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STUDY OF THE INTERNATIONAL REGULATION OF THE "INTELLECTUAL PROPERTY" ASPECTS OF FOLKLORE PROTECTION(1)

Prepared by the Unesco Secretariat

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I. PRELIMINARY REMARKS

1. Beset with considerable difficulties at the national level, the question of folklore protection becomes even more complicated at the international level, when it is viewed in its broadest context, as it must be by any serious study of the problem. Such difficulties are inherent both in the concept of folklore and in that of protection.

2. Folklore is a vague concept. The most celebrated folklorists themselves do not suggest any hard and unanimous criterion for separating folklore from the mass of socio-cultural phenomena; and should reference be made to the list of specific manifestations which they all consider to be folkloric, these display such a degree of heterogeneity that it seems well nigh impossible for any common statute of protection to be enacted for them.

Some first attempts have, however, been made to classify the phenomena contained in this list. One is particularly relevant to this study: that which sets artistic or literary folklore apart from the rest, the underlying idea being that such folklore is most vitally in need of protection and is, at the same time, most amenable to it. Moreover, some differentiation within this category would seem to be warranted: some folklore phenomena do not have a material form, they have the incorporeity, the evanescence of gesture, of sound, of speech (dance, music, song, oral narratives, poems or tales); others are, from the outset, materialized as objects (folk drawings or sculpture). It is conceivable that the protection of tangible folkloric objects could take the form of the recognition of a droit de suite, akin to the notion of realty in private law.

3. Folklore protection can be of two distinct types, which appear to be quite different from each other.

Inasmuch as the first inquiries made by interested countries highlighted the intellectual property aspects of the question, it was natural that the initial explorations at the international level should have concerned what is customarily called legal protection, the protection of folklore, viewed as part of the national heritage (Volksgut, as the folklorist Hoffmann-Krayer put it), against foreign misappropriation. The question of legal protection is, in fact, the main concern of this study.

4. However, before being protected as intellectual property, folklore needs to be protected for itself, indeed against itself, for it is labile, fragile, exposed to the assaults of time and of man, threatened by erosion and distortion. Many States have, therefore, taken steps to ensure the safeguarding and conservation or, as it is sometimes called, the material protection of the folklore heritage, material protection that no longer falls within the province of law but protection of folklore viewed as a science and, in its ambit, of sociology, ethnology, museology, etc.

5. In a preliminary phase, there is no particular harm - in fact, it is useful, for practical reasons - to consider legal protection separately, as will be done below. But when the time comes to draw up detailed international regulations, it will probably become clear that the two elements of folklore protection are closely interwoven and that an interdisciplinary approach is called for. Legislator will need the assistance of folklore specialists when circumscribing the area they wish to protect. More fundamentally, it will very often become apparent that material protection at the national level (albeit with the co-operation of other States) is prerequisite to the legal protection demanded at the international level.

6. We may perhaps be permitted to introduce a sociological consideration at this point. Although it concerns the material protection of folklore, in due course

it may have some bearing on the implementation of legal protection: it might come up, in particular, either in the content of the moral right of the country of origin, which will have to be recognized, or, conversely, in the invocation by the recipient country of the principles of law and order.

Earlier discussions of the preservation of folklore have apparently always taken as their point of departure the postulate that because every manifestation of folklore contributed to the cultural identity of a people it was per se a value to be preserved. However, just as the lawmakers of the Europe of customary law made a distinction between good and bad customs, it would make sense to apply the same distinction to folklore. Without subscribing to the theses that reduce all folklore to vestiges of the past, it must be admitted that some manifestations of folklore are archaic and could impede the development of a group. A religious denomination concerned with its aggiornamento may decide against the preservation of certain rites it regards as superstitions. Some popular, folkloric medical practices may prove dangerous for public health. Nagging is part of a folkloric tradition, that may be condemned by the general feeling of a society. If, when speaking about the preservation of folklore, what is meant is keeping alive its memory, conserving it in a museum, the harmful phenomena warrant conservation as much as the beneficial ones. But if, as has been suggested, what is meant is the preservation of the social milieu which produces folklore phenomena, the indiscriminate application of protective measures could result in the perpetuation of undesirable effects.

7. The foregoing remarks should dispel any illusions that a global solution to the legal problem of the international protection of folklore is around the corner. This feeling of circumspection will be reinforced by the exploration, in turn, of the various legal means that have already been recommended to ensure such protection. The most elaborate amongst them are based on property law; the others, which are not so well defined, arise out of the law of obligations.

