

COOMBE

CULTURAL PROPERTIES AND POLITICS

THE EXPANDING PURVIEW OF CULTURAL PROPERTIES AND THEIR POLITICS

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■ **Abstract** Cultural property is a field of law and politics that has expanded dramatically in the last two decades. The review explores the international legal, political, economic and technological terrain in which possessive relations to cultural forms have been articulated and incited, as well as the revitalization of human rights claims premised upon cultural grounds. Changing practices, behaviors, attitudes, and protocols regarding cultural heritage both index and reflect transformations in social relationships that are indicative of larger patterns of late modernity and decolonization. This premise is illustrated through considerations of changing practices in cultural heritage preservation, archaeological and curatorial relationships to indigenous heritage properties, development institutions and programs, uses of intellectual property, and the treatment of traditional knowledge and traditional cultural expression. A new body of negotiated *proprieties* is emerging in a space of unprecedented legal pluralism that constitutes a significant area for sociolegal inquiry.

INTRODUCTION: LEGAL, ECONOMIC, AND POLITICAL CONTEXT

The topics that might be addressed in a survey of law and social science literature pertaining to cultural property have multiplied exponentially in the past decade. In international law, it

was once possible to consider cultural property and cultural heritage as two discrete categories, but even then, commentators bemoaned the fact that the terms in different languages they referred to were seldom translations of the same concepts. *Biens culturels*, *beni culturali*, *bienes culturales*, *Kulturgut*, and *bens culturais*, for example, do not have the same legal meanings (Frigo 2004: 370). Such interpretive difficulties now seem provincial. In any case, these promise only to proliferate as these categories expand, their distinction implodes, and their subject matter and fields of reference proliferate.

No longer an esoteric area of law devoted to the protection of antiquities and their proper provenance, the concept of cultural property today is used to refer to intangibles as well as tangibles from folklore to foodstuffs as well as the lifeways and landscapes from which they spring. From seeds to seascapes, the world of things bearing cultural significance and the struggle over ownership rights apportioned to and appropriate to their significance has increased dramatically in scope and complexity.

Understanding the causes and consequences of the proliferation of cultural properties and of the even greater range of cultural rights claims is a natural area of inquiry for law and social science scholars and the field of sociolegal studies. Arguably, however, very little of the available scholarship is as interdisciplinary in scope as the politics of this dynamic field ideally demands. Few scholars fully understand the international legal frameworks and transnational policy initiatives that are driving governments, nongovernmental organizations (NGOs), development agencies, multilateral institutions, indigenous peoples, and communities, at various scales, to treat “culture as a resource” (Yudice 2003). Slightly more work has been done to relate this movement to new patterns of capital accumulation in a global political economy in which informational capital (Castells 1996–1998) has achieved new prominence (Verdery & Humphrey 2004, Watts 2006), but scholars are only beginning to consider the empirical specificities of informational capitalism in the emergence of culture as a resource (Harvey 2001, Parry 2004, Whatmore 2002).

Culture considered as a resource encompasses a wider range of values than the purely economic emphasis that culture conceived of as an asset tends to project. These values include social cohesion, community autonomy, and political recognition, and concerns about inappropriate forms of cultural appropriation, misrepresentation, and loss of languages and local knowledge. These latter anxieties are integrally related to the spread of

new communications technologies that have enabled cultural forms to be reproduced and publicized at a speed and velocity never before experienced (Burri-Nenova 2008). If digitalization has accelerated processes of social decontextualization, however, it has also heightened awareness of the exploitation of cultural heritage resources and enhanced political consciousness about the injuries they may affect (Coleman & Coombe 2009) while spurring new initiatives for managing and sharing cultural heritage resources in a politically sensitive manner (Christen 2005, 2009; Kansa et al. 2005).

More scholarship is needed to link the assertion of cultural properties to the political climate in which indigenous people have secured unprecedented new rights (Filbo & DeSouza 2007; Gow 2008; Hirtz 2003; Sylvain 2002, 2005) and to relate the revitalization of indigenous rights and identities to neoliberalism (Clark 2005, Coffey 2003, Hale 2002, Hristov 2005, Jung 2003, Perreault 2005, Speed 2007) and the rights-based practices (Goodale 2007) increasingly engaged to resist neoliberal development agendas (Coombe 2007, Weismantel 2006). Cultural claims are central to the collective struggles of many marginalized people for whom culture is a concept used reflexively to engage with wider state or nongovernmental institutions for purposes of identity assertion, greater inclusion in political life, the defense of local autonomy, and new forms of engagement with global markets (as well as resistances thereto). Academic recognition of this new politics of cultural properties and cultural rights has renewed scholarly concern with the conditions of cultural consciousness and relations of objectification, reification, authenticity, and decontextualization (Clifford 2004, Handler 2003, Harrison 2000, Kaneff & King 2004, Kirsch 2004).

Cultural rights in international law include intellectual property rights (or more generally, rights pertaining to moral and material interests in the works of which one is an author), rights of minorities to maintain and to develop cultural heritage, rights to participate in cultural life, rights to benefit from the arts and scientific achievement, and rights to international cultural cooperation (Helfer 2007, Macmillan 2008, Symonides 1998, Yu 2007). These are augmented by the cultural heritage provisions of the 2007 UN Declaration on the Rights of Indigenous Peoples, which even in draft form was an important part of the international customary law used to interpret other rights (Ahmed et al. 2008). Regional human rights instruments also assert the cultural rights of collectivities (Jovanovic 2005).

