

8 The Role of Traditional Leadership and Customary Law under *Sui Generis* Systems of Intellectual Property Rights in Traditional Knowledge

*Gabriel Muzah**

1 Introduction

The global economy is transforming into a knowledge based economy where knowledge becomes valuable when recognised and transferable within intellectual property rights frameworks. Economic globalisation has brought close attention to different kinds of knowledge in various parts of the world resulting in the establishment in 2000 of the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) where member states discuss the intellectual property issues that arise in the context of access to genetic resources and benefit-sharing as well as the protection of traditional knowledge and traditional cultural expressions.¹ Existing intellectual property rights frameworks have been proposed as possible alternative means that could be utilised for the protection of traditional knowledge,² but indigenous communities have demanded an instrument that recognises its holistic nature and the role that traditional leadership and customary laws protection systems play in the protection and preservation of their knowledge.³ This approach entails that measures for the protection of traditional knowledge are mutually supportive with other international systems and processes discussed in the Convention on Biological Diversity (CBD) and the Food and Agricultural Organization of the United Nations (FAO), the International Labour Organisation (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169 or Convention) and the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP or Declaration). As part of this international dialogue, many members of the IGC – including Brazil, Colombia, Egypt, Ethiopia, Indonesia, Iran, Morocco, the African Group, the Andean Community, the Asian Group, the Russian Federation and Venezuela – have called for the establishment of *sui generis* systems to complement or supplement the intellectual property rights system.⁴ These systems are premised on traditional leadership and customs of indigenous communities making customary law a vital area of inquiry as it has attained importance for the definition of national, regional and international regulations on traditional knowledge and genetic resources which is perceptible from an analysis of national constitutions.

However, despite the recognition of traditional knowledge within intellectual property rights frameworks, a gap in literature exists with regard to the effectiveness of customary law as a protective system. To remedy the gap, this paper aims at analysing the role of customary law under *sui generis* systems of intellectual property rights in traditional knowledge. The paper is based on a desk top analysis where the following research questions will be probed:

* Technical and Business Innovation Advisor, College of Business, Peace, Leadership and Governance, Africa University, Mutare, Zimbabwe.

¹ See <<http://www.wipo.int/tk/en/igc/>>.

² WIPO GRTKF/IC/6/14, para. 76, statement by the delegation of the United States.

³ WIPO GRTKF/IC/6/14, para. 228 and WIPO/GRTKF/IC/7/15/Prov. 2, para. 139, statements by the representative of Kaska Dena Council.

⁴ See WIPO, Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options, para. 108, n. 42, WIPO Doc. WIPO/GRTKF/IC/6/3 (2003), available at: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_3.doc>.

- What is the role played by customary law under the *sui generis* systems of intellectual property rights in traditional knowledge?
- To what extent is the mutual supportiveness of this system with human rights?

2 Relevance of the Study

Reference to the Zimbabwean Constitution provides a platform for highlighting the importance of customary law in defining regulations on traditional knowledge and genetic resources. Guidance in interpreting and applying the Zimbabwean Constitution is given explicitly to the courts, tribunal, forum or body in regard to the rights contained in Chapter 4, i.e. the Declaration of Rights. In Section 46(1)(a) the courts are enjoined when interpreting the Declaration to “give full effect to the rights and freedoms enshrined in this chapter”. The word “full” entails that no margin of appreciation of international law is to be permitted under Zimbabwean law. In applying the Declaration of Rights, the courts must also adhere to “the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom”, and, in particular, the principles and values set out in section 3 (part of Chapter 1) which sets out “founding values and principles” which include the supremacy of the Constitution, the rule of law, good governance and recognition of the equality and inherent dignity and worth of all human beings. Furthermore, the courts in applying and interpreting the Declaration of Rights must take into account international law and all treaties and conventions to which Zimbabwe is a party (section 46(c)), may consider relevant foreign law (section 46(e)) and must pay due regard to all the provisions of the Constitution, in particular the national objectives (section 46(d)). So, for example, in the case of misappropriation of traditional knowledge belonging to an indigenous community of Zimbabwe, in interpreting the Declaration of Rights, the courts must take into account the right to preservation of traditional knowledge which forms part of the national objectives in Chapter 2 and international laws and treaties which likewise secure these rights. Accordingly, the jurisprudence of international human rights law applying these instruments must be taken into account by the proposed Constitutional Court when interpreting and applying the Declaration of Rights.

