each other post-contact.²⁰ The relationship that ensued between Maori and Europeans represents the very example that Indigenous Peoples’ colonization histories are related, yet distinct. The Maori struggle to reassert sovereignty, autonomy, and self-determination against the historical backdrop of control over land, forests, waters, and fisheries is exemplified by the early historical Maori armed resistance.²¹ The modern

14. *Id.*

15. *Id.*

16. See Ronald Sackville, *Legal Protection of Indigenous Culture in Australia*, 11 CARDOZO J. INT’L & COMP. L. 711, 732-33 (2003).

17. See, e.g., *Mabo*, 175 C.L.R. at 32-36.

18. See Sackville, *supra* note 16.

19. See *id.* (explaining “[t]he decision in *Mabo* made it clear beyond argument that indigenous laws and customs cannot simply be regarded as separate from and irrelevant to the general body of Australian law. On the contrary, those laws and customs can be the source of entitlements enforceable in Australian courts. Moreover, the language used by members of the High Court left no doubt about their view that a grave historical injustice had been done to the Aboriginal peoples.”).

20. See generally Tom Gibson, *THE MAORI WARS: THE BRITISH ARMY IN NEW ZEALAND 18-20* (Leo Cooper Ltd. 1974) (recounting first contact, Pākehā plans for colonization, and Maori inter-tribal conflict over land and retention of power).

21. See *id.*

movement to continue to press for Maori rights and the just settlement of Maori claims also includes the recognition and protection of Maori resource and intangible asset rights, which is the subject of political sovereignty and the quest for the proper and just interpretation of the Treaty of Waitangi in this modern era.²²

Before colonization, the traditional Maori relationship to the [land and the] fisheries was “spiritual, collective, reciprocal, perpetual and sustainable.”²³ In Aotearoa, Maori land and resources were in great demand from the beginning of European contact.²⁴ As a result of this great demand, even though statutory definition and British Colonial Office interpretations placed Aotearoa/New Zealand outside of British dominion and control, New Zealand was confirmed as a British economic interest.²⁵

British economic interests precipitated the later “negotiation” of the ambiguity-fraught Treaty of Waitangi.²⁶ The British considered the Maori fearsome warriors, a tribal peoples, who represented a well-armed majority in contrast to Pākehā (foreign settlers).²⁷ The Crown determined that the doctrine of *terra nullius* could not be used *de jure* against the Maori because “[t]hey [were not considered] Savages liv-

22. See David Williams, *MATAURANGA MAORI AND TAONGA: THE NATURE AND EXTENT OF TREATY RIGHTS HELD BY IWI AND HAPŪ IN INDIGENOUS FLORA AND FAUNA, CULTURAL HERITAGE OBJECTS, AND VALUED TRADITIONAL KNOWLEDGE* 5 (2001); see also Symposium, *Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 753, 762–63 (2002) (reporting that in 1992 “[v]arious groupings of [I]ndigenous [P]eoples had meetings. The most significant of all these meetings was that of the Mata’atua. The people in Mata’atua are the nine tribes of New Zealand. They promulgated the Mata’atua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples. This Mata’atua Declaration has been borrowed by every subsequent group, and there are now about thirty of these [I]ndigenous [P]eople[s]’ promulgation declarations. Basically, [I]ndigenous [P]eoples want to define their own intellectual and cultural property and the way in which that intellectual and cultural property is to be exploited.”).

23. See Annie Mikaere, *Settlement of Treaty Claims: Full and Final, and Fatally Flawed?*, 17 *N.Z. UNIV. L. REV.* 425, 444 (1997).

24. See *id.*

25. See P.G. McHugh, *Constitutional Theory and Maori Claims, in WAITANGI: MAORI AND PĀKEHĀ PERSPECTIVES OF THE TREATY OF WAITANGI* 30 (I. H. Kawharu, ed., 1989).

26. See *id.* (“In acquiring an *imperium* over other non-Christian societies, the Crown consistently kept to the contractual model. . . . Treaties were a regular feature of the formalities preceding the formal erection of an *imperium* over all non-Christian societies which in British eyes had apparently reached a minimal degree of political organization: only the Australian Aborigine, so primitive as scarcely to be human some nineteenth century commentators thought, failed to cross this threshold. . . . The Treaty of Waitangi represents the application of the contractual theory as a basis of the Crown’s sovereignty over the Maori tribes.”); see also R.J. Walker, *The Treaty of Waitangi as the Focus of Maori Protest in WAITANGI: MAORI AND PĀKEHĀ PERSPECTIVES OF THE TREATY OF WAITANGI*, *supra* note 25, at 263 (explaining that “because of serious discrepancies between the translated Maori version of that key article and the English version, the Treaty is a morally dubious document”).

27. See McHugh, *supra* note 25, at 31.

ing by the Chase, but Tribes who have apportioned the country between them, having fixed Abodes, with an acknowledged Property in the Soil, and with some rude approaches to a regular System of internal Government. . . ."²⁸ Despite political shifts in British Government, it was always determined that Maori consent remained a legal prerequisite to British annexation.²⁹ Furthermore, humanitarian movements within Britain in the 1830s trumpeted the desire to protect "native peoples" from the ill effects of imperialism, including disease, depopulation, degradation, land dispossession, and racial extinction.³⁰

At worst, the Treaty of Waitangi represented a contractual vehicle to accomplish annexation and assimilation of the Maori into the British settler community. At best, the Treaty of Waitangi represented an unbridged gap between the expectations of Maori and Pākehā.³¹ The Treaty of Waitangi has a different meaning for Maori and non-Maori. The treaty is steeped in ambiguity, as it was drafted in both Maori language and English language, with the latter having multiple and differing drafts.³² A gross oversimplification of the differences between the drafts is captured by a summary written by David V. Williams after a thorough and complete analysis of the available drafts of the treaty, in which he deduces that "[f]or the Maori, power was to be shared, while for the Crown, power was to be transferred, with the Crown as Sovereign and the Maori as subject."³³

To be clear, the Treaty of Waitangi is not the source of Maori rights and law; instead "Rangatiratanga," the tribal basis for Maori society, arises from Maori customary law; [both, tribalism and customary law,] are inseparable."³⁴ Rangatiratanga is the traditional authority gov-

28. *See id.*

29. *See id.* at 30-31.

30. *See id.*

31. *See David V. Williams, Te Tiriti o Waitangi - Unique Relationship Between Crown and Tangata Whenua? in WAITANGI: MAORI AND PĀKEHĀ PERSPECTIVES OF THE TREATY OF WAITANGI, supra note 25, at 64, 79-80* ("The Maori text predicates a sharing of power and authority in the governance of the country between Crown and Maori. The English text is about a transfer of power, leaving the Crown as sovereign and Maori as subjects. Much of the Treaty's history has been bedevilled by the fact that Maori and [Pākehā] have been 'talking past each other.'").

32. *See id.* at 76-78.

33. Ian Hugh Kawharu, *Introduction WAITANGI: MAORI AND PĀKEHĀ PERSPECTIVES OF THE TREATY OF WAITANGI, supra note 25, at x, xvii.* The Treaty of Waitangi represents the contractual theory of sovereignty, in which there is an inherent bargained-for exchange. The British sought to extend their sovereignty into the Pacific by using contractual instruments. Thus, the benefit to the British was imperial expansion; the question is what was the commensurate obligation. "In Article 1 of the Treaty, the Maori were to cede their sovereignty over New Zealand to the British Crown, and in return (by Articles 2 and 3), the Crown was to guarantee to protect the Maori people's material assets, culture, and social system - while preserving for itself a pre-emptive right of purchase of tribal land, and lastly, the Crown was to confer on the Maori people the rights of British subjects."

34. *See* McHugh, *supra* note 25, at 25.

erning Maori society.³⁵ Thus, the Maori rights movement and the pressing of claims against the Crown emanate not from the Treaty of Waitangi but rather from Rangatiratanga, which, according to the Maori people, is incorporated into the Treaty of Waitangi.³⁶ Accordingly:

Their consistent theme has been the demand for restoration of and retention of tribal resources under tribal control where Maori customary law is the governing code. Rangatiratanga thus covers most, if not all, aspects of Maori community's affairs. It includes not only the high profile issues of economic development, tenurial reform, land claims, and the like, but can extend to [other tribal matters]. The tribal basis of Maori society and its continued vitality, indeed existence, is thus central to Maori claims.³⁷

Thus, Rangatiratanga and the Treaty of Waitangi can be each fairly interpreted as jurisprudential components of the laws that govern certain relationships and resources in Aotearoa/New Zealand. In analyzing Maori claims under a constitutional framework, P.G. McHugh explains:

The Treaty of Waitangi, particularly the Maori version signed by most of the chiefs, buttresses the claim of [R]angatiratanga under the sovereignty of the Crown. The Treaty, it should be stressed, is seen as an express recognition by the Crown of the incorporation of [R]angatiratanga into the fabric of New Zealand society. . . . It is not a consequence of Pākehā permission or acquiescence, but an inherent attribute of Maori society.³⁸

Under this jurisprudential framework, it is more than fair to interpret the Treaty of Waitangi as giving express recognition to the Indigenous laws of the Maori peoples. The recognition of Rangatiratanga provides the basis for applying Indigenous law to Maori assets, land, culture, and resources because it is this customary law that sustains the continuity of rights. The Indigenous laws governing tribal property and resource rights are common law rules that support establishing a framework of legal pluralism.³⁹ McHugh does not propose that Rangatiratanga is a claim by Maori Peoples to a separate status but instead as a limitation on Crown sovereignty. McHugh explains further that “the political sovereignty of the community breathes life into

35. *See id.*

36. *See Kawharu, supra* note 33, at xix.

37. *See McHugh, supra* note 25, at 25.

38. *See id.*

39. *See McHugh, supra* note 25, at 26 (“The common law principles comprising the doctrine of aboriginal rights, becoming accepted again in New Zealand after a century of neglect, illustrate that such hostility is not inevitable. This doctrine does not confront the legal doctrine of the Crown’s sovereignty; indeed, the rules of aboriginal (land) title expressly harmonize with it. In the end, the common law principles simply confirm the underlying constitutional premise. It is time for a more robust approach, one which considers [R]angatiratanga in the light of the most fundamental of constitutional principles: the sovereignty of the Crown.”).

[the] constitutional arrangement of government acting as a non-legal check upon the Crown's exercise of its legal sovereignty."⁴⁰

C. *The Kingdom of Hawai'i and the Māhele*

Native Hawaiian kinship to their lands was forever compromised following first contact.⁴¹ Westerners introduced the concept of land ownership: from governments, which sought control over the Hawaiian islands for strategic naval and commercial purposes ranging from refueling and resupplying military forces, to individuals who sought the rich lands and soils for harvesting and planting, and selling indigenous mineral resources, rubber, fibers, fertilizers, sugar, coffee, cocoa, vanilla, bananas, and fruits.⁴²

In 1840, King Kamehameha III, seeking to straddle his nation's independence between warring Western empires, promulgated the first constitution, which introduced land ownership across the islands.⁴³ This 1840 constitution paved the way for the Māhele of 1848, the legal mechanism that would authorize the monarchy to divide lands between the king, the government, the Ali'i (chiefs), and the people.⁴⁴ Unfortunately, the authority to shift lands from the monarchs to various constituents meant that the parcels of land more often than not went to pay for newly acquired debts imposed by foreigners.⁴⁵

With the Māhele of 1848, King Kamehameha III had hoped to give his people land to call their own.⁴⁶ While the Māhele provided for land ownership for the maka'āinana (people that attend the land) or kanaka (people) to cultivate crops, such as taro, most Hawaiians of the time could not embrace Western approaches to individual property ownership, including the assessment of taxes and the obligation to pay such taxes, which in reality were beyond affordability.⁴⁷

40. McHugh, *supra* note 25, at 47.

41. See Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Commodification of Culture*, 48 *How. L.J.* 737, 748 (2005); see also PETER ØREBECH, *et al.*, *THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT* 1, 2 (2005) (explaining that "[b]efore Europeans came to Hawai'i, the [Kanaka Maoli] had developed a complex culture based upon customary law. The islands were divided into pie-shaped territories ("ahupua'a") running from the center of the island to the sea. Each territory was under the jurisdiction of an ali'i or a noble. . . . Hawaiian customary law allowed each resident of an ahupua'a to travel throughout the territory to engage in gathering activities, . . . [such as] finding plants for medicinal and ceremonial purposes").