More recent UNESCO conventions have put new emphasis on intangible cultural heritage and cultural diversity, leading to greater state scrutiny of cultural assets and an enhanced reification of cultural traditions (Albro 2005a,b; 2007). Whether the objective is rural development, environmental sustainability, or rights-based development, an emphasis on maintaining (and in some cases profiting from) cultural distinction has assumed new significance in international arenas (Coombe 2005a; Ensor 2005; Radcliffe & Laurie 2006a,b). Certainly not all cultural rights struggles involve claims to cultural property. However, to the extent that assertions of cultural rights tend to assume a possessive rhetorical form and neoliberal ideological domination of government and institutional reform agendas tend to emphasize market-based solutions, cultural properties always figure on the policy horizons of these discourses, practices, and controversies.

New forms of cultural or ethnodevelopment, for instance, which may include ecotourism and the cultivation of culturally distinctive export goods, have been implemented as a means for realizing rural economic revitalization, social cohesion, human security, and political autonomy (Andolino et al. 2005; Aylwin & Coombe 2010; Laurie et al. 2005; Perreault 2003a,b; Radcliffe 2006b; Rhoades 2006). This is a distinctive area of neoliberal governmentality, involving both multilateral institutions and NGOs that seek to empower local communities, recognize traditions as sources of social capital (Bebbington 2004b, Dervytere 2004, Perreault 2003c), and otherwise encourage people to adopt a possessive and entrepreneurial attitude toward their culture and the social relations of reproduction that have traditionally sustained them (Elyachar 2005, Greene 2004, Lowrey 2009). These representations have their sources in diverse international legal instruments and their interpretation, in the institutional policies (Kingsbury 1999) that respond to them, and in the discourse of human and indigenous rights that shape local, NGO, and transnational responses to these policies. The latter provide normative resources for alternative articulations of culture as a source of moral economy, social meaning, and dignified livelihood (Edelman 2005, Gow 2008, Perreault 2005b, Saugestad 2001, Stewart-Harawira 2005).

Implementation of several international agreements and new programs of legal negotiation illustrate a recent acceleration of global policymaking with respect to culture. The Trade-Related Aspects of Intellectual Property (TRIPs) Agreement; the Convention on

Biological Diversity (CBD) Working Group on Article 8(j) activities; the World Intellectual Property Organization (WIPO) Inter-Governmental Committee on Traditional Knowledge, Traditional Cultural Expression, and Genetic Resources negotiation of draft provisions protecting traditional knowledge and traditional cultural expressions and state proposals for an international legal instrument to bind member states; the World Bank's Indigenous Knowledge for Development program; and the passage of UNESCO treaties on the Protection and Promotion of the Diversity of Cultural Expressions and the Protection of Intangible Cultural Heritage are all arguably reshaping local social relations while linking places into transnational networks of activity.

Although the role of NGOs and multilateral institutions in world policymaking and the political importance of indigenism as a global people's movement have received increased scholarly attention in the last decade, there is as yet little academic recognition of these institutions' significant role in the practices through which proprietary relationships to culture are evoked. They bring new notions of modernity and tradition to bear on local practices (Bebbington 2004a), reworking local understandings of relations between nature and culture, emphasizing the significance of social attachments to place, and encouraging local people to express territorial relationships in cultural and proprietary terms (Escobar 2001, 2003, 2008). Environmental and indigenous NGOs play an important role in the processes by which people come to understand themselves as indigenous, as constituting, in the words of the CBD "local communities embodying traditional lifestyles," or as possessing traditional environmental knowledge (Li 2000a,b, Tsing 1999). NGOs may exercise new forms of governmentality under neoliberal regimes (Bebbington 2005; Bryant 2002a,b), such as those that attempt to protect biological and cultural diversity, locate traditional knowledge and traditional cultural expressions, create inventories of intangible cultural heritage, and bring culturally distinct goods to market (Coombe 2010a,b). This is an area that has received scant sociolegal attention.

It is impossible to canvas the scholarly literature in all these areas relevant to cultural property. Instead, I focus on areas of particularly strong concentrations of scholarship, arguing that the proliferation of claims to cultural property might be more significant as an indicator of and impetus toward transformations in political relationships than as an area requiring domestic or international property law reform, although such reforms seem

immanent at different scales in various jurisdictions. The production, exchange, and consumption of cultural property involves the construction, recognition, and acceptance of social groups and group identities in global public spheres as much as it concerns control over objects per se. Changing practices, behaviors, attitudes, and protocols regarding cultural heritage both index and reflect transformations in social relationships that are indicative of larger patterns of late modernity and decolonization.

RETHINKING CULTURAL HERITAGE

As geographer David Harvey (2001) suggests, a concern with the past and with the proper treatment of material objects from that past has a long history reflective of a more general human concern with individual and group identities. Although the use of material culture to bolster national ideologies is well known, he argues that an undue emphasis on this modern phenomenon may work to preclude engagement with more central questions about the use of heritage in producing identities and legitimating power (Harvey 2001, pp. 320–33). Nonetheless, the particular discourse of heritage that emerged in nineteenth-century Europe continues to dominate theory and practice throughout the world by representing its values as universal ones. Its origins are linked to the development of nineteenth-century nationalism and liberal modernity, and although competing discourses do occur, “the dominant discourse is intrinsically embedded with a sense of the pastoral care of the material past” (Smith 2006, p. 17).

