TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS IN KENYA: A STUDY ON WHY THEY NEED AN IPR REGIME TO BE PROTECTED

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DECLARATION

I, HENRY MWANIKI THUO, 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.

Signed: .....  .....

Date: .....03 April 2025.....

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

Signed: .....  .....

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LIST OF ABBREVIATIONS

1. IP – Intellectual Property
2. IPR- Intellectual Property Rights
3. TCEs – Traditional Cultural Expressions
4. TK – Traditional Knowledge
5. WIPO – World Intellectual Property Organization

ABSTRACT

One of the most important aspects of a people's cultural and intellectual history is their traditional wisdom. It is a reflection of their historical and social distinctiveness, and it makes a significant contribution to the well-being of those people in their latter years, which ultimately leads to their environmentally sustainable development. On the other hand, the protection of traditional knowledge through intellectual property law has not yet been recognised in its entirety, and there is still a requirement for the establishment of a legislation that would safeguard it. In order to accomplish this objective, there is a widespread agreement that a regime that is unique to itself ought to be established, with the customary rules being regarded as being of important importance in the protection.

This dissertation demonstrates that the proposed legislative intent to protect traditional knowledge via customary law in Kenya has not yet yielded results. The ongoing inclusive subordinations of the latter will influence any deliberate efforts to safeguard the former. This conclusion has been drawn after a comprehensive analysis of the current implementation of African customary law within the existing personal law frameworks that recognise it as the foundational legal system. This foundation represents one of the various nuanced subordinations, with such nuance remaining ingrained within the Kenyan legal framework regarding traditional knowledge. The negative consequences of this situation, as observed in personal law regimes, are likely to persist unless modifications are adopted.

CHAPTER 1

INTRODUCTION

1.1. INTRODUCTION TO THE STUDY

The World Intellectual Property Organisation defines traditional knowledge (TK) as "a living body of knowledge passed on from one generation to the next within a particular community."[1] Therefore, traditional knowledge is the skills, know-how, and experiences found within a community and passed to the next successors.[2] It forms a part of cultural identification that is tracked through generations.[3]

While a universal definition of traditional knowledge is lacking, it typically pertains to the knowledge itself along with traditional and cultural expressions. This characteristic helps identify symbols and signs that closely relate to traditional knowledge, resulting in an intellectual activity confined in a traditional context.

Traditional knowledge is not found in just one specific setting.[4] On the contrary, it is found in various settings such as medicine, agriculture, and even science. Traditional knowledge places no limits on how much knowledge can progress from one generation to the next.[5]

1.2. BACKGROUND TO THE PROBLEM

TK and, by extension, traditional cultural expressions (TCEs) are vital components of any community's identity, contributing to the well-being of its members and shaping their spiritual

[1] WIPO *Intellectual property and genetic resources, traditional knowledge and traditional cultural expressions,* WIPO Publication 933, 2020.
[2] Dennis-McCarthy N, 'Indigenous customary law and international intellectual property: ascertaining an effective indigenous definition for misappropriation of traditional knowledge' 51 *Victoria University of Wellington Law Review* 4, 2020, 597.
[3] Dennis-McCarthy N, 'Indigenous customary law and international intellectual property: ascertaining an effective indigenous definition for misappropriation of traditional knowledge', 597.
[4] Golla S, 'Traditional knowledge definition, scope and importance, protection, characteristics, nature and types of traditional knowledge' Slideshare a Scribd company, 2020, 4.
[5] Golla S, 'Traditional knowledge definition, scope and importance, protection, characteristics, nature and types of traditional knowledge' Slideshare a Scribd company, 2020, 2-3.

and cultural identity. They embody the inherent culture of the people and as such contain the soul of the nation. This is so accurate that it is acknowledged in the highest legal authority of the nation.[6] Knowledge embodied in codified systems passed down through the generations or originating from an individual or community as a consequence of intellectual effort and insight within a traditional framework is referred to as traditional knowledge.[7] Conversely, cultural expressions are characterised as material manifestations of traditional knowledge or traditions..[8]

Over the years, the importance of safeguarding traditional knowledge has increasingly come to the forefront.[9] Indeed, it must be due to growing realisation that many of the forms of knowledge encompassed within traditional knowledge are important for the development of a country with a significant population living in rural areas and relying on this knowledge to survive.[10]

TK and TCEs are protected in part by the Constitution[11] and in the main by an Act of Parliament.[12] The Act lays out the thorough foundation for the legal system's preservation of TK and TCEs. This dissertation prioritises measures that grant protective rights to owners and custodians of traditional knowledge[13] and cultural expressions.[14]

Of main concern to this dissertation is the provision that protects the rights of owners to TK and TCEs.[15] There is evidence to suggest that individuals develop creations by utilising information that is drawn from TK, and then gain intellectual property rights (IPRs) to the creations, without the originators receiving any benefit from the process.[16]

Although the Act explicitly delineates the scope of protection for both TK and TCEs, one could contend that the safeguards provided are insufficient. Although a degree of protection exists, it remains ambiguous whether this protection and the characteristics of the rights conferred by

[6] Article 11, *The Constitution of Kenya*, 2010.
[7] Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act*, Act No 33 of 2016.
[8] Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act*, Act No 33 of 2016.
[9] Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic resources, traditional knowledge and folklore*, 2nd ed, Kluwer Law International, Netherlands, 2008, 1.
[10] Kariuki F, Ouma S and Ng'etich R, *Property Law,* Strathmore University Press, Nairobi, 2016, 129.
[11] Articles 11, 40 and 69(1)(c), *The Constitution of Kenya,* 2010.
[12] *Protection of Traditional Knowledge and Cultural Expressions Act,* Act No 33 of 2016.
[13] Section 9, *Protection of Traditional Knowledge and Cultural Expressions Act,* Act No 33 of 2016.
[14] Section 16, *Protection of Traditional Knowledge and Cultural Expressions Act,* Act No 33 of 2016.
[15] Section 18, *Protection of Traditional Knowledge and Cultural Expressions Act,* Act No 33 of 2016.
[16] Lawal-Arowolo A, 'Copyright law and the recognition of "folkloric creations" and "folk medicine" in Africa' 5(1) *Journal of Black and African Arts and Civilization*, 2011, 40.

the Act stem from IPRs. Nevertheless, it can be presumed to be the case. The Act permits IPRs to be assigned to the creator of a derivative work;[17] however, the only protection afforded to TK and TCEs in this context is that a formal agreement must be established between the rights holder and the authorised user if the derivative work is intended for commercial or industrial purposes.[18] There is a conspicuous lack of any specific mention of protection of TK of an intellectual property nature. As a matter of fact, Kenya has not adequately defined either cultural or creative industries in the IP context.[19] Neither the Industrial Property Act nor the Copyright Act specifically address traditional knowledge or traditional cultural representations. Cultural industries thus fail to get the full economic rewards that they would otherwise receive from proper IP protection and promotion.[20] The economic sector known as "cultural industries" is centred on the large-scale manufacturing, duplication, distribution, and storage of cultural products and services in commercial and industrial settings.[21] They are therefore, by nature, heavily if not entirely reliant on TK and TCEs.