42. Conway-Jones, *supra* note 41, at 748; see generally *Pub. Access Shoreline v. City Planning Comm'n.*, 903 P.2d 1246, 1263-68 (Haw. 1995) (discussing the development of private property rights in Hawai'i pre- and post-Māhele).

43. Conway-Jones, *supra* note 41, at 748.

44. *Id.* at 749.

45. *Id.*

46. *Id.*

47. *Id.*

Unsurprisingly, the institution of individual property ownership and commensurate tax obligations quickly spelled the demise of the Western legal recognition of Hawaiians' connection to the land.⁴⁸ So shortly thereafter, Westerners bought or gained, through mortgage foreclosures and other "legal" means, many of the lands dispersed to the ali'i and maka'āinana and began developing sugar plantations and designing plans to protect their own individual interests in the islands.⁴⁹ These plans resulted in an overthrow of the monarchy in 1893, with the aid and support of American military troops and officials, forming the basis of annexation in 1898 in which Hawaiian lands were ceded to the United States.⁵⁰ This summary of events is the basis for Hawaiian land claims and resource rights that to this day remain unsettled.

III. ESPOUSING A RIGHTS FRAMEWORK

It is not indefensible to propose that the legacy of distinct colonization histories should be considered when recognizing and establishing a rights framework for protecting Indigenous resources. Giving meaning to a rights-based framework in a modern society depends largely on the practice of true democracy. True democracy stands for the proposition that the least represented in a civilized society will continue to enjoy participation and inclusion in the decisions that society must make to accomplish fair, transparent, and respectful governance for individuals and for groups. With a democratic system of governance, individuals and groups steadfastly rely on a rights framework based on the rule of law to protect property, resources, and liberty. Counter to a rights-based framework is the welfare-based framework of protection. A welfare-based framework limits advocacy to what can be achieved by a minority through the beneficence of the majority. Most clear, the welfare-based system is exemplified by the reliance of segments of society on the benevolence of others, such as the majority or its governments.

For various reasons, a welfare-based framework, standing alone, is ineffective to protect Indigenous Peoples and their resources. A welfare-based framework would create obstacles in establishing accountability and enforcing recognized legal rights. With respect to the relationship between the colonizer and the colonized, the welfare-based framework reinforces the fallacy that the colonized have little to offer while the colonizer has everything to give; notwithstanding that

48. *Id.*

49. Conway-Jones, *supra* note 41, at 749; Felix S. Cohen et al., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 367 (LexisNexis 2005).

50. *Id.*; Joint Resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai'i, 103 Public Law 150, 107 Stat. 1510 (1993).

such beneficence comes with a price. The welfare-based framework actively encourages Indigenous invisibility and radically erodes Indigenous independence and self-determination. The byproduct of adhering to a welfare-based system to address the recognition and protection of Indigenous Peoples and their resources has been the systematic and ongoing process of land dispossession, resource exploitation, and misappropriation of culture. Accordingly, a rights-based framework is the most effective and just means to correct the political, social and cultural imbalances plaguing Indigenous Peoples. A rights-based framework is also the mechanism to stem the harms resulting from Indigenous land dispossession, depopulation, and cultural impoverishment.

About the impact that rights-based advocacy within the United Nations system has had on Aboriginals, Mick Dodson described the feeling that Aboriginal Peoples are not alone in the struggle to secure Indigenous rights. He stated:

We now see that it is a global struggle, not just between a single Indigenous [P]eople and a government, but between the world's Indigenous [P]eoples and the world's colonial governments. While our version of the struggle has its local variants, all our struggles tell essentially the same story. We are still all dealing with the legacy of colonialism. Indigenous [P]eople speak about the gross violations of their peoples' rights and put up innovative, substantial proposals for change.⁵¹

On the international stage, the clarion-call for the recognition and protection of Indigenous Peoples, their lands, and their resources under a rights-based framework was first sounded in 1923 by Deskaheh, Cayuga chief and Speaker of the Six Nations Council, who promoted self-determination by, among other courageous acts, submitting a petition to the League of Nations, in Geneva, Switzerland via the government of the Netherlands in order to challenge Canadian encroachment onto Iroquois territory.⁵² This rights-based framework is embodied in various international documents, most specific, the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted on September 13, 2007. The saliency of the Declaration begins another phase of the rights-based discourse first addressed on the international stage by Deskaheh and later envisioned by Indigenous activists like Dodson.

The Declaration rewrites the narrative of Indigenous claims to land and other inextricably linked resource rights and expressly promotes a collective rights-based framework for bringing justice to Indigenous Peoples who have been systemically dispossessed, depopulated, and

51. Mick Dodson, *Comment to INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* 62, 64 (Sarah Pritchard ed., 1998).

52. *THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION* 84 (Bruce Elliot Johansen ed., 1998).

replaced by settler-colonization. The aim of this article is to promote further movement toward employing the rights-based framework of the Declaration and other source documents to establish complementary legal mechanisms for the recognition and protection of Indigenous resources and intangible assets.

A. *International System of Laws and International Institutions*

It has often been said and repeated that the United Nations, while imperfect, is the best hope for humanity.⁵³ This statement, critically important in the field of human rights, is no less a crucial guiding principle for economic empowerment and development. As there is an indisputable imperative to bring values and a conscience to the fair and just treatment of individuals by other individuals, governments, and nations, there is an equal and compelling need to bring a conscience to commerce in the modern, dynamic information and knowledge industries and markets. Through the hard fought and tireless efforts of dedicated Indigenous and non-Indigenous Peoples, an all too often ignored or forgotten segment of the global community has seized upon their Indigenous birthright to press for recognition and protection of culture, identity, land, and resources through the international system.

Social justice advocates correctly conclude that the human rights system has become an increasingly important arena for reminding governments of their internationally mandated obligations.⁵⁴ Furthermore, a basic knowledge of international law and international institutions is vital to the successful implementation of a rights-based framework to secure meaningful recognition and protection of Indigenous Peoples around the globe.⁵⁵ International law and international institutions are powerful in that they legitimize and influence the development of national laws, regional agreements, and judicial application of these laws and agreements within country borders. The United Nations organization promoting a rights-based framework for Indigenous Peoples is the Working Group on Indigenous Populations (WGIP), which has succeeded in lobbying the United Nations General Assembly to adopt the Declaration on the Rights of Indigenous Peoples.⁵⁶

53. Sarah Pritchard, Olga Havnen & Anne Martin, *Preface* to INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 51, at vi, viii.

54. *See id.* at vi, vi–viii.

55. *See* Sarah Pritchard, *The Significance of International Law*, in INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 51, at 2, 7.

56. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at 1, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf [hereinafter U.N. DRIP]; *see also* Chidi Oguamanam, INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY,

The WGIP represents the Indigenous Peoples' will to resist and reject assimilation. While at the lowest level of the human rights system of hierarchy,⁵⁷ the Working Group has ignited and galvanized an Indigenous Movement to promote and protect the human rights and fundamental freedoms of Indigenous populations and to articulate standards commensurate with the aims of cementing a rights-based framework to secure justice and fairness for the world's Indigenous populations.

About the Working Group, Mick Dodson, the first Aboriginal and Torres Strait Islander Social Justice Commissioner, stated:

The Working Group has come to play a far more extensive role than its mandate would suggest. It is a fine example of how we can use existing structures and transform them to meet our needs and aspirations. As the meeting place between the world's Indigenous [P]eoples and key international organizations, the Working Group has provided many of us with a unique opportunity to interact with a world that would be otherwise impenetrable. We have made sure that it has functioned as a highly visible platform where we can draw attention to our grievances.

It has also been more than that. The Working Group has become the focal point of our coming together as the world's Indigenous [P]eoples. In a sense the Working Group is all about what international law and the UN have neglected. It is about bringing Indigenous [P]eople[s] into the UN system where we have been marginalized and unnoticed. It is about forcing the UN system to face its responsibility as the body charged with protecting the rights of all people. It is about transforming the UN from a club serving the interests of its members, namely nation States and their well-suited diplomats, to a body of all peoples.⁵⁸

B. *International Treaties and Agreements*

Principles of State sovereignty do not have meaning or application with respect to relationships between States and their Indigenous Peo-

AND TRADITIONAL MEDICINE 201 (University of Toronto Press, 2006). The author states:

At present, two important fora, namely, the [Convention on Biological Diversity] CBD and the World Intellectual Property Organization (WIPO), represent the most visible venues in which discussions about national and global policies on indigenous knowledge are conducted. Collaboration between these two bodies encourages and facilitates a holistic and coordinated approach to the [complex phenomenon of cultural integrity of indigenous knowledge]. Recent and ongoing developments in the two fora show that they are inclined toward an inward looking approach in the quest for a mechanism of protection for indigenous knowledge and interests.

57. The work of the WGIP must pass through the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights and then to the Economic and Social Council before reaching the United Nations General Assembly.

58. See Dodson, *supra* note 51, at 62-64.

ples.⁵⁹ State sovereignty cannot be invoked by a State against its peoples. Human rights must take precedence over State sovereignty rights. It is important to recognize that the early human rights system constructed by the United Nations did not recognize the rights of groups or peoples.⁶⁰ Since then, there has been a development of inquiry about how States should address and respond to group or individual rights. It may be emphasized then that self-determination is a substantive right vested in Indigenous Peoples. The right of self-determination is contained within international human rights law and thus attracts the obligation of States to protect it and make it effective in a domestic context.⁶¹

Self-determination in modern practice requires applying principles of human rights laws and extending human rights protections to any area of Indigenous life that will ensure survival of Indigenous culture and the sustainability of Indigenous resources. Victoria Tauli-Corpuz captured the essence of the relationship between Indigenous land, resources, and culture when she stated, “[t]raditional knowledge, culture and resource rights, along with self-determination and territorial rights, are all intertwined and inextricably linked with heritage.”⁶²

Accordingly, Indigenous survival depends on protecting the human rights of Indigenous People in all facets of their interconnected existence, which is based on familial relationships with land, knowledge systems, resources, and culture, all impacting what the western world would identify as property rights, either real or intellectual. Recogniz-

59. Notes on the presentation made by Matthias Ahrens, Saami Council, Member of the United Nations Permanent Forum on Indigenous Issues, entitled “International Intellectual Property: An Indigenous Perspective,” sponsored by the University of Hawai‘i at Mānoa, William S. Richardson School of Law on April 19, 2007 in Honolulu, Hawai‘i.

60. Because it seems that ILO Convention No. 169 takes the view that Indigenous Peoples are not parties to the convention (this position is questionable now with the adoption of the U.N. DRIP), its provisions will not be analyzed beyond this footnote. Article 15(2) of the ILO Convention No. 169 provides:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

See Int’l Labor Org. [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, art. 15 (Jun. 27, 1989), http://www.ilo.org/public/english/employment/skills/hrdr/instr/c_169.htm.

61. See Chartrand, *supra* note 4.

62. Gregory K. Schlais, *The Patenting of Sacred Biological Resources, the Taro Patent Controversy in Hawai‘i: A Soft Law Proposal*, 29 U. Haw. L. Rev. 581, 586 n.26 (2007) (citing VICTORIA TAULI-CORPUZ, BIODEVERSITY, TRADITIONAL KNOWLEDGE AND RIGHTS OF INDIGENOUS PEOPLES (2006)).

ing the need to extend human rights laws to traditional resources and culture is the difference between human rights in theory versus human rights in practice. Undertaking to implement international human rights laws and policies into national laws for the recognition and protection of Indigenous resources and intangible assets represents a start to closing a gap in protection. By virtue of the right to self-determination, Indigenous Peoples freely determine their political status and freely pursue economic, social, and cultural development, which includes determining appropriate uses of traditional knowledge, cultural expressions, and natural and biological resources.⁶³ In contrast, it cannot be argued that when it comes to western intellectual property rights there are few gaps in protection, as these are some of the strongest rights in the world.

