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In Defence of 'Indigenous Cultural Property' : A Theoretical Analysis

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Abstract

Indigenous peoples were subdued and suppressed by the colonial powers in the wake of conquest. Colonial violence had substantial negative cultural consequences on indigenous peoples life as it resulted in rampant exploitation and misappropriation of their culture. Even in the post-colonial era, exploitation continued to persist. Since last few decades, with the rise of indigenous voices on both the domestic and international levels, there is persistent demand to protect indigenous culture as 'property'. However, there are certain challenges on theoretical level against the protection and conceptualisation of 'indigenous cultural property'. The present article delves into the complexities and contradictions offered by critiques of cultural property and justify protection indigenous culture as 'property' rights.

Keywords: Indigenous Peoples, Cultural Property, Indigenous Rights

All over generations, indigenous chronicles, folklores, and cultural objects have been the chief tools of endowing indigenous identities from ancestors to descendants. Regrettably, the repression of indigenous peoples by the immigrants and foreigners in the territories they used to live was revealed by brazen abuses of indigenous cultures.

Arrangements of cultural onslaught have included the confiscation of ancestral lands; misappropriation and commercialisation of indigenous cultural objects without consent of indigenous communities; misconstruction of indigenous histories; repudiation of indigenous mythologies and cultures; eradication of their languages and religions and; even the compulsory relocation of indigenous peoples from their families and refutation of their indigenous identity. Moreover, in the last couple of decades there has been outbreak of new practices for violating indigenous cultures. With the onset of modernization, States and international corporate houses organised their activities into areas hitherto regarded secluded and inaccessible, including many indigenous territories. Indigenous rights activism brought about publicity regarding the prevalent abuses; yet, it also revived the pursuit for procuring indigenous arts and traditional knowledge, which has culminated in the commercialization of indigenous cultures. The latest fashion of aboriginal tourism has also disordered indigenous historical and archaeological sites. Moreover, promoting conservation through bio- prospecting led to incognito licence for bio-piracy.

The present article dwells with some of intriguing questions considering the protection of indigenous cultural property. First, how to define indigenous cultural property? Second, why is it necessary to preserve and protect indigenous cultural property? Third, does the western view of property is akin to that of indigenous view towards cultural property and whether or not western intellectual property regime be appropriate in the protection of indigenous cultural property? It is divided into three sections. First section will provide critical appraisal of indigenous cultural property. Second section will deal with the rationale for protection of indigenous cultural property. Third section shall conclude the issue with some observations.

A Critical Appraisal of Indigenous Cultural Property

During the bygone decades, the politico-economic significance of cultural property is on an upward trajectory, and their global dimension has been persistently developing. This is chiefly due to the fact that the cultural property signifies the material manifestation of a culture and a civilization that are not always limited to a particular national identity (Casini 369). In the year1954, UNESCO coined the term 'cultural property' in the *Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*. Article 1 of the Hague Convention defines cultural property as:

> (a) moveable or immovable property of great importance to the cultural heritage of every people, such moments of architecture, and or history, whether religious or secular, archaeological sites. . . ; works of art; manuscripts; books and other objects of artistic, historical or archaeological interests (Article 1, Hague Convention, 1954).

Cultural property has also been classified as the "fourth estate" of the property—the additional three spheres in that sense are real property, intellectual property, and personal property (Wilf 177). Conventionally, cultural property is understood as tangible resources—"including documents, works of art, tools,

artefacts, buildings, and other entities that have artistic, ethnographic, or historical value"—were believed to go beyond conventional property notions and to worth unique protection (Underkuffler quoted in Carpenter et. al. 1032). Subsequently the definition of cultural property expanded to encompass intangible property within its domain. The same shall be discussed in the later section of this article.