1.3. STATEMENT OF PROBLEM

Culture is an integral part of the identity of a country.[22] As such, it must be safeguarded from exploitation from unscrupulous persons. Culture is perhaps most clearly and evidently manifested in cultural expressions, which are in turn drawn from, or more often based on, TK. Consequently, it is essential to implement stringent legal protections for them. IPRs represent a highly effective method of safeguarding intangible assets. However, they may not represent the most efficient safeguard for TK and TCEs.[23] They can, however, potentially be modified in order to offer the best possible protection to TK Therefore, the overall problem my dissertation seeks to address is whether the protection of TK, and by extension TCEs, in Kenya is adequate and whether an alternative framework would be better suited for their protection.

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[17] Section 20, *Protection of Traditional Knowledge and Cultural Expressions Act*, Act No 33 of 2016.
[18] Section 20(2), *Protection of Traditional Knowledge and Cultural Expressions Act,* Act No 33 of 2016.
[19] Sihanya B, 'Copyright law, teaching and research in Kenya' 2(1) *East African Law Journal*, 2005, 54.
[20] Sihanya B, 'Copyright law, teaching and research in Kenya', 54.
[21] — <https://igi-global.com/dictionary/cultural-industry/65609> accessed on 17 December 2021.
[22] Article 11, *The Constitution of Kenya*, 2010.
[23] Kariuki F, 'Protecting traditional knowledge in Kenya: traditional justice systems as appropriate sui generis systems' — <https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2019/chapter_7_2019_e.pdf> accessed on 8th December 2021.

1.4. RESEARCH OBJECTIVES

The research objectives of this dissertation are:

1. To examine the existing legal framework for the protection of TK and TCEs and evaluate its effectiveness in legal enforcement.
2. To study the nature of IPRs to determine their suitability to protect TK.
3. To study the rationale for protecting TK differently from other forms of IP rights.
4. To explore an appropriate legislative framework for protecting TK in Kenya.

1.5. RESEARCH QUESTIONS

The research questions the dissertation seeks to answer are:

1. To what extent do existing laws provide enforceable protection for TK?
2. What is the nature of IPRs and how suitable are they to protect TK?
3. What legal and ethical considerations justify treating TK under a sui generis system rather than conventional IPR?
4. What is the appropriate framework of protection for TK in Kenya?
5. What are the benefits of the alternative framework of protection?

1.6. HYPOTHESIS

The existing protective framework for safeguarding traditional knowledge is ambiguous and insufficient. As it is, the law just declares that the two are protected without providing specifics on how or what kinds of rights are granted to owners and holders of TK and TCEs. Given their critical importance to a nation's culture and, consequently, its identity, certain safeguards must be put in place to prevent their abuse and mishandling.

Therefore, a new or additional framework is needed in order to better protect them both. This may entail the utilisation of IPRs. Their nature is to protect intangible property, specifically artistic and cultural creations. Considering that cultural expressions, typically rooted in traditional knowledge, are encompassed by intellectual property rights, it follows that they ought to be safeguarded by these rights or analogous protections.

1.7. JUSTIFICATION OF STUDY

Although TK and TCEs in Kenya have some degree of security, it is inadequate. The governing Act[24] for this important aspect of the nation's identity should be integrated into the existing Copyright Act.[25] This will lead to a more robust framework of protection for TK and TCEs With this increased security, creativity and by extension culture, will surely benefit. In addition, the social and economic benefits to be had are great and considerably worthwhile.

1.8. THEORETICAL/CONCEPTUAL FRAMEWORK

i) Utilitarianism

Posner defines it as a theory asserting that the moral value of an action or a law is to be evaluated based on its impact in fostering happiness collectively among all members of society.[26] He later states two features of this theory which require clarification as they do not appear clearly at the outset. Firstly, it constitutes a doctrine of both individual ethics and societal equity. An exemplary individual is one who seeks to optimise the aggregate of happiness (both his own and that of others), while an ideal society is one that aims to enhance that aggregate.[27] Priel, another academic, presents a comparable definition of utilitarianism, asserting that it is the conviction that the ethical evaluation of circumstances should be grounded in their impact on happiness.[28]

Academics of utilitarianism have long disagreed on key points, with their disagreements focussing on how Jeremy Bentham's ideas should be understood. The contention regarding Bentham's philosophy can be distilled into two analytical frameworks: the authoritarian and the individualist. There are two schools of thought, and the majority of modern commentators can be put into either of them.[29] The authoritarian school consists of commentators who highlight the illiberal aspects of his ideology, while individualist interpreters focus on the

[24] *Protection of Traditional Knowledge and Cultural Expressions Act,* Act No 33 of 2016.
[25] Act No 12 of 2001.
[26] Posner R, 'Utilitarianism, Economics and Legal Theory' 8(1) *Journal of Legal Studies*, 1979,104.
[27] Posner R, 'Utilitarianism, Economics and Legal Theory', 112.
[28] Priel D, 'Toward classical legal positivism' 101(4) *Virginia Law Review,* 2015, 987.
[29] Crimmins E, 'Contending interpretations of Bentham's utilitarianism', 29(4) *Canadian Journal of Political Science,* 1996, 751.

individualistic foundations of his thought, noting that he aimed for laws to be structured to aid individuals in their pursuit of happiness as they, rather than the legislator, see fit.[30]

Utilitarianism is the predominant framework in intellectual property, significantly influencing most legal determinations related to it.[31] The Constitution of the USA's Article 1, Section 8, Clause 8 provides a utilitarian justification for patents and copyrights (1787). By giving writers and inventors the sole right to their works for certain periods of time, Congress can improve the advancement of science and the useful arts.[32] Judges together with lawmakers have not extensively examined the philosophical underpinnings of the utilitarian approach to intellectual property, but philosophers like Hettinger and Kuflik have addressed this perspective.[33]

