

**Consent, Decision Making and Dispute Resolution of Traditional Knowledge
and Cultural Expressions under “The Protection of Traditional Knowledge
and Cultural Expressions Act” in Kenya**

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DECLARATION

I, OTIENO MARY A. AWUOR, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signature: _____

Date: _____

This Research Proposal has been submitted for examination with my approval as University Supervisor.

Signed: _____

Date: _____

Dr. Isaac Rutenberg

Abstract

Traditional Knowledge and Cultural Expressions are a sui generis form of Intellectual Property that vests in Indigenous communities. Through generations of livelihood and interaction with their environment, these communities discover, develop and maintain knowledge and express it as part of their cultural heritage. This enduring relationship with such patrimony is slowly gaining recognition internationally and consequently being protected by state laws against abuse and exploitation by third parties.

This paper examines Kenya's protection under 'The Protection of Traditional Knowledge and Cultural Expressions Act' and argues that the rules as to consent, decision making and dispute resolution, remain unclear and impracticable. This paper argues that these sections are bound to create an implementation difficulty in the Kenyan context. This paper also briefly considers other problematic sections of the Act that unavoidably affect the issues under discussion. In doing so, it assesses the practice and experience of more advanced jurisdictions in protecting their Indigenous knowledge and its forms of expression.

This research briefly looks at the issue of intergenerational loss of knowledge that may need to be considered in the Kenya in the near future. Consequently, the study recommends amendments to the Act to clarify ambiguous sections. It also suggests that clear and concise rules or regulations of the implementation process ought to be crafted. Further, that awareness as to indigenous knowledge rights be conducted to allow for alternative solutions to the identified gaps in the Act such as creating institutional corporations and protection groups to actively implement the protection of the rights in question.

List of Abbreviations

ARCE	Archives and Research Centre for Ethnomusicology
ADR	Alternative Dispute Resolution
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ATSIHP	Aboriginal and Torres Strait Islander Heritage Protection
BD	Biological Diversity
CBD	Convention on Biological Diversity
COP	Conference of the Parties
CS	Cabinet Secretary
Cth	Commonwealth
EPBC	Environment Protection and Biodiversity Conservation
GR	Genetic Resources
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IP	Intellectual Property
IPRS	Intellectual Property Rights Systems
KECOBO	Kenya Copyright Board
PPVFRA	Protection of Plant Varieties and Farmer's Rights Act
R&D	Research and Development
SAARC	South Asian Association for Regional Cooperation
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge

TKDL	Traditional Knowledge Digital Library
TKDR	Traditional Knowledge Digital Repository
TM	Traditional Medicine
UNDRIP	United Nation Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
Vic	Victoria
WIPO	World Intellectual Property Organisation

List of Cases

AUSTRALIAN

Milpurrurru and others v Indofurn Pty Ltd (The Carpet's case)

U.S.A

John Bulun Bulun & Anor v R&T Textiles Pty Ltd

Foster and Others v Mountford and Rigby Ltd

List of Legal Instruments

INTERNATIONAL INSTRUMENTS

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Convention on Biological Diversity (CBD)

Convention Concerning Indigenous and Tribal peoples in Independent Countries

International Covenant on Economic, Social and Cultural Rights (ICESCR)

United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP)

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

REGIONAL INSTRUMENTS

Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture

Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore Treaty

AUSTRALIAN STATUTES / REGULATIONS

Aboriginal Heritage Act

Aboriginal and Torres Strait Islander Heritage Protection Act

Biological Resources Act

Environment Protection and Biodiversity Conservation Act

Environment Protection and Biodiversity Conservation Regulations

INDIAN STATUTES / RULES / POLICIES /

Biological Diversity Act

Biological Diversity Rules

Patent Act

Protection of Plant Varieties and Farmer's Rights Act

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act

Traditional Knowledge (Protection and Regulation of Access) Bill

National Intellectual Property Rights Policy

KENYAN LAWS AND STATUTES

Constitution of Kenya

Protection of Traditional Knowledge and Cultural Expressions Act

ZAMBIAN STATUTES

Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act

CHAPTER 1

INTRODUCTION

1.1. Background

Traditional Knowledge (TK)¹ and Traditional Cultural Expressions (TCE)² are a branch of Intellectual Property (IP) recently accorded a sui generis protection due to their nature as a living body of knowledge that is developed, sustained and passed on from generations within a traditional community.³ During the age of industrialization, the IP system was geared toward technological and developmental needs of society. However in recent years, indigenous peoples, traditional communities and governments in developing countries have sought protection for traditional knowledge systems. Therefore, the World Intellectual Property Organization (WIPO) is undergoing negotiations with countries to create either recommendations or an International treaty or treaties that introduce a minimum standard of protection of TKs, TCEs in member states.⁴

The conventional IP system considered TK and TCEs as part of public domain and hence had no specialised system of protection as a form of IP.⁵ This has caused unwanted misappropriation and misuse of the knowledge and cultural heritage of different indigenous peoples and traditional communities around the world.⁶ Many states have complained of the same and this has led to the move towards developing a system of protection. Such communities are recognised in the United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP). The Declaration provides that, *“indigenous peoples have a right to maintain, control, protect and develop their cultural heritage, TK and TCEs as well as the manifestations of their sciences, technologies and cultures, including human and Genetic Resources (GRs), seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts”*. In addition, *“They have the right to maintain, control, protect and develop their IP over*

¹ Any knowledge originating from an individual, local or traditional community; that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community or contained in the codified knowledge systems passed on from generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity and know-how of traditional architecture, construction technologies, designs, marks and indications.

² Any form, tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested and comprise of verbal, musical, expressions by movement and tangible expressions.

³ http://www.wipo.int/pressroom/en/briefs/tk_ip.html on 23 January 2017.

⁴ http://www.wipo.int/pressroom/en/briefs/tk_ip.html on 23 January 2017.

⁵ WIPO, ‘Intellectual Property and GRs, TK and TCEs’, 2015, 10.

⁶ <http://www.wipo.int/tk/en/resources/faqs.html> on 24 January 2017.

such cultural heritage, TK and TCEs”.⁷ WIPO has been a fore runner in the undertaking to create a new specialised system of regulation with the aim to protect traditional communities from exploitation and to ensure equitable compensation for the use of their TK and TCEs. These rights have recently been recognised in Kenya through “The Protection of Traditional Knowledge and Cultural Expressions Act” (‘The Act’), which came into force on 21 September 2016.

Kenya has a rich and well known traditional culture evidenced with the existence of 42 tribes, each practicing its heritage in a unique and dissimilar way. There has been exploitation of different forms of Kenyan TK and TCEs in the entertainment industry nationally and internationally, without permission or acknowledgement of the communities holding the rights.⁸ The Protection of Traditional Knowledge and Cultural Expressions Act was introduced to curb such exploitation. The Act gives effect to Articles 11 of the Kenyan constitution on the right to culture and its expression, Article 40 on the protection and promotion of IP rights and 69(1) placing an obligation on the state to protect and enhance IP in and indigenous knowledge of, biodiversity and GRs of the communities.⁹ However the entry of the Act alone, may not solve the problem. The Act in itself presents a number of implementation difficulties, ambiguities and questions. These are discussed in detail in the coming chapters.

The challenges this study identifies include the broad definition of a community encompassing thousands of persons from all over the country which creates a problem with regard to obtaining consent and decision making. Also the definitions of words such as community, owner and holder seem to overlap.¹⁰ Lastly, the Act is not clear on the process or mechanism of resolving disputes over shared TK and TCEs with other communities both in Kenya and in neighbouring countries. This may be a potential source of regional disagreements undermining the importance of cooperation in protection of the rights in question.¹¹ The above issues may work against the objective of the Act. Therefore in addressing these shortfalls, the Act will be smoothly

⁷ Article 31, UNGA, UNDRIP, UN A/RES/61/295 (2 October 2007).

⁸ Nzomo V, ‘Traditional Knowledge and Traditional Cultural Expressions in Kenya’, IP Kenya, 29 February 2012 <https://ipkenya.wordpress.com/2012/02/29/traditional-knowledge-and-traditional-cultural-expressions-in-kenya/> on 24 January 2017.

⁹ Article 11, Article 40, Article 69(1), *Constitution of Kenya* (2010).

¹⁰ Nzomo V, ‘Kenya’s Protection of TK and Cultural Expressions Act No. 33 of 2016 Comes into Force’, IP Kenya, 23 September 2016 <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/#more-8374> on 24 January 2017.

¹¹ Harrington J, Deacon H, ‘TK and Culture Expressions Act 2016’, The Star, 3 December 2016 http://www.the-star.co.ke/news/2016/12/03/traditional-knowledge-and-culture-expressions-act-2016_c1467018 on 24 January 2017.

implemented and will provide guidance to many other countries that seek to protect their TK and TCEs.¹²

1.2. Statement of the Problem

Africa and especially Kenya, has a rich traditional culture expressed diversely among its many tribes. The Act accords communities and governments the right to determine who, when and how their TK and TCEs are used as well as enabling them to benefit collectively from exploitation of such knowledge. Despite the protection afforded in the Act, Kenyan TK and TCEs have been exploited by different people around the world in their works of art, music, design and even fashion.¹³ While other people have gained through commercial exploitation of such work, the communities from which they derive their ideas do not benefit.¹⁴ One of the objectives of IP is to incentivise and reward creators, inventors and authors by allowing them to benefit from the commercial exploitation of any work that was inspired or derived from their original work (in this case knowledge, culture, heritage).¹⁵

The fact that other people may exploit the knowledge they derive from a community, and that community is not compensated in any way, raises the legal questions of permission and acknowledgement by the community. Neither of which have been sought. Begging the questions of fairness, justice and equitability. The Act was introduced to address these issues in Kenya, however, it creates ambiguities that may defeat its objective. Particularly, with regard to who consent and decision making is obtained from. And secondly, the Act's lack of a procedure to resolve disputes over shared TK and TCEs. The purpose of this study is to scrutinize these specific provisions of the Act, in order to examine their shortfalls and thereafter provide recommendations to resolve the ambiguities they present.