A concern with cultural heritage emerged from modern state anxieties around national social cohesion and identity and the need to inculcate national sentiment and civic responsibility. A preoccupation with monuments as witnesses to history and as works of art, reflected in the French idea of *patrimoine* and the Romantically derived English conservation movement, became internationally naturalized in the twentieth century. Critical scholars show how it reinforces the power of national elites, upholds the stature of rarefied bodies of expertise, denies social diversities of experience, and ignores and obscures non-national community identities while constituting the public as passive and uncritical consumers of heritage, rather than as active creators and interpreters of it.

In the past two decades, heritage scholars have shifted attention from concrete sites, objects, and localities to consider the pervasive intangibility and contingency of heritage

(Munjeri 2004). What makes things, monuments, and places “heritage” are not inherent cultural values or innate significance, but rather are “the present-day cultural processes and activities that are undertaken at and around them” (Smith 2006, p. 3) through which they are given value and meaning. Such processes as the management, conservation, and governance of places, sites, and objects are thus constitutive of their cultural valuation. In short, “heritage is a multi-layered performance---be this a performance of visiting, managing, interpretation or conservation---that embodies acts of remembrance and commemoration while negotiating and constructing a sense of place, belonging and understanding in the present” (Smith 2006, p. 3). The cultural process of identity formation that is basic to and constitutive of heritage, however, has been obscured by an ideological emphasis on things or objects and their provenance---linked and defined by concepts of monumentality and aesthetics (p. 4). This “authorized heritage discourse” serves to erase subaltern and popular practices through which received values are challenged, the meanings of the past are negotiated and reworked, and community and group identities are socially projected, perceived, and challenged. New understandings of heritage have emerged both from a backlash against the professionalization of the field of cultural heritage management and from the challenges of minorities and indigenous peoples to monologic narratives of national history and identity that negatively affect their representation and self-understandings.

One instance of a practice through which archaeology and heritage studies have become engaged in identity politics involves cultural resource management (CRM), the policy and procedures used to protect, preserve, and/or conserve cultural heritage items, site, places, and monuments, which is also the process through which the archaeological database is preserved and maintained (Smith 2004, p. 1). Those things that are managed by archaeologists as having universal cultural value (but often claimed by the state as national patrimony) are often crucial to the identities of others, as the proliferation of conflicts between archaeologists and indigenous peoples in the Americas and Australia clearly demonstrates. Through CRM, heritage scholar Laurajane Smith (2004, pp. 2–3) argues, archaeological knowledge and expertise is mobilized by public policy makers to help govern or regulate permissible expressions of social and cultural identity:

The way in which any heritage item, site or place is managed, interpreted and understood has a direct impact on how those people who associated with, or who associate themselves with, that heritage, are themselves understood and perceived. The past, and the material culture that symbolizes that past, plays an important part in creating, recreating and underpinning a sense of identity... Various groups or organizations and interests may use the past to give historical and cultural legitimacy to a range of claims about themselves and their experiences in the present (Smith 2004, p. 2).

As a form of expertise and an intellectual discipline that is privileged in Western societies in debates about the past, archaeology is a form of knowledge that functions as a technology of government. Its knowledge, techniques, and procedures become mobilized in the regulation of populations and the governance of social problems that interact with claims about the meaning of the past and its heritage. These are utilized by governments and policy makers who, through CRM, clarify and arbitrate competing demands and claims about the past from various interests. Moreover, archaeological knowledge is used to help define the interests and populations linked with social problems that intersect with particular understandings of the past. Thus, the discipline plays a role in legitimating or delegitimizing interests, particularly in postcolonial contexts in which people seek to establish claims to land, sovereignty, and nationhood; “archaeological knowledge, and the discourse that frames that knowledge, can and does have a direct impact on people’s sense of cultural identity, and thus becomes a legitimate target and point of contention for a range of interests” (Smith 2004, p. 3).

The subject of cultural heritage, scholars now widely recognize, is not a group of tangible things from the past---sites, places, and objects---with inherent historical values that can be properly owned, controlled, and managed. Rather, it is a set of values and meanings that are contested and negotiated in a wider field of social practices. Such things have value not because of their inherent significance, but because of their role in the transmission of identities and values (Smith 2006). A growing movement identifies and justifies desires to engage local communities more fully in heritage management, for example (Buggey & Mitchell 2008), and, as I discuss below, archaeological practice has slowly evolved to

incorporate indigenous criticism into theory and research (Meskell 2002, Nicholas & Bannister 2004).

The valuation of cultural heritage is certainly a revitalized arena of cultural property politics. Cultural heritage is now understood by critical practitioners in the field as “culture and landscape cared for by communities” to be passed on to the future to serve people’s need for a sense of identity and belonging, while at the same time serving as the basis for new industry (Loulanski 2006, p. 209). Heritage bridges the gaps between culture and the economy (and, increasingly, the environment). No longer focused primarily on the preservation of monuments, conservation is oriented toward future usages for social purposes. It embraces distinctive styles of living in unique areas and is no longer wholly encompassed by exhibits, archives, or tourist sites; there has been a shift in emphasis from preservation to sustainable use (Loulanski 2006, p. 211). State-led projects of institutionalized storage of objects are increasingly rejected in favor of community-based research and development focusing on improvements in local life and livelihoods (p. 211). Combining natural and cultural environments, cultural heritage protection is now linked to sustainable development, and cultural heritage politics is now oriented toward maintaining the unity between the tangible (objects) and the intangible (lived experience and practice).

As anthropologist Lisa Breglia (2006) explores, neoliberal policies have heightened controversies over the proper custodians of cultural heritage. The divestiture of state-owned enterprises and the decentralization of control over cultural institutions have simultaneously led to new forms of commodification and to new forms of identity politics. Heritage sites and objects are increasingly turned over to market forces and literally expected to earn their keep; their incorporation into new forms of tourist enterprise provokes intense responses from those who regard these as their own cultural patrimony. Breglia is particularly concerned with monuments, but similar politics can be discerned with respect to properties of cultural significance worldwide.