II. EXAMINATION OF DIFFERENT SYSTEMS

(a) Systems based on property law

8. Copyright is the legal concept that comes most readily to mind whenever thought is given to the problem of according folklore the protection of the law. This is the system that has been adopted in a number of Codes of Law (Algeria, Kenya, Morocco, Senegal, Tunisia). It provides an easy way of recognizing a moral right and pecuniary rights belonging, if not to the creators themselves, at least to those who are considered their representatives, that is, the national States.

9. But does the analogy hold water? At first glance it might seem to commend itself by virtue of the two essential features without which, it is felt, the question of copyright cannot arise, namely, artistic or literary creation and a certain degree of originality, it being understood that common law contents itself with originality of form, or relative originality.

However, if one takes a closer look at these two features, they are not all that clear-cut: works of folklore arise out of a series of imitations and this casts some doubt on the wisdom of making originality, even relative originality, a criterion; furthermore, folklore has an elusive quality, since it stretches over and is diluted by time, whereas artistic or literary creation, for many legal systems at least, finds its ultimate expression in public disclosure.

10. Another more serious objection can be made: copyright was devised for individuals, whereas, in the case of folklore a whole community would be the copyright owner. It is true that some legislation (the 1957 French Act, for

example, Articles 9 and 13) gives sanction to the notion of a collective work. However, it is important to note how such texts define a collective work: they see it as the work of a set group of individuals whose relationship to a supervisor is readily identifiable. With folklore, it is quite a different story; here one is confronted with an indistinct grouping whose outlines are variable, and whose components are anonymous and unstable and often include the dead as well as the living. To apply a copyright to such a grouping would presuppose the existence of a collective creative conscience. This hypothesis of social psychology need not be rejected out of hand, but it is the subject of fierce controversy, as is well known.

11. Though it may seem logical that the copyright on a work of folklore should belong to the community from which it stemmed, this idea is not pressed to its logical conclusion: the community that earned the copyright will not be able to exercise it. In the system under consideration, it is commonly acknowledged that the State having territorial sovereignty is competent to assert title to the copyrights on all works of folklore - the State alone and not the limited groupings in which the folklore originated. There are two reasons for this situation, which may very well be regarded as a monopoly or as a not specifically authorized power of representation. One is a practical reason, the fact that the small groups that produce folklore more often than not have no representative bodies or even organization; the other is a legal reason, the fact that what is involved is the protection of folklore beyond a country's frontiers and that States are, in principle, the sole legal entities governed by international law.

Nevertheless, there is something inappropriate, indeed unjust, in the State's exclusive right to intervene in the folklore field. For folklore is, by its very nature, a highly diversified, extremely localized phenomenon which is not rooted in society as a whole but in distinctive, often very restricted, groups: a province an ethnic group, a village, a particular occupational group, an age group. The establishment of State control over folklore could result in the dispossession of the actual authors. The same criticism could, furthermore, be made of other systems of protection, for there is no avoiding the inherent contradiction between folklore and centralized control.

12. In another theory which could have been a by-product of the preceding one, the notion of copyright is dropped, thus eliminating the confusion caused by its individualist character; folklore is placed in a public domain, as this term is understood in the laws governing artistic and literary property, but one which pays, the sovereign State reaping the benefits thereof. There is not much point, however, in dwelling on this system, for it does not go very far towards achieving the objective of protection of folklore as formulated by the countries of origin. Their right to royalties would, of course, be theoretically ensured; but, subject to that condition, all would be free to use and manipulate the folklore heritage as they saw fit. It may be noted here once again that the legal protection of folklore without the necessary basis for material protection is not likely to be very effective.

13. Use of the term "public domain" is not limited to the copyright system. It is used in administrative law to designate State property, especially such property as the State uses in the performance of its essential functions. Now is not one of its essential functions to preserve the cultural identity of its people? The considerations which, almost everywhere, have caused major historic monuments to be placed in the public domain, are also applicable to works of folklore. Or, to use another comparison, cultural resources are subject to nationalization on the same basis as natural resources. In any case, it is clear that property law operates in such a way as to confer on the State the maximum of prerogatives, and, hence, the maximum power for protecting folklore. This is the system that underlies the 1968 Bolivian Decree, a document of special importance in that it probably triggered off the whole movement of research in our field.

14. One possible weak link in the system is, however, the very mechanical nature of the notion of territoriality which it applies. The rule of jus soli is readily understandable for monuments or for natural resources; but is there not an ineradicable human factor involved in folklore? The answer to that, of course, will be that it is legitimate to assume that the anonymous producers of folklore are bound to a territorial sovereign by ties of nationality and domicile. And that is sufficient reason, it will be concluded, to force them to undergo a kind of expropriation. But does that necessarily mean expropriation without compensation? It would be fair to provide for the compensation of those who participate most directly in folklore production.