¹² Harrington J, Deacon H, 'TK and Culture Expressions Act 2016', The Star, 3 December 2016 http://www.the-star.co.ke/news/2016/12/03/traditional-knowledge-and-culture-expressions-act-2016_c1467018 on 24 January 2017.

¹³ Harrington J, Deacon H, 'TK and Culture Expressions Act 2016', The Star, 3 December 2016 http://www.the-star.co.ke/news/2016/12/03/traditional-knowledge-and-culture-expressions-act-2016_c1467018 on 24 January 2017.

¹⁴ <http://www.wipo.int/tk/en/resources/faqs.html> on 24 January 2017.

¹⁵ Fisher W, 'Theories of Intellectual Property', in Munzer SR (ed) *New Essays in the Legal and Political Theory of Property*, (1st edition), Cambridge University Press (2001) <http://www.law.harvard.edu/faculty/tfisher/iptheory.html>

1.3. Research Objectives

The study will be guided by the following specific objectives:

- i. To determine how obtaining consent and decision making will take place under the Act.
- ii. To determine the mechanism of resolving disputes over shared Traditional Knowledge and Traditional Cultural Expressions with other communities in Kenya as well as in neighbouring countries.
- iii. To scrutinize the protection accorded to Traditional Knowledge and Traditional Cultural Expressions in other developed countries.
- iv. To make specific recommendations on what changes should be made in order to efficiently protect Traditional Knowledge and Traditional Cultural Expressions and in Kenya.

1.4. Research Questions

- i. Who does one obtain consent from under the Act?
- ii. How will decision making under the Act take place?
- iii. How will disputes over shared Traditional Knowledge and Traditional Cultural Expressions with other communities in Kenya as well as in neighbouring countries be resolved under the Act?
- iv. What legal measures have other countries taken in the protection of their Traditional Knowledge and Traditional Cultural Expressions?

1.5. Justification of the Study

This research will be of use to a number of persons and groups. Firstly, this research will be beneficial to law makers as it will evidently highlight shortfalls in the act and make suggestions for possible amendments to enhance protection of indigenous communities. Also, this study will be of benefit to the larger academic community by elucidating the issue relating to national protection of Traditional Knowledge and Traditional Cultural Expressions. Further, this study may be of particular benefit to developing nations that hope to or are in the process of drafting laws for the protection of their own traditional communities. Above all, this study aims to benefit traditional and indigenous communities in Kenya as they will receive legal recognition as well as protection under the Act.

1.6. Theoretical Framework

This study employs three theories in investigating the foundation of TK and TCEs as a form of IP that requires special and better protection under ‘The Protection of Traditional Knowledge and Cultural Expressions Act’. The theories are the Economic theory of regulation, the Communitarianism theory and the theory of Property and Personhood.

The Economic theory of regulation theory rests on the “public interest” theory. The theory propounds that regulation is supplied in response to public demand for the correction of inefficient and inequitable market practices.¹⁶ The need for suitable regulation of TK/TCEs can be premised on this school of thought due to the exploitation and misuse of TK/TCEs. Such abuse has forced indigenous communities together with their states, to take part in the drafting of an International standard of regulation of TK/TCEs as well as the creation of national laws to protect them.

IP plays a significant role in economic development through innovation, product development and technical change.¹⁷ Economic theory demonstrates that Intellectual Property Rights systems (IPRS) play a positive role in fostering development in a country subject to circumstances such as complementary policies with regard to the type of IP in question.¹⁸ Authors and creators in IP are given exclusive rights and control over their work allowing them to commercially exploit such work and gain from it through licensing, sale or other means. TK/TCEs being a form of IP attracting sui generis protection, will similarly promote the same. This can be seen through their past and current creativity in the production of items such as clothing, beadwork, and jewellery, among others. Such activities have created local jobs, enhanced vocational skills and promoted tourism in areas where such communities prevail. Moreover, they have attracted foreign earnings that ultimately promote the Kenyan economy.¹⁹ Providing IP rights for TK/TCEs will enable communities to commercialize their traditional creations as they wish and exclude exploiters of their work. This will also enable them to exercise their control over how their TK/TCEs are used and avoid degrading use.²⁰ It is therefore crucial to recognise and appreciate the benefits that derive from TK and TCEs both to the communities holding such knowledge as well as the country at

¹⁶ Posner RA, ‘Theories of Economic Regulation’, 5 *Bell Journal of Economics* 2 (1974), 335-358.

¹⁷ Maskus KE, ‘Intellectual Property Rights and Economic Development’, 32 *Case Western Reserve Journal of International Law* 471 (2000), 478-482.

¹⁸ Maskus KE, ‘Intellectual Property Rights and Economic Development’, 502.

¹⁹ WIPO, ‘Intellectual Property and GRs, TK and TCEs’, 20.

²⁰ WIPO, ‘Intellectual Property and GRs, TK and TCEs’, 20.

large. It therefore follows that a suitable form of protection of such knowledge must be prescribed in law.

The study is further informed by the Communitarianism theory. This theory was proposed by John Goodwyn Barmby (1820-1881). Communism has no single definition although it can be said to imply the common ownership of things.²¹ It has been maintained over time and can be said to be a basis of the concept of communal ownership of property (and rights arising thereof). It accentuates the intrinsic connection between an individual and his or her community, holding that one's social identity and personality are considerably influenced by the community they are part of. The community may be a family or in a wider sense a community in a given geographic location sharing similar interests or history.²² It views persons as creatures embedded in language, history and culture, which are social constructs. A person cannot be without society.

The theory recognises the importance of social and common good rather than individualistic autonomy and rights.²³ The political implications of communitarianism depend upon the cultural outlooks and social priorities of particular contexts in question.²⁴ This research relies on this theory to buttress the importance of the traditional way of life among indigenous communities that practise their culture and consider it indispensable to their livelihood. Communism shows that communities can indeed own property as one entity and that policies and laws regulating them should be tailored according to their cultural outlook.

Lastly, the study is informed by the Theory of Property and Personhood. This theory is posited by Margaret Jane Radin who propounds that people possess items that they consider part of themselves. Such objects are bound up with their personhood and their loss or misuse causes pain that cannot be relieved by replacement.²⁵ This theory provides a basis for this research to elucidate the relationship between traditional communities and their knowledge and culture. Indigenous

²¹ Busky DF, 'Communism in history and theory: From utopian socialism to the fall of the Soviet Union', *Praeger*, 2002.

²² Avineri S, de-Shalit A (eds) 1992, *Communitarianism and Individualism* in Oxford readings in Politics and Government, Oxford University Press, 1992.

²³ Etzioni A, 'Communitarianism' (2013) <https://www.britannica.com/topic/communitarianism#toc299520> on 2 February 2017.

²⁴ Bell, Daniel, 'Communitarianism', *The Stanford Encyclopedia of Philosophy* (2001) <https://plato.stanford.edu/entries/communitarianism/> on 2 February 2017.

²⁵ Radin MJ, 'Property and Personhood', *Stanford Law Review* 957 (1982) <https://cyber.harvard.edu/IPCoop/82radi.html>

communities have an intrinsic connection with their cultures, heritage and objects composing such culture and heritage. The nature of TK/TCEs is the history, culture, practices and heritage that have been passed on from generation to another, forming part of that community's lifestyle. Sharing this heritage is the essence of the existence of these communities and therefore every individual forming part of such a community is defined by it. It is their personhood as individuals and more importantly as a community. This invaluable nature of TK and TCEs to such communities must be given due regard in the creation of suitable laws to ensure their protection from misuse and misappropriation.

1.7. Literature review

Scholars such as McManis and Teran have recognised that TK and TCEs are a recent and much debated issue. Discussions on how and whether they should be protected have been ongoing in forums such as WIPO, Convention on Biological Diversity (CBD), and Conference of the Parties (COP) and also at national and regional levels.²⁶ Some principal international agreements in relation to TK/TCEs include the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁷ the International Labour Organisation's Convention (No.169)²⁸ and the CBD.²⁹ Regional frameworks of protection are underway to create special protection for their TKs. They include the Draft Framework for an African Instrument on the Protection of TK (Draft ARIPO/OAPI Framework) and the Draft Legal Instrument for South Asian Association for Regional Cooperation (SAARC).³⁰ The instruments attempt to strike a balance between access to TK and their protection. The Draft SAARC provides that the prime benefit must be to the holders of such knowledge as well as limitations that may be put.³¹ They further highlight some of the limitations in the existing forms of IP to protect TK/TCEs which include the failure to address the

²⁶ McManis C and Teran Y, 'Trends and Scenarios in the legal protection of traditional knowledge', in Wong T and Dutfield G (eds), *Intellectual property and human development: Current Trends and Future Scenarios*, Cambridge University Press, 2010, 140.

²⁷ Articles 15 and 27, ICESCR, 16 December 1966, 99 UNTS 3.

²⁸ Articles 2 and 5, *ILO Convention Concerning Indigenous and Tribal peoples in Independent Countries* (No. 169), 27 June 1989, 1650 U.N.T.S. 383.

²⁹ CBD, 5 June 1992, 1760 U.N.T.S. 79.

³⁰ McManis C and Teran Y, 'Trends and Scenarios in the legal protection of traditional knowledge', 160-161.

³¹ McManis C and Teran Y, 'Trends and Scenarios in the legal protection of traditional knowledge', 160-161.

protection of TK/TCEs holistically. Integrated solutions would therefore be more suited in preserving these peoples heritage.³²

Pires de Carvalho (2007) suggests that an international treaty such as the one discussed could have minimum standards relating to the acquisition and enforcement of TK rights while leaving to define, at national level, the scope and identification of owners.³³ He adds that such a treaty could draw from the flexible concept of ‘same treatment’ under the Paris Convention of Industrial Property, to ensure reciprocity.³⁴ In a paper prepared for the Commonwealth Secretariat, Drahos similarly holds that an International treaty should not at this stage try and create substantive norms for protection of TK but should rather encourage the development of national approaches on norm creation and use the treaty as a mechanism with respect to enforcement of the rights in discussion.³⁵

On the other hand, Jessica Lai notes that there would exist a paradox in the establishment of an integrated international system of protection of indigenous communities. This is due to the very nature of TK/TCEs being original in relation to the specific communities in question, and not global or general in nature, to be similarly applied across communities across the world without losing its significance.³⁶ Miranda Forsyth similarly states that the nature of TK/TCEs has two consequences for legislation; first, that neither TK nor customary rules regulating access to TK/TCEs can ignore the social processes in which they exist.³⁷ Second, that it is problematic to link TK/TCEs within the community which it is part to a single ‘right’ ‘owned’ by a clearly defined group of persons.³⁸ However, due regard may be given to this while still creating an International treaty regulating TK/TCEs by allowing for reasonable flexibility in the treaty so as to cater for the different TK/TCEs among different indigenous communities around the world.