It is possible to justify intellectual property rights from a utilitarian point of view if they are able to create the greatest possible balance of positive and negative repercussions for society. The purpose of IPRs is to provide incentives and rewards to authors and inventors, as well as to entrepreneurs and investors, in order to optimise the amount of social value that is created. As a result of these, the development of science, technology, industry, and the arts is supported, which is a concept that is essential to the utilitarian ideology.[34]

The vast majority of utilitarians favour a free market.[35] It is still up for debate whether trademark protection promotes or hinders free markets. Conversely, utilitarians do not advocate for free markets as ends in and of themselves; rather, they think that the most important thing is that the society in question is providing the greatest amount of benefit to its members. Furthermore, utilitarians would probably favour a system similar to our trademark protection system given the courts' typical unwillingness to accept monopolies in our societyFinally, it is likely that rational utilitarians would agree that society benefits more from trademark protection than it would without such measures, even when considering that the safeguarding of trademark monopolies may lead to certain market inefficiencies stemming from reduced competition among merchants.[36]

[30] Crimmins E, 'Contending interpretations of Bentham's utilitarianism', 754.
[31] Resnik D, 'A pluralistic account of intellectual property', 46(4) *Journal of Business Ethics,* 2003, 323.
[32] Article I, Section 8, Clause 8, *The Constitution of the United States,* 1787.
[33] Resnik D, 'A pluralistic account of intellectual property', 323.
[34] Resnik D, 'A pluralistic account of intellectual property', 324.
[35] Ealy JA, 'Utilitarianism and trademark protection', 19(14) *Journal of Contemporary Legal Issues,* 2000, 20-21.
[36] Ealy JA, 'Utilitarianism and trademark protection', 20-21.

As a conclusion, it is possible to argue that the utilitarianism theory, in relation to intellectual property, would be somewhat advantageous to the cause of its application. This conclusion is based on the argumentation that was presented earlier.

ii) African communitarianism

The main proponent of the theory of African communitarianism is Ifeanyi Menkiti. He states that a person is not defined, as in Western views, on his individual characteristics, but by their community and social roles.[37] Furthermore, he asserts that, when viewed through the lens of African perspectives, the significance of the communal environment outweighs that of individual existence.[38]

In Menkiti's opinion, personhood is something at which an individual could fail at and that it is not inherent at birth, but something which must be achieved through social and ritual incorporation into the community.[39]

As a result of its emphasis on traditional and communal values, our responsibilities to one another, and the advancement of the common good, the African communalist political ideology has been classified as communitarianism in contemporary political thinking.[40]

1.9. LITERATURE REVIEW

i) Introduction

The nature of traditional knowledge makes it extremely important to safeguard it against appropriation and ensure that it is preserved. The majority of the time, it is neither recorded in writing nor registered with any department of the government in question. The fact that it exists and is typically utilised on the basis of an open-sharing principle makes it extremely vulnerable to being stolen by bio-pirates. Consequently, these individuals get intellectual property rights (IPRs) over the information, which allows them to restrict access to the individuals who were the ones who actually produced the knowledge and/or are the ones who are responsible for

[37] Menkiti I, 'Person and community in African thought' in Wright R (ed) *African philosophy: an introduction,* 3ed, University Press of America, Indiana, 1984, 172.
[38] Menkiti, 'Person and community in African thought', 171.
[39] Menkiti, 'Person and community in African thought', 171.
[40] Hellsten S, 'Human rights in Africa: from communitarian values to utilitarian practice' 1 *Human rights review* 1, 2004, 69.

maintaining the knowledge. As a result of the fact that the existing western IP rules support, promote, and excuse the wholesale, uninvited appropriation of whatever TK promised profit, the problem is not helped by the fact that there is no responsibility or expectation to allow the originators of the information to have a say or a role in the proceeds. This problem is exacerbated by the fact that there is no obligation to allow the originators of the information to use the proceeds.[41]

ii) Limitations of Kenya's legal framework

A number of scholars, including Ben Sihanya, have articulated their concerns regarding the current state of protection for TK and TCEs in Kenya over several years. Sihanya articulates his concerns vis-a-vis the limited effect of intellectual property on development of cultural enterprises. According to his point of view, a significant portion of the potential in this sector is still waiting to be realised, and as a result, there is a requirement to identify cultural creativity and industries inside the framework of intellectual property.[42] The urgency of this matter cannot be overstated, as artists and cultural entrepreneurs, both from abroad and within the local community, have, until quite recently, participated in inappropriate exploitation of TCEs and folklore, often by appropriating, amalgamating, and degrading various cultural artefacts.[43]

Similarly, there is the notion that the framework of intellectual property currently adopted by African nations is inadequate. This is due to the fact that it was introduced to them by their colonisers and incorporated in their laws with the spirit of Western values and principles intact.[44] This sentiment is echoed elsewhere where Sihanya submits that Kenya's Western-oriented copyright law has been sustained by these three closely related factors:

The first is that colonial and neo-colonial experiences have a strong influence on Kenya's copyright legislation and practices. Secondly, corporations based in the UK or US also influence copyright law and practice, directly and indirectly, through the governments of the countries they originate from or through copyright transactions and litigation. Indeed, they seek to have Kenya's copyright reflect Northern (and in particular Western) standards, which provide them with the desired protection and with the norms with which they are familiar. Last

[41] Waziri K and Folasade A, 'Protection of traditional knowledge in Nigeria: Breaking the barriers', 29 *Journal of Law, Policy and Globalization* 1, 2014, 178.
[42] Sihanya B, 'Copyright law, teaching and research in Kenya', 55.
[43] Sihanya B, 'Copyright law, teaching and research in Kenya', 57.
[44] Lawal-Arowolo A, 'Copyright law and the recognition of "folkloric creations" and "folk medicine" in Africa', 49.

but not least, a large number of legal and commercial players who influence Kenyan copyright law have assimilated the principles and objectives represented in international and Western copyright.[45]

iii) Comparative jurisdictions

The need to protect cultural expression and traditional knowledge is echoed in other jurisdictions as well. Indeed, many scholars, such as Munzer and Raustiala, are of the opinion that traditional knowledge, in some jurisdictions it is referred to as indigenous knowledge, should be granted intellectual property rights.[46] In Nigeria, for example, the intellectual property regime shares some similarities to the one in Kenya. Under the Nigerian copyright regime, cultural expressions and traditional knowledge are protected in a way that is somewhat akin to the manner of protection in Kenya. Expressions of folklore, as they are called, are granted rights that are not quite copyright but are similar in nature.[47] They are called neighbouring rights.[48] Furthermore, even though Nigerian law forbids the commercialisation of cultural expressions,[49] like its Kenyan counterpart, it does not provide the proprietors of information and cultural expressions with the IPRs necessary to ensure the protection of their creative cultural works.