(b) Systems arising out of the law of obligations

15. Reference is sometimes made to the theory of unjustified enrichment. The simile is attractive: the entrepreneur who publishes records of music borrowed from some exotic folklore seems indeed to enrich himself at the expense of the far-away creators. However, the objections can be made:

(1) that, in fact, not all legal systems recognize the action of de in rem verso;

(2) that, in law, it is not a foregone conclusion that the loss of earnings experienced by the country of origin constitutes an impoverishment as this term is construed by classical theory; and that the absence of justification is, furthermore, not established, given the fact that, in the absence of international regulations, which is assumed, folklore is considered res nullius and the right of occupation can be seen as justification for enrichment.

16. On the other hand, there is no legal system that does not recognize claims for damages to compensate for loss sustained.

Some of these are specific actions founded on a distinct type of civil responsibility. There is one that stands out, and that is the action founded on unfair competition (at times extended to cover improper or unlawful competition). It has been seen as providing folklore protection with a reasonable and flexible instrument for ad hoc action that does not necessitate the prior establishment of rigid institutions. There is a flaw, however, and it resides in the notion of competition, since folklore must be preserved even without competition, before even the country of origin itself has begun to exploit its own cultural heritage.

17. The objection may be skirted by looking for an analogy - as one State (Israel) has apparently considered doing in the domain of the laws dealing with designations of origin. These laws are not totally unrelated to the theory of unfair competition. However, by emphasizing the qualities of the particular locality and the know-how of local people, they presume a potential for exploitation and thus a potential for competition within the country of origin. This would make the establishment of proof much easier. It should be noted, however

(1) that such legislation was enacted, on the whole, to consumers and to sanction fraud perpetrated to their disadvantage; this is not the main objective of regulations for the protection of folklore;

(2) that, in the final analysis, laws enacted unilaterally in the country of origin would have to be registered abroad and covered by international agreements to be effective in other countries.

18. The same limitation would become apparent in the event that recourse were made to the common law of aquilian responsibility (liability with respect to wrongful damage done to property). The damage is incontestable, but where

does the fault of the foreign user towards the country of origin lie? The act of the user can be held to be unlawful only in so far as the rights of the country of origin over its folklore have already been given international sanction.

III. STEPS TOWARDS A SOLUTION

(a) The search for principles

19. The question of folklore protection brings into play divergent interests, all of comparable validity, depending on the particular angle from which they are viewed. This explains why there is no single principle that might hold the key to the question but a number of principles that will have to be adjusted and reconciled with each other. This last point cannot be emphasized too strongly.

20. At the present time, it is universally proclaimed that creative work confers beneficial title to the product created. Moreover, though there are some who would contest an unlimited right of inheritance, the transmission of assets acquired by labour through several generations at least is proclaimed as a right of natural solidarity. This double principle provides ample philosophical justification for asserting a right to be enjoyed by the diffuse groupings amongst which folklore emerges, a primitive right over elements they have created themselves or have been handed down by tradition.

But this right of groups in whose midst folklore arises is going to be repressed and inhibited by the State in the name of other principles: the public interest, which transcends private interest; national history, which transcends localized folklore; territorial sovereignty, which commands access to ethnological areas. Inhibit does not, however, mean destroy.

21. Let us now leave behind us the folklore-productive groups and the country of origin. Their ethnocentrism, in its varying degrees, is countered by a principle of unity and universality of the human spirit, a principle that has important implications.

It can be expected that this principle, which might be termed the cosmopolitan principle (since the cosmopolitan is a citizen of the world), would first have a moderating effect on the principle of national folklore protection by showing that the indigenous purity of folkloric phenomena is seldom absolute. In Europe and elsewhere there are well-known cases of transnational folklore. The April 1964 Memorandum of the Bolivian Government wisely drew attention to the difficulties of organizing a national system of protection that could be caused by this type of intellectual co-paternity as between two or more nations. It may even be asked whether it is humanly possible to overcome such difficulties; and, accordingly, whether it might not be prudent to abandon, once and for all, the attempt to disentangle the threads of obscure influences woven over several centuries that the oral quality of folklore has enmeshed even more inextricably.

22. The cosmopolitan principle should, in the second place, lead to the recognition of an obligation on the part of States to co-operate at the international level in the field of folklore. The cultural heritage of every nation is also part of the cultural heritage of mankind. While the country of origin has a legitimate interest in managing and exploiting the resources of its folklore, other countries have an equally legitimate interest in acquainting themselves with it. Should it be suggested that the State has a right of ownership over its folkloric "subsoil", let it be immediately made clear that such a right cannot be absolute, that it is limited by a "social duty", a duty towards the family of nations, the duty to organize at one and the same time the preservation and the dissemination of its indigenous folklore.