³² McManis C and Teran Y, ‘Trends and Scenarios in the legal protection of traditional knowledge’, 161.

³³ McManis C and Teran Y, ‘Trends and Scenarios in the legal protection of traditional knowledge’, 164.

³⁴ Article 2 of the *Paris Convention for the Protection of Industrial Property* provides that: ‘Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the union the advantages that their respective laws now grant, or may hereinafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter. And the same legal remedy against any infringement of their rights...’

³⁵ McManis C and Teran Y, ‘Trends and Scenarios in the legal protection of traditional knowledge’, 164.

³⁶ Lai JC, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* Springer International Publishing, 2014, 201.

³⁷ Forsyth M, ‘The traditional knowledge movement in the Pacific Island countries: the challenge of localism’, 29 *Prometheus* 3 (2011), 272.

³⁸ Forsyth M, ‘The traditional knowledge movement in the Pacific Island countries’, 272.

Protection of TK/TCEs in Kenya through the recently enacted Act must therefore aim to provide proficient and constructive protection to indigenous communities in Kenya through consideration of the international and regional frameworks. This will enable the Act or amendments originating therefrom to capture all the dynamics at play and finally address the issue satisfactorily.

1.8. Research Design and Methodology

The research will focus heavily on a documentary/archival analysis of the shortfalls in The Protection of Traditional Knowledge and Cultural Expressions Act. In doing so, primary sources such as The Constitution of Kenya, statutes and policies will be considered. Secondary sources such as books, journal articles, online journals, and writings of scholars will also be analysed.

Finally, the research will compare the legal framework applied by other developed countries in dealing with the issue. Cases in courts that have dealt with the subject will be reviewed. This will be done through library and desktop research. The study will exclude collection of data due to time constraints as the research is part of the fulfilment of a Bachelor of Laws degree with a stipulated timeline of a semester.

1.9. Limitations

This study will be limited by the fact that the Act in question is a fairly new law and therefore has not had considerable time for implementation and review. Giving rise to the second issue of limited or non-existent case law with respect to TK and TCEs in the Kenyan context. Lastly, the research method used excludes collection of data/first-hand information.

1.10. Chapter Breakdown

Chapter 1: Introduction

The Research Proposal

Chapter 2: TK and TCEs

Defines Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) in the Intellectual Property sphere. It examines the historical context of TK and TCEs, their importance in the world and in the Kenyan context. It further considers the protection they warrant under a sui generis system in IP.

Chapter 3: An analysis of “The Protection of Traditional Knowledge and Cultural Expressions Act”

This chapter scrutinises the sections within the Act that overlap with other sections, create implementation difficulties or raise ambiguities requiring improvement or an amendment of the Act.

Chapter 4: A Comparative analysis

A comparison of the Kenyan TK and TCEs’ framework of protection with that of other countries. Identification of the best practice and proposing its incorporation into the Kenyan framework.

Chapter 5: Conclusion and Recommendations

Proposing a way forward and the possible recommendations that may be undertaken in order to ensure suitable protection of TK and TCEs in Kenya.

CHAPTER 2

TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

This chapter commences by defining Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) in the Intellectual Property sphere. It gives a historical context of TK and TCEs and concludes by highlighting their importance across the world and more importantly in Kenya. There exists an estimated 300 million indigenous people in over seventy countries in the world. Such people retain their distinct political and socio-cultural way of life, distinct from the dominant groups in their larger societies.³⁹

No single definition would do justice to the diverse forms of knowledge held by indigenous peoples and communities throughout the world. Because there is no generally accepted formal definition, WIPO uses working definitions and descriptions in a bid to disentangle the issue.⁴⁰ TK involves the use of knowledge such as traditional technical know-how, ecological, medical or scientific innovations, information, skills and practices.⁴¹ Traditional knowledge is not so known due to its antiquity, however, this form of protection focuses on the dynamic nature of a community's livelihood. It is knowledge that is sustained, developed and passed on to generations to come. The intrinsic connection of such knowledge with the community is what makes it 'traditional'.⁴² It is associated with forms of cultural expressions of folklore such as songs, narratives, ceremonies, handicrafts, designs, ornaments and motifs. For many communities therefore, TK and its way of expression will be inextricable.⁴³ Cultural expressions are defined by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) as "*those expressions that result from the creativity of individuals, groups and societies, and that have cultural content*".⁴⁴

³⁹ Ramcharan R, Sinjela M, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights: Issues, Challenges and Strategies' 12 *International Journal on Minority and Group Rights* 1 (2005), 1.

⁴⁰ WIPO, 'Intellectual Property and GRs, TK and TCEs', 13.

⁴¹ WIPO, 'Intellectual Property and Traditional Knowledge', 2008, 5.

⁴² WIPO, 'Intellectual Property and Traditional Knowledge', 5.

⁴³ WIPO, 'Intellectual Property and Traditional Knowledge', 5.

⁴⁴ Article 4(3), *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2005.

Indigenous communities, peoples and nations are all traditional knowledge holders, but not all holders are indigenous communities. It is agreed that traditional knowledge refers to both tangible and intangible aspects, where the tangible is composed of genetic resource knowledge and the intangible composed of symbolic or religious elements of expression (TCEs).⁴⁵ Some examples of TK and TCEs include: Thai traditional healers using *plao-noi* to treat ulcers, the San people using *hoodia cactus* to fend off hunger while hunting.⁴⁶ Rosy periwinkle, unique to Madagascar, contains properties that can cure certain forms of cancer.⁴⁷ The *Maasai Shuka* and handiwork or artefacts therefrom, traced to the Maasai of Kenya and Tanzania.

In the past, western health systems focused heavily on scientifically proven techniques of treatment and only recently, have traditional medicinal methods been recognised. Centuries old healing methods from Chinese and Indian Ayurveda were barely recognised yet such methods had been through decades of trial and error to make them appropriate in a given community. In 1993, an estimated 43 billion USD from sales of products derived from traditional medicines were made. Of this, scanty profits were given to the indigenous communities who made the research possible.⁴⁸ It may seem as a positive endeavour by companies such as Smithkline Beecham, Monsanto, and Bristol Meyers among others, but these companies essentially exploit resources held by traditional communities, claim them as their own and make colossal returns that are barely shared with the local communities that provided them with precise ecological knowledge that would otherwise take them years to obtain.⁴⁹

The exploitation of TCEs has also been widely seen of folk music, artefacts and clothing. Exploitation has ranged from copying or mixing local songs with popular western music to displaying and collecting sacred items. In *Foster v Mountford*⁵⁰ an anthropologist published a book containing images and descriptions of Central Australian Aboriginal sacred and secret

⁴⁵ McManis CR (ed), *Biodiversity and the Law: Intellectual Property, Biotechnology and Traditional Knowledge*, (1st Ed), Earthscan (2009), 357.

⁴⁶ WIPO, 'Intellectual Property and GRs, TK and TCEs', 14.

⁴⁷ Ragavan S, 'Protection of Traditional Knowledge', 2 *Minnesota Intellectual Property Review* 1 (2001), 8.

⁴⁸ Ramcharan R, Sinjela M, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights', 7-8.

⁴⁹ Ramcharan R, Sinjela M, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights', 7-8.

⁵⁰ *Foster and Others v Mountford and Rigby Ltd* (1976) 14 ALR 71.

ceremonies.⁵¹ Indigenous communities have submitted that such violations depict them in a degrading manner and even violates the sacredness of their cultural heritage. There have been instances where tribal paintings are copied with minor changes. Such infringements dilute tribal customs of a people but are nevertheless protected under copyright law as copyright only concerns itself with the originality of expression of an author's idea. Likewise, the Maasai of Kenya and Tanzania who hold one of the most powerful images of tribal Africa, had their traditional African blanket: the *Maasai Shuka* commercially exploited by Louis Vuitton's men collection with no form of compensation given to the community despite the company selling billions worth of goods.⁵² Another example is the use of sacred *Ami chants* by the German rock group Enigma, for its song 'Return to Innocence'.⁵³

In the previous chapter, the economic theory of regulation is introduced. It is built upon public interest where due to public demand, regulation is introduced to deal with an injustice in the market.⁵⁴ The exploitations described above and that are seen to have existed even in the 1900s, must call our attention to the need for the creation of strict international and national laws protecting TK and TCEs. We must keep in mind the role that Intellectual Property Rights Systems (IPRS) play in economic development. They allow authors, and in this case would allow indigenous communities under a sui generis system of protection, to hold the exclusive rights to control, use and commercially exploit their TK and TCEs. This would require everyone and more so, the large companies seen to exploit indigenous communities to seek permission, licenses or even buy the rights from the communities in order to use their works. Such economic trade or agreements are in themselves beneficial to indigenous communities and the country as they lead to more economic activity, trade, tourism and development where such communities dwell.

⁵¹ Bosse J, 'Traditional Cultural Expressions and Copyright Law in Australia', 7 April 2015, <http://www.jatl.org/blog/2015/3/28/traditional-cultural-expressions-and-copyright-law-in-australia> on 13 January 2017.

⁵² Young S, 'Maasai fighting for compensation from fashion labels who have appropriated their iconic cultural brand', 7 February 2017, <http://www.independent.co.uk/life-style/fashion/maasai-people-cultural-appropriation-luxury-fashion-retailers-louis-vuitton-east-africa-intellectual-a7553701.html> on 26 August 2017.

