

The 2007 Indigenous Traditional Cultural Expression Protection Act (ITCEPA) of Taiwan – An Innovative *Sui Generis* Regime

Chris Chu Cheng Huang ⁺

Institute of Law for Science and Technology, National Tsing Hua University, Taiwan

Abstract. There are 14 indigenous tribes officially recognized in Taiwan, which belong ethnically to the Austronesian family. Since the end of World War II, the ruling KMT government adopted strongly the assimilation policy to sustain its dictatorial ruling over the island. Yet with decades of indigenous rights movement, a stipulation of multiculturalism was finally incorporated into the constitutional amendment in 2000, and consequently leads to the adoption of the Indigenous Fundamental Law in 2005 as its necessary implementation instrument. In the articles of 2005 Law, the Government is obliged to protect the traditional intellectual creations, and to assure the development of indigenous language and culture. To substantiate the obligation, the Congress approved the Indigenous Traditional Cultural Expression Protection Act (ITCEPA) at the end of 2007. The ITCEPA is an innovative *sui generis* regime to protect indigenous traditional cultural expression, which is parallel to the civil law IPs. The Article is therefore intending to introduce the provisions and process of ITCEPA, and to analyze its impact over the real-life self-governance of indigenous peoples of Taiwan.

Keywords: Taiwan indigenous people, Indigenous Traditional Cultural Expression, *Sui Generis*.

1. Introduction

Ethnically as members of the Austronesian family, there are fourteen tribes officially recognized as Taiwan indigenous peoples ¹. The abundance of their traditional cultural expression has always been the major representations of the island's culture uniqueness. In the Summer Olympics Game of 1996, a part of traditional song performed by KUO Ying-nan (Difang Duana), who was the prestigious elder of Taiwan indigenous Amis tribe, was copied, derived and mixed into the Game's theme song without the consent from KUO and his tribe, and triggered serious tensions. The incidence also evidences the criticalness and imminence of the protection of Taiwan indigenous traditional art expressions.

The traditional cultural creations of indigenous peoples, including their music, dance, songs, graphics and folk arts and other objective cultural expressions, had long been regarded as *res nullius* in terms of their incompatibility with the civil law IPs ². Taking copyrightable expressions for example, which need to fulfil the minimum requirement of creativity or originality. Yet most of the indigenous traditional cultural expressions are in nature necessarily to replicate the traditional elements inherited from generation to generations, even the sheer creativity could not be generated. Moral right that is generally contemplated under civil law IPs is also a big hurdle for applying IPs. In Taiwan, under Article 18 of the Copyright Act ³, "[t]he protection of moral rights of an author who has died or been extinguished shall be deemed to be the same as when the author was living or in existence and shall not be infringed upon by any person", which recognizes the author's moral rights that does not exist in the group-rights nature of the indigenous culture expression. Another difficulty is on the limited duration of IPs. Article 30 of the Copyright Act indicates the IPs "[e]ndure for the life of the author and fifty years after the author's death. Where a work is first publicly released between the fortieth and fiftieth years after the author's death, the economic rights shall endure for a term of ten years beginning from the time of the first public release ⁴", yet since the indigenous traditional cultural expression has no traceable initiating date, it would be impossible to calculate the duration and justify the expiration of the life of its protection.

Applying the single IPs rule over the indigenous cultural expression also metaphors the denial of their paralleled subjectivity, including their customary law and self-governance that factually exists long before

⁺ Corresponding author. Tel.: + 886-939-308827; fax: +886-3-5162523.
E-mail address: itic.adhoc@gmail.com.

the establishment of the civil society sovereignty, also of their contribution to the main-stream knowledge and authority ⁵. Therefore, the indigenous cultural expression could be “discovered” and disposed without restriction, i.e., they fell into to the public domain ⁶.

Fortunately, with the long-term endeavor from the local indigenous rights movement and the consequent evolvement of indigenous consciousness, the country adopted the landmarked Article 10(11) amendment of its Constitution in 2000 ⁷, which stipulates its affirmation of “multiculturalism, and positively assures the development of indigenous language and culture.” To implement the Amendment, the Indigenous Fundamental Law, a supreme law regulating the indigenous fundamental rights was inaugurated in 2005 by the Congress ⁸. Article 10 of the Fundamental law indicates that “[t]he Government shall preserve and protect indigenous culture[,]” while the Article 13 writes specifically that “[t]he Government shall protect the indigenous traditional knowledge over biodiversity and intellectual creations” as an indivisible mean to preserve and protect indigenous culture.

On December 7, 2007, the Indigenous Traditional Cultural Expression Protection Act (ITCEPA) was approved to substantiate the Fundamental Law clauses ⁹. With ITCEPA, the indigenous traditional intellectual expression is no longer left in the plight without protection.