23. Other interests, private interests, are also involved in the question and it would be unfair to consider them a priori as having no validity. We need not concern ourselves with the commercial interests of the publishers; they can look after themselves. But the tourist and even the occasional spectator deserves greater solicitude. In the effort to protect folklore, it would be absurd to subject every film, every amateur recording to police control. In this regard, individual freedom must be a moderating principle. Folkloric events have an element of fun that would resist too rigid institutionalization. They require protection arrangements with some lightness of touch.

(b) Technical arrangements

24. The first rule of international law to be laid down will be recognition of the right of every State over the folklore which can be said to originate within its borders.

The location giving rise to folklore will be determined according to one or the other of two criteria: the place where traditional events take place; or, independently of such events, the existence of a latent tradition which has its roots in a particular area.

The right of the State will be conceived as a kind of original right or rather as a statute containing intellectual property prerogatives that are, however, strictly conditioned by obligations under public law.

25. The prerogatives of the State enjoying the right should be capped by a moral right, the right to require that all reproductions of folklore works carry an indication of their origin, and also the right to insist on universal respect for the integrity of the work and the dignity of its authors, whether living or dead, and to prevent them from being made figures of fun under cover of picturesqueness.

26. Every State has the right to use and enjoy the benefit of its folklore as it thinks fit, and, correlatively, the right to prevent third parties, foreign States and their nationals from making use of it. This provision covers latent folklore, i.e. folkloric material before it has emerged in a fixed form, as well as the fixed form itself, once the work has been reproduced in material form. Obviously the important point in respect of any system of international regulation of folklore is the opposability ad extra of the rights of the State, i.e. their opposability to foreign States and foreign nationals who claim the right to use folklore as if it were property belonging to no one. However, some distinctions are inevitable: the force of such opposability and the force of the rights of the State themselves must, rationally, depend on the ultimate purpose for which folklore is used.

27. It is with respect to commercial use that the countries of origin enjoy the most solidly based prerogatives. From the start they claimed the right to derive a pecuniary benefit from their folklore: the right of exploitation can no longer be contested. It is not even certain that any time-limit should be set on this right, at least in so far as it concerns latent folklore, notwithstanding any material form it may already have acquired, for such folklore is constantly being renewed, which gives rise to new rights of exploitation.

28. It is up to every State to decide on the procedure it will adopt to monitor foreign exploitation of its folklore - whether it grants licences to foreign companies for a consideration or whether, allowing it to be used without any preliminary stipulations, it is content to demand from such companies royalties equivalent to a certain proportion of their profits. However, irrespective of the procedure chosen, it would appear that, from the standpoint of international law, the validity of the levies made by the country of origin should be contingent

on the latter's ability to prove that it has set aside at least a part of the receipts as compensation for the actual creators of folklore, if they are identifiable, or, secondarily, as subsidies for groups connected with the creation of folklore or even, possibly, as endowments to institutions established to promote folklore.

29. Use for scientific purposes or, more accurately perhaps, ethnological use, does not give rise to a conflict of pecuniary interests. It is, however, conceivable that a State may wish to reserve for its own nationals certain privileges could be scientifically appropriate in that they ensure a more intimate understanding of the folklore phenomena in question. A system of research licences would not be contrary to intellectual co-operation between nations, provided that the issuance of such licences can be denied to foreign ethnologists only for a limited period of time (for example, ten years), the time required to train national researchers. In return for such a limitation on the monopoly, the international community would be under an obligation to lend its assistance to the country of origin, if need be, in the training of a body of ethnologists. This reveals once again, incidentally, the way in which legal and material protection overlap each other.

30. In the interest of intellectual co-operation, the use of folklore for educational or cultural purposes should be exempt from restrictions and royalties. Its use for purely amateur recreational purposes should likewise be exempt, out of respect for freedom and also because the matter is relatively unimportant.

(c) Methodological remarks

31. From the foregoing outline and the uncertainties it has not attempted to hide, the general impression may be gathered that an international regulation for the protection of folklore is something that can only be progressively applied. If the action taken is to be effective, it seems essential not to introduce too comprehensive or inflexible a system of regulations in the initial stage.

As far as the field of application is concerned, it would be best to avoid trying to encompass all folkloric phenomena at once, but rather to concentrate on those that have given rise to the most flagrant misrepresentation and misappropriation, which, moreover, are obviously the easiest to detect. This would, in fact, mean restricting the initial legal protection of folklore to the following areas: dance, music, song and oral narratives. Folklore embodied in tangible artefacts ought to be treated separately, inasmuch as arrangements made to protect it would involve aspects of international museum law.

As to the question of a legal instrument, it would undoubtedly be preferable, at this stage, which is one of familiarization with the problems involved, to proceed by making recommendations rather than by drawing up an international convention.