3 Agreements and Fora on Human Rights, Indigenous Peoples and Traditional Knowledge

The integrity of traditional knowledge systems is maintained through the recognition of its holistic nature. It is linked to biodiversity, landscapes, cultural and spiritual values and customary laws. It can be best illustrated by the intrinsic relationship a Zimbabwean traditional community has with the Marula tree which forms an important part of their diet, tradition and culture to an extent of referring to it as the “tree of life” due to its ability to provide food and medicine which are fundamental human needs.⁵ The ripe fruits are eaten raw, the kernels are eaten either raw or roasted and fruit juice is fermented to produce children’s beverage or traditional beer, making jam, oil processing and added to sorghum or millet porridge. The wood is used for making light weight utensils which include drums, mortars, traditional wooden bowls and decorative curios which are used during cultural events such as marriages and other traditional ceremonies. The bark, leaves and roots are used for medicinal purposes to treat diarrhoea, sore eyes, toothaches, colds and flu.⁶ These therapeutic claims are supported by

⁵ R. A. Street and G Prinsloo, ‘Commercially Important Medicinal Plants of South Africa: A Review’, *Journal of Chemistry* (2013).

⁶ A. Maroyi, ‘Local Knowledge and Use of Marula [*Sclerocarya birrea* (A. Rich) Hochst.] in South Central Zimbabwe’, *12:3 Indian Journal of Traditional Knowledge* (2013) p. 398, at p. 403.

literature with the bark and leaf extracts having anti-diarrhoeal, anti-diabetic, anti-inflammatory, anti-septic, anti-microbial, anti-plasmodial, anti-hypertensive, anti-convulsant and anti-oxidant properties.⁷ This intergenerational knowledge was developed through interaction with the environment, and such intellectual creations are inseparably embedded. The biodiversity and landscape associated knowledge with regards to the marula tree cannot be separated from cultural and spiritual values which are also regulated by customary laws. According to Bash, for a variety of conceptual, historical and political reasons, contemporary international law distinguishes between “natural” land forms, cultural monuments, movable cultural property, the performing arts and scientific knowledge. Indigenous peoples do not make these distinctions.⁸

This holistic understanding of traditional knowledge dates back to the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993)⁹ which was the first international conference on the cultural and intellectual property rights of indigenous peoples attended by over 150 delegates from 14 countries including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA and Aotearoa. It underlines that indigenous flora and fauna is inextricably bound to the territories of indigenous communities, and that land and natural resource claims must be settled in order to promote traditional production systems. It further notes that existing protection mechanisms are insufficient for the protection of indigenous peoples’ cultural and intellectual property rights.

During the same year, 1993, the Convention on Biological Diversity entered into force. It has three main objectives: “the conservation of biological diversity, the sustainable use of the components of biological diversity and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”. Article 8(j) requires parties to:

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and *promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices.*¹⁰

Article 10(c) requires countries to “protect and encourage the customary use of biological resources in accordance with traditional cultural practices”. This set the tone of the recognition of rights to land and traditional territories, natural resources and self-determination, as vital for the survival of indigenous peoples and cultures. The NGO resolution on farmers’ rights at the UN Food and Agriculture Organisation Conference in Leipzig in 1996 further emphasised the importance of recognising that collective knowledge is intimately linked to cultural diversity, land and biodiversity and cannot be dissociated from either of these three aspects. It became the precursor to the recognition of farmers’ rights, for the first time, in a binding international instrument. The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) was approved by FAO in November 2001 and entered into force on 29 June 2004. Its objectives are the conservation and sustainable use of plant genetic resources for food and

⁷ J. A. Ojewole *et al.*, ‘Sclerocarya birrea (A. Rich) Hochst [Marula] (Anacardiaceae): A Review of Its Phytochemistry, Pharmacology and Toxicology and Its Ethnomedicinal Uses’, 24:5 *Phytoteraphy Research* (2010) p. 633, at p. 639.