2. A *Sui Generis* Regime to Protect Collective Rights

The traditional cultural expressions protected under ITCEPA include, namely, the traditional religious ceremony, music, dance, songs, sculptures, weave and dye, graphics, wardrobes, folk arts and other expression of cultural activities of the indigenous peoples (Article 3), which needs to be certified and registered through the administrative agency, i.e., the Indigenous Peoples Council of the Executive Yuan ¹⁰ (Article 4, 5, 6), so to be protected though. Once the certification process is completed, the indigenous peoples and tribes registered will be entitled to proclaim the exclusive right over it (Article 7), which include the right to exclude any false attribution, distorting, mutilating, modifying, or otherwise changing the content, form, or name of the work that damaging the author's reputation, and to litigate against any activities infringe the registered context (Article 10).

The rights entitled to the indigenous peoples and their tribes under ITCEPA is not a personal rights but a collectively one. The applicant of this *sui generis* right, according to ITCEPA, shall be limited to the (official) indigenous peoples or tribes ¹¹ (Article 6(2)), though which may eventually not be found entitled with or to exclusively own the rights. Provided no specific indigenous peoples or tribes is found to entitle to the applied rights, then which shall be registered to the Taiwan indigenous peoples as a whole, not as *res nullius* or public domain, and take effect immediately after the date of registration (Article 7(3)). The subjects entitled to this *sui generis* rights is therefore to include the applicants, non-applicant indigenous tribes who is found to entitle, and the indigenous peoples as a whole, while an individual with indigenous identity as a member of the entitled tribe have no *locus standi* to obtain and proclaim the rights.

Given its nature as collective rights, the rights entitled under ITCEPA can only be exercised, unless provided by laws or contracts otherwise, by the registered indigenous peoples or tribes, or indigenous peoples as a whole exclusively, including to exploit and usufruct the economic rights, and to proclaim their moral rights of which (Article 14 (3)). An individual member of the entitled indigenous peoples or tribe or the indigenous peoples as a whole is, however, free to exploit and usufruct the registered creations (Article 14 (4)), which makes the collective rights more versatile than the classic ones. One may conclude that ITCEPA is to prevent the false exploitation of indigenous traditional cultural expression by the non-indigenous to assure the former may conduct and regulate exclusively their own cultural discourse and expression ¹². The ITCEPA also positively affirm the *sui generis* collective cultural rights first ever of the Taiwan indigenous peoples as a foundation to the implementation of their prospected self-governance. Matters with respect to the manner, taboos or other restrictions to the utilization of indigenous cultural expression, and the benefits conferred to the tribe through the utilization and authorization, shall be subject to the full discretion of registered indigenous peoples or tribes under their own customary laws, and which is intensively left open by ITCEPA.

3. The Impact of ITCEPA Regime over Indigenous Self-Governance in Taiwan

The afore-mentioned Indigenous Fundamental Law has ratified the long-desired objectives of the indigenous rights movement. The law provides that the government shall, in accordance with the will of indigenous peoples, assure their equal status and development of self-governance, which shall eventually lead to the implementation of their autonomy (Article 4). Among the self-governance related matters the most controversial issues will be to recognize the indigenous peoples' rights to land and natural resources (Article 20), and to impose upon the government a duty to protect indigenous peoples' traditional knowledge over bio-diversity and cultural creations/expressions (Article 13). Yet in the wake of calling for a comprehensive implementation of the Fundamental Law and review over the past-year efforts, there is always a severe criticism for the sheer result especially of substantiating their rights over the natural resources and intellectual property.

The very limited results shall attribute themselves to the incompatibility between the goals stipulated in the Fundamental Law and the civil law regime. A comprehensive implementation of the indigenous *sui generis* rights almost means to invalidate substantive property rights granted under current regime. To name a few, the retrospective recognition of indigenous title must lead to the effect of taking the private estate possessed by the non-indigenous, and the vindication of a *sui generis* IPs over the indigenous cultural expression will certainly deprive the free material from civil law public domain. Who then shall bear the costs especially the frustration ones from the majority? These blunt facts have evidenced the difficulties in realizing the indigenous *sui generis* regime retrospectively, especially under a non-linear constitutional structure which is commonly shared by most of the imagined communities, and their consequent minimal progressions.

Nevertheless, the ITCEPA may prove to be a rare exception. Many by-laws needed to be drafted before the kick-off of ITCEPA, including the certification and granting procedure, registry, publication and revocation procedure, registry of licensing agreement, management of the fund collected from licensing benefits. The 2nd draft of the by-laws to implement ITCEPA has been accomplished by the author in 2010. Notwithstanding which is still withheld by the officials for further review. To accelerate the preparation period psychologically, the author has proposed the Indigenous Peoples Council to launch a semi-experimental program as the "Demonstrative Application Program on the Exclusive Right of Traditional Cultural Expression" since 2012, so to further assure (to the officials) their feasibility and integrity¹³. The program allows 14 local NGOs to voluntarily represent their indigenous tribes or peoples to undergo a moot application procedure. The NGOs will undertake the responsibility, under traditional customary law or current legal procedure, to re-assemble the tribal congress and obtain their consensus over the issues such as choosing the traditional intellectual expressions recognized as the most representative yet severely-threatened or exploited ones. In the meantime, a historical and cultural review over the origin and preservation of the targets, namely the history, exploitation taboos, and cultural implication of the expressions, together with field investigation will be conducted by the NGOs. Finally the NGOs will follow the application procedures designed by the author to file for registration with the gathered references. Since it is a moot procedure, the *sui generis* rights will not be virtually entitled to any tribes, yet the applications and the results under the program will be officially acknowledged by the administrative agency once the by-laws are actually approved.

