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Abstract:

Universalist norms for a globalised diversity: on the protection of traditional cultural expressions

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The protection of traditional knowledge has become the focus of extensive discussion and emerging legislative measures in several countries – both in relation to technology, medicine etc. and thus somewhat related to a Western notion of "patents", and in respect of traditional cultural expressions and (very broadly) traditional art, loosely related to the Western idea of "copyright". It is the second concept this paper wants to address, the problem of rights in, and protection of, "cultural" goods that represent a kind of "artistic" tradition. This leads to the first problem of the discussion: is there a "tradition" as such or is it invented through its protection? Further, what is the relationship between tradition and change, for example between tradition and modern art? Has an "indigenous" artist really a fiduciary duty to his/her people in relation to the art he/she produces? Is "indigenous" art and culture only outside the Western world? The paper will also examine whether the notions of individualistic, even "romantic", authorship and creativity always (or ever) existed in Western intellectual history, or are in turn indeed only confined to the Western world. The second part of the paper will explore the effects of legislative intervention for the (perceived) protection of traditional cultural expressions. What are the rights such a protection intends to give? Do they have proprietary character? Can authorship in law be equated with authorship in the sense of cultural history? Is the notion of property rights indeed the same everywhere in the West (and really entirely opposed to the notion of "ownership" in non-Western legal cultures) or are there differences even between the Anglo-Saxon world and Continental Europe? The paper also seeks to discuss whether this potentially proprietary protection of traditional cultures is a modern form of indirect rule and neo-colonialism, and whether it tries to embody (or impose?) "universalist", but not necessarily "enlightened", principles by aiming at protecting the continued existence of the difference of cultures. In this respect, a comparison will be made to similar problems in comparative law generally, save for the fact that comparative law discovers existing normative systems, while in the present context the creation of a normative constitution is intended. The paper finally looks into the possibility that legally ordered and preserved differentiation could be a potential measure for segregation and racism.