⁸ R. Barsh Barsh, ‘How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property’, 8:1 *International Journal of Cultural Property* (1999) p. 14–47.

⁹ See the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993), available at: <<http://www.ngaaho.maori.nz/cms/resources/mataatua.pdf>>.

¹⁰ Emphasis added.

agriculture (i.e. agricultural biodiversity) and the fair and equitable sharing of benefits derived from their use. Zimbabwe is a contracting party and ratified the convention in 2005. Article 9 sets out the following measures that government should take to protect and promote farmers' rights:

- (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- (b) the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture;
- (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

Headquartered in Geneva, Switzerland, the International Labour Organisation was the first UN body that specifically dealt with indigenous matters. Work started in 1926 with the development of standards for the protection of indigenous workers. ILO first focused more on the integration of indigenous workers into mainstream society than on dealing with and securing customary indigenous rights. This approach changed when Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries was adopted in 1989. This treaty entered into force in 1991. Convention 169 focuses on land rights, labour, social security and education. While Article 15(1) provides for a rights-based approach to natural resources and thus complements the 1992 Rio documents, the issues of traditional knowledge and intellectual property rights are beyond the scope of Convention 169:¹¹ “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.” The Convention does not define who the indigenous and tribal peoples are but provides criteria for describing the peoples it aims to protect. Article 1(2) states: “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.” Article 1(1) describes the difference between tribal and indigenous peoples which is also of relevance for the interpretation of the CBD. These treaties speak of “indigenous and local communities” without giving any indications who might be the actual members of these groups. According to Convention 169, the following distinction is made: 1) *tribal peoples*: their social, cultural and economic conditions distinguish them from other sections of the national community. Their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations, and 2) *indigenous peoples*: are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries. Do, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. The main drawback of Convention 169 is the very limited membership of currently 22 states, of which Zimbabwe is yet to be part. Although it is legally binding for its members, it does not include an enforcement and compliance mechanism. The specific importance of this Convention for indigenous peoples living in its member states specifically in the context of traditional knowledge and intellectual property rights was recently underlined by a judgement of the Supreme Court of Costa Rica. While supporting the future patentability of inventions “essentially derived from the knowledge associated with traditional biological practices or cultural practices in the public domain” in Costa Rica, the Supreme Court also stated that such an amendment “is a change that directly affects the interests of indigenous communities, and, as a result, in conformity with the 169 Convention this amendment must be consulted ...”. This judgement supports the call by indigenous peoples' organisations to be

¹¹ Text available at: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>.

formally included in the development of national intellectual property regulations that would cover their genetic resources and traditional knowledge.

The most comprehensive expression of indigenous peoples is found in the 2007 United Nations Declaration on the Rights of Indigenous Peoples. The UN General Assembly, in adopting the Declaration on 17 September 2007, referred to it as a “major step forward towards the promotion and protection of human rights and fundamental freedoms for all”. It stresses the right to, *inter alia*:

- Self-determination, representation and full participation;
- Special measures to control, develop and protect sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of flora and fauna and oral traditions;
- Control access and assert ownership over plants and animals vital to indigenous cultures; and to own, develop, control and use the lands and territories, including flora and fauna and other resources which they have traditionally owned or otherwise occupied or used;
- Free, prior and informed consent (FPIC);
- Just and fair compensation for any such activities that have adverse environmental, economic, social, cultural or spiritual impact; and
- Collective as well as individual human rights.

Although the UNDRIP is not legally binding and consequently does not provide for compliance and enforcement mechanisms, its provisions add to the existing body of customary international law, and is a valuable reference point when articulating the rights of indigenous peoples.