Nonetheless, the copyright legislation in Ghana delineates folklore as inclusive of all literary, artistic, and scientific creations that embody the cultural heritage of the nation, generated, preserved, and developed by Ghanaian ethnic groups or by anonymous Ghanaian creators, in addition to any works classified within the copyright law as Ghanaian Folklore. The composition 'Yaa Amponsah,' frequently described as the 'spirit of voice,' is acknowledged as a work of folklore safeguarded by copyright law in Ghana.[50]

iv) Conclusion

There are two schools of thinking that are generally accepted. Certain individuals are of the opinion that traditional knowledge is not eligible for legal protection, which includes any

[45] Sihanya B, 'Copyright law, teaching and research in Kenya', 29.
[46] Munzer S and Raustiala K, 'The uneasy case for intellectual property rights in traditional knowledge' 27(1) *Cardozo Arts and Entertainment Law Journal*, 2009, 42.
[47] Oriakhogba D, 'Development, concept and scope of copyright protection in Nigeria: an overview', 5(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* 2014, 186.
[48] Part II, *Copyright Act* (Nigeria).
[49] Section 31, Part II, *Copyright Act* (Nigeria).
[50] Lawal-Arowolo A, 'Copyright law and the recognition of "folkloric creations" and "folk medicine" in Africa', 46.

protection that is considered to be of a sui generis nature and is founded on modified intellectual property principles. The individuals in question also propose that, in the event that such rights do exist, the individuals who currently possess them ought to relinquish them, typically for the sake of the general welfare of society. In conclusion, they assert that conventional knowledge, regardless of how it is defined, is situated firmly within the realm of public awareness. There are individuals who believe that this type of information, particularly that which reflects the customs and traditions of specific indigenous populations, should be protected.[51]

Both of the access to knowledge and traditional knowledge movements fundamentally aim to enhance flexibility within intellectual property rights frameworks. They can extract substantial information from one another. Furthermore, permitting the two movements to educate rather than contradict one another may ultimately cultivate a more robust and equitable system—one that facilitates access, acknowledges welfare benefits, and fosters the advancement of new technologies and desired innovations. Nevertheless, a system may acknowledge the rights of indigenous peoples to self-determination and cultural governance, encompassing the stipulations governing third-party utilisation of their knowledge and culture.[52]

Furthermore, it is important to recognise that traditional knowledge, encompassing folklore and folk art, warrants a distinct level of protection compared to sacred traditional knowledge. Indigenous groups typically resist the commercialisation of their treasured traditional knowledge. Some individuals may be amenable to disclosing certain holy traditions, yet remain reluctant to permit others to utilise, commercialise, or disseminate them. This differential approach necessitates a markedly distinct protection system compared to one that simply provides guarantees of sufficient remuneration for the rights-holder.[53]

Conversely, certain troubling issues arise when discussing how to incorporate traditional knowledge and cultural expressions into intellectual property laws. This is because modern legal systems place the utmost emphasis on protecting patents, copyrights, trademarks, and trade secrets as forms of IP. There are some people who would add geographic indicators and rights of publicity to this list. For example, Tiger Woods has the right to choose how his image is used in advertisements with his trademark. Additionally, some people might include rights

[51] Long D, 'Traditional knowledge and the fight for public domain', 5(1) *John Marshall Review of Intellectual Property Law*, 2006, 318.
[52] Long D, 'Traditional knowledge and the fight for public domain', 320.
[53] Long D, 'Traditional knowledge and the fight for public domain', 320.

in traditional knowledge. The fact that these later themes are "non-standard" kinds of property is precisely the reason why they are the subject of a great deal of controversy.[54]

It is asserted that traditional knowledge, inherently dynamic, integrative, holistic, and synergistic, evolves in response to the changing demands of the populace and is most significant in situ. It derives its energy from being profoundly embedded in people's lives and cannot be separated from them. Questions arise around the recognition of ownership and the rules governing the acquisition and dissemination of knowledge within groups that may impose restrictions on the availability of their information. Moreover, the stipulations of patent, trademark, and copyright laws establish certain quantifiable criteria, including ownership limitations, application costs, and time constraints.[55]

Consequently, this results in differences in the problems that are associated with TK in comparison to the majority of other types of IP. Largely, issues concerning patents, copyrights, trademarks, and trade secrets in United States centre on the economic relevance of these IPRs. They infrequently address issues pertaining to particular ethnic or racial groups and their historical assertions. Conversely, discussions regarding traditional knowledge focus on the rights of indigenous populations and the historical treatment they have received from dominant cultures.[56] Traditional knowledge and cultural manifestations are at the centre of this debate over intellectual property rights.

This dissertation aims to examine the current status of protection for TK and TCEs in Kenya, as well as to identify potential improvements in safeguarding these elements for the communities from which they originate. This study will specifically examine the potential of a modified IPR regime as a suitable framework for protection.

1.10. METHODOLOGY

This dissertation will be a combination of doctrinal assessment and policy analysis. This means that the dissertation will address a current problem identified within the law and propose a possible solution to this problem. The issue pertains to the legal protection afforded to TK and TCEs, in addition to the rights of all the communities that possess and generate them. The research will primarily involve desk-based qualitative analysis, heavily relying on secondary

[54] Munzer S and Raustiala K, 'The uneasy case for intellectual property rights in traditional knowledge', 46-47.
[55] Waziri K and Folasade A, 'Protection of traditional knowledge in Nigeria: Breaking the barriers', 179.
[56] Munzer S and Raustiala K, 'The uneasy case for intellectual property rights in traditional knowledge', 47.

sources, including books and journal articles, with a lesser emphasis on primary sources such as enacted statutes.