Although cultural property is often perceived either as the common heritage of humankind or as the inalienable property of a nation, the agencies involved in its protection, preservation, promotion, and development are actually far more diverse. In many parts of the world, for instance, particular families have assumed the role of caretakers for archaeological and religious sites for several generations, and other institutions that have

supported their maintenance, excavation, and research may also have their own interests. To the extent that these sites are found on ancestral territories, descendant groups may have distinct claims. Arguably, none of this diversity of interest is new. Numerous parties with competing and sometimes conflicting proprietary attachments to cultural patrimony and the proprieties of its treatment may, however, become more evident as the state either withdraws its protective agencies, delegates its authority, or, alternatively, becomes more aggressively involved in developing these resources for financial gain. Contemporary theoretical work on heritage has responded by moving away from studying heritage as material culture to understanding it as a political practice of social relationship (Breglia 2006, p. 14).

The international legal field of intangible cultural heritage has recently received an infusion of political energy, resulting in the 2007 Convention for the Safeguarding of Intangible Cultural Heritage, which has shifted emphasis from recognition of national masterpieces to preserving lived heritage at the borders between nature and culture, as maintained by the active participation of communities pursuant human rights and sustainable development principles (Aikawa-Faure 2009). Another arena of cultural politics promises to be animated by the citations of cultural significance and celebrations of cultural difference that the legal and regulatory implementation of this Convention promises to incite (Bendix 2009).

INDIGENOUS CULTURAL HERITAGE POLITICS

Perhaps the most remarkable transformation of social practices around the politics of cultural heritage involves rights to the material artifacts and intellectual property associated with sites of cultural significance to indigenous peoples. Intense debates about who controls the past, who regulates access to sites, material, and information, and whose interpretations of the past should have authority have characterized archaeological, anthropological, and museum research involving material of significance to aboriginal peoples in Australia, First Nations groups in Canada, and Native American groups in particular. Early debates focused upon repatriation, turning around charges of cultural appropriation and the propriety of possessing cultural goods, echoing older claims with respect to artistic artifacts (Glass

2004). However, responses to charges of appropriation have become progressively less exclusive and more inclusive in nature.

Archeologists conventionally treated their materials as empirical records of a universally defined cultural past that enriched scientific understanding of a common cultural heritage; no living group was accepted as having any justifiable right to restrict the research mandate of scientific experts (Nicholas & Wylie 2009, p. 15). Such beliefs have come under enhanced scrutiny; it is now acknowledged that very few archaeologists do purely disinterested scholarly work and local and descendant communities have challenged these premises (Nicholas 2005). Archaeologists are increasingly accountable to a wider group of stakeholders who do not accept the privileging of their allegedly wholly scientific interests. The passage of the Native American Grave Protection and Repatriation Act in the United States in 1990 was but one of many acknowledgments of the rights of descendant communities that practitioners have come to recognize. Requests for the return of artifacts, historic photographs, and ethnographic information have become common. Ethical issues of accountability and professional responsibility now go beyond issues of stewardship of the archaeological record to encompass responsibilities for the welfare and empowerment of those descendant communities whose cultural properties (not only objects of cultural significance to them but those properties that are deemed representative of their culture) are involved in archaeological research.

Although some communities, including some nation-states, have adopted exclusive property models--refusing access to researchers interested in their cultural heritage, claiming all resulting intellectual property rights in any research, and/or insisting upon compensation and royalties--more innovative models of benefit sharing have also emerged. Some professional archaeologists and anthropologists still assume a proprietary interest in their discoveries and discount the necessity of considering descendant community interests, but others have become more sensitive to the colonial power dynamics that historically enabled the cultural records of some peoples to become the scientific records of others. Indigenous peoples may have significantly different attachments to what we consider history--ancient artifacts, human remains, and culturally significant places may retain a distinctive currency and/or spiritual properties in their unique moral economies.

Acknowledging this respectfully has involved new processes of consultation, reciprocation, and collaborative practice:

Some of the most creative of these initiatives are predicated on a commitment to involve Indigenous peoples directly in the process of archaeology, a process that often significantly reframes and enriches archaeological practice. Descendant Indigenous communities often raise questions that archaeologists had never addressed, and their traditional knowledge is vital for understanding the material traces of antecedent land-use patterns, resource-harvesting practices, and a range of other more social aspects of past lifeways (Nicholas & Wylie 2009, p. 18).

The archeological embrace of ideals of collaborative practice has resulted in a broadening of academic discourse and a disciplinary practice that is not only more ethically responsible, but also more theoretically robust (pp. 18–19). Indigenous communities may now assume direction of research projects that involve their territories, material history, or cultural heritage; develop elaborate protocols for consultation; restrict some forms of publication likely to cause social harm; and/or craft access and use guidelines designed to further community objectives (Nicholas 2008). Creative uses of intellectual property laws have enabled some indigenous peoples to limit inappropriate uses of cultural heritage. Potential laws promise to provide further proprietary forms of protection and redress, such as those proposed to protect indigenous cultural heritage, traditional knowledge, and traditional cultural expressions (Coombe 2008). Where researchers and local people achieve relations of goodwill, their joint interests may combine to address contemporary community needs for employment, resource management, language preservation, education, and sustainable forms of local development or to support territorial claims. Whether or not we consider these a result of the recognition of indigenous cultural property or simply a creative way to avoid proprietary solutions, there is little doubt that such benefit-sharing activities evince an increased ethical sensitivity to cultural rights.