Understandably, Indigenous Peoples have an aversion to western intellectual property rights protection systems because they do not account for the contextual history of Indigenous Peoples nor do they take into account the necessity for Indigenous resources to be protected by complementary Indigenous laws. Often intellectual property laws have been used by dominant settler societies against Indigenous Peoples to dispossess the latter of their culture, identity, and assets in the same fashion that the former perfected the art of land dispossession. The use of dominant settler society's law to exact these dispossessions justifies skepticism about the efficacy of western intellectual property law's capacity to protect Indigenous resources. In fact, colonization histories provide myriad examples of the subjugation of Indigenous law to western law. The absence of Indigenous legal systems renders any protection of Indigenous resources impotent.

The modern practice of treating the recognition and protection of Indigenous resources as a human rights issue is a global imperative, especially in light of the pervasiveness of the western intellectual property rights system in every sphere of social, economic, and political life. It is against this backdrop that relevant international documents are reviewed for the purpose of advancing the proposition that protecting Indigenous resources is a human rights issue.

63. See *Paoakalani Declaration*, Ka 'Aha Pono '03: Native Hawaiian Intellectual Property Rights Conference, Waikiki, Hawai'i, Oct. 2003, reprinted in R. Hokulei Lindsey, *Responsibility with Accountability: The Birth of a Strategy to Protect Kanaka Maoli Traditional Knowledge*, 48 *How. L.J.* 763, 771-73 (2005) [hereinafter, "Paoakalani Declaration"].

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND
THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS (ICCPR)

THE UNIVERSAL BILL OF RIGHTS

The International Covenant on Civil and Political Rights, “the cornerstone of modern international human rights law,”⁶⁴ is based on the Universal Declaration of Human Rights (“UDHR”). The UDHR emerged from the aftermath of World War II destruction and was adopted in 1948. The UDHR is the foundation for both the ICCPR and the ICESCR. All three of these documents make up the Universal Bill of Rights. These human rights law instruments establish the right of self-determination in the following terms:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Furthermore, Member States of the United Nations are required to respect that right:

The States Parties . . . shall promote the realization of the right of self determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

This document represents the first agreement among nations as to the enumerated rights and freedoms of all persons in the world.⁶⁵

ICCPR

The General Assembly adopted the ICCPR on December 16, 1966. The Covenant came into force on March 23, 1976. The ICCPR created the Human Rights Committee (HRC). The HRC, based in Geneva, is responsible for the implementation of the ICCPR by Member States. The HRC also monitors compliance with ICCPR provisions by Member States by requiring and reviewing regular submission of reports by each State party on how the rights are being implemented.⁶⁶

The Covenant comprises 53 articles, which are broken up into six parts. Of these 53 Articles, the first 27 give people throughout the world various civil and political rights without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Relevant to this article, the rights enumerated in the Covenant are the right to self-determination,

64. William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995).

65. U.N. High Comm'r for Human Rights [UNHCR], International Covenant on Civil and Political Rights, pmbll., *opened for signature* Dec. 16, 1966, available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR].

66. See Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc/> (last visited Feb. 15, 2009).

the right to life, the right to liberty and security of person, freedom of thought, conscience, and religion, the freedom of expression, and the right to vote and participate in public affairs. Specifically, Article 27 provides:

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.⁶⁷

The comment to Article 27 explains the Committee's interpretation that individuals, to enjoy a particular culture, must be protected in their way of life, which is closely associated with territory and use of its resources, even though Article 27 does not prejudice the sovereignty or territorial integrity of a State party.⁶⁸ The Committee goes on to explain about Article 27 that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. . . . The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions [that] affect them."⁶⁹ Finally, the Committee concludes:

[A]rticle 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. . . .⁷⁰

THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

After the adoption of the UDHR in 1948, the Commission turned its attention to drafting a Covenant on Human Rights.⁷¹ The Covenant only included civil and political rights until the United Nations

67. ICCPR, *supra* note 65, at art. 27.

68. See U.N. Human Rights Comm. [HRC], Office of the High Comm'r for Human Rights, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, ¶ 3.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994), available at <http://www.unhcr.org/refworld/docid/453883fc0.html> (explaining further in paragraph 6.2 that "[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion." *Id.* ¶ 6.2).

69. *Id.* ¶ 7.

70. *Id.* ¶ 9.

71. Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1060 (2007) (summarizing the events

Economic and Social Council instructed the Commission to include economic, social and cultural rights.⁷² The Covenant included rights from both the ICCPR and the ICESCR. Debates ensued over the combination of rights in a single document.⁷³ In response, the General Assembly requested the “two covenants to contain, in order to emphasize the unity of aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible.”⁷⁴ Peter Yu explains that “the portion of the draft covenant that contained economic, social, and cultural rights became the ICESCR, and the rest of the draft Covenant became the ICCPR.”⁷⁵

As of April 18, 2008 there are 158 parties to the Covenant and 67 signatories. The Committee on Economic, Social and Cultural Rights is composed of a group of independent experts who monitor the implementation of the ICESCR by each Member State that is party to the agreement. These States submit regular reports on how economic, social, and cultural rights are being implemented.

Civil, political, economic, social and cultural rights are considered universal, indivisible, interdependent, and interrelated.⁷⁶ These human rights are guaranteed so as to ensure that individuals become and remain free from fear and free from want.⁷⁷ The most relevant rights for the purposes of this article are contained in Article 15, which states:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

leading up to the creation of the Universal Bill of Rights. The drafting history analyzes the need for specific intellectual property language within the Covenant.).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. ICCPR, *supra* note 65, pmbli.; see also U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is an Author (Article 15, Paragraph 1(c), of the Covenant)*, ¶ 1, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), available at <http://www.umn.edu/humanrts/escgencom17.html> (explaining that human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities) [hereinafter ECOSOC, *General Comment No. 17*].

77. See ECOSOC, *General Comment No. 17*, *supra* note 76, ¶ 1.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.⁷⁸

The Committee on Economic, Cultural and Social Rights articulates the basic premise of Article 15 as "the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons."⁷⁹ The Committee insists that the above human rights protection should be distinguished from most legal entitlements recognized in intellectual property systems. The Committee supports distinguishing human rights from intellectual property rights by explaining:

Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.

In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is

78. See Yu, *supra* note 71, at 1042 n.6 (presenting a thorough discussion about the drafting of the ICESCR and debates that ensued over whether to include an intellectual property protection clause as a cultural right).

79. See ECOSOC, *General Comment No. 17*, *supra* note 76, ¶ 1.

referred to as intellectual property rights under national legislation or international agreements.⁸⁰

By presenting intellectual property rights systems and human rights laws as competing paradigms, the Committee can readily support its conclusion that these two areas should not be equated. With respect to Indigenous Peoples, what the Committee seems not to consider expressly is how Indigenous law can be used to further the human rights goals of the ICESCR without necessarily invoking some or many of the ill-suited qualities of western intellectual property rights regimes promoted under national legislation or international agreements. Instead of applying Indigenous law to regulate protection of Indigenous resources and intangible assets under a human rights framework, the Committee reverts to the default position of adopting measures under existing intellectual property law regimes to protect the moral and material interests of authors. In describing the specific legal obligations under Article 15, the Committee explains:

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, State parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.⁸¹

While Article 15 of the ICESCR provides a foundation for enforcing the rights of everyone to benefit from moral and material interests of intellectual authorship, it stops short of addressing the human rights of Indigenous Peoples to have their Indigenous resources and intangible assets recognized, protected, promoted, and disseminated in accordance with what is deemed acceptable under Indigenous law.

80. *Id.*

81. *Id.*

THE DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES

The Declaration is a non-binding, aspirational⁸² document adopted on September 13, 2007 by the United Nations General Assembly after more than two decades of debate.⁸³ The text outlines the rights of the world's estimated 370 million Indigenous People.⁸⁴ The Declaration arose out of the absence of international human rights law regarding Indigenous Peoples.⁸⁵ The Declaration may be viewed as a "framework for human rights based dialogue between Indigenous Peoples and States."⁸⁶

The Declaration was first conceived at the Working Group on Indigenous Populations' fourth session in 1985.⁸⁷ While Indigenous Peoples are classified as the poorest and most vulnerable groups in the world, those who have ushered in the Declaration are optimistic that, as a living document at the national and international levels, it will promote a vision of development and prosperity for Indigenous Peoples.⁸⁸

The adoption of the Declaration in its present form represents a watershed moment in rights-based advocacy for Indigenous Peoples. In this long awaited action, Indigenous Peoples expressly rejected a welfare-based system of governance that subordinated their interests, their law, their culture, and their very survival. The Declaration, a manifesto of sorts, stands quite separate and apart from most United Nations covenants, treaties, and declarations. The Declaration is unique in several respects. First, the Declaration is significant and distinct in that Indigenous Peoples are represented in the document by

82. See U.N. DRIP, *supra* note 56. The Preamble to the Declaration "[s]olemnly proclaims [that its content reflects] a standard of achievement to be pursued in a spirit of partnership and mutual respect. . . ."

83. See *id.*

84. See *id.*

85. Megan Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (Univ. of N.S.W. Faculty of Law Research Series 2008, Working Paper No. 16, 2008), available at <http://law.bepress.com/unswwps/flrps08/art16>.

86. The preambular language of the Declaration "[e]ncourag[es] States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned." U.N. DRIP, *supra* note 56.

87. See Pritchard, *supra* note 51, at 7.

88. See U.N. DRIP, *supra* note 56. The preambular language to the Declaration provides, in part, the following:

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs, Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of their environment. . . .

self and not by any government or State.⁸⁹ This is critical because Indigenous Peoples, since colonization, have argued that it is, in fact, the government or State actor that has been responsible for myriad rights violations against them throughout history and into the present.

Second, the Declaration represents the political will of a highly organized body of Indigenous Peoples from around the world who developed a sophisticated rights-based framework lobby that challenged the legitimacy of the welfare-based framework pressed into service by governments and United Nations leadership, who in the past strongly opposed adopting a broad rights-based framework to recognize and protect Indigenous Peoples and their resources. To summarize Les Malezer, the Indigenous Peoples on the international stage devised a sophisticated and effective Global Caucus of Indigenous Peoples.⁹⁰ According to Malezer, this collective action was an absolute necessity because the abuses against Indigenous Peoples around the globe had reached critical levels, requiring Indigenous Peoples to ignore territorial borders in order to address these gross and institutionalized human rights violations with a near unified voice.⁹¹

To achieve this unified lobby, Indigenous Peoples worked in seven regional caucuses – Africa, Asia, the Pacific, Latin America, North America, the Arctic, and Russia – to develop a comprehensive rights-based framework that is now embodied in the Declaration. The Indigenous Peoples in the seven regions then appointed seven representatives, respectively, to work at the international level to lobby at the United Nations for the recognition and protection of Indigenous Peoples and their resources. Arguably, the distinct organizational structure of the Indigenous Global Caucus, which allowed for the development and adoption of a clear and unalterable rights-based position, contributed greatly to the legitimacy of the aspirations of Indigenous Peoples, so much so that governments became unwilling to vote against Indigenous Peoples regarding the adoption of the Declaration. This unwillingness was a testament to the superior organization of the Caucus, especially considering that during all negotiations, Indigenous

89. See Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations — Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 496-97 (1995) (“The Draft Declaration acknowledges indigenous peoples as ‘peoples’ in the international sense, but recognized that they continue to possess a distinct collective legal character and standing even in cases where they have agreed to be incorporated into existing states. This is of cardinal importance because indigenous peoples generally do not aspire to separate statehood; while, at the same time, they do not see that they can ever accept complete integration into the states [comprising] the United Nations. Although equal in law to all other peoples, indigenous peoples tend to prefer partnerships over separate statehood or complete integration. To protect the integrity of these basic arrangements, indigenous peoples must continue to enjoy a legal status of their own, and access to international fora.”).