Relevant member states of the African Regional Intellectual Property Organization (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore on 9 August 2010 at Swakopmund in the Republic of Namibia. This was in accordance with the objectives of ARIPO generally and in particular Article III(c), which provides for the establishment of such common services or organs as may be necessary or desirable for the coordination, harmonisation and development of the intellectual property activities affecting its member states. The Protocol recognises the intrinsic value of traditional knowledge, traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, scientific, ecological, agricultural, medical, technological, commercial and educational value and further emphasises that legal protection must be tailored to the specific characteristics of traditional knowledge and expressions of folklore, including their collective or community context, the intergenerational nature of their development, preservation and transmission, their link to a community’s cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned. The purpose of this Protocol is: “(a) to protect traditional knowledge holders against any infringement of their rights as recognized by the Protocol; and (b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context”. The Protocol came into force on 11 May 2015, three months after the government of the Republic of Zimbabwe deposited the sixth instrument of ratification,¹² and became the latest *sui generis* system of intellectual property rights in traditional knowledge.

¹² See more at: <<http://www.aripo.org/news-events-publications/news/item/54-entry-into-force-of-the-aripo-swakopmund-protocol-on-the-protection-of-traditional-knowledge-and-expressions-of-folklore#sthash.17yyd46Y.dpuf>>

4 The Relevance of Traditional Leadership and Customary Law as the Primary Regulatory Mechanism over Uses of Traditional Knowledge

The relevance of traditional leadership and customary law as the primary regulatory mechanism over uses of traditional knowledge is deep rooted in the recognition of the holistic nature of traditional knowledge and its expression through substantive legal principles. Chapter 15 of the Zimbabwe Constitution recognises the institution, status and role of traditional leaders under customary law. It further provides that a traditional leader is responsible for performing cultural, customary and traditional functions of a chief, head person or village head for his or her community. The functions of these leaders include, among others: the promotion and upholding of cultural values of their communities and, in particular, to promote sound family values; taking measures to preserve the culture, traditions, history and heritage of their communities, including sacred shrines; facilitating development; in accordance with an Act of Parliament, to administer communal land and to protect the environment and to resolve disputes amongst people in their communities in accordance with customary law. This implies that traditional leaders have the capacity to regulate the use of traditional knowledge using customary laws as a mechanism. The Zimbabwean High Court confirms customary law as a primary regulatory mechanism as decided in *Munodawafa v. Masvingo District Administrator & Others*¹³ where the plaintiff brought an action for an order declaring that the customary laws of succession were not observed nor given due consideration in the appointment of the fifth defendant as chief, directing the responsible minister to recommend to the president that the fifth defendant should be removed from the chieftainship, and requiring that a meeting of the elders of the clan be convened to elect the most suitable candidate. The fifth defendant argued that the Court no longer had jurisdiction in such matters in view of the wording of section 283 of the 2013 Constitution. This provides that an Act of Parliament must provide for, *inter alia*, the appointment, suspension, succession and removal of traditional leaders, in accordance with the prevailing culture, customs, traditions and practices of the communities concerned. However, the appointment, removal and suspension of chiefs must be done by the president on the recommendation of the provincial assembly of chiefs through the National Council of Chiefs and the minister responsible for traditional leaders and in accordance with the traditional practices and traditions of the communities concerned. Disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the president on the recommendation of the provincial assembly of chiefs through the minister responsible for traditional leaders. The plaintiff argued that, as the summons had been issued before the 2013 Constitution came into effect, the matter fell to be dealt with in terms of the procedure previously applicable. It was held that constitutionally, as provided for by section 171, the High Court has inherent jurisdiction to hear all civil and criminal matters throughout Zimbabwe. The High Court is therefore always a forum of jurisdiction that can be selected by the parties, and the Court will exercise its jurisdiction where it is clear that it should do so. Critically, however, where domestic remedies for resolving the issue are provided, as here, the Court will want to know why it should exercise its inherent jurisdiction if such remedies have not been exhausted. There was no reason why the remedies provided in section 283 of the Constitution should not be exhausted first.¹⁴

Defining traditional knowledge also provides guidance on the relevance of customary law. The Swakopmund Protocol defines traditional knowledge as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge

¹³ (HC 8352/11) [2015] ZWHHC 571 (23 June 2015).