These dynamic new forms of social relationship, moreover, also characterize other fields of contention more conventionally considered issues of cultural property, particularly in museum contexts. Contemporary source communities are recognized as having interests in properties of cultural significance that neither internationalist commitments to maintaining world heritage, state interests in controlling national cultural patrimony, nor commitments

to market forces for distribution properly encompass (Busse 2008, Geismar 2008).

Throughout the Pacific, for example, museums have played a significant role in negotiating among competing interests in cultural property to ensure that public interests are not ignored nor source communities alienated. For example, Te Papa Tongarewa, the Museum of New Zealand, was completely rebuilt and reorganized to recognize the bicultural nature of the state and the equality of its founding societies. Maori taonga, or cultural treasures, are held by the museum through an institution of guardianship. This may involve relinquishing items or exhibiting them in a culturally sensitive way, but most significantly engages Maori representatives and leaders in decision-making processes. As anthropologist Heidi Geismar (2008, p. 115) explains:

Rather than a condition of ownership, this notion of guardianship develops relationships of consultation and collaboration. The acknowledgment that property is a relationship rather than an object (so evident to property theorists, yet so obfuscated [in cultural property debates]...) suggests an alternative view of cultural property, which acknowledges the political and social relations that objects are enmeshed within as vital to their identities.... Ownership does not only imply the right to freely do what one wants to with an object; it is far expanded beyond this commodity logic and also implies a state of responsibility. The two are not mutually incompatible. The notion of property (and cultural property) implies entitlement, use, placement, and circulation as well as commoditization.

The idea of museum guardianship has spread throughout the indigenous world and among diasporic communities. Although repatriation of objects is one course of action, recognizing guardianship may actually facilitate the keeping of cultural properties in public museums and enhance their use and display. The participation of artists, researchers, and elders from source communities in the work of the museum may be a productive source of new ideas, shifting emphasis from fixed objects owned by individuals, groups, or institutions “to a more relational understanding of the dynamic links between people and things” (Geismar 2008, p. 116). Indeed, recognition of the specificity of indigenous curatorial practices has emerged in concert with the understanding that museums play an active role in the preservation of intangible cultural heritage and require new partnerships with communities to do so. These efforts are shifting “museological thinking and practice

from a focus on objects and material culture to a focus on people and the sociocultural practices, processes, and interactions associated with their cultural expressions” (Kreps 2009, p. 194).

In many instances involving indigenous peoples, new museum principles regarding access, use, and interpretation have reconnected communities with their cultural heritage and reinforced recognition of the role of the past in the present, thus revitalizing cultural pride. Such principles are based on relationships of respect and recognize that Western notions of private property do not necessarily do justice to the relationship between cultural properties and identity in indigenous communities (Bell et al. 2008). As anthropologist Brian Noble (2008, p. 465) suggests, “owning as property” emphasizes exclusivity with respect to possession and alienability for purposes of exchange and wealth maximization, whereas “owning as belonging” puts emphasis on transactions that strengthen relations of respect and responsibility among people and between peoples. For example, strong attachments and obligations to items of significant cultural value to indigenous communities may be accompanied by distinctive forms of inalienability:

[T]ransfer and other forms of exchange of cultural property tend to strengthen, deepen and extend social and emotional connections among people, their histories, their material productions, their knowledge, their lands, their kin groups, and the Creator, rather than effect a separation, as would be expected of the predominantly Western understanding of property as a commodity.... [T]o reduce this connection to a simple relation between property and identity is to be too narrow. Modes of exchange, and relationships and obligations created through exchange, are also crucial to social and political formation (Noble (2008, p. 474).

To recognize other practices of ownership besides those of Western legality is to practice a form of mutual respect and recognition that arguably continues to elude most theorists of both property and culture. Effectively, it is to acknowledge that cultural property is just one dimension of cultural rights -- a category of human rights that put enhanced emphasis on moral rights, collective cultural identity, cultural integrity, cultural cooperation, cross cultural communications, and intercultural exchange.

CULTURE AND DEVELOPMENT

“[C]ulture has recently acquired a new visibility and salience in development thinking and practice” (Radcliffe 2006b, p. 1). Culture has been a core feature of development practice since the late 1990s; it indexes concerns about maintaining cultural diversity, respecting local value systems that ensure social cohesion, and ending discrimination against the socially marginalized (Radcliffe 2006b, pp. 1–8). Whether the objective is rural development or environmental sustainability, an emphasis on maintaining and in some cases profiting from cultural distinction has assumed new significance (Clarke 2008; Coombe 2005a; Coombe et al. 2007; Radcliffe & Laurie 2006a,b).

We have witnessed a growing possessiveness in relationship to cultural forms at exactly the same time that culture is being revalued, not only by indigenous peoples (Brown 2003, 2005) but also by communities, regions, and national governments. These latter stakeholders see cultural expressions, cultural distinctions, and cultural diversity as sources of meaning and value that promote social cohesion, prevent rural-to-urban migration, offer new livelihood opportunities, and, of course, have the potential to provide new sources of income. Intellectual property is central to these initiatives, and new forms of *sui generis* rights are being considered in a number of forums where traditions and cultural preservation have assumed new urgency. These deliberations involve a range of actors, including newly vocal indigenous peoples, diasporic religious communities, farmers, healers, artisans, and a growing array of NGOs.