90. November 26, 2008 presentation made by Les Malezer at the University of Hawai‘i at Mānoa, Kamakakuokalani Center for Hawaiian Studies.

91. See *id.*

Peoples remained on message that they would make no concessions on land rights.

Third, Indigenous Peoples remained resolute on the issue of land rights and did not waiver in their position not to make concessions as to these rights. The Declaration unapologetically provides:

Article 25

Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.⁹²

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control their lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.⁹³

It is very likely that had Indigenous Peoples made concessions as to land rights during previous lobbying efforts for a Declaration, such would have augured well for earlier adoption. Surely though, such concessions would have likely diluted the very objectives that embody the human rights movement of Indigenous Peoples – the right to self determination; to own and control Indigenous lands, territories, and resources, and the right to free, prior, and informed consent. In fact, Indigenous land rights and the means by which these rights were violated form the basis of or foundation for various Indigenous modern claims for recognition and protection of and redress for harms to land, culture, and peoples. Without the anchor of land rights for Indigenous Peoples – the first peoples – other legitimate claims – such as recognition and protection of culture, religion, language, education, employment, health, economic participation and development, and intangible assets and resources – lose traction.⁹⁴

92. U.N. DRIP, *supra* note 56. Articles 25 and 26 are included in Part VI of the Declaration, which contain those provisions relating to “Land and Resources.”

93. *Id.*

94. *See id.* Articles 1-5 comprise Part I and relate to “Fundamental Rights.” *See also* Daes, *supra* note 89, at 495 (“Part I is a statement of the fundamental principles of equality and non-discrimination, with regard to indigenous peoples collectively as peoples, and individually as human persons. In this context, specific reference is made to self-determination, not because it is a right of indigenes, but as a right of all peoples, of which indigenous peoples cannot be denied. We have stated this in the most unambiguous terms, because the equality of indigenous peoples has so fre-

Despite the decades long resolve of Indigenous Peoples at all levels – international, regional, national, and local – some observers in the intellectual property arena proposed that Indigenous Peoples, in order to best protect their intellectual property, should minimize their reliance on land rights in order to take advantage of existing western intellectual property options for protection of Indigenous resources and intangible assets. The Declaration's adoption proves that such a strategy, at the very least, is inconsistent with the goals and objectives of Indigenous Peoples; at worst, such a strategy seeks to continue promoting the welfare-based framework, which necessarily marginalizes and subordinates Indigenous Peoples' interests, laws, and culture to the laws of the dominant settler society. It is the law of the dominant settler society that, when implemented, worked the exact injustice on Indigenous Peoples that led to the generational struggle for international human rights that Indigenous Peoples have been waging since first contact and colonization.

Consistent with the worldview of Indigenous Peoples – that in most cases Indigenous resources are inextricably linked to Indigenous lands and territories – their Indigenous resources and intangible assets represent a distinct aspect of self and therefore represent a component of the right of self-determination. By virtue of this right, Indigenous Peoples did not capitulate to cacophonous calls by intellectual property law scholars, practitioners, and government officials to work within the western intellectual property rights framework. Instead,

quently been denied in the past on racist grounds.”). Articles 6 and 7 comprise Part II and relate to “Life and Security.” *See id.* (“Part II of the Draft Declaration broadly recognizes the rights of indigenous peoples to their physical existence and cultural identity. It rejects the four principal threats to indigenous peoples survival today: forced relocation, forced assimilation, militarization of their territories, and official denial of their indigenous identity.”). Articles 8-13 comprise Part III of the Declaration, which relate to “Culture, Religion, and Language.” Articles 14-17 comprise Part IV and relate to “Education, Media and Employment.” Articles 18-24 comprise Part V and relate to “Participation and Development.” *See id.* (“Parts III, IV and V of the Draft Declaration focus on issues of special concern to indigenous peoples in the exercise of their rights to equality, self-determination and collective identity. These issues include religious, spiritual, cultural and linguistic freedom, and the renewal of indigenous institutions in the fields of education, health, economy and communications. In broad terms, these parts of the Draft Declaration deal with aspects of strengthening the distinctiveness of indigenous societies, within the institutional frameworks of existing states.”). Articles 33-37 comprise Part VII and relate to “Self-Government and Indigenous Laws.” *See id.* at 496 (“Part VII provides some general guidelines for those situations in which indigenous peoples exercise their political rights through forms of autonomy or internal self-government within existing states. It also clarifies the responsibility of indigenous peoples’ own institutions to respect “internationally recognized human rights standards.”). Articles 38-42 comprise Part VIII and relate to “Implementation.” *See id.* (“Part VIII addresses the specific responsibilities of states and the future role of the international community, in ensuring recognition and respect for the rights of indigenous peoples and the implementation of the provisions of the Draft Declaration.”). Finally, Articles 43-46 comprise Part IX and relate to “Minimum Standards & Respect for Human Rights.”

the Indigenous Peoples Caucus lobbied for and won inclusion of Article 31 in the Declaration:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁹⁵

The power and promise of the Declaration becomes apparent upon review of the countries that voted against the Declaration's adoption. Australia, Canada, New Zealand, and the United States voted against adoption of the Declaration. Representatives from these countries have cited many reasons for their respective positions. Some have proffered that the Declaration does not reflect a workable state practice. For example, opponents to the Declaration posit the land conditions would encompass most of their country and allocate rights to Indigenous Peoples that would not be equally shared by others.⁹⁶ Specifically, these opponents argue that, as written, the Declaration would appear to require governments to offer a right to redress to Indigenous Peoples and provide compensation for the value of an entire country.⁹⁷ Still further, the Declaration's opponents argue that it is inconsistent with the legal tradition of States.⁹⁸ Even though the

95. U.N. DRIP, *supra* note 56, at art. 31.

96. *See id.* at art. 27. Article 27 provides:

States shall establish and implement, in conjunction with indigenous peoples concerned, fair, independent, impartial, open and transparent process, *giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources*, [emphasis added] including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

97. *Cf. id.* at art. 28. Article 28 provides:

Indigenous peoples have the right to redress, by means that can include restitution, or when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

98. U.N. GAOR, 61st Sess., 107th plen. mtg. at 12, U.N. Doc. A/61/PV.107 (Sept. 13, 2007); *Cf. U.N. DRIP, supra* note 56. Article 46 provides:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authoriz-

Declaration provides for the protection of territorial integrity and sovereignty,⁹⁹ Australia failed to endorse the document because leaders fear unintended consequences from the Declaration's references to self-determination, which, in the opposition leadership's opinion, might give rise to Indigenous law taking precedence over state law.¹⁰⁰

IV. THE CHALLENGE OF INDIGENIZING INTELLECTUAL PROPERTY LAW

In spite of the political magnitude of the adoption of the U.N. DRIP, Indigenous Peoples pursuing rights-based initiatives, such as the recognition and protection of Indigenous resources and intangible assets, are campaigning in a post civil rights society against counter mobilization forces of sovereign nations. Sovereign counter-mobilization efforts include the limitation of rights. The four nations opposing the adoption of the U.N. DRIP are similarly opposed to concepts of legal pluralism.¹⁰¹ One can argue that those opposed to invoking legal pluralism to recognize the legitimacy of Indigenous law to protect In-

ing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitation shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of democratic society.

99. See U.N. DRIP, *supra* note 56; see also Adam Gartrell, *Opposition Indigenous Law Claims 'Wrong,'* AUSTRALIAN, Mar. 10, 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,23350257-12377,00.html>.

100. Gartrell, *supra* note 99; Cf. U.N. DRIP, *supra* note 56. Article 27 promotes substantive and procedural due process principles in the recognition and adjudication of the rights of Indigenous Peoples to their interests. Article 27 seeks recognition of Indigenous rights and inclusion of Indigenous Peoples in an adjudicative process relating to Indigenous interests. More specifically, Article 27 promotes legal pluralism and democratic ideals by calling for "due recognition to Indigenous Peoples' laws" in the case of adjudications of Indigenous interests. In addition, Article 34 provides:

Indigenous peoples have the right to *promote, develop and maintain* their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, *in the cases where they exist, juridical systems or customs*, [emphasis added] in accordance with international human rights standards.

101. Cf. Angelique EagleWoman (Wambdi A. WasteWin), *Fencing Off the Eagle and the Condor, Border Politics, and Indigenous Peoples*, 23 NAT. RESOURCES & ENV'T. 33 (2008), available at http://www.law.uidaho.edu/documents/Eaglewoman_NRE_Fall08.pdf?pid=109041&doc=1 (commenting that "[a]dvocates of indigenous peoples' rights were not surprised that the United States opposed the adoption of the first minimum human rights standards set forth in the international arena for indigenous peoples").

Indigenous resources and intangible assets have adopted a materialization of rights framework.

By materializing rights, new rights are seen as impinging on rights that currently exist and are retained by others. Sovereign counter-mobilization seems to reject the notion that many rights for which Indigenous Peoples assert by virtue of the right to self-determination are rights that are flexible and would not impinge on the asserted rights of others. Moreover sovereign counter-mobilization has the effect of perpetuating cultural apartheid; stalling the implementation of widely held standards of international human rights into national laws and policies; and denying the relevance and vitality of Indigenous law and its role in providing complete protection for Indigenous resources and intangible assets.

A. *Cultural Apartheid*

Imperialism, colonialism, and apartheid nearly obliterated generations of Indigenous Peoples around the globe. The specter of the police state in some cases or the deprivation of rights to practice traditional education, society, and culture in other cases eradicated from existence large segments of peoples and populations. A general comparison to these rights deprivations under apartheid regimes can be made to the rights deprivations suffered by Indigenous Peoples at the hands of dominant settler societies. Stripping Indigenous Peoples from their lands, their culture, and their families has had a measurable and deleterious effect on modern Indigenous communities, economies, and identity.

There is really no question that dominant settler societies caused and continue to cause Indigenous land loss and alienation. There is also no credible question that land loss and alienation result in demonstrable harm to Indigenous identity. What is becoming gravely apparent in an information and intellectual property driven economy is that the harm to Indigenous identity has been exacerbated by dominant settler societies' intrusion upon, misappropriation of, and alienation and disenfranchisement of Indigenous Peoples from their resources and intangible assets.

The byproduct of systemic exploitation, misappropriation, and alienation reasonably can be characterized as economic, socio-political, and cultural apartheid. This form of apartheid threatens to extinguish Indigenous identity and survival by thwarting rights-based advocacy for Indigenous self-determination, community sustainability, and social entrepreneurship. Stated another way, Indigenous identity and survival in today's economy depends upon Indigenous control over Indigenous resources and intangible assets.¹⁰² In order to dimin-

102. See Valerie J. Phillips, *Indigenous Rights to Traditional Knowledge and Cultural Expressions: Implementing the Millennium Development Goals*, 3 INTERCUL-

ish the negative effects of cultural apartheid, the international community, States, Indigenous Peoples, and private corporate institutions should learn from the ameliorative past.

One of the initiatives employed during the dismantling of apartheid in South Africa was the establishment of The Truth and Reconciliation Commission (“TRC”). One of the purposes of the TRC was to begin a healing process. Part of the process encouraged granting amnesty to perpetrators while simultaneously attempting to offer a process of healing for victims. In order to make progress toward healing, the TRC required implementing certain steps: identification of problems, victims willing to come forward and discuss painful memories, and perpetrators willing to provide full disclosure of all requested information.