⁵³ Gervais JD, 'Spiritual but not intellectual? : The protection of Sacred Intangible Traditional Knowledge', 11 *Cardozo Journal of International law & Comparative law* (2003), 469.

⁵⁴ Posner RA, 'Theories of Economic Regulation', 5 *Bell Journal of Economics* 2 (1974), 335-358.

TK and TCE rights are held by a community as one entity. Communitarianism proposes communal ownership as is common in such traditional set ups.⁵⁵ It recognises the connection between an individual and his community in relation to shared language, history and culture. The theory places emphasis on promoting social and common good rather than individualistic autonomy and rights.⁵⁶ The political implications that arise from this depend upon the cultural outlooks and social priorities of the particular contexts in question.⁵⁷ Therefore, we must give due regard to the traditional way of life among indigenous communities who consider practising their culture indispensable to their livelihood. The laws regulating them such as Kenya's 'Protection of Traditional Knowledge and Cultural Expressions Act', ought to be tailored to their cultural outlook in order to be meaningful to the communities.

Margaret Jane Radin, in her theory of Property and Personhood argued that people own items they consider as definitive of their personhood and that the pain caused by the loss or misuse of such objects cannot be eased by replacement.⁵⁸ This is the kind of relationship indigenous communities have with the tangible and intangible objects they create to express their traditional knowledge and culture. Such knowledge and objects form part of their culture, practices and lifestyle. Sharing this heritage is the essence of these communities and therefore every individual forming part of such a community is defined by it. It is their personhood as individuals and more importantly as a community. This invaluable nature of TK and TCEs must be given due regard in the creation of suitable laws.

For a considerable period, the prevailing IP system has been applied as the solution to this issue.⁵⁹ However, since it fails to consider the sacred nature of cultural expressions, it has been deemed inefficient.⁶⁰ Issues such as territorial application make it ineffective as TK and TCEs are exploited across borders. Conventional IP systems have also been tailored for individual and joint ownership rather than communal ownership.⁶¹ In *Bulun Bulun v R&T Textiles*⁶² (the 'T-shirt case'), the

⁵⁵ Busky DF, 'Communism in history and theory: From utopian socialism to the fall of the Soviet Union', 2002.

⁵⁶ Etzioni A, 'Communitarianism', (2013).

⁵⁷ Bell, Daniel, 'Communitarianism', (2001).

⁵⁸ Radin MJ, 'Property and Personhood', (1982).

⁵⁹ Ragavan S, 'Protection of Traditional Knowledge', 15-16.

⁶⁰ Ragavan S, 'Protection of Traditional Knowledge', 15-17.

⁶¹ Ramcharan R, Sinjela M, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights', 15-16.

⁶² *John Bulun Bulun & Anor v R&T Textiles Pty Ltd* [1998] ALR 157.

Australian Federal Court noted that there was no common law basis for communal title over copyright of an artwork made by an Aboriginal artist yet still reaffirming the fiduciary relationship that existed between the plaintiff and his clan due to the nature of artistic ownership in that cultural context.⁶³ Further, for patenting, TK and TCEs fail to meet the novelty criteria as they are known to have existed from past generations and to have been practiced over time and therefore not a novel idea.⁶⁴ Moreover, it is said that TK and TCEs fall under ‘public domain’ as they are commonly found in the public within a given community and have been for centuries.⁶⁵ Does this mean that TK and TCEs will continue to be exploited and put into degrading use? This study supports the view that a *sui generis* system would best serve to protect such knowledge and expressions.

The cultural heritage in Kenya began with subduing and suppression during the colonial era, when the British imposed foreign language, values, beliefs and lifestyle on communities.⁶⁶ National pride in Kenya’s culture and way of life was only regained after attaining independence. Decades later, with the promulgation of the 2010 Constitution, recognition of the diverse cultures among the people of Kenya was upheld. Article 11 recognises culture as the foundation of Kenya and protects its expression as well as the indigenous communities holding it.⁶⁷ Article 40 orders the state to support, promote and protect IP rights of the people of Kenya⁶⁸ and Article 69 obliges the state to enhance and protect indigenous knowledge, biodiversity and GRs of the communities.⁶⁹ The varied ethnicities, cultures and sparse distribution of cultural heritage in Kenya made previous legislations such as the Environment Management and Co-ordination Act and the Land Act ineffective to adequately define and protect the rights of indigenous communities and their knowledge.⁷⁰ ‘The Protection of Traditional Knowledge and Cultural Expressions Act’ assented to on 31st August 2016, came into force to actualise the aforementioned provisions of the

⁶³ Bosse J, ‘Traditional Cultural Expressions and Copyright Law in Australia’, 2015, http://www.jatl.org/blog/2015/3/28/traditional-cultural-expressions-and-copyright-law-in-australia_on_13_January_2017.

⁶⁴ Ramcharan R, Sinjela M, ‘Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights’, 15-16.

⁶⁵ Ragavan S, ‘Protection of Traditional Knowledge’, 13.

⁶⁶ Mwanzia K, ‘Assessment of legislation on Cultural Heritage Resources in Kenya’, *University College London Press* (2016), 31.

⁶⁷ Article 11, *Constitution of Kenya* (2010).

⁶⁸ Article 40, *Constitution of Kenya* (2010).

⁶⁹ Article 69, *Constitution of Kenya* (2010).

⁷⁰ Mwanzia K, ‘Assessment of legislation on Cultural Heritage Resources in Kenya’, 35.

Constitution as well as to create a conclusive source of reference with regard to traditional knowledge, culture and rights arising therefrom.

Immense awareness is forthcoming internationally about the contributions of such knowledge. TK systems exist in diverse fields including food, agriculture, biodiversity, nutrition and medicine. Although not included in the health systems of many countries, more than 80% of the medicines of the world have evolved from TK and Traditional Medicines (TM).⁷¹ They have been used in highly urbanised countries like Singapore and China. About 1,000 traditional manufacturers in China produce 4,000 products, almost half the drugs consumed in the country. Drug companies like Pfizer have collaborated with the Chinese government in order to learn how traditional therapies act. Others like Marco Polo Tech. in Maryland, have sought to apply contemporary scientific research to traditional medicines before launching them in USA.⁷² Western countries such as Canada have also increasingly accepted the use of such knowledge.

The Protection of Traditional Knowledge and Cultural Expressions Act is designed to perpetuate benefit to local holders of TK, biodiversity and GRs in terms of posterity and economic gain.⁷³ It bestows on them the right to hold and use such knowledge, the right to prevent its misuse or degrading treatment and more importantly, the right to sanction its use by third parties and receive equal and fair compensation for it. In so doing, the statute must take into account the historical realities, present needs and future aspirations of Kenyan indigenous communities.⁷⁴ As communities all over the world awaken to the breadth and wealth of TK and TCEs, equitable ways of sharing in the benefits must be devised.⁷⁵ A world where indigenous people are not recognised as full and equal members of contemporary societies, would not be a just order.⁷⁶

⁷¹ Sharma K, Sharma O, 'Traditional Knowledge and IPR', 2 *The World Journal on Juristic Polity* (2017), 2.

⁷² Ramcharan R, Sinjela M, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights', 10.

⁷³ Mwanzia K, 'Assessment of legislation on Cultural Heritage Resources in Kenya', 43.

⁷⁴ Mwanzia K, 'Assessment of legislation on Cultural Heritage Resources in Kenya', 39.

⁷⁵ Ramcharan R, Sinjela M, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights', 23.

⁷⁶ Ramcharan R, Sinjela M, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights', 24.

CHAPTER 3

‘THE PROTECTION OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS ACT’

3.1. Introduction

It is evident from the foregoing chapters that traditional communities hardly have the required knowledge and resources to protect their TK and TCEs. It is part of natural justice to provide these people with a say in matters concerning them. Use of communities’ TK and TCEs must, therefore, only be allowed where true consent is obtained. It then follows that policies of such nature must be devised in countries where these communities live.⁷⁷ This chapter scrutinises key sections within the Act that overlap with other sections, create implementation difficulties or raise ambiguities requiring improvement or amendment. It specifically explores two questions in this regard. First, the issue of obtaining consent and decision making as envisioned in the Act. Secondly, how disputes over shared TK and TCEs with Kenyan as well as neighbouring communities will be resolved.

3.2 Consent and Decision Making

Section 25(1) of the ‘Protection of Traditional Knowledge and Cultural Expressions Act’ states that the owners of TK and TCEs may grant authorization for use of their TK and TCEs. Section 25(3) further states that consent may only be given by the owner after undertaking documented consultations with members of the community in accordance with their traditional processes for decision-making.⁷⁸ It follows then, that a prospective user must identify the community whose TK/TCE they seek to use as well as its registered owner, in order to obtain consent. Section 2⁷⁹ defines the community as “*a homogeneous and consciously distinct group of the people who share any of the following attributes: common ancestry; similar culture or unique mode of livelihood or language; geographical space; ecological space; or community of interest*”. Evidently, this encompasses all thousands of persons who form part of the tribal communities in Kenya, such as the Luo, Kikuyu, Kamba, Luhya, Kisii, Taita, Maasai and so forth.

⁷⁷ Sharma K, Sharma O, ‘Traditional Knowledge and IPR’, 9.

⁷⁸ Section 25(3), *Protection of Traditional Knowledge and Cultural Expressions Act* (Act No. 33 of 2016).

⁷⁹ Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act*.

An owner is defined as “*local and traditional communities and recognized individuals or organizations within such communities in whom the custody or protection of TK and CE are entrusted in accordance with the customary law and practices of that community*”.⁸⁰ Whereas a recognised individual or organization within a community may be easy to identify, the Act does not define who constitutes the local and traditional community from whom consent is to be obtained. The Act largely borrows from the Swakopmund Protocol⁸¹ which has been similarly criticised for lack of a definition as to who constitutes a traditional community. However, it is proposed that the reason for this is its regional nature, therefore, leaving it to member states to define who constitutes a traditional community in their contexts.⁸² Even so, the Act will nevertheless need to define a traditional community in the Kenyan context.