Development’s cultural turn has occurred in the context of both neoliberal policies and resistances thereto. Culture is embraced as a value that can be ascribed to a place, a group, an institution, a resource management strategy, or a site of material production (Radcliffe 2006c, pp. 229–31). If culture is increasingly seen as a new basis for capital accumulation, however, it may also be deployed in strategic interventions in the accumulation of mutual respect, recognition, and dignity. Recognition of cultural property, in other words, may engender consciousness of the need for cultural rights. As geographer Sarah Radcliffe (2006c) elaborates, development institutions’ proclivity to address culture as a product treats culture as a set of material objects and distinctive behaviors, promoting the search for culturally distinct products and services for global markets. Alternatively, treating culture as an institution puts development emphasis on distinctive forms of organization, regulation, and governance (Radcliffe 2006c, pp. 235–36). Much more rarely, however, do

development endeavors recognize cultural traditions as sources of innovation and political aspiration in which people attempt to express and forge a distinctive sense of who they are and the economic and political futures they desire (Appadurai 2004, Bebbington 2005).

To illustrate, appellations of origin and geographical indications---geographical names that designate the origin of a good where “the quality and characteristics exhibited by the product are essentially attributable to the geographical environment, including natural and human factors” (Hopperger 2007, p. 3) -- are forms of intellectual property protection used to maintain local conditions of production and to recognize and value traditional methods and practices. Historically, they served to protect the rural traditions of European elites; in some areas, they have come to signify the very existence of local cultural distinction (Fillippucci 2004). Increasingly, they are considered means to promote the development of others whose traditions may thereby assume new value. These market-based vehicles may be abused, particularly by states more anxious to secure new sources of export revenue than to support community traditions (Chan 2008). To the extent that such marks reify local culture, there is a risk that they may fix or freeze local practices rather than enable their ongoing generativity. Moreover, they are costly to administer and require technical expertise and major investments in marketing to provide benefits. Major public investments and/or international and NGO support will be necessary to prevent the most powerful private actors in a community from monopolizing these opportunities. These challenges are not insurmountable, however, and these vehicles have been embraced by many states, NGOs, and development agencies as holding potential for both environmental sustainability (Larson 2008) and economic development by creating markets for culturally distinctive goods (Bramley & Kirsten 2007, Aylwin & Coombe 2010, Coombe et al. 2007).

Minority and indigenous communities have also asserted affirmative intellectual property rights, insisting that their specific traditions are important sources of symbolic value. They seek to capitalize on the symbolic resource that authenticity holds in a global market, where some consumers value the heterogeneous in a field of homogeneity and seek out difference in a sea of sameness (e.g., Maori Trademarks in New Zealand and First Nations’ certification marks in Canada). They are encouraged by international bodies such as UNESCO that stress the complementarity of cultural and economic aspects of development and encourage intercultural exchange as a political and social good. For better or worse,

marks indicating conditions of origin (which also include collective and certification marks) have assumed a new popularity as vehicles to protect and project culturally distinctive forms of production and tradition-based goods while meeting sustainable development objectives (Aylwin & Coombe 2010). The possibility of their collective ownership and management makes them especially attractive vehicles for sustaining traditional relations of production and social relations of reproduction, rather than exacerbating local relations of inequality. The public nature of the rights that flow from their use raises hopes for the sustenance of localized production strategies that draw on historical memories while building local cultural pride.

These vehicles for protecting and projecting cultural properties may be attractive to so wide a range of social actors precisely because they combine development orientations toward treating culture as a product with recognitions of culture as an institution, while also holding out promise for communities seeking both recognition of their cultural rights and improvements in their livelihoods. The properties of culture are deployed for diverse ends. As legal scholar Madhavi Sunder (2007, p. 106) suggests, historically, indigenous peoples and so-called traditional communities were understood to be contributors to or guardians of the public domain; recognizing their traditional contributions as innovations has either been rejected as an oxymoron or demonized as a form of neoliberal false consciousness that extends intellectual property rights into forms of stewardship that go beyond the appropriate realm of cultivation. Nonetheless, the creative use of geographical indications is one example through which culture and commerce are conjoined and tradition potentially preserved through its commercialization: “[T]hird-world artisans recognize that ‘[e]xcept in a museum setting, no traditional craft skill can be sustained unless it has a viable market’” (Sunder 2007, p.111). Sunder finds this consonant with the human capability approach to development that understands development as any action that expands the human capabilities that allow people to achieve central freedoms, including the freedom to participate and be remunerated in the market (p. 121). Recognition of indigenous and/or traditional peoples as authors and innovators enhances their access to essential goods, furthers development objectives, and improves intercultural relations (p. 121).

It might well be argued that the enormous intensity of interest in traditional knowledge and its preservation in international policymaking circles has more to do with identifying

and tapping into reservoirs of insight, technique, and systemic knowledge that hold promise for future developments in science and technology than it does with the maintenance of local people's livelihoods, the alleviation of their poverty, or the promotion of their political autonomy. Nonetheless, to the extent that the discourse provides grounds for recognition and valorization of cultural differences, it also thereby provides a means of making linkages to other human rights associated with cultural distinction and thus a covert ground for pressing more political claims.

Global efforts to respect, preserve, and value traditional knowledge arguably depoliticize positions of impoverishment by throwing the more acceptable mantle of culture over conditions of social marginalization. But to recognize the importance of cultural diversity in maintaining biological diversity, I have argued, is not to recognize cultural diversity in abstract, reified, or museological terms, but to recognize an emerging international human right that affirms the interrelationship of rights to food sovereignty, territorial security, and collective heritage (Coombe 2005b). At least part of the ideological work of culture in these new claims is related in a fundamental way to transformations in capital accumulation that create increasingly greater pressures to harness information so that it can be aggregated and transformed into works of intellectual property.