To ameliorate the effects of cultural apartheid, similar steps can be implemented to respond to the harms caused to Indigenous identity by dominant settler societies’ misuse and disrespect for Indigenous resources and intangible assets. First, the problem must be identified. The first step of the process has largely been accomplished by the over twenty years of Indigenous rights-based advocacy for recognition and protection of Indigenous resources and intangible assets. The second step of the process is also reflected in the extensive reporting by Indigenous Peoples of the abuses, incursions, and infringements engaged in by dominant settler societies. That leaves step three, the requirement for perpetrators to provide full disclosure of their conduct resulting in misappropriation, infringement, and misuses of Indigenous resources and intangible assets. How this last step is accomplished depends, in large measure, on the capacity and willingness of the international community, States, and Indigenous Peoples to negotiate Indigenous resource and intangible asset protections into national law.

TURAL HUM. RTS. L. REV. 191, 193-94 (2008) (explaining, in the context of meeting the national millennium goals, that “national and international efforts . . . are likely to concentrate on the mainstream development model, in which the lands and resources of indigenous peoples are appropriated and/or destroyed such that the latter are plunged deeper into poverty. International actors such as the World Bank Group (WBG), World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO) have been precisely the organizations that have promoted the mainstream development model to the exclusion of indigenous peoples’ own economic and development paradigms. . . . [Western] intellectual property law exclusively supports the mainstream or dominant development model. . . . Scholars, activists, and even WIPO consultants have continually pointed out that indigenous and tribal peoples already have their own customary laws and rules which relate to the protection and sharing of cultural property. Logically, such laws and rules are as tied to indigenous economies as western intellectual property law is tied to the economies of nation-states. Indigenous economies are necessarily undermined when their laws and rules regarding TCEs and genetic resources are simply ignored.”).

B. *The Rights Gap: The Chasm Between International Human Rights Standards and National Law*

For Indigenous Peoples, misappropriation of Indigenous resources and intangible assets is not only a taking for commerce without conscience it is a taking of Indigenous resources and intangible assets for uses inconsistent with Indigenous customs, standards and values. Accordingly, takings for commercial gain are not the only concerns for an Indigenous system of laws and enforcement mechanisms for the protection of Indigenous resources and intangible assets. As such, western intellectual property rights regimes are inadequate to protect the non-commercial attributes of Indigenous resources and intangible assets; in contrast, international human rights standards calling for the recognition and implementation of Indigenous law and legal systems responds to the unique character and nature of Indigenous resources and intangible assets. Why? Because the character and nature of Indigenous resources and intangible assets transcend purely commercial attributes and, as such, can be described as the crucial kernel encoded with the knowledge, tradition, and expression that will contribute to the survival of Indigenous identity and culture.

There has not been a wave of national reaction to and support of implementing the aspirational goals of Articles 34 and 38 of U.N. DRIP – for States to take appropriate measures, in consultation and cooperation with Indigenous Peoples, to promote Indigenous structures and juridical systems that will protect and enforce Indigenous resources and intangible assets. Failing to implement Indigenous law and legal systems to protect Indigenous resources will only exacerbate the currently ongoing plundering of these resources. Such a stance will render Indigenous rights insecure; as well, such a stance will reflect poorly on “democratic nations”¹⁰³ and will continue to fuel claims of misappropriation that will ultimately require settlement at some future date and at a greater cost to all interested parties.¹⁰⁴ Judge Posner’s observations about the benefits of private ownership of physical property rights to western society are instructive. While significant differences exist between physical property and intellectual property, Judge Posner explains about the former that:

103. See Huff, *supra* note 12, at 295-296 (“State opposition to indigenous claims of self-determination cannot be maintained if this new branch of international law [including recent international human rights jurisprudence, international legal norms prohibiting racial discrimination, and the U.N. DRIP] is developed, strengthened and heeded.”).

104. See *id.* at 295 (It is more likely that States oppose indigenous claims of self-determination because recognizing such claims could lead to a loss of control over the valuable natural resources which remain on indigenous traditional lands. Unilateral State control of indigenous lands and resources is, however, already contrary to international human rights law and can no longer be lawfully maintained. States would do better to move into a new era of relations with indigenous peoples, rather than continue to expropriate lands and resources which have never belonged to them. . . .”).

with private property, people have an incentive to invest in developing the property – to make it as valuable as it can be made – because they get to enjoy the benefits of that investment. They reap where they have sown. If you had a situation in which anyone was free to come along and harvest the crops that you had planted, you would not have any incentive to plant. If we want people to invest for the future, we have to give them property rights.¹⁰⁵

Recognizing an analogue of rights for Indigenous resources and intangible assets protected by Indigenous laws and customs for the benefit of Indigenous Peoples facilitates Indigenous investment and development of resources while simultaneously protecting Indigenous Peoples from pervasive and systemic misappropriation.

Notwithstanding glacial movement to recognize and employ Indigenous law and legal systems to protect and enforce Indigenous resources and intangible assets, a few jurisdictions have leaped ahead of the international human rights community to develop intellectual property-type protection for Indigenous resources. Their objective is to protect these resources under a new rights-based regime in favor of Indigenous Peoples, albeit most are part of national legislation and not a codification of Indigenous law and legal systems.¹⁰⁶ For example, Peru,¹⁰⁷ Panama,¹⁰⁸ Portugal,¹⁰⁹ Ecuador,¹¹⁰ Costa Rica,¹¹¹ and The

105. Richard A. Posner, *Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173, 176-77 (2005) (Judge Posner clearly articulates that the above reasoning does not apply equally to intellectual property because of its invisibility, the greater potential for monopoly, the public-good aspects of intellectual property, and greater degree of unincentivized creation of intellectual property. Nevertheless, Posner recognizes that property rights have a role to play, one of which is discerning the identity of the rights holder or steward of the intellectual property, or as discussed in this article, the Indigenous resource.).

106. See Paul Kuruk, *The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT'L & COMP. L. REV. 67 (2007) (describing Ecuadorian law on Intellectual Property of 1998 as requiring protection for biological and genetic heritage equivalent to the protection for industrial property. "The 1998 Law also conditions the grant of product or process patents that relate to such heritage on the legal acquisition of elements of the heritage from the relevant traditional owners."). Matthias Leistner explains that the likely impetus for this early wave of regulation to protect traditional knowledge was the adoption of national laws consistent with the adoption of the Convention on Biodiversity. See also Matthias Leistner, *Analysis of Different Areas of Indigenous Resources*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 92-93 (Silke von Lewinski ed.) (Kluwer Law Int'l, 2004).

107. See Leistner, *Analysis of Different Areas of Indigenous Resources* in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE *supra* note 106, at 93 n.204 (citing Law Establishing a Regime of Protection of the Collective Knowledge of the Indigenous Peoples Related to Biological Resources, Ley No. 27811, published in the Official Journal of Peru, *El Peruano*, 10 August 2002). The law, described as one of the most elaborate laws concerning traditional knowledge, is oriented to biodiversity and requires authorization be given in accordance with Indigenous Peoples' own rules and customary law, as determined by an organization representative of the Indigenous Peoples. Ley que Establece el Régimen . . . [Protection Regime for the Collective

Philippines¹¹² have enacted legislation and/or promulgated regulations for, *inter alia*, the positive protection of Indigenous resources to create incentives to maintain and continuously develop and evolve Indigenous resources and intangible assets for the benefit of Indigenous Peoples and their communities.¹¹³

Knowledge of Indigenous Peoples Derived from Biological Resources] Ley No. 27811, del 24 de julio de 2002, El Pervano, del 10 de agosto. The law prescribes rights in traditional knowledge within the public domain as well as traditional knowledge possessed by Indigenous Peoples and not yet present in the public domain. The law also established minimum standards for licensing traditional knowledge, with particular emphasis on royalty payment schemes. Finally, the law establishes systems of registers, three in total, one of which is “established by Indigenous Peoples themselves in accordance with their own customary law.”

108. See Leistner, *supra* note 107, at 97 n.219 (citing to Law No. 20 of 26 June 2000, with accompanying regulations, “The Special Intellectual Property Regime upon Collective Rights of Indigenous Communities, for the Protection of their Cultural Identities and Traditional Knowledge.”). The law provides for both positive protection in favor of Indigenous Peoples and negative protection against non-authorized third party users of cultural assets. The law paints a broad stroke that includes a multifaceted list of protected traditional knowledge and cultural expression. The law also provides for registration and licensing.

109. See *id.* at 98 n.230 (citing Decree Law No. 118/2002, of 20 April 2002). This law establishes protection for landraces (plant varieties) and has as its objectives “registration, conservation, legal custody and transfer of plant endogenous material with an actual or potential value for agriculture, agro-forestry, and landscape-related activities,” . . . as well as associated traditional knowledge, which includes “knowledge relating to methods, processes, products, and denominations that are applicable in agriculture, food, and industrial activities in general, including handicrafts, trade and services informally associated with the use and preservation of local varieties, and other endogenous and spontaneous material [] covered by the [] law.” See *id.* at 98-99.

110. See ICCPR, *supra* note 65; see also Huff, *supra* note 12, at 304.

111. See Leistner, *supra* note 107, at 115 n.292 (citing Biodiversity Law, Law No. 7788 of the Legislative Assembly of the Republic of Costa Rica). The law “provides for biodiversity-related protection of traditional knowledge . . . ; [however the law does not resolve] the exact nature and scope of rights, the identification of beneficiaries[, nor] the regulation of the public domain. . . . [Instead, these issues and concerns are] left to further development in [a legislatively mandated] participatory process.” See *id.* at 118.

112. See *id.* at 100 n.237 (citing Philippines Indigenous Peoples Rights Act of 1997 (PIPRA), Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for other Purposes, Republic Act No. 8371, 28 July 1997). This law is one component of the protection of cultural integrity of the various distinct regional groups of Indigenous Peoples and its central focus is on free and prior, informed consent of these communities. Free and prior, informed consent is determined by each community’s customary laws and practices, “free from any external manipulation, interference and coercion. . . .” See *id.* at 102. “The further development and implementation of community intellectual property rights is the task of the National Commission on Indigenous Peoples (NCIP), an office created by the PIPRA. The NCIP . . . is the primary agency responsible for formulating and implementing policies, plans and programmes to recognize, protect and promote the rights of [Indigenous Peoples]. The members of the NCIP are seven regionally representative Commissioners belonging [themselves] to Indigenous communities.”). *Id.*

113. See Leistner, *supra* note 107, at 93.

Despite these examples of relatively progressive legislative and regulatory action by nation-States, many of the world's Indigenous Peoples have yet to have their Indigenous law and legal systems implemented into or even meaningfully recognized by western intellectual property laws or court decisions. With respect to the Indigenous Peoples in the United States, particularly Native Hawaiians, western law and courts have only sporadically referred to Indigenous laws for guidance.¹¹⁴ In Hawai'i, Indigenous customary law has been recognized in a compelling line of quasi-environmental,¹¹⁵ gathering,¹¹⁶ and access¹¹⁷ rights cases; but Indigenous law and the above referenced cases have yet to be given weight or deference in the intellectual property rights arena.

Relatively recently, the United States District for the District of Hawai'i was presented with a case ripe for, at the very least, recognition of Indigenous rights and law in defense of a Native Hawaiian artist being sued for copyright infringement by a non-Native Hawaiian copyright holder.¹¹⁸ The facts in *Kim Taylor Reece v. Island Treasures Art Gallery, Inc.*¹¹⁹ embody many of the injustices visited upon Native Hawaiians by colonization and assimilationist practices of the dominant settler society. While the *Reece* decision seeks to respond to various inequities, it overlooks an opportunity to acknowledge jurisprudence recognizing Native Hawaiian rights that are vital to protecting Native Hawaiian resources and intangible assets.¹²⁰

114. See *id.* at 90 (stating “[T]he United States has not formally recognized customary law as part of the general national legal system, although provision is made for its application where necessary by Indian tribal courts.”).

115. See generally *Public Access Shoreline Haw. v. Haw. County Planning Comm'n.*, 903 P.2d 1246, 1256-58 (Haw. 1995) (affirming decision that state agency has an obligation to comply with the Coastal Zone Management Act [citation omitted] and article XII, § 7 of the Hawai'i Constitution (read in conjunction with [Hawai'i Revised Statutes] HRS § 1-1) in protecting traditional and customary practices of Native Hawaiians).