Furthermore, section 33(1) requires that user agreements are made only after members of the community have been consulted on the terms and conditions of the proposed agreement.⁸³ Due to the broad definition of a community envisaged by the Act, it may be difficult or even impossible to consult with all the members of a given community who rightfully share in the TK and TCE. This requirement also creates potential sources of dispute where members who consider themselves part of a community through any of the broad attributes defined under section 2, claim not to have been consulted in decision making thereby initiating legal proceedings. It must be noted that many tribal communities in Kenya have very close ties in the practice of some customs such as livelihood, dialects of language, cultural practices, and may even share the same knowledge and expressions, yet are still part of a consciously distinct ethnic group.⁸⁴

In addition to the above, the Act uses the words owner and holder interchangeably throughout the Act. In some sections, it states that consent must be obtained from the owners, while in others, it gives holders the right to give consent as to use of their TK and TCEs. Under section 2, a holder “*means recognized individuals or organizations within communities in whom the custody or protection of TK and CE are entrusted in accordance with the customary law and practices of that*

⁸⁰ Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act*.

⁸¹ *Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore Treaty*, 2010.

⁸² Nkomo ML, ‘South Africa’s Proposed Intellectual Property Law: The Need for Improved Regional Cooperation’, 46 *The Comparative and International Law Journal of Southern Africa* 2 (2013), 264.

⁸³ Section 33(1), *Protection of Traditional Knowledge and Cultural Expressions Act*.

⁸⁴ Groth S, *Negotiating Tradition: The Pragmatics of International Deliberation on Cultural Property*, Universitätsverlag Göttingen, 2012, 155.

community".⁸⁵ The above definition is a complete overlap with the meaning of an owner, where individuals and organisations were also recognised as owners, suggesting that owners and holders are intended to be one entity.

Visibly, the separation in meanings is unnecessary. Zambia's "Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act" of 2016 is worth noting in this regard. It gives one precise definition encompassing the three notions. It states in Section 2⁸⁶ that a holder "*means a traditional community, an individual or a group, irrespective of the pattern of ownership, and who is the owner of the traditional knowledge, genetic resource or expression of folklore in a traditional and intergenerational context who has a right over or to whom traditional knowledge, a genetic resource or expression of folklore belongs to, in accordance with customary laws and practices*".⁸⁷ It goes further to state that the beneficiary of TK shall be the holder.⁸⁸ The same is stated in Section 6 of the "Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore" Treaty.⁸⁹ Such a definition streamlines the three concepts and reduces errors that may be created by separate definitions in the Kenyan Act.

3.3 Dispute Resolution

The second issue that remains unclear in the Act is the question of how disputes over shared TK and TCEs with Kenyan and neighbouring communities would be resolved. To consider the full extent of this issue, we must first examine the source of such disputes, the authority put in charge of settling such disputes and the most appropriate mechanism for dispute settlement bearing in mind the unique nature of TK and TCEs.

Section 8 requires every county to establish and maintain a register with information relating to TK and TCEs documented during the registration process.⁹⁰ The registers should not compromise undisclosed elements of TK or the interests of the holders of such undisclosed knowledge. Additionally, it requires that the national government in consultation with the county government,

⁸⁵ Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act*.

⁸⁶ Section 2, *Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act*, 2016 (Zambia).

⁸⁷ http://www.wipo.int/tk/en/databases/tklaws/articles/article_0082.html on 26 November 2017.

⁸⁸ Section 16(1), *Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act*.

⁸⁹ Section 6, *Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore Treaty*, 2010.

⁹⁰ Section 8, *Protection of Traditional Knowledge and Cultural Expressions Act*.

maintain a comprehensive Traditional Knowledge Digital Repository (TKDR) which shall contain information relating to TK and CEs that have been documented and registered by the county government.⁹¹ At the same time, the Act does not give crucial information regarding formalities for application by indigenous communities, processing and finally registration of TK and TCEs both at county and national level.⁹² This oversight may well be a source of dispute between communities who end up registering the same TK. Further, Kenya Copyright Board (KECOBO) and the county governments are expected to work with other organizations dealing with matters related to TK and TCEs to establish and maintain the database, yet the mode and scope of such engagement is not defined.⁹³ Such obscurities stand to cause a lack of coordination between the county and national government, leading to inefficiency in the registering of indigenous knowledge.

Proper documentation of TK and TCEs plays a role in its protection and enforcement. Record keeping as envisioned in the Act must be organized in an effective manner to ensure that the enforcement of the rights of traditional communities is possible.⁹⁴ There are concerns that documentation would make TK and TCEs more widely available and liable to misappropriation,⁹⁵ however, the goal is to recognise right holders and their respective TK and TCEs as well as give opportunity for bona fide users to seek prior informed consent from the communities that they may otherwise not know exist. Section 7 provides that owners of TK and TCEs should register their knowledge as well as the community that owns it. This would potentially reduce the cases of exploitation centered on the fact that exploiters did not know who the TK or TCEs belongs to. Documentation would thus reduce disputes as to ownership and lack of consent. Formal registries will nevertheless support sui generis protection systems by making the records confidential for the relevant community only, as will be seen in the next chapter. Such systems may employ a defensive

⁹¹ Section 8(3), *Protection of Traditional Knowledge and Cultural Expressions Act*.

⁹² Nzomo V, 'Kenya's Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016 Comes Into Force', IP Kenya, 23 September 2016 <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/> on 26 November 2017.

⁹³ Ouma M, 'Breaking it Down: The Protection of Traditional Knowledge and Cultural Expressions Act', 6 *Jahazi* 1 (2017), 19.

⁹⁴ Wanzala J, 'Kenya Works with Communities on Genetic Resources and Traditional Knowledge Protection', Intellectual Property Watch, 15 February 2017 <https://www.ip-watch.org/2017/02/15/kenya-works-communities-genetic-resources-traditional-knowledge-protection/> on 24 November 2017.

⁹⁵ WIPO, 'Intellectual Property and GRs, TK and TCEs', 38.

protection approach which is designed to prevent the illegitimate acquisition of IP rights by third parties.⁹⁶

On the issue of dispute resolution, section 38(1)⁹⁷ allows holders of TK and CEs to institute civil proceedings. Section 40⁹⁸ adds that disputes may be resolved through mediation, Alternative Dispute Resolution (ADR) or through application of customary laws and protocols. Disputes between holders and third parties are complex as they entail legal as well as cultural and ethical questions.⁹⁹ Use of TK or TCEs that violate a community's religious or sacred beliefs may be graver than violation that causes financial loss.¹⁰⁰ Remedy through litigation in domestic courts would therefore be unsatisfactory. Further, for disputes between communities with different cultural beliefs and customary laws but sharing the same TK and TCEs, even customary laws would be inadequate to arrive at a common ground on competing claims. For instance, the Samburu and Maasai who share a number of their cultural artifacts, knowledge and expressions.¹⁰¹

There is a grey area under Section 7(6)¹⁰² on whether concurrent claims by communities would be resolved by KECOBO or the county government. There is also no mention of an appeal mechanism or even review of such determinations.¹⁰³ Lastly, the Act is absolutely silent on a dispute resolution mechanism for claims arising between communities in Kenya sharing TK/TCEs with communities outside Kenya. E.g. the Maasai of Kenya and Tanzania. A dispute resolution mechanism is essential to guarantee the management and enforcement of such transboundary TK/TCEs. Such a mechanism endeavours to manage disputes among countries and communities and increase the bargaining power among states.¹⁰⁴ However, this is lacking.

Finally, the Act does not create a self-executing framework as there is no implementing body established. It defines CS as the "*Cabinet Secretary responsible for matters relating to Intellectual Property rights*".¹⁰⁵ This could be interpreted to cover a number of ministries including

⁹⁶ WIPO, 'Intellectual Property and GRs, TK and TCEs', 22.

⁹⁷ *Protection of Traditional Knowledge and Cultural Expressions Act*.

⁹⁸ *Protection of Traditional Knowledge and Cultural Expressions Act*.

⁹⁹ *Milpurruru and others v Indofurn Pty Ltd (The Carpet's case)* 1994 30 IPR 244.

¹⁰⁰ *Milpurruru and others v Indofurn Pty Ltd (The Carpet's case)* 1994 30 IPR 244.

¹⁰¹ Groth S, *Negotiating Tradition: The Pragmatics of International Deliberation on Cultural Property*, 155.

¹⁰² *Protection of Traditional Knowledge and Cultural Expressions Act*.

¹⁰³ Ouma M, 'Breaking it Down: The Protection of Traditional Knowledge and Cultural Expressions Act', 20.

¹⁰⁴ Harrington J, Deacon H, 'TK and Culture Expressions Act 2016', *The Star*, 3 December 2016 http://www.the-star.co.ke/news/2016/12/03/traditional-knowledge-and-culture-expressions-act-2016_c1467018 on 24 January 2018.

¹⁰⁵ Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act*.

Agriculture, Office of the Attorney General, Industrialisation, or Sports, Arts and Culture.¹⁰⁶ It therefore leaves the Act with no clear person responsible for its administration and enforcement at national level.¹⁰⁷ Yet, numerous duties remain placed under the ambit of the national government or left for the CS to ‘decide, create or establish’. As seen from turf wars between institutions in the country such as the lands Ministry and the National Lands Commission (NLC), ambiguous statutory roles more often cause supremacy feuds and bar any meaningful progress by the institutions.¹⁰⁸ As was the case between the two, guidance by the court had to be sought to determine their roles. Such wrangles cripple the progress of transactions in the country and prevent progress in different sectors.¹⁰⁹ KECOBO, a state organ under the Office of the Attorney General, is selected as the body to maintain the TKDR and on this basis may perhaps take up the roles under discussion. However, this still needs clarification.¹¹⁰

¹⁰⁶ Nzomo V, ‘Kenya’s Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016 Comes Into Force’, IP Kenya, 23 September 2016 <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/> on 26 November 2017.

¹⁰⁶ Section 5, *Protection of Traditional Knowledge and Cultural Expressions Act*.