The drive to represent local people's knowledge and practices as innovative works---forms of intangible or intellectual property---integrally related to an indigenous identity or a traditional lifestyle emerges from within this political economy. It is in this context that we must situate efforts to culturalize or indigenize knowledge so that it might cease to be mere information and pass, instead, in the more valuable form of a work (Coombe 2003). Only then may claims be made to possess, control, preserve, and maintain it; only then will people be respected. Over the course of its interpretation during the last decade, the CBD has become the focus of many Third World governments', indigenous peoples', and nongovernmental or civil society organizations' energies because it appears to represent the only major international, legally binding treaty that has some potential to counter the neoliberal imperatives of the TRIPs Agreement (McAfee 1999). As indigenous peoples have become more active and sophisticated participants in this policymaking sphere and brought to it expertise honed in other United Nations venues, they have put issues of cultural integrity, democratic decision making, accountability, and self-determination

squarely on the bargaining table. Their capacities to do so are greatly assisted by the rhetorical leverage provided by international human rights norms and the central, if ambiguous, place of culture within these.

Many indigenous peoples (and many of those who may be deemed to have traditional lifestyles) are resident in or enclosed by the jurisdictions of states with which they have long historical relationships of distrust, betrayal, and violence. Rather than trust state delegates to the CBD to represent their interests, they have used the CBD agenda, forums, funding, and publicity opportunities to further establish legitimacy and support for the Declaration on the Rights of Indigenous Peoples, the draft of which was negotiated almost simultaneously with debates about the implementation of the CBD. Negotiations over the draft, which in 2007 became a declaration to which most states are now signatories, created a distinctive vocabulary of representations and claims that have been reiterated in so many legal contexts that they may eventually be considered a form of international customary law.

According to international legal principles, only peoples may claim self-determination, and all peoples have cultures. Indigenous peoples' rights to their lands, territories, and resources are recognized as deriving from their cultures and spiritual traditions. Peoples are entitled to pursue their cultural development and to revitalize and protect cultural traditions. Indigenous peoples are also recognized as having the right to control their intellectual and cultural properties, and these include rights to special measures to control, develop, and protect their sciences, technologies, and cultural manifestations (including knowledge of local genetic resources). Principles for protection of indigenous heritage define it to include knowledge transmitted intergenerationally and pertaining to a particular people or its territory. Emphasis is placed on the dynamic and innovative nature of traditional knowledge. Moreover, the creation of the legal and political category of traditional knowledge has in turn created the political conditions through which traditional cultural expressions have also, for better or worse, become understood as cultural property to be managed.

TRADITIONAL CULTURAL EXPRESSIONS

Many of the practices referred to in this article presuppose that some level or kind of protection may or should be asserted with respect to traditional cultural goods. The

protection of traditional cultural expressions from illicit appropriation, misrepresentation, and unauthorized commercialization, however, is an area fragmented by modern Western law into intellectual property, cultural human rights, common law tort liability, and, more recently, indigenous rights claims (Girsberger 2008, Graber 2008, Macmillan 2008).

Despite years of international negotiations and transnational advocacy, no consensus has been reached on the advisability of either a global regime or the use of customary law as a viable means of protection (Wendland 2008). Protection itself is a concept with multiple and conflicting meanings that range from enabling commercialization to preventing it, depending on the subject matter and its social significance. Digital communications have amplified concerns in this area, increasing the risks of misappropriation and decontextualization while also offering new opportunities for communities to benefit from promoting new uses for traditional cultural expressions that promote sustainable development (Antons 2008a,b; Burri-Nenova 2008; Sahlfeld 2008).

The growing interest in protecting traditional cultural expression, however, is at least as indicative of state interests in locating and cultivating new investments, cultural export products, and tourism opportunities as it is evidence of concern with the livelihoods and well-being of those indigenous peoples and minority communities most likely to harbor distinctive cultural resources. Modern states have long histories of absorbing minority cultural traditions into nationalized cultural patrimony; indeed, even the concept of tradition has its origins in modernity and the constitution of an uncivilized, premodern, or non-Western other in need of redemption by civilizing processes.

In an excellent survey of the history of the category, historian Monika Dommann (2008) shows how folklore was defined as “knowledge of the people” untouched by modernity. It was also considered evidence of a human past that would inevitably disappear with the advent of progress unless it was salvaged by modern national science for posterity. Central to nineteenth-century European nation-building projects and colonial governance projects, the construction of distinctive cultural traditions in the making of national and colonial imagined communities often involved the reification of the distinctive customs of rural and/or tribal peoples. National archives were created to house cultural materials; property in these physical materials was usually held by the state, but the cultural content was deemed to be in the public domain, making the value in such material easy to exploit and sequester.

With respect to traditional music for example, any intellectual property rights were held only in original recordings and in new arrangements based on prior compositions.

This fragmentation of legal rights, enabled by the historical conditions under which these cultural materials were valued, collected, and exploited, has given rise to new cultural property controversies (Coleman & Coombe 2009). Postcolonial states have long disputed the universality of the nineteenth-century laws that enabled the dispossession of their cultural heritage as a continuation of injuries effected by colonialism that preclude their full social development. The one-member state, one-vote system at work in WIPO has enabled so-called developing countries to keep the issue on the table for global negotiations; some states, for example, have incorporated folklore into copyright legislation, creating lively national public domains under which new forms of creativity and cultural revitalization have thrived (Goodman 2002, 2005). UNESCO took up the issue in 1989, incorporating folklore into the “universal heritage of humanity,” which attracted new forms of censure as both indigenous peoples and so-called traditional communities emerged as potential stakeholders. WIPO has reassumed leadership over international policy negotiations that recognize this new field of rights-holders. It has also added the denomination “traditional cultural expressions” to replace folklore for those who regard the latter term as an anachronistic reference to a frozen cultural archive that they consider, instead, to be a field of dynamic resources for continuing innovation.