116. See generally *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 748 (Haw. 1982) (explaining Hawai'i's 1978 statute, HRS § 7-1, appears to contain two types of rights: specific and enumerated gathering rights and general and broad access and water rights).

117. See generally *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1271 (Haw. 1992) (resolving in the affirmative, on remand in *Pele Def. Fund v. Estate of James Campbell*, Civ. No. 89-089, Findings of Fact, Conclusions of Law and Order (August 26, 2002), the issue of whether Native Hawaiians exercised traditional and customary subsistence, cultural, and religious rights in undeveloped areas of Wao Kele 'O Puna as against private landowners).

118. *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1199 (D. Hawai'i 2006).

119. *Id.* This case is important because it marks a pivotal point in the extension of western copyright protection at the expense of protection of cultural resources and the recognition and adherence to Indigenous customary law.

120. To be fair, the procedural posture of *Reece* presents a couple of challenges. First, this case was brought to a United States District Court on a theory of copyright infringement, an exclusive federal claim. Second, *Reece*, a non-Native Hawaiian, was the plaintiff in the suit and his purpose was not to protect Native Hawaiian traditional

Notably absent from the *Reece* decision is any allusion to Hawai'i precedent recognizing "Hawai'i's constitutional mandate to protect traditional and customary [N]ative Hawaiian rights."¹²¹ In the jurisprudence addressing Native Hawaiian traditional and customary rights – from the landmark decisions of *Kalipi v. Hawaiian Trust Company Limited*¹²² through *Ka Pa'akai o Ka'aina v. Land Use Commission* – the Supreme Court of Hawai'i has determined that:

In order for the rights of [N]ative Hawaiians to be meaningfully preserved and protected, they must be enforceable. In order for [N]ative Hawaiian rights to be enforceable, an appropriate analytic framework for enforcement is needed. Such an analytic framework must endeavor to accommodate the competing interests of protecting [N]ative Hawaiian culture and rights, on the one hand, and economic development and security, on the other.¹²³

Before setting forth the analytic framework that the *Reece* court could have at least considered in dicta, it is critical to first examine the Supreme Court of Hawai'i jurisprudence that provides the foundation for the analytic framework that may offer guidance in future cases where the resource rights of Indigenous Peoples are implicated.

In his landmark decision that squarely articulated the legal and equitable foundations for the recognition and protection of Native Hawaiian traditional and customary rights, as well as adherence to Native Hawaiian law, custom, and usage, Chief Justice William S. Richardson, the first Native Hawaiian to be appointed to the Hawai'i judiciary, embraced legal pluralism by acknowledging and giving effect to Indigenous law as well as western property law to deliver a transformative opinion firmly establishing "the court's obligation to preserve

and customary rights; instead, his interest was to protect his copyright to a photograph of an image, not the image itself. The conundrum in this case is that the image, a hula dancer performing a traditional hula kahiko dance pose, is reasonably considered part of the cultural expression of Native Hawaiians. Accordingly, Judge Seabright, the author of the *Reece* opinion, may have been constrained by the posture of the case. Notwithstanding, it is quite possible that Judge Seabright could have stopped short of committing the hula kahiko movement and image to the public domain by proposing in dicta that the public domain condition for using the hula kahiko would be a requirement to recognize the rights and protections of Native Hawaiians in their Indigenous resources and intangible assets. For example, even under a western intellectual property rights regime, Judge Seabright's ruling could have questioned whether, in fact, *Reece* sought and received authority to use the hula kahiko image, by way of license obtained from a Native Hawaiian organization, such as a halau, to permit the type of commercial exploitation that *Reece* had benefited from for over twenty years. Cf. *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (holding that model's *identity* was not protected by copyright law and the state law protecting her rights was not preempted).

121. *Ka Pa'akai o Ka'aina v. Land Use Comm'n.*, 7 P.3d 1068, 1082 (Haw. 2000).

122. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 748 (Haw. 1982).

123. *Ka Pa'akai o Ka'aina*, 7 P.3d at 1082. In the context of Indigenous resources and intangible assets, the goals of Indigenous law and western intellectual property law can be complementary in many cases.

and enforce [Native Hawaiian] traditional rights.”¹²⁴ On behalf of a unanimous panel of the Supreme Court of Hawai‘i, Chief Justice Richardson resolutely opined:

We recognize that permitting access to private property for purposes of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But an argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail.¹²⁵

To prove the correctness of this position, Chief Justice Richardson first explained the panel’s reliance on the Hawai‘i State Constitution, Article XII, § 7 for both substantive and guiding policy. Section 7 provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of [N]ative Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the rights of the State to regulate such rights.¹²⁶

Next, Chief Justice Richardson interpreted HRS § 7-1 as intending to recognize the gathering rights of Native Hawaiians by:

assur[ing] that lawful occupants of an ahupua‘a may, for the purposes of practicing [N]ative Hawaiian customs and traditions, enter undeveloped lands, within the ahupua‘a to gather [] items enumerated in the statute.¹²⁷

Finally, Chief Justice Richardson acknowledged the enforceability of Native Hawaiian customary law and usage by interpreting the exception to the adoption of the doctrine of custom codified in HRS § 1-1 sanctioning the continuation of native understandings and practices that did not unreasonably interfere with the spirit of the common law.¹²⁸ Chief Justice Richardson explained that HRS § 1-1 “would apply in a particular area¹²⁹ [or discipline] . . . as a vehicle for the continued existence of those customary rights [that] continued to be practiced and [] worked no actual harm upon the recognized interests

124. See *Kalipi*, 656 P.2d at 748 (providing the source of Chief Justice Richardson’s core principle, which was later restated in *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Comm’n.*, 903 P.2d 1246, 1273 (Haw. 1995)).

125. *Kalipi*, 656 P.2d at 748.

126. *Id.*; *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1271 (Haw. 1992).

127. *Kalipi*, 656 P.2d at 749.

128. *Id.* at 750-51 (explaining “that the statutory exception to the common law is . . . akin to the English doctrine of custom whereby practices and privileges, unique to particular districts[,] continued to apply to residents of those districts even though in contravention of the common law,” citing 1 W. Blackstone, *Commentaries*.); see also *Pub. Access Shoreline*, 903 P.2d at 1268-69 (holding “that common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this State”).

129. *Kalipi*, 656 P.2d at 751.

of others."¹³⁰ With respect to the interests of others, Chief Justice Richardson explained "that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area [or discipline]."¹³¹

Building on the landmark analytic framework penned by Chief Justice Richardson, the Supreme Court of Hawai'i extended what has now come to be known as *Kalipi* rights to cover "all rights customarily and traditionally held by ancient Hawaiians."¹³² Accordingly, the court held that Native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a Native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."¹³³

Continuing to build on foundations of *Kalipi* and *Pele*, the court in *Public Access Shoreline v. City Planning Commission (PASH)* determined that neither of the above cases "precluded further inquiry concerning the extent that traditional practices have endured under the laws of the State; such that the nature and scope of rights retained by § 1-1 would [] depend upon the particular circumstances of each case."¹³⁴ The opinion in *PASH* also explained that the rights claimed by Native Hawaiians were not based on land ownership but rather on a "range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others."¹³⁵

The *PASH* panel further determined that "[w]here these practices have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done. . . ."¹³⁶ The analytic framework led the court to admit that "[c]ustomary and traditional rights in [the Hawaiian Islands] flow from [N]ative Hawaiians' pre-existing sovereignty . . . [and these rights] must be protected to the extent feasible in accordance with article XII, § 7."¹³⁷

To fulfill its obligation to provide guidance about and enforcement of Native Hawaiian rights, the Supreme Court of Hawai'i, in *Ka*

130. *Id.* at 752.

131. *Id.* at 751.

132. *Pele Def. Fund*, 837 P.2d at 1271. (At the 1978 Constitutional Convention, "the Committee on Hawaiian Affairs added what is now known as article XII, § 7 to reaffirm customarily and traditionally exercised rights of [N]ative Hawaiians. . . . The committee contemplated that some traditional rights might extend beyond the ahupua'a;. . . . The committee intended this provision to protect the broadest possible spectrum of [N]ative Hawaiian rights: . . . [and] in reaffirming these rights in the Constitution [the] committee intended the courts to provide judicial guidance and enforcement to guarantee these rights.").

133. *Id.* at 1272.

134. *Public Access Shoreline*, 903 P.2d at 1259.

135. *Id.* at 1261.

136. *Id.*

137. *Id.* at 1270-72.

Pa‘akai o Ka‘Aina v. Land Use Commission, articulated an analytic framework for state agencies to apply when meeting their duty to “protect customary and traditional [N]ative Hawaiian rights.”¹³⁸ This framework is appropriately adaptable to cases involving Indigenous resources and intangible assets and their recognition and protection, exclusive of or contemporaneous with analysis and application of western intellectual property laws. The adapted analytic framework would require a court to do the following: (1) make findings about the identity and scope of valued Indigenous resources and intangible assets that are culturally significant to Native Hawaiians; (2) make findings about the extent to which traditional and customary resources will be impaired or affected by another’s conduct; and (3) draw conclusions about the feasible actions to be taken to reasonably protect Native Hawaiian rights and resources. With this framework in place, reviewing courts will not inadvertently fail to assess or consider the impact that judicial decisions will have on the recognition and protection of Indigenous resources and intangible assets. It is this framework that could have provided a more meaningful analysis of the copyright infringement dispute launched by a non-Native Hawaiian copyright holder against a Native Hawaiian artist who herself was raised and trained in the cultural art of hula, a traditional dance that, in part, communicates the identity of Native Hawaiians.

While the above cases were borne out of Native Hawaiian rights associated with land, by virtue of the Hawai‘i Constitution’s article XII, § 7, HRS § 1-1, judicial precedent and, most recently, the adoption of the U.N. DRIP, they now represent strong persuasive authority critically relevant to recognizing and protecting rights in Indigenous resources and intangible assets. It is against this jurisprudential backdrop that the *Reece* case could have at least considered the proposed adapted analytic framework.¹³⁹ Instead, the *Reece* case

138. *Ka Pa‘akai o Ka‘aina*, 7 P.3d at 1084 (instructing that “[i]n order to fulfill its duty to preserve and protect customary and traditional [N]ative Hawaiian rights to the extent feasible, the [Land Use Commission], in its review of a petition for reclassification of district boundaries, must – at a minimum – make specific findings and conclusions as to the following: (1) the identity and scope of ‘valued cultural, historical, or natural resources’ in the petition area, including the extent to which traditional and customary [N]ative Hawaiian rights are exercised in the petition area; (2) the extent to which those resources – including traditional and customary [N]ative Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect [N]ative Hawaiian rights if they are found to exist.”).

139. There is no doubt that the Copyright Act has application in certain contexts involving Indigenous cultural expression. In fact, some Indigenous artists, having access to monetary and information resources, are taking advantage of western intellectual property law to protect their art and cultural creations. However, the use of western intellectual property law to protect the varied forms of Indigenous resources and intangible assets has been routinely criticized. This is so because Indigenous cultural expression is not merely an individual effort at expression; instead, Indigenous cultural expression is informed by and is infused with traditional knowledge and prac-

demonstrates that the pendulum of privilege continues to shift in the direction of western intellectual property law, the force and effect of which is to primarily protect the interests of institutional copyright holders and individual creators over and above the interests of Indigenous Peoples.¹⁴⁰ What is most disturbing about the *Reece* decision is the language and narrative employed to arrive at its conclusion; well meaning yes, but still disturbing.