Focusing back to the conception of cultural property, Patty Gerstenblith has opined that, cultural property is "composed of two potentially conflicting elements": "culture", which represents group-oriented concepts of value, and "property" which conventionally has concentrated on individualistic perspective of ownership (Gerstenblith 567). As the conventional outlook of property concentrates on the uniformity and surety of guarding the individual owner's rights of non-admission and alienation, chiefly for wealth-aggrandizement reasons. Partly for this reason, transcribing cultural property concept in the trajectory of indigenous rights is not free from paradoxes. As is in actuality, indigenous cultural property rise above the established legal notions of markets, title, and transferability that is usually related with ownership, making it all the more essential for property intellectuals to assess its characteristics (Carpenter et al. 1027). For example, In *Milirrpum v. Nabalco*[2] the Judge measured the bond of Australian Aboriginals to their ancestral land. He held that, instead considering that the land is their proprietary, they maintained that they are part of the land: that it had been relegated to them by their spirit ancestors and that they had special responsibility towards it and need to carry certain rituals on it (Chechi 63). By this illustration it is evident that, if term 'property' is used, it must be assigned meaning with great responsibility and attention to detail. Upsurge of such kind of an alternative approach to 'property' have revolutionise the concept of 'cultural property', especially in the context of indigenous peoples. Significant breakthrough in the domain consists of remarkable extension of subject matter, loosening the necessities of physical noticeability from cultural property and into the field of cultural heritage. Accordingly, cultural property has stretched out from the territory of the tangible into the province of the intangible (Carpenter et al. 1034).

In the indigenous civilisations where scholarly and mystical life has found shape not depicted by exceptionally massive structures or the making of a large number of material entities, the protection of cultural identity rests far more on the obligation of tradition and conservation of folklore, rituals and traditional skills (Prott & O'Keefe 312). Thus the notion of indigenous cultural property expands to encompass "all objects, sites and knowledge the nature of use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory" (E/CN.4/Sub.2/1995/26) . To rethink cultural property in this way has its own complications and paradoxes.

Critiques and Paradoxes of Indigenous Cultural Property

Despite some consensus on the concept of cultural property there remains several critiques and unresolved disputes over the notion itself. First set of

critique comes from the scholars who believe that the cultural property is not entitled to differential treatment and it must be subjected to 'market based approach' towards regulation and protection of property. Posner, a prominent scholar of this school, recognises the fact that cultural property protection is essential in upholding the dignity of a particular group of peoples. With such perception, he acknowledges that cultural property is discernible from other natural resources for the reason that it has intellectual and artistic value, because it offers a casement into history, and because its future worth is contingent on its judicious maintenance (Posner 225). Nonetheless these reflections for Posner are essentially emotional and found deficient in justifying any sort of "moral claim" by the [indigenous] peoples to their cultural property (Posner 223). Finally, he reposes in the market and argues that if people look for proprietorship of their cultural property, "they can always purchase it through a government or museum. They do not have any moral right to possession" (Posner quoted in Carpenter et al. 1040).

Second set of critique comes from scholars who believe that culture is part of public domain and hence concept of 'commons' is applicable to it. In his work titled *Who Owns Native Culture?*, anthropologist Michael F. Brown delve into peculiar questions concerning with right to indigenous cultural property. In the course of offering a judicious recognition of the significance of collective autonomy in conserving cultural heritage, Brown brings out two specific concerns. First, he contends that an unqualified application of law in cultural conflict inaptly "forces the elusive qualities of entire civilizations—everything from attitudes and bodily postures to agricultural techniques —into ready-made legal categories" (Brown 1041). Cultures withstands and rise above available legal claims, he asserts. Second, Brown contends that the propensity to manifest legal claims in terms of rigid 'rights' restricts the scope to reconcile cultural interests that are comparative and collectively experienced among people. Brown chooses as an alternative cultural property plans that enable some degree of access among competing groups (such plans requesting for recreational consumers of the public lands to freely circumvent indigenous peoples sacred sites) over processes that would confer title to one specific group (for example, apportioning copyright for a sacred song or image (Brown 1041).

Reason for arguing in above-mentioned manner is Brown's deep concern in the worldwide public access to information and culture. He put forward that it is the "cultural and intellectual commons"—that is subjected to onslaught (Brown 212-213). In arguing so, Brown builds his argument based upon the work of Lawrence Lessig who is of the opinion that both culture and intellectual property are intrinsically non-rivalrous[1] and for that reason, open to hybridity. Seeing that Culture is fluid (Spisak 86) and accessible to everyone, to 'propertize' it implies a licence to its 'owners' to exclude 'others' that is rest of the world.