Issues of jurisdiction and self-determination promise to further complicate this terrain of emerging rights and responsibilities, especially given the multiple meanings that attend to the concept of customary law, so often proffered as a means to recognize traditional systems of cultural management and further the political self-determination of indigenous and minority peoples. The so-called protection of traditional cultural expressions (like the protection of traditional knowledge) is arguably the questionable political work of centralized modern legal systems attempting to incorporate the cultural systems of peripheral societies, which they tend to do with peculiar cases of tunnel vision (Teubner & Fischer-Lescano 2008). Aggressive global expansions of the Western intellectual property system driven by new strategies of capital accumulation and national policy objectives of preserving cultural and biological diversity often result in instrumental approaches to traditional cultural expression at odds with the needs, values, and rationalities of local

communities. Anthropological studies of national efforts to protect traditional cultural resources ironically illustrate the vulnerability of minority social systems to state deployments of colonial regimes of customary law---ignoring the specificity of the social processes through which knowledge and cultural expressions are generated while harnessing tradition for modern markets (e.g., Aragon 2008, Aragon & Leach 2008, Balliger 2007, Green 2007, Scher 2002).

As a consequence, those who seek to maintain the vitality of locally or regionally specific forms of knowledge and cultural expression against the incursions of modern global science, universalizing aesthetics, capital accumulation and national elites hungry for new forms of exploitable resources, must translate and articulate their own values in the vocabularies of human rights to culture, which are increasingly animated by community investments in maintaining and supporting identities, social systems, livelihoods, and alternative value systems. As Fiona Macmillan (2008, p. 62) [suggests](#):

[P]erhaps, however, there is still enough vitality in the more specific concept of cultural rights to offer a political and legal counterbalance to the power of the WTO system. The UNESCO Conventions concluded this century might be thought to demonstrate this proposition. Nevertheless, the question of how we make cultural rights strong enough and specific enough to confer proper legal protection remains.

CONCLUSION

Many scholars remain sceptical about the value and consequences of marrying the anthropological idea of culture with the legal concept of property, particularly to the extent that critical theorists now understand culture as having its locus in symbolic processes that are continually recreated in social practices imbricated in relations of power. Such an understanding sits uneasily with a vision of culture “as a bounded entity, the properties of which can be ‘inventoried’” (Handler 2003: 356). To the extent that heritage preservation and cultural property initiatives tend to assume an objectifying approach, they may fundamentally transform the symbolic processes they seek to protect by focusing too narrowly on objects, sites, and traditions to the detriment of the semiotic dimensions of culture (pp. 361-3).

To address the issue of cultural property is necessarily to consider the positing and positioning of social identities; collective identities are never objectively given and groups

have no objectively bounded existence: “Power is fundamentally engaged within claims of cultural appropriation and claims to ‘culture’ – both in attempts to address historical imbalances, such as past histories of dispossession and colonisation and also in the renegotiation of contemporary positions within societies...” (Anderson 2009: 192). The rhetoric of cultural ownership may give rise to absurd claims (Comaroff & Comaroff 2009), particularly when contemporary social categories are deployed to make possessive assertions with respect to historical objects that long predate the identities of those claiming them (Appiah 2006). Still, we fundamentally misunderstand the very concept of property if we focus primarily upon a Western model of exclusive individual or corporate ownership, as so many critics of cultural and intellectual property implicitly do. As legal scholars Carpenter, Katyal and Riley (2009) suggest, critics of cultural property wrongly conflate it with a narrow and fundamentalist paradigm of property that emphasizes alienation, exclusivity, and commodification. It would seem prudent, however, to avoid fetishizing a particular concept of property in order to counter certain fetishizations of culture. Property plays many roles in societies; it makes itself manifest in ideologies, multiple legal systems, social relationships, social practices, and in the interrelationship between these (von Benda-Beckmann, von Benda-Beckmann & Wiber 2006). Surely the very topic of cultural property demands greater critical reflexivity with respect to property’s diverse forms as well as enhanced scrutiny of Western proprietary prejudices!

The illustrative survey of interdisciplinary scholarly literature with respect to cultural property presented here suggests that proprietary and possessive claims based on cultural attachments to things---material and immaterial, tangible and intangible---are proliferating under conditions of neoliberalism, informational capitalism, and the establishment of new regimes of human rights. New agents, institutions, and new fields of transnational politics and legal pluralism with respect to cultural property are concurrently emergent. Nevertheless, attempts to construct new regimes of state-based property rights lag far behind traditional customs, contemporary mores, and particularly the new practices, protocols, ethics, and relationships of mutual respect and recognition that have been provoked by these claims. Over the last two decades, then, we have witnessed a new and vital field of cultural rights norms and practices emerging in the shadows of cultural properties yet to be validated by formal systems of Western law. Arguably, this new field of

negotiated *proprieties* holds as much if not greater promise for pluricultural ethics and intercultural futures than the prospect of legislated cultural properties. It is clearly evident that interrelated concepts of property and culture are at work in the world in many ways that demand greater critical attention from social scientists of law.

DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

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