The *Reece* case provides a very good example of why legal pluralism should be recognized as a foundation for indigenizing western intellectual property law's rights regime.¹⁴¹ Unfortunately, the *Reece* court relied exclusively on western intellectual property law to reach the short-term result it deemed equitable. This well-meaning attempt at applying western intellectual property law alone to protect Indigenous intangible resources can have equally harmful, albeit unintended, results. The *Reece* case marks a shift from the standard cases of misappropriation that Indigenous Peoples face. Instead of the plaintiffs being members of the Indigenous community, the complainant was actually a non-Indigenous person who developed a lucrative and profitable business model based upon the dissemination of cultural images, specifically the hula kahiko, captured in photographs.¹⁴² *Reece*, a fine art photographer, makes a substantial living from his sepia tone images of Indigenous-looking women posing in or performing the hula kahiko with an ocean backdrop. The subject matter of *Reece*'s instant lawsuit was a photograph entitled "Makanani."¹⁴³ *Reece* first published *Makanani* in 1988 as a poster and since then has licensed the image for use in myriad media, to include publication on greeting cards, t-shirts, and picture frame inserts.¹⁴⁴ In its fact-finding, the court stated:

Plaintiff's "Makanani" photograph has been widely disseminated. From 1995-2003, the image was used as an insert in koa picture frames sold at Hawai'i Longs, Walmart, and Kmart stores. The photograph has been published in several magazines and newspapers in

tices that have cultural, religious, and spiritual meaning, all of which require unique forms of additional protection. Complete and appropriate protection would be made possible by accessing Indigenous law and relying on principles of legal pluralism to provide essential Indigenous protection for Indigenous resources and intangible assets.

140. One of the purposes of the Copyright Act in feudal as well as modern times was to protect all forms of expression so as to counteract any attempts at artistic or cultural repression. While the original granting of copyright was reserved for the privileged, it later evolved to encompass the expression of the masses. Modern developments in intellectual property law have resulted in a remarkable pendulum shift back to securing protection primarily for privileged institutional copyright holders.

141. See *Reece*, 468 F. Supp. 2d at 1199 (denying *Reece*'s motion for preliminary injunction).

142. *Id.* at 1200.

143. See *id.*

144. See *id.*

Hawai'i. Further, plaintiff approximates that 10,000 posters and 20,000 greeting cards bearing the image have been sold.¹⁴⁵

Reece filed his lawsuit in 2006 after demanding that Island Treasures Art Gallery and its owner Gail Allen cease using an "unauthorized copy of his photograph."¹⁴⁶ The alleged "unauthorized use" to which Reece referred focused on a stained glass work created by a Native Hawaiian artist, which was on display at the Island Treasures Art Gallery and offered for sale by the gallery and its owner. Marylee Colucci, the Native Hawaiian artist, created "Nohe" to depict hula kahiko.¹⁴⁷ The exploitative paradigm is obvious. The hula kahiko is a form of cultural expression communicating identity, which makes it a subject of great appreciation and significance to Native Hawaiians and non-Native Hawaiians. Specifically, the court relies on an anthropological observation to explain that:

Hula is a vital expression of Hawaiian culture. For many, it is an articulation of nature and beauty, of respect for the ancient gods and goddesses, of historical memory and legends and of daily life. Hula plays a role in preserving Hawaiian culture and history. Although Hawaiian was not originally a written language, Native Hawaiians have "an extensive literature accumulated in memory, added to from generation to generation, and handed down by word of mouth." Historically "[i]t consisted of *meles* (songs) of various kinds, genealogies, and honorific chants, stories and traditional lore in which were imbedded fragments of history and biography," and which were "used as an accompaniment to the *hula*, a large part of it being composed especially for that purpose."¹⁴⁸

Ironically and sadly, the art gallery initially removed "Nohe" from display in response to Reece's protestations. Later, the art gallery's owner and Colucci agreed only to display "Nohe" but not to offer it for sale.¹⁴⁹ Reece filed his copyright infringement suit arguing "Nohe" is a virtually identical copy of "Makanani" and urging that his "business of selling and creating original photographs will be irreparably harmed" if "Nohe" continues to be displayed and sold.¹⁵⁰

145. See generally *id.* It is important to note how fast precedent can become entrenched in the western common law system. Already, two cases, *Art Attacks Ink, LLC v. MGA Entertainment, Inc.*, 2007 WL 935655 (S.D. Cal. 2007) (Slip Copy) and *Bryant v. Gordon*, 483 F.Supp.2d 605 (N.D. Ill. 2007), have cited the *Reece* case for western propositions dealing directly with materials that must be considered public domain. Lest we act swiftly to bring Indigenous context to this case, it will cement the concept of Native Hawaiian traditional knowledge and cultural expressions as just another element of the public domain, available for unrestricted use by all others.

146. See *Reece*, 468 F. Supp. 2d at 1201.

147. *Id.* at 1201.

148. *Id.* at 1200 (quoting 1 RALPH S. KUYKENDALL, *THE HAWAIIAN KINGDOM* 10-11 (1938)).

149. See *id.* at 1201.

150. See *id.*

The *Reece* case presents equally as many ironies as it does challenges. The decision provides a short-term equitable result—namely the denial of the motion for preliminary injunction in favor of Colucci and the art gallery that displayed her work; as well, the decision does reference descriptions of Indigenous knowledge and custom, albeit for the purpose of comparing Colucci's work to Reece's in order to assess the former's similarity to the latter's work, consistent with application of western intellectual property substantive rules for determining whether illicit "copying" occurred. But the court stopped short of truly achieving equity when it did not consider, at least in dicta, Native Hawaiian values and rights consistent with those identified and protected by *Kalipi* jurisprudence. This failure works an unintended injustice to Native Hawaiian rights. The injustice is the failure to recognize Native Hawaiian rights in the jurisprudential narrative to bring some context and coherence to the actual dispute before the court. By ignoring the Native Hawaiian rights narrative, the court inadvertently and ironically invokes harmful narratives that can be used against Native Hawaiians and other Indigenous Peoples attempting to protect their Indigenous resources and intangible assets.

The first and probably most harmful injustice is the court's unilateral donation of Native Hawaiian resources and intangible assets to the public domain. Native Hawaiians did not challenge Reece's photograph as an invasion of Native Hawaiian interests in the cultural practice and expression of hula. In fact, the Native Hawaiian community tolerated Reece's use of culturally significant expression. Despite this tolerance, Reece felt emboldened by western intellectual property law to sue, among others, a Native Hawaiian artist for her expression of her cultural identity. In responding to the dispute before it, the court invoked only federal copyright law; it overlooked the primacy of the Native Hawaiian right to use traditional practices in sanctioned cultural expression. At the same time, the court, when assessing the copyrightability of Reece's photograph, unilaterally laid claim to the practice of hula kahiko by defining the practice as an "idea . . . forever the common property of mankind."¹⁵¹ The irony is clear. Upon applying federal copyright law without regard to addressing any other framework, the court determined Reece's photograph to be copyrightable and deserving of at least thin copyright protection while simultaneously and unilaterally deciding that the practice of hula kahiko is "unprotectable" and thus "owned" by the public domain, not Native Hawaiians. The following excerpt from the case further crystallizes the transfer of Native Hawaiian rights in hula kahiko to the public domain:

Not all elements of plaintiff's photograph are copyrightable. Copyright protection does not extend to the idea underlying the work;

151. See *id.* at 1202.

only the expression of the idea by the artist is protected. Some general ideas are not protected by copyright law; instead, 'they remain forever the common property of artistic mankind.' Further, everyone is free to use materials in the public domain, and no one can obtain the exclusive right to them by incorporating them in a literary, musical, or artistic work.¹⁵²

The district court's determination that several elements of hula kahiko amount to ideas or facts under a western paradigm results in a dual misappropriation of Native Hawaiian resources and intangible assets. In two virtually consecutive transactions, Native Hawaiian traditional resources and intangible assets were misappropriated: first with the filing of a copyright infringement action by a non-Indigenous individual and second by the unilateral judicial decision to transfer ownership of aspects of the hula kahiko to the public domain.

The public domain debacle is not the only irony of the case. With the application of federal copyright law's access and substantial similarity test, the court gives more weight to Reece's commercially profitable distribution right than to Colucci's right to engage in cultural expression. This is borne out by the limited result in the case. While Colucci's "Nohe" cultural expression was deemed not similar to Reece's work, the court specifically stated that "[it] wishes to make clear, however, that its ruling is limited in nature and applies only to this piece of art, "Nohe." What this means is that other cultural expressions depicting hula kahiko could violate Reece's work. Accordingly, Reece has, *de facto*, monopolized more rights than he ever deserved. To illustrate this conclusion, the art gallery owner testified "it relies on a regular supply of art from local artists and approximately five percent of consignments are artworks featuring hula dancers[; . . . because of Reece's lawsuit,] artists have stopped producing artworks with hula images for the gallery and some have removed their [other] works from the gallery."¹⁵³ This is a clear example of how protecting Indigenous resources and intangible assets would benefit both Indigenous Peoples and non-Indigenous Peoples, alike. Both groups of artists could have felt safe to continue engaging in creative and cultural expressions; but now both groups fear litigation if they produce works similar to any of Reece's works, which primarily center on hula images.

Another likely unintended result from the case is that in order for Colucci and the art gallery to defend successfully against liability for copyright infringement, they had to agree that the 'ike motion of the hula kahiko was itself unprotected. The result is a judicial record that transforms an element of Native Hawaiian cultural expression and traditional practice into a commodity available for indiscriminate use by others with no consideration for the rights of Native Hawaiians.

152. See *id.* at 1202-03.

153. See *Reece*, 468 F. Supp. 2d at 1210.

As such, Native Hawaiians are dispossessed and disenfranchised of their right either to direct the appropriate use of the practice or to regulate how others would portray a component of Native Hawaiian identity for commercial or other purposes. The practical result of the court's decision is the granting of a license to allow others (corporations, non-Native artists, tourists, etc.) to freely distribute, monopolize, and profit from their external perceptions of the cultural images significant and meaningful to Native Hawaiians.

There is another disturbing aspect to the case, which relates to re-framing the Native Hawaiian narrative. Again, while likely unintended, the language and reasoning used in the opinion rewrites the narrative presented by Colucci, a Native Hawaiian artist. First, even though Colucci explained the derivation of her cultural expression, the court imposed its law regarding "copying" and gave marginal weight to the derivation of "Nohe." Colucci explained the origin of "Nohe":

["Nohe" was drawn] from her own memories as a hula dancer, from memories and photographs of her niece ("Nohe's" namesake) dancing hula and from pictures of other hula performances. She said she has created other stained glass works of hula dancers on the beach and that the dancers are always faceless, with similar skin and hair color and with a lei or flower in their hair. Colucci explained that she includes 'ilima in her dancers' lei because the flower is her halau's signature.¹⁵⁴

Colucci explained further that she omits facial features in an effort to represent all Hawaiian hula dancers, not just a single dancer. Despite Colucci's explanation of the faceless feature, the court when comparing the two works reinterprets Colucci's cultural expression in the following way: "The dancer's blank face makes her anonymous, whereas the model in Makaanani is clearly a specific person. . . ."¹⁵⁵ Colucci was, in essence, communicating to the court about the collective identity of Native Hawaiians. This very fine point about narrative exemplifies what is really present in Colucci's cultural expression and what is absent from Reece's work. The court could have identified this aspect of Native Hawaiian culture and practice to distinguish Colucci's work from Reece's work when analyzing "copying" in accordance with federal copyright law.

While the *Reece* court's decision-making power was to a degree limited by the procedural posture of this case, there were opportunities for the court to consider the adapted analytic framework when rendering its decision. First, either through dicta or the recognition of prior rights in the hula kahiko image, the district court could have made findings about the valid owner of the cultural image that was the

154. *See id.* at 1201.

155. *See id.* at 1209.

subject matter of Reece's photograph. Next, the district court could have considered whether Native Hawaiian rights in Indigenous resources and intangible assets would have been impaired by the unilateral transfer of hula kahiko to the public domain. Finally, the district court could have fashioned a more elegant injunction that would have comprehensively responded to what Reece was taking from both Native Hawaiians and non-Native Hawaiians by the threat of litigation for future cultural and creative expressions. For these reasons, the *Reece* decision should be viewed by Native Hawaiians and the Hawai'i judiciary as a clarion-call to implement the U.N. DRIP into state law as well as extend *Kalipi* rights to Native Hawaiian resources and intangible assets at the earliest opportunity.