Brown therefore attempts to tender both "descriptive and normative critiques" of indigenous peoples' struggle to govern intangible facets of indigenous culture (Carpenter et al. 1024). Pragmatically, he refers to "the

difficulty—the near—impossibility . . . of recapturing information that has entered the public domain" (Brown 317). Further, he highlights the tendency in indigenous peoples' to resist the unrestrained diffusion and commercialisation of indigenous culture, mostly by the way of Internet. In doing so he quotes a person from the Oregon's Klamath Tribe: "All this information gets shared, gets into people's private lives. It's upsetting that the songs of my relatives can be on the Internet. These spiritual songs live in my heart and shouldn't be available to just any one. It disturbs me very much" (Brown quoted in Carpenter et al. 1042). It is to be noted that league of scholars, such as Brown, critical about the notion of cultural property maintains that the religious or cultural injury that the members of indigenous communities, as in case of Klamath tribe, discern is nothing but an element of digitized globe that has empowered culture, for good or bad, to be accessible for all. The central point of whole arguments of such critic's is that an open access to culture needs to be welcomed rather than criticised, even though it causes some harm to indigenous culture.

Naomi Mezey in her work, *The Paradoxes of Cultural Property* also censure the application of law towards proprietorship or claims over cultural property because of issues pertaining to identity(Mezey 2004). Using a "cultural critique" analogous to Brown's, Mezey argues that "[t]he problem with the using ideas of cultural property to resolve cultural disputes is that cultural property uses and encourages an anemic theory of culture so that it can make sense as a form of property"(Mezey 2005). As per Menzey, such a theoretical notion spawns an unsolvable anomaly for two reasons. First, "[p]roperty is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things" (Mezey 2005). Consequently, "culture property claims tend to fix culture, which is anything unfixed, dynamic, and unstable" (Mezey 2005).

Placing herself in the same league with Brown, Mezey worries that indigenous assertions to cultural property will dwindle cultural blending and hybridity. She notes that "[i]t is the circulation of cultural products and practices that keeps them meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and in equality" (Mezey 2007). Hence, cultural property will have adverse consequence on an unrestricted spreading of culture, for the reason that "[a]s groups become strategically and emotionally committed to their 'cultural identity', culture tend to increase intragroup conformity intergroup intransigence in the face of cultural conflict" (Mezey 2007).

Mezey eventually emphasises that cultural property's conservationist standpoint provide a passive and theoretically arid construction of culture itself. Accordingly, she argues:

> [T]he idea of property has so colonized the idea of culture that there is not much culture left in cultural property. What is left are collective property claims on the basis of something we continue to call culture, but which looks increasingly like a collection of things that we identify superficially with a group of people (Mezey 2005).

Mezey's view point, along with some other critiques apprehensiveness about the propertisation of culture, appears to function from an assumed proposition: as property essentially entitle the owners to exclude others (Callies & Breemer 39), any cultural property right will unfortunately stalemate the natural, communion, and free movement of culture.

Third set of critique is from scholars concerning political ramification of propertisation of indigenous culture. Kimberlee Weatherall expresses her concerns that protection of indigenous cultural property may be condensed in the idea of 'cultural integrity' (Weatherall 222). She argues that 'cultural integrity' as a rationale for propertisation of cultural property has its own problems. First, overemphasis on cultural integrity has potential divisive side effects: "balkanisation, fragmentation, fundamentalism, illiberalism, segregation and prejudice" (Minow quoted in Weatherall 227). Second, similar to previously mentioned, "[c]ultures have no boundaries or fixed existence — they influenced by other cultures" (Weatherall 227). Any attempt or freeze culture would be detrimental to its growth. She express herself by quoting Waldron that, "[w]e need culture but we don't need cultural integrity" (Waldron quoted in Weatherall 222) .

Fourth set of critique is offered from scholars having a global, cosmopolitan perspective. One such cultural theorist K. A. Appiah, who takes a somewhat moderate stand on the issues pertaining to the protection of international cultural property. He points out that a lot of the works of cultural relevance are explained these days through the prism of 'cultural patrimony' as if it belongs to any particular group. However, as the time passes and changes are apparent due to globalisation, it becomes more and more critical to demand that a specific group or people have proprietorship over cultural work. Besides his uneasiness with a group-specific conceptualisation of cultural property, Appiah, similar to Brown and Mezey, manifests a much superior doubt with regard to the concept of propertising intangible objects, mainly in the case of indigenous peoples. The moment when the focus is shifted from tangible objects to intangible aspect of an object, Appiah writes, "[i]t's no longer just a particular object but any reproducible image of it that must be regulated by those whose patrimony it is. We find ourselves obliged, in theory, to repatriate ideas and experiences"(Appiah quoted in Carpenter et al. 1045). As a consequence of propertising culture, Appiah contends, we tend to alter the character of culture itself: we scale down ourselves to a level of "mine-and-thine reasoning" that thwarts the expected hybridity of cultural transaction. Moreover, as intellectual property laws be likely credit title holder, they are legally powerful enough to oversee the wellbeing of consumers—"audience, readers, viewers, and listeners" (Appiah 130).