Smelling the smoke, the administrative agency in charge of IPR matters in Taiwan, i.e., the IPs Bureau of Ministry of Economic Affairs, has recently initiated a non-official consultation procedure with the Indigenous Peoples Council whenever there is a potential conflict between the IPs applications and the ITCEPA. The IPs Bureau also promised to invalidate any copyright or patent obtained containing indigenous traditional cultural expression without authorization, with the request from certificated owner under ITCEPA. Such a gesture not only indicates that the indigenous *sui generis* regime is hierarchically higher than the IPR regime, but also provide a prospect that ITCEPA may serve as a model regime to the future collective *sui generis* regimes available to the indigenous peoples, such as those related with the indigenous title over land and natural resources, and pave the way to a workable formulae of their self-governance. The *sui generis* regime has always been conceived as an optimum model for the protection of indigenous traditional cultural expression either in theory or practice. Yet while the Law No. 20 of 2000 in Panamá led the way as a model precursor, no similar regime has ever been introduced into Asian countries till the adoption of ITCEPA in

2007. As mentioned above, even among those similar formulae, the ITCEPA still stands as an innovative, radical and complete legal system with low profile due to the unique international status of Taiwan, especially which is designed under a typical non-linear constitutional structure shared by most of the post-War Asian Nation-States. The facilities of ITCEPA along with the progressive indigenous policies of Taiwan is expected to cast a limelight over the Asian model of indigenous traditional cultural expression protection and their future autonomy.

4. Conclusion

The *sui generis* regime has always been conceived as an optimum model for the protection of indigenous traditional cultural expression either in theory or practice. Yet while the Law No. 20 of 2000 in Panamá led the way as a model precursor, no similar regime has ever been introduced into Asian countries till the adoption of ITCEPA in 2007. As mentioned above, even among those similar formulae, the ITCEPA still stands as an innovative, radical and complete legal system with low profile due to the unique international status of Taiwan, especially which is designed under a typical non-linear constitutional structure shared by most of the post-War Asian Nation-States. The facilities of ITCEPA along with the progressive indigenous policies of Taiwan are expected to cast a limelight over the Asian model of indigenous traditional cultural expression protection and their future autonomy.

5. References

- [1] The fourteen tribes officially recognized by Taiwan government are Saisiyat, Sediq, Thao, Bunun, Ysout, Rukai, Paiwan, Atayal, Truku, Sakizaya, Kavalan, Puyuma, and Yumi. See the area of each tribe's distribution in <http://www.apc.gov.tw/portal/docList.html?CID=6726E5B80C8822F9>.
- [2] C. H. Farley. Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer? *Connecticut Law Review*. 1997, 31(1): 1-57; D. J. Gervais. Spiritual But not Intellectual? The Protection of Sacred Intangible Traditional Knowledge. *Cardozo Journal of International and Comparative Law*. 2003, 11: 467-496.
- [3] Taiwan Copyright Act, Art. 18.
- [4] *Id.*, Art. 30.
- [5] C. C. Huang. Time, Labour and Ecology-Essential Elements to the Aboriginal Property. *Tsing Hua Journal of Law and Technology Policy*. 2005, 2(1):5-48.
- [6] D. J. Halbert. *Resisting intellectual property*. Routledge, 2005.
- [7] The Amendment of the Constitution of Taiwan, Art. 10(11).
- [8] The Indigenous Fundamental Law was promulgated on February 05, 2005, includes 35 articles.
- [9] There are 23 articles in ITCEPA. ITCEPA was stipulated on December 7, 2007 and promulgated on December 26 in the same year. See the legislative history in: Legislative Yuan, Official Gazette Department. *Legislative Yuan Gazette*, 2002, 96(85): 96-122.
- [10] See the official website of the Indigenous Peoples Council of the Executive Yuan: <http://www.apc.gov.tw/>.
- [11] According to the Taiwan indigenous ethnic policy, only the indigenous peoples or tribes officially recognized by the government do have official status. Until now, there are many tribes still struggling for being recognized by the government.
- [12] According to Article 1 of ITCEPA, the Legislative Purpose of the Act is "[I]n order to protect the traditional intellectual creations of indigenous peoples, and to promote the cultural development of indigenous peoples, this Act is set forth according to Article 13 of the Indigenous Fundamental Law[.]"
- [13] See the program website in: <http://ctm-indigenous.v.m.nthu.edu.tw/>.