V. INDIGENOUS LAW, LEGAL PLURALISM, AND RE(DE)FINING THE NARRATIVE

Customary law is much broader than the general legal system. It is dynamic; an expression of tradition and a means of expressing the rules that allow communities to operate effectively.¹⁵⁶ Mistakenly, the narrative associated with customary law is that it is rigid, inflexible, and even ancient.¹⁵⁷ Such characterizations are the foundations for

156. Kathryn Trees, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne — A Case Study*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS 214, 215 available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-06.pdf>; John Toohey, *Aboriginal Customary Laws Reference — An Overview*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS 173, 176 available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-05.pdf>; Chris Cunneen and Melanie Schwartz, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS 429, 431 available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-11.pdf>; Megan Davis and Hannah McGlade, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS 382, 387 available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-10.pdf>; Greg McIntyre, *Aboriginal Customary Law: Can It Be Recognized?*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS 342, 345 available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-09.pdf>; Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS 452, 452 available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-12.pdf>; Steven Churches, *Aboriginal Customary Law in the Context of Western Australian Constitutional Law*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS 534, 537 available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-14.pdf>; and Victoria Williams, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil, and Family Law*, in ABORIGINAL CUSTOMARY LAWS: PROJECT 94 BACKGROUND PAPERS (2006) available at <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-01.pdf>.

157. There is no doubt that there exists an air of immutability about Indigenous customary law but this in no way should be used to render the conclusion that Indigenous customary law is inflexible, static, and ancient. The Honorable John Toohey cites Professor Max Charlesworth's critique: "but one must distinguish between the

criticisms about Indigenous customary law's place in settling controversies about rights and obligations relating to knowledge, resources, and intangible assets owing their origins, in whole or in part, to Indigenous Peoples. These criticisms question Indigenous law's legitimacy in modern society. A few of the more prevalent criticisms question: Indigenous law's transparency, predictability, coherence, and consistency; the existence and reliability of customary institutions and systems; and the risks associated with elevating special interests above the majority.¹⁵⁸ The most insidious criticism, however, is steeped in the self-promoting argument that Indigenous law has been misused to advance the egoistic interests of the communities' most powerful members.¹⁵⁹

These are compelling arguments that shine suspicion on Indigenous law and legal systems, but these arguments are equally cogent when repositioned to reflect the shining light of scrutiny on any other legal system past or present. Despite this truism, it is worth responding to these criticisms in order to make way for the equally compelling arguments to support the implementation of Indigenous law and legal systems to recognize and protect Indigenous resources and intangible assets.

The first criticism would reject acknowledging Indigenous law and legal systems on grounds that they would not be transparent, predictable, determinate, coherent, and consistent. Understanding the positioning of this argument is key to recognizing the fallacy of what this argument would posit. Indigenous law would be applied to Indigenous resources and intangible assets, not to intellectual property that squarely exists by virtue of creation in the non-Indigenous world. Thus, if Indigenous Peoples govern Indigenous resources and intangible assets and they choose to acknowledge Indigenous law and legal systems, this does not have to be measured against what proponents of the western intellectual property rights regime would consider transparent, predictable, determinate, coherent, and consistent. As an ancillary matter, it is quite interesting that the intellectual property rights lobby is largely directed by corporate institutional actors who drive intellectual property rights policy to suit their vision of extensive ownership and control of technology, media, pharmaceuticals, and any

public rhetoric of Aborigines, which gives the impression that Aboriginal religion is essentially devoted to the faithful replication of the primordial design laid down by Ancestor Spirits, and the reality of actual life and practice where there is continual profess of development and creative invention." Toohey, *supra* note 156, at 174, 187.

158. See Peter Ørebeck, *The Place of Customary Law in Democratic Societies*, in *THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT*, *supra* note 41, at 290 (framing these criticisms in more general terms).

159. See Fred Bosselman, *The Choice of Customary Law*, in *THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT*, *supra* note 41, at 439 (reporting that "some observers of customary law systems have noted conflicts between the sexes or among age groups").

other valuable intangible asset to the exclusion of those unable to pay monopoly prices.

The next criticism would reject acknowledging Indigenous law and legal systems for their perceived lack of reliability. Indigenous law and legal systems rely on Indigenous Peoples being willing to assent to the law. Because customary law is contractual in nature, its existence depends on popular acknowledgement by Indigenous Peoples. To this end, Indigenous law and legal systems will remain reliable so long as they are acknowledged by Indigenous Peoples. Relying on Indigenous Peoples' acknowledgement is also what will keep Indigenous law and legal systems from becoming static and intractable. In order for Indigenous law and legal systems to remain vital to Indigenous communities, both urban and rural, Indigenous law and legal systems will have to continue to evolve with Indigenous circumstances. Thus, the reliability of Indigenous law and legal systems will be maintained by establishing mechanisms for redefining or abolishing out-of-date customs, practices, and laws.¹⁶⁰

Still, more objection to acknowledging Indigenous law and legal systems derives from the argument that such law is undemocratic in that it would elevate the interests of Indigenous Peoples and their law above the majority. Putting aside the colonization histories of Indigenous Peoples who were themselves displaced by the undemocratic application of the laws of the dominant settler society, this argument fails again for want of proof that recognizing Indigenous law for the protection of Indigenous resources and intangible assets would disenfranchise a powerful and disproportionately well-represented dominant settler society. Such arguments are fiction; their goals are meant to entrench the status quo in which the dominant settler society retains its laws that depend for their existence on the primacy of representative democracy as opposed to a true democracy where even "societal members of lower status or position initiate and contribute to custom."¹⁶¹

Finally, the most insidious argument for rejecting Indigenous law and legal systems is ironically that acknowledgement would mean certain members of Indigenous groups wielding power over other community members or even excluding the latter from Indigenous community participation. The irony in this criticism is barely palatable. Issues of domination, control, and marginalization plague any legal system. Such a criticism assumes that Indigenous Peoples do not maintain a framework of rights recognition within their own laws. This criticism can be responded to in many ways, but it seems most effective to remind the dominant settler majority that customary law represents the "living fabric of [Indigenous] life," which has been

160. See Ørebech, *supra* note 41, at 298-99.

161. *Id.* at 295.

under attack since first contact. The struggle of Indigenous Peoples to obtain rights recognition as against dominant settler societies is a history that teaches of the inequities and injustices that result from domination, control, and marginalization. Indigenous Peoples no longer tolerate this treatment from dominant settler societies and, therefore, it is unlikely that they will tolerate it within Indigenous communities.

There are strong and compelling arguments for acknowledging Indigenous law and legal systems, especially with respect to recognizing and protecting Indigenous resources and intangible assets. As a fundamental matter, all laws potentially impacting the rights in and interests to Indigenous resources and intangible assets should aim to achieve comprehensive protection. Thus, it would be unethical, inaccurate, and even incompetent for proponents of a unitary western legal system to ignore Indigenous law, procedural protocols, or community rules that govern Indigenous resource and intangible assets.¹⁶² Ignoring the suitability of Indigenous law and legal systems to protect Indigenous resources and intangible assets would result in diminishing the value of the asset and potentially depleting the asset to a point where there would be no value for any group or individual.

Despite the above criticisms, Indigenous law shares significant democratically rooted ideals with western common law and with the theoretical, idealistic principles that democratic legislation is normatively meant to achieve. For example, Aboriginal customary law has a body of rules, values, and traditions accepted in Indigenous societies as establishing standards and procedures to be followed and upheld.¹⁶³ In addition, acknowledging Indigenous law and legal systems will empower Indigenous Peoples and reinforce the responsibility that accompanies law-making and law-enforcing power.

Looking inward, proponents of Indigenous law and legal systems argue that protection of Indigenous knowledge should originate at the grassroots level as an initiative of the Indigenous or local communities with the active support of their national governments.¹⁶⁴ This inward

162. See generally Silke von Lewinski, *Protection of Genetic Resources, Traditional Knowledge and Folklore by Legal Regimes beyond Intellectual Property*, in *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE*, *supra* note 106, at 386-96; see Meghana RaoRane, *Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions*, 15 *PAC. RIM L. & POL'Y J.* 827, 846 (2006) (concentrating mainly on the application of Indigenous customary law to protect Indigenous cultural expression, RaoRane argues that Indigenous customary law has satisfactorily governed the use of TCEs, and is flexible enough to protect the diverse cultural expressions of Indigenous communities around the world).

163. Sarah Pritchard, *The Significance of International Law*, in *INDIGENOUS PEOPLES, THE UNITED NATIONS, AND HUMAN RIGHTS*, *supra* note 51, at 14 (citing K. Maddock, *Aboriginal Customary Law*, in *ABORIGINES AND THE LAW: ESSAYS IN MEMORY OF ELISABETH EGGLESTON* 212, 230-32 (Peter Hanks and Bryan Keon-Cohen eds., 1984)).

164. See Oguamanam, *supra* note 56, at 201.

approach is in line with a bottom-up or upstream model of extra-legal lawmaking that redistributes law equally among members of society.¹⁶⁵ The upstream approach makes possible the adaptation of Indigenous law to Indigenous-related rights and obligations. The approach allows Indigenous law and legal systems to be flexible, to respond to the modern conditions of Indigenous Peoples, and to facilitate the evolution of “the living fabric of [Indigenous] life.”¹⁶⁶

Acknowledging that Indigenous law is real law and that it serves as the foundation for Indigenous legal systems will also promote cooperation and innovation inside and outside of Indigenous communities. In many cases, Indigenous law represented and continues to represent the original common law of certain lands. Indigenous law systems have or are capable of implementing governing bodies, representatives, constitutions, and Acts of Law. Most important, Indigenous law and legal systems are legitimate because Indigenous Peoples, as well as non-Indigenous Peoples, continue to acknowledge and assent to Indigenous law through ongoing adherence to rules, practices, or ceremonial processes and accompanying sanctions.¹⁶⁷ By acknowledging Indigenous law and legal systems, the dominant settler society will find that Indigenous Peoples might be more willing to cooperate with non-Indigenous Peoples because there will be built a level of trust, acceptance (without assimilation), and a willingness to innovate alongside non-Indigenous Peoples to evolve knowledge systems of both Indigenous and non-Indigenous Peoples.

VI. CONCLUSION

There is significant ground to cover in order to reach a truly democratic society where Indigenous and non-Indigenous Peoples are treated equally. The United Nations Declaration for the Rights of Indigenous Peoples is one small step toward this equality. More steps need to be taken to ensure the protection of Indigenous Peoples and their resources and intangible assets. Many legal and political thinkers, from the late Darrell Posey to Ian Hugh Kawharu and Maui Solo-

165. See Ørebech, *supra* note 41, at 282-83 (comparing top-down and bottom-up democracy to assess the benefits of customary law. Ørebech concludes “top-down proponents often overlook the disadvantageous aspects of the parliamentary decision-making process. Although the executive branch may be indirectly democratic, heavy lobbying and overly expensive delegation of enforcement power create opportunities for ‘groupthink,’ ‘[g]roup polarization,’ and corporate strongholds[.]” ultimately leading to deviations from legislative intent or even corruption. The end result is that “[t]he ruling power is not the ‘pluralistic channel will,’ but the will of bureaucracy and strong corporate powers” – a far cry from “ideal democracy.”).

166. See *id.* at 283 (presenting the normative case for recognizing the legitimacy of customary law premised upon bottom-up democracy as opposed to a faulty bureaucratic system – a disabled legislative body – that has crippled democracy by abrogating true representation of the will of the people).

167. See *id.* at 282.

mon,¹⁶⁸ are aware that Indigenous resources and intangible assets represent one of the most significant modern rights issues for Indigenous Peoples both internationally and domestically. Implementation of the U.N. DRIP and the recognition of Indigenous law and legal systems are two vital tools to refind Indigenous rights for the survival of Indigenous identity in a constantly evolving, globalizing, and resource hungry society.

168. See *Introduction*, in WAITANGI REVISITED: PERSPECTIVES ON THE TREATY OF WAITANGI, *supra* note 6, at xviii.