¹⁰⁷ Nzomo V, ‘Kenya’s Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016 Comes Into Force’, IP Kenya, 23 September 2016 <https://ipkenya.wordpress.com/2016/09/23/kenyas-protection-of-traditional-knowledge-and-cultural-expressions-act-no-33-of-2016-comes-into-force/> on 26 November 2017.

¹⁰⁸ Muhoho P, ‘Supreme Court defines roles of Ministry, NLC’, 2015 <http://www.mediamaxnetwork.co.ke/people-daily/184218/supreme-court-defines-roles-of-ministry-nlc/> on 31 January 2018.

¹⁰⁹ <https://www.nation.co.ke/lifestyle/dn2/Court-clarifies-roles-of-lands-ministry-and-NLC/957860-3051986-64gs5v/index.html> on 31 January 2018.

¹¹⁰ Section 5, *Protection of Traditional Knowledge and Cultural Expressions Act*.

CHAPTER 4

A COMPARATIVE ANALYSIS

The Chapter is composed of a comparative analysis of the Kenyan TK and TCE framework with that of India and Australia. It identifies the best practice with reference to the issues discussed in the previous chapter. First, on the issue of obtaining consent and decision making. Second, how disputes over shared TK and TCEs may be resolved. It begins with an analysis of Australia's TK and TCEs framework followed by that of India.

4.1. Australia

It should be noted that Australia does not have a single *sui generis* statutory law for their TK and CEs. It rather has a number of mechanisms and laws put in place for their protection.¹¹¹ Due to its level of advancement and years of employing these mechanisms, it has proved to protect the rights of Indigenous communities in Australia and therefore worth discussing. Australia is one of 17 mega-diverse countries in the world, who are jointly responsible for over 70% of the world's biodiversity (TK).¹¹² Australia's two distinct indigenous communities are the Aboriginal peoples and the Torres Strait Islander peoples.¹¹³ It has been held that Australia is the only continent where its indigenous communities maintain a single kind of adaptation into modern times. I.e. hunting and gathering.¹¹⁴

Commonwealth, state and territory legislation govern TK and TCEs in Australia.¹¹⁵ The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)¹¹⁶ (ATSIHP Act) was created for the federal government, as a fall back where Australian territorial laws were inadequate in protecting community rights. The ATSIHP Act under section 3 specifically defines who constitutes the Aboriginal community and therefore warrants protection under the Act. It also protects native land of particular significance to Aboriginals in accordance with their tradition.¹¹⁷

¹¹¹ https://cyber.harvard.edu/cx/Traditional_Knowledge on 24 January 2018.

¹¹² Wright E, Cahill A, Stoianoff N, 'Australia and Indigenous traditional knowledge', *University of Technology Sydney Law Research Series* 6 (2017).

¹¹³ <https://www.britannica.com/topic/Australian-Aboriginal> on 26 January 2018.

¹¹⁴ <https://www.britannica.com/topic/Australian-Aboriginal> on 26 January 2018.

¹¹⁵ Wright E, Cahill A, Stoianoff N, 'Australia and Indigenous traditional knowledge', 2017.

¹¹⁶ *Aboriginal and Torres Strait Islander Heritage Protection Act* (No. 79 of 1984).

¹¹⁷ Stoianoff N, Alpana R, 'Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation', *UTSLRS 20 Monash University Law Review* 745 (2015).

The Environment Protection and Biodiversity Conservation Act 1999(Cth)¹¹⁸ (EPBC Act) in section 301 and Part 8A of the EPBC Regulations 2000(Cth)¹¹⁹ speak about access to biological resources and recognise the special way of life of indigenous people in the Commonwealth. They provide that consent must be given by the indigenous community providing access and use of the knowledge. The EPBC Act establishes the Australian Heritage Council which comprises of local communities. Further the Indigenous Advisory Committee assists the Minister with regard to the Act, ensuring that any regulation emanating from him are well considered and favourable to traditional communities.

The inaugural Indigenous Knowledge forum held in August 2012, in Sydney Australia led to a research project that produced the 2014 New South Wales White Paper, ‘Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management’.¹²⁰ The research was faced with the issue of defining Aboriginal communities. Some consider that the community is composed of those who descended from the traditional custodians of the land. Others stated that because of moving the communities, others who now take care of the country even if they are not traditional custodians must be considered.¹²¹ After much consultation with indigenous communities, the White Paper concluded that there must be flexibility in how the communities define themselves and in what context they do so. It upheld the right for self-determination by the communities and held that any legislation created must reflect the same.¹²²

The Aboriginal Heritage Act 2006(Vic)¹²³, only registers intangible heritage for traditional owners recognised as being representative of a group of traditional owners.¹²⁴ The Biological Resources Act 2006¹²⁵ which is similar to the EPBC Act and holding the same as to consent and benefit sharing where a statement of the use of TK and its source must be disclosed.¹²⁶ As will be seen, Commonwealth legislation, state and territorial policies have necessitated Aboriginal peoples to

¹¹⁸ Section 301, *Environment Protection and Biodiversity Conservation Act* (No. 91 of 1999).

¹¹⁹ Part 8A, *Environment Protection and Biodiversity Conservation Regulations*, (2000).

¹²⁰ Stoianoff N, Cahill A, Wright E, ‘Indigenous Knowledge: What are the issues?’ in Natalie Stoianoff (ed) *Indigenous Knowledge Forum: Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture*, 39 *UTSLRS* 7 (2017).

¹²¹ Stoianoff N, Cahill A, Wright E, ‘Indigenous Knowledge: What are the issues,’ 2017.

¹²² Stoianoff N, Cahill A, Wright E, ‘Indigenous Knowledge: What are the issues,’ 2017.

¹²³ *Aboriginal Heritage Act* (2006).

¹²⁴ Wright E, Cahill A, Stoianoff N, ‘Australia and Indigenous traditional knowledge’, 2017.

¹²⁵ *Biological resources Act* (2006).

¹²⁶ Wright E, Cahill A, Stoianoff N, ‘Australia and Indigenous traditional knowledge’, 2017.

incorporate in order to undertake activities such as those of decision making, receiving and distributing funding and holding title.¹²⁷ The communities worked within unfamiliar complex legal frameworks and thus took charge of their financial and administrative matters through these corporations.¹²⁸

Australia is a member of the Pacific Regional Framework for the Protection of TK and Expression of Culture¹²⁹, created in 2002. The forum has a specific action plan and Model Laws to protect TK and TCEs and employ customary use as its foundation.¹³⁰ Section 37 outlines the functions of an established Cultural Authority to include: developing of standard terms and conditions for user agreements; to liaise with regional bodies in relation to matters under the Act and to maintain a record of traditional owners and knowledge or expressions of culture.¹³¹ The establishment of an Authority ensures the inclusion of all owners in consent giving and creates dispute resolution possibilities. The Framework defines traditional owners generally and specifically provides that it is a starting point to creating national frameworks. Therefore states may adopt the laws in addition to modifications suiting their internal developments.¹³² The framework reinforces the key elements identified by the Intergovernmental Committee of the WIPO for a sui generis system of protection.¹³³ Australia also recently adopted the UNDRIP, a massive step in an even better protection system for its Indigenous Peoples.

Benefit sharing arrangements in Australia are enhanced and broadened. An example is the collaboration between Chuulangun Aboriginal Corporation and the Quality Use of Medicines and Pharmacy Research Centre at the University of South Australia.¹³⁴ They partnered in the research of bush plants from the Kaanju Homelands at the Wenlock and Pascoe Rivers in Cape York, Peninsula. The agreement addressed Indigenous Cultural and IP Rights and sets out both the

¹²⁷ Bauman T, Smith S, Lenffer A, Kelly T, Carter R, Harding M, 'Traditional Owner Agreement-Making In Victoria: The Right People for Country Program', 18 *Australian Indigenous Law Review* 1 (2015), 80.

¹²⁸ Bauman T, Smith S, Lenffer A, Kelly T, Carter R, Harding M, 'Traditional Owner Agreement-Making In Victoria', 80.

¹²⁹ *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture*, 2002.

¹³⁰ https://cyber.harvard.edu/cx/Traditional_Knowledge on 25 January 2018.

¹³¹ Section 37, *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 2002.

¹³² *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture*, 2002.

¹³³ Stoianoff N, Alpana R, 'Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation', 2015.

¹³⁴ Wright E, Cahill A, Stoianoff N, 'Australia and Indigenous traditional knowledge', 2017.

parties' obligations with regard to benefit sharing.¹³⁵ The Aboriginal Corporation was named a partner of the University and wheeled the research and commercialization decisions. The research has had constructive results and there has been protection of the discovered medicinal properties under Mr. David Claudie who is the Chief Executive Officer of the Aboriginal Corporation as well as a TK holder of the knowledge obtained from his father's lineage.¹³⁶ Another example is the collaboration between Macquarie University and the Yaegl Local Aboriginal Land Council which conserves cultural knowledge in databases co-owned by the local community and sharing the benefit from commercialisation of their research.¹³⁷

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) which is the world's leading research institute on the cultures on Aboriginals and Torres Strait Islander peoples, led by an Indigenous Council.¹³⁸ The Institute has introduced policies for different types of collections in their possession, which uphold principles of prior informed consent and benefit sharing. The guidelines have encouraged the practices that are desired by indigenous peoples both nationally and internationally.¹³⁹ This supplements its legal provisions in the protection of its indigenous communities.

Centres and companies that are dedicated solely for the protection of Indigenous people's rights are common in Australia. They have advocates and lawyers who are well versed in Indigenous knowledge and ensure that other IP rights of such groups are not violated by persons who do not seek consent from indigenous owners. They represent particular communities and cover all their legal needs ranging from drafting agreements, dispute resolution and legal advice at low costs. An example is Arts law which has advocated for better protection of Indigenous Culture and IP at WIPO Conferences. It gives submissions to the government pushing for reforms on specific issues concerning indigenous peoples. Through this it develops best practice standards for businesses and other bodies intending to work with traditional communities.¹⁴⁰

¹³⁵ Wright E, Cahill A, Stoianoff N, 'Australia and Indigenous traditional knowledge', 2017.