Rationale for the Protection of Indigenous Cultural Property

There is no universally agreed upon justification for the protection of indigenous cultural property. International negotiations take place despite such lack of a coherent theory. The different justifications adopted by the scholars

are generally based on equity, property rights, cultural integrity etc. An outline to various justifications are as follows:

Equity as a Rationale

An important principle that underlines the thought for the protection of indigenous culture is enshrined under the notion of equity (Joint Report of UNESCO & UNEP of September, 2002). This may be further grouped into distributive justice (Fincham 68-73), moral rights (Berryman 299-301) and human rights (Kuprecht 15-20). As a result of colonisation and occupation, indigenous and local communities have been oppressed socially, politically, and economically. The resulting inequalities continue to affect the status of such communities. Given the colonial history in which colonizing powers discredited and exploited indigenous and local communities and the resulting inequality, the strongest argument for the protection of indigenous culture is based on distributive justice. Professor Keith Aoki, analysing the work of W.E.B. Du Bois, observes that "black folk" have had experiencing torture due to theft of their bodies, infants, hard work, labour yield, cultural artefacts and vivid traditions. He further contends that as result of structural inequality in the initial acquisition of intellectual property rights, the black inventors were deprived of beneficial distributive impact of the US patent system (Aoki 741). As the said system "[e]ncouraged a more diverse composition of inventors through broadened access to opportunities for investing in, exploiting, and deriving income from inventive activity" (Aoki 740). Aoki's goal is not to simply argue for restitution for the past injustice of failing to recognise black authorship, but to put intellectual property law in social context. Some historians, for example, suggest that Eli Whitney may have borrowed the central idea of notion of cotton gin from a slave named Sam (Aoki 745-746).

Another line of equity argument takes on moral rights perspective. Proponents for the protection of traditional indigenous knowledge adopt the moral rights of creator from Continental-Europe legal system and the Berne Convention to claim that the indigenous communities should have right over traditional indigenous knowledge (Torsen & Jane 38-40). For example, Stephen Munzer and Kal Raustiala, although noting that moral rights are contested, agreed that such justification should give two sets of rights as conceived by Wesley Hohfeld: the first "narrow liberty-right and/or claim-right would be disclosure (divulgation): to make an item for their TK known to the world . . . but to retain the power to keep that item from being used in any by others" (Munzer & Raustiala 73) followed by the "claim-right and power . . . to prevent the attribution of an item of TK to any person or group other than the indigenous communities that generated the item" (Munzer & Raustiala 73). Other scholars have used the principles of unjust enrichment and misappropriation theories. Several pharmaceutical companies tap the indigenous traditional knowledge to develop products and usually don't share the benefits contrary to morality (Nagan et al. 9).

The new discourse on indigenous rights under international law have come to the fore in direct retort to the determined struggles and demands of indigenous

groups as regard to the continued existence and growth of their distinct cultures (Wiessner 121). And protection of indigenous culture revolves around the principle of inviolable human dignity, which may not be in all situation individualists in nature. As Siegfried Wiessner, citing Neil MacCormick, observes that "[t]he Kantian ideal of respect for person implies... an obligation in each of us to respect that which in other constitutes any part of their sense of their own identity" (Maccormick 261).

Need for Property Rights

A traditional view of property recognises that property protects right-holders from other individuals to do just about whatever they wish with it (Stranhilevitz 7-14). Element of physicality was intrinsic to the concept of property. In other words, property rights were exercised on tangible objects. Such a conceptualisation of property is best expressed in the definition advanced by Blackstone:

> There is nothing which so generally strikes the imagination, and engages affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe (Blackstone 2).