1.11. CHAPTER BREAKDOWN

The introduction to the dissertation is included in the first chapter. In it, you will find a breakdown of the research methodology that will be utilised, as well as an analysis of the present literary stance in relation to the study subject.

Chapter two examines the existing framework of laws for the protection of TK and TCEs. It offers an examination of the diverse statutes and policies implemented by the government, along with the adopted international instruments.

Chapter three examines the justification for safeguarding TK and TCEs under an IPR framework. It examines all the justifications for the safeguarding of TK.

Chapter four focuses on the nature of IP and the rights that it confers on creative works. In particular, it focuses on IPRs suitability, or otherwise, to protect TK. This section relies heavily on enacted statute and legal opinions from scholars. In order to assess the adequacy of protection, some comparisons are made to jurisdictions in developed countries with well-defined intellectual property regimes, such as Australia.

Finally, chapter five discusses the findings of the discussions provided in the preceding chapters as well as providing recommendations derived from the overall discussion.

CHAPTER 2: LAWS AND POLICIES ON TRADITIONAL KNOWLEDGE IN KENYA

2.1. INTRODUCTION

TK is governed by various laws and policies designed to protect it, with Intellectual property law being a commonly utilised framework for safeguarding traditional knowledge in Kenya. The law was previously an act focused on safeguarding traditional knowledge. Intellectual property law provides individuals with rights concerning the products of their intellectual endeavours. Intellectual property rights serve as a mechanism that enables creators to maintain exclusive control over their works. This framework encompasses a comprehensive range of rights that empower the rights holder to prevent others from creating, reproducing, or utilising the creation in any intangible manner for a designated duration.

In addition to safeguarding owners' innovation and improving their competitiveness in the market, intellectual property rights also serve to safeguard the welfare of customers using the products and services they utilise. The Constitution outlines IP protection.[57] The article assigns the government the duty of safeguarding and enforcing the intellectual property rights of Kenyans. In addition to intellectual property law, Kenya possesses various other specific laws and policies safeguarding traditional knowledge, as elaborated below.

2.2. THE CONSTITUTION OF KENYA, 2010

This Constitution assigns the state the duty to promote, support, and protect the IPrs of the Kenyan citizenry.[58] Moreover, it requires the state to assume the obligation of protecting and promoting the IP and TK of all communities in Kenya linked to biodiversity and genetic resources.

It also recognises the native culture as the essential foundation upon which the nation is built, embodying the collective civilization of the Kenya's population. It mandates legislators to enact laws ensuring communities will receive compensation or other forms of recognition for the use of their cultures and heritage, while concurrently acknowledging and safeguarding the

[57] Article 40(5), *The Constitution of Kenya,* 2010.
[58] Article 40(5), *The Constitution of Kenya,* 2010.

ownership of genetic resources and the associated knowledge possessed by indigenous communities.[59]

2.3. THE NATIONAL POLICY ON TK, GENETICS RESOURCES AND TCEs (2009)

To facilitate seamless incorporation of TK systems into national development and effective decision-making across all governmental tiers, the policy must include the protection, recognition, preservation, promotion, and sustainable use of traditional knowledge.[60] It acknowledges that TK is defined by its dynamic nature, a comprehensive approach, and a continuous evolution influenced by experimentation, innovation, external factors, and fresh viewpoints. Additionally, this is communicated through continuous practice, oral traditions, proverbs, metaphors, sayings, and guidance from experts and elders.[61] As a result, TK and other connected traditions are illegally disseminated from their native communities, primarily by youth, without a thorough knowledge of its value and meaning, ultimately leading to their erosion, degradation, and eventual collapse.

Nevertheless, it neglects to recognise the significance of established traditional institutions, which are essential in the governance, accessibility, and utilisation of traditional knowledge, while also safeguarding it from unauthorised transfer and potential degradation. Moreover, it recognises the fact that property rights are adequate for the protection of traditional knowledge, as they safeguard both corporate and individual ownership, along with the collective wisdom of Kenyan communities throughout past, present, and future generations.[62]

2.4. THE NATIONAL POLICY ON CULTURE AND HERITAGE (2009)

This policy, although primarily focused on its subject matter, also carries importance for traditional knowledge.[63] The policy describes culture as a complex mix of material, unique, emotional, and spiritual attributes that characterise a social group or community. In contrast,

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[59] Article 11, *The Constitution of Kenya*, 2010.
[60] WIPO *Submission of Kenya: The national policy on traditional knowledge, genetic resources and traditional cultural expressions, July 2009,* Intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore 16th Session, 2010, para. 1.1.10, WIPO/GRTKF/IC/16/INF/25.
[61]WIPO *Submission of Kenya: The national policy on traditional knowledge, genetic resources and traditional cultural expressions,* para. 1.1.2.
[62] WIPO *Submission of Kenya: The national policy on traditional knowledge, genetic resources and traditional cultural expressions,* para. 4.5.1.
[63] Kyule M, 'Assessment of legislation on cultural heritage resources in Kenya' in Deisser AM and Njuguna M (eds) *Conservation of Natural and Cultural Heritage in Kenya: A Cross-Disciplinary Approach*, 1st ed, UCL Press, 2016, 33.

national heritage involves the preservation, enhancement, and transmission of the totality of creativity in all its forms to future generations in order to preserve a history of human experiences and aspirations.[64] Crucially, the strategy acknowledges Kenyans' unique cultural innovation that comes from their long-term relationships with nature and the environment. Traditional governance systems are not given enough consideration in the policy's support of numerous initiatives that catalyse the promotion and preservation of Kenyan communities' cherished traditions. The policy's second flaw is that it acknowledges cultural creativity as an intellectual property that belongs to people, groups, artists, or performances. This is how to safeguard it, indicating that conventional knowledge cannot be adequately protected by IP techniques alone.

2.5. THE PROTECTION OF TK AND TCEs, ACT NO 33 OF 2016

This Act delineates a systematic framework aimed at the protection and promotion of TK and TCEs within Kenya, in accordance with articles 11, 40, and 69 (1) (c) of the Constitution of Kenya. The Act confers ownership of traditional knowledge in alignment with customary law and practices. The notion of ownership within the realm of intellectual property necessitates increased precision and poses challenges, especially concerning traditional knowledge, where individuals who hold this knowledge are frequently regarded as custodians rather than genuine owners.[65] Similar to intellectual property rights, the Act also covers the economic and moral sui generis rights of owners and holders of traditional knowledge.[66]

As much as the national and county governments are mandated to develop TK databases, the community's role is still unclear and needs clarification. Again, it is not straightforward who owns and controls the database after it is developed.[67] Similarly, the legislation must explain the function of customary rules and traditional governance frameworks in safeguarding traditional knowledge.