¹³⁶ Wright E, Cahill A, Stoianoff N, 'Australia and Indigenous traditional knowledge', 2017.

¹³⁷ Wright E, Cahill A, Stoianoff N, 'Australia and Indigenous traditional knowledge', 2017.

¹³⁸ Torsen M, Anderson J, 'Intellectual Property and The Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives', 4 *Heritage and Society* 2 (2010), 69.

¹³⁹ Torsen M, Anderson J, 'Intellectual Property and the Safeguarding of Traditional Cultures, 71.

¹⁴⁰ <https://www.artslaw.com.au/news/entry/indigenous-issues/> on 21 January 2018.

Besides this, Australian courts have been applying a progressive approach even within the traditional IP laws of trademark, patents and copyright, in cases involving the exploitation of cultural heritage. Albeit to a limited extent, due to the inability of Copyright laws to recognise collective rights in TK and TCEs¹⁴¹ as well as the previously discussed limitations of IP laws. This is has provided a good deal of protection and compensation to exploited TK and CEs.¹⁴² The Federal court in the Carpets case¹⁴³ as well as the T-shirt case¹⁴⁴ and several others, even in applying copyright laws still took cognisance of the fiduciary nature between individuals and their communities. For other dispute resolution mechanisms, principles such as: processes should do no harm, they should be tailored towards local interests, no one size fits all, owners should choose their mediators and cultural practices observed, were identified in Victoria.¹⁴⁵

Though Australia has not passed a single wholesome *sui generis* legislation yet, it has made significant efforts within its different laws and the aforesaid mechanisms to support and protection its indigenous knowledge. Evidently, it is only a few steps from establishing a *sui generis* system.¹⁴⁶

4.2. India

India is also one of the few mega diverse countries.¹⁴⁷ It is rich in traditional medicinal knowledge existing in forms such as Ayurveda, Yoga & Naturopathy, Unani, and Siddha which hold great economic value.¹⁴⁸ Three main legislations have been passed to deal with the issue of TK and TCEs in India. They include the Biological Diversity Act (BD Act), the Protection of Plant Varieties and Farmer's Rights Act (PPVFRA Act) of 2001 which protects innovations made by traditional farmers and is pursuant to its obligation under article 27(3) of the TRIPS Agreement¹⁴⁹.

¹⁴¹ Stoianoff N, Alpana R, 'Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation', 2015.

¹⁴² https://cyber.harvard.edu/cx/Traditional_Knowledge on 25 January 2018.

¹⁴³ Milpurrru and others v Indofum Pty Ltd (The Carpet's case) 1994 30 IPR 244.

¹⁴⁴ John Bulun Bulun & Anor v R&T Textiles Pty Ltd [1998] ALR 157.

¹⁴⁵ Bauman T, Smith S, Lenffer A, Kelly T, Carter R, Harding M, 'Traditional Owner Agreement-Making In Victoria: the Right People for the Country Program', 80.

¹⁴⁶ Stoianoff N, Cahill A, Wright E, 'Indigenous Knowledge: What are the issues,' 2017.

¹⁴⁷ Swamy RN, 'Protection of Traditional Knowledge in the Present IPR Regime: A Mirage or a Reality' 60 *Indian Journal of Public Administration* 1 (2014), 40.

¹⁴⁸ Government of India, *National Intellectual Property Rights Policy*, 2016, 9.

¹⁴⁹ Article 27, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement), Apr. 15 1994, U.N.T.S. 299.

Lastly, is a revision of the Patents Act to prevent exploitation of TK.¹⁵⁰ The Patent Act requires that the source of any biological material used in an invention be revealed. Patents may be revoked where they are in effect TK or a duplication of the same.¹⁵¹ Another Act is the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act that vests the traditional rights to forest dwelling communities over consent and access to forest goods and occupation in forests.¹⁵²

Traditional communities fall within the purview of the BD Act of India as they qualify as benefit claimers as defined under section 2.¹⁵³ It holds that benefit claimers “*means the conservers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application.*”¹⁵⁴ The BD Act creates the National Biodiversity Authority tasked with regulating all activities surrounding biological resources. The authority has detailed guidelines for access to biological resources as well as equitable benefit sharing regulations. The authority is given the power to consent or oppose the grant of IP rights outside India on a biological resource obtained from India as well as knowledge associated with those resources.¹⁵⁵ Moreover, the BD Act provides that a fund be created for depositing of any money resultant from benefit sharing agreements. The Authority may then direct the money to specific individuals or groups or organisations, ie benefit claimers, in accordance with the agreement and in a manner it deems fit.¹⁵⁶ The Biological Diversity Rules¹⁵⁷ of India are the implementing rules of the Biological Diversity Act.

India approved its first ever IPR policy to enhance its arts, culture, TK and biodiversity resources in 2016.¹⁵⁸ The policy has broad objectives including awareness and promotion, improving the legal framework, administration and management, enforcement and adjudication among others. It

¹⁵⁰ Robinson DF, Abdel-Latif A, Roffe Pedro (eds), *Protecting Traditional Knowledge: WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, Taylor & Francis, 2017, 253.

¹⁵¹ Robinson DF, Abdel-Latif A, Roffe Pedro (eds), *Protecting Traditional Knowledge: WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 253.

¹⁵² Swamy RN, ‘Protection of Traditional Knowledge in the Present IPR Regime: A Mirage or a Reality’, 43.

¹⁵³ Section 2, *Biological Diversity Act* (2002).

¹⁵⁴ Section 2, *Biological Diversity Act* (2002).

¹⁵⁵ Section 18(4), *Biological Diversity Act* (2002).

¹⁵⁶ Section 21(3), *Biological Diversity Act* (2002).

¹⁵⁷ Biological Diversity Rules, *Biological Diversity Act* (2004).

¹⁵⁸ <https://www.bananaip.com/ip-news-center/traditional-knowledge-ipr-policy-2016/> on 26 January 2018.

recognises that for the effective implementation and enforcement of its laws in protection of TK/TCEs, right holders must be aware of their rights and the value of the knowledge they hold.¹⁵⁹ The government of India has partnered with industrial bodies, corporations and R&D Institutions to work with in the equitable access and use of its resources.¹⁶⁰

The Jeevani (Aarogyapachha) Case¹⁶¹ is the first case in India dealing with benefit sharing where the TK regarding the Aarogyapachha plant was revealed by some members of the Kani tribe to scientists of the Tropical Botanical Garden and Research Institute.¹⁶² The drug was marketed in India and US, Japan. The Institute paid license fees and royalties to an autonomous trust to benefit the Kani informers as well as the community in general. The trust was to take part in developmental activities for the Kani, prepare a register to document the knowledge base of Kanis and evolve methods to promote sustainable use of the resources.¹⁶³

The Archives and Research Centre for Ethnomusicology (ARCE) of the American Institute of Indian Studies was established in 1982 in India. It aimed at creating an archive of recordings of Indian music and oral traditions for preservation and access. It now houses 194 collections voluntarily deposited.¹⁶⁴ ARCE is based on standard model agreements with three options for depositors to choose from: one that allows no access for a fixed period, one that allows listening in ARCE premises and one that allows copies for research and teaching with no permission for further copies. ARCE has recently embarked on an ‘Archives and Community Partnership’ project where all recordings, rights and revenue are being shared between ARCE and the indigenous communities.¹⁶⁵

Documentation alongside registration of TK and TCEs will substantially reduce disputes among communities sharing TK and TCEs. There are many initiatives around the world to document TK and TCEs. Holders and governments are involved in a wide range of collections, databases, inventories, registries, lists and other forms of documenting to preserve the information.¹⁶⁶ The most comprehensive database is India’s Traditional Knowledge Digital Library (TKDL) holding

¹⁵⁹ Government of India, *National Intellectual Property Rights Policy* (2016).

¹⁶⁰ Government of India, *National Intellectual Property Rights Policy* (2016).

¹⁶¹ <http://www.wipo.int/ipadvantage/en/details.jsp?id=2599> on 26 January 2018.

¹⁶² Swamy RN, ‘Protection of Traditional Knowledge in the Present IPR Regime: A Mirage or a Reality’, 56

¹⁶³ Swamy RN, ‘Protection of Traditional Knowledge in the Present IPR Regime: A Mirage or a Reality’, 55-56.

¹⁶⁴ Torsen M, Anderson J, ‘Intellectual Property and the Safeguarding of Traditional Cultures, 75.

¹⁶⁵ Torsen M, Anderson J, ‘Intellectual Property and the Safeguarding of Traditional Cultures, 75-76.

¹⁶⁶ WIPO, ‘Intellectual Property and GRs, TK and TCEs’, 38.

36,000 formulations utilized in Ayurvedic medicinal practice. The information is available in a variety of languages and categorises the knowledge allowing it to be linked to International patent classification systems.¹⁶⁷ Such a database requires a government to be directly invested and involved in protecting such knowledge otherwise making it easier for misuse by third parties and ownership disputes over what is documented.¹⁶⁸ Those who seek information from the TKDL must negotiate and conclude an access agreement which they may not reveal to a third party unless necessary for the purpose of citation. This is necessary to prevent misuse.¹⁶⁹

India drafted ‘The Traditional Knowledge (Protection and Regulation of Access) Bill, 2009 and could be on the way to enacting a *sui generis* piece of legislation.¹⁷⁰ This Bill is a first attempt to pass a separate and complete regime for the protection, conservation and management of TK in India.¹⁷¹

¹⁶⁷ <https://law.duke.edu/cspd/itkpaper4/#3.4.3> on 21 January 2018.

¹⁶⁸ <https://law.duke.edu/cspd/itkpaper4/#3.4.3> on 21 January 2018.

¹⁶⁹ <http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdl.asp?GL=Eng> on 21 January 18.

¹⁷⁰ Shrivastav V, ‘Protection of Traditional Knowledge within the existing framework of Intellectual Property Rights: Defensive and Positive approach’, 37.