With the emergence of science and technology conception of property underwent transformation wherein dephysicalization is recognised. Additionally, many scholars are of the view that in the modern context the metaphor of property as a" bundle of rights" (Penner 711) must be replaced with "web of interests"(Arnold 281). As Bentham put forward that property also transmits certain component of heritage and intrinsic value (Bell & Prachomovsky 12-17), it shall not be undesirable to incorporate element of heritage in the concept of property and protect cultural heritage of indigenous peoples within property right framework. Among the modern ideologues, who visualises such a broad notion of property, Hanoch Dagan's view would be relevant to note:

> [P]roperty is an umbrella for set of institutions, serving a pluralistic set of liberal values: autonomy, utility, labour, personhood, community and distributive justice. Property law, at least at its best, tailors different configurations of entitlements to different property institutions, with each such institution designed to match the specific balance between property values best suited to its characteristic social settings (Dagan 1419).

In the same league, Carpenter et al. advances two major shift in the notion of conventional property in order to incorporate indigenous peoples' aspirations in the protection of their culture. First, from 'personhood' to 'peoplehood' model of property. As they observe that an individual right approach to property is to a great degree formed by a theoretical tradition of personhood based upon the autonomy of individual (Carpenter et al. 1027). On the other hand 'peoplehood' echoes a collective consciousness and loyalty to a group distinguished by

"common descendant —a shared genealogy or geography" as well as by "contemporary commonality, such as language, religion, culture, or consciousness" (Carpenter et al. 1054). Second, from 'absolute ownership' to 'stewardship' model of property. Stewardship possibly means that there exists a "[f]iduciary duty of care or the duty of loyalty to something that one does not own"(Carpenter et al. 1069). The notion of stewardship has its application in various sectors; for example, in the corporate world it is understood as "the willingness to be accountable for the wellbeing of larger organisation by operating in service, rather than in control, of those around us" (Block XX). In the field of operational management, it used to motivate workers to work in the benefit and best interest of the company in spite of the fact that they are not the owners. Thus the concept of stewardship in property enables to recognise trusteeship consciousness of indigenous peoples towards its cultural property. For Carpenter et al. trail of stewardship in relation to cultural property consist of three key component: it includes rights of commodification that control the making of end products from cultural properties—goods that are derived from the cultural property, such as replication of religious artifacts; it consist of the right that oversee the acquisition and usage of these end products from cultural properties, including the right to ascertain whether to circulate knowledge with nonindigenous population for commercial purposes, for example in case of "cultural tourism" tasks; and it includes some degree of rights of representation and acknowledgement —in other words, the capacity of indigenous peoples to play a part in the commercialisation of their traditional knowledge and traditional cultural expressions (Carpenter et al. 1084).

Domain of Indigenous Cultural Property

Working on the determination of indigenous cultural property realm, Carpenter et al. identifies three broad subset stemming out from the notion of indigenous cultural property: tangible, intangible and real (Carpenter et al. 1084). Tangible cultural property includes "[h]istoric and prehistoric structures and artifacts, as well as cultural objects of importance to contemporary [indigenous peoples] tribes, such as sacred objects and objects of cultural patrimony" (Tsosie 5). The tangible cultural property is generally understood to mean physical form of property, which includes both moveable and immoveable property. Initially the understanding of cultural property was restricted to tangible objects. However, influential novelist Raymond Williams noted that 'culture' is living and evolving concept based on 'structure of feeling' and intangible products are key part of culture. He in reality illuminated the spirit of cultural property, which is an aggregate of not only tangible properties, but also and especially of the vital components signifying the living culture of human communities, their evolution, and their continuing development (William 122-132).

Intangible cultural property consist of, identifies Federico Lenzerni,: "(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive

events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship" (Lenzerini 107).

For indigenous peoples, continuing possession and safeguarding cultural property have become extremely difficult. Land plays a predominantly influential part in indigenous cultural survival for the following obvious reasons: a traditional land base empowers indigenous communities to dwell in-group's, in place where they are free to profess and propagate common culture and religion as a unified community. Moreover, it defines their historical events, languages, culture, and enduring peoplehood. Considering the fact that relationship with land defines indigenous peoples, thus traditional land forms the subject matter of real property (Carpenter et al. 1113).

Conclusion

Central to the above discussion was the question of legitimacy in protecting indigenous intellectual and cultural property. Protecting indigenous culture as a property right may be justified if the concept of property is premised on stewardship rather the traditional understanding of ownership. Stewardship model of cultural property allows the members of indigenous communities to be collective custodian to their culture.

End Notes

1. Non-rivalrous is a term applied usually in the field of economic. It represents such categories of goods, which can be consumed simultaneously by several consumers.
2. Milirrpum v. Nabalco Pty. Ltd (1971) 17 FLR 141.

Disclaimer

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