2.6. CONCLUSION

The social and economic affairs of indigenous communities are founded on traditional knowledge. There have been numerous attempts to safeguard it, resulting in the establishment

[64] Government of Kenya, *The national policy on culture and heritage,* 2016, 4.
[65] Section 19, *Protection of Traditional Knowledge and Cultural Expressions Act* (No 33 of 2016).
[66] Section 2, *Protection of Traditional Knowledge and Cultural Expressions Act* (No 33 of 2016).
[67] Section 8, *Protection of Traditional Knowledge and Cultural Expressions Act* (No 33 of 2016).

of a variety of laws and policies that have been calamitous throughout. Sui generis regimes ought to be implemented and enforced. Customary laws are once more recognised as the most important factor in safeguarding traditional knowledge. Regrettably, the legislative endeavours to safeguard traditional knowledge through customary laws have been unsuccessful, and the only way to ensure the survival of TK is to incorporate the laws into the preservation efforts.

CHAPTER 3: RATIONALE FOR TRADITIONAL KNOWLEDGE PROTECTION USING IPR REGIME

3.1. INTRODUCTION

Similar to many African nations, Kenya possesses a profound cultural heritage. Consequently, the majority of its local communities possess traditional knowledge. Recently, there has been an increased demand for traditional knowledge because of its close relationship with traditional cultural expressions and genetic resources. TK is commonly used by third parties for business reasons and misappropriated in extreme cases. One of the most common issues that always surfaces regarding TK and TCEs in Kenya is the fact that the most widely known examples of these, namely kiondos and kikois, are purported to be misappropriated. This then begs the question as to the extent TK is protected in Kenya. Also, the issue leaves many wondering if the communities, who are holders and custodians of TK, have control over their traditional knowledge and if any genuine legal regime is mandated to address matters related to the ownership of TK.

3.2. REASONS FOR TRADITIONAL KNOWLEDGE PROTECTION

The justification for safeguarding traditional knowledge centres on fundamental fairness and the ability to protect, regulate, and conserve cultural resources. Furthermore, they require the corresponding right to receive equitable compensation for the contributions made by every community.[68]

Given its relevance in modern society, indigenous people are entitled to substantial compensation to ensure fair use of traditional knowledge. Policymakers increasingly use TK, especially those in economic development, food and diversity, trade, and health. On this foundation, there are five reasons why traditional knowledge should always be protected, as discussed below:

a. Equity

Traditional knowledge generates a lot of value in the country. Unfortunately, this value is neither recognized nor compensated relatively. For example, traditional farmers take their time to nurture, conserve, and use animals and plants to produce the best. They continue to add value to plant genetics through the best-adapted varieties although they have yet to be recognized in

[68] Jewell C, 'Protecting traditional knowledge: a grassroots perspective' WIPO Magazine, February 2017—<https://www.wipo.int/wipo_magazine/en/2017/01/article_0004.html> accessed on 29th January 2024.

any way.[69] Actually, seed companies take those varieties, process and produce them for sale, and are permitted to protect the produce through Plant Breeder's Rights and benefit from them while the farmers are overlooked.

b. Conservation of biodiversity

When individuals from traditional backgrounds engage in knowledge innovations, they effectively showcase their cultural heritage. Safeguarding individual rights involves maintaining the connection between humans and natural elements, including flora and fauna. Protecting traditional knowledge contributes to environmental conservation and the advancement of sustainable food security and agriculture.

c. Traditional practices preservation

Protecting TK is a potential way of providing a framework that can be used to maintain knowledge and practices, including traditional lifestyles.[70] Preserving TK is an excellent way of protecting the self-identification of the traditional people, which supports their continuous existence. This aspect surpasses the IPR protection scope predicted in the multilateral instruments. Sufficient commitment to protect TK can raise its profile, making it more attractive and worthy of preservation.

d. Bio-piracy protection

Many patents on genetic resources and other knowledge acquired from Africa and other developing countries have been granted. However, the big question is how misappropriation of traditional knowledge will be prevented. Three elements have been put across: documentation of traditional knowledge, proposing the creation of a TK digital repository accessible to all; with this, the state will monitor the possibilities of misuse— obtaining prior informed consent and establishing the source of patented materials.

e. The importance and use of TK in development

[69] Curci J, 'The defensive protection of traditional knowledge in international patent law' in Curci J (ed) *The protection of biodiversity and traditional knowledge in international law of intellectual property,* Cambridge University Press, 2010, 187.

[70] Susilowati IF and Hermono B, 'Legal protection of traditional knowledge, recognition and certainty of property protection of traditional knowledge of indigenous peoples' 23 *Advanced Science Letters* 12, 2017, 11723–11726.

TK should be protected from misappropriation and loss. If owners are adequately compensated for their innovation, they are willing to make access easy and conserve it, ensuring future use and access.[71]

3.3. CONCLUSION

Protecting traditional knowledge can either be positive or defensive.[72] The former avails strategies that ensure third parties are barred from gaining intellectual property rights once they use TK. Conversely, positive protection inhibits unauthorised use and promotes active exploitation by the owning community. The proposed administrative framework and legal regime in Kenya aim to offer both positive and defensive protection.

[71] WIPO, 'Traditional knowledge'— < https://wipo.int/tk/en/tk/ > accessed on 14 January 2024.
[72] WIPO, 'Traditional knowledge'— < https://wipo.int/tk/en/tk/ > accessed on 14 January 2024.

CHAPTER 4: THE NATURE OF INTELLECTUAL PROPERTY RIGHTS (IPRs)

2.1. INTRODUCTION

The term "intellectual property" describes works of art. It includes everything from names, signs, and symbols to inventions, designs, literary and creative works, performances, and plant kinds.[73] These rights are known as IPRs, and they are granted to the type of property in question. These rights function in the same manner as any other property rights, and their primary purpose is to safeguard the compositions of authors, creators, and inventors.[74]

The protection of IPRs is an essential component in fostering inventiveness among artists and inventors around the world. Developing creative inventions requires a large amount of time, energy, and resources on the part of these innovators. Furthermore, in order for them to be able to benefit from their works, they require protection for those works. This is where the rights to intellectual property occur.