¹⁴ See <<https://www.zimlil.org/zw/judgment/harare-high-court/2015/571/>>.

is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources. This knowledge can only be effectively protected in accordance with laws, norms and practices of these local or traditional communities. These laws, norms and practices are defined as customary law by the said Protocol. Riley notes that:

[t]ribal law is drawn from a tribe's traditional customary law, tribal belief systems, and other contemporary forms of tribal governance, including ordinances and tribal constitutions. It therefore reflects not only substantive legal principles, but also the cultural context from which they evolved. Through tribal law, indigenous governance of cultural property and traditional knowledge will correlate specifically to the works tribes seek to protect, allow for forms of punishment consistent with the community's values, and properly incentivize behavior that is good for the community at large.¹⁵

Traditional knowledge can also be defined in relation to how it is developed, responds and adapts to environmental, social, cultural and economic pressures and demands. A WIPO report notes: "What makes knowledge 'traditional' is not its antiquity: much traditional knowledge is not ancient or inert, but is a vital, dynamic part of the contemporary lives of many communities today. It is a form of knowledge which has a traditional link with a certain community."¹⁶ This dynamism also subsists in customary law as noted by one judicial decision: "[O]ne of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."¹⁷ The link between traditional knowledge and customary law suggests that solutions to traditional knowledge issues drawn from customary law can succeed. Customary law arguments have been used to support claims to intellectual property rights in traditional knowledge. An example is an Australian case involving aspects of copyright law, *Yumbulul v. Reserve Bank of Australia*, where the plaintiff asserted claims against the Federal Reserve Bank of Australia and the agency that represented the plaintiff in connection with a license agreement to reproduce on a commemorative ten dollar note an indigenous design that he made. The court found that the plaintiff inherited from his mother, a member of the Galpu clan, the right to make the traditional design that was the subject matter of the law suit. Unchallenged evidence was presented to the court that the "attainment of the right to make such a [design] is a matter of great honour, and accordingly abuses of rights in relation to the careful protection of images on such poles is a subject of great sensitivity".¹⁸ This then becomes evident that the role of customary law under the Swakopmund Protocol is to act as the primary regulatory mechanism as it is within the scope of recognising the holistic nature of traditional knowledge.

5 Mutual Supportiveness of the Swakopmund Protocol with Human Rights

The preamble of the Swakopmund Protocol acknowledges the value of traditional knowledge systems and their contribution to local and traditional communities as well as "all humanity". It further expresses the need: to recognise and reward the contributions made by such communities to the conservation of the environment, to food security and sustainable agriculture, to the improvement in the health of the populations, to the progress of science and

¹⁵ A. Riley, "Straight Stealing": Towards an Indigenous System of Cultural Property Protection, 80 *Washington Law Review* (2005) p. 69, at p. 90.

¹⁶ WIPO, *Intellectual Property and Traditional Knowledge 6*, available at: <http://www.wipo.org/freepublications/en/tk/920/wipo_pub_920.pdf>.

¹⁷ *Lewis v. Bankole*, [1908] 1 N.L.R. 81, 100-01 (Nig.).

¹⁸ *Yumbulul v. Reserve Bank of Australia*, at 123.

technology, to the safeguarding of cultural heritage, to the development of artistic skills, and to enhancing a diversity of cultural contents and artistic expressions. The preamble also underscores the need to respect the continuing customary use, development, exchange and transmission of traditional knowledge and expressions of folklore by traditional and local communities, as well as the customary custodianship of traditional knowledge and expressions of folklore. Meeting the needs of the holders and custodians of traditional knowledge and expressions of folklore is an important aim of the Protocol. Contained in this aim is the empowerment of the holders of traditional knowledge and expressions of folklore, in order for them to exercise “due control over their knowledge and expressions”. The preamble emphasises that the protection of traditional knowledge and expressions of folklore must be “tailored” to the specific characteristics of such knowledge and expression.