¹⁷¹ https://www.bananaip.com/ip-news-center/round-table-on-protection-of_25/ on 26 January 2018.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSIONS

This study reveals that the ‘The Protection of Traditional Knowledge and Cultural Expressions Act’ of Kenya is not clear on the issues of consent, decision making and the mechanism of dispute resolution. This chapter proposes a suitable way of incorporation into the Kenyan framework, the best practices previously discussed. It also proposes recommendations to enhance the Kenyan Act and gives a final conclusion of the study. The chapter also mentions other issues related to the Act that merit careful consideration but do not fall within the scope of this research.

This study gives the following recommendations to supplement the Kenyan *sui generis* framework. First, on the lack of a clear competent authority to oversee its implementation, an explicit mention of the Ministry and Cabinet Secretary in charge must be included in the Act. A competent authority will offer coordination and commence its operation. Without this is an orphaned Act whose objectives will be problematic to achieve. Moreover, a clear delineation of responsibilities under the Act needs to be agreed upon. As seen in the Australian framework, multiple institutions all working with indigenous communities, have played a role in the creation of a strong system.

Secondly, the creation of protection groups and organisations such as that of the Maasai should be promoted and imitated by other communities in Kenya. The Maasai Intellectual Property Initiative Trust (MIPI) is a branch of the Washington DC based non-profit organisation, Light Years IP.¹⁷² They have actively protected Maasai cultural knowledge through purposing to obtain licenses from companies known to use Maasai IP, engaging in lobbying where their cultural heritage is used in an offensive manner, they educate Maasai’s on their brand and the value of their knowledge and they consult the Maasai people on controlling the use by third parties of their IP.¹⁷³ This has greatly supported the Maasai in protecting their brand and knowledge from exploitation. In the same breadth, indigenous communities should be encouraged to form trusts that manage their knowledge. A trust would simplify and shorten the process of identifying owners and obtaining prior informed consent from the owners, who must otherwise engage in consultations before decision making.¹⁷⁴ Where the trust is given authority by the owners to make decisions, it would

¹⁷² <http://maasaiip.org/about-us/> on 31 January 2018.

¹⁷³ <http://maasaiip.org/about-us/> on 31 January 2018.

¹⁷⁴ Wanjohi MM, ‘Protection of Folklore in Kenya: The Case of Maasai Handicrafts’, Unpublished LLM Thesis, University of Nairobi, November 2015, 69.

do so promptly and ensure that only culturally acceptable use of the knowledge is undertaken. It would also devise reliable mechanisms for benefit sharing.¹⁷⁵

It follows then, that education and public awareness ought to be included in the Act, to create a better understanding of Kenyan indigenous culture and the best ways to manage it. More importantly, education among local communities must be done to inform them on the legal rights, remedies and processes afforded to them under the Act and different laws.¹⁷⁶

Digital archives have the potential to guarantee the smooth implementation of the legislations in place, as evidenced in India. A repository such as that of ARCE in India can be implemented in Kenya. The standard model agreements as to access allow for effective management of the knowledge and a record as to who is granted access under what model agreement. Exploitation is thereby heavily monitored. At the same time, there is a reduction of disputes since all sources of culture and knowledge in the country are documented and archived. Similarly, the Indian Traditional Knowledge Digital Library provides an excellent prototype of what should be included, how it could be coded to ensure protection and how it can be achieved.¹⁷⁷

An Institution where prospective users and indigenous communities, can use for inquiries as to the status of TK/CEs, use and benefits arising therefrom is created. In the Kenyan context, it would allow members of communities who rightfully claim to have been left out of decision making processes or benefits due to them, to easily resolve such issues as records will be duly kept and may be updated in such circumstances. Digital repositories need only to accommodate the desires of traditional owners and remain flexible to the needs of the communities as they change over time.¹⁷⁸

On the second issue contended in chapter 3, disputes between countries sharing TK and TCEs exist and are unavoidable. A number of Kenyan tribal communities share cultural knowledge and its forms of expression with neighbouring countries. Kenya shares the ethnic tribe of the Maasai's with Tanzania, and should draw from the experiences of other states with societies rich in TK and TCEs. For instance the experiences of Ghana, Togo and Benin over who owns the Agbadza and

¹⁷⁵ Wanjohi MM, 'Protection of Folklore in Kenya: The Case of Maasai Handicrafts', 69.

¹⁷⁶ Karanja W, 'The Legitimacy of Indigenous Intellectual Property Rights' Claims', *Strathmore Law Review*, January 2016, 189.

¹⁷⁷ <http://www.austlii.edu.au/au/journals/UTSLRS/2015/20.html> on 26 January 2018.

¹⁷⁸ Torsen M, Anderson J, 'Intellectual Property and the Safeguarding of Traditional Cultures', 73.

Gahu traditional drum-dances or the Kente cloth designs of Ghana and Cote D'Ivoire.¹⁷⁹ This is a concern that the Kenyan Act has remained silent about but must nevertheless be addressed. Countries sharing such knowledge should formulate agreements to address this issue.¹⁸⁰ Kenya may lead in this regard and stand guided by principles that these agreements ought to map emotional, substantive and procedural interests of all parties. This will stand as an essential base for dispute resolution and for the agreement making processes to succeed.¹⁸¹

The ARIPO approach concerning regional TCEs is worth noting. It has developed the Swakopmund Protocol that recognises the regional nature of TCEs in Africa and provides for regional protection in terms of foreign holders who shall benefit on the same level as national holders.¹⁸² National authorities and the ARIPO office are required to facilitate the management and enforcement of protection of holders from foreign countries.¹⁸³ Article 14¹⁸⁴ of the 'WIPO Protection of Traditional Knowledge Revised Outline of Policy Options and Legal Mechanism' likewise holds, with regard to cooperation between the regional and national office. It requires that eligible foreign holders of TK should at least enjoy benefits of protection at the same level as national holders.¹⁸⁵ This cooperation promotes regional support for the diplomatic resolution of disputes that may arise. The Kenyan Act may borrow a leaf from this mechanism and include provisions that recognise shared knowledge and national treatment of foreign TK holders.

In addition to the above, and as seen in Australia, a state that has extensively mooted the issue of customary laws, the creation of protocols on access, control and use of TK is the best way to integrate customary laws into the legal framework. The protocols form the standard practise in the protection of TK and should be considered legitimate by the state in order to uphold acceptable

¹⁷⁹ Kakooza A, 'Developing Legal Frameworks for the Protection of TK and TCEs: Challenges and Opportunities', Ugandan Christian University.

¹⁸⁰ Bauman T, Smith S, Lenffer A, Kelly T, Rodney C, Harding M, 'Traditional Owner Agreement-Making in Victoria: The Right People for Country Program', 80.

¹⁸¹ Bauman T, Smith S, Lenffer A, Kelly T, Carter R, Harding M, 'Traditional Owner Agreement-Making In Victoria', 80.

¹⁸² Nkomo ML, 'South Africa's Proposed Intellectual Property Law: The Need for Improved Regional Cooperation', 262-263.

¹⁸³ Nkomo ML, 'South Africa's Proposed Intellectual Property Law: The Need for Improved Regional Cooperation', 263.

¹⁸⁴ Article 14, WIPO, 'The Protection of Traditional Knowledge Revised Outline of Policy Options and Legal Mechanism', 2006.

¹⁸⁵ Article 14, WIPO, 'The Protection of Traditional Knowledge Revised Outline of Policy Options and Legal Mechanism', 2006.

use as permitted by traditional communities.¹⁸⁶ Indigenous communities consider their customary laws integral to the use of their knowledge and expressions, and may only give consent where such customary laws are respected. The state should ensure that this is not undermined by third parties.

Parliament must deliberate upon the organisation of ethnic communities in Kenya and frame the Act in the way that best reflects the actual existence and organisation of traditional communities. Unlike Australia whose indigenous communities are mainly the Aboriginal and Torres Strait community, Kenya has numerous ethnic communities with close ties in relation to some cultural practices, dialect and language and so forth. Policies, guidelines and regulations that create clarity on consent and decision making must be drafted. Government ministries and agencies dealing with various aspects of IP, TK and TCEs must also work together to effectively implement the Act.¹⁸⁷ This will permit the implementation of the Act, allow for improvement of the shortcomings and slowly create good practice in the protection of TK in Kenyan TK and CEs.

An important issue surrounding TK and TCEs, although outside the scope of this research, is the intergenerational loss of knowledge.¹⁸⁸ With the rising development in Kenya and the world, education, urbanisation and spread of western knowledge, TK and CEs are slowly disappearing. Record keeping on traditional repositories and databases will significantly lessen this loss and keep the valuable knowledge available for future generations of community members.¹⁸⁹

In conclusion, numerous instances of exploitation have been discussed in this study. In keeping with the theory of corrective justice, traditional communities must be recognised as both receivers and producers of knowledge.¹⁹⁰ Promoting them in their capacity for creative work and participation in the global culture and commercial markets is development as freedom.¹⁹¹ Wealth lies not only in accessing other people's knowledge but also in the ability to produce new knowledge and to benefit culturally and economically from it.¹⁹² In conclusion, this study asserts

¹⁸⁶ Wanjohi MM, 'Protection of Folklore in Kenya: The Case of Maasai Handicrafts', University of Nairobi, 2015, 65.

¹⁸⁷ Ouma M, 'Breaking it Down: The Protection of Traditional Knowledge and Cultural Expressions Act', 21.

¹⁸⁸ Stoianoff N, Alpana R, 'Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation', 2015.

¹⁸⁹ Stoianoff N, Alpana R, 'Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation', 2015.

¹⁹⁰ Madhavi S, 'The Invention of Traditional Knowledge', 70 *Law and Contemporary Problems* 2 (2007), 124.

¹⁹¹ Madhavi S, 'The Invention of Traditional Knowledge', 124.

¹⁹² Madhavi S, 'The Invention of Traditional Knowledge', 124.

that there is no ‘one size fits all’ approach¹⁹³ and that a range of processes particular to our circumstances in Kenya will drive the improvement of the protection we accord to indigenous communities. By incorporating the recommendations proposed, progress will be made in the protection of Kenyan TK and TCEs.

¹⁹³ Torsen M, Anderson J, ‘Intellectual Property and the Safeguarding of Traditional Cultures, 68.

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