Modern attempts to protect intellectual property via international law can trace its roots back to two seminal international treaties: the Berne Convention for the Protection of Literary and Artistic Works (1886) and the Paris Convention for the Protection of Industrial Property (1883). WIPO is responsible for administering more than 25 international treaties on intellectual property at the present time. Additional protection for IPRs is provided for in Article 27 of the Universal Declaration of Human Rights.[75]

In Kenya, IPRs are well entrenched in the legal structure. The Constitution of Kenya requires the state to protect the people's IPRs.[76] It compels it to safeguard and promote the IP and indigenous knowledge related to the biodiversity and genetic resources of the various ethnic communities.[77] There are also several Acts which have been enacted to govern different aspects of IP. These include the Copyright Act[78], the Industrial Property Act[79], the Trademarks Act[80],

[73] WIPO *Intellectual property and genetic resources, traditional knowledge and traditional cultural expressions,* WIPO Publication 933, 2020.
[74] WIPO *What is intellectual property?*, WIPO Publication 450, 2020.
[75] WIPO, *What is intellectual property?*
[76] Article 11, *The Constitution of Kenya*, 2010.
[77] Article 69 (1)(a) & (e), *The Constitution of Kenya*, 2010.
[78] Act No 12 of 2001.
[79] Act No 3 of 2001.
[80] CAP 506.

the Seeds and Plant Varieties Act[81] and most importantly with regard to this study, the Protection of Traditional Knowledge and Cultural Expressions Act.[82] Kenya is also a party to several intellectual property treaties, conventions and instruments, including the Convention Establishing the World Intellectual Property Organisation[83], the Agreement on the Creation of the African Regional Intellectual Property Organisation[84], and most importantly with respect to this study, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore.[85]

2.2. DISCUSSION

A loose collection of legal principles known as intellectual property rights (IPRs) govern how intellectual property is used in the domains of industry, science, literature, and the arts. The main justification put up for IPRs is to safeguard inventors' rights to profit from their work and to give them and other members of the public the financial incentive and authority to conduct additional research. Copyright, patents, trademarks, industrial designs, trade secrets, and geographic indications are the traditional categories of intellectual property rights.[86]

IP protection requires IPRs because IP does not lend itself well to the traditional utilitarian and labor-based justifications of property. The difference between traditional property and intellectual property provides some more justifications for this. According to conventional property theory, property is not solely connected to personal possession. Instead, property refers to the relationship that exists between the owner and other people in relation to an object. To safeguard the owner's property, this relationship is a right that can be used against others. In the case of intellectual property, the state must ensure that the idea or work is the sole owner, thereby fabricating a relationship between IP owners and others.[87] This is because, should an individual come into possession of, for example, plans for an invention, without IP protection the owner or creator would have no recourse in preventing the individual from utilizing the plans.

[81] CAP 326.
[82] Act No 33 of 2016.
[83] 14 July 1967, 11846 UNTS 823.
[84] 9 December 1976, TRT/AP001/001.
[85] 9 August 2010, TRT/AP010/001.
[86] Ezeanya C, 'Contending issues of intellectual property rights protection and indigenous knowledge of pharmacology in Africa south of the Sahara' 6 *The Journal of Pan African Studies* 5, 2013, 26.
[87] Ostergard Jr R, 'Intellectual property: a universal human right?' 21 *Human Rights Quarterly* 1, 1999, 166.

Another distinction between the traditional theory of property and IP is supply. This is due to the fact that, supply of land is finite i.e., if one person owns the land in a particular area then no else can use it lawfully without their consent. On the other hand, a formula for a pharmaceutical product or the lyrics of a song can be passed on by word of mouth or printed on paper and distributed with the supply remaining unchanged.[88] However many times the idea is passed on its supply will never be diminished. This distinction can be summarised as follows: society formulates laws to exclude others from an individual's property. Intellectual property rights grant individuals the authority to prohibit others from utilising their ideas, creations, and inventions.[89]

By removing the nonexclusive feature, IP rules essentially allow creators to change the fundamental characteristics of many creative works. IPRs provide someone exclusive control over an item in order to achieve this. They give the proprietor the power to set a monopoly price within the bounds of what product demand will bear, to exclude competitors, and to regulate output. As a result, those who would have been free to carry out someone else's concept now need to at least get the owner's consent and possibly pay them to do so.[90]

In this regard, the removal of the nonexclusive nature of intellectual objects is how IPRs differ from traditional property rights. This is due to the fact that giving them exclusive authority is an attempt to change their fundamental makeup. The concepts of scarce, perishable, or diminishable property are reflected in traditional theories of property. IP is not subject to these traits. Only IPRs, which are artificially imposed measures, make it scarce.[91]

One piece of encouraging news is that indigenous people and self-organizations are increasingly putting their focus on IPRs. This is a positive development. WIPO is now in contact with a large number of non-governmental organisations that advocate for indigenous people's rights. This has enabled WIPO to establish principles and adequate supporting information for legal norms regarding the most efficient methods of protecting TK.[92]

The recognition of indigenous IP emerged from the determination of indigenous peoples to assert their exclusive ownership over their intellectual and cultural assets.[93] The indigenous

[88] Ostergard Jr R, 'Intellectual property: a universal human right?', 166.
[89] Ostergard Jr R, 'Intellectual property: a universal human right?', 166.
[90] Ostergard Jr R, 'Intellectual property: a universal human right?', 167.
[91] Ostergard Jr R, 'Intellectual property: a universal human right?', 167.
[92] Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic resources, traditional knowledge and folklore*, 2nd ed, Kluwer Law International, Netherlands, 2008, 2.
[93] UNGA, Article 3 *United Nations declaration on the rights of indigenous peoples*, UN A/Res/61/295 13 September 2007.

populations have faced considerable exploitation, coupled with inadequate protective measures regarding their intellectual and cultural rights.[94]

Additionally, there are distinct issues that extend beyond illegal and commercial considerations, encompassing cultural, moral, historical, spiritual, and ethical dimensions. The illegal appropriation of sacred cultural symbols, designs, or artefacts has caused financial losses and significant offence to the communities that uphold these traditions.