This is in support with the provisions the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR, entered into force in 1976) which establishes the right to self-determination, including the right to dispose of natural resources, implying also the right to protect these resources including intellectual property. The Protocol also makes available the protection of intellectual property to traditional communities as it conceptualises the *sui generis* protection of traditional knowledge in line with Zimbabwe’s constitutional provisions, which states that all are equal before the law and are entitled without any discrimination to equal protection of the law. Prior to this *sui generis* system of intellectual property rights in traditional knowledge positive protection through existing mechanisms tended to discriminate traditional or local communities as they did not recognise the holistic and collective nature of these rights. This is evident in the Australian case of *Bulun Bulun v. R & T Textiles Party Ltd.*¹⁹ The suit was based in part on a claim of equitable ownership of the design by one of the plaintiffs, an artist, on behalf of his indigenous group. The plaintiffs contended that under indigenous customary law the indigenous people were the traditional owners both of the body of ritual knowledge from which the painting was derived and of the subject matter of the painting. While acknowledging the possible application of indigenous intellectual property law from 1788 (when Australia was first occupied by the Europeans) to 1912 (when the Copyright Act was passed), the court held that the notion of “communal title” advocated by the plaintiffs could no longer be supported under Australia’s legal system where copyright matters were now governed entirely by statute. The court decision is supported by the language in section 8 of the current Copyright Act that “copyright does not subsist otherwise than by virtue of this Act”. The Court observed that under the Copyright Act, copyright is owned by the “author of a work”, a concept held to exclude any notion of group ownership in a work unless it is a “work of joint authorship” within the meaning of the Act.²⁰

The Protocol extends protection to traditional knowledge that is: (i) generated, preserved and transmitted in a traditional and intergenerational context; (ii) distinctively associated with a local or traditional community; and (iii) integral to the cultural identity of a local or traditional community that is recognised as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols. It further prescribes the beneficiaries of protection as the owners of the rights shall be the holders of traditional knowledge, namely the local and traditional communities, and recognised individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context in accordance with the provisions of section 4. This can be interpreted as providing the right for collective property and protection against being

¹⁹ *Bulun Bulun v. R & T Textiles Party Ltd.* (1998), 41 I.P.R. 513, 525 (Austl.).

²⁰ *Ibid.*, at 525

deprived of that property. This is mutually supportive of the Declaration of Rights as set out in Chapter 4 of the Constitution of Zimbabwe which provides for the right to own property alone as well as in association with others. It also provides for the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. This provision implies the protection of rights over advancements and innovations based on traditional knowledge.

While not legally binding, UNDRIP affirms a positive right of indigenous people 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. These set of rights are potentially covered by section 9 of the Swakopmund Protocol which follows the established trend to link the use of traditional knowledge to the two principles that became prominent in the Convention of Biological Diversity: the principle of prior informed consent and the principle of sharing benefits. Section 9 provides that the protection to be extended to traditional knowledge holders shall include the fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties. The national competent authority shall, in the absence of such mutual agreement, mediate between the concerned parties with a view to arriving at an agreement on the fair and equitable sharing of benefits. The right to equitable remuneration might extend to non-monetary benefits, such as contributions to community development, depending on the material needs and cultural preferences expressed by the traditional or local communities themselves.

6 Conclusion

The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the framework of the African Regional Intellectual Property Organization has made traditional knowledge become valuable as it recognises and makes it transferable through intellectual property rights frameworks. The understanding of its holistic nature affirms the effectiveness of traditional leadership and customary law as the primary regulatory mechanism in this framework which is mutually supportive of the Declaration of Rights as provided in Chapter 4 of the Zimbabwean Constitution which also recognises the institution, status and role of traditional leaders under customary law. However, it should be noted that whilst Zimbabwe has deposited an instrument of ratification to this Protocol, it is yet to enact a statute to that effect. The Constitution provides in section 327(2) that an international treaty which has been concluded or executed by the president or under the president's authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.