CHAPTER 5: FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1. INTRODUCTION

The main goals of traditional knowledge protection are knowledge preservation and preventing unauthorised use and appropriation by outside parties.[95] Moreover, the protective measures

[94] 'The Mataatua Declaration on cultural and intellectual property rights of indigenous peoples' First international conference on the cultural & intellectual property rights of indigenous peoples, Whakatane, 12 June 1993, Preamble.

[95] Ouma M, 'Protection of traditional knowledge and cultural expressions in Kenya', WIPO-WTO, Research papers from the 2014 colloquium for teachers of intellectual property law, 2014, 77, <

ensure that access to the information is contingent upon previous informed consent, so facilitating equal distribution of advantages obtained from its utilisation. Additionally, the individuals and local organisations possessing the information should reap rewards whenever there is economic use of that expertise.

If there is a specific legal regime in Kenya, the traditional knowledge rights holders can only rely on the laws passed, which, unfortunately, are not effective in providing protection. Although there are specific provisions in the Kenyan constitution that the government is obliged to protect traditional knowledge, particular laws are still essential to provide protection.[96] There is already a strong foundation on the draft Traditional Knowledge Bill, but it still requires modification for it to provide adequate legal protection.

5.2. FINDINGS

Traditional knowledge has declined in most areas of study. The young generation is not interested in something other than learning about traditional knowledge, nor is it ready to observe customary laws. There are no longer ancestral lands or sacred sites that would motivate the current generation to want to know more about their traditions. As an example, the Mijikenda community has lost the famous Keya forest, and the Yanadi community is no longer allowed to access its sacred forests freely. Customary laws and cultural values have been eroded because of the spread of Western culture. Most of the African cultures have been lost, overlooked, or hardly recognized.

To address the different issues raised by traditional knowledge, national governments have been developing institutional solutions. The United Nations Declaration on the Rights of Indigenous Peoples delineates the inherent rights to histories, spiritual traditions, and philosophies, as well as to lands, resources, and territories. The Convention on Biological Diversity and the Nagoya Protocol protect the rights of indigenous groups to their knowledge, ensuring they benefit from its use and retain control over access to that knowledge.

Although there are IPR regimes in place aimed at safeguarding traditional knowledge, it is essential to reassess the established criteria to ensure comprehensive preservation of this invaluable heritage. In most cases, IPRs are individual rights, and they only recognize personal

https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2014/chapter_8_2014_e.pdf > accessed on 19 January 2024.

[96]—<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/protecting-promoting-and-revitalizing-traditional> on 19 January 2024.

ownership based on the amount of time and work expended in developing the new invention.[97] Therefore, they need to acknowledge the traditional knowledge itself. Furthermore, traditional knowledge is primarily owned by the community, which facilitates passing it from one generation to the next.

In the contemporary framework, traditional knowledge must demonstrate novelty, commercial viability, and inventive progression. The current knowledge within TK is well-known; it lacks innovative advancements, and the limitations imposed on individuals, families, or communities hinder TK's commercial visibility. The individuals, families, or communities possessing a particular TK enjoy keeping it a secret and not opening it up to the public. In traditional medicine, men or women cannot take advantage of the existing IP to protect their knowledge.[98]

There are still many moral and practical issues with the current legal systems, even if the government and indigenous people continue to consult on how to preserve traditional knowledge. Moreover, concerns remain concerning the unequal power dynamics between custodians of traditional knowledge and the affluent businesses aiming to exploit it. The disparity necessitates additional mitigation.

5.3. RECOMMENDATIONS

It is unnecessary to foster discord between the public domain and traditional knowledge. Local communities ought to possess the authority over traditional knowledge, thereby serving as its rightful stewards. It is imperative that they reap the full advantages of its commercial application, while simultaneously ensuring that the knowledge remains accessible to a broader audience.

A traditional repository of information or library can adeptly serve this purpose. The Protection of Traditional Knowledge and Cultural Expressions Act of 2016 in Kenya requires the Kenyan Copyright Board to create a digital repository for traditional knowledge and cultural expressions, which includes information documented by the county governments. The worldwide spread of this information promotes a level of transparency that could reduce the likelihood of exploiting traditional knowledge.

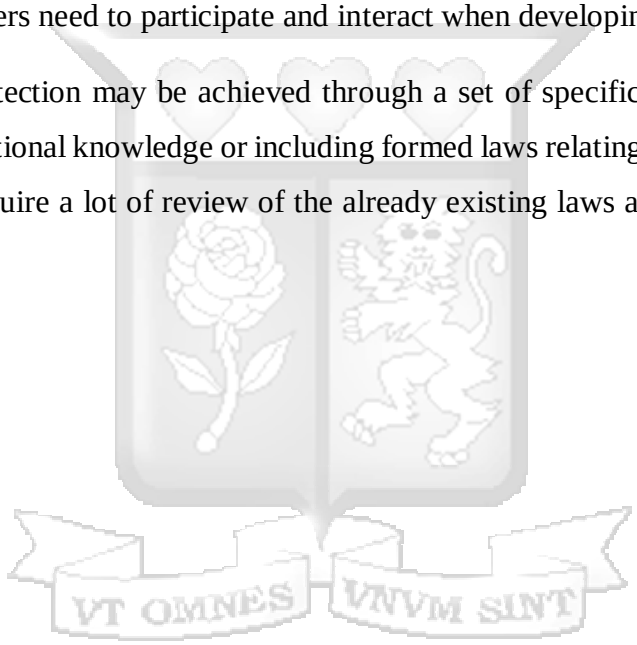
[97] World Intellectual Property Organisation, *The protection of traditional knowledge: Draft articles*, 2012, 5.
[98] Ambani J and Ahaya O, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era', 1 *Strathmore Law Journal* 1, 2015, 57.

Moreover, it is essential that indigenous and local ethnic communities act as the primary guardians of traditional knowledge, as it rightfully belongs to them. It is essential that national traditional knowledge systems obtain legal support, allowing communities to make and enforce decisions about their traditional knowledge. The specified procedures will help mitigate the innate power imbalances that now define conventional knowledge.

5.4. CONCLUSION

Developing a sui generis system could be a great move. This would function as an integrated framework encompassing policies related to TK, TCEs, and genetic resources. This type of legislation can attract a lot of interest and publicity from TK owners and policymakers, although all stakeholders need to participate and interact when developing it.

Alternatively, TK protection may be achieved through a set of specific regimes modified to different types of traditional knowledge or including formed laws relating to one particular TK. These options will require a lot of review of the already existing laws and modifying several provisions.



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